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The "Particular Dangers" of Slaughter's Impact on the FCC

Blair Levin • July 2026

I recently co-authored a Harvard Business Review note about the impact of Trump vs Slaughter--the case in which the Court allowed the President to fire independent regulators without cause--on businesses generally.[1]

Here, however, I want to address the specific impact on the FCC and the businesses regulated by the FCC's rules and procedures. As discussed below, there are nuances unappreciated by the commentary to date and particular dangers—and a need for a response-- that FCC-related enterprises face that the general business community does not. Further, it is in the interest of those enterprises to try to shape the post-Slaughter environment that will create a fair and more predictable regulatory environment in the years to come.

One widespread view is that, with the current FCC Chair doing the most important work through the bureaus, and his belief that the FCC was already part of the Administration and not independent, there is little to no impact.[2]

Another view is that *Slaughter* settles the question of the President's control of the FCC so that while there is an impact, there is no remaining legal question as to the President's total power over the agency.

[1] In short, the article details how, in the wake of the Supreme Court decision, agency decision-making will likely become more informal and less transparent, as presidents assert or threaten executive privilege, national security, and other exceptions to sidestep procedural safeguards; policy shifts from one administration to the next will likely lead to dramatic changes in the overall regulatory environment; the ability of courts and Congress to curb political or arbitrary rulemaking and enforcement will likely diminish; economic, scientific, and other expert analysis as a basis for regulation and enforcement will likely decline; and influence on agency staff from politically-connected lobbyists will increase.

[2] A version of this view can be found in the recent Hill editorial in which the author proposes replacing the multi-member FCC with a single administrator. While I disagree with the proposal for reasons provided both here and in the Harvard Business Review piece, I concede the logic; that if the President can fire any Commissioner without cause and create a one-party Commission, the difference between that end game and a single administrator ends up being minimal. For reasons outlined in this note, I think there are ways to avoid that outcome. I also am confident that in the next few weeks, every pundit will have to throw in into their writing a reference to the Odyssey, with the most common reference facing the task of sailing between Scylla and Charybdis. But as I am slightly ahead of the curve here let me say that choice of a single party Commission and a single administrator resembles the danger of either Scylla and Charybdis and I hope, like Odysseus, we can sail between them (and hopefully not lose crew members in the process.)

Both are reasonable observations. For reasons detailed below, however, I think both views miss important nuances about the law and business impact.

The context for analyzing *Slaughter's* immediate impact on the FCC starts with [reports] that, with the decision, Trump will now fire the sole Democrat on the Commission, Commissioner Gomez.

He might, but I doubt it. Doing so would mean there is no quorum as the law requires at least three members.[3] While much can be done through the bureaus, a quorum is required for significant rule changes that Chairman Carr wants, such as changes to the broadcast ownership rules.[4]

Further, the Supreme Court's 2010 decision in New Process Steel v. NLRB made clear that an agency cannot work around its statutory quorum requirement through creative delegation.

When the President fired an NLRB member in early 2025, the agency lost its quorum and went nearly a year without being able to issue decisions, resolve labor disputes, or adjudicate labor complaints. Hundreds of pending cases sat frozen.

So here, Trump firing Gomez without replacing her potentially would result in years of uncertainty about the legality of FCC decisions, putting a cloud over the sector as investors will not have clarity about policy-dependent investments and operating decisions.

Another potential scenario is that Trump attempts to have the Senate confirm a third Republican Commissioner and then fires Gomez.

While more likely, this option also faces legal and political challenges.

Despite the view that Slaughter resolved all the issues related to presidential power, that Court opinion, like all judicial opinions, leaves the door open to issues not litigated in that case. May the President now oust all Democrats from the FCC as he did from the FTC? Or does the Communications Act's explicit multi-party design impose a structural floor that survives the *Slaughter* ruling?

The law itself indicates that Congress intended the agency to always have members from both parties. That was not an accident. When Congress created the FCC, it did not simply establish an independent agency. It explicitly designed a multi-member, multi-party commission, writing into the Communications Act that no single political party can hold more than a bare majority of seats. It explicitly limits the number of commissioners of the President's party, relative to the

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[3] 47 USC 154(h) states that "Three members of the Commission shall constitute a quorum thereof.".
[4] It is telling that Chairman Carr has proposed a rule change in which the Commission does not change the current 39% cap but instead change the rule to "allow the FCC to approve deals that exceed the 39% cap, but only if doing so would promote the public interest." Putting aside for now that Carr has already done exactly that with his media bureau approving the Nexstar/Tegna deal, such a public interest standard, applied by a one-party Commission, would lead to only allowing those broadcasters whose news coverage favors the party in power to get bigger.

number of minority commissioners, thereby implicitly requiring members of the other party.[5] That language demonstrates the existence of a minority by design, a structural choice that reflects Congress's deliberate judgment that control over the nation's communications technology should never rest in a single set of partisan hands. It was a recognition that the airwaves belong to the public, that a key source of information for the public must remain free from overly partisan government interference.

Such a move would also create a political challenge. Attempting to create a de facto Republican-only FCC might cause some Republican Senate opposition. It opens the door to Democrats eventually creating a one-party Commission, limiting Republican influence during a Democratic administration as well as limiting job prospects for Republican Senate staffers who wish to move from the Hill to the FCC. Traditionally, the Senate leadership of the non-Presidential party has had the right to approve or veto any Presidential nominee that is not from the President's party. While not embedded in the law, changing that tradition could cause ripples among Republican Senators looking down the road to when a Democrat occupies the White House.

A related scenario is that, as Gomez's term has technically ended,[6] Trump could simply nominate someone who is not a Republican who is loyal to him to fill her seat. While arguably more consistent with the law, it raises similar political issues and a legal issue of whether the bi-partisan requirement can be ignored through such an appointment.

So, one question for a future court will be whether a one-party FCC can ever issue rulings with the force of law. If the President were to act to create a Commission without any Democratic representation, that question would likely be litigated.

A second question involves whether Commissioners have any protection against Presidential removal. Again, there is a widespread view that Commissioners are now at-will employees who can be terminated by the President at any time. Not only is such a view reasonable, but it is also the most likely way most courts would view the matter.

But here too, there is an opening to challenge that view. And while the odds of a legal victory are not high, there is a political benefit to arguing that FCC Commissioners should have greater protection than the Court afforded FTC Commissioners and others in independent agencies.

In a Supreme Court decision decided the same day, it did not grant the President the same power over the Fed that it provided over the FTC. It explained the difference in multiple ways,

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[5] 47 USC § 4(b)(5) explicitly provides that "The maximum number of commissioners who may be members of the same political party shall be a number equal to the least number of commissioners which constitutes a majority of the full membership of the Commission." One could reasonably construe the last clause to mean a majority of the total number of Commissioners at any given time and thus to limit the number of majority Commissioners to two if the Commission consists of only three members (the bare minimum needed for a quorum). As discussed in this note, this provision seems designed to ensure minority participation in any quorum, but admittedly, the provision is awkwardly phrased, giving rise to potential litigation over its meaning.

[6] Gomez's term expired June 30th but under the laws she can serve until the end of 2027 or until her seat is filled by a Senate confirmed nominee, whichever comes first.

including a history of banking regulation, particularly with the First and Second Banks of the United States, being independent.

But as Harvard Professor and Administrative Law expert Cass Sunstein wrote about that justification, "the First and Second Banks were not a lot like the modern Federal Reserve. They did not have anything like its functions. So is history really authoritative here?"

As Sunstein goes on to discuss, the foundation for the Court's decision is not history but rather "recognizing a particular danger." Sunstein further cites Justice Kavanaugh's concurring opinion as articulating that danger: that taking away Fed independence would "risk destabilizing the U.S. economy."

So, if the Court in the Fed case was pragmatically avoiding a particular danger, it opens the door to arguing that the FCC is more like the Fed than the FTC. The FTC is more like the DOJ, in that its primary function is law enforcement, something that comes under the Presidential powers in Article I. Further, other agencies enforcing rules related to such things as securities or drugs do not raise the same partisan or First Amendment concerns. (They do raise pay-to-play corruption issues but that is an issue for another day.)

Here, the FCC, like the Fed, has unique functions, and unbridled presidential power raises a particular danger of government suppression of news and information. Not only does the FCC have a history of a legislatively mandated bi-partisan membership predating its creation (as its predecessor, the Federal Radio Commission, had a similar mandate), but also the FCC's specific domain gives the bipartisan requirement additional significance that other agencies lack.

If the financial system must have some level of protection against a complete partisan takeover, arguably democracy and the First Amendment should be protected in a similar manner. Democracy depends on communications technology that serves everyone, not just those in political favor. As the FCC licenses broadcasters and regulates political advertising and media concentration, giving any single administration complete control over its composition would allow a president to exert indirect control over the media that covers that president. The bipartisan requirement provides a structural check against using the FCC's licensing authority as a weapon against political opponents.

In short, given that oversight of the nation's communications technology and the protection of a free press are no less foundational to democracy than monetary policy, there is an argument that the FCC belongs closer to the Federal Reserve carveout the Court recognized in parallel with the Slaughter decision than to the FTC.

The political dynamics also make the FCC more like the Fed than the FTC. The financial community—through an amicus brief signed by every living former chair of the Federal Reserve as well as six former Treasury secretaries who served presidents of both parties as well seven former White House economic advisors, spanning roughly five decades of U.S. economic policymaking—warned of the dangers of unbridled presidential power over the Fed.

In the same way, the business community regulated by the FCC should fear unbridled presidential power.

To see why, consider the petition of a conservative group seeking the denial of Disney's owned and operated broadcast stations license renewals. It accuses Disney of multiple sins, including that "ABC's network programs show a consistent and overt partisan bias to its programming across multiple shows," that the stations "run a Race & Culture effort that intentionally brings an ideological agenda to local newsrooms and documentary shows," that Disney is "engaged in race- or gender-based discrimination" and that "[a] company that is not forthright with the Commission lacks the character to hold an FCC license." Importantly, many of the alleged sins go to the actions of the parent, not the broadcast license holder.

Many arguments those groups make can be directly alleged against conservative broadcasters like Nexstar, Sinclair[7] and Fox. And while Fox News itself is a cable channel, the fact that the parent had to pay nearly a billion dollars because of its false news coverage could, under the conservative petition's theory about the character of the licensee, be applied to take away Fox's broadcast license, an action that some have already argued the FCC should take and that the FCC rejected but that could be raised again.

To be clear, I don't think the FCC taking away the Disney licenses will be upheld by the courts.

Further, having minority commissioners is only a first line of defense—not a foolproof defense—against an FCC majority intent on partisan actions related to licensing. But as the FCC-related business community well understands, having Commissioners of both parties improves the quality of the policy deliberations at the Commission, as the majority understands that a minority dissenting opinion can often serve as a template for a court to overturn the majority decision. Thus, the majority is forced to address problems in their own preferred policies or increase the risk of a court overturning their policy.

Still, the more it appears to the market that licenses are subject to partisan manipulation, the less value the market will assign to those licenses.

The FCC regulated businesses should recognize that danger. In my experience, many do but are largely silent due to fears of political retribution. The sentiment expressed by a Comcast executive justifying the company's donations to Trump's projects-- "If we have to name a ride after him at Universal Studios, that's fine too, as long as it means they leave us alone"—echoes the sentiment I have heard from multiple businesses.

In addition, some of the silence can be attributed to the view many hold that while Trump and Carr will use the powers of government for political retribution, Democrats will adhere to the rule of law and not use government powers to punish political opponents.

[7] Sinclair, for example, gave scripts that it required anchors on local news of their stations to read, scripts that were described as "turning its news anchors into soldiers in Trump's war on the media." In another example, "the company distributed stories to its local news websites based on videos manipulated by the Republican National Committee to, in one case, make it look as though President Biden soiled himself."

That was likely true in 2024. Perhaps it will be true in 2029 if the Democrats win the White House, but no one should see that as certain. Democrats may see what California did with gerrymandering as a model for action. That is, in response to something Democrats don't like—in that case the Texas gerrymandering—Democrats will do something they are uncomfortable with as a justifiable defensive move while simultaneously going on offense to support federal efforts to prevent the unwanted activity.

Applied here, a Democrat running the FCC in 2029 might do to conservative broadcasters what Carr is doing to Disney, while supporting legislation that would prevent any FCC from acting in that way.

How does this play out? No one should be certain. But businesses, recognizing the dangers of a purely partisan FCC as well as the uncertainty that the current situation creates should take what steps they can to raise barriers to such partisan activity and create a more certain legal environment.[8]

In this case, the right step is to ensure that the Commission always has bipartisan membership, with the minority member providing advance warnings to businesses and the public, of problematic behavior.

This can be done through non-exclusive steps, including litigation arguing, as discussed above, that a quorum requires non-majority members and/or that the FCC should be seen as more like the Fed and less like the FTC.

I am not suggesting that such efforts are likely to win in court, though notably the Supreme Court has undercut Trump's aspirations for power when opposed by business interests, such as in the Fed case and the tariff litigation. I am suggesting, however, that the business community could serve itself and the public interest by arguing that the bipartisan tradition at the FCC plays a critical role in protecting the purposes of the Communications Act and the First Amendment.

In the near term, even if the litigation fails, it likely will force those arguing for full Presidential control to clarify the limits of their power or to create a situation in which political forces will be more likely to consider ways to limit that power.[9]

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[8] Those who attended law school when I did, in the late 1970's, will recognize that my thinking here owes something to the "veil of ignorance" idea promulgated by John Rawls in his Theory of Justice; that one should favor rules that would be fair and just if the person did not know their economic and social status in that society. So here, business should want an institutional framework that regulates it that would be mostly likely to be fair and just without knowing who oversees the governing institution. This is distinguished from the more modern "veil of ignorance" in which, for example, one can start a war without understanding of how the opponent might respond, or propose military actions or economic actions that violate international rules and order.

[9] The strategy I am suggesting here is like what AT&T and Verizon did in their recent appeal to the Supreme Court of FCC enforcement actions. The companies lost the case but in the process, the FCC clarified its Enforcement Orders were non-binding and were more like an indictment than a conviction; that parties could ignore the Enforcement Orders and the FCC could not punish the parties for non-payment; that the findings in the Enforcement Orders had no conclusive effect and that courts were free to ignore them; and that to enforce any Enforcement Orders, the DOJ, representing the FCC, would have to go to court where the 7th

And that leads us to 2029. No one should be certain of what the political environment will be then. Nonetheless, the FCC related business community should be asking itself what is the institutional environment in which it wants disputes and regulation umpired even when it does not know who will be in the White House. What that community does know, however, is that it is better to have disputes settled by the rule of law and expert analysis than by the market for Presidential affections.[10] In that light, there is no downside and significant potential upside, of preparing for that moment by articulating how preventing FCC decision making from only reflecting White House partisan preferences creates a more predictable and business friendly operating environment.[11]

As discussed in the Harvard Business Review article noted above, all business benefits from bipartisan independent agencies and will suffer as the culture of those agencies becomes increasingly partisan. But FCC regulated businesses face particular dangers due to their role in the information economy. If the financial sector was concerned about a partisan takeover of our monetary system, the telecommunications and media sectors should be similarly concerned about a partisan takeover of key elements of our information ecosystem. And act accordingly.

Amendment right to a jury trial would apply. Further, by doing so, the companies improved their leverage in negotiations with the FCC. In short, litigation sometimes forces a party to admit to limitations to win the litigation.

[10] For example, the FCC settles interference issues between users of spectrum. I feel confident that the businesses would rather be settled by the engineers at the FCC Office of Engineering and Technology based on engineering studies than by the White House based on who contributed the most to what fund the President designated for a contribution.

[11] And to make an obvious but often overlooked point, the business community would have more credibility in 2029 with Democrats, if they advocate for such policies now, rather than only doing so when the Democrats are in charge.