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RECENT DEVELOPMENTS IN ADMINISTRATIVE LAW: THE IMPACT ON COMMODITIES REGULATION AND ENFORCEMENT

As the Supreme Court continues to issue landmark decisions regarding administrative law, two conflicting trends emerge. Instead of relying on the executive agencies, the Court has established its claim in deciding key legal issues via the judicial review process and interpreting the executive's statutory authority. Yet, the Court is increasingly endorsing a unitary executive. These shifts within the administrative landscape have created both challenges and opportunities for market participants.

By Michael Spafford, Patricia Liverpool, and Nora Logsdon *

Recent Supreme Court decisions in administrative law have had a substantial impact on regulation and enforcement — at times, limiting the powers of executive agencies but also expanding the powers of the executive. In particular, the Court has jealously asserted the primacy of the courts to decide key factual and legal issues in judicial (and not administrative) proceedings and interpret independently the executive's statutory authority without deference to the executive agencies overseeing those statutes. Cases such as *Securities & Exchange Commission v. Jarkesy*[1] and *Loper Bright Enterprises v. Raimondo*[2] have introduced new limits to executive powers, insisting on due process and judicial oversight. On the other hand, the Court also has seemingly endorsed a unitary executive whose powers cannot be delegated, except in limited circumstances, and whose authority over independent agencies created by Congress has been expanded. These two trends are increasingly clashing with each other. How the Court resolves them will have an outsized impact on administrative enforcement and litigation going forward, creating both obstacles and opportunities for market participants.

DUE PROCESS AND JURY TRIALS

Recent case law clarifying the bounds of due process places limits on the ability of the executive to impose civil money penalties. The Supreme Court's 2024 decision in *Securities & Exchange Commission v. Jarkesy* involved an enforcement action brought by the Securities and Exchange Commission ("SEC") the agency that oversees securities laws designed to "protect[] investors, maintain[] fair, orderly, and efficient markets, and facilitat[e] capital formation."[3] George Jarkesy sued the SEC in federal court after the SEC levied a civil money penalty of $300,000 against

[1] 144 S. Ct. 2117 (2024).

[2] 144 S. Ct. 2244 (2024).

[3] U.S. Securities and Exchange Commission: About: Mission (last updated Aug. 9, 2023), https://www.sec.gov/about/mission.

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him and his investment firm in administrative proceedings for antifraud violations. Mr. Jarkesy claimed the SEC had improperly used its internal administrative enforcement powers in violation of the Seventh Amendment, which preserves a right to a jury trial in certain federal cases.[4] The Fifth Circuit agreed, and the Supreme Court affirmed.[5]

The *Jarkesy* Court ruled that the Seventh Amendment entitles defendants to a jury trial when the SEC seeks civil penalties for fraud. The Court found the SEC claims were "legal in nature," rather than equitable, because securities fraud claims were aligned closely with common law fraud claims.[6] *Jarkesy* set up a two-step process for determining what remedies are "legal in nature."[7] First, claims such as fraud that were traditionally held at common law may be determinative of whether a remedy is legal in nature. "While monetary relief can be legal or equitable, money damages are the prototypical common law remedy."[8] Second, and more importantly, if the remedy sought is punitive or designed to deter rather than compensate for losses, the remedy is legal in nature. "Because [the securities laws] tie the availability of civil money penalties to the perceived need to punish the defendant rather than restore the victim, such considerations are legal rather than equitable."[9] If this two-step test is met, the Seventh Amendment reserves to the jury all questions of fact necessary to determine liability for any civil money penalties.[10] The jury trial right also attaches on a per-violation basis and covers any finding of fact that would increase the civil money penalty,[11] which means, for example, that any aggravating facts used to increase the penalty amounts or the factual predicates underlying claims of failure to supervise should be heard by a jury.

The *Jarkesy* Court recognized at least two exceptions to the jury trial right. The first is the so-called "public rights" exception. The Court considered and rejected the SEC's public rights argument, finding that the SEC's civil money penalty claims did not seek to vindicate traditionally public rights. Citing *Crowell v. Benson*, which non-exhaustively listed "interstate and foreign commerce, taxation, immigration, the public lands, public health, the facilities of the post office, pensions, and payments to veterans" as matters involving public rights,[12] the Court noted that the "exception permits Congress, under certain circumstances, to assign an action to an agency tribunal without a jury"[13] only those matters that "historically could have been determined exclusively by [the executive and legislative] branches."[14] The Court did not further define public rights, holding instead that common law claims like fraud did not seek to vindicate "public rights."

While courts will need to adjudicate the scope of public rights on a case-by-case basis, it seems clear that the exception is narrow. Recently, in January 2025, the U.S. District Court for the District of Columbia held that an administrative adjudicatory process under the Department of Veterans Affairs ("VA") concerned public rights, rather than private rights, and as such, *Jarkesy* did not apply.[15] The court found the plaintiff's challenge to a VA procedure permitting further review of denied disability claims by an internal review board did not deny his right to a jury trial, as the granting of

[4] *Jarkesy v. Securities & Exchange Commission*, 803 F.3d 9, 14 (D.C. Cir. 2015); *Securities & Exchange Commission v. Jarkesy*, 603 U.S. 109 (2024).

[5] *Jarkesy*, 803 F.3d at 30.

[6] *Securities & Exchange Commission v. Jarkesy*, 144 S. Ct. 2117, 2128-30 (2024).

[7] *Jarkesy*, 603 U.S. at 122.

[8] *Id.*

[9] *Id.* at 123.

[10] *See also Tull v. United States*, 481 U.S. 412 (1987); *Feltner v. Columbia Pictures Television Inc.*, 523 U.S. 340 (1998). The jury trial may be voluntarily waived. *Singer v. United States*, 380 U.S. 24 (1965).

[11] *See, e.g.*, *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

[12] *Crowell v. Benson*, 285 U.S. 22, 51 (1932).

[13] *Jarkesy*, 603 U.S. at 112.

[14] *Id.* (citing *Stern v. Marshall*, 564 U.S. 462, 484 (2011)).

[15] *Prewitt v. McDonough*, No. CV 21-2243 (RDM), 2025 WL 42744, at *1 (D.D.C. Jan. 7, 2025).

public benefits, such as disability payments to veterans, fell within the "public rights" exception.

The second exception involves equitable claims, which the Court defined as seeking remedies designed to restore the status quo (for example, an injunction or restitution). The Commodity Futures Trading Commission ("CFTC") recently sought to take advantage of this exception when it used its administrative proceedings to seek cease-and-desist orders against certain unregistered entities, which had failed to register as futures commission merchants.[16] This prompted a sharp rebuke from two CFTC Commissioners. In particular, then-CFTC Commissioner Caroline Pham stated that:

> It is unbelievable that in the wake of the U.S. Supreme Court's *Jarkesy* opinion and the heightened scrutiny of agency administrative proceedings, the Commission is doubling down on bringing enforcement actions before a hearing officer — not even an Administrative Law Judge. Last year, when the Commission pulled this maneuver at the last minute, I stated that this shotgun approach "flies in the face of decades of Commission-standard practice and rules, bypasses federal Article III courts, and is a misuse of the CFTC's adjudication authority." Worse, the Commission is using these administrative proceedings to advance novel interpretations of the definition of a futures commission merchant ("FCM") and the CFTC's registration requirement, all while evading public scrutiny or oversight by the courts. It could not be more clear that the CFTC believes there is no higher authority in the Nation: the CFTC is above the law.[17]

Recent decisions of the Supreme Court have narrowed the availability of injunctive relief on other grounds[18] and suggest that the Court may seek to constrain this exception as well.

NON-DELEGATION OF GOVERNMENTAL AUTHORITY

Recent cases also have clarified the extent to which private entities can sanction market participants using delegated governmental authority. In *Alpine Sec. Corp. v. FINRA*,[19] the DC Circuit Court limited the Financial Industry Regulatory Authority's ("FINRA") power to expel member brokerage firms. FINRA is a self-regulatory organization ("SRO") that regulates member brokerage firms and exchange markets and strives "to protect investors and safeguard the integrity of . . . capital markets to ensure that everyone can invest with confidence."[20] In 2022, FINRA sanctioned and issued a cease-and-desist letter against a registered brokerage firm, Alpine Securities Corporation ("Alpine"), for violating FINRA's rules. When Alpine continued to operate in apparent defiance of the order, FINRA began expedited proceedings to expel Alpine from FINRA, a veritable death penalty that would have extinguished its ability to broker securities transactions. Alpine sought a preliminary injunction, arguing that "either (1) FINRA is a private entity that the government has invested with too much power, in violation of the private nondelegation doctrine or (2) FINRA is a governmental entity, in which case its expedited proceeding violates the Appointments Clause of the Constitution."[21] After the district court denied Alpine's

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[16] CFTC Charges Four Entities for Failing to Register as FCMs, CFTC (Sept. 24, 2024), https://www.cftc.gov/PressRoom/PressReleases/8976-24.

[17] Dissenting Statement of Commissioner Caroline D. Pham on the Filing of Administrative Complaints for Enforcement Actions, CFTC (Sept. 24, 2024), https://www.cftc.gov/PressRoom/SpeechesTestimony/phamstatement092424; Dissenting Statement of Commissioner Mersinger Regarding cryptoiminsertrade.com, Expert Stocks Zone, FalconRorexBot, and swiftminingexpert.com, CFTC (Sept. 24, 2024), https://www.cftc.gov/PressRoom/SpeechesTestimony/mersingerstatement092424. *See also* Statement of Commissioner Pham on *SEC v. Jarkesy*, CFTC (June 28, 2024), https://www.cftc.gov/PressRoom/SpeechesTestimony/phamstatement062824 ("'[A]dministrative proceedings, where the agency is the prosecutor, judge, and jury, *lack the checks-and-balances imposed by separation of powers* between the executive and judicial branches of government to ensure a fair hearing and due process.' The [*Jarkesy*] Court's opinion explicitly recognizes this truism and reinforces the law of the land. There is more work to be done at the Commission to *ensure that our adjudications and settlements can withstand scrutiny*, particularly when they deprive others of property without appropriate due process and in violation of the Constitution.") (emphasis added).

[18] *Trump v. CASA, Inc.*, 145 S. Ct. 2540 (June 27, 2025) (finding that district courts lacked authority to issue universal injunctions).

[19] 121 F. 4th 1314 (D.C. Cir. 2024).

[20] About FINRA, FINRA, https://www.finra.org/about.

[21] *Alpine Sec. Corp. v. Fin. Indus. Regul. Auth.*, 121 F.4th 1314, 1324 (D.C. Cir. 2024).

motion to stay the expulsion, Alpine appealed and the D.C. Circuit reversed, finding that FINRA had been improperly delegated the power to expel a member without SEC review.

Due to the expedited FINRA process, "the SEC statutorily cannot review expulsion orders before they go into effect and may be unable or unwilling to grant a stay so that [the SEC] can meaningfully review [FINRA's] decision before it goes into effect and the expelled member's business collapses."[22] Under these circumstances, the court found that FINRA could not "singlehandedly expel Alpine and thereby exclude it from the securities trading industry"[23] without affording Alpine its statutory right to SEC review. Delegation of governmental authority to a private entity is constitutional "only 'as an aid' to an accountable government agency that retains the ultimate authority to 'approve[ ], disprove[ ], or modif[y]' the private entity's actions and decisions on delegated matters."[24] Delegation without such review by an appropriate governmental agency is unconstitutional. On remand, the district court was ordered "to enter a limited preliminary injunction enjoining FINRA from giving effect to any expulsion order issued against Alpine until either the SEC reviews the order on the merits or the time for Alpine to seek SEC review lapses."[25] With respect to Alpine's Appointments Clause challenge, the court found that Alpine failed to show irreparable harm "stemming from participating in FINRA's hearing process enforcing FINRA's membership rules."[26] In June 2025, the Supreme Court denied certiorari.[27]

The *Alpine* court did not reach an interesting question posed by *Jarkesy* — is expulsion from the industry a legal remedy to which the Seventh Amendment attaches? On its face, expulsion is a death penalty and clearly punitive, which would appear to satisfy the two-step *Jarkesy* test. The harder question is when does the Seventh Amendment right attach? The *Alpine* court described FINRA as a "private entity" that cannot decide delegated matters without SEC review. Does the jury trial right attach at the SRO stage, when the SRO makes findings of fact about the violations? Or does it attach later when the administrative agency reviews those findings and conclusions and seeks to enforce them? Regardless, it seems clear that civil money penalties imposed for fraud or manipulation are common law claims requiring a jury, unless waived. An SRO seeking to penalize fraud or manipulation must allow for review by a governmental agency and the possibility of a jury trial.

THE END OF CHEVRON DEFERENCE

In this new era, the Chevron doctrine has been overturned. The doctrine, established in 1984 in *Chevron U.S.A. v. National Resources Defense Council, Inc.*,[28] required federal courts to defer to agency interpretations of statutes that "have the force of law," where "the statute is silent or ambiguous" on the specific issue and the agency interpretation is "reasonable."[29] For decades, *Chevron* gave deference to agencies interpreting their own rules, unless the matter involved major questions of extraordinary significance.[30] In 2024, the Supreme Court changed course. In *Loper Bright Enterprises v. Raimondo*,[31] the Court overruled *Chevron*, holding that courts must exercise their own independent judgment in interpreting statutes and "deciding whether an agency has acted within its statutory authority."[32] The case arose from a challenge by commercial fishermen to a National Marine Fisheries Service rule requiring the fishing industry to fund at-sea monitoring programs — an obligation the companies argued exceeded the agency's statutory authority. The Court ultimately held that courts are required to resolve any ambiguity using "traditional tools of statutory construction" independently without deference.[33] "The final interpretation of the laws [is] the proper and peculiar province of the courts," and is not "fundamentally different just because an administrative interpretation is in play."[34]

Recent cases have relied on *Loper Bright*'s precedent to overturn agency interpretations. In September 2023, for example, the CFTC blocked KalshiEx LLC ("Kalshi") from listing derivative contracts that allowed

[22] *Id.* at 1328.

[23] *Id.* at 1337.

[24] *Id.* at 1325 (internal citation omitted).

[25] *Id.* at 1337.

[26] *Id.*

[27] *Alpine Sec. Corp. v. Fin. Indus. Auth.*, No. 24-904, 2025 WL 1549780, at *1 (June 2, 2025).

[28] 467 U.S. 837 (1984).

[29] *Chevron*, 467 U.S. at 843-44.

[30] *West Virginia v. EPA*, 597 U.S. 697, 721 (2022).

[31] 144 S. Ct. 2244 (2024).

[32] *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 412 (2024).

[33] *Id.* at 403.

[34] *Id.* at 385, 401 (internal citation and quotation marks omitted).

participants to trade on the outcome of U.S. congressional elections because the CFTC found them to be contrary to the public interest and to involve "gaming" or unlawful activity prohibited by the Commodity Exchange Act ("CEA"). Kalshi challenged the CFTC's order as arbitrary and capricious. The U.S. District Court for the District of Columbia held in *KalshiEx LLC v. CFTC* that the CFTC had exceeded its statutory authority and that Kalshi's contracts did not constitute "unlawful activity or gaming," rejecting the CFTC's interpretation.[35] The court cited *Loper Bright*, emphasizing that it must independently interpret the CEA's special rule relating to event contracts, rather than defer to the agency's position. The D.C. Circuit subsequently denied the CFTC's emergency motion to stay pending appeal, allowing Kalshi to list and trade the event contracts.

In another significant case, the Fifth Circuit challenged the rule-making authority of the SEC and Nasdaq. The Fifth Circuit vacated Nasdaq's board diversity rules in *Alliance for Fair Board Recruitment v. SEC*[36] and held that the Securities Exchange Act of 1934 did not give the SEC the power to approve Nasdaq's diversity rules. The SEC and Nasdaq argued that the Act conferred the power to seek "full disclosure" from companies, including diversity, but the court rejected this interpretation and decided that a clearer nexus should exist between any disclosure requirements and the core purposes of the Act. Without more, the SEC needed to show "clear congressional authorization" to justify the rules.[37]

Loper Bright and its growing progeny reaffirm the courts' central role in interpreting the law, in an objective and independent manner without deference to the executive branch, and signal a possible move toward stricter oversight of agency actions and a more constrained regulatory environment. In that sense, it is consistent with *Jarkesy* and *Alpine* in demanding procedural due process and judicial oversight.

THE RISE OF THE UNITARY EXECUTIVE

Humphrey's Executor has been the law of the land for 90 years, but recent court decisions have challenged its reasoning. In *Humphrey's Executor v. United States*,[38] the Court unanimously upheld the constitutionality of "for-cause" removal protections for independent agencies with multiple Commissioners. The estate of Mr. Humphrey, a former Commissioner of the Federal Trade Commission ("FTC"), brought suit seeking back pay denied to him when he was removed by President Franklin Roosevelt without cause in apparent contravention of a Federal Trade Commission Act provision limiting removal to instances of "inefficiency, neglect of duty, or malfeasance in office."[39] The Court found that the Constitution did not give the President "illimitable power of removal," and distinguished the FTC from other executive departments or agencies because it was created by Congress to perform "quasi-legislative" and "quasi-judicial" rather than "purely executive" duties.[40] "The commission is to be nonpartisan; and it must, from the very nature of its duties, act with entire impartiality [and is] called upon to exercise the trained judgment of a body of experts appointed by laws and experience."[41] In so doing, the Court validated the constitutionality of independent agencies and concluded that "the intent of the act is to limit the executive power of removal to the causes enumerated" in the act.[42]

In *Seila Law LLC v. CFPB*,[43] the Court refused to apply *Humphrey's Executor* to a single director agency. When the Consumer Financial Protection Bureau ("CFPB") was established after the 2008 recession, Congress determined that the agency should be independent — Congress designated a single director, selected by the President with the advice and consent of the Senate, and removable only for cause, which Congress defined as including inefficiency, neglect, or wrongdoing. The constitutionality of the position was challenged by Seila Law LLC, which was under investigation by the CFPB. The Court declined to extend *Humphrey's Executor* to the CFPB and held that the "for cause" removal requirement violated the separation of powers in this case because it sought to limit the President's removal power.[44]

Most recently, the Court has examined challenges to *Humphrey's Executor* as applied to multimember commissions. In January 2025, the President fired

[35] *KalshiEX LLC v. Commodity Futures Trading Comm'n*, No. 23-3257 (JMC), 2024 WL 4164694 (D.D.C. Sept. 12, 2024).

[36] 125 F.4th 159 (5th Cir. 2024).

[37] *Id.* at 181 (internal citation and quotation marks omitted).

[38] 295 U.S. 602 (1935).

[39] *Id.* at 620 (internal citation and quotation marks omitted).

[40] *Id.* at 629.

[41] *Id.* at 624 (internal citation and quotation marks omitted).

[42] *Id.* at 625.

[43] 591 U.S. 197 (2020).

[44] *Id.* at 238.

National Labor Relations Board ("NLRB") Member Gwynne Wilcox without cause. In response, Ms. Wilcox sued the United States, arguing that her removal violated the "for-cause" removal provisions of the National Labor Relations Act.[45] The government argued that *Humphrey's Executor* should be overruled or confined to its specific facts, arguing that the NLRB exercised substantial executive power and therefore should be subordinate to the President. After the D.C. District Court disagreed and enjoined the Administration from removing Ms. Wilcox, the case was quickly appealed to the Supreme Court. On May 22, 2025, the Supreme Court used its emergency docket to stay the lower court injunction, thereby allowing the Administration to fire Ms. Wilcox.[46] "Because the Constitution vests the executive power in the President, *see* Art. II, §1, cl. 1, [the President] may remove without cause executive officers who exercise that power on his behalf, subject to narrow exceptions recognized by our precedents, [] *Seila Law LLC v. Consumer Financial Protection Bureau*, 591 U. S. 197, 215−218 (2020)."[47] The Court stayed the lower court injunction, stating that "the government is likely to show that . . . the NLRB . . . exercise[s] considerable executive power [and] the government faces greater risk of harm from an order allowing a removed officer to continue exercising the executive power than a wrongfully removed officer faces from being unable to perform her statutory duty."[48]

In July 2025, the Supreme Court had another chance to act. In *Trump v. Boyle*, the Trump Administration asked that the Court stay a permanent injunction requiring the reinstatement of three recently fired members of the U.S. Consumer Product Safety Commission.[49] In its brief opinion, the Court specifically cited to *Trump v. Wilcox* and noted similarities between the two cases. The Court also stated: "Although our interim orders are not conclusive as to the merits, they inform how a court should exercise its equitable discretion in like cases."[50] Both *Trump v. Wilcox* and *Trump v. Boyle* have since returned to the lower courts for adjudication on the merits, but given the Supreme Court's reasoning, it seems likely that if either were to come before the Supreme Court again, the Administration would prevail.

Indeed, the removal issue will likely make its way to the Supreme Court in due course as Circuits continue to diverge on the question of for-cause removal protections. In a recent Eleventh Circuit case, the court upheld a for-cause removal protection for Administrative Law Judges ("ALJs").[51] In *Walmart, Inc. v. Chief Administrative Law Judge*, Walmart challenged the constitutionality of protections for the ALJ in the Department of Justice's Office of the Chief Administrative Hearing Officer after Immigration and Customs Enforcement ("ICE") filed 20 complaints against Walmart for violating certain recordkeeping requirements.[52] The district court had initially agreed with Walmart and issued a permanent injunction against adjudication of ICE's complaints. The 11th Circuit reversed. The court held that (1) the ICE ALJs perform an adjudicatory function, rather than an executive function; (2) the Attorney General retained plenary review of the ALJ decisions, providing an additional layer of protection; and (3) the Constitution granted Congress some say over how inferior officers like ALJs are appointed, which "implie[d] authority to limit and regulate the removal of those inferior officers so appointed."[53]

Conversely, the Fifth Circuit recently upheld a preliminary injunction against cases pending before the NLRB on opposite reasoning. In *Space Exploration Technology Corp. v. NLRB*, the court concluded that the structure of the NLRB is likely unconstitutional as the for-cause removal protections for ALJs and Board Members violated separation of powers principles.[54] The court cited *Jarkesy* and noted that the ALJs were inferior officers holding substantial authority, making for-cause protections suspect. The court also acknowledged the applicability of *Humphrey's Executor* in some circumstances but distinguished the NLRB on the grounds that its Board Members and ALJs also exercise specifically administrative and policymaking powers. The for-cause protections in this context were therefore unconstitutional. This decision provides stark contrast to the decision in *Walmart* and indicates that similar challenges are likely to emerge in other circuits and eventually make their way to the Supreme Court for review.

In the meantime, the Administration has continued its direct assault on *Humphrey's Executor* in another case pending in the D.C. Circuit, which challenged the

[45] *Wilcox v. Trump*, 775 F.Supp. 3d 215 (D.D.C. 2025).

[46] *Trump v. Wilcox*, 145 S. Ct. 1415 (2025).

[47] *Id.*

[48] *Id.*

[49] *Trump v. Boyle*, 145 S. Ct. 2653 (2025).

[50] *Id*. at 2635 (2025).

[51] 144 F.4th 1315 (11th Cir. 2025).

[52] *Id.*

[53] *Id.* at 1348.

[54] No. 24-10855, 2025 WL 2396748 (5th Cir. Aug. 19, 2025).

removal of FTC Commissioners Rebecca Slaughter and Alvaro Bedoya without cause.[55] The government argued that the FTC's leadership structure is unconstitutional because it restricts the President's power of removal, citing *Seila Law*. On July 17, 2025, the D.C. District Court rejected the government's arguments and granted Ms. Slaughter's motion for summary judgment (the court dismissed Mr. Bedoya's claims as moot as Mr. Bedoya had resigned from the FTC and thus lacked standing to sue).[56] In so doing, the court reaffirmed that *Humphrey's Executor* remains the law of the land and upheld the for-cause removal protections in the Federal Trade Commission Act. The court further issued an injunction requiring that Ms. Slaughter be reinstated as a commissioner. The Trump Administration immediately appealed the judgment, and on July 24, 2025, the Court of Appeals for the D.C. Circuit granted the government's emergency motion for an administrative stay pending further order of the court.[57]

On September 2, 2025, having considered the matter further, the D.C. Circuit dissolved the stay, finding that the Administration was unlikely to succeed on the merits. The court stated: the "Supreme Court has repeatedly and expressly left *Humphrey's Executor* in place, and so precluded Presidents from removing Commissioners at will . . . . To grant a stay would defy the Supreme Court's decisions that bind our judgments."[58] As to the other factors governing a stay, the court found that this case, unlike *Wilcox*, was different.[59] First, the irreparable harm determination is different "where binding Supreme Court precedent establishes the wrongfulness of the removal."[60] Second, the D.C. Circuit explained that Ms. Slaughter was "the sole remaining Democrat on a Commission with a governing majority of three Republicans.[61] As a result, there is no risk her reinstatement would impede the President's agenda in any meaningful way. Further, there is "substantial public interest in having the lower courts stay in their lane and leave to the Supreme Court 'the prerogative of overruling its own decisions.'"[62] In arguing that *Humphrey's Executor* should not apply, the government claimed that the FTC's authority had expanded since the Supreme Court decision such that the commissioners should now be removable at will. For example, the government reasoned that the FTC could now seek civil monetary penalties in federal courts. Although *Seila Law* had characterized the CFPB's power to seek monetary penalties as an executive power not considered in *Humphrey's Executor*, the D.C. Circuit cited *Jarkesy* and reasoned that unlike the CFPB, the FTC could only seek such civil penalties in court and not through administrative proceedings.[63] The court was not persuaded by the government's arguments. The appellate court thus dissolved the stay, denied the motion for a stay pending appeal, and denied the motion to expedite the appeal.[64] The government has since appealed the D.C. Circuit's decision, and the Supreme Court has temporarily stayed Ms. Slaughter's reinstatement pending further order from the Court.[65]

Questions involving *Humphrey's Executor* and *Seila Law* will continue to arise, and so the court's decision will test whether *Seila Law* is limited to single commissioner-led agencies or has broad application to multi-person commissions, thereby challenging the independent, bipartisan natures of many agencies like the FTC.

To some extent, the success of these challenges to the independence of governmental agencies may depend on the agency involved. The Administration has sought to remove Lisa Cook, one of the Board Members of the Federal Reserve Board.[66] On August 28, 2025, Ms. Cook filed for an emergency temporary restraining

[55] *Ex-FTC Commissioners Slaughter, Bedoya Sue Trump Over Firing*, The Hill (Mar. 27, 2025), https://thehill.com/regulation/court-battles/5216048-fired-ftc-commissioners-sue-trump/; *Slaughter v. Trump*, 1:25-CV-00909 (Mar. 7, 2025).

[56] *Slaughter v. Trump*, No. 25-cv-0909, 2025 WL 1984395 (D.D.C. July 17, 2025).

[57] *Slaughter v. Trump*, No. 25-cv-0909, 2025 WL 2145665 (D.C. Cir. July 21, 2025).

[58] Order at 2, *Slaughter v. Trump*, No. 25-cv-0909 (D.C. Cir. Sept. 2, 2025), Doc. No. 2133109.

[59] *Id*. at 12.

[60] *Id.*

[61] *Id.*

[62] *Id.* (internal citation omitted).

[63] *Id.* at 7.

[64] *Id.* at 1.

[65] Application to Stay the Judgment of the United States District Court for the District of Columbia and Request for Administrative Stay, *Trump v. Slaughter*, No. 25A264 (Sept. 4, 2025); Order, *Trump v. Slaughter*, No. 25A264 (Sept. 15, 2025).

[66] Jon Hill, *Trump Fires Fed's Lisa Cook Over Mortgage Fraud Allegation*, Law360 (Aug. 25, 2025), https://www.law360.com/articles/2380353/trump-fires-fed-s-lisa-cook-over-mortgage-fraud-allegation.

order.[67] On September 9, 2025, the district court granted Ms. Cook's motion for a temporary restraining order, finding that her removal did not comply with the Federal Reserve Act's for-cause requirement.[68] Instead of addressing the constitutionality of the requirement, the government focused on whether the Administration provided a proper legal cause to remove Ms. Cook — alleged mortgage fraud occurring prior to her nomination to the Board.[69] The court reasoned that the for-cause protection only related to concerns about a Board member's performance of statutory duties or conduct in office.[70] Further, the court explained that Ms. Cook is one of seven members of a Board designed to be immune to policy and independent of the President's agenda.[71]

The government is sure to appeal the decision. The higher courts likely will address how and to what extent for-cause removal protections depend on the structure of the governmental agency. The Supreme Court in *Trump v. Wilcox* indicated that because of the Federal Reserve's unique structure, for-cause removal protections for members of the Board may differ.[72] Conversely, other agencies such as the CFTC remain subject to the reasoning in *Trump v. Wilcox*. Congress established the CFTC in 1974 as an independent government agency with a mandate to regulate the commodity futures and options markets in the United States.[73] Its mission is "to promote the integrity, resilience, and vibrancy of the U.S. derivatives markets" by protecting "the public from fraud, manipulation, and abusive practices related to the sale of commodity and financial futures and options, and [fostering] open, competitive, and financially sound futures and option markets."[74] The CEA states that the CFTC "shall" consist of five Commissioners, appointed by the President with the advice and consent of the Senate.[75] Commissioners are to serve staggered five-year terms, with no more than three active Commissioners from the same political party.[76] The CEA does not have a "for cause" provision and is silent on the issue of removal. Instead, the CEA provides that the CFTC shall be administered "solely" by the CFTC Chair, who serves at the pleasure of the President.[77] The CEA does have certain provisions requiring reporting to Congress, but overall, its structure and duties seem to be broadly consistent with Article I and the Commerce Clause of the Constitution. Moreover, the bipartisan nature of the CFTC has largely worked well in practice and has contributed to fairly consistent regulation of the complex

This may soon be challenged if the Administration refuses to nominate new Commissioners to replace departing ones. The Administration has nominated Brian Quintenz, a Republican, to serve as CFTC Chair and succeed Commissioner Christy Goldsmith-Romero, a Democrat. Commissioner Summer Mersinger recently left the Commission at the end of May, and Commissioner Kristin Johnson left in early September.[78] Acting Chairman Caroline Pham has announced her intent to resign from the CFTC when the new CFTC Chair takes office.[79] If Mr. Quintenz is confirmed as CFTC Chair, the Commission will become a panel of one.[80] So far, the Administration has not nominated any

[67] Complaint, *Cook v. Trump*, No. 25-cv-020903 (D.D.C. Aug. 28, 2025), ECF No. 1.

[68] Memorandum Opinion at 8, *Cook*, No. 25-cv-020903 (D.D.C. Sept. 9, 2025), ECF No. 27.

[69] *Id.* at 4-5, 8-9.

[70] *Id.* at 16.

[71] *Id.* at 46.

[72] *Trump v. Wilcox*, 145 S. Ct. 1415 (2025) (citing *Seila Law*, 591 U.S. at 222, n.8 (2020)). *See also* Memorandum Opinion at 22, *Cook*, No. 25-cv-020903 (D.D.C. Sept. 9, 2025), ECF No. 27 (stating that the Supreme Court in *Wilcox* emphasized that its analysis did not extent to the Federal Reserve Board's for-cause protection).

[73] About the Commission, CFTC (accessed June 6, 2025), https://www.cftc.gov/About/AboutTheCommission.

[74] *Id.*; U.S. CFTC, USAGov (accessed June 7, 2025), https://www.usa.gov/agencies/u-s-commodity-futures-trading-commission.

[75] 7 U.S.C. § 2.

[76] About the Commission, CFTC (accessed June 6, 2025), https://www.cftc.gov/About/AboutTheCommission.

[77] 7 U.S.C. § 2.

[78] *Another Commissioner Resigns From 'Small-But-Mighty' US Commodities Regulator*, Reuters (May 21, 2025), https://www.reuters.com/world/us/another-commissioner-resigns-small-but-mighty-us-commodities-regulator-2025-05-21/; *Commissioner Kristin Johnson Announces Departure from CFTC*, CFTC (Aug. 26, 2025), https://www.cftc.gov/PressRoom/SpeechesTestimony/opajohnson24.

[79] *100 Days: Keynote Address by Acting Chairman Caroline D. Pham, 39th ISDA Annual General Meeting*, CFTC (May 15, 2025), https://www.cftc.gov/PressRoom/SpeechesTestimony/opapham15.

[80] *Id.* The current Administration has not nominated anyone else to fill the other four Commissioner offices.

new Commissioners. The CFTC has functioned well in the past with less than five Commissioners, but those have been temporary circumstances typically occasioned by political transitions. Can a Commission that is required to have five Commissioners legally function with only one when the Administration refuses to fill the remaining Commissioner positions in apparent violation of the clear mandate of the governing statute? Would that undermine the constitutionally mandated separation of powers, giving litigants like Jarkesy an opportunity to challenge CFTC actions as unlawful? This remains to be seen.

CONCLUSION

The recent developments in administrative law discussed above will have a substantial impact on administrative regulation and enforcement. Without the independent protections vested by *Humphrey's Executor*, the executive branch may be able to solidify its power over independent agencies, signaling a shift towards a unitary executive. A positive outcome in *Wilcox*, *Boyle*, or *Slaughter* will tend to increase the President's control and power in areas that Congress has traditionally imposed limitations and encouraged independent actions. Similarly, the nondelegation doctrine would tend to consolidate powers in an agency controlled by the executive and negate delegation to disconnected private actors. Pushing back against this trend are the requirements of due process and the Seventh Amendment and judicial oversight. The *Jarkesy* decision curtails the authority of executive agencies to sanction market participants via administrative proceedings. Agencies who seek punitive civil penalties via administrative proceedings will face challenges in the courts. The overturn of *Chevron* requires courts to use their judgment in determining whether an agency has acted within its statutory authority, rather than deferring to the executive agencies. These two conflicting trends—the rise of the unitary executive and the exercise of judicial oversight and due process—will be certain to impact administrative enforcement and litigation going forward. They also will afford market participants new avenues to challenge agency actions. ■