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IS *HUMPHREY'S* HISTORY?

By Michael F. McBride[1]

In 1935, in the seminal case of *Humphrey's Executor v. United States*, 295 U.S. 602 (1935) (*Humphrey's Executor*), the Supreme Court upheld the statutory "for cause" restriction on removal by the President of Commissioners of the Federal Trade Commission ("Commission" or "FTC") and ordered the United States to provide back pay to Commissioner Humphrey's estate. As the courts have recently recognized, "The Commission unquestionably exercises significant executive power," *Slaughter v. Trump*, No. 25-5261, 2025 WL 2551247 (D.C. Cir. Sept. 2, 2025) (Rao, J., dissenting, at 1). As such, the issue arises whether the "unitary executive theory" of Constitutional structure means that the President must have the authority to terminate commissioners and board members of so-called "independent" regulatory agencies, at least those which exercise executive power.

There is much litigation on this subject at the present time, given President Trump's determination to terminate the membership of several Democratic members of regulatory agencies, such as the National Labor Relations Board (NLRB), National Transportation Safety Board (NTSB), Merit Systems Protection Board (MSPB), Nuclear Regulatory Commission (NRC), and Surface Transportation Board (STB). Some of those terminations have reached the Supreme Court, which has allowed them to go into effect pending review of the terminations on the merits. The latest is an order (in No. 25-332) issued by the Court on September 22, 2025, allowing the termination of FTC Commissioner Rebecca Kelly Slaughter to go into effect, while treating the application for a stay as a petition for *certiorari*, granting it, stating the questions to be briefed, requiring the parties to brief the case on an expedited basis, so as to permit oral argument in December 2025.[2] The three liberal

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[2] *Trump v. Slaughter*, No. 25-332 (U.S. Sept. 22, 2025).

Justices dissented from issuance of the stay. Meanwhile, the Court denied petitions in advance of judgment before in the cases (Nos. 25-312, 25-319) involving the NLRB and MSPB.[3]

To understand why this issue arises, recall that the Constitution vests the entirety of the executive power in the President. U.S. Const. art. II § 1, cl. 1. It is well-established that this grant includes the power to remove officers who exercise the executive power on the President's behalf. *Myers. v. United States*, 272 U.S. 52, 117, 163-64 (1926); *Seila Law LCC v. CFPB*, 591 U.S. 197, 213-16 (2020); *see Collins v. Yellen*, 594 U.S. 220, 254-56 (2021). The removal power ensures that officers "remain accountable to the President, whose authority they wield." *Seila Law*, 591 U.S. at 213. The President must be able to control and supervise his subordinates in order to "take Care that the Laws be faithfully executed." U.S. Const. art. II § 3; *see Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 483 (2010).

So—does the fact that the Supreme Court has had several opportunities to overturn *Humphrey's Executor*, but has not, mean that the Court will not overturn it? Or, is the Court being more careful, waiting for the right makeup of the Court and set of facts on which to rule?

I explore both sides of this debate, and will let the reader decide, prior to a final merits determination by the Supreme Court, whether *Humphrey's Executor* will (or should) be upheld, in whole or in part.

Note: the President also terminated "for cause" the membership of Lisa Cook on the Federal Reserve Board. The Supreme Court has not stayed a lower-court injunction barring the termination of her membership, and her case is also being heard by the Court this Term, as is FTC Commissioner Slaughter's case. Termination for cause does not raise, at least directly, the issue whether *Humphrey's Executor* should be overturned.

[3] *Harris v. Bessent*, No. 25-312 (U.S. Sept. 22, 2025); *Wilcox v. Trump*, No. 25-319 (U.S. Sept. 22, 2025).

Note also: There are also arguments that certain agencies, such as the NTSB and the MSPB, are not agencies exercising executive power, but instead are either largely advisory (in the case of the NTSB) or are purely adjudicatory (in the case of the MSPB), and thus should not be subject to the Court's holding in FTC Commissioner Slaughter's case whether to overturn *Humphrey's Executor.* In the case involving the termination of the membership of Robert Primus on the STB, his counsel are arguing that the STB largely does not exercise executive authority, in an effort to distinguish his case from those in which the agencies involved are conceded to exercise executive authority.

MIGHT *HUMPHREY'S EXECUTOR* BE UPHELD?

Although it appears to many that the current Court has concluded that *Humphrey's Executor* was based on an incorrect premise, i.e., that the FTC did not have the requisite executive authority which may be necessary for the President to have Constitutional authority to terminate the Commissioners because they are exercising executive powers), that has been challenged in a recent U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) case involving President Trump's authority to terminate Rebecca Slaughter, a Commissioner of the FTC (the same agency involved in *Humphrey's Executor*). The motions' panel's majority opinion (on the question whether to issue a stay pending appeal, not the final merits) raised the issue "whether the statute providing the Commissioners for-cause removal protection unconstitutionally infringes on the President's Article II power." *Slaughter v. Trump*, 2025 WL 2551247 at *2. The motions' panel denied the government's request for a stay pending appeal.

In the course of deciding whether to issue a stay pending appeal, the panel majority asserted that the Supreme Court has had five chances to overturn *Humphrey's* and did not do so in each such case. *Id.* (citing *Wiener v. United States*, 257 U.S. 349, 356 (1958); *Morrison v. Olson*, 487 U.S. 654, 686-96 (1988); *Free Enter. Fund*, 561 U.S. at 483; *Seila Law* 591 U.S. at 228; and *Collins*, 594 U.S. at 250-51). Accordingly, the panel majority concluded that *Humphrey's Executor* "controls this case and binds this court." *Id.* Further, the panel's majority asserted, "recent developments on the Supreme Court's

emergency docket do not permit this court to do the Supreme Court's job of reconsidering that precedent." *Id.*[4]

In *Miller v. United States*, 272 U.S. 52 (1926), the Court did not restrict itself to the immediate issue before it, i.e., the President's inherent power to remove a postmaster, obviously an executive official. The Court announced that the President had inherent constitutional power of removal also of officials who have "duties of a quasi-judicial character . . . whose decisions after hearing affect interests of individuals, the discharge of which the President cannot in a particular case properly influence or control." *Id.* at 135. This view of presidential power was deemed to flow from his "constitutional duty of seeing that the laws be faithfully executed." *Id.*

But then, the Court seemingly did an about-face in *Humphrey's Executor*, at least for members of multi-member commissions. In so holding, the Court asserted that the FTC did not have executive authority, an assertion which, as we will see, was incorrect.

In *Wiener v. United States*, 357 U.S. 349 (1958), the Court considered a claim for back pay by a former member of the War Claims Commission appointed by President Truman, but terminated by President Eisenhower, saying "I regard it as in the national interest to complete the administration of the War Claims Act of 1948, as amended, with personnel of my own selection." *Id.* at 350. Thereafter, President Eisenhower made recess appointments to the Commission, including Petitioner's post. After Congress assembled, the President sent names of the new appointees to the Senate. The Senate had not

[4] Although the Court has explicitly declined to overrule *Humphrey's Executor,* it has eviscerated its reasoning and rejected attempts to extend it to "new situation[s]." *Seila Law*, 591 U.S. at at 238; *Free Enter. Fund*, 561 U.S. at 483-84; *see also Trump v. Boyle*, 606 U.S. ___, 145 S. Ct. 2653, 2654-55 (2025) (Kavanaugh, J., concurring) (suggesting "at least a fair prospect (not certainty, but at least some reasonable prospect)" that *Humphrey's Executor* will be further "narrow[ed]" or "overrule[d]"). As Judge Rao's dissent put it in the *Slaughter v. Trump* decision granting a stay pending appeal, "we are required to adhere to *both* the Court's holdings and its reasoning. With respect to *Humphrey's Executor*, however, the Court's holding and its reasoning have diverged." 2025 WL 2551247 at *12..

confirmed these nominations when the Commission was abolished. Thereupon, Petitioner brought a proceeding in the Court of Claims for recovery of his salary as a War Claims Commissioner. A divided Court of Claims dismissed the petition. The Court took up the case because it presented a variant of the constitutional issue decided in *Humphrey's Executor.*

About *Humphrey's Executor*, the *Wiener* Court stated (357 U.S. at 353) that:

> 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. The versatility of circumstances often mocks a natural desire for definitiveness. Within less than ten years, a unanimous Court, in *Humphrey's Executor v. United States*, 295 U.S. 602, narrowly confined the scope of the *Myers* decision to include only 'all purely executive officers. 295 U.S. at 628. The Court explicitly 'disapproved' the expressions in *Myers* supporting the President's inherent constitutional power to remove members of quasi-judicial bodies. 295 U.S. 626-27. Congress had given members of the Federal Trade Commission a seven-year term and also provided for the removal of a Commissioner by the President for inefficiency, neglect of duty or malfeasance in office.

In *Wiener*, 357 U.S. at 353, the Court provided additional background about *Humphrey's Executor.* It said:

> Humphrey's case was a *cause celebre*—and not least in the halls of Congress. And what is the essence of the decision in Humphrey's case? It drew a sharp line of cleavage between officials who were part of the Executive establishment, and

> were thus removable by virtue of the President's constitutional powers, and those who are members of a body 'to exercise its judgment without the leave or hindrance of any other official or any department of the government,' 295 U.S. at 625-26, as to whom a power of removal exists only if Congress may fairly be said to have conferred it. This sharp differentiation derives from the difference in functions between those who are part of the Executive establishment and those whose tasks require absolute freedom from Executive interference. 'For it is quite evident,' again to quote *Humphrey's Executor*, 'that one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter's will,' 295 U.S. at 629.

So, the *Wiener* Court concluded, "Thus, the most reliable factor for drawing an inference regarding the President's power of removal in our case is the nature of the function that Congress vested in the War Claims Commission." *Id.* The Court concluded that "The philosophy of *Humphrey's Executor*, in its explicit language as well as its implications, precludes such a claim" "that the President could remove a member of an adjudicatory body like the War Claims Commission merely because he wanted his own appointees on such a Commission." *Id.* at 356. So, the *Wiener* Court relied on the conclusion that the FTC did not perform executive functions, but merely adjudicatory (and perhaps legislative) functions, to conclude that the holding in *Humphrey's Executor* was correct.

In *Morrison v. Olson*, 487 U.S. 654 (1988), the Court considered a provision allowing the Attorney General to remove an independent counsel, subject to judicial review. The Court considered the case more analogous to *Humphrey's Executor* and *Wiener* than to *Myers.* It summarized its views of *Humphrey's Executor:*

> In *Humphrey's Executor*, the issue was whether a statute restricting the President's power to remove the

> commissioners of the Federal Trade Commission [] only for 'inefficiency, neglect of duty, or malfeasance in office' was consistent with the Constitution. 295 U.S. at 619. We stated that whether Congress can 'condition the [President's power of removal] by fixing a definite term and precluding a removal except for cause will depend upon the character of the office.' *Id*. at 631. Contrary to the implication of some dicta in *Myers*,[5] the President's power to remove Government officials simply was not "all-inclusive in respect of civil officers with the exception of the judiciary provided for by the Constitution." 295 U.S. at 629. At least in regard to 'quasi-legislative' and 'quasi-judicial' agencies such as the FTC,[] '[t]he authority of Congress, in creating [such] agencies, to require them to act in discharge of their duties independently of executive control . . . includes, as an appropriate incident, power to fix the period during which they shall continue in office, and to forbid their removal except for cause in the meantime.' *Ibid*. In *Humphrey's Executor*, we found it "plain" that the Constitution did not give the President "illimitable power of removal" over the officers of independent agencies. *Ibid*. Were the President to have the power to remove FTC commissioners at will, the "coercive influence" of the removal power would "threate[n] the independence of [the] commission." *Id.* at 630.
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> [5] The Court expressly disapproved of any statements in *Myers* that "are out of harmony" with the views expressed in *Humphrey's Executor*. 295 U.S. at 626. We recognized that the only issue actually decided in *Myers* was that "the President had power to remove a postmaster of the first class, without the advice and consent of the Senate as required by act of Congress." 295 U.S. at 626.

487 U.S. at 687-88. The *Morrison* Court went on to discuss *Wiener* (*id.* at 688)*:*

> Similarly, in *Wiener*, we considered whether the President had unfettered discretion to remove a member of the War Claims Commission, which had been established by Congress in the War Claims Act of 1948, 62 Stat. 1240. The Commission's function was to receive and adjudicate certain claims for compensation from those who had suffered personal injury or property damage at the hands of the enemy during World War II. Commissioners were appointed by the President, with the advice and consent of the Senate, but the statute made no provision for the removal of officers, perhaps because the Commission itself was to have a limited existence. As in *Humphrey's Executor*, however, the Commissioners were entrusted by Congress with adjudicatory powers that were to be exercised free from executive control. In this context, 'Congress did not wish to have hang over the Commission the Damocles' sword of removal by the President for no reason other than that he preferred to have on that Commission men of his own choosing.' 357 U.S. at 356. Accordingly, we rejected the President's attempt to remove a Commissioner "merely because he wanted his own appointees on [the] Commission," stating that 'no such power is given to the President directly by the Constitution, and none is impliedly conferred upon him by statute.' *Ibid*."

The Court went on *Morrison* to uphold the statutory provision concerning independent counsels, stating "we simply do not see how the President's need to control the exercise of that discretion [to conduct the affairs of the independent counsel] is so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the President." 487 at 691-92. So, the Court held that the limitation on the President's power of removal of the independent counsel either for "good cause" or for "misconduct" does not "sufficiently deprive[] the President of control over the independent counsel to interfere impermissibly

with his constitutional obligation to ensure the faithful execution of the laws." *Id.* at 693.[5]

In *Seila Law*, 591 U.S. at 228, the Court considered the structure of the CFPB under Constitutional separation-of-powers principles. The statute contained a provision providing for appointment by the President of a single Director for a five-year term, 12 U.S.C. § 5491(b)(2), during which the President may remove the Director only for "inefficiency, neglect of duty, or malfeasance in office. *Id.* § 5491(c)(1), (3). The argument was presented that the CFPB's structure violated the separation of powers.

The Court began by noting that Article II vests the entire "executive power" in the President alone, but the Constitution presumes that lesser executive officers will assist the President in discharging his duties. The President's executive power generally includes the power to supervise—and, if necessary, remove—those who exercise the President's power on his behalf. The Court noted that the President's removal power was recognized by the First Congress in 1789, confirmed by the Court in *Myers*, and reiterated in *Free Enterprise Fund*, 561 U.S. 477. In *Free Enterprise Fund*, the Court recognized that it had previously upheld certain congressional limits on the President's removal power. But the Court declined to extend those limits to "a new situation not yet encountered by the Court." *Id.* at 483. *Free Enterprise Fund* left in place only two exceptions to the President's unrestricted removal power. First, *Humphrey's Executor* permitted Congress to give for-cause removal protection to a multi-member body of experts who were balanced along partisan

[5] Justice Scalia famously dissented in *Morrison v. Olson*, on separation-of-powers grounds. 487 U.S. at 697. His dissent was sufficiently persuasive, however, that it led to the Court's construction of it as a narrow exception to the President's generally unencumbered authority to remove officers of the United States at will. The Court held in *Seila Law* that *Morrision*'s holding was a narrow exception only applying to inferior officers. 591 U.S. at 228. Interestingly, in his *Morrison* dissent, Justice Scalia read the majority opinion to hold that "*Humphrey's Executor* is swept into the dustbin of repudiated constitutional principles. 487 U.S. at 725 (citing *ante* at 689 "[o]ur present considered view,' the Court says, '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 that official is classified as 'purely executive.'").

lines, appointed to staggered terms, performed only "quasi-legislative" and "quasi-judicial functions," and were said not to exercise any executive power. Second, *Morrison* approved for-cause removal protection for an *inferior* officer—the independent counsel—who had limited duties and no policymaking or administrative authority.

The Court held in *Seila Law* that neither *Humphrey's Executor* nor *Morrison* resolves whether the CFPB Director's insulation from removal is constitutional. The New Deal-era FTC upheld in *Humphrey's Executor* bears little resemblance to the CFPB. Unlike the multiple Commissioners of the FTC, who were balanced along partisan lines and served staggered terms to ensure the accumulation of institutional knowledge, the CFPB Director serves a five-year term that guarantees abrupt shifts in leadership and the loss of agency expertise. In addition, the Director cannot be dismissed as a mere legislative or judicial aide. Rather the Director possesses significant administrative and enforcement authority, including the power to seek daunting monetary penalties against private parties in federal court—a quintessentially executive power not considered in *Humphrey's Executor.*

The Court held that the logic of *Morrison* also does not apply. The independent counsel approved in *Morrison* was an inferior officer who lacked policymaking or administrative authority and exercised narrow authority to initiate criminal investigations and prosecutions of governmental actors identified by others. By contrast, the CFPB Director is a principal officer whose duties are far from limited. The Director promulgates binding rules fleshing out 19 consumer-protection statutes that cover everything from credit cards and car payments to mortgages and student loans. And the Director brings the coercive power of the state to bear on millions of private citizens and businesses, imposing potentially billion-dollar penalties through administrative adjudications and civil actions.

The question, therefore, was whether to extend the *Humphrey's Executor* and *Morrison* exceptions to a "new situation." The Court declined to extend those precedents to an independent agency led by a single Director and vested with significant executive power. The Court held that the single-Director

structure has no foothold in history or tradition. The Court also held that it is incompatible with the structure of the Constitution, which—with the sole exception of the Presidency—scrupulously avoids concentrating power in the hands of any single individual. The Court stated that the Framers' constitutional strategy is straightforward: divide power everywhere except for the Presidency, and render the President directly accountable to the people through regular elections. In that scheme, individual executive officials may wield significant authority, but that authority remains subject to the ongoing supervision and control of the elected President. Because the CFPB's single-Director structure contravenes this carefully calibrated system by vesting significant governmental power in the hands of a single individual who is neither elected by the people nor meaningly controlled (through the threat of removal) by someone who is. The Court overturned the lower courts' determinations that *Seila Law*'s challenge to the CFPB's structure were foreclosed by *Humphrey's Executor* and *Morrison*, and held that Congress could not limit the President's power to remove the Director to instances of "inefficiency, neglect, or malfeasance." *Seila Law*, 591 U.S. at 213. Accordingly, it vacated and remanded for further consideration in light of the Court's opinions (including concurrences by Justices Thomas and Kagan, neither of which joined Chief Justice Roberts' opinion that the solution to the Constitutional violation was the sever the "for cause" removal provision).

In *Collins*, 594 U.S. at 254-58, in a case involving the Director of the Federal Housing Finance Agency (an "independent agency" tasked with regulating Fannie Mae and Freddie Mac and, if necessary, stepping in as their conservator or receiver), the Court again acknowledged that the Constitution grants the President the power to remove officers who exercise the executive power on the President's behalf, but did not address whether the uphold or overturn *Humphrey's Executor.*

So, where does that leave us? As the majority opinion in the D.C. Circuit in *Slaughter v. Trump*, No. 25-5261, 2025 WL 2551247 discussed, on the issue of a stay pending judicial review, the Supreme Court has had several opportunities to overturn *Humphrey's Executor* and it has not done so. So, perhaps the Court will continue to duck the ultimate question—whether to

uphold or overturn *Humphrey's Executor*—and deal with individual circumstances, such as the Federal Reserve Board being a "quasi-private entity," or the Librarian of Congress arguably being an arm of Congress, rather than the Executive Branch, under which *Humphrey's Executor* may protect such officials from dismissal.

But there are also reasons to believe that *Humphrey's Executor* may be ripe for overturning. To begin with, the case involved a claim of backpay, not for reinstatement, and there are substantial questions regarding the power of courts to order reinstatement. *See Slaughter v. Trump*, No. 25-5261, 2025 WL 2551247 at *8-12 (especially *id.* at *11) (Rao, J., dissenting) ("In sum, the government is likely to succeed in its appeal of the district court's injunction, which orders relief that exceeds the Article III judicial authority and intrudes on the President's exercise of executive power"). Moreover, as Judge Rao explained in her dissent (*id.* at *12):

> Although the Court has explicitly declined to overrule *Humphrey's Executor*, it has eviscerated its reasoning and rejected attempts to extend it to 'new situation[s].' *Seila Law*, 140 S. Ct. at 2211; *Free Enter. Fund*, 561 U.S. at 483-84; *see also Boyle*, 145 S. Ct. at 2654-55 (Kavanaugh, J., concurring) (suggesting 'at least a fair prospect (not certainty, but at least some reasonable prospect)' that *Humphrey's Executor* will be further 'narrow[ed]' or 'overrule[d]'). Without further guidance from the Supreme Court, lower courts are put in a somewhat difficult position because we are required to adhere to *both* the Court's holdings and its reasoning. With respect to *Humphrey's Executor*, however, the Court's holding and reasoning have diverged.

As Judge Rao went on to explain, "Even while leaving *Humphrey's Executor* on the books, the Court has recognized that members of the [NLRB], the [MSPB], and the Consumer Product Safety Commission ('CPSC'), all so-called 'independent multi-member agencies, exercise 'considerable executive

power.' *Wilcox*, 145 S. Ct. at 1415; *see Boyle,* 145 S. Ct. at 2654." *Id.* at *13. After granting stays of injunctions that order reinstatement of officers of those agencies removed by the President, Judge Rao stated that "[t]he reasoning of these orders must be applied to stay Slaughter's reinstatement." *Id.* She went on to state that

> While leaving *Humphrey's Executor* in place, the Supreme Court has explicitly recognized that the 'conclusion that the FTC did not exercise executive power has not withstood the test of time.'[7] *Seila Law*, 140 S. Ct. at 2198 n.2. The Constitution establishes three departments of the federal government, and the so-called independent agencies are necessarily part of the Executive Branch, not some headless fourth branch. Commissioners of the FTC exercise 'considerable executive power,' and such officers are not entitled to reinstatement while they litigate the lawfulness of their removal. *Wilcox*, 145 S. Ct. at 1415; *see Boyle*, 145 S. Ct. at 2654.
>
> [7] In light of the Supreme Court's explicit recognition that, despite the reasoning of *Humphrey's Executor,* the 1935 FTC exercised executive power, there is no need to parse the past and present powers of the FTC. The Commission exercised executive power in 1935, and Congress has only expanded the powers of the FTC in the intervening years. *See* Eli Nachmany, *The Original FTC,* 77 Ala. L. Rev. 1 (forthcoming 2025) (unpublished manuscript at 42-49)."

It seems to me that this explanation—that the FTC does, indeed, exercise executive power, and did so in 1935—strongly suggests that a majority of the current Court, in this Term, in one of the cases pending before it in which the continuing vitality of *Humphrey's Executor* is raised, will conclude that it was wrongly decided in 1935 and, in any event, does not survive current Constitutional analysis, which relies on the indisputable fact that there are only three branches of government and also that (at least most) so-called "independent" regulatory agencies must be considered a part of the Executive Branch and thus the members of regulatory agencies must be subject to

termination by the President under his Article II powers to both appoint, and terminate, members of such agencies.

Judge Rao noted that:

> In the stay posture, the Supreme Court has withheld judgment on the lawfulness of the President's removals of so-called independent agency heads, focusing on the harm to the government from reinstatement. That reasoning similarly requires a stay here while the merits of the removal, and the ongoing validity of *Humphrey's Executor,* continue to be litigated.

2025 WL 2551247 at *13. But her discussion of the fact that the Court erred, in *Humphrey's Executor*, in concluding that the FTC did not have executive authority, suggests that, in the proper case, the Court is likely to overturn *Humphrey's Executor*, but perhaps with some residual exceptions for quasi-private agencies such as the Federal Reserve Board or other agencies that may be found to be arms of the Congress rather than the Executive. There also may be exceptions for agencies that do not exercise any, or at least a significant amount of, executive power, such as the NTSB and MSPB, and as is being argued about the STB.

If the Court does not overturn *Humphrey's Executor*, it will have to address the issue whether a court can order reinstatement of any Presidential appointee, notwithstanding the separation-of-powers doctrine.

But, even if the Court overturns *Humphrey's Executor* in whole or in part, it will have to separately address, at least in the case of Lisa Cook's membership on the Federal Reserve Board, the question whether the "for cause" provision invoked by the President to terminate her membership is satisfied, and whether the President's determination that the "for cause" provision is entitled to deference.

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