AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 12: The Contemporary Era—Separation of Powers/Appointment and Removal Power

**Seila Law LLC v. Consumer Financial Protection Bureau, \_\_\_ U.S. \_\_** (2020)

*Responding to the 2008 financial crisis, Congress created the Consumer Financial Protection Bureau. The CFPB was designed as an independent regulatory agency overseeing consumer debt products. It had an unusual structure in that it was to be led by a single director, nominated by the president and confirmed by the Senate, for a five-year term. The director can be removed by the president only in the case of inefficiency, neglect or malfeasance. The CFPB was housed within the Federal Reserve, and received all of its funding directly from the Federal Reserve (rather than congressional appropriations).*

*Seila Law LLC is a law firm that provides debt-related legal services to clients. CFPB began an investigation of the firm to see whether it had engaged in unlawful practices in advertising or selling debt relief services. When the firm declined to provide demanded documents, the CFPB petitioned a federal district court for enforcement. The firm continued to object on the grounds that the CFPB was unconstitutionally structured and thus its demands were themselves unlawful. The district court rejected that argument, and a circuit court agreed with the trial court. In a 5-4 decision, the Supreme Court reversed the lower courts. The majority found that the political insulation of the director of the CFPB from presidential removal violated the constitutional principle that the president must generally be able to remove executive officers exercising important executive duties in order to fulfill his duty to faithfully execute the law.*

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

. . . .

We hold that the CFPB’s leadership by a single individual removable only for inefficiency, neglect, or malfeasance violates the separation of powers.

Article II provides that “[t]he executive Power shall be vested in a President,” who must “take Care that the Laws be faithfully executed.” The entire “executive Power” belongs to the President alone. But because it would be “impossib[le]” for “one man” to “perform all the great business of the State,” the Constitution assumes that lesser executive officers will “assist the supreme Magistrate in discharging the duties of his trust.”

These lesser officers must remain accountable to the President, whose authority they wield. As Madison explained, “[I]f any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws.” That power, in turn, generally includes the ability to remove executive officials, for it is “only the authority that can remove” such officials that they “must fear and, in the performance of [their] functions, obey.” *Bowsher v. Synar* (1986).

The President’s removal power has long been confirmed by history and precedent. It “was discussed extensively in Congress when the first executive departments were created” in 1789. . . .

The Court recognized the President’s prerogative to remove executive officials in Myers v. United States (1926). . . .

We recently reiterated the President’s general removal power in Free Enterprise Fund v. Public Company Accounting Oversight Board (2010). “Since 1789,” we recapped, “the Constitution has been understood to empower the President to keep these officers accountable—by removing them from office, if necessary.” . . .

Free Enterprise Fund left in place two exceptions to the President’s unrestricted removal power. First, in Humphrey’s Executor v. United States (1935), decided less than a decade after Myers, the Court upheld a statute that protected the Commissioners of the Federal Trade Commission from removal except for “inefficiency, neglect of duty, or malfeasance in office.” In reaching that conclusion, the Court stressed that Congress’s ability to impose such removal restrictions “will depend upon the character of the office.”

Because the Court limited its holding “to officers of the kind here under consideration,” the contours of the Humphrey’s Executor exception depend upon the characteristics of the agency before the Court. Rightly or wrongly, the Court viewed the FTC (as it existed in 1935) as exercising “no part of the executive power.” Instead, it was “an administrative body” that performed “specified duties as a legislative or as a judicial aid.” . . .

In short, Humphrey’s Executor permitted 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. . . .

. . . .

We have recognized a second exception for inferior officers in two cases, United States v. Perkins (1886)and Morrison v. Olson (1988). In Perkins, we upheld tenure protections for a naval cadet-engineer. And, in Morrison, we upheld a provision granting good-cause tenure protection to an independent counsel appointed to investigate and prosecute particular alleged crimes by high-ranking Government officials. Backing away from the reliance in Humphrey’s Executor on the concepts of “quasi-legislative” and “quasi-judicial” power, we viewed the ultimate question as whether a removal restriction is of “such a nature that [it] impede[s] the President’s ability to perform his constitutional duty.” . . .

These two exceptions—one for multimember expert agencies that do not wield substantial executive power, and one for inferior officers with limited duties and no policymaking or administrative authority—“represent what up to now have been the outermost constitutional limits of permissible congressional restrictions on the President’s removal power.”

. . . .

The question instead is whether to extend those precedents to the “new situation” before us, namely an independent agency led by a single Director and vested with significant executive power. We decline to do so. Such an agency has no basis in history and no place in our constitutional structure.

“Perhaps the most telling indication of [a] severe constitutional problem” with an executive entity “is [a] lack of historical precedent” to support it. An agency with a structure like that of the CFPB is almost wholly unprecedented.

. . . .

In addition to being a historical anomaly, the CFPB’s single-Director configuration is incompatible with our constitutional structure. Aside from the sole exception of the Presidency, that structure scrupulously avoids concentrating power in the hands of any single individual.

. . . .

The resulting constitutional strategy is straightforward: divide power everywhere except for the Presidency, and render the President directly accountable to the people through regular elections. In that scheme, individual executive officials will still wield significant authority, but that authority remains subject to the ongoing supervision and control of the elected President. Through the President’s oversight, “the chain of dependence [is] preserved,” so that “the lowest officers, the middle grade, and the highest” all “depend, as they ought, on the President, and the President on the community.”

The CFPB’s single-Director structure contravenes this carefully calibrated system by vesting significant governmental power in the hands of a single individual accountable to no one. The Director is neither elected by the people nor meaningfully controlled (through the threat of removal) by someone who is. The Director does not even depend on Congress for annual appropriations. Yet the Director may unilaterally, without meaningful supervision, issue final regulations, oversee adjudications, set enforcement priorities, initiate prosecutions, and determine what penalties to impose on private parties. With no colleagues to persuade, and no boss or electorate looking over her shoulder, the Director may dictate and enforce policy for a vital segment of the economy affecting millions of Americans.

. . . .

[T]ext, first principles, the First Congress’s decision in 1789, Myers, and Free Enterprise Fund all establish that the President’s removal power is the rule, not the exception. While we do not revisit Humphrey’s Executor or any other precedent today, we decline to elevate it into a freestanding invitation for Congress to impose additional restrictions on the President’s removal authority.

. . . .

Constitutional avoidance is not a license to rewrite Congress’s work to say whatever the Constitution needs it to say in a given situation. Without a proffered interpretation that is rooted in the statutory text and structure, and would avoid the constitutional violation we have identified, we take Congress at its word that it meant to impose a meaningful restriction on the President’s removal authority.

. . . .

The only constitutional defect we have identified in the CFPB’s structure is the Director’s insulation from removal. If the Director were removable at will by the President, the constitutional violation would disappear. We must therefore decide whether the removal provision can be severed from the other statutory provisions relating to the CFPB’s powers and responsibilities.

In Free Enterprise Fund, we found a set of unconstitutional removal provisions severable even in the absence of an express severability clause because the surviving provisions were capable of “functioning independently” and “nothing in the statute’s text or historical context [made] it evident that Congress, faced with the limitations imposed by the Constitution, would have preferred no Board at all to a Board whose members are removable at will.”

So too here. The provisions of the Dodd-Frank Act bearing on the CFPB’s structure and duties remain fully operative without the offending tenure restriction. Those provisions are capable of functioning independently, and there is nothing in the text or history of the Dodd-Frank Act that demonstrates Congress would have preferred no CFPB to a CFPB supervised by the President. Quite the opposite. . . .

. . . .

As in every severability case, there may be means of remedying the defect in the CFPB’s structure that the Court lacks the authority to provide. Our severability analysis does not foreclose Congress from pursuing alternative responses to the problem—for example, converting the CFPB into a multimember agency. The Court’s only instrument, however, is a blunt one. We have “the negative power to disregard an unconstitutional enactment,” but we cannot re-write Congress’s work by creating offices, terms, and the like. “[S]uch editorial freedom . . . belongs to the Legislature, not the Judiciary.”

. . . .

*Vacated and Remanded*.

JUSTICE THOMAS, with whom JUSTICE GORSUCH joins, concurring in part and dissenting in part.

. . . .

The decision in Humphrey’s Executor poses a direct threat to our constitutional structure and, as a result, the liberty of the American people. The Court concludes that it is not strictly necessary for us to overrule that decision. But with today’s decision, the Court has repudiated almost every aspect of Humphrey’s Executor. In a future case, I would repudiate what is left of this erroneous precedent.

. . . .

Despite the defined structural limitations of the Constitution and the clear vesting of executive power in the President, Congress has increasingly shifted executive power to a de facto fourth branch of Government—independent agencies. These agencies wield considerable executive power without Presidential oversight. They are led by officers who are insulated from the President by removal restrictions, “reduc[ing] the Chief Magistrate to [the role of] cajoler-in-chief.” . . .

Unfortunately, this Court “ha[s] not always been vigilant about protecting the structure of our Constitution,” at times endorsing a “more pragmatic, flexible approach” to our Government’s design. Our tolerance of independent agencies in Humphrey’s Executor is an unfortunate example of the Court’s failure to apply the Constitution as written. That decision has paved the way for an ever-expanding encroachment on the power of the Executive, contrary to our constitutional design.

. . . .

Humphrey’s Executor laid the foundation for a fundamental departure from our constitutional structure with nothing more than handwaving and obfuscating phrases such as “quasi-legislative” and “quasi-judicial.” Unlike the thorough analysis in Myers, the Court’s thinly reasoned decision is completely “devoid of textual or historical precedent for the novel principle it set forth.” The exceptional weakness of the reasoning could be a product of the circumstances under which the case was decided—in the midst of a bitter standoff between the Court and President Roosevelt—or it could be just another example of this Court departing from the strictures of the Constitution for a “more pragmatic, flexible approach” to our government’s design. But whatever the motivation, Humphrey’s Executor does not comport with the Constitution.

Humphrey’s Executor relies on one key premise: the notion that there is a category of “quasi-legislative” and “quasi-judicial” power that is not exercised by Congress or the Judiciary, but that is also not part of “the executive power vested by the Constitution in the President.” . . .

The problem is that the Court’s premise was entirely wrong. The Constitution does not permit the creation of officers exercising “quasi-legislative” and “quasi-judicial powers” in “quasi-legislative” and “quasi-judicial agencies.” No such powers or agencies exist. Congress lacks the authority to delegate its legislative power, Whitman v. American Trucking Assns., Inc. (2001), and it cannot authorize the use of judicial power by officers acting outside of the bounds of Article III, Stern v. Marshall (2011). Nor can Congress create agencies that straddle multiple branches of Government. The Constitution sets out three branches of Government and provides each with a different form of power—legislative, executive, and judicial. Free-floating agencies simply do not comport with this constitutional structure. . . .

Today’s decision constitutes the latest in a series of cases that have significantly undermined Humphrey’s Executor. First, in Morrison, the Court repudiated the reasoning of the decision. Then, in Free Enterprise Fund, we returned to the principles set out in the “landmark case of Myers.” And today, the Court rightfully limits Humphrey’s Executor to “multimember expert agencies that do not wield substantial executive power.” After these decisions, the foundation for Humphrey’s Executor is not just shaky. It is nonexistent.

. . . .

Consistent with the traditional understanding of the judicial power, I would deny CFPB’s petition to enforce the civil investigative demand that it issued to Seila. Seila “challenge[d] the validity of both the civil investigative demand and the ensuing enforcement action.” Seila has not countersued or sought affirmative relief preventing the CFPB from acting in the future; it simply asks us to “reverse the court of appeals’ judgment.” I would do just that. As the Court recognizes, the enforcement of a civil investigative demand by an official with unconstitutional removal protection injures Seila. Presented with an enforcement request from an unconstitutionally insulated Director, I would simply deny the CFPB’s petition for an order of enforcement. This approach would resolve the dispute before us without addressing the issue of severability.

. . . .

JUSTICE KAGAN, with whom JUSTICE GINSBURG, JUSTICE BREYER, and JUSTICE SOTOMAYOR join, concurring in the judgment in respect to severability and dissenting in part.

Throughout the Nation’s history, this Court has left most decisions about how to structure the Executive Branch to Congress and the President, acting through legislation they both agree to. In particular, the Court has commonly allowed those two branches to create zones of administrative independence by limiting the President’s power to remove agency heads. The Federal Reserve Board. The Federal Trade Commission (FTC). The National Labor Relations Board. Statute after statute establishing such entities instructs the President that he may not discharge their directors except for cause—most often phrased as inefficiency, neglect of duty, or malfeasance in office. Those statutes, whose language the Court has repeatedly approved, provide the model for the removal restriction before us today. If precedent were any guide, that provision would have survived its encounter with this Court—and so would the intended independence of the Consumer Financial Protection Bureau (CFPB).

. . . .

. . . . [A]s James Madison stated, the creation of distinct branches “did not mean that these departments ought to have no partial agency in, or no controul over the acts of each other.” To the contrary, Madison explained, the drafters of the Constitution—like those of then-existing state constitutions—opted against keeping the branches of government “absolutely separate and distinct.” Or as Justice Story reiterated a half-century later: “[W]hen we speak of a separation of the three great departments of government,” it is “not meant to affirm, that they must be kept wholly and entirely separate.” Instead, the branches have—as they must for the whole arrangement to work—“common link[s] of connexion [and] dependence.”

One way the Constitution reflects that vision is by giving Congress broad authority to establish and organize the Executive Branch. Article II presumes the existence of “Officer[s]” in “executive Departments.” But it does not, as you might think from reading the majority opinion, give the President authority to decide what kinds of officers—in what departments, with what responsibilities—the Executive Branch requires. . . . Instead, Article I’s Necessary and Proper Clause puts those decisions in the legislature’s hands. Congress has the power “[t]o make all Laws which shall be necessary and proper for carrying into Execution” not just its own enumerated powers but also “all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” Similarly, the Appointments Clause reflects Congress’s central role in structuring the Executive Branch. Yes, the President can appoint principal officers, but only as the legislature “shall . . . establish[ ] by Law” (and of course subject to the Senate’s advice and consent). And Congress has plenary power to decide not only what inferior officers will exist but also who (the President or a head of department) will appoint them. So as Madison told the first Congress, the legislature gets to “create[ ] the office, define[ ] the powers, [and] limit[ ] its duration.” The President, as to the construction of his own branch of government, can only try to work his will through the legislative process.

The majority relies for its contrary vision on Article II’s Vesting Clause, but the provision can’t carry all that weight. Or as Chief Justice Rehnquist wrote of a similar claim in Morrison v. Olson (1988), “extrapolat[ing]” an unrestricted removal power from such “general constitutional language”—which says only that “[t]he executive Power shall be vested in a President”—is “more than the text will bear.” . . .

. . . .

History no better serves the majority’s cause. As Madison wrote, “a regular course of practice” can “liquidate & settle the meaning of” disputed or indeterminate constitutional provisions. The majority lays claim to that kind of record, asserting that its muscular view of “[t]he President’s removal power has long been confirmed by history.” But that is not so. The early history—including the fabled Decision of 1789—shows mostly debate and division about removal authority. And when a “settle[ment of] meaning” at last occurred, it was not on the majority’s terms. Instead, it supports wide latitude for Congress to create spheres of administrative independence.

. . . .

As the decades and centuries passed, those efforts picked up steam. Confronting new economic, technological, and social conditions, Congress—and often the President—saw new needs for pockets of independence within the federal bureaucracy. And that was especially so, again, when it came to financial regulation. I mention just a few highlights here—times when Congress decided that effective governance depended on shielding technical or expertise-based functions relating to the financial system from political pressure (or the moneyed interests that might lie behind it). Enacted under the Necessary and Proper Clause, those measures—creating some of the Nation’s most enduring institutions—themselves helped settle the extent of Congress’s power. “[A] regular course of practice,” to use Madison’s phrase, has “liquidate[d]” constitutional meaning about the permissibility of independent agencies.

Take first Congress’s decision in 1816 to create the Second Bank of the United States—“the first truly independent agency in the republic’s history.” Of the twenty-five directors who led the Bank, the President could appoint and remove only five. Yet the Bank had a greater impact on the Nation than any but a few institutions, regulating the Nation’s money supply in ways anticipating what the Federal Reserve does today. Of course, the Bank was controversial—in large part because of its freedom from presidential control. Andrew Jackson chafed at the Bank’s independence and eventually fired his Treasury Secretary for keeping public moneys there (a dismissal that itself provoked a political storm). No matter. Innovations in governance always have opponents; administrative independence predictably (though by no means invariably) provokes presidential ire. The point is that by the early 19th century, Congress established a body wielding enormous financial power mostly outside the President’s dominion.

The Civil War brought yet further encroachments on presidential control over financial regulators. In response to wartime economic pressures, President Lincoln (not known for his modest view of executive power) asked Congress to establish an office called the Comptroller of the Currency. The statute he signed made the Comptroller removable only with the Senate’s consent—a version of the old Hamiltonian idea, though this time required not by the Constitution itself but by Congress. . . .

. . . .

What is more, the Court’s precedents before today have accepted the role of independent agencies in our governmental system. To be sure, the line of our decisions has not run altogether straight. But we have repeatedly upheld provisions that prevent the President from firing regulatory officials except for such matters as neglect or malfeasance. In those decisions, we sounded a caution, insisting that Congress could not impede through removal restrictions the President’s performance of his own constitutional duties. (So, to take the clearest example, Congress could not curb the President’s power to remove his close military or diplomatic advisers.) But within that broad limit, this Court held, Congress could protect from at-will removal the officials it deemed to need some independence from political pressures. Nowhere do those precedents suggest what the majority announces today: that the President has an “unrestricted removal power” subject to two bounded exceptions.

The majority grounds its new approach in Myers, ignoring the way this Court has cabined that decision. Myers, the majority tells us, found an unrestrained removal power “essential to the [President’s] execution of the laws.” What the majority does not say is that within a decade the Court abandoned that view. . . . In Humphrey’s Executor v. United States (1935), the Court unceremoniously—and unanimously—confined Myers to its facts. . . .

. . . .

. . . . Morrison is no “exception” to a broader rule from Myers. Morrison echoed all of Humphrey’s criticism of the by-then infamous Myers “dicta.” It again rejected the notion of an “all-inclusive” removal power. Ibid. It yet further confined Myers’ reach, making clear that Congress could restrict the President’s removal of officials carrying out even the most traditional executive functions. And the decision, with care, set out the governing rule—again, that removal restrictions are permissible so long as they do not impede the President’s performance of his own constitutionally assigned duties. . . .

. . . .

The deferential approach this Court has taken gives Congress the flexibility it needs to craft administrative agencies. Diverse problems of government demand diverse solutions. They call for varied measures and mixtures of democratic accountability and technical expertise, energy and efficiency. Sometimes, the arguments push toward tight presidential control of agencies. The President’s engagement, some people say, can disrupt bureaucratic stagnation, counter industry capture, and make agencies more responsive to public interests. At other times, the arguments favor greater independence from presidential involvement. Insulation from political pressure helps ensure impartial adjudications. It places technical issues in the hands of those most capable of addressing them. It promotes continuity, and prevents short-term electoral interests from distorting policy. . . .

. . . .

Applying our longstanding precedent, the answer is clear: It does not. This Court, as the majority acknowledges, has sustained the constitutionality of the FTC and similar independent agencies. The for-cause protections for the heads of those agencies, the Court has found, do not impede the President’s ability to perform his own constitutional duties, and so do not breach the separation of powers. There is nothing different here. The CFPB wields the same kind of power as the FTC and similar agencies. And all of their heads receive the same kind of removal protection. No less than those other entities—by now part of the fabric of government—the CFPB is thus a permissible exercise of Congress’s power under the Necessary and Proper Clause to structure administration.

. . . .

Congress’s choice to put a single director, rather than a multimember commission, at the CFPB’s head violates no principle of separation of powers. The purported constitutional problem here is that an official has “slip[ped] from the Executive’s control” and “supervision”—that he has become unaccountable to the President. So to make sense on the majority’s own terms, the distinction between singular and plural agency heads must rest on a theory about why the former more easily “slip” from the President’s grasp. But the majority has nothing to offer. In fact, the opposite is more likely to be true: To the extent that such matters are measurable, individuals are easier than groups to supervise.

. . . .