

United States Senate
WASHINGTON, DC 20510

16 March 2021

The Honorable Joseph R. Biden
The White House
1600 Pennsylvania Avenue NW
Washington, D.C. 20500

Dear Mr. President:

We write to express our alarm about the sudden dismissal of Ms. Sharon Fast Gustafson as General Counsel of the Equal Employment Opportunity Commission on March 5, 2021, some two years and five months before her term was due to expire on August 5, 2023.

As you know, Ms. Gustafson made history in 2019 by becoming the first Senate-confirmed female General Counsel at the EEOC since that agency was created in 1965. A champion of working women who practiced employment law for nearly three decades, she won the groundbreaking Supreme Court case of *Young v. United Parcel Service*, 135 S. Ct. 1338 (2015), which established for the first time that employers must make certain accommodations for their pregnant employees. It is a tragic irony that you would choose to begin your presidency by firing such a trailblazing woman from an agency whose very mission is to protect workers from discrimination.

In her letter refusing your demand for her resignation, Ms. Gustafson mentioned that you gave no reason for making such a demand. She conveyed concerns, however, that it may have been because of her work bringing together believers of all faiths to explore how the EEOC could better respond to religious discrimination in the workplace. Her letter stated in part, “I do not know which of your advisors recommended that you make the request. But please be aware that there are those who oppose my advocacy on behalf of employees who experience religious discrimination and on behalf of constitutional and statutory protections for religious entities.”¹

We truly hope that Ms. Gustafson’s termination was not motivated by opposition to her work fighting religious discrimination, but in the absence of any explanation, all we can do is hope. Whatever the reason, this termination does more than set a dangerous precedent; it exceeds presidential authority. The EEOC is a quasi-judicial agency designed by Congress to be bipartisan and free from coercive political interference. Its General Counsel is nominated by the President and confirmed by the Senate for a fixed four-year term. Well-established Supreme Court precedent leaves no doubt that for-cause removal

¹ Letter from Sharon Fast Gustafson to Joseph R. Biden (March 5, 2021): <https://eppc.org/wp-content/uploads/2021/03/GC-EEOC-to-White-House.pdf>

applies to term-limited political appointees at quasi-judicial agencies, even if they perform substantively executive functions within those agencies.²

Just last year, in a case that otherwise upheld broad presidential removal power, the Supreme Court reiterated two legal exceptions to that power, including “one for multimember expert agencies that do not wield substantial executive power.”³ For this reason, no one seriously argues that the President may remove EEOC *commissioners* without cause. The argument that the General Counsel is distinguishable from commissioners in this regard either misunderstands or simply overlooks the plain language of the Court’s opinion. The exception attaches to “multimember expert agencies”—i.e., to the agencies themselves, not merely to members of those agencies. The General Counsel is a political appointee to, and an essential component of, a multimember expert agency that does not “wield substantial executive power.” As such, her position clearly falls under this exception.

Sharon Gustafson’s termination, in defiance of Supreme Court precedent and well-established practice, undermines the ability of the Equal Employment Opportunity Commission to function as the meaningfully independent entity Congress designed it to be. We therefore call on you to reinstate Ms. Gustafson immediately to her position as General Counsel.

Sincerely,



Rand Paul, M.D.
United States Senator



Rick Scott
United States Senator



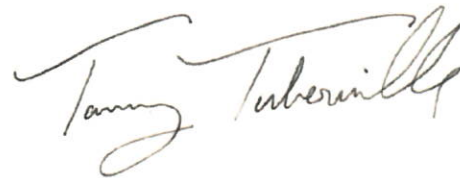
James Lankford
United States Senator



Mike Braun
United States Senator



Roger Marshall
United States Senator



Tommy Tuberville
United States Senator

² See *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 629 (1935): “[t]he authority of Congress, in creating quasi legislative or quasi judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted; and that authority includes, as an appropriate incident, power to fix the period during which they shall continue, and to forbid their removal except for cause in the meantime. For it is quite evident that one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter’s will.”

³ *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2199-2200 (2020).