

Upcoming Supreme Court Decision Is Likely to Affect Agencies, HR

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A case the U.S. Supreme Court is hearing this term is likely to affect the president's removal powers for Federal Trade Commission (FTC) commissioners, U.S. Equal Employment Opportunity Commission (EEOC) commissioners, and National Labor Relations Board (NLRB) members. If the president's authority to remove members of independent agencies is expanded, as some court observers expect, policy changes affecting HR may become more frequent.

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FTC Case

The case before the court, *Trump v. Slaughter*, arose when President Donald Trump removed FTC Commissioner Rebecca Kelly Slaughter in March for policy disagreements and without cause as defined by the FTC Act, said Allison Hawkins, an attorney with Burr & Forman in Birmingham, Ala.

Slaughter sued over her allegedly unlawful removal, citing the act's language that commissioners cannot be removed except for the reasons specified by Congress: "inefficiency, neglect of duty, or malfeasance in office." She also cited the Supreme Court's precedent in *Humphrey's Executor v. United States* that the FTC operates as an independent agency, shielding it from the president's removal power.

The Supreme Court has directed the case's parties to address two questions, Hawkins explained: 1) whether Congress' removal protections for FTC commissioners conflict with the Constitution's allocation of powers over the government's branches "and, if so, whether *Humphrey's Executor* ... should be overruled"; and 2) even if government officials like Slaughter were improperly removed from office, whether federal courts have the power to order their reinstatement or retention.

"On a macro level, the court will address whether Congress may constitutionally limit the president's removal power," Hawkins said.

Prior Supreme Court Precedent

In *Humphrey's Executor*, a 1935 decision, the Supreme Court addressed a similar situation — the power of President Franklin Delano Roosevelt to remove FTC Commissioner William Humphrey for policy disagreements.

In that case, the court similarly addressed the constitutionality of the FTC Act's language limiting the president's removal power to removal for cause only.

"President Roosevelt argued that the act's language was unconstitutional and [that] the text, history, and structure of the Constitution [establish] that the executive power includes, and must include, the absolute and unqualified power to remove officials charged with executive power — any ruling to the contrary would infringe on the Constitution's inherent separation of powers," Hawkins said.

The court disagreed and upheld the act's language as constitutional, maintaining that FTC commissioners "occup[y] no place in the executive department ... and exercise no part of the executive power vested by the Constitution in the president."

The court distinguished the FTC as an independent agency that is neither political nor executive but rather quasi-judicial and quasi-legislative and thus distinct from those agencies that are purely executive and subject to the president's removal powers, Hawkins explained. "In assessing, the court concluded Congress could constitutionally restrict the president's removal authority for independent agencies."

However, in light of the Supreme Court's more recent decisions, it might overrule *Humphrey's Executor*. In a 2020 decision, *Seila Law v. CFPB*, Justice Clarence Thomas wrote a concurring opinion criticizing the concept of the "independent agencies." Congress cannot create agencies that straddle multiple branches of government, he said. "The Constitution sets out three branches of government and provides each with a different form of power — legislative, executive, and judicial," Thomas wrote.

Even if the court upholds the concept of independent agencies, it might determine that the FTC has not withstood the test of time.

Humphrey's Executor "was decided in 1935, and the FTC's functions have significantly evolved since that time," Hawkins said. "In reviewing the FTC's role today, the court could decide it does in fact exercise executive powers and no longer operates as an independent agency shielded from the president's removal power."

Earlier this year, the Supreme Court [stayed orders](#) from the U.S. District Court for the District of Columbia that had prevented Trump from removing Gwynne Wilcox from the NLRB and Cathy Harris from the Merit Systems Protection Board (MSPB). In doing so, the Supreme Court wrote, "the stay reflects our judgment that the government is likely to show that both the NLRB and MSPB exercise considerable executive power."

If the Supreme Court finds that the FTC is similar in nature to the NLRB, this statement could foreshadow how the court may rule in *Slaughter*, said James Plunkett, an attorney with Ogletree Deakins in Washington, D.C.

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Possible Impact of Upcoming Ruling

A decision in *Slaughter* could provide significant clues as to how the Supreme Court might ultimately decide cases involving the termination of members of the NLRB and commissioners of the EEOC, Plunkett said.

After Trump fired two Democratic members of the EEOC in January, one of them sued the administration.

Jocelyn Samuels argued in a court filing that her removal was unlawful and that the protections set by Congress are constitutional under *Humphrey's Executor*, said Stephen Scott, an attorney with Fisher Phillips in Portland, Ore. This case is still playing out in a district court in D.C.

Who is leading the agency plays a monumental role in steering the agency's focus, Hawkins said. For example, Chair Andrea Lucas, a commissioner since 2020 whose promotion to chair was announced Nov. 6, has articulated [new priorities for the agency](#) under the Trump administration, including fighting antisemitism and [national origin discrimination](#), when companies have an unlawful preference for hiring immigrant workers over U.S. citizens.

A broadening of presidential powers to remove independent agency officials in the *Slaughter* case would mean that HR needs to "more frequently update its policies and practices to align with the current commission's interpretation of the laws," Hawkins predicted.

Oral argument in *Slaughter* is scheduled for Dec. 8.