Unitary Government or Unitary Executive? *Trump v. Slaughter* and the Separation of Powers

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Introduction

In *Trump v. Slaughter*, the Supreme Court held unconstitutional statutory limits on the President's power to remove the heads of the Federal Trade Commission (FTC), a multi-member "independent" agency.[1] In the process, the Court overruled its 1935 decision in *Humphrey's Executor v. United States*,[2] which had upheld the same statutory removal restriction at issue in *Slaughter*. To the majority, *Humphrey's Executor* was an outlier, and the *Slaughter* decision properly restored the relationship between (1) the President, in whom "the" executive power is vested and who is obligated to "take Care that the Laws be faithfully executed,"[3] and (2) principal executive-branch agents who assist the President's execution of the law. To the dissent, however, *Slaughter* "fundamentally recalibrat[ed] the balance of power in this country" and "discard[ed our] democratic regime in favor of one that distorts the structure of Government."[4]

The majority has the better of the argument on the question of whether the President should have unrestricted authority to remove principal executive officers. The dissent vastly overstates things when it claims a continuous practice of "independent" agencies dating back to the Founding. And though they emphasize the last 140 years, beginning with the establishment of the Interstate Commerce Commission (ICC) in 1887, they fail to show that the ICC

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[1] Trump v. Slaughter, 146 S. Ct. 2283 (2026).

[2] Humphrey's Executor v. United States, 295 U.S. 602 (1935).

[3] U.S. Const. art. II, § 1, cl. 1; *id.* art. II, § 3.

[4] *Slaughter*, 146 S. Ct. at 2346 (Sotomayor, J., dissenting).

and newer agencies like the FTC (created in 1914) have meaningful Founding-era analogs. That shouldn't be surprising; these independent agencies began to appear at the time Progressive views of government came to the fore. Thus, the foundation for the dissent is not the Founding, but the Progressive and New Deal Eras, during which the Constitution's separation of powers was openly criticized. This article discusses the premises that underly the dissenting opinion.

Importantly, the dissent largely sidesteps the *nature* of the modern independent agency, namely, an agency that exercises legislative, executive, and judicial powers. The dissent instead focuses on agency attributes related to "independence," that is, length of terms and removal restrictions.

Thus, while the dissent laments the rise of an extremely powerful President, the blame should fall on Congress, which delegated legislative, executive, and judicial powers to executive-branch agencies, and on the courts, which have approved these delegations.

Part I of this Article discusses the majority and dissenting opinions in *Slaughter*. Part II explains where the modern independent agency came from. Part III shows that these modern independent agencies find no support in the Constitution. Part IV provides an example of what the modern administrative state can do. Part V concludes with a candid assessment of where the separation of powers stands post-*Slaughter*.

I. *Slaughter* and Its Discontents

A. Background

President Trump began his second term in office with an FTC comprising two Republicans and three Democrats.[5] After the Democratic Chair resigned (as is customary), President Trump appointed, and the Senate confirmed, a Republican replacement.[6] With the Commission now deadlocked two to two, President Trump invoked Article II and terminated the remaining two Democratic members, asserting that their service was "inconsistent with

[5] *Id.* at 2292.

[6] *Id.*

his Administration's priorities."[7] Commissioner Rebecca Slaughter challenged her firing in federal court on the ground that the Federal Trade Commission Act precludes the removal of commissioners without cause.[8] The district court, finding itself bound by *Humphrey's Executor*, declared the President's "purported removal" *ultra vires*.[9] The D.C. Circuit, in a 2–1 decision, declined to stay the district court's order.[10] "To grant a stay," the court reasoned, "would be to defy the Supreme Court's decision [in *Humphrey's Executor*]."[11] The President sought an emergency stay of the district court's order from the Supreme Court, which granted the President's request and granted certiorari before judgment on the question whether the statutory removal protections for FTC commissioners violate the separation of powers and, if so, whether *Humphrey's Executor* should be overruled.[12]

B. The Majority Opinion

1. In a 6–3 opinion written by Chief Justice John Roberts, the Court held unconstitutional statutory limits on the President's power to remove the heads of the FTC.[13] According to the Court, the President's unrestricted power to remove those principal officers rests on a straightforward reading of the Constitution and the structure it established. The Constitution "vest[s]" "*[t]he* executive power . . . in *a* President of the United States of America."[14] The singular signifier was not an afterthought: The Framers considered—but rejected—the idea of a "plural" executive and established a single officeholder in whom all executive

[7] *Id.*

[8] *Id.*; *see* 15 U.S.C. § 41 ("Any Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office.").

[9] *Slaughter*, 146 S. Ct. at 2292.

[10] Slaughter v. Trump, No. 25-5261, 2025 U.S. App. LEXIS 22628 (D.C. Cir. Sept. 2, 2025).

[11] *Id.* at *3.

[12] Trump v. Slaughter, 146 S. Ct. 18 (2025) (granting application for stay and certiorari before judgment).

[13] *Slaughter*, 146 S. Ct. at 2283.

[14] U.S. Const. art. II, § 1, cl. 1 (emphasis added).

power is vested.[15] With this power, the President is obligated to "take Care that the Laws be faithfully executed."[16] To do so, he must act through executive-branch subordinates, who "'derive their offices from his appointment' and remain 'subject to his superintendence.'"[17] They must also be accountable to him, and this desire for accountability is what drove the Framers' decision to establish "[u]nity in the Executive,"[18] for "only a 'single Person' could make the office 'responsibl[e]' to the people."[19] Finally, to ensure that the President's subordinates are responsible to him, and thus to the people, they must be removable at will by him.[20] The President's removal power is but "a necessary corollary of the Constitution's design," lest the intended "unity" of the executive branch be "destroyed."[21] The Court observed that the government's early practice, "liquidated and settled the President's power of removal."[22]

2. The Court's precedent, the majority continued, "confirms" what "text, history, and structure settle."[23] Two cases merit discussion here. First, in *Myers v. United States*, the Court considered President Woodrow Wilson's unilateral firing of a postmaster, whose removal—under statute—required the advice and consent of the Senate.[24] *Myers* exhaustively discussed the Constitution's

[15] *Slaughter*, 146 S. Ct. at 2293–94 (discussing debates on nature of presidential office); *see also* Seila Law, LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197, 203 (2020) ("Under our Constitution, the 'executive Power'—all of it—is 'vested in a President.'" quoting U.S. Const. art. II, § 1, cl. 1)).

[16] U.S. Const. art. II, § 3.

[17] *Slaughter*, 146 S. Ct. at 2293 (quoting The Federalist No. 72, 436 (Alexander Hamilton) (C. Rossiter ed., 1961)).

[18] *Id.* (quoting 1 Farrand's Records 66 (J. Wilson)).

[19] *Id.* (quoting 1 Farrand's Records 109 (J. Wilson)); *see also* The Federalist No. 70, 427 (Alexander Hamilton) (C. Rossiter ed., 1961). (arguing that a "plurality in the executive tends to conceal faults and destroy responsibility").

[20] *Slaughter*, 146 S. Ct. at 2292–95; *see id.* at 2293 ("To remain accountable to the President, those officers must be removable by the President.").

[21] *Id*. at 2295 (quoting The Federalist No. 70, at 424 (Alexander Hamilton) (C. Rossiter ed., 1961)).

[22] *Id.* (cleaned up) (quoting 8 The Writings of James Madison 450 (G. Hunt ed., 1908)).

[23] *Id*. at 2297.

[24] Myers v. United States, 272 U.S. 52, 107 (1926).

text and the history concerning presidential removal.[25] The Court rejected the postmaster's challenge and "reaffirmed the President's power to fire his subordinates at will."[26] Second, in *Humphrey's Executor*,[27] the Court considered the President's unilateral firing of William Humphrey without cause.[28] After Humphrey's death, his estate sued for back pay and argued that his firing was illegal because the Federal Trade Commission Act precluded removal without cause.[29] In response, Roosevelt argued that the Act's removal restriction was unconstitutional under *Myers*.[30]

The Court disagreed and ruled against the President. According to the Court, the 1935 FTC was an "administrative body created by Congress" to perform "specified duties as a legislative or as a judicial aid."[31] It "act[ed] in part quasi legislatively and in part quasi judicially."[32] To the extent it exercised any executive "function," it did so "in the discharge and effectuation of its quasi legislative or quasi judicial powers, or as an agency of the legislative or judicial departments of the government."[33] "Such a body," the Court concluded, "cannot in any proper sense be characterized as an arm or an eye of the executive."[34]

Humphrey's Executor distinguished *Myers*, which (*Humphrey's Executor* said) applies to an officer who is "merely one of the units in the executive department and, hence, inherently subject to the exclusive and illimitable power of removal by the Chief Executive, whose subordinate and aid he is."[35] But, the Court continued, *Myers* does not apply "to an officer who occupies no place in the

[25] *Id.* at 109–64 (reviewing Article II, historical practice, and Supreme Court precedent); *id.* at 164–77 (discussing "period in the history of the government when both houses of Congress attempted to reverse this constitutional construction"); *see also Slaughter*, 146 S. Ct. at 2298–99.

[26] *Slaughter*, 146 S. Ct. at 2298.

[27] *Humphrey's Executor*, 295 U.S. at 602.

[28] *Slaughter*, 146 S. Ct. at 2299.

[29] *Humphrey's Executor*, 295 U.S. at 619–20.

[30] *Id.* at 616–18 (argument for the United States).

[31] *Id.* at 628.

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.* at 627.

executive department and who exercises no part of the executive power vested by the Constitution in the President."[36] Therefore, according to *Humphrey's Executor*, the 1935 FTC fell outside of *Myers*'s holding.

3. Slaughter relied on the *Humphrey's Executor* Court's "purely executive officers" discussion from *Myers*.[37] The *Slaughter* majority criticized *Humphrey's Executor*'s "highly circumscribed and almost fictional view of the FTC's role."[38] According to the *Slaughter* majority, the FTC, even in 1935, exercised executive power—"at least to some degree."[39] The majority then pointed to more recent cases that "further undermined" *Humphrey's Executor*'s premises: *Free Enterprise Fund v. Public Company Accounting Oversight Board*[40] and *Seila Law LLC v. Consumer Financial Protection Bureau*,[41] both of which "emphasized that *Humphrey's* had to be read on its own terms, and thus applies only to agencies that perform specified duties as a legislative or as a judicial aid."[42]

Finally, "[i]f anything more *is* left of *Humphrey's*, we overrule it."[43]

C. The Dissent

Justice Sonia Sotomayor, joined by Justices Elena Kagan and Ketanji Brown Jackson, penned a long dissent disagreeing with almost every aspect of the majority opinion. According to them, "Congress and the President together have decided," for "most of this Nation's history," that "some Government functions should operate at a distance

[36] *Id.* at 628; *see Slaughter*, 146 S. Ct. at 2300 (quoting *Humphrey's Executor*, 295 U.S. at 628) (*Humphrey's* then "pivoted" and explained that some presidentially appointed officers "perform 'executive function[s],' but exercise 'no part of the executive power.'").

[37] *See Slaughter*, 146 S. Ct. at 2300 (stating *Humphrey's Executor* "started by reaffirming that the President possesses 'the exclusive and illimitable power' to remove 'all purely executive officers,' just as *Myers* held.") (quoting *Humphrey's Executor*, 295 U.S. at 627–28).

[38] *Id.* at 2301.

[39] *Id.* (quoting Morrison v. Olson, 487 U.S. 654, 690 n.28 (1988)).

[40] Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477 (2010) (holding dual-layer for-cause removal unconstitutional).

[41] *Selia Law LLC*, 591 U.S. at 197 (refusing to extend *Humphrey's Executor* from multimember commissions to single-person directorships).

[42] *Slaughter*, 146 S. Ct. at 2301 (quotation marks and citations omitted).

[43] *See id.* at 2302.

from partisan politics."[44] The word "most" does a lot of work here, as the dissent focuses principally on "[n]inety years of precedent" (i.e., *Humphrey's Executor*) and "140 years of consistent political practice" (i.e., since 1887, when the Interstate Commerce Commission was created).[45]

1. Humphrey's Executor: *90 Years of Precedent*

The dissent—correctly—observed that the *Humphrey's Executor* Court focused on the FTC's "character."[46] The 1935 FTC was a "body of experts tasked with carry[ing] into effect legislative policies embodied in the [FTC Act] in accordance with the legislative standard therein prescribed, including by determining what constitutes unfair methods of competition."[47] Accordingly, the agency "was not purely executive; instead, it 'act[ed] in part quasi-legislatively and in part quasi-judicially' by 'filling in and administering the details embodied [in the law's] general standard.'"[48] The 1935 FTC "must, from the very nature of its duties, act with entire impartiality," as "[i]t is charged with the enforcement of no policy except the policy of the law."[49] Therefore, "[g]iven the FTC's role in 'carrying into operation' Congress's legislative goals, it needed some independence from Presidential domination."[50] Finally the dissent said, that it was "quite evident" "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."[51]

[44] *Id.* at 2319 (Sotomayor, J., dissenting).

[45] *Id.* at 2326; *see id.* at 2321–26 (discussing *Humphrey's Executor*), 2326–29 (interpreting constitutional text), 2329–34 (disputing majority's account of the Decision of 1789 and related debates), 2334–36 (pre-*Humphrey's Executor* precedent), 2336–37 (practical discussion of trade-offs), 2337–46 (arguing that *stare decisis* requires upholding removal restriction).

[46] *Id.* at 2321 (quoting *Humphrey's Executor*, 295 U.S. at 629).

[47] *Id.*

[48] *Id.*

[49] *Humphrey's Executor*, 295 U.S. at 624.

[50] *Slaughter*, 146 S. Ct. at 2322 (Sotomayor, J., dissenting) (quoting *Humphrey's Executor*, 295 U.S. at 630).

[51] *Id.* (quoting *Humphrey's Executor*, 295 U.S. at 629).

The dissent claims to see a straight line from *Humphrey's Executor* through the Supreme Court's 2020 decision in *Seila Law*.[52] The dissent is correct that in *Free Enterprise Fund* and *Seila Law*, the Court "underscored that *Humphrey's* remain[ed] good law in its core application to multimember bodies like the FTC."[53] But the dissent here overlooks the distinction that *Humphrey's Executor* itself made between "purely executive offices" and the 1935 FTC, and it ignores the discussion in *Seila Law* concerning the (unquestionably executive) nature of the power wielded by the Consumer Financial Protection Bureau (CFPB).[54]

2. "Since the Founding," but "Especially", the Last 140 Years

According to the dissent, Congress has—"[s]ince the founding"—"created agencies that in various ways have embodied th[e] goal of independence."[55] But the dissent's Founding Era examples are markedly different than the independent agencies that began to appear approximately 140 years ago, and those newer agencies. And the independent agencies themselves have undergone significant changes since their creation, to say nothing of more contemporary agencies like the CFPB.

a. The dissent points to the Sinking Fund Commission, the Revolutionary War Debt Commission, the Mint Board, and the First and Second Banks of the United States as early examples of independent agencies.[56] But none are meaningfully similar to the modern independent agency, which "wields vast power and touches almost every aspect of daily life."[57]

The Sinking Fund Commission was an agency to which Congress "delegated general power over purchasing decisions" through a 1790 law that authorized "open market purchases of U.S. securities that would both 'effect a reduction of the amount of the public debt' and benefit the 'creditors of the United States, by raising the price of their

[52] *Id.* at 2322–23.

[53] *Id.* at 2323 (citing *Seila Law*, 591 U.S. at 215–18; *Free Enter. Fund*, 561 U.S. at 483).

[54] *See generally Seila Law*, 591 U.S. at 218–20; *see id.* at 218 (noting that, unlike the 1935 FTC, the CFPB "is hardly a mere legislative or judicial aid").

[55] *Slaughter,* 146 S. Ct. at 2323 (Sotomayor, J., dissenting).

[56] *Id.* at 2332–34.

[57] *Free Enter. Fund*, 561 U.S. at 499.

stock.'"[58] The Revolutionary War Debt Commission was an agency "created 'to settle the accounts between the United States, and the individual states,' whose decisions would be 'final and conclusive' without further review."[59]

The Mint Board oversaw the mint, which was established "for the purpose of a national coinage."[60] Mint officials were responsible for receiving metals for coinage, assaying the metals' values, coining and engraving the metals, safely keeping all coins, and using them to make payments.[61] The standard for gold and silver coins was set.[62] And those coins, struck at and issued from the mint, were declared to be "lawful tender in all payments whatsoever."[63]

Finally, the First Bank of the United States issued notes "that would be receivable in all payments to the United states, thereby rendering them a *de facto* circulating currency," and acted "as the federal government's fiscal agent."[64] The First Bank also had "private" operations similar to modern-day, federally chartered banks, "accept[ing] deposits from the public and ma[king] loans to private citizens and businesses."[65] The Second Bank had similar authorities and functions.[66]

b. The dissent also looked to post-Founding Era agencies, such as the ICC, created in 1887, the Federal Reserve Board (1913), and the DTC (1914). Here, the dissent focuses on the agencies' structural attributes—number of members, length of terms, removal restrictions, and others—as evidence of a continuing tradition of independent agencies.[67]

[58] Christine Kexel Chabot, *Is the Federal Reserve Constitutional? An Originalist Argument for Independent Agencies*, 96 Notre Dame L. Rev. 1, 39 (2020) (quoting Act of Aug. 12, 1790, ch. 47, 1 Stat. 186).

[59] *Slaughter*, 146 S. Ct. at 2333 (Sotomayor, J., dissenting) (quoting Act of Aug. 5, 1790, ch. 38, 1 Stat. 178).

[60] Act of Apr. 2, 1792, 1 Stat. 246, § 1.

[61] *Id.* § 3.

[62] *Id.* §§ 12, 13.

[63] *Id.* § 16.

[64] Aditya Bamzai & Aaron L. Nielson, *Article II and the Federal Reserve*, 109 Cornell L. Rev. 843, 874 (2024) (cleaned up).

[65] *Id.*

[66] *Id.* at 877.

[67] *Slaughter,* 146 S. Ct. at 2320, 2324–25, 2334 (Sotomayor, J. dissenting).

II. The Modern Administrative State

Throughout the dissenting opinion is the premise that Congress may "create[] agencies that in various ways . . . embod[y] th[e] goal[s] of independence" and "expertise," to "ensur[e] 'a continuous policy, free from the effect of changing White House incumbency'" and capable of "accomplish[ing] the modern work of Government."[68] This premise is largely anachronistic, embodying a view of government that arose long after the Founding. Indeed, it was openly hostile to the Founding. The "modern" view of government, developed in the Progressive and New Deal Eras, derided the Constitution's "simplistic" arrangement as an obstruction to meeting the needs of modern life.[69]

In this part, after a quick summary of the Constitution's original structure and purpose, we discuss how the modern agency arose.

A. The Original Separation of Powers

The American people, through the Constitution as ratified in 1788, vested the federal government with three, and only three, powers—legislative, executive, and judicial—and divided these powers among three, and only three, branches.[70] The Constitution

[68] *Id.* at 2319, 2325, 2339 (quoting 51 Cong. Rec. 10376 (1914)); *see also id.* at 2319 ("some" government decisions should depend, not on politics, but on "judgment, expertise, and the public good"); *id.* at 2320 ("This [independent] structure allows the agencies to address complex problems while enjoying some independence from Presidential removal and thus absolute partisan control."); *id.* at 2339 ("Congress recognized not only the need for efficient and effective regulation of the increasingly complex American economy, but also the risks of concentrating such power in the hands of the President with no check against the influence of partisan control."); *id.* at 2339–40 ("Creating these agencies under the President gave the Executive Branch the tools needed to execute the law and accomplish the modern work of Government, preserving 'ample authority' for the President to ensure the 'competen[t] perform[ance]' of the officers leading the agency.") (citation omitted); *id.* at 2340 ("ensuring expertise, bipartisanship," and "stability, continuity, and the development of expertise"); *id.* at 2341 ("some Government decisions . . . depend not on political favoritism or partisan advantage (or at least not only on those considerations), but on expertise, adherence to law, judgment, and the public good") (citation omitted).

[69] *See* Gillian E. Metzger, *Forward, 1930s Redux: The Administrative State Under Siege*, 131 Harv. L. Rev. 1, 52 (2017) (It "was in the Progressive Era at the end of the nineteenth century and the early decades of the twentieth that national administrative government truly blossomed.").

[70] U.S. Const. art. I, § 1; art. II, § 1, cl. 1; art. III, § 1; *see also* The Federalist No. 47, at 324 (James Madison) (J. Cooke ed., 1961) (identifying the three "legislative, executive, and judiciary" powers as "all" of the government's powers).

itself includes exceptions—for example, the President is vested with a defined power in the legislative process (the veto), and the Senate is vested with judicial power to conduct impeachment trials.[71] Because the Constitution identifies the exceptions, the political branches may not divine their own.[72] Thus, while the government's powers are not "'hermetically' sealed from one another,"[73] they are expressly divided into "three defined categories."[74] And the grant of certain, identifiable power to each particular branch is "exclusive."[75]

Critically, of course, the "ultimate purpose of this separation of powers is to protect the liberty and security of the governed."[76] The people's liberty and security are protected by separating the government's powers because "power is of an encroaching nature,"[77] and "a majority . . . united by a common interest" leaves the "rights of the minority . . . insecure."[78] Therefore, Madison explained, the "constant aim [wa]s to divide and arrange the several [branches] in such a manner as that each may be a check on the other."[79] This tripartite structure may seem simple. But, as Justice Scalia noted, this liberty-protecting structure is the "real key to the distinctiveness of America."[80] It was this structure, with its checks and balances, that drew the ire of Progressive reformers, whose ideas led to the modern administrative state.

[71] U.S. CONST. art. I, §§ 7, 3, cl. 6.

[72] Under the negative implication canon, *expressio unius est exclusio alterius*, "the specification" of one or few things generally "implies the exclusion" of others not specified. ANTONIN SCALIA & BRYAN A. GARMER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 107 (2012).

[73] INS v. Chadha, 462 U.S. 919, 951 (1983) (citation omitted).

[74] *Id*.

[75] Dep't of Transp. v. Ass'n of Am. R.R., 575 U.S. 43, 67 (2015) (Thomas, J., concurring in the judgment) (citations omitted).

[76] Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 272 (1991).

[77] THE FEDERALIST No. 48, at 332 (James Madison) (J. Cooke ed., 1961).

[78] THE FEDERALIST No. 51, at 351 (James Madison) (J. Cooke ed., 1961).

[79] *Id*. at 349.

[80] *See* Considering the Role of Judges Under the Constitution of the United States: Hearing Before the S. Comm. on the Judiciary, 112th Cong., at 40:21 (2011) (statement of Justice Antonin Scalia), https://tinyurl.com/2k3u2m3v.

B. The Progressive Amendment of Tripartite Government[81]

1. The Progressive Premise

The Progressive framers of the modern administrative state viewed the separation of powers as antiquated, insufficiently based in science and expertise, amenable to partisan control, and unable to address the complexities of modern society.[82] According to Woodrow Wilson, government "is not a machine, but a living thing," and—taking aim at the Constitution's separation of powers—"[n]o living thing can have its organs offset against each other, as checks, and live."[83] Indeed, he claimed, "[t]here can be no successful government without the intimate, instinctive coordination of the organs of life and action."[84]

Therefore, the problem, as Wilson put it, in a piece called "Leaderless Government," is that "we have the composite thing which we call the Government of the United States. Its several parts are severally chosen; it is no unified and corporate whole."[85] "It is a government without definite order," he charged, "showing a confused interplay of forces, in which no man stands at the helm to steer, whose course is beaten out by shifting winds of personal influence and popular opinion."[86]

Felix Frankfurter argued that "[e]nforcement of a rigid conception of separation of powers would make modern government impossible."[87] It was thus incumbent on the *study of administration* to

[81] This section draws from Pacific Legal Foundation's *amicus* briefs filed in *Slaughter* and other separation-of-powers cases. *See* Briefs *Amicus Curiae* of Pacific Legal Foundation, Trump v. Slaughter, No. 25-332 (U.S. filed Oct. 2025); Axon Enter. Inc. v. FTC, No. 21-86 (U.S. filed May 2022); United States v. Arthrex, Inc., Nos. 19-1434, 19-1452, 19-1458 (U.S. filed Dec. 2020); Seila Law LLC v. CFPB, No. 19-7 (U.S. filed Dec. 2019); Lucia v. SEC, No. 17-130 (U.S. filed Feb. 17, 2018).

[82] *See, e.g.*, Felix Frankfurter, The Public and Its Government 152 (Yale Univ. Press 1930) ("The staples of contemporary politics—the organization of industry, the control of public utilities, and well-being of agriculture, the mastery of crime and disease—are deeply enmeshed in intricate and technical facts, and must be extricated from presupposition and partisanship."); Frank J. Goodnow, The Principles of Administrative Law in the United States 31 (1905) (arguing that while Montesquieu's principle was widely accepted by 18th-century thinkers as "a legal rule," it was not so accepted "as a scientific theory").

[83] Woodrow Wilson, The New Freedom 47 (Doubleday, Page & Co. 1918).

[84] *Id.* at 48.

[85] Woodrow Wilson, *Leaderless Government*, 3 Va. L. Register 337, 349 (1897).

[86] *Id.*

[87] Frankfurter,, *supra* note 82, at 78.

"discover the best principles upon which to base [the] distribution" of constitutional authority.[88] As James Landis put it, "the administrative process spr[ang] from the inadequacy of a simple tripartite form of government to deal with modern problems."[89] And "[r]esolving the deeper problems of American government required a new understanding of democracy" itself.[90]

2. The Attempt to Separate Administration from Politics

The framers of the modern administrative state, relying on the study of administration to "discover the best principles upon which to base [the] distribution" of constitutional authority,[91] aimed to separate—not the government's powers from each other—but rather administration from politics. As Wilson argued, "administration lies outside the proper sphere of *politics*. Administrative questions are not political questions."[92] And, he continued, "[a]lthough politics sets the tasks for administration, it should not be suffered to manipulate its offices."[93] Accordingly, Frankfurter argued, power "must more and more be lodged in administrative experts."[94] But this new power would *not* be controlled by "the traditional machineries and processes of law."[95] Instead, safeguards would be based on "high standards of professional service, an effective procedure . . ., easy access to public scrutiny and a constant play of alert public criticism."[96]

Ignoring the Founders' clear-eyed view of human nature,[97] the framers of the administrative state argued for autonomy from

[88] Woodrow Wilson, *The Study of Administration*, 2 Pol. Sci. Q. 197, 213 (1887).

[89] James M. Landis, The Administrative Process 1 (1938).

[90] Mark Tushnet, *Administrative Law in the 1930s: The Supreme Court's Accommodation of Progressive Legal Theory*, 60 Duke L.J. 1565, 1574 (2011) (discussing Frankfurter and Landis).

[91] Wilson, *supra* note 95, at 213. *Administration*, 2 Pol. Sci. Q. 197, 213 (1887).

[92] *Id.* at 210.

[93] *Id.*

[94] Frankfurter, *supra* note 89, at 157–58.

[95] Tushnet, *supra* note 97, at 1575.

[96] Frankfurter, *supra* note 89, at 159.

[97] *See, e.g.*, The Federalist No. 51, at 349 (James Madison) (J. Cooke. ed., 1961) ("If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.").

oversight.[98] As Professor Mark Tushnet explained, the slow and disjointed processes of legislation and judicial review had to be jettisoned.[99] Moving forward, Congress would delegate broad grants of rulemaking authority to independent experts, and courts would apply only "deferential oversight" to those experts administering the law—all "so that the nation's regulatory experiment could continue."[100] Herbert Croly acknowledged that the resulting expert entity, called a "commission," did "not fit into the traditional classification of governmental powers" because "[i]t exercises an authority which is in part executive, in part legislative, and in part judicial."[101]

The people's liberties would, in turn, become negotiable, as administrative law trumped constitutional law. As Goodnow put it, because "*constitutional* law goes no further than to sketch out the general plan" and "simply states in a general way what are individual rights," it was "[left] to the *administrative* law to indicate how far [individual rights] are modified by the powers granted to administrative officers, and what remedies are open in case individual rights are violated."[102]

3. Wilson's New Government

Wilson saw the growth of the administrative state, which took place "for the most part without [constitutional] amendment," as

[98] Wilson argued that it "is . . . manifestly a radical defect in our federal system that it parcels out power and confuses responsibility as it does." As scholar Ronald J. Pestritto explained, in contrast to the Founders' reliance on checks to counter ambition, Wilson thought "openness and a cabinet system" would solve the problem of self-interestedness. RONALD PESTRITTO, WOODROW WILSON AND THE ROOTS OF MODERN LIBERALISM 125 (Roman & Littlefield Pubs., Inc. 2005).

[99] Tushnet, *supra* note 90, at 1568.

[100] Charles M. Haar & Michael Allen Wolf, Euclid *Lives: The Survival of Progressive Jurisprudence*, 115 HARV. L. REV. 2158, 2161 (2002) (footnote omitted).

[101] HERBERT CROLY, PROGRESSIVE DEMOCRACY 364 (The MacMillan Co. 1915).

[102] FRANK J. GOODNOW, THE PRINCIPLES OF ADMINISTRATIVE LAW IN THE UNITED STATES 47 (1905) (emphasis added). The Supreme Court dutifully obliged. *See, e.g.*, Block v. Hirsh, 256 U.S. 135, 155 (1921) (explaining that "circumstances" can transform traditional "matter[s] of purely private concern" into "public affair[s]" amenable to comprehensive regulation); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 442 (1934) ("[T]here has been a growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare."); *see also* Truax v. Corrigan, 257 U.S. 312, 376 (1921) (Brandeis, J., dissenting) ("In the interest of the public and in order to preserve the liberty and property of the great majority of citizens of a state, rights of property and the liberty of the individual must be remolded, from time to time, to meet the changing needs of society.").

"perfectly normal and legitimate."[103] Tellingly, he noted, this legitimacy did not stem from "the original intention of those who drew the paper."[104] In fact, Wilson readily conceded this "adaptation" would "fill its framers of the simple days of 1787 with nothing less than amazement."[105] But this was a feature—not a bug—of Wilson's new government, for the Constitution "cannot be regarded as a mere legal document, to be read as a will or a contract would be," but "must, of the necessity of the case, be a vehicle of life."[106] And, as "the life of the nation changes so must the interpretation of the document which contains it change" based on "the exigencies and the new aspects of life itself."[107]

III. Unitary Government

The *Slaughter* dissent now becomes easier to understand—but harder to defend. Indeed, the dissent ignores the intellectual history of the administrative state altogether. The closest it comes is its reference to Justice Neil Gorsuch's concurring opinion,[108] which discusses themes presented in this Article.

Instead, the dissent wrongly claims a consistent practice of "independent" agencies going back to the Founding but especially over the last 140 years.[109] Even Professor Cass R. Sunstein, a defender of the modern administrative state, has acknowledged that "[a]lthough administrative agencies have been a part of government since the founding of the republic, the modern regulatory agency is a recent phenomenon[,] . . . it was not until the New Deal that the modern agency became a pervasive feature of American government."[110]

[103] WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 192 (1908).

[104] *Id.*

[105] *Id.* at 158; City of Arlington v. FCC, 569 U.S. 290, 313 (2013) (Roberts, C.J., dissenting). ("The Framers could hardly have envisioned today's 'vast and varied federal bureaucracy' and the authority administrative agencies now hold over our economic, social, and political activities.") (quoting *Free Enter. Fund*, 561 U.S. at 499).

[106] WILSON, *supra* note 103, at 192.

[107] *Id.*

[108] *Slaughter*, 146 S. Ct. at 2340 (Sotomayor, J., dissenting) (citing *id.* at 2311–19 (Gorsuch, J., concurring)).

[109] *Id.* at 2319.

[110] Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 424 n.9 (1987).

First, as noted, the powers exercised by the Mint Board and other early agencies have little, if anything, in common with today's powerful independent agencies like the FTC and the Securities and Exchange Commission (SEC). Similarly, the First and Second Banks of the United States acted as private banks (albeit with public functions), not as government agencies with powers to investigate and enforce laws and regulations. But even if we focus on the past 140 years, the dissent papers over the fact that today's agencies acquired most of their powers within the past four to five decades. As Chief Justice Roberts observed, while "modern administrative agencies" perhaps "fit most comfortably within the Executive Branch, as a practical matter they exercise" all three powers of government.[111] Nor is the "accumulation of these powers in the same hands . . . an occasional or isolated exception to the constitutional plan; it is a central feature of modern American government."[112]

The FTC, for example, exercises legislative power—the power to adopt generally applicable rules for the government of society[113]—when it "define[s] with specificity acts or practices which are unfair or deceptive acts or practices" under the Federal Trade Commission Act.[114] Similarly, the CFPB is authorized to "prescribe rules or issue orders or guidelines pursuant to" more than a dozen laws, including the Fair Debt Collection Practices Act and the Truth in Lending Act.[115] Some agencies adopt new policies through enforcement actions—and may enforce these new policies retroactively.[116] The extensive legislative authorities exercised by agencies are new. As then-Professor Elena Kagan recognized, "From the beginning of the twentieth century onward, many statutes authorizing agency

[111] *City of Arlington*, 569 U.S. at 312 (Roberts, C.J., dissenting); Sunstein, *supra* note 110, at 446.

[112] *City of Arlington*, 569 U.S. at 313 (Roberts, C.J., dissenting).

[113] Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 136 (1810).

[114] 15 U.S.C. § 57a(a)(1)(B).

[115] 12 U.S.C. §§ 5481(12), 5581(a)(1)(A), 5581(b).

[116] The National Labor Relations Board (NLRB) notes this practice on its website. *See* https://tinyurl.com/3bmbvut8. *See also* 12 U.S.C. § 5492(a)(10) (The CFPB may "implement[] the Federal consumer financial laws through . . . enforcement actions."). *But see* Brown-Forman Corp. v. NLRB, 169 F.4th 646, 656–71 (6th Cir. 2026) (invalidating NLRB's use of retroactive policymaking via adjudication because the NLRB did so without respecting the bounds of its adjudicatory authority).

action included open-ended grants of power, leaving to the relevant agency's discretion major questions of public policy."[117]

Independent agencies also exercise executive power by investigating and enforcing—both in-house and in-court—laws enacted by Congress and the agencies' own rules and regulations.

Finally, independent agencies exercise judicial power—the "power to bind parties and to authorize the deprivation of private rights"[118]—when they adjudicate disputes. The FTC, SEC, NLRB, Consumer Product Safety Commission (CPSC), and many more agencies are authorized to both prosecute and adjudicate alleged violations of law in their in-house tribunals.[119] Typically, an administrative law judge (ALJ) employed by the agency will conduct the hearing.[120] These ALJs have significant powers and discretion, including supervising discovery, issuing subpoenas, deciding motions, and ruling on the admissibility of evidence. As the Supreme Court noted, "an SEC ALJ exercises authority 'comparable to' that of a federal district judge conducting a bench trial."[121] Following an ALJ's "initial" decision, either the respondent or the agency's enforcement counsel may appeal to the agency itself.[122] In these administrative appeals, agencies have significant discretion, including the authority to issue new findings of fact.[123] Only after this process may regulated parties seek judicial review. But even then, the agency's factual findings are "conclusive" if "supported by substantial evidence on the record considered as a whole."[124] As a result, private parties subjected to these kinds of

[117] Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2255 (2001) (footnote omitted).

[118] William Baude, *Adjudication Outside Article III*, 133 Harv. L. Rev. 1511, 1513–14 (2020).

[119] *See* 15 U.S.C. § 45 (FTC); 15 U.S.C. §§ 77h–1, 78u–2, 78u–3, 80b–3 (SEC); 29 U.S.C. § 160 (NLRB); 15 U.S.C. § 2064(f) (CPSC).

[120] *See, e.g.*, SEC v. Jarkesy, 603 U.S. 109, 117 (2024) (describing SEC in-house process through which the Commission itself, or one of its ALJs, presides).

[121] Lucia v. SEC, 585 U.S. 237, 242 (2018) (citation omitted).

[122] *See, e.g.*, 16 C.F.R. § 1025.53 (providing for appeal from initial decision to CPSC).

[123] *See, e.g.*, 16 C.F.R. § 1025.55 (authorizing CPSC, "to the extent necessary or desirable, exercise all the powers which it could have exercised if it had made the Initial Decision").

[124] 29 U.S.C. § 160(e) (setting forth standard of judicial review of NLRB decisions); *see also* 5 U.S.C. § 706(2)(E) (setting forth substantial evidence "scope of review" for administrative fact-finding).

in-house agency proceedings are never afforded the right to an independent fact-finder.

Indeed, unlike agencies from the Progressive Era through the 1960s, which were generally limited to issuing cease-and-desist orders to prevent *future* violations of the law,[125] agencies today may impose financial liability for *past acts*,[126] a livelihood-destroying power previously confined to courts and juries. The Supreme Court did not greenlight this new authority until 1978.[127] That judicial innovation, in turn, encouraged Congress, from 1978 to 2010, to increase the fines that agencies could impose—in some cases, by many orders of magnitude.[128] Today, "[t]he U.S. Code currently includes at least 188 express authorizations [for executive agencies] to adjudicate money penalties, subject to deferential judicial review,"[129] and in 2022 alone, agencies exacted "$10,444,092,795 across 1,329 cases."[130] Only by disregarding the ballooning of agency authority from 1978 to 2010 can the dissent mistake a post-1978 creation for a holdover from the Progressive and New Deal Eras.

The dissent's lament that the result of the *Slaughter* decision is "a President who emerges with far greater power than ever before,"[131] is true—as far as it goes. But it ignores how such a powerful President emerged: (1) Congress delegated vast legislative, executive, and judicial powers to *executive-branch* agencies, and (2) the Supreme Court—with the *Slaughter* dissenters' philosophical backing—approved those delegations and an expansive view of Congress's enumerated powers necessary to sustain them.[132] Indeed, the dissent *endorses* federal government regulation over "the management of nuclear energy; the security of the monetary supply; and the safety

[125] William Yeatman & Keelyn Gallagher, *The Rise of Money Sanctions in Federal Agency Adjudication*, 76 Admin. L. Rev. 857, 860, 863–64 (2024).

[126] *Id.* at 875.

[127] *See* Atlas Roofing Co. v. OSHRC, 430 U.S. 442 (1977).

[128] Yeatman & Gallagher, *supra* note 125, at 885.

[129] *Id.*

[130] *Id.* at 884.

[131] *Slaughter*, 146 S. Ct. at 2346 (Sotomayor, J., dissenting).

[132] *See* FCC v. Consumers' Rsch., 606 U.S. 656, 673 (2025) (Kagan, J., for the Court) (allowing Congress to delegate vast rulemaking discretion as long as it provides an "intelligible principle"); NFIB v. Sebelius, 567 U.S. 519, 599–602 (2012) (Ginsburg, J., dissenting, joined, inter alios, by Sotomayor and Kagan, J.J.) (endorsing an extremely broad reading of Congress's authority under the Commerce Clause).

of American workplaces, consumer products, . . . chemical hazards," the "protect[ion of] Americans against harms caused by dangerous goods,"[133] and "so much more."[134] But its endorsement rests on a governmental structure that the Constitution did not establish.

As noted previously, the dissent also contends—implausibly—that modern administrative agencies have not fundamentally changed. According to the dissent, "the FTC of 1935, like today's FTC, had the power to conduct investigations, make rules, and bring enforcement actions."[135] It ignores the *legislative* nature of the modern agency's rules and the *judicial* nature of their in-house enforcement actions. Yet the dissent may have a point when it says that "[i]f . . . the political branches [did go] too far in assigning certain powers to the FTC over the years, . . . it is unclear why the appropriate remedy at this point would not be to sever these additional, objectionable powers."[136]

Leaving aside the severability doctrine, the dissent is correct that the Supreme Court has largely approved of the dramatic growth of the modern administrative state. The majority opinion in *Slaughter* elides this point. It notes that the FTC "has the power to promulgate substantive rules that carry the force of law."[137] According to the majority, however, the "power to flesh out such statutory regimes—and to do so through discretionary actions, largely outside the remit of courts—is executive through and through."[138] To be sure, the executive branch must interpret the laws and apply them as it understands them. But the majority's description of this "executive" power seems to leave out the possibility that Congress might delegate legislative power to executive agencies.[139]

Similarly, the majority states that today's FTC "enforces . . . statutes and rules through in-house adjudications" and that "[t]his power, too, is executive."[140] Again, the executive branch may exercise

[133] *Slaughter*, 146 S. Ct. at 2319, 2340 (Sotomayor, J., dissenting).

[134] *Id.* at 2314 (Gorsuch, J., concurring).

[135] *Id.* at 2323 (Sotomayor, J., dissenting) (citation omitted).

[136] *Id.*

[137] *Id.* at 2304 (majority opinion).

[138] *Id.* at 2305 (citing *Seila Law*, 591 U.S. at 218–20).

[139] *See id.* at 2314 (Gorsuch, J., concurring) (noting that *Humphrey's Executor* made "independent agencies more tempting repositories for delegated powers that the President could not access with quite such ease").

[140] *Id.* at 2305 (majority opinion) (citing *Seila Law*, 591 U.S. at 219).

executive power through adjudicative-like procedures. But when these executive adjudications bind private rights—as they often do—these adjudications are exercises of the *judicial* power.

* * *

Both the majority and the dissent sidestep a key issue—whether the "independent" agencies exercise (only) executive power. The majority decision—that the President must have authority to remove principal executive officers at will—can be supported in full only if the officers exercise executive power. The majority assumes that to be the case, on the basis of perhaps an overly formalistic view that executive agencies necessarily exercise only executive powers. But the dissent, too, relies on an unfounded premise, namely, that unrestricted removal power is dangerous because independent executive agencies—not the President—are proper repositories of vast swaths of legislative, executive, and judicial powers.

IV. Reliance Interests?

In arguing that *stare decisis*, if nothing else, precludes the majority's conclusion, the dissent emphasizes the reliance interests of Congress, which depended on *Humphrey's Executor* to "construct[] the modern system of Government."[141] For all the reasons discussed previously, *this* reliance interest cuts exactly the other way.

The dissent later adds that "[o]rdinary Americans and regulated firms alike have organized their affairs understanding that some Government decisions will depend not on political favoritism or partisan advantage (or at least not only on those considerations), but on expertise, adherence to law, judgment, and the public good."[142] That's a nice theory. But this "understanding" is not necessarily well-founded. We'll discuss one case to show the arbitrariness of the "modern system of Government."

PLF represented Leachco, Inc., a family business in Ada, Oklahoma, in an administrative proceeding launched by the CPSC, which alleged

[141] *Id.* at 2339 (Sotomayor, J., dissenting); *but see* Citizens United v. FEC, 558 U.S. 310, 365 (2010) (refusing to credit similar legislative reliance for purposes of *stare decisis* because otherwise "legislative acts could prevent us from overruling our own precedents, thereby interfering with our duty 'to say what the law is'").

[142] *Slaughter*, 146 S. Ct. at 2341 (Sotomayor, J., dissenting) (citation omitted).

that Leachco's infant lounger (called a "Podster") was a "substantial product hazard."[143] The CPSC had the burden to show that (1) the Podster is a defective product (2) that causes (3) a substantial risk of injury to the public.[144] The allegations were specious. While three infants had, sadly, died in or near one of the 180,000 Podsters on the market, they died because of caregiver misuse.[145] But leaving misuse aside, even if each Podster had been used only once (an unreasonably low estimate, as one of CPSC's experts admitted), the risk of injury was *less than two one-thousandths of a percent* (0.0017%). Hardly a substantial risk of injury to the public.[146] Yet, the CPSC relied on its extraordinary delegation to protect the public against risks merely "associated with" consumer products,[147] and its own nonbinding interpretive regulation through which the agency may consider (or not) various factors, including "other factors [the CPSC deems] relevant," to decide whether a product is defective.[148]

The CPSC's arbitrary power continues in its administrative hearings. Under CPSC rules, which have not been updated since 1982,[149] parties may not conduct fact or expert depositions without leave of the proceeding's "Presiding Officer" and may not issue subpoenas

143 The CPSC's adjudication docket can be found here: https://tinyurl.com/2tvr3zpz. PLF, on Leachco's behalf, also filed a collateral action in federal court for an order enjoining the CPSC proceeding on the grounds that the Commissioners enjoyed unlawful for-cause removal protections. The Supreme Court denied Leachco's cert petition, which presented the question whether *Humphrey's Executor* should be overruled. *See* Leachco, Inc. v. Consumer Prod. Safety Comm'n, 103 F.4th 748 (10th Cir. 2024), *cert. denied*, 145 S. Ct. 1047 (2025).

144 15 U.S.C. § 2064(a)(2).

145 In one case, daycare personnel placed an infant in a Podster, placed the Podster in a crib, put a bottle in the infant's mouth, and left him unsupervised for 45 minutes. Another infant was similarly left unsupervised. And the other infant, put to sleep in her parents' bed (maybe but not definitively in a Podster), suffocated under one of her parents.

146 Sadly, approximately 3,500 infants in the United States die each year while sleeping. *See* Rachel Y. Moon, et al., *Sleep-Related Infant Deaths: Updated 2022 Recommendations for Reducing Infant Deaths in the Sleep Environment*, 150 Pediatrics (July 2022), at e2022057990, https://tinyurl.com/yphkychu. Many deaths occur in products that the CPSC itself recommends for "safe sleep." *See* Consumer Product Safety Commission, Injuries and Deaths Associated with Nursery Products Among Children Younger than Age Five (2026). https://tinyurl.com/t3c5yc5t.

147 15 U.S.C. § 2051(b)(1).

148 16 C.F.R. § 1115.4.

149 *See* 16 C.F.R. pt. 1025.

without approval from the Commission.[150] The presiding officer may "relax[]" the Federal Rules of Evidence if he or she determines that "the ends of justice will be better served by so doing."[151]

The hearing in Leachco's case lasted four days. The CPSC's evidence consisted almost entirely of hearsay.[152] Indeed, expert reports in CPSC cases are treated as direct testimony and, because prehearing depositions are presumptively precluded, experts are not cross-examined until the hearing itself.[153] And the expert testimony presented by the CPSC was woefully inadequate. One of its experts was a 34-year employee, whose work before the hearing included analyzing Leachco's Podster—work that led directly to the CPSC's administrative lawsuit. This expert was offered to testify that the Podster's design uniquely encouraged people to misuse it. Her testimony was nothing more than conjecture and anecdote. She admitted that she conducted no surveys or studies, and relied on no methodologies, to support her opinion.[154]

The CPSC also designated Dr. Erin Mannen as an expert to testify about the Podster's alleged defects. Dr. Mannen, however, has received—and continues to receive—research funding from the CPSC,[155] an obvious conflict of interest. Regardless, her testimony was wholly unreliable. Virtually none of the studies she relied on had been peer-reviewed, and none had been validated to correlate with live-infant results. For example, Dr. Mannen used crash test dummies to measure "neck flexion," that is, the angle of a dummy's "neck." She purported to measure the angle of a crash test dummy's "neck" when placed in a Podster (by Dr. Mannen herself) and then compared that measurement with the angle (0°) on a flat mattress. According to her measurements, the dummy's "neck" was "flexed" more in the Podster and, at some point, flexion can be dangerous. But Dr. Mannen could not and did not identify that danger point.

[150] 16 C.F.R. §§ 1025.35(a), 1025.38(c), 1025.44(b).

[151] 16 C.F.R. § 1025.43(a).

[152] *See* Leachco's Answering Brief at 40-41, In the Matter of Leachco, Inc., CPSC No. 22-1 (Oct. 17, 2024).

[153] 16 C.F.R. § 1025.44(b). Under the Federal Rules of Evidence, expert reports are hearsay, experts are deposed before trial, and experts may present direct evidence at trial only by testifying. Fed. R. Civ. P. 26(b)(4)(A).

[154] *See* Brief for Respondent at 18, 74-85, In the Matter of Leachco, Inc., CPSC No. 22-1 (CPSC Sept. 29, 2023), https://tinyurl.com/677mvh8w.

[155] *See id.* at 70.

The rest of her testimony followed the same script: some feature or use of the Podster might be "more" dangerous than that of a mattress. But she never established when such "danger" rose to the level of presenting a substantial risk of injury to the public. You can read all the painful details in Leachco's post-hearing brief.[156]

After the hearing in August 2023, the presiding officer issued an initial decision in July 2024 and ruled in Leachco's favor.[157] He concluded that the CPSC's (enforcement lawyers) failed to prove the Podster had a defect and, even if some technical defect had been established, the agency failed to prove that any defect created a substantial risk of injury to the public.

One might argue that the Wilsonian scheme worked here—the nonpartisan ALJ reached the correct result. Two points in response. First, the ALJ was not employed by the CPSC[158]—unlike the ALJs who oversee in-house adjudications at the SEC, FTC, NLRB, and elsewhere. Second, it strains credulity to think that the CPSC would have launched its case against Leachco had it known it would have had to prove its case in an independent court before a jury in Oklahoma. The Leach family was put through a stressful and expensive ordeal because the CPSC has vast discretionary executive power—and, as discussed next—judicial power.

After the ALJ's decision, the agency's enforcement lawyers filed an appeal—to the Commission, the very entity that approved filing charges in the first place.[159] "Appellate" briefing was completed in November 2024, but the Commission did nothing for almost a year and a half.

Finally, in March 2026—eight years after beginning its investigation and four years after initiating its administrative action—the

[156] *See id.* at 26–71.

[157] *See* Memorandum Opinion and Initial Order, In the Matter of Leachco, Inc., CPSC No. 22-1 (CPSC July 3, 2024), https://tinyurl.com/3mk46fub.

[158] *See* Order Scheduling Prehearing Conference, In the Matter of Leachco, Inc., CPSC No. 22-1 (CPSC Apr. 4, 2022) https://tinyurl.com/3zffhvdm. (ALJ from Federal Mine Safety and Health Review Commission noting "interagency agreement for the loan of [ALJ's] services" to the CPSC).

[159] 16 C.F.R. § 1025.55 (providing for appeal of initial decision). On review, the Commission "shall, to the extent necessary or desirable, exercise all the powers which it could have exercised if it had made the Initial Decision." *Id.* § 1025.55(a). The Commission may, therefore, adopt new findings of fact.

Commission folded and dismissed its complaint against Leachco.[160] But the Commission added one last insult: It vacated the Presiding Officer's decision to prevent other regulated parties from using it as precedent.[161]

In sum, in its in-house administrative enforcement proceedings, the Commission enforces its own regulations, makes its own procedural and evidentiary rules—which it can follow or not at its own discretion—and serves as prosecutor, judge, jury, and appellate court (with de novo fact-finding power). It can also "disappear" decisions it does not like. And decisions it does not like are subjected to only "substantial evidence" upon judicial review.[162] All of this, the *Slaughter* dissent has assured us, is based on "expertise, adherence to law, judgment, and the public good."[163]

Conclusion

Slaughter is correct as a matter of constitutional first principles: The President has the power to fire principal executive-branch subordinates because only then can the people hold Washington's vast bureaucracy to account. The dissent's contrary vision of our Constitution is irreconcilable with the Founding and follows, instead, Progressive reformers who openly criticized the Constitution's separation of powers.

But the *Slaughter* majority opinion has its faults. The majority endorses the overly formalist stance that everything done by today's executive branch is necessarily executive, suggesting that the Court "do[es] not allow intrusions on Article I nor on Article III."[164] But the Court *does permit* such intrusions. In the aftermath of the New Deal, the justices have tolerated virtually unfettered delegations of legislative power to the executive branch, leaving it to agencies to "fill out"

[160] *See* Order Vacating Initial Decision, In the Matter of Leachco, Inc., CPSC No. 22-1 (CPSC Mar. 16, 2026), https://tinyurl.com/56wrt6aw. The Commission pointed to a recently adopted standard for infant loungers and the need to prioritize agency resources as justifications for dismissal. *See id*. at 5, 7. Left unmentioned were the significant resources Leachco went through to defend itself against baseless accusations. The Commission also noted that Leachco no longer sells the Podster. *Id*. at 6. Yet that was true long before the Commission's final decision.

[161] *Id*. at 8–9. *See* 16 C.F.R. § 1025.55(b).

[162] 15 U.S.C § 2060(c).

[163] *Slaughter*, 146 S. Ct. at 2341 (Sotomayor, J., dissenting) (citation omitted).

[164] *Id*. at 2310 (majority opinion).

the major details of federal policy.[165] At the same time, the Court has expanded executive authority to adjudicate administrative actions and impose significant monetary sanctions subject only to limited judicial review, sapping the protections provided by juries and tenure-protected judges.[166] After *Slaughter*, these rulemaking and adjudicatory functions effectively belong to the President, empowering one man to make the law, enforce the law, and adjudicate deprivations under the law: "the very definition of tyranny."[167]

To restore the Framers' vision, the Court must recalibrate the balance of powers by preventing executive encroachments on the legislative and judicial branches. This recalibration will require the Court to revisit the nondelegation and public rights doctrines. The legacy of *Slaughter* may well depend on it. But the stakes extend further: Will the Court enforce legislative and judicial prerogatives as vigorously as it champions the unitary executive? Or will the "unitary executive" become, in practice, unitary *government*?

[165] *See Consumers' Rsch.*, 606 U.S. at 673 (explaining Congress need only provide an "intelligible principle" to satisfy Article I's Vesting Clause).

[166] *See Atlas Roofing*, 430 U.S. at 450 (expanding the "public rights exception" to Article III to permit executive adjudication of claims brought by the government "in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact"). While the Court has recently undermined *Atlas Roofing*, *Jarkesy*, 603 U.S. at 109, 138–39 & n.4, lower courts continue applying it to deny Americans their right to a neutral judicial tribunal. *See, e.g.*, Axalta Coating Sys. LLC v. FAA, 144 F.4th 467, 476, 477 (3d Cir. 2025).

[167] The Federalist No. 47, at 324 (James Madison) (J. Cooke ed., 1961).