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The Facebook Oversight Board proved it's not Mark Zuckerberg's puppet — now it's his move

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KEY POINTS

Facing its first major case since its creation in October 2020, Facebook's Oversight Board upheld the company's decision to restrict former President Donald Trump's access to his Facebook and Instagram accounts.

The ruling is reminiscent of the monumental 1803 ruling by the U.S. Supreme Court in Marbury v. Madison, a case that established the judicial branch's powers of accountability over the executive and legislative branches.

By agreeing with Facebook's decision to restrict Trump but criticizing the company's processes and policies, the board is cementing its power while signaling to the public that it truly aims to operate as an independent body.

In this article

FB -0.18 (-0.06%)





Erin Scott | Reuters

In 1803, Supreme Court Chief Justice John Marshall was faced with an impossible decision.

He could disagree with President Thomas Jefferson on the matter of Marbury v. Madison, calling his administration's actions illegal and risk that Jefferson would immediately dismiss or ignore the court's decision. Or he could bow to the executive branch, agree with its actions, and be allowed a crumb of power within the young U.S. democracy.

In the end, Marshall and the rest of the court made an astounding decision. In its ruling, the court criticized the administration's actions, but ultimately upheld them by ruling that the law in question was unconstitutional.

The decision is held as the most important in U.S. constitutional law because although Jefferson ultimately got the ruling he wanted, in the process Marshall established the principle of judicial review. The ruling set a precedent for the legitimacy and power of the Supreme Court in the U.S., firmly establishing its powers of accountability over the

That process was repeated on Wednesday in the modern arena of a technology empire.

Facing its first major case since its creation in October 2020, [Facebook's](#) Oversight Board [upheld the company's decision](#) to restrict former President Donald Trump's access to his Facebook and Instagram accounts.

But while it agreed with the actions taken by Facebook and CEO Mark Zuckerberg following the insurrection at the U.S. Capitol on Jan. 6, the Oversight Board also criticized the way the company arrived at its decision and demanded that Facebook clarify and codify its content policies.

The decision leaves Zuckerberg in a similar spot that Marshall put Jefferson. He got the result he wanted, but at the cost of his absolute power.

The first real test for the Oversight Board

To understand the significance of Wednesday's decision, it's important to remember how Facebook's Oversight Board came to be.

The independent body was [announced by Zuckerberg in November 2018](#), after the company had faced a grueling avalanche of critical news reports and scandals for months.

"I've increasingly come to believe that Facebook should not make so many important decisions about free expression and safety on our own," Zuckerberg said in a note published on Nov. 15, 2018. That was one day after the New York Times had [published a scathing report](#) detailing how COO Sheryl Sandberg and other Facebook execs tried to downplay and spin bad news.

Zuckerberg announced the independent body, and then nothing happened for more than a year.

It wasn't until January 2020 that the company finally unveiled the bylaws for its Oversight Board. Despite Zuckerberg contending that the board's decisions would be



importantly, the board's decisions would apply narrowly, with Facebook retaining final say on whether or not to broadly apply the decisions of the board.

These limitations weren't surprising, given how much power Zuckerberg has singlehandedly wielded over his domain since the creation of Facebook in 2004.

Zuckerberg has close personal ties with most of the members of [his board of directors](#), and directors who attempt to exercise oversight tend to leave the board not soon after, according to [a report in the Wall Street Journal](#). Most significantly, [Zuckerberg holds controlling power](#) from his shares of Facebook stock, making the votes held by the company's investors irrelevant. This is why time and again, proposals pitched at the company's annual shareholders meeting are swiftly rejected, despite [in some cases](#) receiving support from a majority of shareholders not named Zuckerberg.

This is why a group of Facebook critics decided to launch their own "[Real Facebook Oversight Board](#)" in September 2020. The group holds no power or influence, but its mere existence symbolized how little trust or hope anyone outside the walls of Facebook had for the actual Oversight Board.

It wasn't until October 2020 that the Oversight Board finally launched, and by then, it was too late for the board to have any sort of say on the company's handling of the 2020 U.S. election.

Since then, the board has handled a few cases. But the independent body didn't really get its first test until Jan. 21, when Facebook announced that it would [refer its decision](#) to suspend Trump indefinitely.

Halving the difference

As with the case of Marbury v. Madison, the Facebook Oversight Board found itself in an impossible position with its first major test.

Had the board overturned Facebook's decision to restrict Trump, it would've absolved the company from its responsibilities and drawn harsh criticism from anybody on the left of the U.S. political spectrum as well as Trump's many critics around the world. The



ruling would've undermined Facebook's own decision in January and would've pressed Zuckerberg to prove (or disprove) his commitment to the board's rulings.

On the other hand, simply agreeing with Facebook would have drawn criticism from Trump's adherents and positioned the board as little more than Zuckerberg's puppet.

Instead, the Oversight Board halved the difference, upholding the suspension while taking the company to task by broadly criticizing its policies and demanding that Facebook commit to a six-month re-evaluation. That process will require the company to reassess its penalty on Trump and decide an appropriate duration for that penalty that is consistent with Facebook's rules and do so in a way that is "clear, necessary and proportionate."

In this ruling, the Oversight Board did not mince words or back away from its impossible task.

"In applying a vague, standardless penalty and then referring this case to the Board to resolve, Facebook seeks to avoid its responsibilities," the board said in its note announcing its decision. "The Board declines Facebook's request and insists that Facebook apply and justify a defined penalty."

Like Marshall and the early Supreme Court, the board used this case as an opportunity to establish that it will define its purpose, not Facebook.

"It is Facebook's role to create necessary and proportionate penalties that respond to severe violations of its content policies," the board wrote. "The Board's role is to ensure that Facebook's rules and processes are consistent with its content policies, its values and its human rights commitments."

The board's ruling extended beyond Trump's specific suspension. In the ruling, the board criticized the company in other areas, echoing complaints outsiders have had for years, and laid out several specific recommendations for how the company can start to get a handle on the matters.

These recommendations address how the company distinguishes between users who



how the company handles situations when an influential user makes posts that pose a high probability of imminent harm. The recommendations also call on Facebook to address confusion about how decisions are made regarding these highly influential users, and the recommendations call on Facebook to report how many accounts it restricts based on region and country in the company's regular transparency reports.

Proving its power

In arriving at its decision, the board has done what no other body within the walls of Facebook's empire has dared to do: Publicly and officially criticize the company for its very real failures and the significant impact those failures have had on human rights and democracy across the globe.

More importantly, the board established its legitimacy and independence and cornered Zuckerberg into validating its power.

The rest is now up to Zuckerberg.

Should he commit to and comply with the board's decisions and recommendations, he can legitimize the power of the board while giving up some of his own control.

If he ignores what the board had to say and undermines it, he will reveal the independent body as nothing more than a sham to conceal that there are no checks and balances in the Facebook empire.

[Facebook's initial response](#) suggests it hasn't decided which way to go.

Facebook Vice President of Global Affairs and Communications Nick Clegg said the company is pleased with the board's ruling to recognize that the company's actions in January were justified. Clegg thanked the board, and he said Facebook will consider the six-month review and its numerous recommendations. Clegg, however, did not commit the company to anything beyond the decision to keep Trump off of Facebook.

It's an initial and short reaction, but the lack of commitment to the board's recommendation is notable.



It's worth calling back to Zuckerberg's words when he first introduced the idea of this independent body.

"I believe independence is important for a few reasons," Zuckerberg wrote in November 2018. "First, it will prevent the concentration of too much decision-making within our teams. Second, it will create accountability and oversight. Third, it will provide assurance that these decisions are made in the best interests of our community and not for commercial reasons."

If Facebook wants the world to believe it's serious about following consistent policies, it must make a commitment to the six-month review process and follow through with the board's demands. Otherwise, this Oversight Board is exactly what critics always thought it would be: A joke.

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