

3 Tips for Brands Following SCOTUS's *Trump v. Slaughter* Decision

July 1, 2026

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Following the Supreme Court's decision in *Trump v. Slaughter*, brands looking to avoid FTC scrutiny and ensure compliance with the FTC's priorities will have to be more nimble in their compliance programs and attentive to FTC messaging, because the makeup of the FTC may now shift more rapidly than ever before. The Supreme Court held that "the President may remove his subordinates at will" and overruled *Humphrey's Executor v. United States*, the 90-year-old Supreme Court decision that aimed to protect the independence of the Federal Trade Commission ("FTC") and other multi-member federal agencies. The 6-3 decision expands presidential authority over independent agencies and represents one of the Court's more consequential decisions concerning the constitutional authority of administrative agencies.

The case stems from President Donald Trump's removal of FTC Commissioner Rebecca Kelly Slaughter before the expiration of her term without "identify[ing] a cause under the" FTC's removal statute, which permits removal only "for inefficiency, neglect of duty, or malfeasance in office."¹ Slaughter challenged her removal, initially prevailed in federal district court arguing that she was removed "without cause" and was reinstated as a commissioner. The Supreme Court has now decisively overruled the *Humphrey's Executor* decision, which upheld the FTC's for-cause removal rule and shaped administrative agency jurisprudence for nearly a century, declaring "[i]f anything more is left of *Humphrey's*, we overrule it."

What's Next?

Trump v. Slaughter not only departs from 90 years of precedent, it also could result in a seismic shift of power from independent agencies to the president. The president has long been able to shape FTC policy by appointing the majority of its commissioners. However, the Supreme Court has now expanded the president's power, because the president can now fire commissioners appointed by the opposition party — and even by the president him or herself — whenever they disagree with the president's positions (or for any reason at all).

The decision has consequences well beyond the FTC, as it applies to many other administrative agencies. The Supreme Court has already begun to grapple with that reality, as it issued a concurrent decision in *Trump v. Cook*, rejecting the government's request for a stay of a District Court's decision enjoining the removal of Lisa Cook, a member of the Board of Governors of the Federal Reserve System, who was removed without being "afford[ed] . . . the procedural protections to which she was entitled by statute."

While it may take some time to understand the full scope of the consequences of *Trump v. Slaughter*, there are a few steps brands can take now to set themselves up for success and to avoid unwanted FTC scrutiny:

- **Focus on compliance.** Compliance with law, including FTC rules and guidance, is always the best approach. Compliance with *all* rules and guidance is even more important in a world where the FTC's priorities may be shifting rapidly. Companies that focus their compliance efforts only on areas where the FTC has already announced enforcement priority may be caught flat-footed when new commissioners are appointed and those priorities change.
- **Stay nimble.** Under *Humphrey's Executor*, with staggered terms and for-cause removal, brands could rely on agency statements regarding enforcement priorities to shape their own compliance focus. However, those efforts will become more difficult as the makeup of the Commission may change much more rapidly than ever before. Legal, marketing and product teams should all be aware that agency opinions, guidance, and focus may be a moving target.
- **Stay abreast of the FTC's priorities.** It will now be more important than ever to have up-to-date information regarding the FTC's current enforcement priorities. This intel should be gathered not just from warning letters and active enforcement matters, but also by listening intently to the FTC when commissioners speak at conferences and other forums.

Background and Humphrey's Executor

For nearly 90 years, *Humphrey's Executor* has served as the foundation for the constitutional independence of the FTC and numerous other federal agencies. The dispute arose under Section 1 of the FTC Act, which provides that FTC commissioners may be removed by the president only for "inefficiency, neglect of duty, or malfeasance in office." Nevertheless, President Franklin D. Roosevelt sought the removal of FTC Commissioner William Humphrey, who had been appointed by President Herbert Hoover, on the basis of policy disagreements. Humphrey refused to resign, and President Roosevelt removed him. After Humphrey's death, his estate sought unpaid salary on the theory that the removal violated the FTC Act.

In 1935, the Supreme Court unanimously held that Congress could constitutionally restrict the president's authority to remove FTC commissioners. The Court distinguished the FTC from purely executive agencies, concluding that it exercised "quasi-legislative" and "quasi-judicial" functions and was intended by Congress to operate with a degree of independence from direct presidential control. Accordingly, the president could not remove commissioners solely because of policy disagreements.

The Legacy of Humphrey's Executor

Humphrey's Executor became the principal constitutional authority supporting independent, bipartisan agencies whose members serve staggered terms and are protected from at-will removal. Agencies such as the FTC, Securities and Exchange Commission, Federal Communications Commission, National Labor Relations Board and others have operated under that framework for decades.

Although *Humphrey's Executor* recognized the FTC's independence from direct presidential control, it did not place the agency beyond congressional or judicial oversight. Throughout its history, both Congress and the courts have acted as important checks when the Commission was perceived to have exceeded its statutory authority. One of the most notable examples came during the FTC's controversial "KidVid" rulemaking in the late 1970s. After the Commission proposed sweeping restrictions on advertising directed to children, Congress responded by imposing significant procedural and substantive limitations on the agency's authority.

The judiciary has likewise limited aspects of the FTC's authority in recent years. In *AMG Capital Management, LLC v. FTC*, the Supreme Court unanimously rejected the FTC's longstanding interpretation of Section 13(b), holding that the statute does not authorize the Commission to obtain equitable monetary relief directly in federal court.² More recently, in *Axon Enterprise, Inc. v. FTC*, the Court held that certain constitutional challenges to FTC administrative proceedings may proceed directly in federal district court rather than waiting for the administrative process to conclude.³

The Supreme Court increasingly characterized *Humphrey's Executor* as a limited exception to the president's general constitutional authority to supervise executive officers. For example, in *Free Enterprise Fund v. PCAOB*, the Court invalidated dual layers of for-cause removal protection.⁴ Then, in *Seila Law LLC v. CFPB*, the Court held that Congress could not insulate a single director of the Consumer Financial Protection Bureau from at-will removal by the president.⁵ Most recently in *Collins v. Yellen*, the Court reached a similar conclusion with respect to the Federal Housing Finance Agency.⁶

Although none of those decisions overruled *Humphrey's Executor*, each narrowed its reach and emphasized the president's constitutional authority to supervise officials exercising executive power. At the same time, several members of the Court questioned whether the "quasi-legislative" and "quasi-judicial" distinctions underlying *Humphrey's Executor* remained meaningful in light of the modern administrative state.

Against that backdrop, *Trump v. Slaughter* presented the Court with the question it had repeatedly declined to answer directly: should *Humphrey's Executor* should remain the law?

The Supreme Court Overrules *Humphrey's Executor*

In the majority opinion, Chief Justice John Roberts explains that "[t]he Constitution vests '[t]he executive Power' in a 'President of the United States of America' and instructs that he 'take Care that the Laws be faithfully executed.'" Chief Justice Roberts reasons that "[t]o remain accountable to the President" appointed officers "must be removable by the President." The opinion grounds its analysis primarily in the Court's interpretation of historical documents and intent of the Constitution's drafters. The Court finds that, despite the fact that "[j]ust ten years earlier, the colonists had 'thrown off the Yoke' of King George III and his colonial governors," the framers nonetheless desired "unity in the Executive," to avoid what they perceived as "the States' feeble and divided" governors. Thus, the "the power to remove at will was a necessary corollary of the Constitution's design."

In *Trump v. Slaughter*, the Court holds that the Constitution intends to place "executive power" in a "single hand." The Court reasons that appointed officers, including FTC commissioners, are "to serve as envoys of the President, not his equals. Their very purpose, after all, was to assist him 'to discharge his arduous employment.'" Chief Justice Roberts continues, "[a]lthough it is up to the Senate to decide whether to confirm those with whom the President would *prefer* to work, neither Congress nor the courts may saddle him with those with whom he *cannot* work. Subordinates who exercise the President's power are subject to removal by him."

The Court derides *Humphrey's Executor* as "tethered to a[n] . . . almost fictional view of the FTC's role" and holds unequivocally: "What text, history, and structure settle, our precedent confirms—the President may remove his subordinates at will."

If you have any questions about this decision or its future impacts, please contact the authors of this alert or your Haynes Boone lawyer.

¹ 15 U. S. C. §41.

² *AMG Capital Management, LLC v. FTC*, 593 U.S. 67 (2021).

³ *Axon Enterprise, Inc. v. Federal Trade Commission*, 598 U.S. 175 (2023).

⁴ *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010).

⁵ *Seila Law LLC v. Consumer Financial Protection Bureau*, 591 U.S. 197 (2020).

⁶ *Collins v. Yellen*, 594 U.S. 220 (2021).