Podcast Transcript

The FTC – Independent No More

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Kattman: Thank you for joining us for another episode of BakerHosts AD Nauseam, a podcast series focusing on new and trending advertising issues with an emphasis on the FTC and the NAD. I'm Amy Kattman, and you're listening to BakerHosts.

We are joined today by Randy Shaheen and Daniel Kaufman from BakerHostetler's Advertising, Marketing, and Digital Media team. Together, they have decades of advertising experience and approach advertising issues from multiple perspectives. On today's episode of AD Nauseam, Randy and Daniel take a look at the recent Supreme Court decision involving the FTC. With that, welcome to AD Nauseam, and let's turn it over to Randy and Daniel.

Kaufman: Welcome back to AD Nauseum, your favorite, I hope, ad law podcast. This is Daniel Kaufman, but for the very first time, Amy Mudge is not here with me. But we have a special guest who has joined us many times before, Mr. Randy Shaheen.

Shaheen: Thanks, Daniel. Glad to be here and especially glad to be here so that Amy and her family can take a well-deserved vacation. And I know she'll be back for the next episode. But we had some late-breaking FTC news, and so she gave us the okay to proceed without her. And so today we're going to answer the question of what do Donald Trump and Franklin Roosevelt have in common?

Kaufman: Many different ways to answer that question but we will do that. And it is funny, Amy was, she seemed almost eager to have a week off. She is enjoying her trip, and I love it.

Yeah, it is funny. We don't often see FTC cases at the Supreme Court. In the past, we've gone decades and decades with no FTC cases. But we've had three in the past five years. AMG, which did not go well for the agency. Axon also didn't go well for the agency. And the latest, we have *Slaughter v. Trump*. And let's just say there are many different opinions as to whether this is good or bad for the agency.

Shaheen: And that may change over time, depending on who is in charge of the executive branch.

Kaufman: And who is being investigated. Yes.

Shaheen: I'm definitely looking forward to talking more about the *Slaughter* decision and what it might mean for the FTC going forward. But before we get there, I know Amy always likes to do some sort of pop culture question. Are there any movies or books that you're focused on for this summer?

Kaufman: So I got to say, I saw it in the theaters, and it is on streaming now. Project Hail Mary, one of the best films of the genre, I think. I really loved the movie. It was so well done. It is a great buddy flick. It is a great space flick. It is a great science flick. It just has everything in it, and it is heartwarming. I can't praise that movie enough. I'm assuming you've seen Project Hail Mary, Randy.

Shaheen: Yes. I didn't see it in the theater, and I knew next to nothing. I didn't know, I had seen the Mars movie and knew about that book. I didn't even know this was a book, but I watched it when it went on streaming and absolutely loved it, a hundred percent. This was an amazing, it is nice to see a movie that is not like a sequel and is so original and entertaining.

Kaufman: And it wasn't all CGI. Rocky was a puppet. He was a thing. That was great. Reading, I've decided to try to improve my brain a little bit this summer. So, I'm reading this, it won the Pulitzer Prize in 2018, The Overstory, which is interesting so far. It is a bit of a slog. It is about trees and how they're connected. But I've been warned that it gets really wacky and out there. So, I'll see what happens. But how about you?

Shaheen: Reading, I have to confess, has really suffered since the era of streaming. And that is something I need to fix because there is no substitute for reading. But instead, I have now resorted to often watching streaming versions of books. I just watched The Night Manager, both seasons. I guess the first season actually is based on a real book. The second season is a made-up second book that never got written. So, but yeah, reading is on my to-improve to-do list here.

Kaufman: Yes, summer is a good time to do that. I agree. Okay, Randy, we could easily spend the next 20 minutes doing a deep dive into the *Slaughter* decision, the reasoning, the history, but time is precious here. And we mainly want to talk about what this decision might mean going forward for the FTC. But maybe to start things off, can you give us a thumbnail sketch of the decision and what has led up to this?

Shaheen: Sure. So, we had the new administration, the Trump administration, take over in 2025. And soon after that, the President fired the now two Democratic FTC commissioners. The chair, Lina Khan, had left on her own before that. And so Becca Slaughter and Alvaro Bedoya are fired for no cause.

Historically, the presumption was the President couldn't just fire FTC commissioners. The FTC Act said the President could only remove them for inefficiency, neglect of duty, or malfeasance. And no one had suggested, including the President, that either of these commissioners had done any of those things. And this concept, this understanding, really derived from a 1935 Supreme Court decision called *Humphrey's Executor*. Humphrey had been fired by President Roosevelt. And, but the case was brought as *Humphrey's Executor* because in the interim, he passed away. So, he could no longer obviously be reinstated at the commission, but his estate was suing, as I understand it, for back pay, assuming that his firing was unlawful.

And the Supreme Court agreed with *Humphrey's Executor*. They said the firing was unlawful in part because the Court said the FTC really didn't exercise executive functions. They weren't functioning as part of the executive branch. So the language in the FTC Act controlled. So based upon that, Commissioners Slaughter and Bedoya sued to get their jobs back. Now in the interim, Commissioner Bedoya, before he came to the FTC, taught at Georgetown, and he eventually resigned for personal reasons, and I believe went back to Georgetown. So that just left Commissioner Slaughter as a plaintiff.

Kaufman: I think he might be, there is some sort of, I don't want to call it a think tank. There is some organization that he is affiliated with. I can't remember the name of it, but he is off to newer things.

But in her lawsuit, Slaughter, of course, relies heavily on the *Humphrey's Executor* case that you talked about. And to be clear, she had a few wins as the case made its way through the courts, pretty quickly, I might add. But the *Humphrey's Executor* case has been on shaky grounds for many years. And we've seen this in many decisions for the past couple of decades. And at the end of June, the Supreme Court, with a 6-3 vote, overturned *Humphrey's* and said, basically, the separation of powers requires that the President should be able to remove his subordinates at will in order to comply with the constitutional requirement that the President effectively execute the laws of the land.

Shaheen: So the opinion was delivered by the chief justice. He wrote the majority opinion, and he really didn't mince words. He called the historical view that the FTC doesn't exercise executive power almost fictional. And his core point in that regard was, look, the FTC does lots of things that seem to be an exercise of executive power. They bring lawsuits, they execute federal statutes, and they enforce laws. And that, according to the chief, is executive power. And under Article II, he went on to say, the President has to have total control over who executes the law.

Kaufman: So look, we're not going to delve much more into the rationale of the decision and also the dissenting and concurring statements, but it really is a fascinating read that provides some interesting history lessons and raises some real important questions about the different branches of government and what Congress might have been thinking when they created these agencies that were designed to be independent of the executive branch.

Shaheen: So at the outset, the FTC Act states that it is like many agencies to be comprised of multiple commissioners, five in this case, one of which is designated the chair, and no more than three can be from the same political party. I do remember one time there was at least one commissioner who was an Independent. So there are some workarounds on that, but no more than three can be the same political party. And so for decades, we had commissioners from both parties serving together. But are we done with that now? And is the new norm going to be what we've had now for the last year or so, where we have commissioners who are all of the same party as the president with the rest of the seats on the commission being vacant?

Kaufman: Randy, look, my take is given where we are today and the state of the world and the country and divisions that we see everywhere, it is just hard to see minority commissioners happening again, barring some significant changes. But let's face it, look, if you are the majority party your life is going to be much easier if you don't have to deal with different points of views from the other party or dissenting statements. Now, of course, then that starts to raise the question, why do you need a commission at all? One director might be sufficient if you aren't getting at that multitude of views from multiple parties.

Shaheen: Yes, interesting question. And we'll see how, it'll be interesting to see how that develops. Is that what is going to happen the next time around? Or if, I guess we're down to two Republican commissioners now. If one of them leaves, are we just going to be left with one? So, it'll be interesting to see how that evolves. But Daniel, you spent 20-plus years at the FTC. From where you sat, did the bipartisan nature of the commission have a day-to-day impact on how the agency operated?

Kaufman: I think it really did. And I think you would regularly see when you were at the FTC the effect of what it meant to be at an agency that was designed to be bipartisan. We saw a lot of times where the commissioners had differing views on a case or a rule or a statement, and they would work through challenging issues and often make compromises with a stated goal of achieving unanimity. For many years, they wanted a five-nothing vote. When they failed to reach a compromise, however, the public would then see some sort of concurring or dissenting statement and at times raised some real significant questions, perhaps, about what the majority was doing. Maybe there was too little money, inappropriate relief. They should have alleged more. The statements went in all different directions. And these statements were important. And they would inevitably surface in discussions and articles, congressional hearings and in litigations. And I think those are likely going to be a thing of the past. And I think they did help the FTC often get to good decisions through compromise and efforts to achieve unanimity.

Shaheen: Yeah, and I think the same. For me, it was probably true from the outside. I will say with the caveat, I feel when I first started doing this two-plus decades ago, we also lived in a somewhat less partisan time. So some of what is happening now may just be also partially a reflection of just more partisanship. But I can remember, for decades one administration would come, and one would go, and there might have been Republican Democrat or Democrat to Republican. But the pendulum swings, the swings you saw as far as enforcement policy, were relatively minor. There would be shifts, yes, but it wasn't night and day. Commissioners would mostly remain, the chair would typically go, but the other commissioners would mostly remain. And there just weren't these sort of dramatic changes as far as enforcement policy, emphasis on certain procedures or industries. Those days, especially if we no longer have minority commissioners, are probably likely gone now, which I think is not necessarily a good thing for business, right? If you have less certainty, less consistency for businesses and consumers in terms of how they operate, how they market, how they advertise, I think that can be difficult on companies.

Kaufman: I very much agree. But look, I think we have to assume that at the moment there is a new administration that walks into the White House, they will clean house at the FTC on day one. And the seats that are supposed to be filled by another party will simply not be filled. And you're right, those modest swings that we saw for many years will become far more significant with a new administration changing direction far more substantially and likely spending a good deal of time undoing what the prior administration did with no highlights, with no statements highlighting things that might be less than ideal.

Shaheen: Yeah, and Daniel, I think it is worth just taking a second to focus on this issue of the wider pendulum swings. So, for example, if you're an in-house counsel or you're a compliance officer for a company, what does a post-*Slaughter*-decision FTC actually look like for your day-to-day job and the day-to-day advice you have to give? And you might well develop a case of what we like to call regulatory whiplash.

So, we know that the two major parties already, because we saw some of this in the prior administration, even with minority commissioners there, we know the two parties have had some pretty different views about FTC rulemaking. The Republicans traditionally dissented from most of what the Democrats are trying to do in that space, including the privacy rulings that Chair Khan made and the negative option rule, which Republicans did recently restart under Chair Ferguson.

We've also seen, and it is the first time I can remember this happening. You may have more of a recollection, Daniel, but we had an order that the FTC entered against Rytr under the Khan FTC. The Republicans dissented from it. And then when they took over, they actually modified the order to essentially get rid of it. And is that going to happen? Are you going to petition the new FTC to get rid of your order? Or conversely, is it possible you could have your investigation closed and then reopened, or maybe an order, like happened in the Facebook case, have an order that gets reopened to be modified? It really does call into question how much stability there is going to be.

Kaufman: Yeah, no, look, from my perspective, Rytr was an unfamiliar thing for the agency to do. That was definitely new to me, but I agree, this is going to create some compliance challenges. Now, one thing, of course, that is worth flagging is that the core of the FTC Act, of course, is not going to change from administration to administration. Statutory, that doesn't change. One administration, however, might prioritize different types of actions, but what it means ultimately to be deceptive or unfair is pretty well established through decades of court decisions.

But when it comes to policy statements and rules and guides, I think that is where we're going to likely see more of that shifting landscape. And that is a real big deal for a lot of companies to navigate. There will be investigations that are initiated under one administration that may roll into the next. And the next administration may have far broader or narrower views on liability and remedies. And again, a big deal and something that companies and people who do our jobs are going to have to think long and hard about if you are dealing with the agency during election years. It is going to be complicated.

Shaheen: Maybe that is good news for lawyers. I don't know. Bad news for businesses, good news for lawyers. But we won't dwell. We won't dwell on that.

So, one question I know, Daniel, I have posed to you several times, is what happens? So, let's say the new administration is from a different party, and they want to get rid of, they have this authority now under *Slaughter* to get rid of the existing commissioners from the old part of the outgoing party. And so they want to fire them, and maybe they want to do it day one. But the problem, of course, is that you still have to get your folks confirmed and the confirmation process, like the Republicans now, they control the Senate. And yet, I don't know, it's been months since the third Republican commissioner was nominated. It just, the confirmation process is slow. And if you're president, but your party doesn't control the Senate, you may never get your appointees confirmed. So what do you do at that point? If you fire the old folks, who is running the agency until you get people confirmed to take over there?

Kaufman: Randy, it is a great question. And I will confess, I have been talking to a number of my former FTC colleagues on this issue because it is a great academic exercise. And look, where I'm landing is, I don't think the FTC statute was designed to address that sort of contingency. There is maybe a little bit of work that can continue if it is through consensus with a company that wants to settle a litigation. But I think the scenario is likely to happen eventually. And there are some federal statutes that do deal with vacancies and the ability to appoint actings. But my understanding is I don't think the FTC is actually part of that statutory scheme. I think it is just the actual executive branch agencies that are delineated there. So, I think at a bottom line, like when an election happens and there is a change in administration, they create a transition team that goes into every agency to figure out transition. This is going to be a really big deal for a transition team to look closely at it. And it might eventually require some sort of modest congressional fix to make sure that at the end of January and then after an election that the FTC isn't just sitting there waiting for somebody to arrive who is Senate confirmed. But I think there are some real issues that need to be looked at closely. And not just the FTC. I'm sure there are other independent agencies that are going to be similarly situated.

Shaheen: Maybe another future Supreme Court decision and another future podcast. We'll see.

Kaufman: It is interesting, but part of the challenge is, let's say there was a way for the FTC to theoretically continue doing things without a Senate-confirmed person at the chair. It just creates deep questions about whatever they're doing and just another route for people to challenge the actions they took. And you just don't want to be in that position two years down the road to be fighting over calls that were made two years ago. It's, there needs to be a clear solution.

Shaheen: I remember a while back now because of the confirmation process and the slowness, I think that the commission was down to two members, one Republican, one Democrat. And people were worried, what happens if one of them, if the Democrat leaves, because the Republican, I think, was the acting chair at that point. If the Democrat leaves, can the commission still function with one commissioner? And people seem pretty confident that was fine, but now we're potentially talking zero commissioners, which is something I don't think anyone has contemplated before.

So there is a lot, obviously, to think about here, but I think if you focus on the here and now, it doesn't seem to me that there is a whole lot that is going to change immediately. We are now at this point, a year and a half into the administration. Commissioners Slaughter and Bedoya have been gone for quite some time. And for the past year, we've been dealing, we've had the reality of an FTC that is controlled by one party. And I don't think there's been a single dissenting view so far, which again, is not surprising if it is all one party. So, I guess, really the only difference now for the most part is we know that this is the new normal, right? This has been upheld by the Supreme Court. This is how the FTC is likely to operate going forward.

Kaufman: Yeah, I think that is right, Randy. Look, this is a very big decision, to be clear. And decades from now, this is a decision they'll be talking about in some law school classes. But that immediate impact I don't think is a huge deal, again, given that she's been gone for a year, so is Bedoya. This is what we've been seeing. But once the next election cycle comes into swing, I think that is when things may start to get interesting. And hopefully we will still be around here at AD Nauseam to talk to everybody about that because I love chatting about this FTC stuff.

Shaheen: All right, Daniel, always nice to talk. And thanks for having me on.

Kattman: Thank you, Daniel and Randy. If you have any questions for Daniel or Randy, their contact information is in the show notes. As always, thanks for listening to BakerHosts.