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Quo Vadis—Federal Trade Commission?

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QUO VADIS- FEDERAL TRADE COMMISSION?

Chief Judge Susan G. Braden (Ret.)*

The Supreme Court's opinion this term in *Slaughter v. Trump*[1] may provide proponents of the "unitary executive"[2] with a much-anticipated opportunity to begin dismantling the Federal Trade Commission (FTC), long viewed as one of the most problematic and unwieldy of federal agencies. How did this happen?

At the turn of the 20th century, progressive thinkers and academics convinced Congress that creating independent administrative agencies run by so-called "experts" would provide the public with a superior form of government that could deal with the oil, steel, and railroad monopolies.[3] During the 20th century, however, the "administrative state" grew exponentially to regulate almost every aspect of the American economy and private life – a federal government that today the framers of the Constitution would not recognize.[4] One of the first of these agencies to be created by Congress in 1914 was the FTC. Over the years, however, it became the poster child for a federal agency out of control.

As retired Circuit Court Judge Richard A. Posner, lauded as one of the most-cited American legal scholars of the past century, observed in 1969:

> The Commission is rudderless; poorly managed, and poorly staffed; obsessed with trivia; politicized all in all, inefficient and incompetent.

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[1] *Trump* v. *Slaughter*, No. 25-5261 (U.S. argued December 8, 2025).

[2] *See* THE FEDERALIST, NO.70 (Alexander Hamilton); *see also* Christopher S. Yoo *et al*., *The Unitary Executive During the Third Half-Century, 1889–1945*, 80 NOTRE DAME L. REV. 1, 88 (2004); STEVEN CALABRESI AND CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH, Yale University Press (2008); Ilya Somin, *Reining in the Presidency Requires Limiting the Scope of Federal Power,* YALE J. ON REG. NOTICE & COMMENT (Nov.9, 2022), available at https://www.yalejreg.com/nc/symposium-shane-democracy-chief-executive-12.

[3] WALTER LIPPMAN, PUBLIC OPINION, 335 (1922 Harcourt, Brace, and Company) (describing the public as a "bewildered herd" that needed to be governed by "a specialized class whose interests reach beyond the locality" to cure the chief defect in democracy "the omnicompetent citizen."); *see also* David Foster and Joseph Warren, *From Classical to Progressive Liberalism: Ideological Development and the Origins of the Administrative State*, 86 J. POL. 720 (2024).

[4] JOANNA GRINSINGER, THE UNWIELDY AMERICAN STATE: ADMINISTRATIVE POLITICS SINCE THE NEW DEAL, Cambridge University Press (2012).

> And—the persistence of these criticisms would seem to indicate—largely impervious to criticism.[5]

The issue the Supreme Court will decide in *Slaughter* facially appears simple: whether the President has authority under Article II the Constitution[6] to remove a FTC Commissioner at will. To understand the significance of the Court's resolution of this issue, this article briefly will canvas relevant Court cases, consider how the Court may rule, and examine pending congressional legislation that may determine the future of the FTC as a stand-alone federal agency or whether it will be transferred and integrated into the Department of Justice ("DOJ"), untethered from the FTC's problematic past. As part of the DOJ, the FTC will be far better positioned to confront rapidly changing domestic and interconnected international markets requiring the enforcement credibility that only can be provided with the backing of the President, regardless of political affiliation.

I. THE JURISPRUDENTIAL JOURNEY TO *SLAUGHTER*

In 1839, in *Ex Parte Matter of Hennen*,[7] the Supreme Court was presented with a motion to show cause why a mandamus should not issue to restore Mr. Hennen to his position as Clerk of the District Court of the Eastern District of Louisiana. Since the tenure of the Clerk was not specified in either the Constitution or statute, the Court reasoned,

> it would seem to be a sound and necessary rule, to consider the power of removal as incident to the power of appointment.…These clerks fall under that class of inferior officers, the appointment of which the Constitution authorizes Congress to vest in the head of the department. The same rule, as to the power of removal, must be applied to offices where the appointment is vested in the President alone. The nature of the power and the control over the officer appointed does not at all depend on the source from which it emanates. The execution of the power depends upon the authority of the law, and not upon the agent who is to administer it.[8]

The mandamus was denied.[9]

In 1903, President Theodore Roosevelt requested the Department of Commerce to form a Bureau of Corporations to gather information, issue reports, and conduct investigations.[10] It had a

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[5] Richard A. Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47 (1969); *see also* Ernest Gellhorn, *The Wages of Zealotry: The FTC Under Siege*, American Enterprise Institute (Feb. 6, 1980).
[6] Art. II, § 2, cl. 1.
[7] 38 U.S. 230 (1839).
[8] *Id.* at 259-260.
[9] *Id*. at 262.
[10] *A Brief History of the Federal Trade Commission*, Federal Trade Commission 90th Anniversary Symposium 6 (Feb. 22-23, 2004), available at https://www.ftc.gov/sites/default/files/attachments/ftc-90-symposium/90thanniv_program.pdf.

dedicated staff and five presidential appointed Commissioners, including a Chairman.[11] The Bureau of Corporations, however, had no authority to enforce any laws. In 1914, however, Congress enacted the Federal Trade Commission Act to establish a five-member body authorized to issue cease and desist orders to stop "unfair methods of competition."[12] The term of each Commissioner was seven years, but no more than three Commissioners could be affiliated with the same political party. Within a month, Congress also enacted the Clayton Antitrust Act authorizing the FTC to block anticompetitive stock and asset acquisitions, vertical arrangements, and interlocking directorates, and certain types of price discrimination.[13] The Bureau of Corporations' sitting Commissioners and staff were reassigned to the FTC, which evolved into the FTC's first Bureau of Competition.[14]

During World War I, however, the FTC was not tasked with breaking up monopolies. Instead, President Wilson ironically directed the agency to set prices for government purchases.[15] The FTC also was used to convene make-work "trade practice conferences" initiated by private industry to consider proposed rules for the Commission.[16] Consequently, the FTC became a backwater where political has-beens were appointed Commissioners, including William E. Humphrey, who lost his bid for Senate in 1916 but was rewarded by President Calvin Coolidge for his loyalty to the Republican party with an appointment to the FTC in 1925.

In 1926, the Supreme Court decided *Myers* v. *United States.*[17] The issue before the Court was whether the President had the authority under the Constitution to remove executive officers appointed by him, albeit with the advice and consent of the Senate. The officer in question was a postmaster. Chief Justice William Howard Taft had previously served as President of the United States and knew a thing or two about what was necessary for the President to conduct his duties. The seventy page opinion that Chief Justice Taft authored recited a detailed history of the debates leading up to and during the First Federal Congress[18] and reviewed the jurisprudence concerning the parameters of the President's authority beginning with *Marbury* v. *Madison*.[19] The guiding principle of the Court's decision was the combined text in Article II, section1, clause 1 of the Constitution, which provides:

> The executive Power shall be vested in a President. . . and Article II, section 3, which states that:
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> [H]e shall take Care that the Laws be faithfully executed.[20]

Ergo, Chief Justice Taft concluded, as the President's "selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he cannot continue to be responsible."[21] One would assume such a landmark decision would be

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[11] *Id.*
[12] Pub. L. 63-203, 38 Stat. 717, 719-20 (1914).
[13] Pub. L. 63-212, 38 Stat. 730 (1914).
[14] *Supra* note 10.
[15] *Id.*
[16] *Id*.
[17] 272 U.S. 52 (1926).
[18] *Id.* at 110-139.
[19] *Id.* at 139 (citing 1 Cranch 137 (1803)).
[20] Art. II, § 2, cl. 1; § 3.
[21] 272 U.S. at 117 (citing Fisher Ames, 1 Annals of Congress 474 (1789).

the last word about the President's authority to hire and fire those selected to implement executive policy for all times. Not so, as we shall see.

The 1926-1927 term of the Supreme Court continued to be a busy one as it issued a trifecta of decisions limiting the effectiveness of the FTC as an antitrust enforcement agency. First, in *FTC* v. *Western Meat Co.,*[22] the Court held, if a stock acquisition were followed by an asset acquisition before the FTC could issue a complaint, divestiture was off the table as a remedy. Next, in *FTC* v. *Eastman Kodak Co*.,[23] the Court held the FTC Act did not authorize divestiture orders. And, in *Arrow-Hart & Hegeman Electric Co.* v. *FTC,*[24] the Court held the FTC lost jurisdiction to enforce Section 5 if it issued a complaint to block a stock acquisition that was followed by an asset acquisition. All three of these cases had something in common: they were decided while William E. Humphrey served as an FTC Commissioner (1925-1933).

When President Franklin D. Roosevelt assumed office in 1933, he correctly viewed Humphrey as an impediment to the President's "New Deal" agenda that would need to use aggressive federal intervention to end the widespread poverty caused by the Great Depression. Humphrey had a different view, not to mention a big mouth: he "vowed not to approve any Commission action that did not have as its goal to 'help business help itself.'"[25]

Confident in his authority to remove Humphrey after the Supreme Court's decision in *Myers*, but revealing his patrician pedigree, President Roosevelt wrote Humphrey a very polite letter asking him to step aside. Humphrey did not take the hint and decided he would serve out his second seven year term, having been reappointed to the FTC during the last days of the Hoover Administration. President Roosevelt thought otherwise and sent Humphrey a more direct missive asking for his resignation. Humphrey declined and promptly was fired. A few months later, Humphrey died. His estate filed a case in the Court of Claims for the entire amount of Humphrey's salary for his unfinished term. That court, however, dodged making a decision and instead certified two questions to the Supreme Court, set forth in *Humphrey's Executor* v. *United States*:[26]

> 1. Do the provisions of section 1 the Federal Trade Commission Act, stating that 'any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office', restrict or limit the power of the President to remove a commissioner except upon one or more of the causes named?
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> If the foregoing question is answered in the affirmative, then—
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> 2. If the power of the President to remove a commissioner is restricted or limited as shown by the foregoing interrogatory and the answer made thereto, is such a restriction or limitation valid under the Constitution of the United States?[27]

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[22] 272 U.S. 554 (1926).
[23] 274 U.S. 619 (1927).
[24] 291 U.S. 587 (1934).
[25] Daniel A. Crane, *Debunking Humprey's Executor*, 83 GEO. WASH. L.REV. 1835, 1841 (2015).
[26] 295 U.S. 602 (1935).
[27] *Id.* at 619.

In deciding the first question, the Court was persuaded that the phrases "continue in office"[28] and the "fixing of a definite term subject to removal for cause"[29] together expressed "legislative intent that the term is not to be curtailed in the absence of such cause."[30] In addition, the Court was of the belief the Commission was "nonpartisan; and it must, from the very nature of its duties, act with entire impartiality. It is charged with the enforcement of no policy except the policy of the law. Its duties are neither political nor executive, but predominantly *quasi* judicial and *quasi* legislative."[31] Significantly, at that time, the FTC had no independent authority to file suit in federal court; it could file an administrative case, but an order could only be enforced by a federal court of appeals.[32]

The second question presented in *Humphrey's Executor* was whether the removal provisions of the FTC Act unconstitutionally interfered with the President's executive authority, to which the *Myers* opinion required an affirmative answer. Uncharacteristically, the Court gave short shrift to the doctrine of *stare decisis.* Instead, it found "[t]he office of a postmaster is so essentially unlike the office now involved that the decision in the *Myers* Case cannot be accepted as controlling our decision here. A postmaster is an executive officer restricted to the performance of executive functions,"[33] a role sufficiently different from a FTC Commissioner who exercises "*quasi* judicial or *quasi* legislative powers, or as an agency of the legislative or judicial departments[.]"[34] Therefore, in a bizarre twist of logic, the Court concluded the separation of powers embodied in Article II actually prohibited the President from removing Humphrey from office since, in his capacity as a FTC Commissioner, he had been performing the functions of the other two federal branches.[35] And so, based on this reasoning, unelected bureaucrats were handed the keys to much of the federal government for the 20th century and well into the 21st.

In 1988, *Humphrey's Executor* was reprised in *Morrison* v. *Olson*,[36] where Chief Justice Rehnquist's opinion held that the independent counsel provisions of Title VI of the Ethics in Government Act of 1978 [37] did not violate the Constitution's separation of powers.[38] *Humphrey's Executor* was cited with approval for the proposition that Congress could establish a fixed term of service and prohibit removal, other than for "cause," because these conditions on presidential appointees did not impair the President's executive authority under Article II—at least for "quasi-legislative" and "quasi-judicial agencies."[39] Justice Scalia's memorable dissent in *Morrison*, however, extolled the "carefully researched and reasoned" opinion in *Meyers* upholding the

[28] *Id.* at 623
[29] *Id.*
[30] *Id*.
[31] *Id.* at 624.
[32] *Supra* note 25.
[33] 295 U.S. at 627.
[34] *Id.* at 628.
[35] *Id.* at 629-631.
[36] 487 U.S. 654 (1988).
[37] 28 U.S.C. §§ 591-599.
[38] 487 U.S., at 660.
[39] *Id*. at 687.

President's prerogative to remove "principal officers" while plunging his sharpened pen into the very heart of *Humphrey's Executor*, which he described as "six quick pages devoid of textual or historical precedent for the novel principle it set forth[.]"[40]

In 2010, the Supreme Court decided *Free Enter. Fund* v. *PCAOB.*[41] At issue was whether the provisions of the Sarbanes-Oxley Act of 2002,[42] prohibiting "for cause" removal of a Board member without notice, a hearing, and a vote of the Securities Exchange Commission (SEC), violated Article II. Chief Justice Robert's opinion for the Court held since neither the individual members of the Board nor the SEC were accountable to the President, the President was "stripped of the power our precedents have preserved, and his ability to execute the laws—by holding his subordinates accountable for their conduct—is impaired. That arrangement is contrary to Article II's vesting of the executive power in the President."[43] The continuing vitality of *Humphrey's Executor*, however, clearly was on Chief Justice Roberts's mind by his deft deferral of that task another day: "While we have sustained in certain cases limits on the President's removal power, the Act before us imposes a new type of restriction—two levels of protection from removal for those who nonetheless exercise significant executive power. Congress cannot limit the President's authority in his way."[44]

With the addition of Justices Gorsuch[45] in 2017 and Kavanaugh[46] in 2018, the time seemed ripe for the Court to repeal *Humphrey's Executor*. *Seila Law LLC* v. *CFBP* [47] appeared to present that opportunity. This case concerned whether Congress could shield the Director of the Consumer Financial Protection Bureau (CFPB) from removal by the President, except for "inefficiency, neglect, or malfeasance."[48] In the opening pages of Chief Justice Roberts's plurality opinion, however, he emphasized not once, but three times on the same page,[49] that *Humphrey's Executor* was still "precedent." The opinion explained that in the past the Court had allowed Congress to

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[40] *Id*. at 726 (Scalia, J. dissenting).
[41] 561 U.S. 477 (2010).
[42] 15 U.S.C. § 7201 *et seq*. and 18 U.S.C. § 1350 *et seq.*
[43] 561 U.S. at 496.
[44] *Id*. at 514.
[45] *See Gutierrez-Brizuela* v. *Lynch***,** 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) ("[T]he fact is… executive bureaucracies. . . swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design. Maybe the time has come to face the behemoth."); s*ee also* Associate Justice Neil Gorsuch, A REPUBLIC IF YOU CAN KEEP IT, 52-53, Crown Publishing Group (2019) ("It seems to me that the separation of legislative and judicial powers were distinct by nature and their separation was among the most import liberty-protecting devices of the constitutional design, an independent right of the people essential to the preservation of all other rights enumerated in the Bill of Rights."); *id* at 219 (" Respect for precedent may also create abiding injustice as the cost of ensuring consistency and predictability more systematically. In the words of Jerome Frank, courts may 'feel obligated to consecrate their former blunders.'").
[46] *See PHH Corp.* v. *CFPB*, 881 F.3d 75, 165 (D.C. Cir. 2018) (Kavanaugh, J., dissenting) ("Because of their massive power and the absence of Presidential supervision and direction, independent agencies pose a significant threat to individual liberty and to the constitutional system of separation of powers and checks and balances.").
[47] 591 U.S. 197 (2020).
[48] *Id*. at 203.
[49] *Id* at 204; *see also id.* at 209, 215-219, 228-229 (for the Court's additional discussion of *Humphrey's Executor)*.

"create expert agencies led by a *group* of principal officers removable by the President only for good cause"[50] and to "provide tenure protections to certain *inferior* officers with narrowly defined duties."[51] A caveat followed: "the contours of the *Humphrey's Executor* exception depend upon the characteristics of the agency before the Court,"[52] that is, applying only to "multimember expert agencies that do not wield substantial executive power"[53] or "inferior officers with limited duties and no policymaking or administrative authority."[54] However, in a footnote---perhaps added at the suggestion of Justices Thomas and Gorsuch---the Chief Justice appeared almost ready to reverse *Humphrey's Executor*, stating: "The Court's conclusion that the FTC did not exercise executive power has not withstood the test of time. As we observed in *Morrison* . . ., '[I]t is hard to dispute that the powers of the FTC at the time of *Humphrey's Executor* would at the present time be considered 'executive,' at least to some degree.'"[55] Although Chief Justice Roberts' attempt to limit the application of *Humphrey's Executor* to an "expert" agency led by a "*group* of principal officers,"[56] there is no requirement in the FTC Act that a Commissioner have any special background in antitrust or consumer protection law, [57] nor is any "expertise" relevant to whether the FTC Act's removal provision is constitutional. Likewise, the Commission's "group" composition cannot be said to have remote relevance to that dispositive issue. Therefore, neither of these factors should bar the Court from directly confronting whether the FTC Act's removal provision undermines the President's Article II authority and whether *Humphrey's Executor* remains worthy of continued precedential status.

Three years after *Seila Law,* the Supreme Court could have addressed the constitutionality of *Humphrey's Executor* in *Axon Enterprise, Inc.* v. *Federal Trade Commission*,[58] a merger case where the defendant challenged not only the FTC's structure under Article II, but also the procedures by which FTC's administrative law judge adjudications are conducted. The district court in that case declined to tackle these issues, instead ruling that Congress, in enacting the FTC Act, "implicitly preclude[d]" [district courts] of [28 U.S.C.§ 1331] jurisdiction[59] "through the enactment of an administrative review scheme."[60] The U.S. Court of Appeals for the Ninth Circuit affirmed.[61] The Supreme Court, in an unanimous opinion authored by Justice Kagan, held the FTC Act did not divest Article III judges of exclusive jurisdiction to adjudicate constitutional questions

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[50] *Id.* at 204 (citing *Humphrey's Executor*) (emphasis in original).
[51] *Id* (citing *Morrison*) (emphasis in original).
[52] *Id*. at 215.
[53] *Id.* at 218.
[54] *Id.*
[55] *Id* at 216 n.2 (quoting *Morrison*, 487 U.S. at 690, n.28).
[56] 581 U.S. at 204 (emphasis in original).
[57] William E. Kovacic, *The Quality of Appointments and the Capability of the Federal Trade Commission*, 49 ADMIN. L. REV. 915, 917 (1997).
[58] 598 U.S. 175 (2023). (This case was consolidated with *Securities and Exchange Commission* v. *Cochran,* No. 21239, raising the same constitutional issues regarding the structure of and administrative procedures at the SEC).
[59] 28 U.S.C. § 1331 provides federal district courts with original jurisdiction over all "federal questions."
[60] *Axon Enter., Inc.,* v. *FTC,* 452 F. Supp. 3d 882, 891 (D. Ariz. 2020).
[61] *Axon Enter., Inc.,* v. *FTC*, 986 F.3d 1173 (9th Cir. 2021).

and remanded the case.[62] In response, the FTC promptly dismissed a five-year crusade against Axon Enterprises to avoid having these constitutional issues adjudicated.

Two other recent cases warrant mention before we reach *Slaughter*. Without wading into the viability of *Humphrey's Executor,* the Supreme Court in *United States* v. *Arthrex, Inc*.,[63] considered whether Congress could constitutionally authorize the Secretary of Commerce to appoint Patent & Trademark Administrative Board judges who functioned as "principal officers" in conducting patent validity decisions. Chief Justice Robert's opinion for the Court held that this violated the Appointments Clause.[64] And, in *Collins* v. *Yellen,*[65] the Court held that Article II prohibited Congress from establishing the Federal Housing Agency with a single Director who could only be removed by the President "for cause."

The stage was now set for *Slaughter.*

II. ENTER *SLAUGHTER*

In May 2018, Rebecca Kelly Slaughter, a long-time policy advisor to Senator Schumer (D-NY), became a FTC Commissioner and briefly served as Acting Chair for almost four months at the beginning of the Biden Administration. On March 19, 2025, shortly after being sworn in for a second term, President Trump fired her by email, with no reason given.[66] Ms. Slaughter sued in the D.C. District Court, which promptly reinstated her.[67] Although the U.S. Court of Appeals for the D.C. Circuit temporarily stayed her reinstatement, the court changed course and on September 2, 2025, allowed the lower court decision to become effective.[68] The government wasted no time in going straight to the Supreme Court to lodge an application to stay the injunction and seek an administrative stay.[69] Eighteen days later, Chief Justice Roberts treated the Government's application as a petition for a *writ of certiorari* "before judgment" and granted it, while also framing the questions to be considered by the Court:

> (1) Whether the statutory removal protections for members of the Federal Trade Commission violates the separation of powers and, if so, whether *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935) should be overruled. (2) Whether a federal court may prevent a person's removal from public office, either through relief at equity or at law.[70]

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[62] 598 U.S. at 180.
[63] 594 U.S. 1 (2021).
[64] *Id.* at 23-27; *see also* Daniel A. Crane, *FTC Independence After Seila Law*, Ctr. for the Study of the Admin. State, Antonin Scalia School of Law, CSAS Working Paper 22-02 at 16 (2022).
[65] 594 U.S. 220 (2021).
[66] President Trump also fired FTC Commissioner Alvaro Bedoya on the same date, without providing a reason or hearing.
[67] *Slaughter* v. *Trump*, No. 25-cv-909 (July 24, 2025). Mr. Bedoya decided not to challenge his removal.
[68] *Slaughter* v. *Trump,* No. 25-5261 (Sept. 2, 2025).
[69] *Trump* v. *Slaughter,* No. 25A264 (Sept. 4, 2025).
[70] *Trump* v. *Slaughter*, 606 U.S.__ (Sept. 22, 2025).

The Court's answer to Question 1 will define the President's authority under Article II; the to answer to Question 2 will delineate the extent of Article III judicial power. The Court's decision, likely to be authored by Chief Justice Roberts, may be the most consequential since *Marbury* v. *Madison*.[71]

The *raison d'etre* for *Humphrey's Executor*'s feeble attempt to distinguish *Myers* was premised on the belief that the FTC did not perform executive functions, as its duties were "predominantly *quasi* judicial and *quasi* legislative."[72] The FTC, however, lost its "quasi-status" long ago.[73] Within two years of the Court's decision in *Humphrey's Executor,* Congress increased the FTC's enforcement portfolio with the first of many statutes bearing the names of their House and Senate authors. In 1936, the Robinson-Patman Act became law.[74] In 1938, Wheeler-Lea amendments were made to the FTC Act to prohibit "unfair or deceptive acts or practices" and authorizing the agency to seek pre-complaint injunctions, obtain cease-and-desist orders, and be awarded civil penalties.[75] The Wheeler-Lea amendments also empowered the FTC to issue substantive rules regulating false and misleading advertising in the food, drug, medical device, and cosmetics industries. In 1939, the Wool Products Labeling Act was enacted.[76]

Subsequent Congresses and Administrations, whether in the hands of the Democrats or Republicans, have shown their collective and continuing enthusiasm for providing the FTC with ever expanding antitrust and consumer protection authority. Today, the FTC has "enforcement or administrative responsibilities under more than eighty laws."[77]

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[71] 5 U.S. (1 Cranch) 137 (1803).
[72] 295 U.S. at 628.
[73] Crane, *supra* note 25.
[74] 15 U.S.C. § 13.
[75] 15 U.S.C. §§ 45(a), 5(a).
[76] 54 Stat. 1128 (1940) (codified as amended at 15 U.S.C. §68 (2012)).
[77] Federal Trade Commission Legal Library Statutes, available at https://www.ftc.gov/legal-library/browse/statutes (here listed in chronological order: the Webb-Pomerene Act, 15 U.S.C. §§ 61-68 (1918); the Packers and Stockyards Act, codified in 7 U.S.C. §§ 181-229, §227 (1921); the Lanham Trademark Act, codified in 15 U.S.C. § 1064 (1946); the Celler-Kefauver Act, codified in 15 U.S.C. § 18 (1950); the Defense Production Act of 1950, codified in 50 U.S.C. § 4558; the Fur Products Labeling Act, 15 U.S.C. §§ 69-69j (1951); the Textile Fiber Products Identification Act, codified in 15 U.S. C. §§ 70-70k (1958); the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331-1340; 21 U.S.C. § 387c (1965); the Fair Packaging and Labeling Act of 1966, 15 U.S.C. §§ 1451-1461; the Truth In Lending Act, 15 U.S.C. §§ 1601-1667f, as amended (1968) (includes the Consumer Credit Protection Act); the Fair Credit Reporting Act, 15 U.S.C. § 1681-1681x (1970) (since 2010, the FTC and CFPB share enforcement responsibilities, but private parties also may file cases in federal court); the Postal Reorganization Act of 1970, 39 U.S.C. § 3009; the Motor Vehicle Information and Cost Savings Act of 1972, 49 U.S.C. §§ 32908, 32912-32913, 32918, and 42 U.S.C. § 6363; the Hobby Protection Act, 15 U.S.C. §§ 2101-2106 (1973); the Fair Credit Billing Act, 15 U.S.C. § 1666-1666j (1974); the Equal Credit Opportunity Act, 15 U.S.C. §1691 *et. seq.* (1974) (initially, this law prohibited lending discrimination based on sex or marital status. In 1976, it was amended also to prohibit lending discrimination based on race, color, religion, national origin, age, receipt of public assistance income, or whether a person exercised certain other consumer protection laws. Today, the FTC, the DOJ's Civil Rights Division. The CFPB, the National Credit Union Administration, and the Federal Deposit Insurance Administration enforce different parts of this law.); the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, codified in U.S.C. §§ 2301-2312 (1970) (requiring the FTC to regulate standards for written warranties, limit disclaimers of implied warranties, and providing consumer remedies for breach of warranty or service contract obligations. This Act was amended by the Fair and Accurate Credit Transactions Act of 2003, 15 U.S.C. §§ 1681-1681x (2003) (allowing consumers to obtain a free credit report once every twelve months from one of three nationwide credit reporting companies which, together with the FTC, maintain a web site to access these

reports. Title X of 12 U.S.C. §§ 5481-5603, however, transferred most of the FTC's rulemaking authority and one study to the CFPC, but the FTC retained all of its enforcement authority under the FTC Act and rulemaking authority over unfair or deceptive practices concerning data.); the Petroleum Marketing Practices Act, codified in 15 U.S.C. §§ 2821-2824 (1974); the Energy Policy and Conservation Act, 42 U.S.C. §§ 6272-6273, 6294 (1975); the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a (requiring parties to notify the FTC and the Antitrust Division about certain upcoming mergers and acquisitions certain mergers, pay filing fees based-on-the-size of the transaction, undergo an investigation to determine whether the transactions have anticompetitive effects, and observe a waiting period before any transaction is finalized. Filing fees are split between the FTC and Antitrust Division and comprise a significant source of operating revenues as Congress increasingly requires fee revenue to offset congressional appropriations.); the Consumer Leasing Act of 1976, 15 U.S.C. §§ 1667-1667f; the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692p.(1978); the Electronic Fund Transfer Act of 1978, 15 U.S.C. §§ 1693-1693r; the Outer Continental Shelf Lands Act Amendments of 1978, codified in 43 U.S.C. §§ 1337, 1344; the Deep Seabed Hard Minerals Act, codified in 30 U.S.C. § 1413 (1980); the Comprehensive Smokeless Tobacco Health Education Act of 1986, 15 U.S.C. §§ 4401-4408; the 1988 Fair Credit and Charge Card Disclosure Act, codified in 15 U.S.C. § 1637 (1988); the Home Equity Loan Consumer Protection Act of 1988, codified in 15 U.S.C. §§ 1637,1647; and 1665b; the Dolphin Protection and Consumer Information Act of 1990, 16 U.S.C. § 1385; the Federal Deposit Insurance Corporation Improvement Act of 1991, codified in 12 U.S.C. § 1831t; the Energy Policy Act of 1992, codified in 15 U.S.C. §§ 2821-2824, 15 U.S.C. § 3203 note, 16 U.S.C. § 2621 note; 42 U.S.C. §§ 6201-6202; 42 U.S.C. § 6291 *et. seq*.; 42 U.S.C. § 13232; the Telephone Disclosure and Dispute Resolution Act of 1992, 15 U.S.C. §§ 5701-5724; National Cooperative Research and Production Act of 1993, 15 U.S.C. §§ 4301-4306; the Made in USA Provisions of the Violent Crime Control and Law Enforcement Act of 1994, codified in 15 U.S.C. § 45a; the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. § 6101 *et seq.*(1994); the Home Ownership and Equity Protection Act, codified in 15 U.S.C. §§1601-02, §§1639-41(1994); the International Antitrust Enforcement Assistance Act of 1994, 15 U.S.C. §§ 6201-6212); the Interstate Commerce Commission Termination Act of 1995, codified in 49 U.S.C. § 10706; the Children's Online Privacy Protection Act, 15 U.S.C. §§ 6501-6506 (1998); the Identity Theft Assumption and Deterrence Act of 1998, codified in 18 U.S.C. §1028 note; the Gramm-Leach-Biley Act, codified in 15 U.S.C. §§ 6801-6809, 6821-6827 (1999); the Muhammad Ali Boxing Reform Act of 2000, 15 U.S.C. §§ 5538; the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. §§ 6191-6108 (2000); the College Scholarship Fraud Prevention Act of 2000, codified in 20 U.S.C. § 1092d; the Crimes Against Charitable Americans Act of 2001,15 U.S.C. § 6102 and 6106; the Fair and Accurate Credit Transaction Act of 2003, 15 U.S.C. § 1681-1681x; the Do-Not-Call Implementation Act, 15 U.S.C. §§ 6151-6155 (2003); the Fairness to Contact Lens Consumer Act, 15 U.S.C. §§ 7601-7610 (2003); the Controlling the Assault of Non-Solicited Pornography and Marketing Act (CAN-SPAM Act), 15 U.S.C. §§ 7701-7713 (2003); the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, codified in 21 U.S.C. § 355(j) (Section 1102), 21 U.S.C. § 355 note (Sections 111-118); the Standards Development Organization Act of 2004, 15 U.S.C. §§ 4301-4306; the Magnuson-Stevens Fishery Conservation and Management Act, as amended by the Consolidated Appropriations Act of 2004, codified in 16 U.S.C. § 1862; the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, codified in 15 U.S.C. §§ 1637-1638, 1664, and 1665b; the Energy Policy Act of 2005, codified in 42 U.S.C. §§ 6294, 7545, 16471; the Military Lending Act, 10 U.S.C. § 998 (2006); the 2006 U.S. SAFE WEB Act, codified in 15 U.S.C. §§ 41 *et. seq*.; the Unlawful Internet Gambling Enforcement Act, 31 U.S.C. §§ 5361-5367 (2006); the Postal Accountability and Enhancement Act of 2006, codified in 39 U.S.C. § 409; the Pandemic and All-Hazards Preparedness Act of 2006, codified in 42 U.S.C. § 247d-6a note; the Sober Truth on Preventing Underage Drinking Act (STOP Act) of 2006, 42 U.S.C. § 290bb-25b; the Energy Independence and Security Act of 2007, codified in 42 U.S.C. § 17021 and §§ 17301-17305; the Mortgage-Related Provisions of Omnibus Appropriations Act of 2009, Title VI, Section 626, 12 U.S.C. § 5538; the Family Smoking Prevention and Tobacco Act of 2009, codified in 15 U.S.C. §§ 1331-1340; the Credit Card Accountability Responsibility and Disclosure Act of 2009 (Credit CARD Act), 15 U.S.C. §§ 1601-1667f, 1681 *et. seq*. and 1693 *et. seq*.; the Health Information Technology Provisions of American Recovery and Reinvestment Act of 2009, Title XIII, Subtitle D, codified in 42 U.S.C. § 17937 and § 17953; the Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5481note, 15 U.S.C. § 1602, and § 1631 *et. seq.* (2010) (transferring most of the FTC's rulemaking and enforcement authority over consumer finance and one study to the CFPB, but the FTC retained enforcement authority over the FTC Act and rulemaking involving non-bank financial services.); the Restore Online Shoppers' Confidence Act of 2010, 15 U.S.C. §§ 8401-8405; the Consumer Review Fairness Act,15 U.S.C. § 45(b) (2016); the Elder Abuse Prevention and Prosecution Act, 34 U.S.C. § 21711 *et seq.* (2017); the Better Online Ticket Sales Act, 15 U.S.C. § 45c (2014); the Opioid Addiction Recovery Fraud Prevention Act of 2018, codified in 15 U.S.C. § 45d;

As the litany of post-*Humphrey's Executor* laws evidence, the FTC has functioned for many decades as an executive enforcement agency. A myriad of other reasons supporting the jettison of *Humphrey's Executor* were articulated in Justice Thomas's concurring and dissenting-in-part opinion in *Seila Law,*[78] in which Justice Gorsuch joined. Not surprisingly, the centerpiece of their argument begins with a recitation of Article II,[79] buttressed by the Court's decisions in *Myer*s,[80] *Morrison*,[81] and *Free Enterprise Fund*.[82] Therefore, it would not be surprising if the Court's *Slaughter* decision holds that Congress cannot impose any restrictions on a President's ability to fire an executive appointee without violating Article II.

If so, however, the Court would likely just sever the Commissioner-removal provisions in the FTC Act and let the chips fall where they may.[83] To date, the Court certainly has not evidenced an appetite for bold remedial action.[84] For example, in *Seila Law*, Chief Justice Roberts posited: "If the Director [of the CFPB] were removable at will by the President, the constitutional violation would disappear. We must therefore decide whether the removal provision can be severed[.]"[85] The simplicity of severing the offending part of the Dodd-Frank Act[86] was appealing to the majority in that case, as it avoided the Court's deciding petitioner's request to quash the pending civil investigative demand and dismiss the CFPB's case.[87] Justice

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the Economic Growth, Regulatory Relief, and Consumer Protection Act, codified in 15 U.S.C. § 1650, § 1681c, and 12 U.S.C. § 5365 note (2018); the Patient Right to Know Drug Prices Act, codified in 21 U.S.C. § 355 note (2018); the FAA Reauthorization Act, of 2018, codified in 49 U.S.C. § 44801 note; the Horseracing Integrity and Safety Act of 2020, 15 U.S.C. §§ 3051-3060; the Patient Protection and Affordable Care Act, Sections 3012 and 4001, codified in 42 U.S.C. § 280j note and 42 U.S.C. § 300u-10 (2010); the COVID-19 Consumer Protection Act of the 2021 Consolidated Appropriations Act, Public Law 116-260,117th Cong. (2021-2022); No Surprises Act of the 2021 Consolidated Appropriations, 26 U.S.C. § 9816; the Fraud and Scam Reduction Act, 15 U.S.C. § 45e (2022); the Integrity, Notification, and Fairness in Online Retail Marketplaces for Consumers Act (Inform Consumers Act) 15 U.S.C. § 45f (2023); the Protecting Americans' Data From Foreign Adversaries Act of 2024, 15 U.S.C. Chapter 123 (§ 9901); the Credit Repair Organization Act, 15 U.S.C. §§ 1679-1679j (2025); the Sports Agent Responsibility and Trust Act, 15 U.S.C. §§ 7801-7807 (2025); the Tools To Address Known Exploration By Immobilizing Technological Deepfakes On Websites and Networks Act (Take It Down Act), 47 U.S.C. § 223 (2025).

[78] *Selia Law*, 591 U.S. at 238-261 (Thomas, J., concurring in part and dissenting in part).

[79] *Id.* at 239, 241-243.

[80] *Id*. at 246.

[81] *Id.* at 248-249.

[82] *Id.* at 249-250.

[83] Transcript of Oral Argument, *Trump* v. *Slaughter*, No. 25-332 (Dec. 8, 2025), at 51 (Justice Kavanaugh: "[O]verruling or narrowing *Humphrey's Executor* would not threaten the existence of these agencies but only would alter how the heads of those agencies can be removed, correct?" General Sauer: "Correct. They'd be. . .politically accountable to the President." Justice Kavanaugh: "The way we've done it is to sever the removal restriction, not to destroy the agency, correct? ""General Sauer:" That's exactly right."); *see also id.* at 51.

[84] As Justice Thomas observed in his concurring opinion in *Murphy* v. *National Collegiate Athletic Assn*.: "Early American courts did not have a severability doctrine. If a statute was unconstitutional, the court would just decline to enforce the statute[.]" 584 U.S. 453, 488 (2018).

[85] *Seila Law,* 591 U.S. at 234.

[86] 12 U.S.C. §§ 5481-5603 (2010).

[87] *Seila Law,* 591 U.S. at 234 (quoting Free Enterprise Fund, 561 U.S. 508 ("Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem, severing any problematic portions while leaving the remainder intact.")).

Thomas thought otherwise, criticizing the Court's opting to sever the offending part of the statute "[i]nstead of determining the meaning of a statute's text."[88]

There is a wild card that may yet be played in *Slaughter*. No text in Article II specifically addresses the President's authority to remove a federal officer, whether at will or otherwise. Therefore, proponents of the President's removal authority contend it is "incident" to the Appointments Clause,[89] as *Ex Parte Matter of Hennen* held, [90] coupled with *Myers*' reliance on the Article II phrase requiring the President to "take Care that the Laws be faithfully executed."[91] In *Morrison,* however, Chief Justice Rehnquist removed the some of "gold plating" off *Myers* before explaining how the "Take Care" mandate should be analyzed:

> *[O]ur present considered* view is that the determination of whether the Constitution allows Congress to impose a 'good cause'-type restriction on the President's power to remove an official cannot be made to turn on whether or not the official is classified as 'purely executive.' The analysis contained in our removal cases is designed not to define rigid categories of those officials who may or may not be removed at will by the President, but to ensure that Congress does not interfere with the President's exercise of the 'executive power' and his constitutionally appointed duty to 'take care that the laws be faithfully executed' under Article II. *Myers* was undoubtably correct in its holding, and in its broader suggestion that there are some 'purely executive' officials who must be removable by the President at will if he is to be able to accomplish his constitutional role. But as the Court noted in *Wiener* [v. *United States*]: [92] 'The assumption was short-lived that the *Myers* case recognized the President's inherent constitutional power to remove officials no matter what the relation of the executive to the discharge of their duties and no matter what restrictions Congress may have imposed regarding the nature of their tenure.'
>
> At the other end of the spectrum from *Myers*, the characterization of the agencies in *Humphrey's Executor* and *Wiener* as 'quasi-legislative' or 'quasi-judicial' in large part reflected our judgment that it was not essential to the President's proper

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[88] *Id*. at 253 (Thomas, J., concurring in part and dissenting in part).
[89] Art. II, § 2, cl. 2.
[90] 38 U.S. at 229; *but see* Transcript of Oral Argument, *Trump* v. *Slaughter*, No. 25-332 (Dec. 8, 2025), at 29 (Justice Jackson: "You're asking us to infer this based on the Constitution's structure, and I don't know why we'd make that inference when the power to create agencies and set everything up lies with Congress.").
[91] Art. II, §3; *see also Meyers*, 272 U.S. at 163-164 ("[A]rticle [II] grants to the President the executive power of the Government, *i.e*., the general administrative control of those executing the laws, including the power of appointment and removal of executive officers—a conclusion confirmed by his obligation to take care that the laws be faithfully executed . . . ."); *see also* Transcript of Oral Argument, *Trump* v. *Slaughter*, No. 25-332 (Dec. 8, 2025), at 31 (Solicitor General: "[T]he Constitution confers the executive power. . . the power to remove is an aspect of the executive power. Further, the text of the Constitution includes the Take Care Clause. . . reinforc[ing] that conclusion.").
[92] 357 U.S. 349, 356 (1958) (rejecting the President's attempt to remove a member of the War Claims Commission "merely because he wanted his own appointees on [the] Commission…no such power is given to the President directly by the Constitution, and none is impliedly conferred upon him by statute[.]").

> execution of his Article II powers that these agencies be headed up by individuals who were removable at will. We do not mean to suggest that an analysis of the functions served by the officials at issue is irrelevant. *But the real question is whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty, and the functions of the officials in question must be analyzed in that light.* [93]

In other words, the legal inquiry per *Morrison* would require the *Slaughter* Court to determine whether the statutory restrictions for removing a FTC Commissioner "for inefficiency, neglect of duty, or malfeasance in office," would "impede" the President from his ability to enforce the FTC Act. Of course, the answer to this question has due process implications which were front and center of the oral argument of another removal case this term: *Trump* v. *Lisa D. Cook* questioning whether the President can remove a member of the Federal Reserve, based on his view of "cause." [94]

Whether the Court decides to require the inquiry in *Morrison* on remand will depend on Chief Justice Roberts, a former Rehnquist law clerk, traditionalist, and incrementalist to his core. To be sure, he would garner the support of Justices Sotomayor, Kagan, and Jackson, who expressed nothing short of alarm at oral argument in *Slaughter* about the prospects of the Court holding that the FTC Act's removal provision unconstitutional. Whether Justice Barrett would find this approach palatable, is unknown, but she expressed concern during the *Slaughter* oral argument about which part or parts of the Constitution the Court should look to find authority for the President firing a FTC Commissioner without cause.[95] Since neither Ms. Slaughter nor Ms. Cook received a merits hearing prior to their removal from office, it is not unlikely that both of their cases would be resolved on that basis alone- and, on the same day.

The second question presented in *Slaughter* -- whether to overrule *Humphrey's Executor* -- presents the court with a different conundrum. Historically, the Court has hesitated to overrule

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[93] *Morrison,* 487 U.S. at 689-691 (quoting *Wiener*, 357 U.S. at 352 (internal citations omitted) (emphasis added).

[94] Transcript of Oral Argument, *Trump* v. *Lisa D. Coo*k, No. 25A312 (Jan, 21, 2026), at 25 (Justice Jackson: "Was Ms. Cook given an opportunity in some sort of formal proceeding[?]"); at 38 (Justice Sotomayor quoting *Reagan* v. *United States*, 182 U.S.410, 425 (1901) :"'[W]here causes of removal are specified by statute, as also where the term of office is for a fixed period, notice and hearing are essential.'"); at 54 (Justice Kavanaugh: "And what's the fear of more process here? In the sense of helping you [the Government] make a better, more accurate decisions, and it helps—process helps you then convince people on the outside that you've made a considered, thorough. appropriate decision, what's the concern about more process?"); at 121(Justice Kavanaugh: " [T]he simplest way—and this is Justice Kagan was asking—to decide this case. . .say there was insufficient process[.]" at 55 (Justice Barrett: "[W]hy are you [the Government] so afraid of a hearing or what would be wrong about with the process[?]"; at 106 (Chief Justice Roberts: "So it may not be an error to go through the process[?]").

[95] Transcript of Oral Argument, *Trump* v. *Slaughter*, No. 25-332 (Dec. 8, 2025), at 59-60 (Justice Barrett: "[I]s there any reason that we have to [cite the specific provisions in the Constitution]? Because it seems to me that there are very hard questions, Justice Kagan in particular was pushing you on them, about what the limits of your logic would be. And it seems to me that, and there's some dispute among this in the amicus briefs and the scholarship about which portion of Article II or if it's in the Appointments Clause, would be the source of this authority. And is there any reason we have to decide that here given that it might be relevant to some of the harder questions about limiting principles?").

long-standing precedent.[96] Some academics and commentators also believe that the disruption of overruling *Humphrey's Executor* would have on other multimember independent commissions will weigh heavily on the Court.[97] Certainly, the fate of at least the removal provisions in the authorizing legislation of the National Labor Relations Board,[98] the Merit Systems Protection Board,[99] the Copyright Office,[100] and the Federal Reserve Bank[101] were on the minds of several Justices during the oral argument in *Slaughter*.[102]

Justice Sotomayor, however, gave voice to a more universal concern, also expressed by Justices Kagan and Jackson, in her confrontation with the Solicitor General:

> You're asking us to destroy the structure of government and to take away from Congress its ability to protect its idea that . . . – the government is better structured with some agencies that are independent. . . .[103]

> Congress emphasized the importance of independency and the prestige that that independence would give to the decisions of agencies who are going to

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[96] *Id.* at 64 (Justice Barrett: "Let me ask you a question about *stare decisis*. How should we think about reliance interests when it comes to reliance interests in government structure?"); *id*. at 89 (Justice Barrett: ("[T]his is going to have longer-term implications."). It is also possible that Chief Justice Roberts does not believe there is really any need for the Court to overrule *Humphrey's Executor. See* Transcript of Oral Argument, *Trump* v. *Slaughter*, No. 25-332 (Dec. 8, 2025), at 109 (Chief Justice Roberts: "[O]ne thing *Seila Law* made pretty clear, I think, is that *Humphrey's Executor* is just a dried husk of whatever people used to think it was because in the opinion itself, it described the powers of the agency it was talking about, and they're vanishing insignificant, have nothing to do with what the FTC looks like today.").

[97] *See, e.g.,* Adam J. White, *Is Humphrey's Executor Headed For Slaughter?,* American Enterprise Institute (Oct. 2, 2025), available at https://www.aei.org.; Thomas A. Berry, Brent Skorup, and Alexander Xenos, *Trump* v. *Slaughte*r, Cato Institute (Oct. 17, 2025), available at https://www.cato.org.; Nick Bennar, *Slaughter'-ing Humphrey's Executor*, LAWFARE (Oct.15, 2025), available at https://www.lawfaremedia.org; *see also* Transcript of Oral Argument, *Trump* v. *Slaughter*, No. 25-332 (Dec. 8, 2025), at 94 (Justice Kavanaugh: "[I]t's very hard to get into the weeds of the particular powers exercised by the FTC and distinguish it from some of the powers exercised by some of the other cabinet agencies that we traditionally think of as executive or the FCC or the SEC. All of those seem to -- the FERC, NLRB -- when you get into them all.").

[98] Transcript of Oral Argument, *Trump* v. *Slaughter*, No. 25-332 (Dec. 8, 2025), at 22 (Justice Kagan: [Y]ou are here saying the NLRB goes down, the MSPB goes down, notwithstanding that they do all their work or almost all their work in judicial-type proceedings." General Sauer: I wouldn't say goes down. I would say they are restored to democratic accountability.").

[99] *Id.*

[100] Transcript of Oral Argument, *Trump* v. *Slaughter*, No. 25-332 (Dec. 8, 2025), at 6 (Chief Justice Roberts: "[W]here do you deal . . . with the Library of Congress, which is half of it's a library, half of its things like the copyright.")

[101] Transcript of Oral Argument, *Trump* v. *Slaughter*, No. 25-332 (Dec. 8, 2025*),* at 17 (Justice Kavanaugh: "The other side says that your position would undermine the independence of the Federal Reserve and . . . I share those concerns."); *see also id.* at 48, 151.

[102] Transcript of Oral Argument, *Trump* v. *Slaughter*, No. 25-332 (Dec. 8, 2025), at 94 (Justice Kavanaugh: "[I]t's very hard to get into the weeds of the particular powers exercised by the FTC and distinguish it from some of the powers exercised by some of the other cabinet agencies that we traditionally think of as executive or the FCC or the SEC. All of those seem to ---the FERC, NLRB - -when you get into them all."); Transcript of Oral Argument, *Trump* v. *Slaughter*, No. 25-332 (Dec. 8, 2025), at 72 (Solicitor General confirming there were about two dozen other agencies that have similar removal provisions as the FTC: "[W]e have challenged four of them in this Court, and we're challenging a handful of others in other courts as well.").

[103] Transcript of Oral Argument, *Trump* v. *Slaughter*, No. 25-332 (Dec. 8, 2025), at 11 (Justice Sotomayor).

> subject the public to rules and regulations, of which there might be burdens, and that independence is being taken out or undercut completely.
>
> Why are you so sure that Congress would have preferred to have the independence narrowed than not to have the agency at all.[104]

The Solicitor General responded:

> The prestige of independency is not a constitutional value. The constitutional value is the separation of powers and the vesting of all the executive power in the President.[105]

Justice Thomas, however, would lay *Humphrey's Executor* to rest, not solely out of a concern for the President's removal authority, but because it is "a direct threat to our constitutional structure and, as a result, the liberty of the American people."[106]

Whatever the ultimate outcome in *Slaughter*, the stage has been set for Congress to begin hearings and enact legislation to ensure the FTC's enforcement of the antitrust and consumer protection laws can continue without the cloud of future constitutional challenges.

III. THE OPPORTUNITY *SLAUGHTER* PRESENTS CONGRESS

The FTC has two enforcement components: the Bureau of Competition and the Bureau of Consumer Protection. The FTC recently informed Congress that the "mission" of the Bureau of Competition is "prevent[ing] anticompetitive mergers and other anticompetitive business practices in the marketplace. By enforcing the antitrust laws, the Bureau promotes competition[.]"[107] The "mission" of the Antitrust Division also "is to promote economic competition through enforcing and providing guidance on antitrust laws and principles."[108] Clearly there is robust and duplicative competition between the two federal government entities devoted to enforcing the antitrust laws.

In 1981, President Reagan's Director of the Office of Management and Budget, David Stockman, proposed eliminating funding for the FTC's Bureau of Competition, describing it as a "passel of ideologues who are hostile to the business system, to the free enterprise system, and who sit down there and invent theories that justify more meddling and interference in the economy."[109] Stockman's efforts, however, came to naught in no small part because it did not

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[104] *Id.* at 36; *see also* Transcript of Oral Argument, *Trump* v. *Slaughter*, No. 25-332 (Dec. 8, 2025), 69-71 (Justice Jackson expressing concern about agency independence).
[105] Transcript of Oral Argument, *Trump* v. *Slaughter*, No. 25-332 (Dec. 8, 2025), at 37 (Solicitor General).
[106] *Selia Law*, 591 U.S. at 239 (Thomas, J., concurring in part and dissenting in part).
[107] Federal Trade Commission, *Congressional Budget Justification, Fiscal Year 2026*, at 67.
[108] *Antitrust Division About the Division*, available at https://www.justice.gov.
[109] CHICAGO TRIB., Feb. 23, 1981, at A-1; *see also* Ernest Gellhorn, *TWO'S A CROWD: The FTC's Redundant Powers*, American Enterprise Institute (Dec. 7, 1981); Editorial Board, *No More FTC?* WASHINGTON POST, Feb. 25, 1981 ("[T]here is a respectable case to be made for getting the FTC out of the antitrust business. . . Congress should take a very hard look.").

emanate from Jamie L. Whitten (D-Miss.), Chairman of the House Appropriations Committee and his Subcommittee Chairs or "Cardinals," known for their almost absolute control of all federal spending at that time.[110]

During the following four decades, the FTC's penchant for initiating lawsuits based on its undefined "unfair competition" statute has vacillated between so-called "traditional" antitrust enforcement and a advancing competition agenda untethered to settled law, as most recently advanced by the last FTC Chair, Lina Kahn,[111] who a House Committee staff report asserted:

> abused her authority at the agency, trampling on the due process rights of regulated parties, upending the rule of law, and violating ethics standards she is bound to uphold. The Committee has found that Chair Khan has consistently betrayed the obligation of the Commission to be an independent, bipartisan agency.[112]

Shortly after the 2020 election, Senator Mike Lee (R-Utah) penned a commentary in the *Wall Street Journal* to state the case for a structural change to rationalize antitrust enforcement:

> Enforcement of U.S. antitrust laws has been divided for more than a century between the Justice Department and the Federal Trade Commission. We've had more than enough time to see that this arrangement doesn't work. . .
>
> No one would intentionally design the system we have today. Even Justice and the FTC, when helping other nations set up their own competition authorities, don't advocate separate enforcers. Effective and efficient antitrust enforcement is essential to maintaining free markets and protecting consumers. But the status quo of divided law enforcement undermines these objectives.[113]

On March 9, 2021, Senator Lee introduced the One Agency Act[114] to consolidate all antitrust authority in the DOJ but leaving the FTC's consumer protection statutory authority and functions intact. In the accompanying press release, Senator Lee stated:

> For too long, our two-headed antitrust enforcement system has suffered from bureaucratic in-fighting, delays, redundancies, and inconsistency.

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[110] Jeffrey Frisby, *Cardinals in Congress*, National News (June 24, 2004), available at https://eangus.org.

[111] Jeffrey A. Sonnenfeld and Sten Tian, *Competition Cop Lina Khan's Antitrust Overreach Is Hurting U.S. Competitiveness--- and Destroying Billions Of Dollars In Value*, Fortune (Dec. 9, 2023) ("[T]he increasingly brazen and counterproductive antitrust anti-merger overreach lead by the FTC Chair Lina Kahn… is plainly dismal."), available at https://fortune.com/2023/12/07/lina-khan-antitrust-overreach-ihurting-us-competitiveness-destroying-billions-value-sonnenfeld-tian/.

[112] H. Comm. On Oversight & Accountability, 118 Cong., *The Federal Trade Commission Under Chair Lina Kkhan: Undue Biden-Harris White House Influence and Sweeping Destruction of Agency Norms* (Majority Staff Report Oct. 31, 2024), at 4.

[113] Mike Lee, *One Agency for Antitrust*, WALL ST. J. (Nov. 17, 2020).
Press Release, *Sen. Lee Reintroduces One Agency Act to Streamline and Improve Antitrust Enforcement*, (March 9, 2021), available at https://www.lee.senate.gov.

[114] S. 633, 117th Cong. (2021-2022). Senator Lee previously introduced a similar bill. *See* S. 4918 (116th Cong.) (2019-2020).

> Competition is too important to tolerate these problems any longer. . . it's time to right the ship by consolidating and strengthening our antitrust enforcement at the Justice Department. The Department is more politically accountable, and its structure is better suited to the decisive enforcement we need to better protect American consumers.[115]

Senator Thom Tillis (R-N.C.) agreed to be a co-sponsor, adding:

> I'm a strong proponent of antitrust enforcement, especially in the case of intellectual property protections….But our current antitrust enforcement system split between the Department of Justice and the Federal Trade Commission- simply isn't working anymore. It hasn't been for years. For too long, unelected and unaccountable bureaucrats at the FTC have pursued overly partisan enforcement actions which are entirely disconnected from economic reality. It's past time that antitrust enforcement be handled solely by a politically accountable entity. I am proud to work with my colleagues on this long-overdue bill to ensure proper enforcement of antitrust laws through an improved, more streamlined process.[116]

On April 12, 2021, Senator Josh Hawley (R-Mo.) introduced the Trust-Busting for the Twenty-First Century Act[117] to "crack down" on mergers and acquisitions by "mega-corporations."[118] This bill would require the FTC to designate certain companies as "dominant digital firms" and any merger or acquisition by one of these firms that exceeded $1 million would be considered to be "an unfair or deceptive act or practice," *per se* unlawful, and subject to civil penalties.[119] In addition, "dominant digital firms" would be prohibited from giving preference to affiliated search entities without providing the FTC with notice to facilitate an investigation.[120] The Clayton Act[121] also would be amended to prohibit mergers and acquisitions between companies having a $100 billion market capitalization if the effect "may be to lessen competition[.]"[122] Further, vertical mergers would no longer be presumed to be competitively benign.[123] And the government's burden of proof to establish Clayton Act violations would be lowered from a "reasonable probability" standard to a mere "preponderance of evidence."[124] The traditional element of proof requiring a plaintiff to establish concentration within a defined

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[115] Press Release, *Sen. Lee Reintroduces One Agency Act to Streamline and Improve Antitrust Enforcement*, (March 9, 2021), available at https://www.lee.senate.gov.
[116] *Id.*
[117] S. 1074, 117th Cong. (2021-2022).
[118] Press Release, *Senator Hawley Introduces the "Trust-Busting for the Twenty-First Century Act": A Plan to Bust Up Anti-Competitive Big Businesses* (Apr. 21, 2021), available at https://www.hawley.senate.gov.
[119] *Supra* note 117.
[120] *Id.*
[121] 15 U.S.C. §§ 12-27, as amended.
[122] *Supra* note 117.
[123] *Id.*
[124] *Id.*

geographic market also would be jettisoned to eliminate the need for economic and industry experts thereby streamlining litigation.[125]

Senator Hawley's ambitious bill also would amend the Sherman Act[126] to change the competitive harm analysis from a consumer welfare standard to a "protection of economic competition within the United States" one.[127] In addition, the plaintiff would no longer be required to define a relevant market or prove market power, but instead only required to show that the defendant has "substantial market power" or its business practices had "anticompetitive or otherwise detrimental effects."[128] The burden of proof also would shift so that the defendant would be required to show any procompetitive effects asserted outweighed anticompetitive effects and otherwise could not be achieved by commercially reasonable alternatives.[129]

And Senator Hawley was just warming up. On April 19, 2021, he introduced the Bust Up Big Tech Act[130] defining the "Structural Separation Requirements for Technology Platforms" to prevent mergers and acquisitions of so-called "Big Tech" companies and require their breakup one year after enactment.[131] In addition to enlarging the FTC's competition staff to monitor compliance, S. 1204 empowered state attorneys general and private citizens to file private civil actions.[132]

On April 23, 2021, Senator Hawley issued the following statement reflecting his growing frustration with the FTC:

> When Congress designed the FTC more than a century ago, it attempted to insulate the agency from political accountability or control. The idea was to appoint neutral 'administrators' to oversee the nation's competitive markets.
>
> That project has failed. The FTC has proven lethargic, unwieldy, susceptible to agency capture, and prone to turf wars. Its multi-member commission diffuses responsibility, making it harder to identify a specific person who can be held accountable for enforcement or regulatory decisions. And the lack of meaningful supervision from the political branches has complicated oversight, and slowed reform.
>
> The problem is particularly acute in the antitrust context. Not only is antitrust authority divided between the five commissioners of the FTC, but

[125] *Id.*
[126] 15 U.S.C. §§1-7.
[127] *Supra* note 117.
[128] *Id.*
[129] *Id.*
[130] S. 1204, 117th Cong. (2021-2022); *see also Press Release, Senator Hawley Introduces the Bust Up Big Tech Act*, (April 19, 2021), available at https://www.hawley.senate.gov.
[131] *Id.*
[132] *Id.*

> it is also divided between the FTC and the DOJ. This situation makes assigning responsibility for enforcement decisions incredibly difficult, if not impossible. As a result, while the FTC has stood by as major corporations have consolidated their power and stifled competition, the political branches have had few tools to spur the FTC into action or shape its priorities.[133]

Professor William A. Kovacic, a prominent academic with considerable knowledge about the FTC, has suggested "improvements in performance" between the FTC and Antitrust Division could result in "fuller integration" that could "realize more completely the benefits of complementarities and learning across the agencies."[134] This amorphous suggestion to remedy well known problems caused by overlapping antitrust enforcement authority is clearly based on his that "the existing configuration of [the FTC as] enforcement agents as given and, perhaps, immutable."[135] Professor Kovacic's cynicism, however, warrants reevaluation in light of the ambitious "to do" list proposed by Senator Hawley, previewing the direction of a future legislation:

> First, Congress should relocate the FTC to the DOJ and provide for clear and direct oversight.
>
> Second, Congress should eliminate the multi-member commission and replace it with a single Director. Like the head of the Antitrust Division, this Director would report directly to the Associate Attorney General. And to ensure regular oversight by Congress, the Director would be confirmed by the Senate every five years.
>
> Third, Congress should end the jurisdictional overlap regarding mergers and acquisitions that has paralyzed enforcement and reassign that responsibility to the Antitrust Division, whose work a restructured FTC would aid and support.
>
> Fourth, Congress should create a new 'Digital Market Research Section' within the FTC composed of technologists, economists, and market specialists. This new section would be tasked with conducting comprehensive studies about digital markets, supporting the enforcement litigation of the DOJ, and reporting regularly to Congress.[136]

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[133] *A Proposal From Sen. Josh Hawley, Overhauling the Federal Trade Commission* (April 23, 2021), available at https://www.hawley.senate.gov.

[134] William E. Kovacic, *Symposium Editor's Essay: Building a Better U.S. Competition Policy Corridor,* 85 Antitrust L.J. , 217, 222 (2023). (Professor Kovacic served in the FTC's Bureau of Competition's Planning Office (1979-1983), as Attorney-Advisor to Commissioner George W. Douglas (1983), General Counsel (2004), and Commissioner (2006-2011, including his term as Chairman 2008-2009)).

[135] *Id*. at 222.

[136] *Supra* note 133.

On January 14, 2025, Representative Ben Cline (R-Va) introduced a streamlined version of the One Agency Act[137] to "consolidate" federal antitrust authority in one department and transfer "all FTC antitrust functions, FTC antitrust employees, FTC antitrust assets, and FTC antitrust funding" to the DOJ.[138] The FTC's "unfair methods of competition" authority would become dormant, but the agency's ability to challenge "unfair and deceptive practices" would be added to the laws the DOJ enforces. In addition, a one year plus a 180 day grace period, if needed, would be provided for DOJ to implement this consolidation.[139] While the Antitrust Division is restructured, it would be authorized to "deputize" FTC employees to investigate and prosecute antitrust violations under the auspices of the DOJ.[140] Although there is no specific directive about where the FTC's consumer protection staff and pending investigations would reside, the likely venue would be within the Civil Division, as is being done with pending CFPB cases.[141] Presumably, the remaining support staff in the Bureau of Economics and Office of the General Counsel would be relocated to appropriate DOJ slots; existing Commissioners either would find new positions with DOJ or the Trump Administration should offer options either in the White House or elsewhere in the executive branch. In addition, H.R. 384 would require businesses to file reports about their "organization, business, conduct, practices, management, and relation to other[s] . . .filing such reports [.]"[142] Neither the type of business nor its size were defined, however, which would require a clarifying amendment before passage to avoid due process issues.

With the *Slaughter* opinion likely to be issued in May or June 2026, the time will be ripe for legislative action. As the proponent of the initial One Agency Act, Senator Lee's leadership as Chair of the Antitrust, Competition Policy, and Consumer Rights Subcommittee and Senators

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[137] H.R. 384, 119th Cong. (2025-2026); *see also* H.R. 7737, 118th Cong. (2023-2024). (Then Representative Mike Johnson (R- La), now Speaker of the House of Representatives, also introduced a substantially similar bill, H.R. 2926, 117th Cong. (2021-2022)). Congressman Cline sits on the Subcommittee on the Administrative State, Regulatory, and Antitrust Subcommittee, the Chair of which is Scott Fitzgerald (R-Wis), who has been a critic of the FTC's efforts to expand antitrust into reshaping market structure for social engineering. Therefore, this House Subcommittee would be an ideal venue to schedule hearings on H.R. 384.

[138] *Id.*

[139] *Id.*

[140] *Id.*

[141] Jon Hill, *CFPB Will Shift Remaining Lawsuits Over to DOJ* (Nov. 20, 2025), available at https://www.law360.com.

[142] *Supra* note 137.

Hawley[143] and Tillis,[144] on record supporting changes to the FTC's structure, hearings should be scheduled early in 2026 to set the groundwork for implementing legislation.

Other members of the Subcommittee should be supportive of this important initiative. Notably, Senator Eric Schmitt (R-Mo.) filed an amicus brief in *Slaughter* arguing for overruling *Humphrey's Executor.*[145] And, as Chairman of the Senate Subcommittee on the Constitution, he has been a thought-leader in identifying recent Supreme Court administrative law decisions a "once-in-a generation opportunity to rebuild the constitutional order we were meant to inherit from our Framers . . . Congress, not agencies, should write laws; the President, not deep-state insulated commissions, should control the executive[.]"[146]

The two newest Republican members of the Subcommittee have been advocates for strong consumer protection. Senator Katie Britt (R-AL) has supported the recent Stop the Scroll Act[147] requiring the Surgeon General and FTC to develop a pop-up label box on a screen to warn about the potential mental health risks associated with social media. In addition, she testified at a June 24, 2025, Subcommittee hearing about the adverse impact of anticompetitive regulations on entrepreneurship and innovation.[148] And on July 30, 2025, Senator Britt co-sponsored Senator Hawley's Guarding Unprotected Aging Retirees from Deception (GUARD) Act [149]permitting state and local law enforcement to use federal grants to investigate financial fraud and requiring the FTC to report the amounts expended. In 2023, when Senator Ashley Moody (R-Fla.) was the Florida Attorney General, she worked with the FTC and other enforcement agencies to issue warning letters to businesses allegedly involved in "abusive, deceptive or unfair debt collection practices[,]"[150] and was involved with the FTC's refund of $540,000 to Florida victims of an

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[143] On February 10, 2020, Senator Hawley expressed support for the merger of the Bureau of Competition, and presumably the relevant staff in the Bureau of Economics, into the Antitrust Division to be headed by a Senate-confirmed Director who would report to the Associate Attorney General. The Antitrust Division would have exclusive jurisdiction over the review of mergers and acquisitions, ending interagency competition and delay in clearance. The FTC would retain its consumer protection functions including a new "digital markets research section" that would conduct studies to enhance the Antitrust Division's enforcement and additional "authority to limit the amount of data firms can collect, enforce new data portability and interoperability requirements, and impose civil penalties for first-time violations of those new rules." "Hawley Seeks Overhaul of the Federal Trade Commission," AXIOS (Feb. 10, 2020) at 2; available at https://www.axios.com/2020/02/10/hawley-ftc-doj-big-tech.

[144] *Supra* note 115.

[145] Brief Of Amicus Curiae U.S. Senator Eric Schmitt Chairman of the Senate Judiciary Subcommittee on the Constitution In Support of Petitioners, *Trump* v. *Slaughter*, *cert. granted*, 606 U.S.__(Sept. 22, 2025).

[146] Senator Eric Schmitt, *Forward- The Post-Chevron Working Group Report in Action: Reclaiming the Constitution from the Administrative State*, Yale J. Reg. Notice & Comment (Oct. 13, 2025), available at https://www.yalejreg.com.

[147] S.1885, 119th Cong. (2025-2026).

[148] *Deregulation & Competition: Reducing Regulatory Burdens to Unlock Innovation and Spur New Entry*, Before the Subcommittee on Antitrust, Competition Policy, and Consumer Rights, 119th Cong. (2025-2026), available at https://www.judiciary.senate.gov.

[149] S.3062, 119th Cong. (2025-2026).

[150] Press Release, *OFR Joins Attorney General Moody, FTC, and Other States in a Nationwide Crackdown on Phantom and Abusive Debt Collection*, Florida Office of Financial Regulation (Sept. 20, 2020), available at https://www.flofr.gov.

illegal robocall scheme.[151] Both Senators Britt and Moody's interest in the FTC's consumer protection responsibilities should make them supporters of the Representative Cline's version of the One Agency Act, as it does not change the FTC's consumer protection substantive authority or staff but transfers both to the DOJ.

The consolidation of the FTC into DOJ also should receive support from Senator Charles Grassley (R-Iowa), Chairman of the Senate Judiciary Committee, who has favored alignment between the two antitrust enforcement agencies for almost a decade. For example, on May 15, 2018, he joined Senator Orrin Hatch (R-Utah), Senator Lee, and Senator Tillis in introducing the Standard Merger and Acquisition Reviews Through Equal Rules Act (SMARTER Act)[152] to require the FTC and Antirust Division to adhere to the same standard in determining whether to block a merger or acquisition.[153]

Republicans, however, are not the only members of the Senate Antirust Subcommittee who have shown an interest in strengthening the laws the FTC enforces. Senator Klobuchar (D-Minn.) authored the Competition and Antirust Enforcement Act of 2021[154] that proposed several substantive changes to strengthen the antitrust laws, but also substantially increased the budget of both the FTC and Antitrust Division.[155]

Senator Cory Booker (D-NJ), the current Ranking Member of the Antitrust Subcommittee, and Senator Richard Blumenthal (D-Conn.) were co-sponsors of this bill.[156] Even in the current politically polarized Senate where bi-partisan bills have not been routine, Judiciary Committee Chairman Grassley joined a of Senate Antitrust Subcommittee's Democratic Senators --Senator Peter Welch (D-Vt.), Senator Adam Schiff (D-Cal), Senator Blumenthal— to co-sponsor the Meat and Poultry Special Investigator Act.[157] That bill, proposed by Senator Ron Wyden (D. Or.), would create an Office of the Special Investigator for Competition Matters within the Department of Agriculture to work with the Antitrust Division and FTC to investigate and prosecute violations of the Packers and Stockyards Act of 1921.[158]

Of course, objections can be expected even to Congressman Cline's simpler and cleaner version of the One Agency Act. But control of the White House and Congress change so that

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[151] Press Release, *Attorney General Moody And The FTC Send More Than $540,000 To Consumers Who Lost Money To Robocall Scams*, (July 6, 2023), available at https://www.myfloridalegal.com.
[152] S.2847 (115th Cong.) (2017-2018) (The companion bill H.R. 5645 passed the House, but not the Senate.).
[153] Press Release, *Sens. Lee, Hatch, Tillis, and Grassley Introduce SMARTER ACT*, (May 15, 2018).
[154] S. 225 (117th Cong.) (2021-2022).
[155] *Id.*; *see also* "*With Filing, Klobuchar Moves Closer to Entering Race for Governor of Minnesota*," N.Y. TIMES, Jan. 25, 2026, at 19 (reporting that Senator Klobuchar's decision to run for Governor of Minnesota is viewed as a potential steppingstone for being tapped as the 2028 Democrat party presidential nominee). Her support of legislation to merge the antitrust enforcement agencies certainly would be well received by Wall Street donors and add national reach to Senator Klobchar's reputation as "a brand of 'Minnesota-nice' pragmatism, centrism and bi-partisanship. . . a bulwark against efforts to shift her party to the left." *Id.*
[156] *Id.*
[157] S. 1312 (119th Cong.) (2025-2026); see also H.R. 1380 (119th Cong.) (2025-2026).
[158] 7 U.S.C. §§181-229 b.

partisan objections to consolidation of antitrust and consumer protection enforcement into DOJ may prove short-sighted. Policies change with elections. That is a fact and one with which our Founders were comfortable since governmental power and policy were meant to reflect the will of the people. Since many Democrats have been supporters of muscular antitrust and consumer protection enforcement over the years, they might see this type of legislation as an opportunity to enhance the enforcement capabilities and status of the FTC within the executive branch. Those Senators who might view this as a way to undermine the FTC's consumer protection efforts would do well to remember that the Supreme Court recently set back the remedial efforts of the FTC in a 2022 unanimous opinion by Justice Breyer in *AMG Capital Management, LLC* v. *FTC.* [159] There the Court held that Section 13(b) of the FTC Act did not empower the agency to obtain monetary relief by filing suit in a federal court, bypassing the procedures set forth in Sections 5 and 19 of the FTC Act, although this had been a growing and successful practice to obtain increased civil penalties for "unfair or deceptive acts or practices."[160] In addition, the orderly transition of the FTC's antitrust and consumer protection staff into DOJ should be welcomed in contrast to the Commission's being left to atrophy, as has been the case with the CFPB after *Seila Law.*[161]

More importantly, legislators inclined to maintain the s*tatus quo* should be mindful that the Supreme Court is aware of other lingering constitutional infirmities in FTC Act other than that presented in *Slaughter.* As the Court's unanimous decision authored by Justice Kagan observed in *Axon Enterprise*:

> [Petitioner's] combination-of-functions claim similarly goes to the core of the FTC's existence, given that the agency indeed houses (and by design) both prosecutorial and adjudicative activities. The challenges here, as in *Free Enterprise Fund*, are not to any specific substantive decision---say, to fining a company. . .or firing an employee[.] Nor are they to the commonplace procedures agencies use to make such a decision. They are instead challenges, again as in *Free Enterprise Fund*, to the structure or very existence of an agency: They charge that an agency is wielding authority unconstitutionally in all or a broad swath of its work.[162]

Justice Thomas' concurring opinion in *Axon Enterprise* gave a warning of these specific constitutional concerns: "I have grave doubts about the constitutional propriety of Congress vesting administrative agencies with primary authority to adjudicate core private right with only deferential judicial review on the back end."[163] He also invited the Court in a future case to

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[159] 593 U.S. 67 (2021).
[160] FTC, Fiscal Year 2021 Congressional Budget Justification 5 (Feb. 10, 2020), available at https://www.ftc.gov/system/files/documents/reports/fy-2021-congressional-budget-justification/fy_2021_cbj_final.pdf . (In 2019, the FTC filed 49 complaints in federal courts, obtained 81 permanent injunctions and orders, and collected in $732 million in consumer redress or disgorgement.).
[161] *New Details Emerge on Trump Officials' Sprint To Gut Consumer Bureau Staff*, N.Y. TIMES (Apr. 27, 2025), available at https://www.nytimes.com/2025/04/27/business/cfpb-layoffs-trump-musk-doge.html.
[162] *Axon Enterprise, Inc*., 598 U.S. at 189 (internal citations omitted).
[163] *Id.* at 196 (Thomas, J., concurring); *also id* at 202 (listing other potential constitutional violations of current federal administrative law, including: Article III "by compelling the Judiciary to defer to administrative agencies

"consider whether such schemes and the appellate review model they embody are constitutional methods for the adjudication of private rights."[164] Clearly, *Slaughter* and *Axon Enterprise, Inc.* should be seen as conveying a non-too-subtle a message that Congress should correct the FTC's constitutional deficiencies now, rather than waiting for the Court to do so.[165]

In addition, the heightened interest in reducing federal expenditures and increasing management efficiencies provides additional impetus for Congress to act in 2026. As Senator Hawley observed, "The reality is the FTC is not putting even its current resources to effective use because the FTC is poorly designed."[166] It seems the Trump Administration also shares this opinion. On May 30, 2025, the White House released its proposed FY 2026 budget that would reduce the FTC's funding from $428 million to $385 million, with a staff reduction of 135.[167] The White House also requested $233 million for the Antitrust Division, with a staff reduction of 69.[168] Pre-merger filing fees, however, are expected to offset appropriations made to both agencies. Both House and Senate versions of the Commerce-Justice-Science appropriations bills for FY 2026 have been approved, but they need to be reconciled.

Finally, concerns have been raised about the FTC's "drift towards Europe in is policy goals and enforcement stratagems."[169] Specifically, the FTC "has spent taxpayer dollars and used its resources to ensure EU regulations opposed by the U.S. business community are effectuated and protected. This is evidenced by the FTC's involvement in the EU's Digital Markets Act."[170] This is not a new development as the FTC has entered into "cooperation agreements" with foreign competition authorities for many years.[171]To the extent that international firms or international governmental entities are engaged in anticompetitive or unfair or deceptive conduct that adversely effects U.S. companies, such matters are best handled within DOJ under the auspices of the President. Yet another compelling reason why the FTC should be integrated within DOJ.

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regarding matters within the core of the Judicial Vesting Clause;" due process "by empowering entities that are not courts of competent jurisdiction to deprive citizens of core private rights;" and the Seventh Amendment "by allowing an administrative agency to adjudicate what may be core private rights without a jury."); *see also* Alyson M. Cox, *From Humphrey's Executor to Seila Law: Ending Dual Federal Antitrust Authority*, 96 Notre Dame L. Rev. 395 (2020); William Simon, *The Case against the Federal Trade Commission*, 19 U. CHI. L. REV. 297 (1952).

[164] *Axon Enterprise, Inc*., 598 U.S. at 204; (Thomas, J., concurring); *see also* P. Hamburger, *Is Administrative Law Unlawful,?* The University of Chicago Press 297 (2014).

[165] Conner J. Dwinell & Craig D. Minerva, *Recent Challenges to FTC Continuality: Surveying the Landscape*, 38 Vol. 2 Antitrust 42 (2024).

[166] Press Release, *Senator Hawley Proposes to Overhaul the Federal Trade Commission*, (Feb. 10, 2020), available at https://www.hawley.senate.gov.

[167] White House Budget Appendix, May 30, 2025 available at https://www.whitehouse.gov/wp-content/uploads/2025/05/appendix_fy2026.pdf.

[168] *Id.*; *see also* Press Release, *Fiscal Year 2026 Commerce, Justice, Science, and Related Agencies Appropriation Bill* at 5 (July 14, 2025), available at https://appropriations.house.gov/ (On July 14, 2025, the House Appropriations Committee proposed $310 million for the Division's enforcement efforts, a 33% increase in base appropriations compared to FY 2024).

[169] *Supra* note 112, at 14.

[170] *Id.* at 15; *see also* Steve Pociask and Issac Schick, *FTC Harms American Companies Through Foreign Regulators*, The American Consumer (Apr. 20, 2023), available at https://www.theamericanconsumer.org.

[171] *See*, *e.g*., U.S.-E.U. Agreement on the Application of Competition Laws, 23 I.L.M. 1186 (1994).

A few years ago, Senator Lee presaged the current opportunity that *Slaughter* presents: "We are at an inflection point, and it is crucial that we not waste it."[172]

If the FTC and Antitrust Division are combined, under DOJ's supervision, not only will the constitutional infirmities that have festered and weakened the FTC's credibility with the federal judiciary and Congress have an opportunity to heal, but the American consumer will have a competition and consumer protection champion strong enough to fell any free enterprise foe---in the 21st century and beyond.

And so, returning to the question at the beginning of this article: "*Quo Vadis* FTC?"

The answer is in the hands of the 119th Congress.

[172] Press Release, *Sen. Lee Sets Senate Republican Antitrust Agenda for the 117th Congress*, (Feb. 16, 2021), available at https://www.lee.senate.gov.