Administrative Law

Cases and Materials

Eighth Edition

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Chapter 1 Administrative Law: An Introduction and Structural Constitutional Issues

At p. 64-95, replace existing Part 1C.3 with the following:

3. Political Branch Control of Agency Power

For whom do agencies work? Congress has the Article I legislative power to create agencies, define their missions, and fund them. Article II, however, vests the executive power in the president and charges that officer to "take Care that the Laws be faithfully executed." It should come as no surprise that this constitutional division has given rise to centuries of competition between the branches for control of agency power. "Personnel is policy," as the saying goes, so much of this competition has focused on control of the power to appoint and remove agency officers.

Obviously, those who appoint the officers who directly control an agency can have vast impact on how that agency actually implements its statutory missions. The Constitution provides an express legal framework for competition over this power in the Appointments Clause, Art. II, § 2, cl. 2.

It is equally obvious that agency officers will tend to listen rather well to those with power to fire them. The Constitution provides for impeachment by Congress, Art. I, § 2, cl. 5; Art. I § 3, cl. 6–7, but does not otherwise expressly govern removal of agency officials. The absence of a "Removals Clause" has left room for unending debate regarding whether Congress can legally impose "good cause" requirements on presidential removal of agency officials, insulating them to some degree from presidential control. Agencies headed by officials enjoying such tenure protections are commonly called "independent" agencies and distinguished from "executive" agencies, which are run by officials who lack them. Independent agencies have been a prominent fixture of the federal government since the creation of the (now defunct) Interstate Commerce Commission in 1887. They include, among many others, the Federal Trade Commission, the Federal Reserve Board, the Federal Communications Commission, the Federal Energy Regulatory Commission, and the National Labor Relations Board. Independent agencies are usually headed by multi-member boards or commissions, with members serving staggered, fixed-year terms. They are often subject to partisan balance requirements to ensure that, at least when all positions are filled, no major party controls more than a bare majority of them. The president generally has power to select one member to serve as chair. Proponents of independent agencies contend that their design enhances governance by promoting agency expertise and by minimizing political interference.

Through much of the twentieth century, a broad consensus existed that the Constitution leaves space for Congress to use tenure protections to insulate at least some types of agencies from some degree of presidential control. Adherents of a strong version of the "unitary executive theory" reject this claim. Broadly speaking, they argue that removal authority is an incident of the "executive power" that Article II of the Constitution vests solely in the president. Congress cannot restrict the president's authority to remove agency officials (principal officials, at least) without infringing on this executive power. As you will read below, the Supreme Court's most recent discussion of removal authority, *Seila Law LLC v. Consumer Financial Protection Bureau* (2020), indicates that a narrow majority of the Supreme Court now adheres to a strong version of the unitary executive theory. The continued "independence" of independent agencies is therefore in some doubt.

The materials below introduce you to constitutional doctrines that have evolved to govern competition between the political branches to control who runs the agencies. These materials are structured a little differently than other readings with the thought that this will help you make sense of *Seila Law* when you get to it. Below, you will find:

- Lesson 1C.3, which has questions about both appointments and removals.
- Notes about appointments.
- Notes about removals as background for *Seila Law.*
- An excerpt from *Seila Law LLC,* along with a few questions to ponder.
- A few more notes briefly introducing you to some additional means the political branches use to control agency power.

Lesson 1C.3. Could Congress vest in itself the power to appoint WTC Commissioners? Could it leave this power in the president but eliminate the requirement of Senate confirmation? What policies underlie the constitutional answers to these questions?

Ben, an attorney at the WTC, is no fan of Commissioners Fred and Barney, whom he regards as political hacks. For a moment he takes solace in the idea that, if and when a new administration comes to town, it will install its own people in place, and they might even have relevant expertise. But then Ben snapped to his senses after recalling § 1 of the WTCA. Why is removing Fred and Barney not so simple a matter as Ben had thought?

Suppose that Congress got tired of paying for five commissioners and amended the WTCA so that its head is a single director, and Fred was chosen. Does this change in agency structure alter your removal analysis?

Suppose for the sake of argument that the WTCA creates the position of General Counsel and grants this officer the sole power to determine whether to initiate administrative enforcement actions against regulated entities under §§ 7 and 11 of the Act. The Act also specifies that the president shall appoint the General Counsel for a four-year term subject to removal for good cause by the Commission. The Act does not require Senate confirmation. Are these appointment and removal provisions constitutional?

NOTES ABOUT APPOINTMENT

1. The Appointments Clause. The Appointments Clause provides that the president

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const., Art. II, § 2, cl. 2. This provision contains two distinctions that are especially important for us to figure out. First, we have to determine who counts as "Officers of the United States" subject to the Appointments Clause's provisions and who does not (*e.g.*, employees). Second, we need to figure out who counts as "inferior Officers" (as opposed to principals) who need not be appointed through the default method of presidential nomination with Senate confirmation.

One structural element of the Appointments Clause may have leapt out at you: Congress cannot, by itself, appoint any officer of the United States—*e.g.*, Congress cannot assign to itself the power to appoint the Secretary of State. Why is this limitation critical to separation of powers?

2. Who are "Officers of the United States"? And who else is there? In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court addressed a challenge to the constitutionality of provisions governing appointment of members of the Federal Election Commission. At the time of this challenge, the Commission had what the Court called "extensive rulemaking and adjudicative powers" as well as "direct and wide ranging" powers to enforce the requirements of the Federal Election Campaign Act. The power to appoint FEC Commissioners was distributed as follows:

> The Secretary of the Senate and the Clerk of the House of Representatives are *ex officio* members of the Commission without the right to vote. Two members are appointed by the President *pro tempore* of the Senate "upon the recommendations of the majority leader of the Senate and the minority leader of the Senate." Two more are to be appointed by the Speaker of the House of Representatives, likewise upon the recommendations of its respective majority and minority leaders. The remaining two members are appointed by the President. Each of the six voting members of the Commission must be confirmed by the majority of both Houses of Congress, and each of the three appointing authorities is forbidden to choose both of their appointees from the same political party.

Id. at 113. A moment's reflection may suggest why Congress designed this particular structure for officials with jurisdiction over congressional elections.

Whatever the wisdom of Congress's plan, the Court deemed it unconstitutional because of the role it gave Congress in appointing "Officers of the United States." The Court vaguely explained that this phrase, as used by the Appointments Clause, captures "any appointee exercising significant authority pursuant to the laws of the United States." It attempted to give some flesh to this standard by noting precedents that had treated postmasters first class and clerks of district courts as "inferior officers."

The Court also distinguished "officers of the United States" from two other kinds of functionary—"employees" and what might be termed "officers of Congress." "Employees" are "lesser functionaries subordinate to officers of the United States . . . ." "Officers of Congress" are persons whom Congress may properly appoint to "perform duties only in aid of those functions that Congress may carry out itself or in an area sufficiently removed from the administration and enforcement of the public law as to permit their being performed by persons not 'Officers of the United States.'" For example, Congress may grant to "officers of Congress" powers of "an investigative or informative nature" because they fall into the "same general category as those powers which Congress might delegate to one of its own committees."

Given their "significant" authority, it was plain that FEC Commissioners were not "employees." Also, they possessed many powers that could not be exercised by an "officer of Congress." In this regard, the Commissioners' powers to seek discretionary judicial relief to enforce the Act were particularly problematic given the executive nature of prosecution. More broadly:

> All aspects of the Act are brought within the Commission's broad administrative powers: rulemaking, advisory opinions, and determinations of eligibility for funds and even for federal elective office itself. These functions, exercised free from day-to-day supervision of either Congress or the Executive Branch, are more legislative and judicial in nature than are the Commission's enforcement powers, and are of kinds usually performed by independent regulatory agencies or by some department in the Executive Branch under the direction of an Act of Congress. Congress viewed these broad powers as essential to effective and impartial administration of the entire substantive framework of the Act. Yet each of these functions also represents the performance of a significant governmental duty exercised pursuant to a public law. While the President may not insist that such functions be delegated to an appointee of his removable at will, none of them operates merely in aid of congressional authority to legislate or is sufficiently removed from the administration and enforcement of public law to allow it to be performed by the present Commission. These administrative functions may therefore be exercised only by persons who are "Officers of the United States."

It followed that the FEC Commissioners were "Officers of the United States" within the meaning of the Appointments Clause. Given that they were, identify two ways in which their appointments technically violated that clause.

3. "Officers of the United States" or employees?—the ALJs. You may recall earlier references in the casebook to "administrative law judges" (ALJs). We discuss their functions in Chapter 4 on administrative adjudications. The important thing to know about them for the moment is that the APA authorizes these agency functionaries to act as front-line decisionmakers for "formal" adjudications by agencies. During these formal adjudications, an ALJ functions much like a judge running a bench trial. Unlike an Article III judge, however, their decisions are typically subject to plenary review by their employing agencies—*e.g.*, the FTC can overrule decisions by its ALJs that it does not like. Seventy years after adoption of the APA, a circuit split developed regarding whether ALJs are "Officers of the United States" subject to Article II's Appointments Clause, or simply "employees" whose appointment is not governed by Article II. The Supreme Court decided that the SEC's ALJs are such officers in *Lucia v. SEC,* 138 S. Ct. 2044 (2018).

Justice Kagan, writing for the Court, relied on two Supreme Court precedents to articulate a two-part test for whether someone is an "officer" within the meaning of the Appointments Clause. She explained that "an individual must occupy a 'continuing' position established by law to qualify as an officer," *id.* at 2051 (quoting *United States v. Germaine*, 99 U.S. 508, 510, 511 (1879)), and must "exercis[e] significant authority pursuant to the laws of the United States." *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 126 (1976)). Everyone involved in the litigation agreed that SEC ALJs satisfy the first part of this test given that they hold career appointments in posts created by statute. *Id.* at 2053.

Turning to the second part, Justice Kagan declined to elaborate on the meaning of "significant authority." Instead, she resolved the issue on the narrow ground that SEC ALJs should be regarded as "officers" because their powers are virtually indistinguishable from those of Special Trial Judges (STJs) of the United States Tax Court, whom the Court had determined were "officers" in *Freytag v. Commissioner*, 501 U.S. 868 (1991). Justice Kagan explained:

> [T]he Commission's ALJs exercise the same "significant discretion" when carrying out the same "important functions" as STJs do. Both sets of officials have all the authority needed to ensure fair and orderly adversarial hearings—indeed, nearly all the tools of federal trial judges. Consider in order the four specific (if overlapping) powers *Freytag* mentioned. First, the Commission's ALJs (like the Tax Court's STJs) "take testimony." More precisely, they "[r]eceiv[e] evidence" and "[e]xamine witnesses" at hearings, and may also take pre-hearing depositions. Second, the ALJs (like STJs) "conduct trials." . . . [T]hey administer oaths, rule on motions, and generally "regulat[e] the course of" a hearing, as well as the conduct of parties and counsel. Third, the ALJs (like STJs) "rule on the admissibility of evidence." . . . And fourth, the ALJs (like STJs) "have the power to enforce compliance with discovery orders." In particular, they may punish all "[c]ontemptuous conduct," including violations of those orders, by means as severe as excluding the offender from the hearing. So point for point—straight from *Freytag*[']s list—the Commission's ALJs have equivalent duties and powers as STJs in conducting adversarial inquiries.

Justices Sotomayor and Ginsburg dissented, reasoning that SEC ALJs did not exercise the significant authority required for "officer" status given that their decisions were subject to de novo review by agency heads.

4. Who are you calling "inferior"? In *Edmond v. United States*, 520 U.S. 651 (1997), the Supreme Court addressed the problem of distinguishing principal and inferior officers within the meaning of the Appointments Clause. The petitioners in this case sought to overturn their court-martial convictions on the ground that the judges of the Coast Guard Court of Criminal Appeals (CGCCA) who had affirmed their convictions had been appointed by the Secretary of Transportation, which was improper because they were principal officers who should have been appointed by the president with the advice and consent of the Senate. Justice Scalia authored an 8-1 opinion rejecting this claim. He explained:

> Generally speaking, the term "inferior officer" connotes a relationship with some higher ranking officer or officers below the President: Whether one is an "inferior" officer depends on whether he has a superior. It is not enough that other officers may be identified who formally maintain a higher

> rank, or possess responsibilities of a greater magnitude. If that were the intention, the Constitution might have used the phrase "lesser officer." Rather, in the context of a Clause designed to preserve political accountability relative to important Government assignments, we think it evident that "inferior officers" are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.

Judges of the CGCCA turn out to be "inferior" because they are subject to joint supervision by the Judge Advocate General of the Coast Guard and the Court of Appeals for the Armed Forces (CAAF). The Judge Advocate General may not attempt to influence the decisions of the CGCCA, but she may "remove a [CGCCA] judge from his judicial assignment without cause." CGCCA decisions are subject to review by the CAAF. The scope of review as to fact is limited, checking only to ensure that "there is some competent evidence in the record to establish each element of the offense beyond reasonable doubt." This limited scope of review did not stop the Supreme Court from concluding that judges of the CGCCA are not principal officers as they "have no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers." *Id*. at 665.

5. Remedying an appointment problem by making principal officers into inferior officers. In *Intercollegiate Broadcasting System, Inc. (IBS) v. Copyright Royalty Board*, 684 F.3d 1332 (D.C. Cir. 2012), the D.C. Circuit faced a constitutional challenge to the power of the Librarian of Congress to appoint Copyright Royalty Judges (CRJs). The court concluded that CRJs are, as defined by statute, principal officers, and, as such, could not be constitutionally appointed by the Librarian. Rather than toss out the entire CRJ scheme as unconstitutional, the court instead transformed them into inferior officers by making them easier to remove.

CRJs have authority to set "reasonable" copyright royalty rates where negotiations among the interested parties fail. As a practical matter, CRJs have considerable discretion in determining what is "reasonable." The Librarian of Congress, an officer appointed by the president with the advice and consent of the Senate, appoints the three CRJs to staggered six-year terms. The Librarian approves the CRJ's procedural regulations, issues ethical rules governing CRJs, and provides CRJs with logistical support. The Register of the Library of Congress is appointed by the Librarian and subject to his direction. The Register has authority to issue interpretations of law that bind the CRJs and to review their decisions for legal error. Subject to this caveat, CRJ decisions are not subject to correction by any other entity within the executive branch.

The D.C. Circuit applied three factors drawn from *Edmond v. United States*, 520 U.S. 651 (1997), bearing on the principal-inferior divide: (1) the degree of supervision and control exercised by higher executive authorities; (2) removability; and (3) power to render final decisions uncorrectable by other executive authorities. The first factor suggested that CRJs are principal officers given that the real heart of their power lies in their control over discretionary, fact-bound royalty determinations. The Register's authority over legal determinations does little to check this practical power. The second factor, removability, favored principal officer status because the Librarian could remove a CRJ only for cause. (The court conceded, however, that an officer protected by a for-cause restriction on removal could, under some circumstances, be considered an inferior officer given that, in *United States v. Morrison*, 487 U.S. 654 (1988), the Supreme Court had determined that independent counsels, who had such protection, were inferior officers. For discussion of *Morrison,* see note 5 below in Notes About Removal.) As for the third factor, no executive authority could review the CRJs' rate determinations to the degree they rested on facts.

The court concluded that the Librarian could not constitutionally appoint CRJs insofar as they are principal officers. To remedy this problem, the court did not throw out the entire CRJ statutory scheme as unconstitutional. Instead, the court followed the lead of the Supreme Court in *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010). In that case, the Supreme Court concluded that for-cause removal protections of members of the Public Company Accounting Oversight Board were unconstitutional. Rather than throw out the entire agency as unconstitutional, however, the Court instead severed the for-cause removal protection but otherwise left the agency intact. (For more discussion of *Free Enterprise,* see note 6 on Notes About Removal.) In just the same way, the D.C. Circuit severed the for-cause limitation on removal of CRJs by the Librarian. Subjecting CRJs to plenary removal authority by the Librarian transformed them into inferior officers whom the Librarian could appoint consistent with the Appointments Clause.

6. Updating *Edmond* and courts' choice of remedy for unconstitutional appointments. In *United States v. Arthrex, Inc.*, 141 S. Ct. 1970 (2021), a closely divided Court relied heavily on *Edmond v. United States*, 520 U.S. 651 (1997), to conclude that the appointment of Administrative Patent Judges (APJs) by the Secretary of Commerce was unconstitutional insofar as APJs were exercising the powers of principal officers. The Court remedied this violation by altering APJs powers.

The Patent and Trademark Office (PTO) is an executive agency within the Department of Commerce that is responsible "for the granting and issuing of patents." 35 U.S.C. §§ 1(a), 2(a)(1). The PTO is headed by a Director who is appointed by the president with the advice and consent of the Senate. Within the PTO, the Patent Trial and Appeal Board (PTAB) is an adjudicatory body that consists of the Director, the Deputy Director, the Commissioner for Patents, the Commissioner for Trademarks, and more than 200 APJs. All PTAB members except the Director—including all APJs—are appointed by the Secretary of Commerce.

Among its many responsibilities, the PTAB conducts inter partes review proceedings, in which it evaluates the validity of existing patents in adversarial proceedings. Inter partes review is conducted by three-member panels of the PTAB, which may be composed solely of APJs, and is not subject to review by another executive officer—although the PTAB itself "may grant rehearings." 35 U.S.C. § 6(c). Moreover, the Secretary may only remove APJs from office "for such cause as will promote the efficiency of the service." 5 U.S.C. § 7513(a).

Arthrex appealed an inter partes review of its '907 patent by a panel of three APJs on the ground that the APJs were principal officers within the meaning of Article II, and thus may only be appointed by the president with the advice of consent of the Senate. The Federal Circuit held for Arthrex and applied a remedy similar to that in *Intercollegiate Broadcasting*, *supra*—it invalidated the APJs' statutory removal protections, making them removable at will by the Secretary and thus inferior officers for purposes of Article II.

The Supreme Court agreed with Federal Circuit that Congress violated the Appointments Clause, but disagreed as to the remedy. Like in *Edmond*, the Court's decision did not "set forth an exclusive criterion for distinguishing between principal and inferior officers for Appointments Clause purposes." 141 S. Ct. at 1985. The Court held that because APJs exercise "significant authority" free from adequate supervision by other members of the executive branch, their appointment by the Secretary is unconstitutional. *Id.* at 1986. In support of its decision, the Court distinguished APJs' circumstances from those of the CGCCA judges in *Edmond*. The "significant" factor in *Edmond* was that CGCCA judges had "no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers." *Id.* at 1980 (quoting *Edmond*, 520 U.S. at 665). APJs, by contrast, do have "'power to render a final decision on behalf of the United States' without any … review by their nominal superior or any other principal officer in the Executive Branch." *Id.* at 1981 (quoting *Edmond*, 520 U.S. at 665). According to the Court, this greater authority for APJs "conflicts with the design of the Appointments Clause 'to preserve political accountability,'" and thus renders their appointment unconstitutional. *Id*. at 1982 (quoting *Edmond*).

As to the remedy, however, the Court rejected Arthrex's bid to invalidate the entire inter partes review regime and focused instead on a "more tailored declaration"—blocking enforcement of § 6(c) insofar as it prevented the Director from reviewing PTAB decisions. *Id.* at 1986. In reaching this conclusion, the Court also rejected the Federal Circuit's decision to strike APJs' removal protections because, regardless of whether this remedy "would cure the constitutional problem, review by the Director better reflects the structure of supervision within the PTO and the nature of APJs' duties." *Id*. at 1987. The Court then remanded the case to the PTAB for review by the Acting Director.

Arthrex's legacy is of course still unclear, but at least three features appear immediately significant. First, it suggests a movement away from removability as the primary distinction between principal and inferior officers in favor of the scope of an officer's authority to make final, unreviewable decisions on behalf of the United States. Second, it confirms the Court's reluctance to invalidate entire agency programs based on unconstitutional appointments, preferring instead to alter or invalidate individual statutory provisions to "fix" the perceived constitutional problem. Finally, the Court's decision to alter the statute to permit review of APJ decisions by the Director, rather than to make APJs removable at will, reflects an acknowledgement that participation by agency heads in administrative decision making is more important to the constitutionality of agency action than mere power over individual decision makers.

7. Recess appointments. At the founding of the Republic, travel and communications were slow, and the President needed a means of appointing officers while the Senate was not in session. The Constitution solved this problem by providing that "[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." U.S. Const., art. II, § 2, cl. 3. This power also, of course, can enable the president to avoid the political difficulties of Senate confirmation where the Senate is controlled by the opposing party. (It also enabled the president to avoid filibusters by a minority before the Senate eliminated filibusters for executive confirmations.)

To prevent the president from exploiting this power, the Senate began holding "pro forma" sessions during periods of adjournment during which no business would be conducted. The Office of Legal Counsel, an office within the Department of Justice, concluded that these pro forma sessions did not block the recess-appointment power because, during these sessions, the Senate could not "receive communications from the President or participate as a body in making appointments." This conflict came to a head in *Noel Canning v. NLRB*, 573 U.S. 513 (2014). The petitioner challenged the authority of the National Labor Relations Board to act on the ground that it lacked its required quorum of three members. The Senate had confirmed two members of the Board in 2010. President Obama, to avoid a filibuster, had invoked the recess-appointment power to appoint three other members without Senate confirmation on January 4, 2012. At that time, the Senate was holding periodic pro forma sessions but was otherwise adjourned.

The Supreme Court agreed unanimously that the President had exceeded his recess-appointment power, but the justices split 5-4 in terms of how they reached this conclusion. Justice Breyer's majority opinion essentially boiled down to the propositions that: (a) the pro forma sessions counted as periods when the Senate was not in recess; and (b) the recesses between the pro forma sessions were too short to permit recess appointments. Justice Scalia's concurrence would have permitted recess appointments only during "intersession recesses" and only for vacancies that arise during them. The upshot is that the Senate can generally block the president from using the recess appointment power by making formalistic adjustments to its calendar.

8. A quick word about acting officials. There are over 1200 agency positions that require presidential nomination and Senate confirmation ("PAS offices"). Delays in both nominations and confirmations result in many of these offices being vacant for considerable periods of time. Some agencies have provisions in their enabling acts that specify who should fill such vacancies in an "acting" capacity. Other single-headed agencies handle succession through the Federal Vacancies Reform Act of 1998 (FVRA), 5 U.S.C. § 3345 et. seq. The default rule under this statute is that, where a PAS office is unfilled, the first assistant to that office will temporarily serve in an acting capacity. The president may, however, direct a senior employee of the agency or another PAS official to take this role instead. A person whom the president has nominated to hold an office permanently may not serve in an acting role unless this person served as first assistant for the office for 90 or more days during the 365-day period that preceded the office becoming open. Complying with these statutory requirements can be tricky, and the consequence of a violation may be that an agency action taken by an improperly appointed official lacks legal force and effect. § 3348(d)(1). For much more about acting officials, see Anne Joseph O'Connell, *Actings*, 120 COLUM. L. REV. 613 (2020).

NOTES ABOUT REMOVAL

1. There is no Removals Clause. Our opening note about appointments quoted the Constitution's Appointments Clause and identified certain key phrases that require elucidation. We cannot start out the notes on removal authority the same way because there is no "Removals Clause" in the Constitution—unless one counts the clauses dealing with the specialized removal process of impeachment. In part as a result of this gap, people have been arguing over the scope of congressional and presidential powers to control removals since the very first Congress in 1789.

More specifically, argument has commonly focused on whether Congress can impose "good cause" limits on the president's authority to remove agency officials. Proponents of this power contend that Congress can use its power under the Necessary and Proper Clause to structure the operations of the offices that it creates and funds, and this power generally should extend to granting limited tenure protections to agency officials. (It is generally conceded, however, that there are some agency officials, e.g., the Secretary of State, whom Congress cannot protect with good-cause restrictions on removal as doing so would interfere with the president's discharge of her independent constitutional powers over matters such as foreign affairs and defense.)

Adherents of the unitary executive theory counter that the Vesting Clause of Article II vests all of the executive power of the federal government in the president, without exception. Also, the Take Care Clause imposes a duty on the president to "take Care that the Laws be faithfully executed." To execute the laws (and ensure that others execute them faithfully), the president must control who remains in office. Therefore, Congress cannot restrict the president's removal authority. For a seminal article on the unitary executive theory, see Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994).

2. The "Decision" of 1789. As you will see when you read Chief Justice Roberts's majority opinion in *Seila Law LLC v. Consumer Financial Protection Bureau* (2020), proponents of the unitary executive theory sometimes rely heavily on the "Decision of 1789" as supporting evidence for their view. It is not all that clear, however, just what the Decision of 1789 decided.

One of the many pressing orders of business for the First Congress was to create the first great departments of government. To this end, the House took up legislation to establish a Department of Foreign Affairs headed by a Secretary to be appointed by the president and confirmed by the Senate, but "to be removable by the president." Days of debate followed as members of the House argued over whether the Constitution lodged power to remove Senate-confirmed officials in the president alone, required the president to seek Senate approval, required impeachment, or instead left questions regarding control of removals to legislative discretion. After a majority of the House had already approved the original statutory language, Representative Benson objected that the phrase stating that the Secretary was "to be removable by the president" suggested that the president's removal power came from a legislative grant from Congress, rather than from the Constitution itself. Purportedly to avoid this inference, he proposed striking this direct reference to presidential removal authority and amending a related provision so that it presupposed the existence of presidential removal authority without suggesting a congressional source for it. The House adopted Benson's proposal in a three-vote process involving shifting majority coalitions that have complicated interpretation of the House's intent ever since. The Senate later approved the measure by the narrowest of margins, with the Vice President providing the tie-breaking vote.

Based upon what the First Congress actually did, we can say that the Decision of 1789 decided that the Constitution does not require the president to obtain Senate approval to remove Senate-confirmed officials. To go further and claim that the Decision of 1789 decided that Congress cannot regulate the president's removal authority is to enter onto highly contested ground. For deep dives, see Jed H. Shugerman, *The Indecisions of 1789: Strategic Ambiguity and the Imaginary Unitary Executive (Part I)* (May 8, 2020), *available at* https://ssrn.com/abstract=3596566, and Saikrishna Prakash, *New Light on the Decision of 1789,* 91 CORNELL L. REV. 1021 (2006).

3. The Tenure-in-Office Act and *Myers v. United States*. The Decision of 1789 settled that the Constitution does not require Senate approval for presidential removal of Senate-confirmed officials. In 1867, however, Congress, after coming into sharp conflict with President Johnson over Reconstruction, imposed this requirement by statute via the Tenure in Office Act, which generally provided that Senate-confirmed appointees were entitled to hold their offices until replaced by a new Senate-confirmed appointee. Passage required Congress to override a veto by Johnson, who condemned the Act as an unconstitutional infringement of the president's "executive power" and a violation of both the Decision of 1789 as well as eighty years of judicial, executive, and legislative practice. He later violated the Act by removing the Secretary of War; the House impeached him for it, and the Senate came within one vote of removing him. Two decades after its enactment, the Act was repealed in 1887.

This repeal did not, however, end Congress's efforts to condition removal of Senate-confirmed officials on Senate permission. During the 1870s, Congress enacted a series of statutes, all signed by President Grant, that required Senate approval of presidential removal of various classes of postmaster. Presidents put up with this requirement for about fifty years. Then, in 1920, President Wilson ordered the firing of Frank Myers, the postmaster first-class of Portland, Oregon, before the end of his four-year term. Myers sued for his lost salary, which ultimately led the Supreme Court to issue one of the great milestones in the history of the debate over the president's executive power, *Myers v. United States*, 272 U.S. 52 (1926).

It turned out that Chief Justice Taft, the author of the majority opinion and a former president, had quite a bit to say on the subject. After discussing the Decision of 1789, many other precedents and notable secondary authorities, and the history of the Tenure in Office Act, he held that requiring Senate approval for removal of Senate-confirmed officials constituted a clear infringement on the executive power that Article II vests in the president. In support of this conclusion, Taft contended that strong presidential control over removals was necessary to protect the president's executive power to direct agency actions. In other words, the president must be able to fire agency officials to control what they do.

Taft also conceded, however, that there could be certain types of decisions that an agency official should make independently, free of immediate presidential control. Taft observed, "there may be duties of a quasi judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President cannot in a particular case properly influence or control." He also added, without further explanation, "[o]f course there may be duties so peculiarly and specifically committed to the discretion of a particular officer as to raise a question whether the President may overrule or revise the officer's interpretation of his statutory duty in a particular instance." Taft added, however, that although the president might not be able to control these decisions in particular instances, she could consider them in determining whether to remove an agency official—*i.e.*, even though the president might lack authority to revise an adjudication, she could fire the adjudicator for doing a bad job.

4. *Humphrey's Executor* and the quasi-categories. Nine years after the Supreme Court narrowly upheld a claim of improper removal brought on behalf of a dead postmaster in *Myers v. United States* (1926), it unanimously rejected a claim of improper removal brought on behalf of a dead commissioner of the Federal Trade Commission in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). Humphrey, a Hoover appointee, was, to say the least, hostile to the Roosevelt administration's approach to governance. President Roosevelt removed him from office, and Humphrey filed suit, claiming that his removal violated a provision of the FTC Act that provided that "[a]ny commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office." Along the way to agreeing with Humphrey's claim, the Court upheld the constitutionality of this restriction on removal authority.

The Court narrowed *Myers*, explaining that its "actual decision" was based on the principle that "a postmaster is an executive officer restricted to the performance of executive functions" and is therefore "inherently subject to the exclusive and illimitable power of removal by the Chief Executive." *Myers*' holding regarding "purely executive officers" had no application to "an officer who occupies no place in the executive department and who exercises no part of the executive power vested by the Constitution in the president."

To a modern eye, this conclusion that *Myers* does not apply to non-executive officials might not seem very helpful to Humphrey's cause given that the FTC's basic job is to carry out the "executive" task of implementing the FTC Act. That was not how the Supreme Court in 1935 characterized matters, however. According to the Court, the FTC could not "in any proper sense be characterized as an arm or an eye of the executive." Instead, as the agency carries out Congress's statutory command to root out "unfair methods of competition" by "filling in and administering the details embodied by that general standard," the Commission acts "in part quasi legislatively and in part quasi judicially." More specifically, when the Commission uses its authority under § 6 of the Act to investigate corporations and make reports to Congress, it acts quasi-legislatively "in aid of the legislative power." When it uses its authority under § 7 to act as a "master in chancery" to determine relief in an antitrust suit, it acts quasi-judicially, "as an agency of the judiciary."

As the Commission's work, properly understood, was "wholly disconnected from the executive department," it followed that separation-of-powers principles, far from demanding absolute presidential control of the Commission, instead demanded agency decisional independence. Good-cause limits on removal were necessary to block improper presidential control.

5. *Morrison v. Olson* reframes the test. In May 1973, Attorney General Elliot Richardson appointed Archibald Cox to serve as a special prosecutor to investigate the Watergate scandal that eventually led to the fall of President Richard Nixon. After Cox subpoenaed Nixon to obtain copies of taped conversations in the Oval Office, Nixon ordered Richardson to fire Cox. Rather than follow this order, Richardson resigned, as did Deputy Attorney General William Ruckelshaus. This left the task of firing Cox to Solicitor General Robert Bork. This series of events became known as the "Saturday Night Massacre." In the aftermath of the Saturday Night Massacre and Watergate, Congress enacted the Ethics in Government Act of 1978, which included provisions creating the office of independent counsel for the investigation and prosecution of high-level government officials. To create insulation between the executive branch and independent counsels, the Act included provisions for a panel of judges to appoint these officers at the request of the Attorney General; it also provided that independent counsels could be removed by the Attorney General only for cause.

In *Morrison v. Olson*, 487 U.S. 654 (1988), the defendants argued that the provisions governing appointment and removal of independent counsels were unconstitutional. The Court rejected these arguments in a 7-1 decision authored by Chief Justice Rehnquist, with Justice Scalia dissenting. Upholding the good-cause restriction on removal under *Humphrey's Executor*, however, was problematic for two reasons. First, in the intervening decades, the Court had reached a consensus that any duties properly assigned to an executive official were necessarily executive in nature. Second, it is difficult to identify any function more clearly "executive" in nature than prosecution, and the precedent controlling removal of "purely executive" officers was still *Myers*.

Chief Justice Rehnquist avoided *Myers* by characterizing its holding not as a condemnation of limits on presidential removal authority as such, but rather as a condemnation of efforts by Congress to "draw to itself . . . the power to remove or the right to participate in the exercise of that power." *Id.* at 686 (quoting Myers v. United States, 272 U.S. 52, 161 (1926); citing also Bowsher v. Synar, 478 U.S. 714 (1986)). In other words, the key to *Myers* was that Congress had "aggrandized" itself by giving the Senate a veto in the removal process. The Ethics in Government Act required the Attorney General to have good cause to fire an independent counsel, but it did not give Congress itself power over removals. *Myers* therefore did not control.

After disposing of *Myers,* the Chief Justice turned his revisionist eye toward *Humphrey's Executor*. He conceded that this opinion had characterized agency powers as "quasi-legislative" and "quasi-judicial" to distinguish the Court's treatment of the "purely executive" postmaster in *Myers*. The Court's "present considered view," however, was that deciding the constitutionality of a restriction on presidential removal authority "cannot be made to turn on whether or not that official is classified as 'purely executive.'" One reason to abandon this categorical approach was that the lines dividing the legislative, executive, and judicial functions can be obscure. In this vein, the Court noted in particular that the FTC's powers discussed in *Humphrey's Executor* would, in more modern parlance, be regarded as "executive" in nature.

The real import of the Court's earlier removal cases was "to ensure that Congress does not interfere with the President's exercise of the 'executive power' and his constitutionally appointed duty to 'take care that the laws be faithfully executed' under Article II." In assessing whether removal restrictions are consistent with separation of powers, the "real question" revolves around "whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty, and the functions of the officials in question must be analyzed in that light."

After announcing this new framework, the Court opined that it "simply d[id] not see how the President's need to control the exercise of [an independent counsel's] discretion is 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." It was enough that the president "retain[ed] ample authority to assure that the counsel is competently performing his or her statutory responsibilities in a manner that comports with the provisions of the Act." In short, the Court indicated that it is constitutionally permissible for at least some agencies to enjoy limited decisional independence so long as the president retains sufficient control to ensure that they exercise their powers within the bounds of the law. The Court added the qualification, however, that it is "undoubtedly correct . . . that there are some 'purely executive' officials who must be removable by the President at will if he is to be able to accomplish his constitutional role."

Justice Scalia's blistering dissent is one of the foundational documents of unitary executive theory. In his view, the majority was correct to abandon the analytic framework of *Humphrey's Executor*, which he condemned for "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" from *Myers*. (It might be fair to note that the dissents in *Myers* added up to over 100 pages.) The majority's new don't-impede-the-president-too-much framework was, however, a separation-of-powers abomination. By insulating some executive decisions from presidential control, it violated Article II's Vesting Clause, which vests not "*some* of the executive power, but *all* of the executive power" in the president. The majority's new "rule" was no rule at all but instead an invitation to standardless discretion.

Aftermath: The statutory provisions authorizing independent counsels were subject to sunset provisions requiring periodic reauthorization. In 1999, after high-ranking executive officials of both parties had been targets of independent counsels, Congress declined to reauthorize their existence. The DOJ responded to the demise of independent counsels authorized by statute by adopting a set of regulations authorizing special counsels. 28 C.F.R. §§ 600.1-10. These regulations provide for the appointment of a special counsel where the Attorney General determines that the "investigation or prosecution of . . . [a] person or matter by a United States Attorney's Office or litigating division of the Department of Justice would present a conflict of interest for the Department or other extraordinary circumstances." *Id.* at § 600.1(a). You no doubt recall the most famous Special Counsel investigation of recent years—Special Counsel Robert Mueller's investigation of the Trump campaign for conspiracy and obstruction of justice.

6. *Free Enterprise Fund* and double "for-cause" protections. In response to spectacular accounting scandals around the turn of the millennium, Congress created the Public Company Accounting Oversight Board to "oversee the audit of public companies that are subject to the securities laws." 15 U.S.C. § 7211(a). Willful violation of a Board rule is a federal crime, and the Board has authority to issue severe sanctions in its own disciplinary proceedings (e.g., revoking a firm's registration, banning a person from associating with a firm, money penalties). The Board's actions are, however, subject to review by the Securities and Exchange Commission, which appoints Board members and can remove them "for good cause shown." § 7211(e)(6).

In *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010), the plaintiffs (FEF) challenged the constitutionality of the statutory provisions governing appointment and removal of Board members. Regarding appointments, FEF contended: (a) Board members were not "inferior" officers and therefore needed to be appointed by the president; (b) even if Board members were inferior, the SEC could not appoint them because it is not a "department" within the meaning of the Appointments Clause; and (c) the Commissioners as a group could not exercise appointment power because its true head is its Chairman. The justices made speedy work of rejecting these arguments. Following *Edmond*, they held that Board members are "inferior" as they are subject to extensive control by the SEC. The SEC is a "department" because it is "a freestanding component of the Executive Branch, not subordinate to or contained within any other such component." Lastly, the Court rejected the argument that the Chairman is the sole head of the SEC, noting that its powers "are generally vested in the Commissioners jointly."

Removal presented a thornier problem. As the situation was characterized by the Chief Justice's majority opinion, two layers of for-cause protection insulated Board members from presidential control— the president could remove SEC Commissioners for cause, and the SEC Commissioners could remove Board members for cause. According to the majority, this double insulation weakened presidential control of Board members too much to be constitutional:

> This novel structure does not merely add to the Board's independence, but transforms it. Neither the President, nor anyone directly responsible to him, nor even an officer whose conduct he may review only for good cause, has full control over the Board. The President is stripped of the power our precedents have preserved, and his ability to execute the laws — by holding his subordinates accountable for their conduct — is impaired.
>
> That arrangement is contrary to Article II's vesting of the executive power in the President. Without 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. He is not the one who decides whether Board members are abusing their offices or neglecting their duties. He can neither ensure that the laws are faithfully executed, nor be held responsible for a Board member's breach of faith. This violates the basic principle that the President "cannot delegate ultimate responsibility or the active obligation to supervise that goes with it," because Article II "makes a single President responsible for the actions of the Executive Branch."

To remedy this problem, the Court invalidated the for-cause restriction on removal of Board members by Commissioners, but, to FEF's disappointment, otherwise left the Board intact.

The four-justice dissent, led by Justice Breyer, strongly disagreed on a number of levels. Most striking of all, Justice Breyer observed that SEC Commissioners are not in fact protected by any express statutory restriction on their removal! (This fact is not so surprising once one realizes that Congress created the SEC between issuance of *Myers* and *Humphrey's Executor* — a time when congressional authority to restrict presidential removal authority was in doubt.)

Justice Breyer contended: (a) in the absence of clearly controlling constitutional text, history, or precedent, the Court should have deferred to the shared judgments of the political branches on structuring of the Board; (b) as a practical matter, the for-cause limitation on removal of Board members was unlikely to matter much given the Commission's statutory controls over Board functions; and (c) the majority's rule was sufficiently murky that it might "sweep[ ] hundreds, perhaps thousands of high level government officials within the scope of the Court's holding, putting their job security and their administrative actions and decisions constitutionally at risk."

Justice Breyer also explained that agency independence, rather than turning solely on whether an agency head enjoys for-cause protection from removal, is in a reality a complex phenomenon that depends on many factors:

> In practical terms no "for cause" provision can, in isolation, define the full measure of executive power. This is because a legislative decision to place ultimate administrative authority in, say, the Secretary of Agriculture rather than the President, the way in which the statute defines the scope of the power the relevant administrator can exercise, the decision as to who controls the agency's budget requests and funding, the relationships between one agency or department and another, as well as more purely political factors (including Congress' ability to assert influence) are more likely to affect the President's power to get something done. That is why President Truman complained . . . "'the powers of the President amount to'" bringing "'people in and try[ing] to persuade them to do what they ought to do without persuasion.'" C. Rossiter, *The American Presidency* 154 (2d rev. ed. 1960).

Understood in the context of these underlying realities, Justice Breyer insisted that the for-cause restriction on removal of Board members by Commissioners was constitutionally unobjectionable. *Cf.* Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15 (2010) (explaining that, although removal restrictions are regarded as the "touchstone" of independent status, functional agency independence depends on many factors—notably including control of funding).

BACKGROUND OF *SEILA LAW, LLC v. CONSUMER FINANCIAL PROTECTION BUREAU*

Independent agencies are usually headed by a multi-member commission or board. Members are appointed for fixed, staggered terms and some version of good cause is required for their removal. When Congress created the Consumer Financial Protection Bureau (CFPB) as part of the Dodd-Frank Act in 2010, it departed from this usual model by providing that the Bureau would be headed by a single Director subject to presidential removal during a five-year term for "inefficiency, neglect of duty, or malfeasance in office."

In 2014, the CFPB brought an enforcement action against PHH Corporation for illegal mortgage insurance referrals. Among its other defenses, PHH Corp. argued that the CFPB's structure unconstitutionally infringed on the president's "executive power" by concentrating power in a single individual who was not fully accountable to the president. Unlike the head of an executive agency, the CFPB Director cannot be removed by the president at will, and unlike the members of other independent agencies, the Director is not constrained by other board members or commissioners. In an opinion authored by then-Judge Kavanaugh, a three-judge panel of the D.C. Circuit accepted this structural argument. PHH Corp. v. CFPB, 839 F.3d 1 (D.C. Cir. 2016), but the D.C. Circuit reversed *en banc*. 881 F.3d 75 (D.C. Cir. 2018) and the Supreme Court denied certiorari, leaving the ultimate resolution of the constitutionality of the CFPB Director's removal protection for another day.

That day came in *Seila Law, LLC v. CFPB*. Seila Law ("Seila") was under investigation by the CFPB for allegedly violating telemarketing sales rules. As part of its investigation, the CFPB requested documents from the firm. Seila responded by challenging the CFPB's authority to issue such a request. Much like PHH before it, Seila claimed that the agency's structure—particularly the Act's requirement that its Director is removable by the president only "for cause"—rendered the CFPB unconstitutional.

Seila Law LLC *v.* Consumer Financial Protection Bureau

591 U.S. __, 140 S. Ct. 2183 (2020)

Roberts, C. J., delivered the opinion of the Court with respect to Parts I, II, and III, in which Thomas, Alito, Gorsuch, and Kavanaugh, JJ., joined, and an opinion with respect to Part IV, in which Alito and Kavanaugh, JJ., joined. Thomas, J., filed an opinion concurring in part and dissenting in part, in which Gorsuch, J., joined. Kagan, J., filed an opinion concurring in the judgment with respect to severability and dissenting in part, in which Ginsburg, Breyer, and Sotomayor, JJ., joined.

CHIEF JUSTICE ROBERTS delivered the opinion of the Court with respect to Parts I, II, and III.

In the wake of the 2008 financial crisis, Congress established the Consumer Financial Protection Bureau (CFPB), an independent regulatory agency tasked with ensuring that consumer debt products are safe and transparent. In organizing the CFPB, Congress deviated from the structure of nearly every other independent administrative agency in our history. Instead of placing the agency under the leadership of a board with multiple members, Congress provided that the CFPB 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. The CFPB Director has no boss, peers, or voters to report to. Yet the Director wields vast rulemaking, enforcement, and adjudicatory authority over a significant portion of the U. S. economy. The question before us is whether this arrangement violates the Constitution's separation of powers.

Under our Constitution, the "executive Power"—all of it—is "vested in a President," who must "take Care that the Laws be faithfully executed." Art. II, §1, cl. 1; *id.*, §3. Because no single person could fulfill that responsibility alone, the Framers expected that the President would rely on subordinate officers for assistance. Ten years ago, in *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, 561 U. S. 477 (2010), we reiterated that, "as a general matter," the Constitution gives the President "the authority to remove those who assist him in carrying out his duties." "Without such power, the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else."

The President's power to remove—and thus supervise—those who wield executive power on his behalf follows from the text of Article II, was settled by the First Congress, and was confirmed in the landmark decision *Myers* v. *United States*, 272 U. S. 52 (1926). Our precedents have recognized only two exceptions to the President's unrestricted removal power. In *Humphrey's Executor* v. *United States*, 295 U. S. 602 (1935), we held that Congress could create expert agencies led by a *group* of principal officers removable by the President only for good cause. And in *United States* v. *Perkins*, 116 U. S. 483 (1886), and *Morrison* v. *Olson*, 487 U. S. 654 (1988), we held that Congress could provide tenure protections to certain *inferior* officers with narrowly defined duties.

We are now asked to extend these precedents to a new configuration: an independent agency that wields significant executive power and is run by a single individual who cannot be removed by the President unless certain statutory criteria are met. We decline to take that step. While we need not and do not revisit our prior decisions allowing certain limitations on the President's removal power, there are compelling reasons not to extend those precedents to the novel context of an independent agency led by a single Director. Such an agency lacks a foundation in historical practice and clashes with constitutional structure by concentrating power in a unilateral actor insulated from Presidential control.

We therefore hold that the structure of the CFPB violates the separation of powers. We go on to hold that the CFPB Director's removal protection is severable from the other statutory provisions bearing on the

CFPB's authority. The agency may therefore continue to operate, but its Director, in light of our decision, must be removable by the President at will.

I

A

. . .

In 2010, Congress acted on these proposals and created the Consumer Financial Protection Bureau (CFPB) as an independent financial regulator within the Federal Reserve System. Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), 124 Stat. 1376. Congress tasked the CFPB with "implement[ing]" and "enforc[ing]" a large body of financial consumer protection laws to "ensur[e] that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive." 12 U. S. C. §5511(a). . . .

Congress also vested the CFPB with potent enforcement powers. The agency has the authority to conduct investigations, issue subpoenas and civil investigative demands, initiate administrative adjudications, and prosecute civil actions in federal court. §§5562, 5564(a), (f). To remedy violations of federal consumer financial law, the CFPB may seek restitution, disgorgement, and injunctive relief, as well as civil penalties of up to $1,000,000 (inflation adjusted) for each day that a violation occurs. . . .

The CFPB's rulemaking and enforcement powers are coupled with extensive adjudicatory authority. The agency may conduct administrative proceedings to "ensure or enforce compliance with" the statutes and regulations it administers. 12 U. S. C. §5563(a). . . .

Congress's design for the CFPB differed from the proposals of Professor Warren and the Obama administration in one critical respect. Rather than create a traditional independent agency headed by a multimember board or commission, Congress elected to place the CFPB under the leadership of a single Director. 12 U. S. C. §5491(b)(1). The CFPB Director is appointed by the President with the advice and consent of the Senate. §5491(b)(2). The Director serves for a term of five years, during which the President may remove the Director from office only for "inefficiency, neglect of duty, or malfeasance in office." §§5491(c)(1), (3).

Unlike most other agencies, the CFPB does not rely on the annual appropriations process for funding. Instead, the CFPB receives funding directly from the Federal Reserve, which is itself funded outside the appropriations process through bank assessments. . . .

III

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

A

Article II provides that "[t]he executive Power shall be vested in a President," who must "take Care that the Laws be faithfully executed." Art. II, §1, cl. 1; *id.*, §3. 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." 30 WRITINGS OF GEORGE WASHINGTON 334 (J. Fitzpatrick ed. 1939).

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." 1 ANNALS OF CONG. 463 (1789). 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*, 478 U. S., at 726 (internal quotation marks omitted).

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. *Free Enterprise Fund*, 561 U. S., at 492. "The view that 'prevailed, as most consonant to the text of the Constitution' and 'to the requisite responsibility and harmony in the Executive Department,' was that the executive power included a power to oversee executive officers through removal." *Ibid.* (quoting Letter from James Madison to Thomas Jefferson (June 30, 1789), 16 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 893 (2004)). The First Congress's recognition of the President's removal power in 1789 "provides contemporaneous and weighty evidence of the Constitution's meaning," *Bowsher*, 478 U. S., at 723 (internal quotation marks omitted), and has long been the "settled and well understood construction of the Constitution," *Ex parte Hennen*, 13 Pet. 230, 259 (1839).

The Court recognized the President's prerogative to remove executive officials in *Myers* v. *United States*. Chief Justice Taft, writing for the Court, conducted an exhaustive examination of the First Congress's determination in 1789, the views of the Framers and their contemporaries, historical practice, and our precedents up until that point. He concluded that Article II "grants to the President" the "general administrative control of those executing the laws, including the power of appointment *and removal* of executive officers." Just as the President's "selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he cannot continue to be responsible." "[T]o hold otherwise," the Court reasoned, "would make it impossible for the President . . . to take care that the laws be faithfully executed."

We recently reiterated the President's general removal power in *Free Enterprise Fund*. "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." Although we had previously sustained congressional limits on that power in certain circumstances, we declined to extend those limits to "a new situation not yet encountered by the Court"—an official insulated by *two* layers of for-cause removal protection. In the face of that novel impediment to the President's oversight of the Executive Branch, we adhered to the general rule that the President possesses "the authority to remove those who assist him in carrying out his duties."

Free Enterprise Fund left in place two exceptions to the President's unrestricted removal power. First, in *Humphrey's Executor*, decided less than a decade after *Myers*, the Court upheld a statute that protected the Commissioners of the FTC 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." It acted "as a legislative agency" in "making investigations and reports" to Congress and "as an agency of the judiciary" in making recommendations to courts as a master in chancery. "To the extent that [the FTC] exercise[d] any executive *function*[,] as distinguished from executive *power* in the constitutional sense," it did so only in the discharge of its "quasi-legislative or quasi-judicial powers."[2]

The Court identified several organizational features that helped explain its characterization of the FTC as non-executive. Composed of five members—no more than three from the same political party—the Board was designed to be "non-partisan" and to "act with entire impartiality." The FTC's duties were "neither political nor executive," but instead called for "the trained judgment of a body of experts" "informed by experience." And the Commissioners' staggered, seven-year terms enabled the agency to accumulate technical expertise and avoid a "complete change" in leadership "at any one time."

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. . . .

While recognizing an exception for multimember bodies with "quasi-judicial" or "quasi-legislative" functions, *Humphrey's Executor* reaffirmed the core holding of *Myers* that the President has "unrestrictable power . . . to remove purely executive officers." The Court acknowledged that between purely executive officers on the one hand, and officers that closely resembled the FTC Commissioners on the other, there existed "a field of doubt" that the Court left "for future consideration."

We have recognized a second exception for *inferior* officers in two cases, *United States* v. *Perkins* and *Morrison* v. *Olson*. 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." Although the independent counsel was a single person and performed "law enforcement functions that typically have been undertaken by officials within the Executive Branch," we concluded that the removal protections did not unduly interfere with the functioning of the Executive Branch because "the independent counsel [was] an inferior officer under the Appointments Clause, with limited jurisdiction and tenure and lacking policymaking or significant administrative authority."

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." *PHH*, 881 F. 3d, at 196 (Kavanaugh, J., dissenting) (internal quotation marks omitted).

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[2] The Court's conclusion that the FTC did not exercise executive power has not withstood the test of time. As we observed in *Morrison* v. *Olson,* "[I]t is hard to dispute that the powers of the FTC at the time of *Humphrey's Executor* would at the present time be considered 'executive,' at least to some degree." . . .

B

Neither *Humphrey's Executor* nor *Morrison* resolves whether the CFPB Director's insulation from removal is constitutional. Start with *Humphrey's Executor.* Unlike the New Deal-era FTC upheld there, the CFPB is led by a single Director who cannot be described as a "body of experts" and cannot be considered "non-partisan" in the same sense as a group of officials drawn from both sides of the aisle. Moreover, while the staggered terms of the FTC Commissioners prevented complete turnovers in agency leadership and guaranteed that there would always be some Commissioners who had accrued significant expertise, the CFPB's single-Director structure and five-year term guarantee abrupt shifts in agency leadership and with it the loss of accumulated expertise.

In addition, the CFPB Director is hardly a mere legislative or judicial aid. Instead of making reports and recommendations to Congress, as the 1935 FTC did, the Director possesses the authority to promulgate binding rules fleshing out 19 federal statutes, including a broad prohibition on unfair and deceptive practices in a major segment of the U. S. economy. And instead of submitting recommended dispositions to an Article III court, the Director may unilaterally issue final decisions awarding legal and equitable relief in administrative adjudications. Finally, the Director's enforcement authority includes the power to seek daunting monetary penalties against private parties on behalf of the United States in federal court—a quintessentially executive power not considered in *Humphrey's Executor*.

The logic of *Morrison* also does not apply. Everyone agrees the CFPB Director is not an inferior officer, and her duties are far from limited. Unlike the independent counsel, who lacked policymaking or administrative authority, the Director has the sole responsibility to administer 19 separate consumer-protection statutes that cover everything from credit cards and car payments to mortgages and student loans. It is true that the independent counsel in *Morrison* was empowered to initiate criminal investigations and prosecutions, and in that respect wielded core executive power. But that power, while significant, was trained inward to high-ranking Governmental actors identified by others, and was confined to a specified matter in which the Department of Justice had a potential conflict of interest. By contrast, the CFPB Director has the authority to bring the coercive power of the state to bear on millions of private citizens and businesses, imposing even billion-dollar penalties through administrative adjudications and civil actions.

In light of these differences, the constitutionality of the CFPB Director's insulation from removal cannot be settled by *Humphrey's Executor* or *Morrison* alone.

C

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.

1

"Perhaps the most telling indication of [a] severe constitutional problem" with an executive entity "is [a] lack of historical precedent" to support it. *Id.,* at 505 (internal quotation marks omitted). An agency with a structure like that of the CFPB is almost wholly unprecedented.

After years of litigating the agency's constitutionality, the Courts of Appeals, parties, and *amici* have identified "only a handful of isolated" incidents in which Congress has provided good-cause tenure to principal officers who wield power alone rather than as members of a board or commission. . . .

2

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 Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty." Their solution to governmental power and its perils was simple: divide it. To prevent the "gradual concentration" of power in the same hands, they enabled "[a]mbition . . . to counteract ambition" at every turn. THE FEDERALIST NO. 51, p. 349 (J. Cooke ed. 1961) (J. Madison). At the highest level, they "split the atom of sovereignty" itself into one Federal Government and the States. They then divided the "powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial."

They did not stop there. Most prominently, the Framers bifurcated the federal legislative power into two Chambers: the House of Representatives and the Senate, each composed of multiple Members and Senators. Art. I, §§2, 3.

The Executive Branch is a stark departure from all this division. The Framers viewed the legislative power as a special threat to individual liberty, so they divided that power to ensure that "differences of opinion" and the "jarrings of parties" would "promote deliberation and circumspection" and "check excesses in the majority." *See* THE FEDERALIST NO. 70, at 475 (A. Hamilton); *see also id*., NO. 51, at 350. By contrast, the Framers thought it necessary to secure the authority of the Executive so that he could carry out his unique responsibilities. *See id*., NO. 70, at 475–478. As Madison put it, while "the weight of the legislative authority requires that it should be . . . divided, the weakness of the executive may require, on the other hand, that it should be fortified." *Id*., NO. 51, at 350.

The Framers deemed an energetic executive essential to "the protection of the community against foreign attacks," "the steady administration of the laws," "the protection of property," and "the security of liberty." *Id*., NO. 70, at 471. Accordingly, they chose not to bog the Executive down with the "habitual feebleness and dilatoriness" that comes with a "diversity of views and opinions." *Id.*, at 476. Instead, they gave the Executive the "[d]ecision, activity, secrecy, and dispatch" that "characterise the proceedings of one man." *Id.*, at 472.

To justify and check *that* authority—unique in our constitutional structure—the Framers made the President the most democratic and politically accountable official in Government. Only the President (along with the Vice President) is elected by the entire Nation. And the President's political accountability is enhanced by the solitary nature of the Executive Branch, which provides "a single object for the jealousy and watchfulness of the people." *Id.,* at 479. The President "cannot delegate ultimate responsibility or the active obligation to supervise that goes with it," because Article II "makes a single President responsible for the actions of the Executive Branch."

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." 1 ANNALS OF CONG. 499 (J. Madison).

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. *See* THE FEDERALIST NO. 58, at 394 (J. Madison) (describing the "power over the purse" as the "most compleat and effectual weapon" in representing the interests of the people). 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. . . .

IV

Having concluded that the CFPB's leadership by a single independent Director violates the separation of powers, we now turn to the appropriate remedy. We directed the parties to brief and argue whether the Director's removal protection was severable from the other provisions of the Dodd-Frank Act that establish the CFPB. If so, then the CFPB may continue to exist and operate notwithstanding Congress's unconstitutional attempt to insulate the agency's Director from removal by the President. [The Court then concluded that the removal protection was severable and eliminated the Director's for-cause protection from removal.] . . .

A decade ago, we declined to extend Congress's authority to limit the President's removal power to a new situation, never before confronted by the Court. We do the same today. In our constitutional system, the executive power belongs to the President, and that power generally includes the ability to supervise and remove the agents who wield executive power in his stead. While we have previously upheld limits on the President's removal authority in certain contexts, we decline to do so when it comes to principal officers who, acting alone, wield significant executive power. The Constitution requires that such officials remain dependent on the President, who in turn is accountable to the people.

The judgment of the United States Court of Appeals for the Ninth Circuit is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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. . . .

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." *Humphrey's Executor*, 295 U.S. at 628. Working from that premise, the Court distinguished the "illimitable" power of removal recognized in *Myers*, and upheld the FTC Act's removal restriction, while simultaneously acknowledging that the Constitution vests the President with the entirety of the executive power.

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, and it cannot authorize the use of judicial power by officers acting outside of the bounds of Article III. 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. See Art. I, §1; Art. II, §1, cl. 1; Art. III, §1. Free-floating agencies simply do not comport with this constitutional structure. . . .

JUSTICE KAGAN, with whom JUSTICE GINSBURG, JUSTICE BREYER, and JUSTICE SOTOMAYOR join, concurring in the judgment with 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). . . .

In second-guessing the political branches, the majority second-guesses as well the wisdom of the Framers and the judgment of history. It writes in rules to the Constitution that the drafters knew well enough not to put there. It repudiates the lessons of American experience, from the 18th century to the present day. And it commits the Nation to a static version of governance, incapable of responding to new conditions and challenges. Congress and the President established the CFPB to address financial practices that had brought on a devastating recession, and could do so again. Today's decision wipes out a feature of that agency its creators thought fundamental to its mission—a measure of independence from political pressure. I respectfully dissent.

I

The text of the Constitution, the history of the country, the precedents of this Court, and the need for sound and adaptable governance—all stand against the majority's opinion. They point not to the majority's "general rule" of "unrestricted removal power" with two grudgingly applied "exceptions." Rather, they bestow discretion on the legislature to structure administrative institutions as the times demand, so long as the President retains the ability to carry out his constitutional duties. And most relevant here, they give Congress wide leeway to limit the President's removal power in the interest of enhancing independence from politics in regulatory bodies like the CFPB.

A

What does the Constitution say about the separation of powers—and particularly about the President's removal authority? (Spoiler alert: about the latter, nothing at all.) . . .

The problem lies . . . in failing to recognize that the separation of powers is, by design, neither rigid nor complete. Blackstone, whose work influenced the Framers on this subject as on others, observed that "every branch" of government "supports and is supported, regulates and is regulated, by the rest." 1 W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 151 (1765). So as 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." THE FEDERALIST NO. 47, at 325 (emphasis deleted). . . .

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." §2, cl. 1. 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. See *ante* ("The entire 'executive Power' belongs to the President alone"). 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." §8, cl. 18. 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). Art. II, §2, cl. 2. 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." 1 ANNALS OF CONG. 582 (1789). 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*, 487 U. S. 654 (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." . . .

Nor can the Take Care Clause come to the majority's rescue. . . . To be sure, the imposition of a duty may imply a grant of power sufficient to carry it out. . . . [But] the text of the Take Care Clause requires only enough authority to make sure "the laws [are] faithfully executed"—meaning with fidelity to the law itself, not to every presidential policy preference. As this Court has held, a President can ensure "'faithful execution' of the laws"—thereby satisfying his "take care" obligation—with a removal provision like the one here. *Morrison*, 487 U.S., at 692. A for-cause standard gives him "ample authority to assure that [an official] is competently performing [his] statutory responsibilities in a manner that comports with the [relevant legislation's] provisions." *Ibid.*

Finally, recall the Constitution's telltale silence: Nowhere does the text say anything about the President's power to remove subordinate officials at will. . . .

B

History no better serves the majority's cause. . . .

1

Begin with evidence from the Constitution's ratification. And note that this moment is indeed the beginning: Delegates to the Constitutional Convention never discussed whether or to what extent the President would have power to remove executive officials. As a result, the Framers advocating ratification had no single view of the matter. In FEDERALIST NO. 77, Hamilton presumed that under the new Constitution "[t]he consent of [the Senate] would be necessary to displace as well as to appoint" officers of the United States. He thought that scheme would promote "steady administration": "Where a man in any station had given satisfactory evidence of his fitness for it, a new president would be restrained" from substituting "a person more agreeable to him." By contrast, Madison thought the Constitution allowed Congress to decide how any executive official could be removed. He explained in FEDERALIST NO. 39: "The tenure of the ministerial offices generally will be a subject of legal regulation, conformably to the reason of the case, and the example of the State Constitutions." Neither view, of course, at all supports the majority's story.

The second chapter is the Decision of 1789, when Congress addressed the removal power while considering the bill creating the Department of Foreign Affairs. Speaking through Chief Justice Taft—a judicial presidentialist if ever there was one—this Court in *Myers* v. *United States* read that debate as expressing Congress's judgment that the Constitution gave the President illimitable power to remove executive officials. The majority rests its own historical claim on that analysis (though somehow also finding room for its two exceptions). But Taft's historical research has held up even worse than *Myers*' holding (which was mostly reversed). As Dean Manning has concluded after reviewing decades' worth of scholarship on the issue, "the implications of the debate, properly understood, [are] highly ambiguous and prone to overreading." Manning, [*Separation of Powers as Ordinary Interpretation,*] 124 HARV. L. REV. [1942, 1965 n. 135 (2011)]; see *id.,* at 2030–2031.

The best view is that the First Congress was "deeply divided" on the President's removal power, and "never squarely addressed" the central issue here. *Id.,* at 1965, n. 135; Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021, 1072 (2006). . . . The summer of 1789 thus ended without resolution of the critical question: Was the removal power "beyond the reach of congressional regulation?" Prakash, *supra,* at 1072. . . .

Contrary to the majority's view, then, the founding era closed without any agreement that Congress lacked the power to curb the President's removal authority. And as it kept that question open, Congress took the first steps—which would launch a tradition—of distinguishing financial regulators from diplomatic and military officers. . . .

2

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." Lessig & Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 30 (1994). 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. A year later, Congress amended the statute to permit removal by the President alone, but only upon "reasons to be communicated by him to the Senate." . . .

And then, nearly a century and a half ago, the floodgates opened. In 1887, the growing power of the railroads over the American economy led Congress to create the Interstate Commerce Commission. Under that legislation, the President could remove the five Commissioners only "for inefficiency, neglect of duty, or malfeasance in office"—the same standard Congress applied to the CFPB Director. More—many more—for-cause removal provisions followed. In 1913, Congress gave the Governors of the Federal Reserve Board for-cause protection to ensure the agency would resist political pressure and promote economic stability. The next year, Congress provided similar protection to the FTC in the interest of ensuring "a continuous policy" "free from the effect" of "changing [White House] incumbency." 51 Cong. Rec. 10376 (1914). The Federal Deposit Insurance Corporation (FDIC), the Securities and Exchange Commission (SEC), the Commodity Futures Trading Commission. In the financial realm, "independent agencies have remained the bedrock of the institutional framework governing U. S. markets." Gadinis, *From Independence to Politics in Financial Regulation*, 101 CAL. L. REV. 327, 331 (2013). By one count, across all subject matter areas, 48 agencies have heads (and below them hundreds more inferior officials) removable only for cause. See *Free Enterprise Fund*, 561 U. S., at 541 (Breyer, J., dissenting). So year by year by year, the broad sweep of history has spoken to the constitutional question before us: Independent agencies are everywhere.

C

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 (much as later scholars rejected Taft's one-sided history). In *Humphrey's Executor* v. *United States,* the Court unceremoniously—and unanimously—confined *Myers* to its facts. "[T]he narrow point actually decided" there, *Humphrey's* stated, was that the President could "remove a postmaster of the first class, without the advice and consent of the Senate." Nothing else in Chief Justice Taft's prolix opinion "c[a]me within the rule of *stare decisis*." (Indeed, the Court went on, everything in *Myers* "out of harmony" with *Humphrey's* was expressly "disapproved.") Half a century later, the Court was more generous. Two decisions read *Myers* as standing for the principle that Congress's own "participation in the removal of executive officers is unconstitutional." *Bowsher* v. *Synar*, 478 U. S. 714, 725 (1986); see *Morrison*, 487 U. S., at 686 ("As we observed in *Bowsher*, the essence" of "*Myers* was the judgment that the Constitution prevents Congress from draw[ing] to itself" the power to remove (internal quotation marks omitted)). *Bowsher* made clear that *Myers* had nothing to say about Congress's power to enact a provision merely "limit[ing] the President's powers of removal" through a for-cause provision. That issue, the Court stated, was "not presented" in "the *Myers* case." Instead, the relevant cite was *Humphrey's*.

And *Humphrey's* found constitutional a statute identical to the one here, providing that the President could remove FTC Commissioners for "inefficiency, neglect of duty, or malfeasance in office. The *Humphrey's* Court, as the majority notes, relied in substantial part on what kind of work the Commissioners performed. (By contrast, nothing in the decision turned—as the majority suggests—on any of the agency's organizational features.) According to *Humphrey's*, the Commissioners' primary work was to "carry into effect legislative policies"—"filling in and administering the details embodied by [a statute's] general standard." In addition, the Court noted, the Commissioners recommended dispositions in court cases, much as a special master does. Given those "quasi-legislative" and "quasi-judicial"—as opposed to "purely executive"—functions, Congress could limit the President's removal authority. Or said another way, Congress could give the FTC some "independen[ce from] executive control." . . .

. . . *Morrison* both extended *Humphrey's* domain and clarified the standard for addressing removal issues. The *Morrison* Court, over a one-Justice dissent, upheld for-cause protections afforded to an independent counsel with power to investigate and prosecute crimes committed by high-ranking officials. The Court well understood that those law enforcement functions differed from the rulemaking and adjudicatory duties highlighted in *Humphrey's* and *Wiener*. But that difference did not resolve the issue. An official's functions, *Morrison* held, were relevant to but not dispositive of a removal limit's constitutionality. The key question in all the cases, *Morrison* saw, was whether such a restriction would "impede the President's ability to perform his constitutional duty." Only if it did so would it fall outside Congress's power. And the protection for the independent counsel, the Court found, did not. Even though the counsel's functions were "purely executive," the President's "need to control the exercise of [her] discretion" was not "so central to the functioning of the Executive Branch as to require" unrestricted removal authority. True enough, the Court acknowledged, that the for-cause standard prevented the President from firing the counsel for discretionary decisions or judgment calls. But it preserved "ample authority" in the President "to assure that the counsel is competently performing" her "responsibilities in a manner that comports with" all legal requirements. That meant the President could meet his own constitutional obligation "to ensure 'the faithful execution' of the laws."

The majority's description of *Morrison* is not true to the decision. (Mostly, it seems, the majority just wishes the case would go away.) First, *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. 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. Second, as all that suggests, *Morrison* is not limited to inferior officers. In the eight pages addressing the removal issue, the Court constantly spoke of "officers" and "officials" in general. By contrast, the Court there used the word "inferior" in just one sentence (which of course the majority quotes), when applying its general standard to the case's facts. Indeed, Justice Scalia's dissent emphasized that the counsel's inferior-office status played no role in the Court's decision. See *id.,* at 724 ("The Court could have resolved the removal power issue in this case by simply relying" on that status, but did not). As Justice Scalia noted, the Court in *United States* v. *Perkins* (1886), had a century earlier allowed Congress to restrict the President's removal power over inferior officers. Were that *Morrison*'s basis, a simple citation would have sufficed. . . .

II

. . .

The question here, which by now you're well equipped to answer, is whether including that for-cause standard in the statute creating the CFPB violates the Constitution.

A

Applying our longstanding precedent, the answer is clear: It does not. . . .

First, the CFPB's powers are nothing unusual in the universe of independent agencies. The CFPB, as the majority notes, can issue regulations, conduct its own adjudications, and bring civil enforcement actions in court—all backed by the threat of penalties. But then again, so too can (among others) the FTC and SEC, two agencies whose regulatory missions parallel the CFPB's. . . . And if influence on economic life is the measure, consider the Federal Reserve, whose every act has global consequence. The CFPB, gauged by that comparison, is a piker.

Second, the removal protection given the CFPB's Director is standard fare. The removal power rests with the President alone; Congress has no role to play, as it did in the laws struck down in *Myers* and *Bowsher*. The statute provides only one layer of protection, unlike the law in *Free Enterprise Fund*. And the clincher, which you have heard before: The for-cause standard used for the CFPB is identical to the one the Court upheld in *Humphrey's*. Both enable the President to fire an agency head for "inefficiency, neglect of duty, or malfeasance in office." A removal provision of that kind applied to a financial agency head, this Court has held, does not "unduly trammel[ ] on executive authority," even though it prevents the President from dismissing the official for a discretionary policy judgment. *Morrison*, 487 U. S., at 691. Once again: The removal power has not been "completely stripped from the President," providing him with no means to "ensure the 'faithful execution' of the laws." Rather, this Court has explained, the for-cause standard gives the President "ample authority to assure that [the official] is competently performing his or her statutory responsibilities in a manner that comports with" all legal obligations. . . .

The analysis is as simple as simple can be. The CFPB Director exercises the same powers, and receives the same removal protections, as the heads of other, constitutionally permissible independent agencies. How could it be that this opinion is a dissent?

B

The majority focuses on one (it says sufficient) reason: The CFPB Director is singular, not plural. "Instead of placing the agency under the leadership of a board with multiple members," the majority protests, "Congress provided that the CFPB would be led by a single Director." And a solo CFPB Director does not fit within either of the majority's supposed exceptions. He is not an inferior officer, so (the majority says) *Morrison* does not apply; and he is not a multimember board, so (the majority says) neither does *Humphrey's*. Further, the majority argues, "[a]n agency with a [unitary] structure like that of the CFPB" is "novel"—or, if not quite that, "almost wholly unprecedented." Finally, the CFPB's organizational form violates the "constitutional structure" because it vests power in a "single individual" who is "insulated from Presidential control."

I'm tempted at this point just to say: No. All I've explained about constitutional text, history, and precedent invalidates the majority's thesis. But I'll set out here some more targeted points, taking step by step the majority's reasoning.

First, as I'm afraid you've heard before, the majority's "exceptions" (like its general rule) are made up. To begin with, our precedents reject the very idea of such exceptions. "The analysis contained in our removal cases," *Morrison* stated, shuns any attempt "to define rigid categories" of officials who may (or may not) have job protection. Still more, the contours of the majority's exceptions don't connect to our decisions' reasoning. The analysis in *Morrison*, as I've shown, extended far beyond inferior officers. And of course that analysis had to apply to *individual* officers: The independent counsel was very much a person, not a committee. So the idea that *Morrison* is in a separate box from this case doesn't hold up. Similarly, *Humphrey's* and later precedents give no support to the majority's view that the number of people at the apex of an agency matters to the constitutional issue. Those opinions mention the "groupness" of the agency head only in their background sections. The majority picks out that until-now-irrelevant fact to distinguish the CFPB, and constructs around it an until-now-unheard-of exception. So if the majority really wants to see something "novel," it need only look to its opinion.

By contrast, the CFPB's single-director structure has a fair bit of precedent behind it. The Comptroller of the Currency. The Office of the Special Counsel (OSC). The Social Security Administration (SSA). The Federal Housing Finance Agency (FHFA). Maybe four prior agencies is in the eye of the beholder, but it's hardly nothing. . . .

And 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.

To begin with, trying to generalize about these matters is something of a fool's errand. Presidential control, as noted earlier, can operate through many means—removal to be sure, but also appointments, oversight devices (*e.g.,* centralized review of rulemaking or litigating positions), budgetary processes, personal outreach, and more. See *Free Enterprise Fund*, 561 U. S., at 524 (Breyer, J., dissenting). The effectiveness of each of those control mechanisms, when present, can then depend on a multitude of agency-specific practices, norms, rules, and organizational features. In that complex stew, the difference between a singular and plural agency head will often make not a whit of difference. . . .

But if the demand is for generalization, then the majority's distinction cuts the opposite way: More powerful control mechanisms are needed (if anything) for commissions. Holding everything else equal, those are the agencies more likely to "slip from the Executive's control." Just consider your everyday experience: It's easier to get one person to do what you want than a gaggle. . . .

Because it has no answer on that score, the majority slides to a different question: Assuming presidential control of any independent agency is vanishingly slim, is a single-head or a multi-head agency more capable of exercising power, and so of endangering liberty? The majority says a single head is the greater threat because he may wield power "*unilaterally*" and "[w]ith no colleagues to persuade." So the CFPB falls victim to what the majority sees as a constitutional anti-power-concentration principle (with an exception for the President).

If you've never heard of a statute being struck down on that ground, you're not alone. It is bad enough to "extrapolat[e]" from the "general constitutional language" of Article II's Vesting Clause an unrestricted removal power constraining Congress's ability to legislate under the Necessary and Proper Clause. It is still worse to extrapolate from the Constitution's general structure (division of powers) and implicit values (liberty) a limit on Congress's express power to create administrative bodies. And more: to extrapolate from such sources a distinction as prosaic as that between the SEC and the CFPB—*i.e.,* between a multi-headed and single-headed agency. . . . In deciding for itself what is "proper," the Court goes beyond its own proper bounds. . . .

QUERIES ABOUT *SEILA LAW*

1. What happened? People have been arguing about the scope of the presidential power to control agency action for nearly a quarter of a millennium, so it should not be surprising that the debate between Chief Justice Roberts and Justice Kagan in *Seila Law* is complex and maybe not so easy for someone new to the material to follow. To understand the contours of this debate, it is helpful to break down the opinions in terms of their use of constitutional text, history, and precedent.

Constitutional text: The Chief Justice contends that the good-cause restriction on removal of the CFPB Director unconstitutionally infringed on the "executive power" that Article II vests in the president alone. What purposes does allocation of "all" of the executive power to the president serve? How does he justify the conclusion that removal power is an element of the executive power? It seems to be common ground that the president would have good cause to fire an agency head for violating the law or serious abuses of discretion. A critical question: Why, for the Chief Justice, isn't this enough authority to satisfy the Constitution?

Turning to Justice Kagan, what constitutional provision, in her view, grants Congress power to impose good cause restrictions on removal of at least some agency heads? Would Justice Kagan agree that there are some agency heads whom the president must be able to fire at will? If so, why? The good cause restriction, while in effect, would have blocked the president from getting rid of the Director of the CFPB due to a policy disagreement. Another critical question: Why, in Justice Kagan's view, doesn't this interference violate the president's control of the executive power?

History: How did the Chief Justice and Justice Kagan deploy the Federalist Papers? The Decision of 1789? How did they characterize congressional practice leading up to the creation of the CFPB? Who, in your view, makes better use of this history?

The Big Three Precedents: To make sense of *Seila Law,* it is critical to understand how the Chief Justice and Justice Kagan characterized and deployed *Myers v. United States, Humphrey's Executor v. United States*, and *Morrison v. Olson*. What rules did the Chief Justice pull out of these three cases? How about Justice Kagan? Whose use of precedent seems truer to these sources?

2. Why care? According to Justice Kagan, why should we want to preserve agency decisional independence in some contexts? What positive values does it serve? For the Chief Justice, what positive values does presidential control promote?

3. What's next? In *Seila Law*, the majority opinion expressly declined to overrule the two foundational cases for agency independence, *Humphrey's Executor* and *Morrison*. Might you, however, use the majority's new reading of these cases to attack the constitutionality of current independent agencies? Recall that *Humphrey's Executor* upheld the independence of the FTC given the powers it possessed in 1935. How do the powers of modern agencies compare? Recall also that the Court limited *Morrison*'s application to "inferior" officers. Is *Morrison* still of any help to independent agencies?

4. Another shoe (i.e., removal restriction) drops. Okay, there is a lot going on in the *Seila Law* opinions, but you might recall that, towards the end of the excerpt from Justice Kagan's dissent, she mentioned that the Federal Housing Financial Agency (FHFA), like the CFPB, has a single Director protected by a for-cause limit on removal. Following hard on the heels of *Seila Law*, the Court in *Collins v. Yellen*, 141 S. Ct. 1761 (2021), held that the FHFA Director's protection from removal was unconstitutional. Justice Alito's majority opinion rejected the argument that *Seila Law* should not control because the FHFA's powers are not as great as those of the CFPB. He instead stated that "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." *Id.* at 1784. Accountability to the president, and thus the electorate, is required wherever an agency does "important" work. *Id.* Also, courts "are not well-suited to weigh the relative importance of the regulatory and enforcement authority of disparate agencies," and "the constitutionality of removal restrictions" should not "hinge[] on such an inquiry." *Id.* at 1784–85.

Justice Kagan concurred on stare decisis grounds but objected that the Court had gratuitously expanded *Seila Law* to require at-will removal for every single-member agency head, regardless of whether that agency head exercises "significant executive authority" as *Seila Law* had indicated. *Id.* at 1801 (Kagan, J., dissenting).

Justice Sotomayor, joined by Justice Breyer, dissented on the constitutional question. She asserted that "the FHFA does not wield significant executive power, the executive power it does wield is exercised over Government affiliates, and its independence is supported by historical tradition. All considerations weigh in favor of recognizing Congress's power to make the FHFA Director removable only for cause." *Id.* at 1808 (Sotomayor, J., dissenting).

NOTES ON OTHER POLITICAL BRANCH CONTROLS OF AGENCIES

1. The demise of the legislative veto. In theory, Congress can override administrative action by passing a statute, but doing so is notoriously hard given that it requires enactment by the House and Senate and either a presidential signature or an override of a presidential veto. In response to this problem, Congress included "legislative veto" provisions in hundreds of enactments since 1929 as the modern administrative state took shape. Such provisions authorize a portion of Congress (*e.g.*, just the House acting alone) to block administrative action without obtaining bicameral approval or undergoing presentment to the president as the Constitution requires for legislation. The legislative veto, in short, makes it cheaper for interested elements in Congress to block administrative actions they do not like.

In *INS v. Chadha*, 462 U.S. 919 (1983), the Supreme Court ruled that legislative vetoes are unconstitutional. The facts of the case were not good for fans of this device. Under the statutory scheme, the Attorney General had discretion to suspend the deportation of persons of good moral character who would suffer extreme hardship if deported; one house of Congress could by resolution block such suspension. An immigration judge determined that Chadha met these requirements and suspended deportation. Subsequently, Representative Eilberg, Chairman of the Judiciary Subcommittee on Immigration, Citizenship, and International Law, introduced a resolution in the house to block suspension of deportation of a half-dozen aliens — one of them Chadha. The Supreme Court described the subsequent legislative process this way:

> On December 16, 1975, the resolution was discharged from further consideration by the House Committee on the Judiciary and submitted to the House of Representatives for a vote. 121 Cong.Rec. 40800. The resolution had not been printed and was not made available to other Members of the House prior to or at the time it was voted on. *Ibid*. So far as the record before us shows, the House consideration of the resolution was based on Representative Eilberg's statement from the floor that "[i]t was the feeling of the committee, after reviewing 340 cases, that the aliens contained in the resolution … did not meet these statutory requirements, particularly as it relates to hardship; and it is the opinion of the committee that their deportation should not be suspended."

Chief Justice Burger's majority opinion striking the legislative veto is often cited as an example of a formalistic approach to separation of powers. Simplifying somewhat, he reasoned: (a) when Congress alters legal rights it is passing a law; (b) when Congress passes a law, it needs to satisfy the constitutional requirements of bicameralism and presentment, which are designed to promote deliberation and protect liberty; and (c) these requirements hold regardless of whether the legislative veto is, from a functional point of view, a "useful political invention," which is a debatable point in any event.

Justice White's dissent is a classic opinion in the functionalist mold. He stressed in particular that the legislative veto was vital to Congress's ability to balance delegation of power and its control:

> Without the legislative veto, Congress is faced with a Hobson's choice: either to refrain from delegating the necessary authority, leaving itself with a hopeless task of writing laws with the requisite specificity to cover endless special circumstances across the entire policy landscape, or in the alternative, to abdicate its law-making function to the executive branch and independent agencies. To choose the former leaves major national problems unresolved; to opt for the latter risks unaccountable policymaking by those not elected to fill that role. Accordingly, over the past five decades, the legislative veto has been placed in nearly 200 statutes. The device is known in every field of governmental concern: reorganization, budgets, foreign affairs, war powers, and regulation of trade, safety, energy, the environment and the economy.

He also observed that it was rather odd for the Court to take such a strict view of the procedural limits on congressional authority given that the Court had, in essence, allowed Congress to delegate to agencies the power to make laws without undergoing bicameralism and presentment.

2. Money. The Supreme Court's *Chadha* opinion did not alter the fundamental political fact that Congress has power to make life quite difficult for an agency and its officials. For instance, congressional oversight committees can require agencies to produce information and agency officials to testify — which can be quite time-consuming and unpleasant for the official. But even more to the point, Congress controls the purse strings. The significance of this power for the practical import of *Chadha* was revealed in a telling anecdote recounted by Fisher and Devins about NASA's abortive effort to make use of that decision:

> The agency contested a legislative veto provision in its appropriations act. Congress responded by providing insufficient funds and then requiring the agency to come back for supplemental appropriations. NASA quickly succumbed in this unequal contest. The unconditional surrender was executed by this letter from the NASA administrator to the congressional subcommittee controlling its appropriations:
>
>> As you are aware, the Supreme Court in 1983 held legislative vetoes to be unconstitutional, and the Department of Justice, in applying that decision to [our] appropriation act, has indicated that provisions for Committee approval to exceed ceilings on certain programs specified in the legislation are unconstitutional.
>>
>> … The House Committee on Appropriations has proposed … deletion of all Committee approval provisions, leaving inflexible, binding funding limitations on several programs. Without some procedure for adjustment, other than a subsequent separate legislative enactment, these ceilings could seriously impact the ability of NASA to meet unforeseen technical changes or problems that are inherent in challenging R&D programs. We believe that the present legislative procedure [providing for committee approval] could be converted by this letter into an informal agreement by NASA not to exceed amounts for Committee designated programs without the prior approval of the Committee on Appropriations. …
>>
>> We appreciate the support NASA has received from the Committees of both the House and the Senate, and wish to assure the Committees that NASA will comply with any ceilings imposed by the Committees without the need for legislative ceilings which could cause serious damage to NASA's ongoing programs.

L. FISHER & N. DEVINS, CONSTITUTIONAL LAW: READINGS IN INSTITUTIONAL DYNAMICS (1991).

3. The Congressional Review Act partially revives the legislative veto. In 1996, Congress enacted a partial substitute for the legislative veto in the Congressional Review Act (CRA), 5 U.S.C. §§ 801–08. The CRA provides that major rules cannot take effect until 60 days after they are submitted to Congress. It also provides streamlined procedures for Congress to consider and enact a joint resolution of disapproval for rules, which, unlike a legislative veto, must survive the presentment process to take effect. To prevent an agency from making an end run around the CRA, it provides that an invalidated rule "may not be reissued in substantially the same form, and a new rule that is substantially the same … may not be issued, unless the reissued or new rule is specifically authorized by law enacted after the date of the joint resolution disapproving the original rule." 5 U.S.C. § 801(b)(2). This is sometimes called the CRA's "salt the earth" provision.

As a CRA resolution must pass both houses and survive presentment, its provisions are likely to be useful only where control of the presidency has recently shifted to a party that also controls both houses of Congress. Prior to 2017, the stars had aligned for invoking the CRA just once. After Republicans took control of both houses of Congress and the White House in the 2000 election, they promptly invalidated a hotly contested OSHA regulation adopted late in the Clinton Administration to address repetitive motion injuries. The CRA then lay dormant for sixteen years, until 2017 when the presidency again switched from Democratic to Republican control while the Republicans controlled both houses of Congress. This time, the CRA carved a much broader swathe of regulatory destruction, eliminating fourteen of the fifteen regulations considered for repeal. In July 2021, President Biden signed three CRA disapprovals into law as Democrats finally had a chance to deploy the CRA against rules promulgated during a Republican administration.

4. Congressional oversight. In connection with its lawmaking power, Congress is responsible for investigating matters of public interest. Included in Congress's investigative power is the power to oversee the operation of the executive and judicial branches. In fact, each house of Congress has at least one committee with explicit responsibility for keeping an eye on the conduct of the other branches (*e.g.*, the House Committee on Oversight and Reform and the Senate Committee on Homeland Security and Governmental Affairs). Historically, Congress's oversight power has taken the form of hearings involving government officials, sometimes tied to the availability of funding, and subpoenas for records relating to official government action, which can be countered by claims of executive privilege or some other publicly relevant justification for withholding the requested materials. Almost always, disputes between Congress and the executive branch over access to information are resolved with some sort of compromise; there are only a handful of examples in American history when presidential challenges to congressional subpoenas have come before the courts.

It should come as no surprise, then, that the question of whether Congress may subpoena the personal (as opposed to public or official) records of a sitting president was an issue of first impression when the Supreme Court decided *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019 (2020). *Mazars* was consolidated with three other cases involving congressional subpoenas of President Trump's personal financial records. Three different committees of the House of Representatives issued subpoenas for those records as part of the committees' investigations into money laundering, foreign interference in the U.S. financial system and elections, and government ethics laws. President Trump sued to enjoin enforcement of all three subpoenas, which were issued to an accounting firm (Mazars) and two banks (Deutsche Bank and Capital One).

Before the Court, the House committees argued that the subpoenas are enforceable as long as they address a "valid legislative purpose." This is the standard that has been applied to previous challenges of legislative subpoenas, and has generally been understood as a low bar for Congress to meet in compelling information. The president and Solicitor General (SG) countered that a subpoena for presidential records is only enforceable when the House establishes a "demonstrated, specific need" for information that is "demonstrably critical" to its legislative purpose. This heightened standard was derived from cases seeking production of official presidential records, and reflects concerns about Congress using its subpoena power to harass a sitting president or to otherwise expose materials that the national interest suggests must or should remain confidential.

Chief Justice Roberts, writing for a seven-justice majority, rejected both arguments. He explained that the SG and the President's "categorical approach would giv[e] short shrift to Congress's important interests in conducting inquiries to obtain the information it needs to legislate effectively," and that the "House's approach fails to take adequate account of the significant separation of powers issues raised by congressional subpoenas for the President's information." The better approach, according to the Court, was to balance the interests of Congress and the president in this unique exercise of legislative power against the chief executive. The Chief Justice set out a (non-exhaustive) list of relevant factors, including: the nature of the legislative purpose; the breadth of the subpoena; the strength of the evidence supporting Congress's purpose; and the "burdens imposed on the president by a subpoena." The Court remanded the case to allow the lower courts to consider these "special concerns."

It is unclear how strictly the lower courts will apply the Court's balancing test in *Mazars* in future cases (including on remand in *Mazars* itself). Do you think that the Chief Justice was correct to hold that legislative subpoenas of a president's personal (i.e. non-privileged) records must be justified more thoroughly than "ordinary" legislative subpoenas? Does allowing Congress to expose the personal information of a president create a dangerous incentive for future Congresses?

5. Centralized presidential control of rulemaking. Statutory delegations of rulemaking authority generally run to agency heads rather than to the president—*e.g.*, Congress delegates to the EPA administrator, not the president, the authority to promulgate national ambient air quality standards. Does the president nonetheless have legal authority to control how agency heads use their rulemaking discretion? The president's position at the apex of the executive branch suggests the existence of such authority. But then, the Constitution instructs the president to "take Care that the Laws be faithfully executed," and Congress generally has, by law, vested rulemaking authority in agency heads. Can Congress constitutionally limit the president's authority to control agency rulemaking? Or, given the level of informal presidential influence over even "independent" agencies, does the "legal" answer to this question matter?

These questions are prompted by presidential efforts over the last several decades to rationalize and centralize agency rulemaking through executive orders that require executive agencies to, among other things, conduct cost-benefit analyses of significant rules. These orders also subject significant agency rules to centralized review by the Office of Information and Regulatory Affairs, an agency within the Office of Management and Budget, which is part of the Executive Office of the President. An executive order issued by the Clinton administration over twenty-five years ago, E.O. 12,866, 58 Fed. Reg. 51, 735 (Sept. 30, 1993), has largely controlled this process. In 2017, the Trump administration issued E.O. 13771, 82 Fed. Reg. 9339 (Feb. 3, 2017), the most significant order governing centralized review since E.O. 12,866. Among other things, this more recent executive order requires agencies to follow a "regulatory budget" that limits the incremental costs that new regulations can impose and to remove two regulations for every one they promulgate. We will discuss these executive orders in greater detail as part of our treatment of agency rulemaking in Chapter 3. The Biden administration promptly rescinded E.O. 13771 and issued a memorandum instructing the Director of the Office of Management and Budget, in consultation with agencies, to develop recommendations for modernizing regulatory review.

For very different assessments of centralized review of rulemaking by two leading scholars of administrative law, *compare* Peter L. Strauss, *Presidential Rulemaking*, 72 CHI.-KENT L. REV. 965, 984 (1997) (contending that presidential control threatens to unduly politicize rulemaking); *with* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2252 (2001) (contending that "the new presidentialization of administration renders the bureaucratic sphere more transparent and responsive to the public, while also better promoting important kinds of regulatory competence and dynamism").

Chapter 3 Rulemaking

At p. 267, substitute for Note 6 in Part 3F:

5. The coming and going of Executive Order 13771—two-for-one and regulatory budgeting. For nearly three decades, Exec. Order 12,866 provided the basic structure for White House review of agency rulemaking. President Trump introduced major innovations when, on January 30, 2017, he issued Exec. Order 13771, "Reducing Regulation and Controlling Regulatory Costs." Simplifying, this order imposed two core requirements. First, the order imposed a type of "regulatory budget" on agencies to cap the "incremental costs" for compliance that an agency's regulations can impose on regulated parties. For fiscal year 2017, agency regulatory budgets were set at zero, precluding agencies from increasing aggregate compliance costs at all. Second, the Trump executive order required agencies to offset "any new incremental costs associated with new regulations . . . by the elimination of existing costs associated with at least two prior regulations."

Exec. Order 13,771 presumably contributed to the slow rate of adoption of regulations during the Trump administration. It is difficult to say how strong of an effect the order actually had, however, given the Trump administration's general hostility to regulation. To no one's surprise, President Biden rescinded this order, as well as several other Trump executive orders relating to regulatory affairs, on his first day in office. Exec. Order 13992, "Revocation of Certain Executive Orders Concerning Federal Regulation."

Chapter 5 Judicial Review of Agency Action

At p. 474, insert as Note 8a in Part 5A:

8a. Can the agency head supplement the record on review? The Supreme Court had another occasion to consider the administrative record in a high-profile case involving the Obama Administration's Deferred Action for Childhood Arrivals (DACA) program. DACA was initiated in 2012 via a memorandum issued by the Secretary of Homeland Security, the official responsible for enforcing immigration laws. In general, DACA did two things. It offered undocumented individuals who came to the United States as children and met certain conditions during their stay temporary relief from deportation. It also, by triggering conditions in other, preexisting regulations, rendered some DACA recipients eligible for federal social security and health care benefits.

In 2017, the Acting Secretary of Homeland Security in the Trump Administration, Elaine C. Duke, issued a memorandum rescinding DACA on the grounds that the program was illegal ("Duke Memo"). The memo relied on an opinion from the Attorney General stating that DACA was illegal as adopted because making federal benefits available to a class of people—individuals who qualify to participate in DACA—was not within the president's statutory authority.

The Duke Memo was challenged in three different cases on arbitrary and capricious grounds. (For a more detailed discussion of the arbitrary and capricious challenges to the program, see note 8a in Part 5G.2.) The lower courts all ruled in favor of the challengers, but one court stayed its judgment for 90 days to allow the current DHS Secretary, Kirstjen Nielsen, to "reissue a memorandum rescinding DACA, this time providing a fuller explanation for the determination that the program lacks statutory and constitutional authority" (the "Nielsen Memo"). The Nielsen Memo agreed with the Duke Memo that DACA "was contrary to law." It also offered three new policy reasons for rescinding DACA that were not in the Duke Memo. The lower court concluded that the Nielsen Memo's additional explanation was not enough to cure the Duke Memo's arbitrariness.

At the Supreme Court, the government argued that the Nielsen Memo's rationale is sufficient to overcome an arbitrary and capricious challenge, citing the policy reasons in the Nielsen Memo that were absent from the Duke Memo. Chief Justice Roberts, writing for the Court, held that the Nielsen Memo, insofar as it offered explanations that were not included in the Duke Memo, was not part of the relevant administrative record in this case:

> Because Secretary Nielsen chose to elaborate on the reasons for the initial rescission [the Duke Memo] rather than take new administrative action, she was limited to the agency's original reasons, and her explanation "must be viewed critically" to ensure that the rescission is not upheld on the basis of impermissible "*post hoc* rationalization." But despite purporting to explain the Duke Memorandum, Secretary Nielsen's reasoning bears little relationship to that of her predecessor. Acting Secretary Duke rested the rescission on the conclusion that DACA is unlawful. Period. By contrast, Secretary Nielsen's new memorandum offered three "separate and independently sufficient reasons" for the rescission, only the first of which is the conclusion that DACA is illegal. . . .

> The policy reasons that Secretary Nielsen cites as a [] basis for the rescission are also nowhere to be found in the Duke Memorandum. That document makes no mention of a preference for legislative fixes, the superiority of case-by-case decisionmaking, the importance of sending a message of robust enforcement, or any other policy consideration. Nor are these points included in the legal analysis from the . . . Attorney General. They can be viewed only as impermissible *post hoc* rationalizations and thus are not properly before us.

Because the Nielsen Memo claimed to be an elaboration on the Duke Memo, rather than a new agency action, the Nielsen Memo's arguments that were not also part of the Duke Memo were post hoc rationalizations, and thus could not be considered in the Court's arbitrary and capricious analysis.

Justice Kavanaugh, writing in dissent, argued that the Chief Justice misapplied the Court's administrative record precedents. First, Justice Kavanaugh argued that the exclusive record requirement only applied to review of agency adjudications, not rulemakings as in the case at hand. (The Court accepted that the Duke and Nielsen Memos were interpretive rules, not adjudications). The Chief Justice effectively dismissed this argument out of hand, noting that Justice Kavanaugh "cites no authority" for his proposition and that "[t]he Government does not even raise this unheralded argument." Second, Justice Kavanaugh argued that prior cases only excluded post hoc rationalizations made by lawyers defending agency action on review, not explanations (like the Nielsen Memo) provided by the agency head herself. The Chief Justice rejected this argument by explaining that:

> While it is true that the Court has often rejected justifications belatedly advanced by advocates, we refer to this as a prohibition on *post hoc* rationalizations, not advocate rationalizations, because the problem is the timing, not the speaker. The functional reasons for requiring contemporaneous explanations apply with equal force regardless whether *post hoc* justifications are raised in court by those appearing on behalf of the agency or by agency officials themselves.

In sum, the majority decision in the DACA cases affirmed the exclusive record requirement in judicial review of agency action by explaining that courts must reject arguments raised for the first time by the agency on review, regardless of who made the argument on behalf of the agency and whether the agency action under review is a rulemaking or an adjudication.

At p. 525, substitute for Note 5 in Part 5D.1:

5. Not terribly concrete guidance about what it means to be concrete. Case law provides some fixed points for determining the "concreteness" of injuries. The justices have long agreed that a busybody-interest in enforcing the law because it is, after all, the law is too "abstract" to count. *Federal Election Commission v. Akins*, 524 U.S. 11 (1998). As we saw two notes ago, case law also insists that mere ideological injury does not suffice. *Sierra Club v. Morton*, 405 U.S. 727 (1972). On the other hand, an injury need not be physical or economic to qualify as concrete. For instance, damage to aesthetic or recreational interests can be concrete enough for standing. *Summers v. Earth Island Institute*, 555 U.S. 488 (2009).

Bearing these fixed points in mind, suppose that a credit reporting agency were to send you a letter informing you that it had concluded you may be a terrorist or a drug trafficker. Would that cause you any concrete harm? How about if you receive such a letter but the information it contains has not been disclosed to any third parties—yet? These issues came up in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021), in which the Supreme Court revisited the problem of standing to enforce a statutory cause of action provided by the Fair Credit Reporting Act (FCRA).

In 2002, TransUnion LLC began offering a service, OFAC Name Screen Alert, that compared consumers' names against a list of terrorists and other criminals maintained by the Office of Foreign Assets Control (OFAC). TransUnion provided an alert if a consumer's first and last names matched those of a person on the OFAC list. Sergio Ramirez and his wife attempted to purchase a car at a Nissan dealership, but a salesperson told him that he could not do so because he was on a "terrorist list." After this unpleasant surprise, Ramirez requested that TransUnion send him a copy of his credit file. An initial mailing did not include information relating to his suspected status as a terrorist, but it did include a required summary of his rights prepared by the Consumer Financial Protection Bureau (CFPB). A second mailing arrived the next day that informed Ramirez that his name matched one on the OFAC list. A CFPB summary of his rights did not come with this second mailing.

Ramirez invoked an express cause of action granted by FCRA to bring three claims against TransUnion. One claim alleged that TransUnion had violated its obligation to "follow reasonable procedures to assure maximum possible accuracy." 15 U.S.C. § 1681e(b). A second alleged that TransUnion had violated its obligation to provide a consumer "[a]ll information in the consumer's file" at the time of the consumer's request. *Id.* at § 1681g(a)(1). A third alleged that TransUnion had violated its obligation to provide a consumer a summary of rights developed by the CFPB "with each written disclosure by the agency to the consumer." *Id.* at § 1681g(c)(2). The district court certified a class of 8,185 members who had received an OFAC notification letter. The parties stipulated that TransUnion had sent misleading OFAC alerts to third parties about 1,853 of the class members (including Ramirez). A jury awarded statutory damages of $984.22 and punitive damages of $6,353.08 to each class member.

The Supreme Court granted certiorari to assess whether the class members had Article III standing for their three claims. Writing for a five-justice majority, Justice Kavanaugh explained that courts assessing concreteness should look to "whether the alleged injury to the plaintiff has a 'close relationship' to a harm 'traditionally' recognized as providing a basis for a lawsuit in American courts." 141 S. Ct. at 2204 (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330, 341 (2016)). Tangible harms, such as physical and monetary ones, easily qualify. Intangible harms, such as "reputational harms, disclosure of private information, and intrusion upon seclusion" can qualify as concrete if they satisfy the close relationship/tradition inquiry. *Id.*

Applying these principles, Justice Kavanaugh accepted that the 1,853 class members who had been identified to third parties as OFAC matches had suffered concrete harm sufficient for Article III standing because this harm bore a "close relationship" with "the reputational harm associated with the tort of defamation." *Id.* at 2208. The other 6,332 class members, however, did not suffer a concrete injury given that, for them, the analogy to reputational torts broke down as these torts require publication for liability.

The class members whose information had not been disclosed to third parties contended they had nonetheless suffered concrete harm given the risk that TransUnion might have disclosed this information at any time. Justice Kavanaugh conceded that a risk of harm can suffice for standing to seek "forward-looking, injunctive relief to prevent the harm from occurring, at least so long as the risk of harm is sufficiently imminent and substantial." *Id.* But he added that "mere risk of future harm, standing alone," cannot support standing to seek retrospective relief in the form of damages "unless the exposure to the risk of future harm itself causes a separate concrete harm." *Id.* at 2210-11. (For general discussion of risk-of-harm as injury-in-fact, see notes 7 and 8, *infra*).

Justice Kavanaugh quickly disposed of standing for the plaintiffs' other claims, maintaining that they had not "demonstrate[d] that they suffered any harm at all from the formatting violations," much less one with a "close relationship to a harm traditionally recognized as providing a basis for a lawsuit in American courts." *Id.* at 2213.

Justice Thomas, who has made himself the leading critic of the Court's standing jurisprudence in recent years, wrote the lead dissent, and he was joined, with a notable caveat, by the three remaining liberals on the Court. He insisted that the Court's premise that Article III standing always requires an "injury-in-fact" is, notwithstanding numbing repetition over the last several decades, flat-out wrong. Instead, the "[k]ey to the scope of the judicial power … is whether an individual asserts his or her own rights . . . or a duty owed broadly to the community." *Id.* at 2217 (citations to Justice Thomas's earlier concurrences omitted). A plaintiff must show an injury-in-fact in the latter case but not the former. As the plaintiffs' claims obviously implicated their individual rights under the FCRA, the plaintiffs could sue to enforce them.

Justice Kagan, joined by Justices Breyer and Sotomayor, agreed with Justice Thomas's evisceration of the majority's application of standing principles but disagreed with his contention that a concrete injury is not necessary for standing to enforce an individual right. *Id.* at 2226 (Kagan, J., dissenting). This difference should generally be immaterial however, because concreteness only requires "real harm," and Congress is in a much better position than the courts to determine where such "real harm" exists. *Id.* As such, proper judicial deference to Congress's judgments means that "[o]verriding an authorization to sue is appropriate when but only when Congress could not reasonably have thought that a suit will contribute to compensating or preventing the harm at issue." *Id.*

So, we have eight justices who agree that a plaintiff must, in theory, demonstrate a concrete injury-in-fact to invoke an express cause of action created by Congress to sue for violation of an individual right. Three of these justices, however, take the view that, if Congress says there is an injury good enough for standing, then there is almost always an injury good enough for standing. And Justice Thomas, who seems inclined to take a sledgehammer to much of modern standing doctrine, thinks that a plaintiff need not demonstrate an injury-in-fact (concrete or not) to enforce an individual right.

At p. 600, substitute for the last paragraph of Note 3 in Part 5F.2:

In *Carr v. Saul*, 141 S. Ct. 1352 (2021), the SSA tried to distinguish *Sims* in a case in which claimants first raised their challenge to the constitutionality of an SSA ALJ's appointment in judicial proceedings. The SSA argued that issue exhaustion should apply to this challenge because the proceedings before the ALJ in *Carr* were more adversarial than those before the Appeals Council in *Sims*. After noting that ALJ proceedings include many inquisitorial features, the Court conceded that they "may be comparatively more adversarial than Appeals Council proceedings" because, for example, they provide claimants a greater opportunity to advance specific issues. *Id*. at 1360. The Court did not, however, resolve whether ALJ proceedings are "adversarial enough" as a general matter to warrant issue exhaustion because "[i]n the specific context of petitioners' Appointments Clause challenges, two additional considerations tip the scales" against this requirement. *Id*. First, agency adjudications are "generally ill-suited to address structural constitutional challenges" because they are outside the agency's expertise. *Id*. Second, issue exhaustion would be futile in the present case because ALJs were powerless to remedy their own flawed appointments.

The Court's acknowledgement of the difference between ALJ and Appeals Council proceedings, even if insufficient to sway the outcome in *Carr*, could signal a new approach to line-drawing by the Court regarding the adversarial nature of proceedings for issue exhaustion more broadly. But as Justice O'Connor reminded us in her concurrence in *Sims*, the baseline principle of issue exhaustion remains unchanged: "[i]n most cases, an issue not presented to an administrative decisionmaker cannot be argued for the first time in federal court. On this underlying principle of administrative law, the Court is unanimous." *Sims*, 530 U.S. at 112.

At p. 647, insert as Note 8a in Part 5G.2:

8a. A recent, high profile affirmation of *State Farm*'s approach to hard look review. The Court confirmed its rational in *State Farm* in a high-profile immigration case, *DHS v. Regents of the University of California*, 140 S. Ct. 1891 (2020). *Regents* addressed the validity of the Trump Administration's rescission of the Obama Administration's Deferred Action for Childhood Arrivals (DACA) program, including a challenge to the rescission of the program as arbitrary and capricious under § 706(a)(2) of the APA.

There were two parts to the DACA program: forbearance, or temporary protection from deportation for certain undocumented individuals, and a benefits component, by which individuals who otherwise would not be eligible for certain federal social security and health care benefits were made eligible by virtue of their participation in the DACA program. DACA was implemented by a memorandum from the Secretary of Homeland Security in the Obama Administration. Rescission of the program was announced in 2017 by a memorandum from Elaine C. Duke, the acting DHS Secretary in the Trump Administration (the Duke Memo). The Duke Memo's explanation for rescinding DACA was based on an opinion from the Attorney General that the original implementation of the program, specifically the fact that the program made a class of individuals eligible for federal benefits without congressional authorization, was contrary to law.

The lower courts all found the Duke Memo arbitrary and capricious. The Supreme Court, in an opinion by Chief Justice Roberts, agreed. The majority relied on its prior decision in *Motor Vehicle Manufacturers Association of the United States, Inc.* v. *State Farm Mutual Automobile Insurance Co.* to conclude that justifying rescission solely on the grounds that offering DACA recipients additional government benefits was unlawful rendered the rescission arbitrary and capricious for failing to consider the consequences to another relevant feature of the program—forbearance:

> In short, the Attorney General neither addressed the forbearance policy at the heart of DACA nor compelled DHS to abandon that policy. Thus, removing benefits eligibility while continuing forbearance remained squarely within the discretion of Acting Secretary Duke, who was responsible for "[e]stablishing national immigration enforcement policies and priorities." But Duke's memo offers no reason for terminating forbearance. She instead treated the Attorney General's

conclusion regarding the illegality of benefits as sufficient to rescind both benefits and forbearance, without explanation.

That reasoning repeated the error we identified in one of our leading modern administrative law cases, *Motor Vehicle Manufacturers Association of the United States, Inc.* v. *State Farm Mutual Automobile Insurance Co.* . . . .

* * *

Even if it is illegal for DHS to extend work authorization and other benefits to DACA recipients, that conclusion supported only "disallow[ing]" benefits. It did "not cast doubt" on the legality of forbearance or upon DHS's original reasons for extending forbearance to childhood arrivals. Thus, given DHS's earlier judgment that forbearance is "especially justified" for "productive young people" who were brought here as children and "know only this country as home," the DACA Memorandum could not be rescinded in full "without any consideration whatsoever" of a forbearance-only policy [citing *State Farm*].

In addition to finding the Duke Memo arbitrary for failing to consider forbearance in connection with its decision to rescind the program, the Court went on to hold that the Duke Memo was also arbitrary for its failure to consider the impact of rescission on the reliance interests of DACA recipients.

Duke also failed to address whether there was "legitimate reliance" on the DACA Memorandum. When an agency changes course, as DHS did here, it must "be cognizant that longstanding policies may have 'engendered serious reliance interests that must be taken into account.'" *Encino Motorcars, LLC* v. *Navarro*, 579 U. S. ___, ___ (2016). "It would be arbitrary and capricious to ignore such matters." *Id*., at 515. Yet that is what the Duke Memorandum did.

For its part, the Government does not contend that Duke considered potential reliance interests; it counters that she did not need to. In the Government's view, shared by the lead dissent, DACA recipients have no "legally cognizable reliance interests" because the DACA Memorandum stated that the program "conferred no substantive rights" and provided benefits only in two-year increments. But neither the Government nor the lead dissent cites any legal authority establishing that such features automatically preclude reliance interests, and we are not aware of any. These disclaimers are surely pertinent in considering the strength of any reliance interests, but that consideration must be undertaken by the agency in the first instance, subject to normal APA review. There was no such consideration in the Duke Memorandum.

* * *

To be clear, DHS was not required to do any of this or to "consider all policy alternatives in reaching [its] decision." *State Farm*, 463 U. S., at 51. Agencies are not compelled to explore "every alternative device and thought conceivable by the mind of

> man." But, because DHS was "not writing on a blank slate," it *was* required to assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns.

The Court held that Duke Memo's failure to address reliance interests rendered it arbitrary and capricious. Within two weeks of the Court's decision, Attorney General Barr wrote a letter to the acting DHS Secretary, Wolf, withdrawing Attorney General Session's 2017 letter questioning DACA's legality in order to "wipe the slate clean to make clear beyond doubt that you are free to exercise your own independent judgment in considering the full range of legal and policy issues implicated by a potential rescission or modification of DACA, as contemplated by the Supreme Court." Roughly one month later, on July 28, 2020, acting Secretary Wolf issued a memorandum announcing, *inter alia*, that the Department would, "effective immediately," reject all new initial DACA applications and "[l]imit the period of any deferred action granted pursuant to the DACA policy after the issuance of this memorandum (and thereby limit the period of any associated work authorization) to one year."

At p. 673, insert as Note 8a in Part 5G.3.b.:

8a. Another threshold limit on *Chevron*'s reach—apparently, you gotta ask for it. Yet another issue relating to *Chevron* that has been percolating through judicial decisions and legal scholarship is whether its deferential standard of review is waivable. *See Amaya v. Rosen*, 986 F.3d 424, 430 n.4 (4th Cir. 2021) (canvassing conflicting precedents). On one view, the applicability of *Chevron* is a non-jurisdictional issue and therefore can be waived. On another, *Chevron* is a non-waivable standard of review embedded in the legal system.

In *Hollyfrontier Cheyenne Refining, LLC v. Renewable Fuels Association*, 141 S. Ct. 2172 (2021), the Court seems to have disposed of this issue in two sentences. This case turned on the meaning of "extension" in the context of a renewable fuel program (RFP) administered by the Environmental Protection Agency. The RFP imposes a statutory obligation on most domestic refineries to mix certain amounts of renewable fuels into their transportation fuels. Small refineries are able to obtain exemptions and to apply for "extensions" to them. 42 U.S.C. § 7545(o)(9)(b)(i). The EPA granted "extensions" to small refineries after their exemptions had lapsed. Renewable fuel producers challenged these extensions on the ground that lapsed exemptions cannot be extended. Justice Gorsuch, writing for a six-justice majority, rejected the argument that "extensions" cannot have temporal gaps; Justice Barrett authored a three-justice dissent.

Here is everything that Justice Gorsuch, an archfoe of *Chevron*, had to say on the issue of waiver in *Hollyfrontier*: "With the recent change in administrations, 'the government is not invoking Chevron.' *Brief for Federal Respondent* 46–47. We therefore decline to consider whether any deference might be due its regulation." *Id.* at 2180.

The dissent did not object to the majority's assumption of *Chevron*'s waivability. Justice Barrett's only express reference to *Chevron* deference was to note that "[t]he Court avoids express reliance" on it. *Id.* at 2184 n.1 (Barrett, J., dissenting). A paragraph later, perhaps needling Justice Gorsuch a bit, she obliquely suggested that his majority opinion had, functionally speaking, applied *Chevron* deference by giving the win to the refiners based on a "possible" reading of "extension." *Id.* at 2184 (italics in original).

Chapter 7 Open Government

At p. 766, insert as Note 2a in Part 7B:

2a. Exemption 5 and final views with legal effect. The Court revisited its deliberative process exemption jurisprudence in *Fish and Wildlife Service v. Sierra Club*, 141 S. Ct. 777 (2021). At issue in *Sierra Club* was whether certain draft biological opinions created under the Endangered Species Act (ESA) were protected from disclosure under FOIA's "deliberative process" exemption (Exemption 5). The Court held that Exemption 5 did protect these particular documents because they were predecisional and deliberative.

If an agency wishes to take an action that may "adversely affect" a species protected under the ESA, it must consult with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (collectively, the Services), which will then prepare a "biological opinion" that determines whether the action will jeopardize the continued existence of the species. If the Services issue a "jeopardy" opinion, they will include "reasonable and prudent alternatives" to the action to avoid harm. The action agency must comply with these reasonable and prudent alternatives, abandon its action, or seek an exemption from the ESA.

Staffers at the Services prepared draft biological opinions that concluded an EPA proposed rule would jeopardize threatened or endangered species. Rather than approve these drafts or send them to EPA, decisionmakers at the Services instead concluded that "more work needed to be done." EPA revised its proposed rule, and the Services issued a final biological opinion concluding that this revised rule would not jeopardize any species. Sierra Club submitted a FOIA request to the Services for documents associated with their consultations with the EPA. The Services refused to turn over the draft biological opinions on the ground that these documents were nonfinal and therefore protected from disclosure.

The Court agreed that Exemption 5 applied. It noted that a proposal that "dies on the vine" remains predecisional and deliberative (and thus protected) because "[w]hat matters … is not whether a document is last in line, but whether it communicates a policy on which the agency has settled." *Id*. at 786. Courts should consider whether "the agency treats the document as its final view on the matter" and if the document will have a "real operative effect," rather than leaving the agency "free to change" its mind. *Id.*

For documents to have "real operative effect," they must have "legal" rather than merely "practical" consequences. *Id.* at 787. Final biological opinions have legal consequences because they "alter[] 'the legal regime to which the action agency is subject, authorizing it' to take action affecting an endangered species 'if (but only if) it complies with the prescribed conditions.'" *Id.* The draft biological opinions did not carry such legal consequences. They might have had the practical consequence of prompting the EPA to change its rule, but it cannot be the case "that any email or memorandum that has the effect of changing an agency's course constitutes a final administrative decision." *Id.* at 788.

Nor did the draft biological opinions represent the Service's "final view." As evidence for this point, the Court noted that the documents were merely drafts, were not approved by agency decisionmakers, and were not sent to the EPA. It concluded that the deliberative process "worked as it should have: The Services and the EPA consulted about how the rule would affect aquatic wildlife until the EPA settled on an approach that would not jeopardize any protected species." *Id.*