Time to Rein in the Unconstitutional Fourth Branch of Government

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Our three branches of government protect liberty through a system of checks and balances that prevent any single individual or entity from growing too powerful. During the 20th century, however, Congress began creating "independent" agencies, typically headed by multiple commissioners appointed by the president. Those agencies skirt the usual system of checks and balances by exercising elements of all three branches, frequently without any oversight or control by anyone, let alone the branch to which the power was originally entrusted. Transferring government power to unaccountable and unelected officials has resulted in unconstitutional agencies that lack the structural protections for liberty designed by the Framers.

In *Seila Law LLC v. CFPB*, the Supreme Court will decide the constitutionality of the Consumer Financial Protection Bureau (CFBP), which was created as part of the 2010 Dodd-Frank Act. From the start, this agency has been criticized not just by the business community and free-market-oriented politicians, but also by constitutional scholars who see major problems with its structure as a single-director agency. The lawsuit was brought by Seila Law, a firm that assists in resolving personal-debt issues among other legal work that puts it in the crosshairs of those who, like Senator Elizabeth Warren, want greater regulation of consumer-facing financial services. When the CFPB began an investigation into Seila Law's practices, the law firm argued that the agency's structure was constitutionally defective. A federal district court in California rejected that claim and the U.S. Court of Appeals for the Ninth Circuit affirmed, but now the Supreme Court will hear the case, with argument set for March 3, 2020.

One of the most concerning hallmarks of independent agencies is the limits Congress frequently puts on the president's ability to remove the officers leading these agencies. Eighty-five years ago, the Supreme Court, f lying in the face of history and precedent, declared in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), that such limitations were constitutional with respect to the recently created Federal Trade Commission (FTC).

The Court took note of the powers held by the FTC: In enforcing antitrust law, the agency could issue and investigate a complaint and fashion relief that a court could accept or reject. The Court described these duties as "neither political nor executive, but predominantly quasi-judicial and quasi-legislative." *Id.* at 624. The Court viewed FTC commissioners as occupying "no place in

the executive department" and exercising "no part of the executive power vested by the Constitution in the President." *Id.* at 628.

Humphrey's Executor's test for limits on the president's ability to remove agency heads is based on which power the agency exercises. While the Court concluded that the FTC is quasi-legislative, quasi-judicial, and non-executive, the core of its holding respects the separation of powers. Twenty-three years later, the Court stuck with that reasoning in deciding *Wiener v. United States*, 357 U.S. 349 (1958), concluding that the War Claims Commission was not executive in character. *Humphrey's Executor* meant that Congress was constitutionally permitted to limit the president's power to remove a member of this quasi-judicial agency.

Thirty years after that, the Court made a dramatic shift in *Morrison v. Olson*, 487 U.S. 654 (1988), which addressed a limitation on the president's ability to remove an independent counsel. Again, the Court found the limitation constitutional, but not for the same reasons as in *Humphrey's Executor* or *Wiener*. The Court wrote that the validity of a for-cause removal restriction cannot turn on whether an agency is "purely executive." Unlike the "rigid categories" in *Humphrey's* and *Wiener* that classified officers as executive, (quasi-)legislative, or (quasi-)judicial, the *Morrison* Court held that the "real question is whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty." *Id.* at 691.

Morrison cast serious doubt on the continuing validity of *Humphrey's Executor*, which its sole dissenter said was now "swept into the dustbin of repudiated constitutional principles" but not overruled. *Id.* at 725 (Scalia, J., dissenting). Predictably, this maneuver has caused no shortage of confused and conf licting opinions in the lower courts over three decades, as judges struggled to apply manifestly incompatible Supreme Court precedents.

Two recent cases illustrate the problem. In *PHH Corp. v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018), the D.C. Circuit confronted the very question at issue here. Justice Brett Kavanaugh, then a judge on that court, found the CFPB to be unconstitutional in his panel opinion before the "post-nuclear" D.C. Circuit reversed him en banc.1

The other case, *Collins v. Mnuchin*, 938 F.3d 553 (5th Cir. 2019), concerned the constitutionality of the Federal Housing Finance Agency (FHFA). The en banc Fifth Circuit found the FHFA unconstitutional but dealt with the incompatibility of *Humphrey's Executor* and *Morrison* in a similar manner to the D.C. Circuit. Instead of applying the *Morrison* test to distinguish the FHFA from the FTC, the court returned to a *Humphrey's*-style analysis: "The FHFA—unlike the FTC—exercises executive functions." *Id.* at 670–72. Like the *PHH* court, the *Collins* court avoided a near-impossible reconciliation of *Humphrey's* and *Morrison* by limiting each to its own facts. But this tactic only works so long as both comparisons achieve the same result. What are lower courts to do if a removal limitation passes the *Humphrey's* test but fails *Morrison*, or vice versa?

The CFPB provides the perfect test case for this conundrum. It is the most independent of independent agencies, led by a single director serving a five-year term and essentially accountable to no one. The CFPB doesn't even need Congress to provide its funding, because its budget requests are rubber-stamped by the Federal Reserve, which is another independent agency. The CFPB has authority over 19 federal consumer-protection laws, through which it writes regulations, investigates potential violations, and brings enforcement actions in its own

administrative proceedings. The CFPB—and, in turn, its sole director—thus exercises significant legislative, executive, and even judicial power over consumer finance regulation.

Supporters of the CFPB's constitutionality seek refuge in *Humphrey's Executor*, arguing that the agency is nothing but a logical extension of that and later cases upholding removal restrictions of officers heading independent agencies. (Notably, those supporters no longer include the CFPB itself, having switched sides under the Trump administration.) But lower courts are all over the place in adjudicating these sorts of disputes, in large part because of the uncertain status of *Humphrey's Executor* and lack of clear direction on the removal doctrine. Unless the inconsistencies among *Humphrey's Executor*, *Morrison*, and other removal cases are resolved, similar disputes will continue to divide lower courts, leaving independent agencies in constitutional limbo.

In evaluating the constitutionality of the removal limitation for the CFPB director, the relevant inquiry is a simple one: does he or she exercise executive power? Thankfully, this is not a close call. A clear violation allows the Supreme Court to set a rule that will guide lower courts in how to expound on the doctrine within the proper constitutional framework. That the CFPB is in a "headless fourth branch," rather than solidly in the executive branch, compounds the constitutional problem rather than saves it. *PHH*, 881 F.3d at 165 (Kavanaugh, J., dissenting).

This fourth branch may in some ways be more efficient than a unitary system where all executive power is under the president's purview. But "[t]he purpose of the separation and equilibration of powers in general, and of the unitary Executive in particular, was not merely to assure effective government but to preserve individual freedom." *Morrison*, 487 U.S. at 727 (Scalia, J., dissenting). Because Congress insulated the CFPB director from the three constitutionally authorized branches, "the Director enjoys more unilateral authority than any other official in any of the three branches of the U.S. Government. … In essence, the Director of the CFPB is the President of Consumer Finance." *PHH*, 881 F.3d at 166–66, 172 (Kavanaugh, J., dissenting).

Some aspects of *Humphrey's Executor* are well-taken: those addressing the separation-of-powers issues that would arise if the president could unilaterally remove judicial or legislative officers. But in the 85 years since the case was decided, its overall reasoning has been gutted, leaving it brain dead but still breathing.

It's time to pull the plug on *Humphrey's Executor*—and, for that matter, *Morrison*—salvaging the useful parts into a new and more coherent removal doctrine in line with the separation of powers. Specifically, the Court should keep only the part of *Humphrey's Executor* that permits limitations on the president's removal power in cases of non-executive officers. Because the CFPB director unquestionably exercises executive power, however, the Court should declare the CFPB's structure unconstitutional.

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