

Consumer Financial Monitor Podcast (Season 7, Episode 47): The Supreme Court Opinions in Trump v. Slaughter and Trump v. Cook: What Do They Mean for the Future of the Administrative State

Speakers: Alan Kaplinsky and Lev Menand

Alan Kaplinsky:

Welcome to the award-winning Consumer Finance Monitor podcast, where we explore important new developments in the world of consumer financial services and what they mean for your business, your customers, and the industry. This is a weekly show brought to you by the Consumer Financial Services Group at the Ballard Spahr Law Firm. And I'm your host, Alan Kaplinski, the founder and former practice group leader for 25 years, and now senior counsel of the Consumer Financial Services Group at Ballard Spahr. And I'll be moderating today's program. Well, today we're going to be discussing two of the most important separation of powers decisions issued by the Supreme Court in decades. Trump v. Slaughter and Trump v. Cook, decided on June 29th, 2026, and both written by Chief Justice John Roberts. Although both cases involve presidential removal authority, they point in seemingly different directions and at least in my mind, raise profound questions about the future of the administrative state.

To help us unpack these decisions, I'm delighted to be joined by Professor Lev Menand of Columbia Law School. Professor Menand is one of the country's leading scholars on administrative law, constitutional structure, financial regulation, and the Federal Reserve system. Lev has written extensively about the constitutional status of the Federal Reserve and the structure of the administrative state. His scholarship has become particularly influential as the Supreme Court has increasingly revisited foundational questions about presidential power and the constitutional limits of independent agencies. There are few academics, if any, that are qualified to help us understand the significance of today's decisions. And let me just mention before I make the formal introduction of Lev, that he was on one of our podcast shows a little more than a year ago when it was after the oral argument in the two Trump cases, both Slaughter and Cook. And also, I will commend to you an article that was published on July 7th in an online publication called Just Security.

And that of course was written shortly after the decisions came down. And I think you will find that a very good resource as well. So Lev, a very warm welcome back to you so that now we're able to complete the circle of your having - It's good to be back. Yeah, it's good to have you. But before turning to Lev, let me level set, particularly for listeners today that aren't as familiar with the two cases that you're going to be talking about as I'm sure many of our listeners are. But I'm also going to save time by summarizing what's involved in each case and the procedural posture before we get into our discussion about some of these issues that are really, I think, very interesting. First, we'll talk about Trump v. Slaughter. That case involved Rebecca Slaughter, one of the Democratic members of the Federal Trade Commission.

Shortly after taking office for his second term, President Trump removed Commissioner Slaughter and one other commissioner, Alvaro Bedoya, before the expiration of their statutory seven-year terms. The FTC Act provides that commissioners may be removed only for "inefficiency, neglect of duty or malfeasance in office." President Trump did not invoke any of those statutory grounds. Instead, he asserted that the continued service of these two commissioners was inconsistent with his administration's priorities and relied directly on his article two constitutional authority as the executive. Commissioner Slaughter challenged her removal in federal district court. Commissioner Bedoya decided not to challenge the removal. The district court ruled in Rebecca Slaughter's favor based squarely on a 1935 decision of the Supreme Court in Humphreys Executor versus United States. The DC Circuit denied the government's request for a stay, but the Supreme Court stayed the district court's injunction and granted certiorari before judgment.

In a six to three decision authored by Chief Justice Roberts, the court reversed. The court held that the FTC's for cause removal protections violate the separation of powers because FTC commissioners exercise what the court referred to as

substantial executive authority. The court emphasized that today's FTC is not simply an expert advisory body. Rather, it promulgates substantive rules, it investigates potential violations of law, it conducts enforcement proceedings, it adjudicates cases, and it seeks substantial monetary relief in federal court when it believes there have been violations of law. And Justice Roberts concluded these are all quintessential executive functions, implying that these were not functions that the FTC had back in 1935 when the *Humphreys* executor case came before the court. Perhaps even more significantly, the court expressly overruled *Humphreys* executor, concluding that its distinction between executive quasi-legislative and quasi-judicial functions cannot be reconciled with the Constitution's vesting of executive authority and power in a single president.

Chief Justice Roberts embraced what's become known as the unitary executive theory that officers exercising executive power must remain accountable to the president through his authority to remove them. Justice Sotomayor joined by Justices Kagan and Jackson dissented, arguing that the court had discarded nearly a century of settled precedent and fundamentally altered the structure of independent federal agencies. And Justice Gorsuch also wrote separately concurring in the judgment, but suggesting that the constitutional problems extend beyond removal protections to Congress's increasingly broad delegations of legislative authority to administrative agencies, an issue that was not before the court, but he felt compelled to express his views about that. Turning now to the second case, *Trump v. Cook* decided the same day involved Federal Reserve Governor Lisa Cook. President Trump sought to remove Governor Cook before the expiration of her term, asserting that statutory grounds existed for removal, different than what happened in the *Slaughter* case.

Unlike *Slaughter*, the administration did not claim unlimited presidential removal authority, rather it argued that cause for removal existed. The lower courts prevented Cook's removal while litigation proceeded and in a five to four decision, the Supreme Court left that injunction in place. Although the court didn't decide the ultimate merits, it emphasized that the Federal Reserve may occupy a unique constitutional position, both the majority in *Cook* and the majority opinion in *slaughter* noted that the Federal Reserve has historical antecedents in the first and second banks of the United States. I'm very puzzled by that, but we'll get to that, and suggested that those institutions may represent a category different from executive agencies exercise the ordinary executive power. Importantly, I think the court did not hold that the Federal Reserve governors enjoy constitutionally protected tenure, nor did it hold that Congress can insulate the Federal Reserve from presidential control.

Instead, the court simply declined for now to extend *slaughter* to the Federal Reserve, leaving many constitutional questions unresolved. Those unanswered questions make these two opinions fascinating companions, and that's exactly what we're going to talk about today. So sorry for being so long-winded Lev, but I think now we have level set and people should be familiar with these two cases. But stepping back, where do you rank *Trump v. Slaughter* among the Supreme Court's separation of powers decisions? Is this as significant as its opinions in *Myers*, *Humphrey's executor*, *Sila Law*, or even *Loebert Bright*?

Lev Menand:

It's arguably more significant than any of those decisions. We don't know for certain just yet how much of a revolution in the structure of our constitutional system, I call it better than a revolution, a deformation, how much of a deformation the *slaughter* opinion represents. But there's good reason to think that it is a more significant deformation than the *Myers* decision represented in 1926. And I think that is the only parallel in the last century plus. And maybe in the full history, the only other decision of comparable significance in my view is *Marbury versus Madison* 1803, Chief Justice John Marshall, and we can talk about why. That was really the decision that *Myers* was disrupting, and that is once again the decision that *slaughter* is disrupting. And all those other decisions you mentioned are sort of footnotes on those three major structural constitutional cases that the court has settled in its

Alan Kaplinsky:

History. Wow. The majority concluded in *slaughter* that today's FTC exercises what it calls quintessential executive functions and therefore has to be fully accountable to the president. Do you find that reasoning persuasive?

Lev Menand:

Not in the least. And I think one of the shocking features of the opinion that Chief Justice Roberts wrote is its complete failure to grapple with all of the counter arguments and reasoning behind the *Humphreys* executor opinion and the longstanding American tradition of government of laws and not of men, of offices determined by law, determined by

Congress. And just the court just completely discards this tradition without sort of engaging in it in favor of this vision of the executive branch that is textually ungrounded and unsupported and really based on a very simple sort of political science theory that Chief Justice Roberts has been spinning out going back to 2010 when the court decided free enterprise fund, but most notably going back to 2020 when the court decided sale of law where there's this idea that if a government body is not accountable to the president and not an article three court and not the legislature itself, then we have some type of government run amuck, some type of illegitimate government inconsistent with our constitutional system.

That's never been the understanding. It's not the understanding in other countries. The administrative agencies like the Federal Trade Commission, they are multiply accountable. They are accountable to the president in part, they are accountable to the legislature in part, and they are accountable to the courts in part. They are not a sort of independent branch of government. They are a component of government and they have antecedents that go back to the first Congress. And so Roberts is just sort of coming in here and putting forth a sort of theory of the Constitution that's just fundamentally disconnected from the actual tradition of the American government and from the text of the Constitution itself, making it a pretty shocking opinion in the scheme of things.

Alan Kaplinsky:

Yeah. So do you agree with Justice Sotomayor's dissent?

Lev Menand:

I agree in large part with Justice Sotomayor's dissent. I think she makes many important points about shortcomings in the majority opinion, although I think one could have written at great length about shortcomings in the majority opinion and said even more than was said here and that the risks are even greater than I think discussed in the dissent because we're fundamentally kneecapping the ability of the Congress to design a law-bound government that is capable of solving social and economic problems in the United States. And that is going to have, I think, far reaching consequences over the course of many decades if our political elites don't find a way to put the genie back in the bottle. And I'll just mention one that's been pointed out by my colleague at Columbia, Jeff Gordon. It's going to be very difficult for the federal government to create regulatory bureaucracy to govern various economic issues now that this sort of solution has been invalidated by the court, which could lead to a Brexit type of outcome for the United States where we have fragmented regulatory regimes because we rely on state regulation.

A lot of these independent commissions like the Federal Trade Commission were designed to give us a stable body of federal law that would apply across the states. And if we no longer have a federal government that's sort of capable of doing that, we're going to get law. It's going to be state-based and it's going to be fragmented and that's going to break down our national market. That's just one of many possible long-term consequences that the court doesn't grapple with.

Alan Kaplinsky:

Right. Do you see any way around the decision? Is there anything that Congress could do, assuming that they were inclined to act, which of course is a major assumption I'm making, but is there anything that they could do to in effect overrule this opinion or work within the constitutional framework? Overruled is the wrong thing to say. You can't overrule the constitution, but is there anything that could be done?

Lev Menand:

So there might be options for Congress, but the body in the best position to cut back on the excesses of this opinion, and we've barely scratched the surface I think on the excesses, is the court itself. And that's of course what happened the first time the court entertained this theory of presidential supremacy, which was in 1926 when the former president Taft, who was the chief justice of the court after his presidency, persuaded four of his colleagues over strong dissents from three other justices to endorse a version of this theory of the Constitution. Nine years later, a nine member, a full unanimous compliment of justices, nine zero voted to basically Tab and Myers. And that included four of the justices who had been in the majority. And so the court itself reversed the broad sweep of Meyers. And so what is happening here is Chief Justice John Roberts is bringing back the full sweep of the Myers decision and more.

He's suggesting that actually they'll go even beyond where Taft was comfortable going. We can talk about that. And so the best move is for the court to cabin slaughter. And the court has in fact, in this great irony really, provided the resources to do so the same day, indeed the same minute that it provided the slaughter decision, it announced a proto new Humphreys executor in the form of Trump versus Cook, where now they have created a new way to cabin this theory. And so the best path forward, I think, is for the court to endorse a Trump versus Cook style exception for a growing number of agencies. And so beyond the Federal Reserve, so how could Congress play into that? Congress could explicitly go out and reaffirm the independence of all these other agencies and tie the statutory schemes in all these other agencies to the Trump v. Cook exception to the slaughter rule, which would give the court then an occasion to say, "Oh yes, well, the independent agency, the Federal Communications Commission revamped is acceptable." And so Congress could help facilitate the court in doing what it did a hundred years ago, which is basically take back this radical theory of presidential supremacy.

Alan Kaplinsky:

Yeah. Yeah. Well, that's a good segue into Cook. And I remember my having the conversation with you after the oral argument where we both sort of scratched our heads with the reasoning that had been employed in the shadow docket by the court where they analogize the Federal Reserve to the first and second banks of the United States. Tell our audience, I think you're going to tell our audience why that historical analogy doesn't make any sense.

Lev Menand:

Yeah. It just sort of reflects a misunderstanding about what the Federal Reserve is and what the First Bank of the United States was. The Federal Reserve is a bank regulator. It's a multi-member commission. It's a government agency. It's part of the United States government. Its leaders are public officials. It is like the Federal Trade Commission in having multiple heads in a commission structure appointed by the president, but removable only for cause. Whereas the Bank of the United States is a bank. So the Board of Governors of the Federal Reserve is a bank regulator. It regulates banks like the Bank of the United States. And so the courts just got the analogy wrong. The sort of analog, if there was any, to the Federal Reserve Board in the founding period was the treasury secretary who actually was given by the Bank of the United States Act some oversight powers with respect to the Bank of the United States.

And it's just a mistake to think that there isn't an analog to the Bank of the United States today. There are a lot of them, including JP Morgan Chase, which has a federal charter.

Alan Kaplinsky:

Right. Yeah. I mean, there are many, many banks that have federal charters and it's really the first bank and the second bank are really private banks of a sort, right? Maybe you could say -

Lev Menand:

Entirely as a formal matter, they're entirely private. They're investor owned banks.

Alan Kaplinsky:

Right.

Lev Menand:

They're investor owned banks. They're operated for a profit.

Alan Kaplinsky:

And they had private investors, right?

Lev Menand:

Yes.

Alan Kaplinsky:

Did the government invest in them as well?

Lev Menand:

The government held a 20% stake in the First Bank of the United States, which it subsequently sold off.

Alan Kaplinsky:

Right.

Lev Menand:

And the first bank had extensive investors overseas. It operated for a profit. Being a business corporation was part of the design. It was not a regulator. The Federal Reserve Board is not a bank in any way. It's not operated for profit, but it also doesn't lend, borrow or purchase assets. It regulates

And it has regulatory authorities just like the other regulators. And this is just very inconvenient for the court's attempt to launder the legitimacy of the board of governors under its new theory using the First Bank. And the way they end up doing it in Trump versus Cook is just to stay at a very high level. Well, the reason the government chartered the Bank of the United States was because there was a concern with direct monetary expansion by the government and a need for political independence in monetary expansion. And that same concern is reflected in the fact that the president can't remove governors at will. And that is true, but it is alluding a whole bunch of very important dis-analogies and also ignoring the possible analogies that could be drawn with the other regulatory commissions, all of which were designed with partisan balance requirements in order to limit partisan policy making in areas in which the political branches had determined that effective policy required some degree of separation from elected officials.

And so the sort of principle behind the Bank of the United States, when you stated at the high level of generality needed is good enough to satisfy, I think, the whole independent agency complex as reflective of a longstanding American history and tradition of trying to ensure competent and effective government in sensitive areas of federal policy execution.

Alan Kaplinsky:

Yeah. Now what about, let me try a different approach here. And that is that the Federal Reserve has got everything that you've described, but on top of everything you described, they have incredible power when it comes to monetary policy. They meet every six weeks. They determine whether to keep interest rates steady, whether to increase them, decrease them, and they look at two things. They look at inflation and they look at employment, whether or not what do they need to do to make sure that there is full employment and that interest rates are not going up and not going down. Although they've created this 2% rule that has been in use by a lot of the Federal Open Market Committee. How do you deal with that? I mean, wouldn't that, if they wanted to try to distinguish the Federal Reserve from the other agencies, instead of going down the First Bank and Second Bank of the United States down that road, why couldn't they have written an opinion that focused on the fact that they exercised this incredible monetary policy, I would argue much more than the executive has.

Executive, I mean, they can do things that have a huge impact on monetary policy, but it's not comparable to the Fed. Well, could that have worked? Could they have written a reasonable opinion based on that Distinction.

Lev Menand:

Yes and no. So I think Justice Kavanaugh has an interest in an opinion along the lines you are suggesting. The problem is it would require this court to embrace an approach to the constitution that they have been crusading against for decades, namely functionalism. It would require them to say that what matters here is on a case by case basis, what are the functional

implications for the ability of the constitutional actors to carry out their constitutional duties of limiting, say in this case, the president's removal authority over this particular organization? That was the methodology of Humphrey's executor.

It was a case by case methodology, an assessment of the functions of the agency and an analysis of the legitimacy under the constitutional system of Congress's choice to limit the president's removal authority in the case of such an agency. And in Humphrey's executor with respect to the FTC, the court said, "Look, this organization is engaged in quasi-judicial and quasi-legislative activities where it is appropriate for Congress to limit the president's removal authority." And in that way, it is different from the post office, which was at issue in Myers, which the court said was purely executive in its function. And so you're saying, why not write a functionalist opinion that says, look at the powers that the Federal Reserve is exercising. They're of a nature that makes it desirable, appropriate, consistent with the constitution's structure to limit presidential removal. And the whole conceit of the slaughter decision is that that is an incorrect way to read and apply the constitution.

And so in Trump v. Slaughter, the court mocks Humphrey's executor and this functionalist analysis and says, "This has no place. We just look at the constitution, they hang their opinion on mostly one line in the constitution read out of context, which is article two, section one, line one, clause one, the executive power shall be vested in a president of the United States of America." And they say, "Look, it's vested in a president. We can't put any of it under the control of people who the president cannot remove at will." That's basically the whole logic of Trump v. Slaughter. And so functionalism has no space there. So then how do they get out of this Bach in Trump v. Cook? They say, "Well, we've long recognized in our other constitutional jurisprudence," though they didn't say long recognized because it's not long recognized. We have recognized in our other constitutional jurisprudence that sometimes there are exceptions and the exceptions are ones that we're going to acknowledge today are ones that are reasonably related to ones that were permitted during the founding period.

And so the court in reaching for the banks of the United States cites a Second Amendment case, United States versus Rahimi, which says Second Amendment rights, these are on their terms sweeping.

How do we know when the government can regulate consistent with the Second Amendment? Well, we look to see the sorts of regulations that existed in the founding period. And so the court is trying to get out of Trump v. Slaughter by saying that yes, the Federal Reserve is a violation of Trump v. Slaughter, but it's one that the first Congress allowed for. And so that's the reason we can allow for it. There's a huge problem with this, which is that the Bank of the United States is not a violation of Trump v. Slaughter. This is just completely lost on the court for some reason. It's not a violation because it's not part of the government, whereas the board of governors is a violation of slaughter. And so they're trying, unlike in the Second Amendment context, if there's a regulation of firearms in the founding, well, it is a violation of an absolute right to hold firearms.

The Bank of the United States is not a violation of the president's absolute right to fire principal officers of the United States because nobody who worked at the Bank of the United States was a principal office of the United States. But putting that aside, this is why they go that route. Your route, functionalism, means staying with Humphrey's executor. And they have reputed Humphrey's executor since the Reagan years.

Alan Kaplinsky:

Well, let me give you this hypothetical. I'm acting like I'm the law professor here. So what if Congress enacted a law stripping all of the so-called executive powers of the Federal Reserve, that is a right to supervise banks, the right to regulate banks, the right to bring enforcement proceedings against banks, all of these so-called FTC-like powers, they handed them to either the FDIC or the comptroller of the currency. And so all you had left of the Fed was its monetary authority and the Federal Reserve banks. I mean, you can't get rid of them and I don't think you can transfer them. I don't think what they do would be considered executive in nature. I mean, they lend money to regular private commercial banks. So would that work? I mean, in other words, if all you had was a Fed that exercised monetary authority, is that a workaround, do you think?

Lev Menand:

Short answer is no.

Alan Kaplinsky:

Damn it.

Lev Menand:

Long answer is the Board of Governors and the Federal Open Market Committee, which are the government agencies that exist under the Federal Reserve Act, they only have powers to regulate banks. They don't have any other powers that would be left. So their monetary policy powers are bank regulatory powers. Now, under the current monetary policy implementation framework, the powers that are exercised to carry out overnight interest rate policy are exercised on the Federal Reserve banks. So the bodies being regulated are the Federal Reserve banks. And when the Federal Open Market Committee changes the target interest rate range for the federal funds rate, this is implemented through an informal rulemaking by the board of governors of the Federal Reserve system, which updates the regulations that govern the rates that the Federal Reserve banks must pay to the member banks on their account balances at the Federal Reserve Banks.

And so it is in all senses a regulation. It's never been litigated in court. The board invokes good cause to skip notice and comment in promulgating these regulations, but these are regulatory authorities. The banks, the Federal Reserve banks, there are 12,

Are federal corporations just like JP Morgan Chase. The difference between the Federal Reserve Banks and JP Morgan Chase, two big differences, three big differences. First big difference, the Federal Reserve Banks are member owned cooperatives of banks. And so JP Morgan Chase, for example, has an ownership stake in the Federal Reserve Bank of New York. They are not residual claimants, so their ownership stake actually looks a little bit more like debt. They have a fixed statutory dividend, but that is the sort of formal structure of the reserve bank, whereas JP Morgan Chase is an investor owned corporation operated for profit. So that's one difference between the reserve banks and the national banks. A second difference is, of course, that the Board of Governors has extensive regulatory authorities over the operation of the Federal Reserve Banks. It also has extensive regulatory authorities over the operation of the national banks, including JP Morgan Chase, but less extensive, less intrusive than the authorities that they have over the Federal Reserve Banks, which is part of why we often don't think about the fact that these are actually organizationally distinct entities.

I said two and then I said maybe three. Those are the big differences. But the key similarity is that the Federal Reserve Banks are not part of the government and they're formerly private entities. They have. Org email addresses, not. Gov email addresses. They do not comply with the APA. They have no governmental authority. Oh, I remember the third thing I was going to say. The reserve banks have more limited banking powers than the national banks. So section 24 seven defines the core banking powers of national banks. The equivalent language in the Federal Reserve Act for the Federal Reserve Banks is more limited because the reserve banks are meant to be bankers banks. So whereas JP Morgan Chase conducts a general banking business with the public, like the Bank of the United States, the Federal Reserve Bank of New York does not. It is not authorized to take deposits from the general public.

It is not authorized to make ordinary loans to the general public. And so it's actually a more limited purpose bank, but it is not part of the government. And so to your question or sort of provocation about executive power and the reserve banks, were the reserve banks part of the government? Were they owned and controlled by the government? I think quite clearly under this court's jurisprudence, they would exercise executive power. Think for example of the small business administration or the loan programs office in the Department of Energy. When the government lends government dollars, that's an exercise of executive power. Under the court's jurisprudence, the whole sort of sweeping nature of it is there are only three types of power and judicial power and legislative power are defined very broadly under the court's jurisprudence. And everything else necessarily is executive power. So lending money is executive power.

It's if the government is doing it, if the government is doing it. And so there's no easy way out once you've endorsed such a broad theory of executive power and what it is. You've put yourself in a box.

The whole beauty of the way the court previously thought about the constitutional system was that it didn't have what my colleague Tom Merrill calls the three buckets view of government. Everything has to be in one of three buckets. It had a view in which there were three apex actors under the constitutional system, but there could be other actors and there were no buckets. And this is illustrated by all sorts of obvious facts, including that the constitution creates the electoral college. There

are other constitutional actors we don't talk as much about. Congress itself is two actors. It's the House of Representatives and the Senate of the United States. And these actors have overlapping powers, but all of a sudden what we have from this court is this insistence that everything has to go in three buckets. And that's what creates the dilemma because the Federal Reserve, they don't want to put it in the executive branch bucket because they've adopted this rule for how that bucket works, but they can't put it in the legislative branch or the judicial branch bucket because they've adopted rules for how those branches work that mean that they can only operate in a very narrow way.

The judicial branch has to decide cases or controversies and the legislative branch can only take actions with legal effect when it proceeds through bicameralism and presentment to pass legislation. So where do you put the Fed? And that's why what they conclude in *Trump v. Cook* is, well, we're going to let that be outside of the buckets because something about the Bank of the United States being outside of the buckets. That's where we've ended

Alan Kaplinsky:

Up. If it's ever a good example of an *Ipsy Dixit* type of reasoning, that's it. And it's not surprising, I guess, that John Roberts doesn't devote a lot of space in the opinion to talking about what these two banks really were. Let me -

Lev Menand:

That's right. The more details, the worse it looks. You want to keep it really high level.

Alan Kaplinsky:

Yeah. So let me go back to something we talked about earlier. Would you agree that the discussion in the slaughter case about the Fed is pure dicta in that case? The case has nothing to do with the Fed. It was dealing with the Federal Trade Commission. And the court, the discussion in the Cook case about the First Bank and Second Bank of the United States and how this is not in one of the three buckets as you put it, that's Dicta too, because there was no attempt by Trump to just fire Cook. He claimed to fire her for cause. I think it was rather flimsy, the reason given. And now I guess the case is going to go back to... I guess that case isn't over, right? It goes back to the Court of Appeals and then probably gets sent back to the district court and they'll probably end up in discovery if this thing goes on any further.

But that's Dicta two. But yet a lot of people are acting as if the Fed issue has now been settled, that it's not in one of the three buckets and we don't need to worry about Trump threatening to fire members of the Fed because he doesn't like what the particular member is going to do with interest rates, jacking up rates. What do you think of that? I mean, I don't think it's settled, but I don't think this court's going to deviate very far if another case comes along that raises the issue directly.

Lev Menand:

Yeah. So I agree with you. It's dicta, but the court in recent years has been passing off what is basically dicta as law, as its almost primary occupation. The court is almost constantly in law declaration mode. It rarely resolves one of these cases with an actual ruling in favor of one party or another. What it does is it takes these cases, it doesn't care much at all about the underlying dispute in the case and uses it as an opportunity to pontificate at length about the law. And so the court has arrogated extraordinary power to itself within our constitutional system to just be almost like a council of revision elaborating on what various statutes actually mean, what the constitution means, pretty much entirely divorced from the necessities of given disputes. And so you're absolutely right. Neither of these particular disputes requires in any way resolving the question of whether the president can violate the Federal Reserve Act by removing Lisa Cook at pleasure because he didn't try to do that and he's not claiming he has that power in the Cook case.

And that issue is not presented in any way in the dispute that he's having with Rebecca Slaughter.

So you're right that it's dicta, but in the larger context of how the court has been operated and how those sort of legal elites have been operating, they've been treating all of the court's dicta as law basically. And it's pretty clear from the decision that the five justices who voted in favor of Cook intend for everyone to treat this issue as decided. That's the whole reason that they go out of their way to decide it and draw pointed rebukes from some of their colleagues, including Justice Barrett for doing so. And they go so far as to say on page 22 in footnote six that in upholding the constitutionality of the Federal Reserve,

so they're describing what they've done as upholding the constitutionality of the Federal Reserve as currently structured. And with its existing enforcement authorities, we do not suggest that Congress could assign the Federal Reserve additional regulatory powers that are attenuated from monetary policy.

It's almost an advisory opinion. They're just going out of their way to say, "Oh, by the way, not only are we upholding the constitutionality of the Federal Reserve, something that neither of the parties has put into question, but we're going to give Congress some advice. Don't amend the Federal Reserve Act to add any regulatory powers that are attenuated from monetary policy." It's extraordinary stuff. I don't know where in Article three of the Constitution they find a warrant for this sort of footnote.

Alan Kaplinsky:

Right, right. All right. Let's turn to Justice Gorsuch's concurrence, which I found very interesting. And in fact, ended up writing a separate blog about his concurrence because of the delegation of powers issues that he went out of his way to talk about. He said that there's a second constitutional problem here. Not only are we dealing with a separation of powers issue, but we're dealing with an issue as to whether the legislature has delegated too much power to an agency. Is that how you read that concurrence that if he were writing the opinion, he would have found also a delegation of powers problem?

Lev Menand:

Yeah. So Justice Gorsuch is making what should be an obvious point that the majority isn't engaging with, which is that Congress would not have delegated all of this power to these agencies to make policy in these sensitive areas

If it was unconstitutional to structure the exercise of the power in the form of a multi-member bipartisan commission with staggered terms and limited presidential removal. And so by striking that down, by leaving the whole rest of the statute in place, you've created a legal framework that nobody ever would have voted for or would not have carried the day, which means that the court is engaged in an extraordinary exercise of power of basically taking away from Congress and giving to the president power over all of these policy areas on the basis of vapors. Gorsuch then goes on to recapitulate his views about delegation, which depart from the court's existing doctrine.

And you could think of this as these are two distinct points. One point is we're creating a concentration of power in the executive that Congress never intended. Another point is, I, Justice Gorsuch, also think that Congress shouldn't be authorized to do that. And we now need to come in and prune all of this by striking down some of these delegations as excessive. Not that Congress ever made them in this form, but now that we've made them into delegations like this, we should clean up our own mess using my preferred version of the non-delegation doctrine whereby Congress cannot delegate powers to the executive based on an intelligible principle. There needs to be a stricter test. And this was somewhat litigated in this case called *Gundy*, which was I think ultimately really decided on different grounds, but the court in *dicta* talked at length about delegation issues.

And one possible direction the court might go, especially if Justice Gorsuch has his way, is to cut back on the federal regulatory state's actual powers after now having cut down the structural limitations on how those powers are exercised.

Alan Kaplinsky:

Right. Are you expecting... Well, Gorsuch, nobody joined in that portion of his concurrence. Is this something that you think is a dead issue because it's only got one justice on the court? Or do you think we're now going to see a rash of cases challenging overly broad statutes that purport to delegate authority to agencies where... And a good example would be section five of the Federal Trade Commission Act. And Gorsuch uses that as an example that it proscribes unfair or deceptive acts or practices. And who the hell knows what that means, right? I mean, there's a lot of case law dealing with it, but it's very vague. And depending upon who is in charge of a particular of the Federal Trade Commission, they can interpret that narrowly or they can try to interpret it very broadly, getting into areas that probably Congress never contemplated they'd get into.

Is this, you think, something that's going to survive the Gorsuch approach or do you think it's just one justice and it's one we don't really need to worry about that?

Lev Menand:

Two thoughts about this. First, I don't think it's a dead issue, even if at the moment Justice Gorsuch is the only person on the court who is passionately driving it. I think that you are right to suggest there may be lawsuits seeking to vindicate Justice Gorsuch's theory. And I think that the process of bringing those lawsuits over the course of many years

May indeed lead to some movement on the non-delegation theory if the court's composition stays the same and the court's size stays the same. If this six three court is still the six three court in 10 years, I think there's a reasonable prospect that there's been changes made to the non-delegation doctrine, maybe not a full Gorsuch, but changes to the doctrine. And so I think it's right to look at that and be concerned about where it could lead. Second thought, I don't think that the FTC Act is the most vulnerable, and that is because I don't think that unfair methods of competition or unfair and deceptive acts and practices are examples of just completely open-ended, contentless sort of delegations that would be the sort of first place you would go to if you wanted to reevaluate the non-delegation doctrine and make it somewhat more muscular. And the reason I say that is those are legal standards.

Unfair methods of competition, that's a legal standard. And those ideas have existed in the law for centuries. And the design of the Federal Trade Commission was intended to create a specialized court-like body to fill out the content of that legal standard, and it doesn't do so in an unsupervised manner. Its decisions are subject to judicial review.

And we do have a body of case law that has developed in a common law-like manner that determined the bounds of the meaning of those legal standards. And this was Even true for some of these standards at the time these statutes were written.

And so there are actual constraints on the exercise of that discretion in ways that can be grounded in the Anglo-American legal tradition, whereas some of the sort of quintessential non-delegation bug bears involve circumstances where the statute basically provides no guidance as to how the executive officer should exercise their discretion. So in the Gundy case, the concern was that it actually left it up to the attorney general under the statute whether to impose a set of requirements on pre-arrest offenders or not with no guidance. It was just up to the attorney general was the argument. And that if that were the case, the attorney general could just do it in the attorney general's discretion structured in no way by legal constraint that that was a non-delegation violation. And so I think cases like that where there's no body of law, there's no legal concept, there's no standard that is structuring the exercise of the power where we're most likely to see movement in the coming years if the court's composition stays the same on the non-delegation document.

Alan Kaplinsky:

Yeah. I mean, what's interesting about it is the court seems like maybe when it has gone out of its way not to deal with... In fact, when I started writing the blog that I put together about Gorsuch's opinion, I found out that there hasn't been a Supreme Court case that has relied on delegation to find a statute unconstitutional for decades. I mean, the court has avoided that. Instead, they've relied on this so-called major questions doctrine, which seems like the same thing, but it's not rooted in the delegation of authority principle in the constitution.

Lev Menand:

Yeah. Under the major questions doctrine, the court doesn't say Congress cannot delegate this authority to an executive officer. They say on our reading of this statute, Congress did not delegate the authority that the executive official is now attempting to exercise.

Alan Kaplinsky:

Right, right, right, right.

Lev Menand:

So it's more of a, it's not been delegated as opposed to it can't be delegated theory.

Alan Kaplinsky:

So we're getting close to the end of our program. Let me ask you this. In my world, I focus on the agencies that deal with our clients and that is banks and others involved in offering consumer financial services. Are there other agencies out there now that are vulnerable after slaughter that you know of?

Lev Menand:

Well, it depends on what you mean by vulnerable. I think a lot of the legal community assumes that slaughter means that all the multi-member commissions but the Federal Reserve and maybe the tax court and the Court for the United States Armed Services are subject to presidential removal at pleasure. Whether that is adjudicated to be the case really depends on whether the president tries to fire anybody and those people bring the case and say that they are exempt from the slaughter rule. I think there are some cases in the pipeline where that's still happening. So the Merit Systems Protection Board litigation is ongoing. The National Labor Relations Board litigation is ongoing. Last time I checked, they will now have to distinguish themselves under slaughter. I would say those are very vulnerable. Yeah.

Alan Kaplinsky:

It's going to be hard to

Lev Menand:

Distinguish

Alan Kaplinsky:

Them, right?

Lev Menand:

The FDIC is less vulnerable in the sense that Trump's not firing any Democrats on the FDIC board right now who are challenging. And so we don't really know. I personally think there's a colorable case that the FDIC is subject to the Cook exception. It's a bank regulator with a lot of similarities to the Federal Reserve Board, but we're just not going to know for many years

Whether some of these other independent agencies might be able to mount a case for their independence. Unless of course the Wilcox case on the NLRB or the Harris case on the Merit Systems Protection Board actually makes it up to the Supreme Court and the Supreme Court says something more about slaughter that really clarifies, what I think people basically take to be clear already, which is it's just the Fed, at least that's what this court thinks, five justices, two justices really. It's only two justices that think the two cases make sense together because of course the three liberal justices who joined to save the Fed dissent and slaughter. So it's only Kavanaugh Roberts that really think this circle has been squared. I think it will wait for another presidency to really see movement possibly in the doctrine from here and substantial movement probably depends upon some form of court reform.

Or court turnover, which is on a much longer timescale.

Alan Kaplinsky:

I mean, looking ahead, crystal balling it five years from now, where do you see the things developing or do you see anything changing in that timeframe?

Lev Menand:

I think the crystal ball is very, very hazy about where

United States government is five years from now. There's so much uncertainty because we're in a period of flux. We're in a paradigm changing period. There was a paradigm in place for 30, 40 years that created a certain amount of stability that would

allow you to make predictions about what might happen five years out. And so many aspects of that paradigm are collapsing or have collapsed and there's no sort of new consensus that has emerged that I can sort of make out. And so five years from now, I mean, where will we be? There's so many contingencies and I just think it's very hard to predict. I think my best prediction is that 20 years from now, we will be in a different place than these two cases suggest. This seems like an unstable equilibrium to me, even though the court has announced it as though it has solved this problem for all time.

Alan Kaplinsky:

Right, right. Okay. We have concluded our program today and Lev, want to thank you again for taking your time to share your thoughts on these two really important cases. I know I learned a heck of a lot today. I'm sure our audience did. So again, my thanks to you.

Lev Menand:

Thank you for having me back.

Alan Kaplinsky:

My pleasure.