

# Supreme Court uses shadow docket to uphold Trump's termination of Federal Trade commissioner

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On October 6, the Supreme Court will begin its 2025 term with routine oral arguments in a case turning on whether a Texas trial judge violated the Constitution by prohibiting a criminal defendant from conferring with counsel during a recess in trial testimony. More than 30 other oral arguments will take place before the December recess, mixing relatively mundane procedural, regulatory and taxation issues with so-called “hot button” items, such as the death penalty, voting rights, religion, campaign finance and transgender athletes.

Based on historical averages, roughly 40 or 50 more cases will be accepted, briefed, argued and decided before the current Supreme Court term ends early next summer.

Rather than relying on this traditional “merits docket,” however, the Supreme Court’s six-justice extreme right-wing majority now rules increasingly through “emergency orders” on the “shadow docket,” almost always aligning with the fascistic Republican Party and expanding the executive power wielded by President Donald Trump.

Continuing this trend, on Monday, September 22, the majority filed a summary order that effectively ends the case brought by Federal Trade Commission (FTC) member Rebecca Slaughter challenging her termination by Trump.

Congress established the FTC in 1914 to regulate domestic commerce and protect against monopoly. To give it at least some political independence, the enabling statute limits the removal of commissioners to cases of “inefficiency, neglect of duty, or malfeasance in office,” a typical “good cause” provision.

The Supreme Court decided 90 years ago in

*Humphrey’s Executor v. United States* that Congress can create agencies such as the FTC and insulate their members from presidential removal unless good cause for firing exists. This principle, important to the checks and balances underlying the overall constitutional framework, has come under recent attack from right-wing Supreme Court justices, who advocate a so-called “unitary executive.”

On March 18, Trump sent terse emails terminating Slaughter and another FTC commissioner, Alvaro Bedoya, prompting Slaughter to write that Trump violated “the plain language of a statute and clear Supreme Court Precedent ... because I have a voice, and he is afraid of what I’ll tell the American people.” Bedoya, who is no longer challenging Trump’s action, added, “The President wants the FTC to be a lap dog for his golfing buddies.”

Ironically, Slaughter was originally nominated by Trump in 2018 to serve as one of the FTC’s seven commissioners. In 2023, Joe Biden renominated her to a second term, which was scheduled to end in 2029.

Citing the statutory language and *Humphrey’s executor*, last July, Washington D.C. District Judge Loren AliKhan ordered that Slaughter remain on the FTC while the case continues to trial in her court on whether good cause existed for her termination. AliKhan’s decision was affirmed by the D.C. Court of Appeals on September 2.

Within a week, however, Chief Justice John Roberts, an open proponent of the unitary executive, temporarily stayed the order reinstating Slaughter to her position. When the five other far-right justices joined him Monday, Slaughter’s legal position became hopeless, although the Supreme Court is going through the

motions of setting her case for oral argument on the merits docket during early December to consider formally whether *Humphrey's Executor* should be overruled.

Justice Elena Kagan wrote a two-paragraph dissent, joined by Justices Sonia Sotomayor and Ketanji Brown Jackson. She wrote:

Our emergency docket should never be used, as it has been this year, to permit what our own precedent bars. Still more, it should not be used, as it also has been, to transfer government authority from Congress to the President, and thus to reshape the Nation's separation of powers.

Kagan pointed out that *Slaughter's* case follows those of Cathy Harris, a member of the Merit Systems Protection Board, and Gwynne Wilcox, an appointee to the National Labor Relations Board, both of whom, like the FTC commissioners, were fired for no reason by Trump despite congressional statutes restricting removal to good cause.

Both Harris and Wilcox were also reinstated by trial judges, and those orders were affirmed in the D.C. Court of Appeals. Also, both reinstatements were vacated with emergency orders from the right-wing Supreme Court majority, purportedly because "the Government faces greater risk of harm from an order allowing a removed officer to continue exercising the executive power than a wrongfully removed officer faces from being unable to perform her statutory duty."

Mary Boyle, a Consumer Product Safety Commissioner, protected by a statute providing for removal only on good cause, also fell victim to an emergency order. This time there was a brief explanation from the majority: "The application is squarely controlled by *Trump v. Wilcox*."

As noted by Berkeley Law School Dean Erwin Chemerinsky, the Supreme Court "thus treated a ruling on the shadow docket, not the 90-year-old precedent, as binding on lower courts."

The shadow docket case being most closely watched now is that of Federal Reserve Board Governor Lisa Cook, whom Trump terminated without any due

process on concocted "mortgage fraud" allegations posted to a social media account. The Supreme Court's shadow docket decision, which could profoundly impact international perceptions of the stability of the United States economy, is expected within weeks.



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