The End of Independent Agencies? Restoring Presidential Control of the Executive Branch

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Other Views:

• Leah Litman, *The Supreme Court Chips Away at the CFPB's Independence*, Slate, June 29, 2020, https://slate.com/news-and-politics/2020/06/supreme-court-seila-law-v-cfpb.html.

• Ian Millhiser, *The Supreme Court's big decision on the CFPB and the "unitary executive," explained*, Vox, June 29, 2020, https://www.vox.com/2020/6/29/21307083/supreme-court-cfpb-seila-law-chief-justice-john-roberts-unitary-executive.

• Elliot Mincberg, *Trump Justices Cast Key Votes to Further Weaken Congress' Authority to Insulate Agency Officials from Political Pressure and to Strike Down Law on Housing Finance Agency: Confirmed Judges, Confirmed Fears*, People for the American Way, June 24, 2021, https://www.pfaw.org/blog-posts/trump-justices-cast-key-votes-to-further-weaken-congress-authority-to-insulate-agency-officials-from-political-pressure-and-to-strike-down-law-on-housing-finance-agency-confirmed-judges-co/.

On the day that President Joe Biden took office, among his first official acts was to fire Peter Robb, the General Counsel of the National Labor Relations Board—a Trump Administration appointee with ten months remaining in his term. That was the beginning of a firing spree. President Biden has removed the Social Security Administration Commissioner and members of the Council of the Administrative Conference of the United States, the National Capital Planning Commission, the U.S. Commission for Fine Arts, the Federal Services Impasse Panel, the Presidio Trust, and other agencies. A new President, of course, needs his own personnel in place to carry out his policy agenda. But some of President Biden's personnel moves differed in kind from those of his predecessors going back nearly a century: among those dismissed were officials of agencies typically regarded as "independent" because they stand outside of the usual department structure and, in some instances, are insulated from the President's direct control through statutory restrictions on removal. Removing the SSA Commissioner and NLRB General Counsel, for example, was unprecedented. President Biden's actions find support in a recent line of Supreme Court precedent that has revived the President's inherent removal power as an aspect of "the executive power" vested in him by the Constitution. In deciding these cases, the Court has cast doubt on Congress's power to cut the President out of independent agencies' affairs by constraining his ability to remove, and thereby to control, agency officials.

President Biden's forceful assertion of the removal power—a position heretofore associated with legal conservatives and Republican administrations—may spur the completion of the Court's reform project. Beginning with *Free Enterprise Fund v. Public Company Accounting Oversight Board*,[1] the Court has undercut the constitutional rationales supporting agency independence from the President and narrowed its precedents authorizing Congress to depart from the general rule of presidential control through unfettered removal authority. What remains of those precedents following *Seila Law LLC v. Consumer Financial Protection Bureau*[2] and *Collins v. Yellen*[3] are two narrow exceptions: (1) for multimember bodies of experts, balanced along partisan lines and performing "quasi-judicial" or "quasi-legislative" functions and (2) for inferior officers. Whether or not President Biden's actions provide the direct impetus for the coup de grace to agency independence, they demonstrate that the Executive Branch, across administrations, is also skeptical of Congress's power in this domain.

The purpose of this article is to describe the current state of play on the constitutional status of removal restrictions and, by extension, agency independence from presidential control. To

1 561 U.S. 477 (2010).

2 140 S. Ct. 2183 (2020).

3 141 S. Ct. 1761 (2021).

set the stage, and provide context for what follows, it begins with an abbreviated discussion of the Supreme Court's removal-power precedents in the periods from the Framing to the New Deal and then from the New-Deal era to the 1980s, during which the key precedents supporting agency independence were forged. The focus then shifts to the current era, with an extended discussion of the Court's reinvigoration of the President's removal power, as a matter of doctrine and increasingly practice. The article concludes with an assessment of the staying power of the Court's independent-agency precedents and the authors' prediction that they may soon fall, in large part if not entirely.

I. The First Era: The Framing Through *Myers*

The Constitution does not explicitly mention the removal power. It contains no provision addressing the removal of Executive Branch officials, save for those dealing with impeachment and conviction. But it is not silent on the issue. The Constitution divides powers and responsibilities among the federal government's three branches, and out of that structure an understanding of the removal power takes shape.

Article I vests the legislative power in the Congress.[4] Article III vests the judicial power in "one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[5]

And Article II vests "the executive power"—not "*some* of the executive power, but *all* of the executive power"[6]—in a single President of the United States.[7] This President is responsible to "take care that the Laws be faithfully executed."[8] The decision to vest this power in a single individual was debated at the Constitutional Convention, and the Founders ultimately decided to place this authority in one person "in order to focus, rather than to spread, Executive responsibility," thereby ensuring political accountability.[9] "They also sought to encourage energetic, vigorous, decisive, and speedy execution of the laws by placing in the hands of a single, constitutionally indispensable, individual the ultimate authority that, in respect to the other branches, the Constitution divides among many."[10] This was done, in no small part, to bolster the executive against the branch the Founders most feared: the legislative.[11]

The Framers did not specifically consider the removal question at the Constitutional Convention. But "during the Revolution and while the [Articles of Confederation] were given effect, Congress exercised the power of removal," and the Convention "gave to the executive all the executive powers of the Congress under the Confederation"—indeed, all executive power—"which seem therefore to have intended the power of removal."[12]

Of course, "[o]nce an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey."[13] And because the President holds the entirety of the executive power and is responsible for seeing that the laws be faithfully executed, it follows that he holds the sole removal power. As James Madison explained in the First Congress:

> If the President should possess alone the power of removal from office, those who are employed in the execution of the law will be in their proper situation, and the chain of dependence be preserved; the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community.[14]

Prior to the Progressive Era, Congress enacted restrictions on the removal of federal officials on several occasions. But the constitutional question of Congress's power to do so remained largely unsettled. The Supreme Court considered a restriction on the removal of inferior officers by department heads in *United States v. Perkins*.[15] The Court held, with scant reasoning, that Congress "may limit and restrict the power of removal" over inferior officers, while reserving the question of "[w]hether or not Congress can restrict the power of removal incident to the power of appointment of those officers who are appointed by the President. . . ."[16] The decision does not address the Executive Vesting Clause or the Take Care Clause, and it is unclear whether its holding extends to removal by the President, as opposed to removal by the head of a department.[17]

The President's removal power *was* at issue in *Shurtleff v. United States*, which involved the dismissal of a customs officer, a "general appraiser of merchandise," at the direction of the President.[18] Without mentioning *Perkins*, the Court began with the presumption that an officer serves at the President's pleasure.[19] Relying on that presumption, it declined to interpret a statutory provision specifying certain grounds of removal as denying the President the right to remove the officer for any other cause or no cause in the absence of "very clear and explicit language" to that effect.[20] Although *Shurtleff* did not resolve the question whether such a limitation would be constitutional, it understood

4 U.S. Const., art. I, § 1.

5 U.S. Const., art. III, § 1.

6 Morrison v. Olson, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting).

7 U.S. Const., art. II, § 1.

8 U.S. Const., art. II, § 3.

9 Clinton v. Jones, 520 U.S. 681, 712 (1997) (Breyer, J., concurring).

10 *Id.*

11 *See* The Federalist No. 51 (Madison) ("As the weight of the legislative authority requires that it should be thus divided, the weakness of the executive may require, on the other hand, that it should be fortified.").

12 Myers v. United States, 272 U.S. 52, 110 (1926) (internal quotation marks omitted).

13 Synar v. United States, 626 F. Supp. 1374, 1401 (D.D.C. 1986) (Scalia, Johnson, and Gasch, JJ.)

14 1 Annals of Cong. 499 (1789).

15 116 U.S. 483 (1886).

16 *Id.* at 484–85.

17 *See Myers*, 272 U.S. at 127, 161–62.

18 189 U.S. 311, 312 (1903).

19 *Id.* at 315.

20 *Id.*

the Constitution presumptively to vest removal power in the President and adopted what would now be called a "limiting construction" of the statutory removal restriction so as to avoid constitutional doubt.[21]

There the law stood until *Myers v. United States*.[22] At issue was a statute requiring the President to seek the Senate's advice and consent before removing certain postmasters prior to the end of their four-year term. After President Woodrow Wilson removed a postmaster from office in 1920, the postmaster sued for the salary from the remainder of his term. Accordingly, the Supreme Court was directly presented with the question whether "under the Constitution the President has the exclusive power of removing executive officers of the United States whom he has appointed by and with the advice and consent of the Senate."[23]

In an opinion by Chief Justice William Howard Taft, the Court recognized the principle that Article II confers on the President "the general administrative control of those executing the laws."[24] The President must therefore have the "power of removing those for whom he cannot continue to be responsible."[25] It follows, then, that Congress may not "draw to itself . . . the right to participate in the exercise of that power. To do this would be to go beyond the words and implications of the [Appointments Clause] and to infringe the constitutional principle of the separation of governmental powers."[26] Instead, as the Court announced as its holding, "[A]rticle 2 grants to the President . . . the power of . . . removal of executive officers" and so "excludes the exercise of legislative power by Congress to provide for . . . removals."[27]

Chief Justice Taft's opinion—subsequently recognized as a landmark in originalist reasoning—relies heavily on Framing-era history and the First Congress's rejection in 1789 of any role in the removal of Executive Branch officials, other than by impeachment.[28] As the opinion details, the First Congress was particularly concerned about the improper blending of executive and legislative functions and recognized that the decision to remove an individual flowed from, but involved a different calculus than, the decision to appoint an individual. The Senate's role in the latter ostensibly involves the weighing of someone's background and personal characteristics and then a determination whether they are suited to the job to which they are being nominated. But the former involves a series of decisions and calculations that are executive in nature and which the President (and his high-ranking aides) are more well-positioned to make: whether the officer's performance is consistent with the President's duty to see that the laws are faithfully executed.

II. The Progressive Turn: *Humphrey's Executor* Through *Morrison v. Olson*

Myers was not the last word on the President's removal power, as the issue would soon arise again due to the explosion of so-called "independent agencies." In the early 20th century, Progressive technocrats sought to remove government administration from the rough and tumble of politics, an aim at odds with the Constitution's vesting of the execution of the laws in a politically accountable President. In their view, economic and social decisionmaking should be entrusted not to politicians, but to experts schooled in the "science of administration."[29]

The Federal Trade Commission was a prime example: it was to "be nonpartisan" and was intended, "from the very nature of its duties"—policing unfair methods of competition—to "act with entire impartiality."[30] Put another way, it was intended to "exercise the trained judgment of a body of experts appointed by law and informed by experience."[31] To that end, Congress provided that Commissioners could be removed by the President only "for inefficiency, neglect of duty, or malfeasance in office."[32]

In *Humphrey's Executor*, the Supreme Court was presented with the question whether that restriction on the President's removal power passed constitutional muster. Despite having decided *Myers* only ten years earlier,[33] the Court upheld the restriction on the President's removal power.[34] Because the job of an FTC Commissioner is "so essentially unlike the office of a postmaster," *Myers* could not be "accepted as controlling [the Court's] decision."[35] The FTC was "created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial

21 *Id.* at 315–18; *see also* Parsons v. United States, 167 U.S. 324, 338–39 (1897) (adopting similar approach).

22 272 U.S. 52.

23 *See id.* at 106.

24 *Id.* at 164.

25 *Id.* at 117.

26 *Id.* at 161.

27 *Id.* at 163–64.

28 As the Court explained, the views of the First Congress are particularly instructive because their decisions on "question[s] of primary importance in the organization of the government" were "made within two years after the Constitutional Convention and within a much shorter time after its ratification, and . . . because that Congress numbered among its leaders those who had been members of the convention." *Id.* at 136; *see also* Marsh v. Chambers, 463 U.S. 703, 790 (1983).

29 *See generally* Daniel A. Crane, *Debunking* Humphrey's Executor, 83 Geo. Wash. L. Rev. 1835, 1844 (2015).

30 *See* Humphrey's Executor v. United States, 295 U.S. 602, 624 (1935).

31 *Id.* (internal quotation omitted).

32 *Id.* at 619.

33 Dissenting in *Morrison v. Olson*, Justice Scalia described the Court's treatment of *Myers* in *Humphrey's Executor* as "gutting, in six quick pages devoid of textual or historical precedent for the novel principle it set forth, a carefully researched and reasoned 70-page opinion." *Morrison*, 487 U.S. at 726.

34 Many at the time viewed this as "the product of an activist, anti-New Deal Court bent on reducing the power of President Franklin Roosevelt." *Id.* at 724. And, indeed, the case was decided on "Black Monday," along with *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935) (striking down the Frazier-Lemke Farm Bankruptcy Act as violating the Takings Clause) and *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (striking down the National Industrial Recovery Act on non-delegation grounds).

35 *Humphrey's Executor*, 295 U.S. at 627.

aid."[36] So while a postmaster was "an executive officer restricted to the performance of executive functions,"[37] the FTC's "duties are neither political nor executive, but predominantly quasi-judicial and quasi-legislative."[38] Indeed, in the Court's view, any "executive function" of the agency was only incidental to carrying out these other powers:

> In making investigations and reports thereon for the information of Congress under § 6 [of the FTC Act], in aid of the legislative power, it acts as a legislative agency. Under § 7 [of the FTC Act], which authorizes the commission to act as a master in chancery under rules prescribed by the court, it acts as an agency of the judiciary. To the extent that it exercises any executive function—as distinguished from executive power in the constitutional sense—it does 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.[39]

So viewed, it was then "plain under the Constitution"—at least to the Court—"that illimitable power of removal is not possessed by the President" over members of "quasi-legislative or quasi-judicial agencies."[40]

Next came *Wiener v. United States*.[41] At issue was whether the President had the authority to remove a member of the War Claims Commission where Congress had not addressed the issue. The Court held that he did not, reading a removal restriction into the statute. The Commission, it reasoned, was adjudicatory and "judicial" in nature, rather than "purely executive," because it was established to adjudicate claims for compensation by internees, POWs, and religious organizations injured by the enemy during World War II. Accordingly, the Court assumed that Congress intended the Commission to be free from executive control, and thus held that the President lacked authority to remove its members.[42]

The Court's interest in policing the boundaries of the separation of powers was re-animated in *Bowsher v. Synar*.[43] The Gramm-Rudman-Hollings Act assigned certain functions to the Comptroller General of the United States in pursuit of a balanced budget. The functions were executive in nature because the Comptroller General was "required to exercise judgment concerning facts that affect the application of the Act" and had to "interpret the provisions of the Act to determine precisely what budgetary calculations are required."[44] The Comptroller General, however, was removable only by Congress—either by a joint resolution or by impeachment. Given the influence exercised by whoever has the power to remove, the Court concluded that Congress had improperly arrogated the executive power to itself by making the Comptroller General answerable only to it.[45]

But then the Court decided *Morrison v. Olson*, and that originalist turn seemed a false start.[46] *Morrison* involved the appointment of an Independent Counsel to investigate and prosecute certain high-ranking federal government officials. Congress had enacted an elaborate scheme for the appointment of Independent Counsels, involving the Attorney General and a special court. It also imposed limitations on the removal of the Independent Counsel: she could be removed either by impeachment and conviction by the Congress, or "by the personal action of the Attorney General and only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of the independent counsel's duties."[47]

The Court upheld the removal restriction, despite the prosecutorial power being a core executive function. In so doing, it jettisoned the rationale of *Humphrey's Executor* that there exists some area of federal power that is not wholly within any branch—and specifically not "executive" in nature—but is instead "quasi-legislative" or "quasi-judicial."[48] The Court recognized that officials exercising this power were executive in nature and that this was also true of the FTC, notwithstanding *Humphrey's Executor*'s insistence to the contrary.[49] Instead, it adopted a new approach and standard that considers whether "removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty."[50] Under that standard, the statutory protection of the Independent Counsel was acceptable. The Independent Counsel was an inferior officer exercising "limited jurisdiction and tenure and lacking policymaking or significant administrative authority"; therefore, the role was not "so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the President."[51] In addition, under the "good cause" removal provision, "the Executive, through the Attorney General,

36 *Id.* at 628.

37 *Id.* at 627.

38 *Id.* at 624.

39 *Id.* at 628.

40 *Id.* at 629. Justice Robert H. Jackson criticized the *Humphrey's Executor* Court's treatment of the FTC in partial dissent in *Fed. Trade Comm'n v. Ruberoid Co.*, 343 U.S. 470, 487–88 (1952):

> Administrative agencies have been called quasi-legislative, quasi-executive or quasi-judicial, as the occasion required, in order to validate their functions within the separation-of-powers scheme of the Constitution. The mere retreat to the qualifying 'quasi' is implicit with confession that all recognized classifications have broken down, and 'quasi' is a smooth cover which we draw over our confusion as we might use a counterpane to conceal a disordered bed.

41 357 U.S. 349 (1958).

42 *Id.* at 355.

43 478 U.S. 714 (1986).

44 *Id.* at 733.

45 *Id.* at 726.

46 487 U.S. 654.

47 28 U.S.C. § 596(a)(1).

48 *Morrison*, 487 U.S. at 689–91 & nn.28, 30.

49 *Id.* at 689 & n.28, 691.

50 *Id.* at 691.

51 *Id.* at 691–92.

retains ample authority to assure that the counsel is competently performing his or her statutory responsibilities."[52]

Chief Justice William Rehnquist's majority opinion drew a single, and singular, dissent by Justice Antonin Scalia—a landmark that Justice Elena Kagan later called "one of the greatest dissents ever written" that only "gets better" with time.[53] As Justice Scalia saw it, the case was about one thing: "Power. The allocation of power among Congress, the President, and the courts in such fashion as to preserve the equilibrium the Constitution sought to establish."[54] Writing for himself alone, Justice Scalia began with the proposition that Article II vests in the president not "*some* of the executive power, but *all* of the executive power."[55] And that, in his view, was sufficient to resolve the case, given that the conduct of a criminal prosecution was plainly an exercise of executive power and the removal restriction deprived the President of "exclusive control over the exercise of that power."[56] The majority could hold otherwise only by abandoning *Humphrey's Executor* sole commendable feature—its "decency formally to observe the constitutional principle that the President had to be the repository of *all* executive power"—and erecting in its place a new standard under which "*any* executive officer's removal can be restricted."[57]

The resultant watering down of the separation of powers just in this one instance, he predicted, would subvert the principle that those enforcing the law should be "accountable to the people," undermine uniform application of law, and ultimately threaten "effective government" and the "individual freedom" preserved through the separation of powers.[58] These consequences and worse, he warned, were plain: "Frequently an issue of this sort will come before the Court clad, so to speak, in sheep's clothing . . . . But this wolf comes as a wolf."[59]

III. The Originalist Turn: *Free Enterprise Fund* and Onwards

Morrison was arguably the nadir of the Supreme Court's separation-of-powers jurisprudence, expressly authorizing intrusion by Congress on the President's exercise of purely executive power. Although the question of presidential removal power was not revisited by the Court for some time, Justice Scalia's dissent was vindicated by popular acceptance and experience, as Congress declined to renew the Independent Counsel statute largely on account of the pathologies identified in his dissent.[60] The decision's fame was followed by a sharp turn toward the original meaning championed in it by Justice Scalia.

That began with *Free Enterprise Fund v. Public Company Accounting Oversight Board*. The case was a challenge by a regulated party to a relatively novel agency structure wrought by Congress in the wake of *Morrison*. In response to a series of accounting scandals, the Congress established a new Public Company Accounting Oversight Board to regulate, inspect, investigate, and discipline accounting firms.[61] The Board's members could be removed by the Securities and Exchange Commission only on three narrow grounds: willful violation of the governing statute, willful abuse of authority, and unjustified failure to enforce the law administered by the Board.[62] SEC members, in turn, could not be removed by the President except for "inefficiency, neglect of duty, or malfeasance in office."[63] The result was what the Court called a "dual for-cause limitation" on removal.[64]

The contrast between Chief Justice John Roberts's majority opinion and *Morrison* was apparent from the very first sentence: "Our Constitution divided the 'powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial.'"[65] The case, it went on to explain, involved a "new situation not yet encountered by the Court."[66] It framed the question so: "May the President be restricted in his ability to remove a principal officer, who is in turn restricted in his ability to remove an inferior officer, even though that inferior officer determines the policy and enforces the laws of the United States?"[67]

That framing followed then-Judge Brett Kavanaugh's dissent in the court below. Whereas the D.C. Circuit majority upheld the dual-restriction structure based on what it considered to be a mundane application of *Humphrey's Executor*, as bolstered and broadened by *Morrison*,[68] Judge Kavanaugh regarded it as novel—not a structure in the mode of *Humphrey's Executor*, but "*Humphrey's Executor* squared."[69] That, he reasoned, was both unsupported by precedent and an excessive limitation on the President's ability to exercise control over core executive functions.[70]

The Supreme Court agreed with Judge Kavanaugh. Because the Board's structure presented a new question—every previous

52 *Id.* at 692.

53 *Justices Kagan and Judges Srinivasan and Kethledge Offer Views from the Bench*, Stanford Lawyer (May 30, 2015), *available at* https://law.stanford.edu/stanford-lawyer/articles/justice-kagan-and-judges-srinivasan-and-kethledge-offer-views-from-the-bench/.

54 *Morrison*, 487 U.S. at 699 (Scalia, J., dissenting).

55 *Id.* at 705.

56 *Id.*

57 *Id.* at 726.

58 *Id.* at 727, 731–32.

59 *Id.* at 699.

60 *See* Helen Dewar, *Independent Counsel Law Is Set to Lapse*, Wash. Post. (June 5, 1999), *available at* https://www.washingtonpost.com/wp-srv/politics/special/counsels/stories/counsel060599.htm.

61 *Free Enterprise Fund*, 561 U.S. at 484–85.

62 *Id.* at 486 (quoting 15 U.S.C. § 7217(d)(3)).

63 *Id.* at 487. Neither the Securities Act, nor the Exchange Act, actually contain such a restriction, but the Court assumed, based on the parties' agreement, that such a restriction applies. *Id.*

64 *Id.* at 492.

65 *Id.* at 483 (quoting INS v. Chadha, 462 U.S. 919, 951 (1983)).

66 *Id.*

67 *Id.* at 483–84.

68 *See* 537 F.3d 667, 685 (D.C. Cir. 2008).

69 *Id.* at 686 (Kavanaugh, J., dissenting).

70 *Id.* at 686–87.

case had involved "only one level of protected tenure"[71]—the Court had to begin from constitutional first principles. And the paramount principle was the one that had "prevailed" at the Framing and in the First Congress: "the executive power include[s] a power to oversee executive officers through removal."[72] *Myers*, a "landmark," had been right all along about the President's power: because "[i]t is his responsibility to take care that the laws be faithfully executed," the President must be able to remove officials who may impede him in that duty.[73]

Given this understanding, a second layer of protection from removal was at least a step too far. Because of the second layer limiting the SEC's power to remove Board members, the President "cannot hold the Commission fully accountable for the Board's conduct, to the same extent that he may hold the Commission accountable for everything else that it does."[74] And "[w]ithout the ability to oversee the Board, or to attribute the Board's failings to those whom he can oversee, the President is no longer the judge of the Board's conduct."[75] That "subverts the President's ability to ensure that the laws are faithfully executed—as well as the public's ability to pass judgment on his efforts"[76] —and is, for that reason, "incompatible with the Constitution's separation of powers."[77] It would be difficult to imagine a more thorough repudiation of the mode of analysis carried out in *Morrison*—a decision *Free Enterprise Fund* characterized as addressing merely "the status of inferior officers" and nothing more.[78]

Several other aspects of *Free Enterprise Fund* would later prove important. First is that it accepted a private party's standing to raise the separation-of-powers issue through a claim challenging action by an agency alleged to be unconstitutionally constituted.[79] Second is its refusal to take the statutory out, and thereby duck the constitutional issue, by broadly interpreting the SEC's removal authority over Board members.[80] Third is the professed narrowness of its holding.[81] Fourth is its aggressive severability analysis resulting in a meagre remedy for the challenger, which obtained a declaration that the removal restrictions, but no other portion of the statute, were invalid, such that Board members would be "removable by the Commission at will."[82]

A decade would pass before the Court next considered the President's removal power in *Seila Law LLC v. Consumer Financial Protection Bureau*.[83] The parallels with its predecessor are striking: Chief Justice Roberts's majority opinion relies again on the novelty of a new agency's structure, in an approach that was again prefigured by then-Judge Kavanaugh in a similar case before the D.C. Circuit.[84] Notably, by the time *Seila Law* reached the court, Judge Kavanaugh had become Justice Kavanaugh and joined the Chief's opinion in full.

That opinion opens not with a statement of principle—that's the next paragraph—but with a description of the issue before the Court. In creating the Consumer Financial Protection Bureau, "Congress deviated from the structure of nearly every other independent administrative agency in our history" by providing that the agency "would be led by a single Director, who serves for a longer term than the President and cannot be removed by the President except for inefficiency, neglect, or malfeasance."[85] That single Director, in turn, "wields vast rulemaking, enforcement, and adjudicatory authority over a significant portion of the U.S. economy."[86] The question, then, was "whether this arrangement violates the Constitution's separation of powers."[87]

Applying the same approach as *Free Enterprise Fund*, the answer was obvious: no. Text, history, and precedent all confirm the President's removal power. And the Court's precedents had recognized only "two exceptions to the President's unrestricted removal power": one for inferior officers, as in *Perkins* and *Morrison*, and one created by *Humphrey's Executor*. The latter, the Court announced, was not quite so broad as had been assumed and did no more than "permit[] Congress to give for-cause removal protections to a multimember body of experts, balanced along partisan lines, that performed legislative and judicial functions and was said not to exercise any executive power."[88] Although an arguable reading of the decision—that is how *Humphrey's Executor* regarded the FTC—this interpretation essentially limited *Humphrey's Executor* to its circumstances, which was just as well given that *Morrison* had already interred its reasoning and rule. So understood, neither *Morrison* nor *Humphrey's Executor* controlled.[89]

From there, the Court made short work of the restriction shielding the CFPB Director from removal. The single-member structure, it observed, was novel, or nearly so until quite recently.[90]

71 *Free Enterprise Fund*, 561 U.S. at 495.

72 *Id.* at 492.

73 *Id.* at 493.

74 *Id.* at 496.

75 *Id.*

76 *Id.* at 498.

77 *Id.*

78 *Id.* at 494.

79 *Id.* at 512 n.12.

80 *Id.* at 502–03.

81 *Id.* at 506 ("We do not decide the status of other Government employees . . . .").

82 *Id.* at 509, 513.

83 140 S. Ct. 2183.

84 PHH Corp. v. Consumer Financial Protection Bureau, 881 F.3d 75, 164 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting).

85 *Seila Law*, 140 S. Ct. at 2191.

86 *Id.*

87 *Id.*

88 *Id.* at 2199.

89 *Id.* at 2200.

90 *Id.* at 2201–02. Similarly structured agencies included the FHFA and the Social Security Administration. As detailed more fully below, the Court made quick work of the FHFA in *Collins v. Yellen*. And shortly thereafter, the Biden Administration made quick work of the Social Security Administration Commissioner. *Constitutionality of the Commissioner of Social Security's Tenure Protection*, 45 OLC Op. __ (July 8, 2021), *available at* https://www.justice.gov/olc/file/1410736/download.

And the Director exercised substantial executive power, with the ability to "*unilaterally*, without meaningful supervision, issue final regulations, oversee adjudications, set enforcement priorities, initiate prosecutions, and determine what penalties to impose on private parties."[91] Accordingly, "the Director's insulation from removal by an accountable President is enough to render the agency's structure unconstitutional."[92] Once again, there was no statutory fix to avoid the constitutional issue.[93] And once again, the remedy was to sever "the offending tenure restriction," leaving the CFPB as it was but with a Director removable at will by the President.[94]

Seila Law differs from *Free Enterprise Fund* only in that it drops the hedging about the full extent of the President's removal power. "The President's power to remove—and thus supervise—those who wield executive power on his behalf," it proclaims, "follows from the text of Article II, was settled by the First Congress, and was confirmed in the landmark decision *Myers*."[95] "[T]he core holding of *Myers*," in turn, is "that the President has unrestrictable power to remove purely executive officers."[96] Moreover, *Humphrey's Executor*'s "conclusion that the FTC did not exercise executive power has not withstood the test of time."[97] There is a reason the Chief Justice felt the need to spell out that the Court's decision "d[id] not revisit *Humphrey's Executor*."[98]

Seila Law pointed the way to *Collins v. Yellen*, a challenge by private parties to the single-director structure of the Federal Housing Finance Agency, which was created around the same time as the CFPB.[99] *Seila Law* had distinguished the FHFA from the CFPB on the ground that the former "regulates primarily Government-sponsored enterprises, not private actors."[100] That observation carried little weight in *Collins*. Per Justice Samuel Alito's majority opinion, "*Seila Law* is all but dispositive."[101]

The Court, however, did not end its analysis there but continued on to address (and reject) a series of contrary arguments and thereby clarify the current state of doctrine. One argument sought to distinguish *Seila Law* based on differences in authority of the two agencies at issue. The Court wasn't having it: although "the FHFA's authority is more limited than that of the CFPB," "the nature and breadth of an agency's authority is not dispositive in determining whether Congress may limit the President's power to remove its head."[102] Any rule that required distinguishing among agencies based on scope of authority or importance—the precise approach announced in *Morrison*, never to be seen again—would be unworkable.[103] Nor does it matter whether an agency regulates "ordinary Americans" directly.[104] And is the supposedly "modest" nature of the statute's tenure restriction—the Director may be removed "for cause," without limiting what causes qualify—enough to save it? Of course not: "even modest restrictions" impair the President's authority, as

> [t]he President must be able to remove not just officers who disobey his commands but also those he finds negligent and inefficient, those who exercise their discretion in a way that is not intelligent or wise, those who have different views of policy, those who come from a competing political party . . . , and those in whom he has simply lost confidence.[105]

After *Collins*, the only question left on the table appears to be whether an officer protected by a removal restriction exercises executive power.

Although *Collins* devotes less space than *Free Enterprise Fund* and *Seila Law* to the theory and practice of executive power, it does push meaningfully beyond their reasoning. The removal power, it states, "is essential to subject Executive Branch actions to a degree of electoral accountability," because "the President, unlike agency officials, is elected."[106] Importantly, that principle applies at all levels of the Executive Branch: "At-will removal ensures that the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community."[107] And, as noted, *Collins* finally repudiated *Morrison*'s logic that the nature and breadth of an executive official's authority matters in assessing the constitutionality of restrictions on removal of that official; after *Collins*, those factors appear to be irrelevant. These points in particular drew a sharp response from Justice Kagan, who joined the majority's judgment on stare decisis grounds but refused to join "the majority's political theory" of electoral accountability and its "extension of *Seila Law*'s holding."[108]

The Court's remedial discussion bears special mention. It found the removal restriction severable from the remainder of the statute, naturally enough.[109] But it did not call into question the agency's actions while the offending removal provision was in effect, because "the officers who headed the FHFA during the time in question were properly *appointed*."[110] Still, the Court left

91 *Seila Law*, 140 S. Ct. at 2203–04.

92 *Id*. at 2204.

93 *See id*. at 2206.

94 *Id*. at 2209.

95 *Id*. at 2191–92.

96 *Id*. at 2199 (quotation marks omitted).

97 *Id*. at 2198 n.2.

98 *Id*. at 2206.

99 141 S. Ct. 1761.

100 *Seila Law*, 140 S. Ct. at 2202.

101 *Collins*, 141 S. Ct. at 1783.

102 *Id.* at 1784.

103 *Id.* at 1785.

104 *Id.* at 1786.

105 *Id.* at 1787 (quotation and citations marks omitted).

106 *Id.* at 1784.

107 *Id.* (quotation marks omitted).

108 *Id*. at 1800–01 (Kagan, J., concurring in part and concurring in the judgment in part).

109 *See id.* at 1787–89.

110 *Id.* at 1787.

open the possibility that the removal restriction could have caused "compensable harm" in the unusual circumstances of the case,[111] such as if the President had been prevented or deterred from removing the FHFA Director.[112] But one doubts that this kind of relief would be available at all outside the unusual circumstances of *Collins*, let alone that many private parties could make such a showing or even allege such a ground for relief.

IV. The End of Independence from Presidential Control?

After *Seila Law* and *Collins*, it would be fair to question whether anything remains of *Humphrey's Executor* and the "headless" fourth branch of independent agencies that it enabled. Indeed, a recent opinion of the Office of Legal Counsel recognized that *Seila Law* and *Collins* leave open only "the possibility that certain agencies . . . may constitutionally be led by officials protected from at-will removal by the President."[113] Although *Humphrey's Executor* has not been formally overruled, its reasoning has been repudiated, as has its holding in large part. The stare decisis calculus suggests that it need not be maintained, and *Collins* in particular suggests that it will not be. Its end could come sooner than many expect.

Seila Law and *Collins* leave no doubt that a majority of Justices regard *Humphrey's Executor* and its progeny as wrongly decided. There is no way to reconcile those cases' authorization of restrictions on removal of Executive Branch officials with *Seila Law*'s recognition that the President's removal authority "follows from the text of Article II," and its announcement that "the President has unrestrictable power to remove purely executive officers."[114] The Court now understands, as the *Humphrey's Executor* Court did not, that what Congress considers to be "independent" agencies[115] exercise purely executive power.[116] "That power," in turn, "acquires its legitimacy and accountability to the public through a clear and effective chain of command down from President," who is and must be "ultimately responsible" for its exercise.[117] And that should be the end of the matter, at least so far as the merits of the removal-power question are concerned.

But that leaves stare decisis, the doctrinal concept that the Court "should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them."[118] Stare decisis is "not an inexorable command," though, and the Court will overturn its past decisions when it has "strong grounds for doing so."[119] To begin with, it may be that stare decisis is not even applicable in this context; because *Myers* has never been overruled, the Court's precedents on removal power could be viewed as conflicting, requiring the Court to pick one line or the other. It would also be easy to distinguish *Humphrey's Executor* and *Wiener* into oblivion. Both regarded *Myers* as reaching only "purely executive officers" *and* adjudged the two agencies they addressed not to wield executive power at all. Even if the latter point was mistaken, the Court need not overrule it, but may instead limit it to those two agencies as they were constituted and functioned at the time. Today's agencies, by contrast, wield vast power that is indisputably executive in nature and so are subject to the rule of *Myers*. The Court has already gone a long way down this path, particularly in *Seila Law*'s characterization of *Humphrey's Executor*'s holding as reaching only agencies "said not to exercise any executive power."[120] For a next step, the Court need do no more than apply that understanding in a case involving a traditional multimember agency.

If the Court is inclined to take *Humphrey's Executor* head-on, stare decisis should be no barrier to overruling it. The doctrine "is at its weakest when [the Court] interpret[s] the Constitution because [its] interpretation can be altered only by constitutional amendment or by overruling [its] prior decisions."[121] In considering whether to overrule a past decision, the Court often considers such factors as "the quality of [its] reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision."[122] The Court's recent decisions neatly dispose of the first three: the reasoning of *Humphrey's Executor* has been eviscerated; *Collins* recognizes its rule (or, more accurately, what *Morrison* made of its rule) to be unworkable; and it plainly conflicts with other decisions, from *Myers* through *Collins*, as well as those recognizing independent agencies to wield executive power.

So far as subsequent developments are concerned, "the Court decided [*Humphrey's Executor*] against a very different . . . backdrop" than prevails today.[123] The years since that decision have witnessed the accretion of a "vast and varied federal bureaucracy" that exercises "authority . . . over our economic, social, and political activities."[124] "The collection of agencies housed outside

111 The suit was brought by shareholders in Fannie Mae and Freddie Mac to obtain relief from and compensation for an FHFA action requiring the companies to transfer nearly all of their earnings to Treasury. *Id*. at 1777. By the time the suit reached the Supreme Court, the shareholders' claims for prospective relief had become moot. *Id*. at 1780.

112 *Id.* at 1789.

113 OLC Opinion, *supra* note 90.

114 *Seila Law*, 140 S. Ct. at 2191–92, 2199.

115 *See, e.g.,* 44 U.S.C. § 3502(5) (listing some).

116 *See* City of Arlington, Tex. v. FCC, 569 U.S. 290, 304 n.4 (2013) (rejecting claim that "agencies exercise 'legislative power' and 'judicial power,'" and explaining that all agency activities, no matter their resemblance to legislative or judicial activities, "are exercises of—indeed, under our constitutional structure they *must* be exercises of—the 'executive Power'"); *Morrison*, 487 U.S. at 690 n.28.

117 United States v. Arthrex, Inc., 141 S. Ct. 1970, 1979, 1982 (2021) (quotation marks omitted); *compare* 1 Annals of Cong. 463 (1789) (statement of James Madison on the floor of the First Congress that "if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws").

118 The Federalist No. 78 (Hamilton).

119 Janus v. Am. Fed. of St., Cnty., & Muni. Empls., 138 S. Ct. 2448, 2478 (2018).

120 *Seila Law*, 140 S. Ct. at 2199.

121 Agostini v. Felton, 521 U.S. 203, 235 (1997).

122 *Janus*, 138 S. Ct. at 2478–79.

123 *Id*. at 2483.

124 *Arlington*, 569 U.S. at 313 (Roberts, C.J., dissenting) (quotation marks omitted).

the traditional executive departments, including the Federal Communications Commission" and FTC, "is routinely described as the 'headless fourth branch of government,' reflecting not only the scope of their authority but their practical independence."[125] There have also been developments in the law. *Humphrey's Executor* and *Wiener* have become anomalies in the Court's executive-power jurisprudence.

Only reliance interests carry any weight against dispatching *Humphrey's Executor*, but *Collins* takes what otherwise would be the weightiest of them off the table. The key is its holding that an agency's past actions remain valid, notwithstanding any improper statutory removal restriction, so long as its officers "were properly *appointed*."[126] So even an outright overruling of *Humphrey's Executor* and what it came to stand for would upset no one's reliance on the work of independent agencies to date. As for Congress, both *Free Enterprise Fund* and *Seila Law* adopt a strong—perhaps insurmountable—presumption that a removal restriction may be severed from the remainder of a law and an agency's structure and powers thereby left otherwise unchanged. To overcome that presumption requires evidence "that Congress, faced with the limitations imposed by the Constitution, would have preferred no [agency] at all to a[n agency] whose members are removable at will."[127] If that standard was not met for the CFPB—which Congress specifically declared "independent" and accorded an unusual single-member structure precisely to bolster its independence—then it is unlikely ever to be met. So Congress's handiwork (the FTC, the FCC, and the rest) should remain fully intact, but for restrictions on the President's removal power. And Congress's reliance on its ability to enact such provisions is due little weight.[128]

All this suggests that *Collins* will not be the last word on the President's removal power. The next case may reach the Court in one of two ways.

First is an action challenging the lawfulness of a removal, as in *Myers* and *Humphrey's Executor*. To date, at least one of the appointees dismissed by President Biden has filed suit. Roger Severino was removed from his position on the Council of the Administrative Conference of the United States (ACUS), "an independent federal agency charged with convening expert representatives from the public and private sectors to recommend improvements to administrative processes and procedure."[129] President Donald Trump appointed Mr. Severino to a three-year term on the Council on January 16, 2021, and President Biden terminated his service on February 3, 2021. Mr. Severino's suit seeks declaratory and injunctive relief, including restoration of his appointment to the Council.[130] As ACUS is a purely advisory multimember agency comprised of experts on administrative affairs, this action potentially calls into question *Humphrey's Executor*. A sticking point, however, is that the statute contains no express removal restriction; accordingly, the more apt precedent may be *Wiener*, which held a similar statute to imply a restriction on removal. Similarly, Social Security Commissioner Andrew Saul, who disputes his recent removal by President Biden, may seek relief by suing for reinstatement or compensation.[131] Although the Social Security Act does restrict removal of the Commissioner, the agency's single-member structure may not require a court to venture much beyond *Collins*. But even so, the Commissioner's largely adjudicative function provides an opportunity to further erode, or perhaps even revisit, *Humphrey's Executor*.

President Biden's dismissals may also be subject to challenge by private parties whose rights were affected. Such challenges are now pending. President Biden took the unprecedented step of removing Peter Robb from his position as General Counsel of the NLRB on Inauguration Day, despite his four-year term running to November 17, 2021. Parties subject to actions initiated by the NLRB General Counsel have challenged the Acting General Counsel's authority to act in pending cases.[132] A similar challenge might be raised to President Biden's removal of Sharon Gustafson from her position as General Counsel of the Equal Employment Opportunity Commission on March 5, 2021, less than halfway through her four-year term, or to President Biden's removal of Mr. Saul.

The second way the constitutional issue may arise is in a private-party challenge to actions by an official insulated from removal by the President, as in *Free Enterprise Fund*, *Seila Law*, and *Collins*. Although those decisions recognized standing for parties regulated by an independent agency to challenge its structure, *Collins* removes nearly any prospect that a private party will obtain meaningful relief if it prevails. It seems likely, then, that a private-party plaintiff (or defendant in an enforcement action) would need to be in it to change the law governing the Executive

125 *Id.* at 314.

126 *Collins*, 141 S. Ct. at 1787.

127 *Seila Law*, 140 S. Ct. at 2209 (internal quotations omitted).

128 *Cf. Chadha*, 462 U.S. at 945 ("[P]olicy arguments supporting even useful 'political inventions' are subject to the demands of the Constitution which defines powers"). This logic, in the main, also applies to removal restrictions for inferior officers. The reasoning of *Perkins*, 116 U.S. 483—what little of it there was—is poor. The decision does not address the constitutional provisions underlying the President's removal power—the Executive Vesting Clause and the Take Care Clause—and those provisions do not distinguish between principal and inferior officers. *Cf.* 1 Annals of Cong. 499 (1789) ("If the President should possess alone the power of removal from office, those who are employed in the execution of the law will be in their proper situation," even "the lowest officers, . . . will depend, as they ought, on the President, and the President on the community.") *Morrison*, as well, conflicts with later decisions that have forcefully rejected its uncertain standard of measuring the propriety of a restriction by whether it leaves the President "ample authority," 487 U.S. at 692, whatever that means. As a practical matter, however, there may be little to gain through a challenge to the insulation of an inferior officer, given that such officers are by definition supervised by principal officers and that it is the insulation of agency heads, who are principal officers, that makes an agency independent of the President. *Cf. Arthrex*, 141 S. Ct. 1979. Even so, the issue could arise the same way that it did in *Perkins*—through a challenge to dismissal.

129 "About," acus.gov.

130 Severino v. Biden, No. 21-cv-314 (D.D.C. filed Feb. 3, 2021).

131 *Biden Fires Trump-Nominated Social Security Commissioner*, Reuters (July 12, 2021), *available at* https://www.reuters.com/article/usa-biden-social-security-idTRNIL1N2OO1OK.

132 *E.g.*, In re NABET-CWA and Jeremy Brown, Case Nos. 19-CB-244528, 19-CV-274119 (NLRB).

Branch, rather than to relieve itself of any obligation. And there are organizations interested in doing just that.[133]

Such challenges may arrive sooner rather than later. The FTC, for example, has recently announced "an aggressive new agenda" that includes stepped-up investigatory and enforcement actions—both exercises of quintessentially executive power.[134] An action challenging the FTC's status would provide the Court with a perfect vehicle to revisit *Humphrey's Executor*'s approval of the same agency's structure.[135]

133 *See, e.g.,* Devin Watkins, *Looking Back at the Success of* 'Free Enterprise Fund,' Competitive Enterprise Inst., Aug. 10, 2018 (noting think tank's role in separation-of-powers suit), *available at* https://cei.org/blog/looking-back-at-the-success-of-free-enterprise-fund/.

134 *See* Aaron Nielson, *Is the FTC on a Collison Course With the Unitary Executive?*, Notice & Comment, July 2, 2021, https://www.yalejreg.com/nc/is-the-ftc-on-a-collison-course-with-the-unitary-executive/. (Professor Nielson would know. He had the unenviable task of defending the FHFA's structure before the Court in *Collins*.)

135 *See, e.g.*, Petition for Writ of Certiorari, Axon Enter., Inc., v. Fed. Trade Comm'n, No. 21-86 (S. Ct. July 20, 2021) (asking the court to consider whether "the structure of the Federal Trade Commission . . . is consistent with the Constitution").