

D.C. Circuit Allows FTC Commissioner Slaughter to Be Reinstated, but the Supreme Court May Soon Decide Otherwise

A photograph of a modern building with a curved facade and large glass windows, reflecting the sky. The building is partially visible on the right side of the page.

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Yesterday, the D.C. Circuit issued the latest decision in the saga over President Trump's firing of the Democratic Federal Trade Commission (FTC) Commissioners. That decision sets the stage for a likely emergency application to the Supreme Court for a stay while the appeals process plays out. The Supreme Court's ruling on such an application may tip its hand on its views about whether the President can fire an FTC Commissioner without cause.

The saga here began in March, when President Trump removed the two Democratic FTC Commissioners — Rebecca Slaughter and Alvaro Bedoya — without cause. This removal teed up a legal challenge to the FTC Act's for-cause removal provision. That provision allows the President to remove an FTC Commissioner only for "inefficiency, neglect of duty, or malfeasance in office." 15 U.S.C. § 41. And it has withstood legal challenges for nearly a century, dating back to *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). There, the Supreme Court rejected the argument that Congress unlawfully constrained executive power by limiting the President's ability to remove FTC Commissioners.

The legality of the President's removal here thus turns on whether *Humphrey's Executor* is still good law. Although the Supreme Court has never overturned it, the Federal Government argued that the decision does not apply to the current FTC. Yet the district court rebuffed that argument and ordered that Commissioner Slaughter be reinstated.

And now so has the D.C. Circuit. That court initially entered a temporary, administrative stay pending its consideration of the Government's motion for a stay pending appeal, but it dissolved that stay in yesterday's 2-1 decision.

The majority (Judges Millett and Pillard) explained that the Government was unlikely to succeed on appeal because the merits of the Government's argument—that “the statute providing the Commissioners for-cause removal protection unconstitutionally infringes on the President's Article II power”—was already conclusively resolved in the negative in *Humphrey's Executor*. The majority rejected the Government's contention that the FTC's powers had expanded since *Humphrey's Executor* such that the decision no longer applied to the current Commission. The majority also rejected the notion that the Supreme Court's recent stays in other removal cases—involving the firing of members of the Consumer Product Safety Commission (CPSC), the Merit Systems Protection Board (MSPB), and the National Labor Relations Board (NLRB)—overruled *Humphrey's Executor*. As the majority observed, those other rulings “presented the never-before-decided question of whether *Humphrey's Executor* should be extended to the statutes providing for-cause removal protection to those officials.” But those rulings did not concern *Humphrey's Executor's* holding that the FTC Act's for-cause removal provision was constitutional. Finally, the majority concluded that the other equitable factors weighed against a stay because a stay would effectively require overruling of binding Supreme Court precedent, whereas the absence of a stay was unlikely to harm the Government because Commissioner Slaughter would not wield unilateral authority or have sufficient power to thwart the President's agenda.

Judge Rao dissented. In her view, the Government was likely to succeed on the merits of the appeal because, even if *Humphrey's Executor* remains good law (which she doubted), federal courts lack the power to reinstate Executive Branch officials. In other words, Judge Rao believed that the Government was likely to succeed in overturning the district court's injunction requiring Commissioner Slaughter to be reinstated. On the other side of the ledger, Judge Rao concluded that Commissioner Slaughter suffered no irreparable harm from removal, as necessary for injunctive relief, because Commissioner Slaughter had no private right to enjoy the power of an FTC Commissioner. To support her views about this balance of harms between the Government and Commissioner Slaughter, Judge Rao cited the Supreme Court's recent stays of other decisions granting reinstatement of terminated Executive Branch officials, which she said show that the harms from courts' overstepping their powers outweigh the benefits from reinstating a fired Executive Branch official.

As a next step, the Federal Government could petition the D.C. Circuit to reconsider the matter en banc (i.e., by all active judges), which is what the terminated MSPB and NLRB officials did earlier this year, in *Harris v. Bessent*. But that is not a necessary intermediate step before seeking Supreme Court review. And given that the en banc D.C. Circuit in *Harris* denied the Government's stay, the Government may not view such an effort as worthwhile.

Instead, the Government will likely follow the path it took in the case involving the CPSC terminations, *Boyle v. Trump*. After the Fourth Circuit panel denied the Government's stay motion, the Government went straight to the Supreme Court and successfully applied for a stay.

Accordingly, the denial of the stay of Commissioner Slaughter's reinstatement likely will end up on the Supreme Court's emergency docket—sometimes called the “shadow docket” because

the Court rules on emergency applications without the benefit of full merits briefing and argument, and often without a reasoned opinion. And there is a reasonable likelihood that the Court will grant the stay. At the very least, the Chief Justice (as the Circuit Justice for the D.C. Circuit) will very likely grant an “administrative stay,” which simply pauses the lower court’s decision while the full Court considers the stay application.

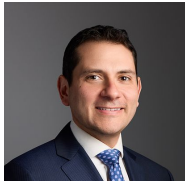
Besides granting or denying a stay pending appeal in the D.C. Circuit, the Supreme Court has a third option: granting certiorari before judgment. Under that approach, the Court would agree to hear the case before the D.C. Circuit decides the merits. The benefit of that approach would be that the Court could consider whether to overrule *Humphrey’s Executor* based on merits briefing and argument. Indeed, critics of the *Boyle* ruling accused the Court of silently overruling *Humphrey’s Executor* in an unreasoned opinion.

Whichever path the Court takes, the ramifications will be major. If *Humphrey’s Executor* stands, FTC Commissioners will retain their historical protections, serving in their roles unless they commit a fireable offense or resign. But if *Humphrey’s Executor* falls, then the concept of an “independent” Commission with mandatory bipartisan membership is likely no more.

We’ll be staying tuned for further developments.



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