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Symposium: Resurrecting the fountainhead of removal doctrine

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The Consumer Financial Protection Bureau has been controversial since its creation. First proposed by then-Harvard Law professor Elizabeth Warren, the CFPB administers 19 federal consumer-protection statutes and is overseen by a single director nominated by the president and confirmed by the Senate. That director serves a five-year term, removable only for "inefficiency, neglect of duty, or malfeasance in office."

Even in a town where so much power is wielded, it isn't going too far to say that the CFPB director is one of the most powerful and unaccountable people in Washington. The agency isn't even beholden to the normal appropriations process because its funding comes from the Federal Reserve. The director simply requests an amount "reasonably necessary to carry out" the agency's duties, and the Fed provides it (so long as it doesn't go above a set percentage of the Fed's operating expenses).

A dedicated CFPB director could rework a large part of America's financial system and there's almost nothing any elected official could do about it. A dedicated president could promise his constituents that he would fix certain broken aspects of consumer lending, but he would be nearly powerless against the awesome and unaccountable power of the CFPB director.

There's something wrong with that. Although independent agencies may sometimes be good for governance, they fit uneasily into our constitutional structure. Seila Law is a California-based law firm that assists clients with consumer debt. When the CFPB opened an investigation into whether the firm violated consumer-finance law, it probably didn't expect to end up at the Supreme Court litigating the constitutionality of its own structure. Or maybe it did, because the structure of the CFPB has hung like a sword of Damocles over the agency since its creation.

This is a good time to have this fight. Independent agencies have been criticized for decades, and the judicial decisions that authorized them have long been questioned. This fourth branch of government skirts the usual system of checks and balances by exercising powers reserved for each of the three branches, frequently without any oversight or control by anyone, let alone the branch to which the power was originally entrusted. Yet the Constitution says, "The executive Power shall be vested in a President." A fair reading of those words would look to the meaning of "executive power" and to anyone wielding that power. Those officials should be, at minimum, accountable to the president.

Humphrey's Executor v. United States (1935) is the foundational case upon which independent agencies were created. The Supreme Court looked to the meaning of "executive power" and ruled that limits on the president's removal powers were constitutional with respect to the recently created Federal Trade Commission. The court described the FTC's statutory duties as "neither political nor executive, but predominantly quasi-judicial and quasi-legislative," emphasizing the "non-partisan" and "expert" aspects of the commission. When conducting investigations and reporting its findings to Congress, the FTC "acts as a legislative agency." When acting "as a master in chancery under rules prescribed by the court, it acts as an agency of the judiciary." The court viewed FTC commissioners as "occup[ying] no place in the executive department" and "exercis[ing] no part of the executive power vested by the Constitution in the President." Any exercise of "executive function," which the court described as distinguishable from "executive power in the constitutional sense," is in the service "of its quasi-legislative or quasi-judicial powers, or as an agency of the legislative or judicial branches of government."

While the court concluded that the FTC is quasi-legislative, quasi-judicial, and nonexecutive, the core of *Humphrey's Executor* is a respect for the separation of powers. If an agency is "wholly disconnected from the executive department," then it follows that the president would not have the inherent, unlimitable authority to control it. Congress may restrict the president's removal power to protect the nonexecutive agency from the executive branch's control. Think, for an obvious example, of a congressional committee. The president has no inherent authority to appoint or remove members of such a committee because it exercises legislative authority. The president could only feasibly gain such authority if Congress gave it to him (and then there would be a significant nondelegation problem).

In the decades after *Humphrey's Executor*, the court continued to examine whether independent agencies wield "executive power." In *Wiener v. United States* (1958), the court looked to the "intrinsic judicial character" of the War Claims Commission in ruling that the president could not remove members of the commission at will. In *Morrison v. Olson* (1988), however, the court changed course, upholding limits on a president's ability to remove an independent counsel after considering whether "the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty."

It is an odd decision. Because the independent counsel was essentially a prosecutor, and prosecution is traditionally a core executive function, the court was obliged to move away from distinctions between the "executive power" and "quasi-legislative" and "quasi-judicial" powers in order to uphold the restrictions on presidential removal. Instead, it turned to the much vaguer question of whether it is "essential to the President's proper execution of his Article II powers that these agencies be headed up by individuals who were removable at will."

Seven justices (with Anthony Kennedy recused and Justice Antonin Scalia vigorously dissenting), none of whom had ever been president or a governor, opined on what was "essential to the President's proper execution of his Article II powers." But there had earlier been a justice who had been president—and who wrote eloquently and knowingly about the nature of effective executive power. Chief Justice William Howard Taft, in *Myers v. United States* (1926), wrote that "when the grant of the executive power is enforced by the express mandate to take care that the laws be faithfully executed, it emphasizes the necessity for including within the executive power as conferred the exclusive power of removal."

Taft's lengthy opinion in *Myers* concluded that constitutional structure and separation of powers principles made the president's removal power regarding officers exercising executive power "illimitable." "From [the] division" of powers into three branches, Taft wrote, "the reasonable construction of the Constitution must be that the branches should be kept separate in all cases in which they were not expressly blended, and the Constitution should be expounded to blend them no more than it affirmatively requires." Taft understood that when an agency exercises executive power, such as by filing suit to enforce a federal consumer-protection law, the officers of that agency are exercising the power vested by the Constitution in the president alone. For that exercise of the president's power to be constitutionally valid, the president must retain ultimate control over its use.

If the CEO of a company were limited in her ability to remove a lesser officer, that would severely curtail her prerogative as executive. Similarly, the president's ability to remove agency heads at will means that he can remove them if he disapproves of their use of the executive power—leaving ultimate responsibility for the exercise of executive power with the president. The public can in turn hold the president accountable for his decision to remove, or not remove, an agency head. If the president is limited in his ability to remove an agency head, then the executive power exists at least partially outside his control. Instead, it rests with the agencies and their chief officers—bureaucrats, unaccountable to the people. Such a system has no place in our constitutional structure, which rigidly defines where each power of government is vested.

Yet only a decade after *Myers* was decided, *Humphrey's Executor*, in the words of Scalia's dissent in *Morrison*, "gutt[ed], in six quick pages devoid of textual or historical precedent for the novel principle it set forth, [*Myers*'s] carefully researched and reasoned 70-page opinion." While on the U.S. Court of Appeals for the District of Columbia Circuit, then-Judge Brett Kavanaugh described in his concurrence in *In re Aiken County* (2011) how *Humphrey's Executor* has led to a situation in which the president "lacks day-to-day control over large swaths of regulatory policy and enforcement in the Executive Branch" due to independent agencies with "huge policymaking and enforcement authority" that can "greatly affect the lives and liberties of the American people."

The test should be whether an officer exercises executive power. Because the executive power is vested by the Constitution exclusively in the president, any officer who exercises that power is removable by the president at his discretion. In *Seila Law*, this is not a close call: The CFPB director obviously exercises executive power. This case, which presents such a clear violation of the separation of powers, will allow the Supreme Court to set down a ground rule that will guide the lower courts in how to expound on the doctrine within the proper constitutional framework.

As Scalia noted in *Morrison*—one of those solo dissents that has come to be viewed as the true reading of the law all along—determining which kind of governmental power an officer exercises is not always easy, and there will always be close cases. Dealing with those close cases of quasi-powers under a clear and definitive test is, however, preferable to the status quo, in which lower courts are faced with the daunting task of simultaneously following *Humphrey's Executor*, *Morrison* and the Constitution.

In *Seila Law*, the Supreme Court should clarify the extent to which *Humphrey's Executor* remains good law and announce a clear test for removal-doctrine cases, thus relieving the lower courts of the task of navigating a jumbled set of precedents and allowing them to return to what Scalia referred to as the "fountainhead" of removal doctrine: the separation of powers.

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