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NCLA Amicus Brief Calls on *en Banc* Fifth Circuit to Rein in CPSC's Unaccountable Power Structure

Consumers' Research; By Two, L.P. v. Consumer Product Safety Commission

Washington, DC (February 14, 2024)—The New Civil Liberties Alliance has filed an *amicus curiae* [brief](#) asking the U.S. Court of Appeals for the Fifth Circuit to rehear the case of *Consumers' Research v. CPSC en banc* in order to decide whether CPSC's structure is unconstitutional. CPSC Commissioners unquestionably wield executive power, yet the President cannot remove them at will. The *en banc* Fifth Circuit should end this glaring arrogation of the executive power that Article II of the Constitution vests solely in the President.

The district court in this case ruled that CPSC “exercises substantial executive power,” so its commissioners should be subject to at-will removal by the President under the U.S. Supreme Court’s 1935 *Humphrey’s Executor v. U.S.* precedent. It is noteworthy that neither the CPSC itself nor the Fifth Circuit panel majority disputes that conclusion. Unfortunately, the panel majority erroneously concluded that *Humphrey’s Executor* required it to uphold CPSC’s structure. However, as Judge Edith Jones’s dissent points out, a careful reading of *Humphrey’s Executor* actually requires affirmance of the district court’s judgment. The Fifth Circuit, sitting *en banc*, should likewise closely follow *Humphrey’s Executor* and determine that CPSC’s structure and actions are unlawful.

This case can pave the way for the Supreme Court to reverse *Humphrey’s*, which erred by upholding tenure protections for Federal Trade Commission commissioners against at-will presidential removal. *Humphrey’s* did not dispute the President’s authority to remove executive branch subordinates, but it found FTC commissioners to be exempt because they did not exercise “executive power.” That judgment was mistaken. FTC has always exercised executive power “in the constitutional sense,” engaging in enforcement activity outside the agency in violation of Article II’s constraints. However, if the Fifth Circuit rules against CPSC because that agency exercises executive power, its ruling would be sustained even if the Supreme Court overrules *Humphrey’s Executor*.

NCLA urges the *en banc* Fifth Circuit to both follow *Humphrey’s* (to the letter) and to encourage that precedent’s downfall. Though *Humphrey’s* strays from the Constitution’s original meaning, CPSC is unconstitutionally structured under *Humphrey’s* regardless. As Judge Jones wrote in her dissent, “[t]he CPSC is not limited to duties as a legislative or judicial aid such as ‘making investigations and reports’ to Congress or ‘making recommendations to courts as a master in chancery,’” but instead wields “[p]lainly ... executive powers.” Thus, CPSC’s structure cannot be sustained even on *Humphrey’s Executor’s* terms.

NCLA released the following statements:

“As Judge Jones pointed out, ‘[f]acts are called facts for a reason’ and ‘[d]ifferent facts often mean different results.’ Because the facts here differ enough from those in *Humphrey’s Executor*, the *en banc* Fifth Circuit should conclude that the CPSC is unconstitutionally structured and thus take an important step toward restoring the constitutional design that the Framers bequeathed to us.”

— **Greg Dolin, Senior Litigation Counsel, NCLA**

“As a former attorney at the CPSC, I have no doubt that the agency wields executive power. For that reason, even under the flawed rule of *Humphrey’s Executor*, CPSC Commissioners must be subject to at-will removal by the President. As Judge Jones recognized, the lower courts do not need *Humphrey’s* to be overturned in order to apply its holding correctly to agencies that improperly wield executive power outside the President’s control.”

— **Mark Chenoweth, President and Chief Legal Officer, NCLA**

For more information visit the *amicus* page [here](#).

ABOUT NCLA

[NCLA](#) is a nonpartisan, nonprofit civil rights group founded by prominent legal scholar [Philip Hamburger](#) to protect constitutional freedoms from violations by the Administrative State. NCLA’s public-interest litigation and other pro bono advocacy strive to tame the unlawful power of state and federal agencies and to foster a new civil liberties movement that will help restore Americans’ fundamental rights.

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