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Supreme Court Clarifies Limits on Presidential Removal Power

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Today, the Supreme Court handed down two widely anticipated decisions on the President's power to remove executive officers. In *Trump v. Slaughter*, the Court held that the for-cause removal protection for Commissioners of the Federal Trade Commission (“FTC”) is unconstitutional, and overruled what remained of *Humphrey's Executor v. United States* (1935). In *Trump v. Cook*, however, the Court determined that Congress can protect Governors of the Federal Reserve from removal. Both decisions were largely as expected, but both are still significant. *Slaughter* reinforces the President's authority over officials in the Executive branch (including administrative agencies), while *Cook* shows the importance of history and tradition in determining the scope of the Executive's power over particular agencies.

Background

Both cases concern the President's power to remove officers working for administrative agencies. At least since *Myers v. United States* was decided in 1926, the Court has emphasized the need for the President to supervise and remove executive officers without interference by Congress. In *Humphrey's Executor v. United States*, however, the Court upheld “for-cause” removal protections for FTC commissioners, reasoning that the agency performed only quasi-judicial and quasi-legislative functions. Since the Court decided *Humphrey's Executor* in 1935, Congress has created dozens of agencies whose members are protected from direct removal and control by the President. At the same time, the Court has increasingly questioned the soundness of that ruling.

In *Slaughter*, President Trump fired an FTC commissioner, asserting an absolute right to terminate executive officers. In *Cook*, the President terminated Lisa Cook—a member of the Board of Governors for the Federal Reserve System—purportedly “for cause,” citing allegations that she had made false statements on mortgage applications, but without giving her notice or opportunity to respond. Both officers sued, and both prevailed in the lower courts, although Cook had received only temporary injunctive relief when the Supreme Court agreed to hear the case.

Slaughter

In a 6-3 decision authored by Chief Justice Roberts, the Court held that the FTC's for-cause removal protections are unconstitutional. Relying extensively on history, the Chief Justice discussed how the First Congress endorsed the view that removal was constitutionally vested in the President and could not be withdrawn by Congress. Chief Justice Roberts pointed to numerous decisions of the Court that had validated that understanding of executive power.

Against that history, the Court concluded, stood *Humphrey's Executor*. Chief Justice Roberts rejected the earlier Court's description of "quasi-judicial" and "quasi-legislative" functions in *Humphrey's Executor*. The Court concluded that the FTC exercises power that is executive "through and through." Describing *Humphrey's Executor* as "a result in search of a rationale" the Court formally overruled the decision. And without *Humphrey's Executor*, the Court concluded, the for-cause removal protection for FTC commissioners could not stand.

Justice Sotomayor, joined by Justices Kagan and Jackson, dissented. In the dissent's view, the majority opinion upends centuries of political practice between all three branches of government and improperly overturns a ninety-year-old precedent.

Cook

Also authored by Chief Justice Roberts, the Court in *Cook* held 5-4 that the President cannot fire governors of the Federal Reserve without cause, including notice and opportunity to dispute the claimed cause. Notably, the government had conceded the constitutionality of the for-cause removal protection for Federal Reserve governors, seeking to have the case decided on statutory grounds. But the Court nevertheless reached the issue, stressing the importance of the Federal Reserve's independence in view of historical practice.

First addressing the statutory argument that "cause" is a low bar and is not judicially reviewable, the Court held that "cause" means a "substantial threshold [that] will depend, at least in part, on the seriousness of the alleged misconduct, and the extent of any nexus that may exist to the Governor's professional duties." And the

Court held that termination without cause must be judicially reviewable, because otherwise the limitation would have no practical significance.

The Court then determined that the Federal Reserve's for-cause protection is constitutional. It rested on the central bank's "distinct historical tradition" tracing to the First and Second Banks of the United States and the founding-era understanding that monetary policy should be insulated from political interference.

The Court emphasized that the President failed to give Cook adequate process before terminating her and so it did not need to resolve whether this case meets the standard of "cause." The court clarified that the President may try to terminate Cook again with the required process.

Justice Kavanaugh concurred to stress that the ruling does not decide whether Cook may ultimately be removed and that the Court was right to confirm the Federal Reserve's independence. Justice Jackson concurred to emphasize that the equities alone resolved the case.

Four Justices dissented across three separate dissents. Justice Thomas would have held the Federal Reserve's removal protection unconstitutional. Justice Alito, joined by Justice Gorsuch, dissented on procedural grounds, arguing the Court should have rejected the stay on the basis that the lower courts erred, rather than reaching to opine on other issues that the lower courts never decided. Justice Barrett dissented on the ground that she would not have reached the constitutional question at all.

The outcomes in both cases are consistent with what Court watchers had anticipated. *Slaughter* recognizes the general rule that the President has the authority to remove officials in the Executive branch (including agency commissioners and the like) without interference from Congress. *Cook* indicates that Federal Reserve governors may be protected from removal, based on the unique historical pedigree of the Federal Reserve. Together, the decisions signal an end to the era of so-called "independent agencies," while also preserving certainty and stability for one of the Nation's "most important financial institutions."

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