

What's At Stake At High Court For Presidential Removal Power

By **Kolya Glick** (October 8, 2025)

The upcoming U.S. Supreme Court term will bring to a head the long-simmering separation-of-powers showdown over the president's authority to remove the heads of independent agencies like the Federal Trade Commission and the Federal Reserve Board of Governors.

Two recent orders frame the legal battles to come. First, on Sept. 22, the Supreme Court issued a brief unsigned order in *Trump v. Slaughter* — over a dissent from Justice Elena Kagan, joined by Justices Sonia Sotomayor and Ketanji Brown Jackson, allowing President Donald Trump's removal of FTC Commissioner Rebecca Slaughter to go forward, ensuring that she remains out of office while the case is resolved.[1]



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The court simultaneously granted certiorari before judgment, scheduling the case for argument on the merits in the December session. In contrast, just nine days later, in *Trump v. Cook*, the court rejected Trump's request to remove Federal Reserve Gov. Lisa Cook while the case challenging her removal is pending.[2]

The court directed the clerk to set a schedule for briefing and argument on that motion — without formally granting certiorari. Together, the forthcoming decisions in those cases raise fundamental questions about the constitutional separation of powers, threaten the 90-year-old precedent of *Humphrey's Executor v. U.S.* and promise to have an immediate impact on Trump's ability to control independent federal agencies.[3]

Slaughter and *Cook* present paradigmatic clashes of the constitutional branches. Flexing its Article I power to regulate interstate commerce, Congress has endowed FTC commissioners and members of the Federal Reserve Board of Governors with a measure of independence from the president.

It has provided by statute that the president may not remove those officers except for cause — i.e., for "inefficiency, neglect of duty, or malfeasance in office," under the FTC Act, and not simply based on policy differences.[4]

The president, on the other hand, is the sole steward of the executive power of the U.S. under Article II, and he alone has the duty of ensuring that executive officials are faithfully executing the laws.[5]

He claims that any restriction on the ability to remove officials undermines his prerogative to control the executive branch, and he cited no cause for removing *Slaughter*. [6] In this context, Congress' and the president's powers cannot coexist, and the Supreme Court must resolve the interbranch dispute.

The separation-of-powers disputes in *Slaughter* and *Cook* expose a tension between two constitutional theories, sometimes categorized imperfectly as formalism and functionalism.

The Supreme Court endorsed a formalist theory of removal powers in the 1926 case of *Myers v. U.S.*, in which it held that the president had inherent and exclusive constitutional

authority to remove executive officers — in that case, the postmaster general — even without congressional authorization to do so.[7]

From Myers' formalism grew the modern unitary executive theory, which emphasizes that the president is the only elected constitutional official in the executive branch. As a result, the theory goes, to ensure both energetic enforcement of the laws,[8] and democratic accountability to the people,[9] the president must be able to answer for the entire executive branch, meaning any restriction on his removal authority is unlawful.

After all, it is the president — and not the heads of agencies — who was elected by, and must answer to, the people.

Functionalism, in contrast, finds its roots in *Humphrey's Executor*, a unanimous 1935 decision that limited and distinguished Myers.[10]

In *Humphrey's*, the court recognized the president's executive prerogatives, but it then weighed that authority against Congress' authority, and express policy decision, to create in the FTC a "body of experts who shall gain experience by length of service — a body which shall be independent of executive authority except in its selection, and free to exercise its judgment without the leave or hindrance of any other official or any department of the government." [11]

In upholding Congress' for-cause removal regime, the court held that the FTC was not a purely executive agency, and so limitations on his control would not unduly intrude on the president's constitutional powers.

Rather, the court explained, the FTC's multimember, bipartisan structure meant that its power was diffused, further noting that the FTC exercised executive authority only in furtherance of its quasi-legislative and quasi-judicial duties.[12]

The *Humphrey's Executor* court thus recognized that Congress has a legitimate interest in creating stable nonpartisan expert agencies that are not subject to shifting, and sometimes volatile, political whims, and that those agencies do not impose such a burdensome restriction on the president's executive authority that they should be rendered unconstitutional.

In *Slaughter*, the Supreme Court has now placed *Humphrey's Executor* in its cross hairs, expressly granting certiorari on whether to overrule that precedent.

And given the court's decision to allow Trump to remove *Slaughter* while the case is pending — implying a majority of the court believes Trump is likely to succeed on the merits — the end of *Humphrey's Executor* may be nigh.

Reinforcing that conclusion, earlier this year, the same six-justice conservative majority that allowed *Slaughter's* removal issued a series of unsigned shadow docket orders permitting the president "to fire without cause members of the National Labor Relations Board, the Merits Systems Protection Board, and the Consumer Product Safety Commission," according to Justice Kagan's dissent.[13]

For those who have been watching the resurgence of the unitary executive theory, and the parallel litigation campaign against the administrative state,[14] *Humphrey's* demise would not come as a surprise.

The reasoning of *Humphrey's* has been rigorously criticized by scholars and judges alike, who note that *Humphrey's* allows unelected and unaccountable agency officials to wield significant executive authority.[15]

Other commentators note that, even if the FTC's functions were exclusively quasi-judicial and quasi-legislative when *Humphrey's* was decided in 1935, the agency now wields significant executive authority.[16]

Moreover, more than a decade of the Chief Justice John Roberts' court's separation-of-powers cases have revealed a heavy skepticism of unelected independent administrative officials at both the principal-officer[17] and inferior-officer[18] levels.

And yet, the doctrine of *stare decisis* makes *Trump v. Slaughter* an intriguing case, particularly as the Supreme Court considers its own role in the modern separation-of-powers.

Indeed, for all its perceived theoretical flaws, *Humphrey's Executor* is foundational to our country's legal and political history, and the entire alphabet-soup of independent agencies that Congress has created over the years — from the Nuclear Regulatory Commission to the Federal Reserve Board — all rests squarely on *Humphrey's* shoulders.[19]

Thus, if *Humphrey's Executor* falls, so falls the logical and legal foundation for all independent agencies, making every one of them susceptible to new legal challenges.

This term, the Supreme Court will thus need to confront the uniquely weighty force of *stare decisis* in separation-of-powers disputes. In this respect, *Humphrey's Executor* provides more than just the theoretical grounding for independent federal agencies.

Its endorsement of independent agencies as a congressional tool has also influenced policymaking in less obvious ways for nearly a century, subtly altering the ongoing give-and-take between officials in the legislative and executive branches.[20]

Thus, overruling *Humphrey's Executor* would not only cast doubt on the legality of every independent agency in the federal government; it would also catalyze a massive transfer of soft constitutional authority — and negotiating leverage — from Congress to the president at a time when the president's expansive claims of executive authority are already under sharp scrutiny.

In the context of ever-present negotiations between the branches, the Supreme Court will need to think carefully about whether it wants to abruptly rewrite the rules of inter-branch engagement more than 90 years after it unanimously announced those rules in *Humphrey's Executor*. In this respect, it is notable that the Supreme Court has never overruled its own separation-of-powers precedent.

The Supreme Court's order denying Trump's request for the immediate removal of Lisa Cook, and ordering argument on that motion, provides yet another captivating wrinkle for the upcoming term, suggesting that, even if *Humphrey's* were to fall, its demise may not doom all independent agencies.

As Justice Brett Kavanaugh recognized in a 2009 law review article, "in some situations it may be worthwhile to insulate particular agencies from direct presidential oversight or control," expressly acknowledging that "the Federal Reserve Board may be one example, due to its power to directly affect the short-term functioning of the U.S. economy by setting

interest rates and adjusting the money supply." [21]

Then-Judge Kavanaugh's words reflect the commonsense notion that financial institutions should have some independence to develop long-term fiscal policy without the concern that elected officials will make decisions for short-term political gains.

But while that logic has intuitive appeal, it is functionalist in nature, and it is difficult to square with the "unitary executive" theory that the Supreme Court has elsewhere endorsed.

Finally, it is always possible the court will find a narrower ruling that limits or avoids *Humphrey's Executor* without overruling it. For instance, the court could hold that, even if Congress' removal restriction is permissible, the courts may not order an agency to reinstate a fired official — one of the "questions presented" in *Slaughter*.

Alternatively, the court could hold that *Humphrey's* was correct when it was decided, but that the modern FTC has changed enough to render its reasoning inapplicable — an argument urged by the government in *Slaughter*.

But regardless of *Slaughter's* outcome, the practical and theoretical debates concerning independent agencies generally — and *Humphrey's Executor's* place in constitutional textbooks specifically — are not going away.

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[1] *Trump v. Slaughter*, No. 25A264 (25-332), 606 U.S. ____ (Sept. 22, 2025).

[2] *Trump v. Cook*, No. 25A312, 606 U.S. ____ (Oct. 1, 2025).

[3] Separately, the Supreme Court allowed Trump to temporarily remove members of the National Labor Relations Board, the Merits Systems Protection Board, and the Consumer Product Safety Commission. See *Trump v. Wilcox*, 24A966, 605 U. S. ____ (2025); *Trump v. Boyle*, No. 25A11, 606 U. S. ____ (2025). The Court has denied certiorari in those cases.

[4] 15 U.S.C. § 41 (the President can remove FTC commissioners only for "inefficiency, neglect of duty, or malfeasance in office"); 12 U.S.C. § 242 (noting "each member [of the Federal Reserve Board of Governors] shall hold office for a term of fourteen years from the expiration of the term of his predecessor, unless sooner removed for cause by the President").

[5] U.S. Const. Art. I, sec. 1.

[6] Trump's asserted "cause" for removing Lisa Cook was an allegation that she made a false statement about her primary residence on a mortgage application. See Aug. 25, 2025 Letter from D. Trump to L. Cook, <https://www.nytimes.com/interactive/2025/08/25/us/trump-lisa-cook-fed-firing.html>.

[7] *Myers v. United States*, 272 U.S. 52 (1926).

[8] *Federalist No. 70* (Alexander Hamilton).

[9] *Seila Law LLC v. CFPB*, 591 U.S. 197, 204 (2020) ("Without such power, the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else." (quoting *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. 477, 514 (2010))).

[10] *Humphrey's Executor v. United States*, 295 U.S. 602 (1935)

[11] *Humphrey's Executor*, 295 U.S. at 626-27.

[12] *Humphrey's Executor*, 295 U.S. at 628.

[13] *Slaughter*, slip op. at 2 (Kagan, J., dissenting).

[14] See, e.g., *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 392 (2024) (reversing *Chevron USA Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837 (1984)); *West Virginia v. EPA*, 597 US 697 (2022) (expanding the "major questions doctrine" to invalidate EPA rule).

[15] See, e.g., *PHH Corp. v. CFPB*, 881 F.3d 75, 138-39 (D.C. Cir. 2018) (en banc) (Henderson, J., dissenting) (noting that *Humphrey's Executor* is the "exception, not the rule," and explaining *Humphrey's* tension with "first principles" of democratic accountability); Daniel A. Crane, *Debunking Humphrey's Executor*, 83 *Geo. Wash. L. Rev.* 1835 (2015) (opining that "[t]he Commission is not politically independent, uniquely expert, or principally legislative or adjudicative. Rather, it is essentially a law enforcement agency beholden to the will of Congress.").

[16] Thomas Smith, *Reclaiming Humphrey's Executor: Expertise and Impartiality in the FTC*, 37 *BYU J. Pub.L.* 437 (2023).

[17] *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 204 (2020) (finding for-cause removal restriction on CFPB director was unconstitutional); *Collins v. Yellen*, 594 U.S. 220, 250 (2021) (finding for-cause removal restriction on FHFA director was unconstitutional).

[18] *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. 477 (2010) (finding two layers of for-cause removal for members of the Public Company Accounting Oversight Board was unconstitutional); see also *United States v. Arthrex Inc.*, 594 U.S. 1, 18 (2021) (finding administrative law judges exercised independent authority that was inconsistent with their appointment as inferior officers); *Lucia v. SEC*, 585 U.S. 237, 241 (2018) (finding SEC administrative law judges were constitutional officers that required appointment consistent with Article II).

[19] Brett M. Kavanaugh, *Separation of Powers During the Forty-Fourth Presidency and Beyond*, 93 *Minn. L. Rev.* 1454, 1486 n.77 (2009) (citing Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 *Admin. L. Rev.* 1111, app. at 1236-94 (2000), for a list of independent agencies)).

[20] See Brett M. Kavanaugh, *Separation of Powers During the Forty-Fourth Presidency and Beyond*, 93 *Minn. L. Rev.* 1454, 1471-72 (2009) ("Although some legal scholars posit that

presidents really do exert some level of control over independent agencies through indirect mechanisms, those who have worked in a White House tend to agree that a President exercises far less practical control over independent agency heads than over the leaders of traditional executive agencies who are removable at will." (footnotes omitted)); Harold H. Bruff, *Specialized Courts in Administrative Law*, 43 Admin. L. Rev. 329, 350 (1991) ("Presidents rarely remove these [independent] commissioners ... [and] potent factors deter active presidential supervision and removal.").

[21] Brett M. Kavanaugh, *Separation of Powers During the Forty-Fourth Presidency and Beyond*, 93 Minn. L. Rev. 1454, 1474 (2009).