THE DIY UNITARY EXECUTIVE

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This Article explores a simple argument for preserving a measure of formal agency decisional independence in the event that the Supreme Court, as Seila Law LLC v. Consumer Financial Protection Bureau *seems to portend, adopts an unalloyed, strong version of the unitary executive theory. According to strong unitarians, Article II's vesting of the executive power in the President authorizes that official to control discretionary powers that Congress has granted to agencies. The executive power, however, is the power to enforce laws, not to break them. It should follow that the President, to exercise an agency's statutory discretion legally, should have to comply with any procedural constraints that Congress has placed on the exercise of that power. Put another way, the President, to take over an agency's role as the "decider," should have to do the decider's work. Presidents, notwithstanding their authority to delegate, should find that these burdens are often not worth the trouble, preserving space for agency decisional independence even in a unitarian world.*

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INTRODUCTION

> "*Then I have an Article 2, where I have the right to do whatever I want as president.*"
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> - President Donald J. Trump[1]

Article II of the U.S. Constitution vests the "executive Power . . . in a President of the United States" and charges her with the duty to "take Care that the Laws be faithfully executed."[2] For nearly a quarter of a millennium, American authorities have been fighting over how much power these provisions grant the President to control administrative machinery.[3] Often, this long argument has revolved around whether Congress can empower agency officials to exercise independent discretion free from legally binding presidential control. For instance, the Clean Air Act instructs the Environmental Protection Agency ("EPA") Administrator to adopt national ambient air quality standards ("NAAQS") that are, in her judgment, "requisite to protect the public health" with "an adequate margin of safety."[4] Does the EPA Administrator, after following statutorily required procedures, enjoy the final word regarding the substance of NAAQS? Or, thanks to Article II, can the President give the final word that the Administrator must follow?

Proponents of a strong version of the "unitary executive theory" insist that the Vesting Clause grants the President the power to direct discretionary decision-making in the executive branch—even where Congress, on the face of a statute, vested that authority in an agency head.[5] Unitarians commonly observe that the

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1. *Remarks by President Trump at Turning Point USA's Teen Student Action Summit 2019* (July 23, 2019), https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-turning-point-usas-teen-student-action-summit-2019/.

2. U.S. CONST. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America."); *id.* at § 3 (providing that the President "shall take Care that the Laws be faithfully executed").

3. *See, e.g.*, JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW 38–39 (2012) (observing that questions regarding control of administrative power "have plagued American administrative law for over two centuries").

4. 42 U.S.C. § 7409(b)(1).

5. *See, e.g.*, STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 3–4 (2008) (contending that all presidents have subscribed to the view that they have "the power to remove and direct all lower-level executive officials"); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 599 (1994) ("[T]he President

framers of the Constitution decided to entrust the executive branch to a single rather than a plural executive to ensure effective, energetic government.[6] Unitary control also enables the electorate to hold the President accountable for agency actions, enhancing democratic legitimacy.[7] In addition, unitarians insist that the President, to maintain directive power over agencies, must also possess power to remove agency heads at will.[8]

On the other side of this long debate is a group with a more restricted view of presidential authority.[9] Its members contend that Congress can, in many contexts, grant agency officials discretion that they may exercise free from strict presidential control.[10] In Professor Strauss's felicitous framing, the President should act as an

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must be able to control subordinate executive officers through the mechanisms of removal, nullification, and execution of the discretion 'assigned' to them himself."); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1166 (1992) (canvassing scholarship contending that the President, as the unitary executive, must have power to control discretionary decision-making by lower-ranking executive officials); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1243 (1994) (concluding that the President likely does not possess authority to "step into the shoes of any subordinate and directly exercise that subordinate's statutory powers," but can achieve much the same effect by issuing detailed binding instructions to officials telling them how they must exercise that discretion); Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701, 704 (contending that the President has authority to "execute any federal law by himself" and "may control other government officers who execute federal law"); Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 ALA. L. REV. 1205, 1210 (2014) ("The President must be able to direct an officer in the exercise of a discretionary duty assigned to that officer by law.").

6. Calabresi & Prakash, *supra* note 5, at 639 (noting "the Framers wished to construct a unitary Executive since they felt it was conducive to energy, dispatch, and responsibility").

7. Rao, *supra* note 5, at 1215 (noting that "[r]ecognizing the President's control over the executive branch reinforces his responsibility—an important alignment of power and accountability").

8. Myers v. United States, 272 U.S. 52, 134 (1926) (holding that the President must have plenary authority to remove any officials that she has appointed); Rao, *supra* note 5, at 1244 (contending presidents "must be able to remove at will all principal officers").

9. The dichotomy between "unitarian" and "restrictionist" is a bit misleading because, "[a]ll will agree that the Constitution creates a unitary chief executive officer." Peter L. Strauss, *Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 696 (2007).

10. *See, e.g.*, Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 4 (1994) (contending that "[a]ny faithful reader of history must conclude that the unitary executive, conceived in the foregoing way, is just myth"); Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 DUKE L.J. 963, 965 (2001) (contending that presidents lack authority "to dictate the substance of regulatory decisions that agencies are required by law to make"); Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 267 (2006) (challenging "the recurring claim that statutes conferring power on executive officials should be read to include the President as an implied recipient of authority"); Strauss, *supra* note 9, at 704–05 (developing the theme that, where Congress delegates authority to an agency, the President should play the role of "overseer" rather than "decider").

"overseer" rather than a "decider" when supervising agencies' statutory discretion.[11] On this view, agency independence from presidential control promotes expert decision-making and insulation from partisanship.[12] Restrictionists contend that Congress has power to protect these values by imposing good-cause restrictions on presidential authority to remove the heads of so-called independent agencies.[13]

The latest clash at the Supreme Court between these approaches led to a unitarian victory in 2020's *Seila Law LLC v. Consumer Financial Protection Bureau*.[14] The majority opinion, authored by Chief Justice Roberts, threw out a statutory provision that imposed a good-cause limitation on presidential authority to remove the Director of the Consumer Financial Protection Bureau ("CFPB").[15] The Chief Justice opened his merits analysis by proclaiming that "all" of the executive power is "vested in a president" who has the "power to remove—and thus supervise—those who wield executive power on his behalf."[16] This sentence might seem like it should have been enough by itself to finish off the Director's independence, but the Chief Justice conceded that two precedents complicated this clear vision of unitarian control.[17] The first precedent was 1935's *Humphrey's Executor v. United States*, in which the Court held that Congress could impose a good-cause restriction on presidential authority to remove commissioners of the Federal Trade Commission ("FTC").[18] The second precedent was 1988's *Morrison v. Olson*, in which the Court upheld good-cause restrictions on removal of independent counsels appointed to prosecute high-ranking executive officials.[19] Although *Seila*'s unitarian premises flatly contradict these two precedents that have served as foundations for the legality of independent agencies, the Chief Justice went to some trouble to distinguish and narrow them rather than expressly overrule them.[20] Justice Thomas, joined by Justice Gorsuch, would have followed *Seila*'s premises to their logical conclusion and thrown out independent agencies as a century-old constitutional abomination.[21]

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11. Strauss, *supra* note 9, at 704–05 (quoting and discussing with great approval EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS 1787–1957, at 80–81 (4th rev. ed. 1957)).

12. *See, e.g.*, Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 19–21 (2010) (identifying promotion of expertise and protection from partisanship as classic justifications for agency independence).

13. *Id.* at 18 (noting that removal protections are the "touchstone" of status as an independent agency but explaining that agency independence is in fact a complex phenomenon that depends on many other factors).

14. 140 S. Ct. 2183 (2020).

15. *Id.* at 2193 (quoting 12 U.S.C. § 5491(c)(1), (3)) (authorizing the President to remove the Director for "inefficiency, neglect of duty, or malfeasance in office")).

16. *Id.* at 2191.

17. *Id.* at 2192.

18. 295 U.S. 602, 630 (1935).

19. 487 U.S. 654, 693 (1988).

20. *Seila*, 140 S. Ct. at 2198–220.

21. *Id.* at 2218–19 (Thomas, J., concurring in part and dissenting in part) (rejecting independent agencies allowed by *Humphrey's Executor* as "a serious, ongoing threat to our Government's design").

Seila might be seen as a narrow escape for the constitutionality of independent agencies given that they can still take some shelter under the damaged umbrellas of *Humphrey's Executor* and *Morrison*. *Seila*'s new equilibrium hardly seems stable, however, given the majority's strong rhetorical embrace of unitary presidential control and its (extremely aggressive) recasting of these two precedents.[22] There is therefore no time like the present for exploring how to preserve agency independence in the event that the unitarians finally finish the job of destroying its legal underpinnings.

For our present inquiry, the core meaning of "executive power" is clear: it is the power to implement, i.e., "execute," the laws of the United States.[23] Bowing to what *Seila* suggests might prove inevitable, let us assume that the Vesting Clause grants the President authority to take control of any (nonjudicial) implementation of the laws of the United States, including any discretionary judgments this implementation might require.[24] Following this view, absent other constitutional constraints, the President is free to take over the executive functions of the Secretary of Energy, FTC commissioners, administrative law judges, or mail deliverers.[25]

Acceptance of this claim need not, however, lead to the destruction of agency decisional independence if we remember that the President, to implement an agency's statutory power rather than exceed it, must honor the legal limits the statute contains. Congress, when it grants statutory discretion to an agency head, commonly imposes procedural requirements designed to inform and channel the exercise of this discretion.[26] If the President, acting on a maximalist unitarian reading of the Vesting Clause, seizes decisional control from an agency, she must comply with these procedural requirements. For instance, if the law imposes a non-delegable requirement that the actual "decider" carry out a particular procedure, e.g., hold a hearing or conduct notice-and-comment proceedings, the President would need to

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22. *See id.* at 2191 (majority opinion) (stressing that the President possesses "all" executive power); *id.* at 2199 (recharacterizing *Humphrey's Executor*, 295 U.S. at 602, as depending on the multi-member structure of the FTC, and *Morrison*, 487 U.S. at 654, as depending on the "inferior" status of independent counsels).

23. *See* Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169, 1173 (2019) (demonstrating that the "executive power" of Article II refers to "the narrow but potent authority to carry out projects defined by a prior exercise of the legislative power").

24. *See Seila*, 140 S. Ct. at 2197 (emphasizing that "the entire 'executive power' belongs to the President alone"); *cf. id.* at 2206 (expressly declining "today" to revisit precedents limiting presidential removal authority); *id.* at 2217 (Thomas, J., concurring in part and dissenting in part) (insisting that the "foundation" of *Humphrey's Executor*'s limitation on executive power has become "nonexistent").

25. Prakash, *supra* note 5, at 704 (contending that, "[v]ested with this [executive] authority, the president may execute any federal law by himself, whatever a federal statute might provide").

26. *Cf.* John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1967 (2011) (observing, in the course of criticizing Justice Scalia's claim that the Vesting Clause bars Congress from protecting independent counsels from the President via tenure protection, that it is commonplace for statutes to "structure and constrain the implementation of executive authority, for example, by prescribing administrative procedures for executive agencies").

conduct that procedure herself.[27] Another fundamental legal constraint on agency action is, of course, judicial review. When the President takes action based on an agency's statutory authority, this action should be subject to judicial review just as if the President were an agency—no special presidential protections should apply.[28] An especially important implication of this last point is that presidents would need to provide reasoned explanations for such actions sufficient for them to survive judicial review for arbitrariness.[29]

Suggesting presidents may need to conduct agency procedures to control and override agency outcomes may seem jarring.[30] We do not think of presidents as conducting business this way, and we suppose them far too busy to do so. This problem, however, leads to the real point of this exercise: presidents should seldom find it worthwhile to seize control of an agency's statutory power to force an agency to abandon its regulatory preferences. For one thing, presidents do not need to use binding power to force an outcome where they can "persuade" an agency to see things their way—and presidents have many levers of influence over agencies.[31] Also, hostile takeovers would generate costs in terms of procedural burdens, political exposure, and increased risk of adverse outcomes on judicial review.[32] One key for preserving a measure of agency decisional independence in a unitarian world, therefore, is for presidents to recognize that, given such costs, they are

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27. Of course, like an agency head, the President would in many administrative contexts be able to delegate almost all of the real day-to-day work of developing an agency action to subordinates. For a brief discussion of how this might work out in practice, see *infra* Section II.B. For additional arguments that the President, when exercising an agency's statutory authority, should have to follow the procedures limiting the agency's exercise of that authority, see Kathryn E. Kovacs, *The Supersecretary in Chief*, 94 S. CAL. L. REV. POSTSCRIPT 61 (2020) [hereinafter Kovacs, *Supersecretary*] (contending that APA procedural and judicial review requirements should apply where the President, claiming authority as the "unitary executive," exercises an agency's statutory powers); *see also* Kathryn E. Kovacs, *Constraining the Statutory President*, 98 WASH. U.L. REV. 63, 68 (2020) [hereinafter Kovacs, *Constraining*] (contending generally that the President, when exercising powers delegated to her by statute, should be subject to regular judicial review as an "agency" within the meaning of the APA).

28. *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2351 (2001) (explaining that, where "the President effectively has stepped into the shoes of an agency head," then "the review provisions usually applicable to that agency's action should govern"); Kovacs, *Supersecretary*, *supra* note 27, at 76–77 (contending that APA requirements, including review for arbitrariness, should apply where the President exercises an agency's statutory powers). *But see* Franklin v. Massachusetts, 505 U.S. 788, 800–01 (1992) (holding that the President is not an "agency" within the meaning of the APA and not subject to judicial review by its terms).

29. *See infra* notes 267–72 (discussing this point).

30. *But see* Kovacs, *Supersecretary*, *supra* note 27, at 76 (proposing that APA requirements apply where the President exercises an agency's statutory powers).

31. *See* Kagan, *supra* note 28, at 2298 (noting that agency officials "may accede to [presidential] preferences because they feel a sense of personal loyalty and commitment to him; because they desire his assistance in budgetary, legislative, and appointments matters; or in extreme cases because they respect and fear his removal power").

32. For discussion of these points, see *infra* Section II.D.

actually better off leaving agencies in charge of agency business—just as Congress intended.

This analysis also carries implications for the intertwined problem of presidential removal authority. A dominant theme of unitarianism is that the President must have plenary removal authority to maintain control of executive agency action.[33] This argument loses considerable force if one accepts that the President always has constitutional authority to take over an agency's statutory discretion—provided the President is willing and able to spend the resources necessary to comply with all legal constraints.

Part I of the Article examines leading legislative, executive, and judicial discussions of presidential control of agency administration—starting with Congress's "Decision of 1789" and ending with 2020's *Seila*. It concludes that *Seila* marks a sharp break with precedent and that its broader language suggests that a majority of the Court, if writing on a clean slate, would adopt an unprecedented, maximalist version of the strong unitary executive theory. In light of this possibility, Part II shifts ground to explore how legal and practical limitations on the President's exercise of "executive power" might defang unitarianism and preserve benefits of agency independence. Finally, Part III briefly teases out implications of the proposed framework for presidential removal authority.

I. TWO CENTURIES OF DEBATE OVER PRESIDENTIAL CONTROL OF AGENCIES

This Part's examination of leading discussions on the limits of presidential control of administration identifies two basic approaches to the problem. One approach, suggested by James Madison as early as 1789 and later adopted in *Humphrey's Executor*, makes the unitarian move of claiming that the President can control all "executive power" but then protects some agency decisions from presidential control by characterizing them as nonexecutive in nature.[34] The other approach, adopted by Attorney General William Wirt in 1823 and later enshrined in *Morrison*, justifies agency decisional independence more directly by denying the premise that the Vesting Clause grants the President control over all agency decisions that execute the law.[35] These "exceptions" to unitary presidential control

33. *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 705–08 (1988) (Scalia, J., dissenting) (contending that good-cause restriction on removal of independent counsels was unconstitutional because it deprived the President of exclusive control of exercise of executive power).

34. *See infra* text accompanying notes 63–65 (discussing Madison's proposal to insulate the comptroller from presidential control) and Section I.E (discussing Humphrey's Ex'r v. United States, 295 U.S. 602 (1935)).

35. *See infra* text accompanying notes 70–80 (discussing Attorney General Wirt's opinion holding that the President lacked authority to review determinations of claims vested by statute in Treasury officials) and Section I.G (discussing *Morrison*, 487 U.S. at 654).

embedded in *Humphrey's Executor* and *Morrison* turn out to have very deep historical roots.[36]

Neither of these two exceptions are consistent with *Seila*'s language and logic, which seem to demand an end to independent agencies.[37] The category game approach of *Humphrey's Executor* is unacceptable because the Court now insists that any power properly exercised by a nonlegislative or nonjudicial agency must necessarily be executive.[38] The *Morrison* approach of accepting a limited amount of agency decisional independence is wrong because the President, thanks to Article II, possesses "all" executive power without exception.[39] *Seila*'s potential radicalism has not yet come to full fruition insofar as *Humphrey's Executor* and *Morrison* remain in place in transmogrified and limited form.[40] Nonetheless, the *Seila* majority's critical approach to these "exceptions" to unitary control suggests that the remains of these two precedents, and the agency decisional independence they protect, are skating on melting ice.

A. The Decision of 1789 on Directive Power and Madison's Comptroller

The First Congress's "Decision of 1789" looms large in discussions of presidential removal and directive authority. Unitarians, including Chief Justice Roberts in *Seila*, commonly invoke it as establishing a definitive legislative construction in favor of an expansive theory of presidential control.[41] Restrictionists push back, correctly observing that there were many complex cross-currents during the legislative debate and that, on closer inspection, the Decision of 1789 itself signified only that the Constitution does not require Senate approval for removal of Senate-confirmed officials.[42]

One of the many extremely 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 appointed by the President and confirmed by the Senate but "to be

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36. *See* Jed H. Shugerman, The Indecisions of 1789: Strategic Ambiguity and the Imaginary Unitary Executive (Part I) (May 8, 2020) (unpublished manuscript), https://ssrn.com/abstract=3596566 (contending that the "1789 settlement lends historical support to our modern settlement," including *Humphrey's Executor* and *Morrison*).

37. Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2219 (2020) (Thomas, J., concurring in part and dissenting in part).

38. *Id.* at 2198 n.2 (majority opinion) (recognizing that, constitutionally, all exercises of power by administrative agencies must be executive in nature).

39. *Id.* at 2191 (emphasizing that "all" executive power belongs to the President).

40. *Id.* at 2192 (expressly declining to "revisit our prior decisions allowing certain limitations on the President's removal power").

41. *Id.* at 2197 (claiming that "[t]he First Congress's recognition of the President's removal power in 1789 'provides contemporaneous and weighty evidence of the Constitution's meaning'" (quoting Bowsher v. Synar, 478 U.S. 714, 723 (1986))).

42. *See* Peter L. Strauss, *On the Difficulties of Generalization—PCAOB in the Footsteps of* Myers, Humphrey's Executor, Morrison, *and* Freytag, 32 CARDOZO L. REV. 2255, 2259 (2011) ("Yet the decision of 1789, as such, was not to state explicitly his authority to remove, but rather to reject proposals that would have provided for senatorial participation in removal.").

removable by the president."[43] Several days of debate ensued as legislators argued over whether the Constitution allowed the President acting alone to remove Senate-confirmed officials, required the President to seek Senate approval, required impeachment of officials, or instead left questions regarding control of removals to legislative discretion.

After a majority of the House had already approved the original statutory language,[44] Representative Egbert Benson objected that the phrase stating that the Secretary was "to be removable by the president" suggested that the source of the President's removal power was Congress, rather than the Constitution itself.[45] Purportedly to avoid this inference, he proposed striking this direct reference and, in its place, amending a related provision so that it presupposed the existence of presidential removal authority without suggesting a congressional source for it.[46] The House adopted Benson's proposal in a multi-step process that has complicated interpretation (or construction) of the House's intent ever since.[47] The upshot of careful head-counting across several votes, however, is that a majority never made plain that it agreed with Benson that the President's removal authority came from the Constitution itself and was beyond legislative control.[48]

The days of discussion that the House devoted to the problem of removal authority did, however, establish the basic terms of the debate over presidential control of agency power that have persisted for nearly a quarter of a millennium. Proponents of strong presidential removal authority, like the unitarians of today, contended that Article II's Vesting Clause allocates all "executive power" to the President subject only to the Constitution's express exceptions, such as limitations

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43. 1 ANNALS OF CONG. 385 (1789) (Joseph Gales & William W. Seaton eds., 1834) (referencing motion of Rep. Madison); *id.* at 473 (referencing earlier proposal; reopening debate).

44. *See id.* at 399, 599.

45. *Id.* at 601 (Rep. Benson) (observing that the phrase "'to be removable by the President' . . . appeared somewhat like a grant"); *see also id.* (Rep. Madison) (agreeing with this assessment).

46. The amendment provided that the Chief Clerk of the Department of Foreign Affairs should take custody of departmental records "whenever the said principal officer shall be removed from office by the President of the United States or in any other case of vacancy." *Id*. (Rep. Benson).

47. *See id.* at 600–03 (adding provision that presumed presidential power to remove Secretary); *id.* at 603–08 (striking phrase "to be removable by the President").

48. For discussion of the implications of shifting majorities for interpretation of the House's intent, see, for example, Myers v. United States, 272 U.S. 52, 286–87 n.75 (1926) (Brandeis, J., dissenting) (concluding "none of the three votes in the House revealed its sense upon the question whether the Constitution vested an uncontrollable power of removal in the President"); Shugerman, *supra* note 36, at 30 (concluding that likely sixteen or at most twenty-four members of the House (of fifty-one) favored a "presidentialist" understanding that the Constitution granted removal power to the President). *But see* Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021, 1021 (2006) (concluding "[m]ajorities in the House and the Senate concluded that the Constitution's grant of executive power enabled the President to remove executive officers").

on the appointment power.[49] They also contended that, although the Constitution does not contain any express provision on removal authority, this power is necessarily "executive" in nature and vested in the President.[50] Opponents rejected all these contentions, arguing that the Constitution, properly understood, granted the President only those executive powers specifically identified in Article II;[51] that it was unreasonable and dangerous to construe the Vesting Clause as granting a vast pool of vague, undefined "executive power" to the President;[52] and that removal authority should not be regarded as "executive" in any event.[53]

Most notably for the present discussion, there was sharp disagreement regarding the power of the President to direct agency decisions. Proponents of strong presidential removal authority insisted that it was necessary to protect the President's directive power to control all agency actions. According to this line of thinking, although the Constitution vests all executive power in the President, the executive branch must include other officials because the President is, after all, a mere mortal who cannot carry out all executive functions herself.[54] As executive officers merely carry out functions that the President has full authority—but insufficient time—to discharge, it follows that these officers should be regarded as

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49. *See, e.g.*, 1 ANNALS, *supra* note 43, at 388 (Rep. Vining) (contending there was a "strong presumption" that the President could exercise removal authority "because it was declared, that all executive power should be vested in him, except in cases where it is otherwise qualified").

50. *See, e.g.*, *id.* at 481–82 (Rep. Madison) (characterizing the removal power as executive; adding, "inasmuch as the power of removal is of an executive nature, and not affected by any constitutional exception, it is beyond the reach of the legislative body").

51. *See, e.g.*, *id.* at 395–96 (Rep. Gerry) (indicating that the President's powers are limited to those that the Constitution expressly identifies); *id.* at 530 (Rep. Smith) (arguing that the Vesting Clause should not be construed as a generalized grant of executive power).

52. *See, e.g.*, *id.* at 589 (Rep. Stone) (contending that those inclined to identify presidential powers by implication should explain whether the President's powers resembled those of an absolute or a restrained monarchy).

53. *See id.* at 490 (Rep. Smith) (observing that state constitutions did not grant removal authority to governors); *id.* at 491 (Rep. Gerry) (asserting that it is "problematical" to define appointment and removal powers as executive); *id.* at 505 (Rep. Jackson) (objecting that "[i]t requires more than a mere *ipse dixit* to demonstrate that any power is in its nature executive"); *id.* at 511 (Rep. Stone) (rejecting the contention that appointment and removal powers are executive outside of monarchies); *id.* at 523 (Rep. Gerry) (objecting that a "general rule" that the power to appoint is executive cannot be drawn "from the constitution, nor from custom, because the State Governments are generally against it"); *id.* at 534 (Rep. White) (rejecting proposition that appointment and removal authority are part of a "general executive power"); *id.* at 566–67 (Rep. Smith) (contending that there are many powers exercised "as executive powers" by the King of Great Britain that the President cannot exercise, and that the power to remove may be among them).

54. *See, e.g.*, *id.* at 492 (Rep. Ames) (explaining, "[t]he constitution places all executive power in the hands of the President, and could he personally execute all the laws, there would be no occasion for establishing auxiliaries; but the circumscribed powers of human nature in one man, demand the aid of others").

mere instruments of presidential will.[55] In addition, this level of presidential control is necessary to ensure that the President is, as the constitutional system contemplates, responsible and accountable for government actions.[56] Maintaining this level of control requires that the President possess authority to remove officials without waiting on Senate permission.[57]

Some members, however, foreshadowed the approach that the Court would adopt two centuries later in *Morrison v. Olson* by denying the premise that the President possesses power to control all decisions vested in agencies.[58] Representative Samuel Livermore, for instance, objected that treating agency heads as mere instruments subject to at-will removal would "make the president a monarch."[59] On the flip side of this same coin, other representatives objected that weak agency heads subject to plenary presidential control would be spineless and corrupt.[60] Others deployed Article II's Opinions Clause, arguing that its grant of authority to the President to obtain written opinions from the heads of departments presupposes that they possess independent decision-making authority.[61]

During this debate, James Madison forcefully argued in favor of strong presidential removal authority based in part on the need to protect presidential

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55. *See id.* at 531 (Rep. Vining) (characterizing the Secretary of Foreign Affairs as "an arm or an eye" over whom the President "ought to have complete command"); *id.* at 542 (Rep. Sedgwick) (characterizing the Secretary of Foreign Affairs as "as much an instrument in the hands of the President, as the pen is the instrument of the Secretary in corresponding with foreign courts").

56. *Id.* at 387 (Rep. Madison) (explaining that he thought "it absolutely necessary that the President should have the power of removing from office; it [would] make him, in a peculiar manner, responsible for their conduct").

57. *Id.* at 394 (Rep. Madison) (observing that, if an agency official "does not conform to the judgment of the President in doing the executive duties of his office, he can be displaced"); *id.* at 495 (Rep. Ames) (observing "[a]dvantages may result from keeping the power of removal *in terrorem* over the heads of the officers; they will be stimulated to do their duty to the satisfaction of the principal, who is to be responsible for the whole executive department").

58. *See* 487 U.S. 654, 690–92 (1988) (holding that limitations of presidential power to control agency decision-making can be constitutionally acceptable provided they do not "impede the President's ability to perform his constitutional duty").

59. 1 ANNALS, *supra* note 43, at 397 (Rep. Bland) (granting removal power to the President would "make the President a monarch, and give him absolute power over all the great departments of Government"); *see also id.* at 571 (Rep. Page) (contending that, if the House struck language authorizing presidential removal, it would "leave your officers responsible to the President, but not abject tools to him"); *id.* at 595 (Rep. Stone) (rejecting proposition "that the business of the Secretary of Foreign Affairs was to be done exclusively for the President").

60. *See, e.g.*, *id.* at 492 (Rep. Gerry) (objecting that vesting removal power solely in the President would transform officers from "creatures of the law" into "mere creatures of the President" who would "dare not exercise the privilege of their creation"); *id.* at 507 (Rep. Jackson) (objecting that granting plenary removal authority to the President would deprive officers of "their independency and firmness" and lead to corruption).

61. *See, e.g.*, *id.* at 539–40 (Rep. Page) (objecting that the Opinions Clause is inconsistent with the proposition "that all such officers were to be the mere creatures of the President dependent upon his will alone").

directive authority.[62] Nonetheless, just a few days after his side prevailed in the Decision of 1789, he made a short-lived proposal to alter the statutory tenure of the comptroller of the currency premised on the idea that this officer made decisions that the President ought not direct or control.[63] Madison observed that the comptroller's "principal duty seems to be deciding upon the lawfulness and justice of the claims and accounts subsisting between the United States and particular citizens" and that, as this duty "partakes strongly of the judicial character, . . . there may be strong reasons why an officer of this kind should not hold his office at the pleasure of the executive branch of the Government."[64] Regarding directive authority, Madison "question[ed] very much whether [the President] can or ought to have any interference in the settling and adjusting the legal claims of individuals against the United States."[65]

In sum, although Madison embraced a strong unitarian understanding that the President should control any power denominated "executive," he also was willing to play a category game to define agency actions as nonexecutive to justify insulating them from the President. The Supreme Court would play an especially aggressive version of this category game to justify statutory protections from presidential removal for FTC commissioners about 150 years later in *Humphrey's Executor v. United States*.[66]

B. Dueling Antebellum Attorney General Opinions on Directive Authority

During the antebellum period, a series of attorneys general issued opinions adopting varying approaches to presidential directive authority—often in the context of discussing whether the President had authority to review determinations by Treasury Department officials regarding claims for payment. Two of these Attorneys General, William Wirt and Caleb Cushing, issued especially notable but contradictory analyses. According to Wirt, writing in 1823, presidents have no directive authority to control how agency officials exercise discretion that Congress has vested in them by statute.[67] Cushing, writing in 1855, insisted that the Vesting and Take Care Clauses together authorize presidential directive authority over agency discretionary actions.[68] Nonetheless, just as we saw with Madison's proposal

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62. *See, e.g.*, *id.* at 394 (Rep. Madison) (observing that, if an agency official "does not conform to the judgment of the President in doing the executive duties of his office, he can be displaced").

63. *Id.* at 635–38 (Rep. Madison).

64. *Id.* at 635–36 (Rep. Madison). Curiously, Madison's proposal, which was to grant the comptroller a term-of-years in office subject to presidential removal, does not seem to address the problem of presidential control that he identified in this passage. *Id.* at 636. Other representatives nonetheless seem to have interpreted the proposal as potentially limiting the President's power to remove the comptroller at will. *Id.* at 637–38 (Reps. Stone, Sedgwick, and Benson).

65. *Id.* at 638 (Rep. Madison).

66. 295 U.S. 602 (1935); *see also infra* Section I.D (discussing *Humphrey's Executor*).

67. The President and Accounting Officers, 1 Op. Att'y Gen. 624, 625 (1823).

68. Relation of the President to the Executive Departments, 7 Op. Att'y Gen. 453, 479 (1855).

for the comptroller, Cushing played the category game to insulate nonexecutive decisions from presidential control.[69]

Wirt wrote his most important opinion on presidential directive authority in response to a query from President Monroe concerning his power to review a decision by subordinate Treasury Department officials settling the account of Joseph Wheaton.[70] These agency officials had acted pursuant to a statute instructing "the accounting officers of the Treasury Department to settle and adjust the account of Joseph Wheaton while acting in the Quartermaster's Department, upon the principles of justice and equity."[71] Wheaton, unhappy with the result of their efforts, sought to appeal to the President.[72] Wirt concluded that the President had no review authority because Congress had specifically charged agency officials, not the President, with determining the account.[73] It followed that, were the President to exercise this power himself, he would violate the Take Care Clause—i.e., "he would not only be not taking care that the laws were faithfully executed, but he would be violating them himself."[74]

Wirt's opinion implicitly rejected the possibility that Article II's Vesting Clause might empower the President with constitutionally superior "executive power" to control how subordinate officials exercise their mere statutory authority. To the contrary, Wirt insisted that it "could never have been the intention of the constitution . . . that [the President] should in person execute laws himself."[75] Wirt reasoned that, if the President had authority to take over *any* of the statutory functions that Congress had lodged in any executive officer, then it necessarily followed that the President had an obligation to take over *all* of them—a suggestion he regarded as so absurd as to be self-refuting.[76] Along these same lines, in an opinion Wirt issued a year later, he emphasized "the utter impossibility of [the President] sitting appeal over the accounting officers of the government, or superintending or directing their operations."[77] This assumption of impossibility implies a duty of care in executing the law, presupposing that the President, if she is to review an accounting officer's decision, should take the time to find any pertinent facts and construe and apply any pertinent law to determine an account legally and rationally.[78]

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69. *Id.* at 470.

70. The President and Accounting Officers, 1 Op. Att'y Gen. 624 (1823).

71. *Id.* at 628 (quoting Act of March 3, 1819).

72. *See id.* at 624 (referencing that the President had referred Wheaton's case to the attorney general for his opinion).

73. *Id.* at 630

74. *Id.* at 625.

75. *Id.*

76. *Id.* at 625, 628–29. Wirt's opinion does not make clear why he thought the President could not pick and choose which statutory authorities to execute. *See id.*

77. The President and Accounting Officers, 1 Op. Att'y Gen. 678, 679 (1824).

78. *Cf.* The President and Accounting Officers, 1 Op. Att'y Gen. 624, 629 (1823) ("How will it be possible for the President to perform these great duties, if he is also to exercise the appellate power of revising and correcting the settlement of all the individual accounts which pass through the hands of the accounting officers?"); *see also* The Power of

In Wirt's view, rather than attempt the impossible task of personally executing all the laws, the President instead has a more manageable obligation under the Take Care Clause to ensure that subordinate officials implement them faithfully and honestly.[79] This obligation did not, according to Wirt, entail authority to reject legal and honest decisions by subordinates acting within the scope of authority delegated to them by Congress merely because the President disagreed with those decisions.[80]

Over the next several decades, attorney general opinions on presidential directive authority were a mixed lot; some hewed to Wirt's restrictive approach,[81] but others intimated, generally without much analysis, that the President has plenary power to direct agency heads and through them subordinate officials.[82] In 1855, however, Attorney General Cushing issued a lengthy opinion rejecting Wirt's analysis outright and insisting that the President does indeed have constitutional authority to control discretion that Congress has purported to vest in agency officials.[83]

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the President Respecting Pension Cases, 4 Op. Att'y Gen. 515, 515 (1846) (Mason) (remarking, "[c]onsidering the high constitutional duties of the President, which occupy his whole time, it requires no argument to show that he could not acquit himself, by their adequate performance, if he were to undertake to review the decisions of subordinates on the weight or effect of evidence in cases appropriately belonging to them"); Duty of the President Respecting the Des Moines Grant, 5 Op. Att'y Gen. 275, 277 (1850) (Crittenden) ("The interference of the President with the performance of the particular duties assigned by law to subordinate officers, either on the ground of correcting errors or supplying omissions, would, in the general, be exceedingly injudicious, if at all warrantable, and would, moreover, involve him in an endless and invidious task, that would occupy his whole attention, and leave him no time for the higher duties of his office.").

79. The President and Accounting Officers, 1 Op. Att'y Gen. 624, 626 (1823).

80. *See id.* ("He is not to perform the duty, but to see that the officer assigned by law performs his duty *faithfully*—that is *honestly:* not with perfect correctness of judgment, but *honestly*.").

81. *See* Accounts and Accounting Officers, 2 Op. Att'y Gen. 507, 510 (1832) (Taney) (concluding "the President does not possess the power to enter into the examination of the correctness of the account"); The Power of the President Respecting Pension Cases, 4 Op. Att'y Gen. 515, 515 (1846) (Mason) (explaining "[t]he law has designated the officer to decide upon applications for pensions, and has provided for no appeal to the President: wherefore, he will not undertake to revise the decisions of the Commissioner"); Jurisdiction of the Accounting Officers, 5 Op. Att'y Gen. 630, 656 (1852) (Crittenden) (opining "that the President of the United States has no jurisdiction to entertain appeals in matters of account").

82. *See* Decisions of the Accounting Officers—To What Extent Final, 2 Op. Att'y Gen. 302 (1829) (Berrien) (asserting authority of the Secretary of War to review decisions "acting . . . by the direction of the President"); Accounts and Accounting Officers, 2 Op. Att'y Gen 463 (1831) (Taney) (asserting that a party seeking review of accounting officer decision "may carry his appeal from the Secretary of War before the President"); Accounts of General Parker and Accounting Officers, 2 Op. Att'y Gen. 652, 653 (1834) (Butler) (asserting that decision by accounting officer "may be reviewed and reversed by the Secretary of the proper department, acting under the authority of the President").

83. *See* Relation of the President to the Executive Departments, 7 Op. Att'y Gen. 453, 479 (1855).

The abstract question that created the occasion for Cushing's broadside was whether heads of departments could issue valid official instructions without expressly invoking authorization from the President to the agency.[84] To justify an affirmative answer, Cushing documented that it was common agency practice to rely on presidential statutory authority without expressly referencing presidential authorization to use it, and he canvassed judicial opinions upholding the validity of this practice.[85] Rather than stop his analysis at this point, Cushing then seized the opportunity to spend the next 23 pages expanding on his theory that the Constitution vests all "executive power" in the President and that this "executive power" necessarily includes authority to control discretion ostensibly vested in agency officials.[86]

Still, Cushing qualified presidential directive authority in several important ways.[87] Most importantly for the present purpose, Cushing conceded that the President cannot control an "act in which the thing done does not belong to the office, but the title of the office is employed as a mere *designatio personae*."[88] In a very short paragraph, Cushing gave three examples to indicate how he expected this unfamiliar exception to operate. Two of them, *United States v. Ferreira* and *Hayburn's Case*, discussed precedents addressing the legality of statutory grants of nonjudicial power to Article III judges.[89] Cushing's third example of a *designatio personae* involved a statutory grant of power to the attorney general "to adjudicate the claims arising under the Convention concluded between the United States and the Republic of Peru."[90] Although Cushing did not explicitly identify the commonality among these three examples, in each instance, the legislature authorized officials to take actions that fall outside the normal powers of their branch. Thus, in *Ferreira* and *Hayburn's Case*, Congress empowered judges to take nonjudicial actions, and in the Peruvian example, Congress empowered the attorney general to exercise the quasi-adjudicative function of resolving claims. As this claim-resolution function was not executive in nature, it fell beyond the President's constitutional authority to control.

In the dueling opinions of Wirt and Cushing, we see the same two basic approaches to limits on presidential control of agency power that appear much later in *Humphrey's Executor v. United States* and *Morrison v. Olson*. Wirt, as *Morrison* later would, insisted that statutes can grant final decision-making authority within

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84. *Id.* at 453.

85. *Id.* at 453–59.

86. *Id.* at 459 ("Now, by the explicit and emphatic language of the Constitution, *the executive power* is vested in the President of the United States.").

87. Cushing conceded that directive power could not sensibly apply where the President seeks advice from a department head pursuant to the Opinions Clause, *id.* at 463, that Congress can control which agency officials may exercise which particular statutory authorities, *id.* at 468, and that the President lacks power to determine agency decisions that are fully determined by the law itself. *Id.* at 470.

88. Relation of the President to the Executive Departments, 7 Op. Att'y Gen. 453, 470 (1855).

89. *Id.* at 470–71 (citing United States v. Ferreira, 54 U.S. 40 (1851), and Hayburn's Case, 2 U.S. 408 (1792)).

90. Relation of the President to the Executive Departments, 7 Op. Att'y Gen. 453, 470 (1855).

the executive branch to agencies without necessarily contravening the President's executive power.[91] Cushing, an aggressive proponent of presidential authority, insisted that the President's constitutional control of the executive power precluded congressional efforts to vest final authority over executive decisions in an agency.[92] He was, however, keen to protect what would later be called "quasi-adjudicative" decisions from presidential distortion.[93] To square this concern with his unitarianism, Cushing, foreshadowing *Humphrey's Executor*, played the category game, implicitly characterizing a type of decision that he thought should be insulated from presidential control as nonexecutive.[94]

C. The Tenure in Office Act, Postmasters, and Myers

The story of presidential control over administration during the late nineteenth to early twentieth century follows an arc from the Tenure in Office Act through to *Myers v. United States*,[95] in which Chief Justice Taft, a former President who turned out to have a lot to say on the subject, issued the Supreme Court's most full-throated defense of presidential control over agency discretion. A close reading of *Myers*, however, reveals that even Taft, like Madison and Cushing long before, left space for a category game to insulate some agency decision-making from presidential control.

The Decision of 1789 may have settled that the Constitution does not require Senate approval for presidential removal of Senate-confirmed officials, but on a narrow construction, it did not settle whether Congress has constitutional authority to impose such a requirement by statute. During the Civil War, Congress made its first move to do so in the National Currency Act of 1863, which provided that the comptroller "shall hold his office for the term of five years unless sooner removed by the President, by and with the advice and consent of the Senate."[96]

After Lincoln's assassination, President Johnson came into sharp conflict with the Radical Republicans over Reconstruction policies. Congress responded in 1867 by massively expanding Senate control of removals by enacting, over Johnson's veto, the Tenure in Office Act, which generally provided that Senate-confirmed appointees were entitled to hold their offices until replaced by a new

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91. *See* The President and Accounting Officers, 1 Op. Att'y Gen. 624, 628 (1823); *cf.* Morrison v. Olson, 487 U.S. 654, 690–92 (1988) (indicating that limitations on presidential power to control agency decision-making, provided they do not "impede the President's ability to perform his constitutional duty," do not infringe on the President's executive power).

92. *See* Relation of the President to the Executive Departments, 7 Op. Att'y Gen. 453, 469–70 (1855).

93. *Id.* at 470 (opining that the President does not control an agency head's exercise of a statutory power that is granted as a *designatio personae*).

94. *See id.* (indicating that the *designatio personae* exception applies where Congress grants power to an official that falls outside the departmental powers of her office—e.g., judicial-like powers to an executive official); *cf.* Humphrey's Ex'r v. United States, 295 U.S. 602, 628 (1935) (upholding good-cause restrictions on removal of FTC commissioners given the quasi-judicial and quasi-legislative nature of their statutory powers).

95. 272 U.S. 52 (1926).

96. National Currency Act of 1863, ch. 58, § 1, 12 Stat. 665, 666.

Senate-confirmed appointee.[97] Johnson's veto message, as one would expect, 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 80 years of consistent judicial, executive, and legislative practice.[98] 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.[99]

In 1869, after some political hardball between the branches,[100] Congress watered down the Act by providing that the President could suspend any Senate-confirmed executive officer during a Senate recess until the end of the next Senate session.[101] The President remained obligated to report such suspensions to the Senate and to nominate new persons for Senate confirmation to replace those suspended.[102] The Act lingered on in this weakened form until Congress, after losing a political battle with President Cleveland,[103] repealed it in 1887.[104]

But the repeal of the Tenure in Office Act did not wipe out Congress's efforts to condition removal of Senate-confirmed officials on Senate permission. Control of postmaster jobs were of special concern as, during the late nineteenth century, these were plum patronage positions.[105] To keep control over these spoils, 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.[106] The last of these statutes provided that postmasters of the first, second, and third classes "shall be appointed and removed by the President by and with the advice and consent of the Senate for four years unless sooner removed or suspended according to law."[107]

For about 50 years, presidents abided by this requirement of Senate approval for removals of Senate-confirmed postmasters. Then, in 1920, President Wilson ordered the firing of Frank Myers, the postmaster first-class of Portland,

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97. Tenure in Office Act, ch. 154, § 1, 14 Stat. 430 (1867), *repealed by* Act of Mar. 3, 1887, ch. 353, 24 Stat. 500.

98. Andrew Johnson, *Veto Message to the Senate*, AM. PRESIDENCY PROJECT (Mar. 2, 1867), https://www.presidency.ucsb.edu/documents/veto-message-425.

99. 2 TRIAL OF ANDREW JOHNSON, PRESIDENT OF THE UNITED STATES, BEFORE THE SENATE OF THE UNITED STATES ON IMPEACHMENT BY THE HOUSE OF REPRESENTATIVES FOR HIGH CRIMES AND MISDEMEANORS 496–98 (1868).

100. JEAN EDWARD SMITH, GRANT 479 (2001) (explaining that, to pressure Congress to repeal the Tenure in Office Act, President Grant declined to remove Johnson appointees, thus blocking patronage appointments).

101. Act of Apr. 5, 1869, ch. 10, § 2, 16 Stat. 6, 7.

102. *Id.*

103. For a summary, see CALABRESI & YOO, *supra* note 5, at 209–12.

104. Act of Mar. 3, 1887, ch. 353, 24 Stat. 500.

105. *See* Myers v. United States, 272 U.S. 52, 279 (1926) (Brandeis, J., dissenting) (characterizing the Post Office Department as the "chief field for plunder" for the spoils system).

106. *Id.* at 253 (discussing 1870s statutory provisions governing appointments and removals of postmasters).

107. Postal Appropriations Bill, ch. 179, § 6, 19 Stat. 78, 80 (1876); *see* Harold Bruff, *The Incompatibility Principle*, 59 ADMIN. L. REV. 225, 258 (2007) (discussing this statute's role in enhancing senatorial control of patronage).

Oregon, before the end of his four-year term.[108] Myers sued for his lost salary, which ultimately led the Supreme Court in 1926 to issue one of the great milestones in the history of the debate over the President's executive power, *Myers v. United States*.[109]

Chief Justice Taft's long majority opinion, after canvassing the Decision of 1789,[110] over a century's worth of case law and secondary authorities,[111] as well as the history of the Tenure in Office Act,[112] 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 alone.[113] The familiar conceptual core of the majority opinion is that Article II vests a general "executive power" in the President, and any express constitutional limits on this general power should be read narrowly.[114] Powers to appoint and remove officials should be regarded as elements of the general executive power.[115] At least for those appointments resulting from presidential nomination with Senate confirmation, Congress has no authority to alter the President's removal power.[116]

To buttress his argument that control of removals should be regarded as an element of the general "executive power," Chief Justice Taft turned to the directive power. Regarding the scope of this power, he characterized agency officials who act in matters involving presidential discretion as mere "alter egos" of the President and necessarily subject to her will.[117] Moreover, even where agency officials exercise "ordinary duties . . . prescribed by statute," they still "come under the general administrative control of the President by virtue of the general grant to him of the executive power."[118] To give practical effect to this directive power that presidents enjoy to control agency officials, the President must be able to remove them.[119] Removal authority, in other words, serves the goal of protecting directive power.

Chief Justice Taft gave two especially notable qualifications to *Myers*' strong defense of presidential control of agency officials and their decisions. First, although Congress cannot restrict the President's removal authority over Senate-

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108. *Myers*, 272 U.S. at 106 (majority opinion).

109. *Id.*

110. *Id.* at 109–36.

111. *See generally id.* at 139–58 (discussing, among other authorities, Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), later case law, and the views of luminaries including Alexander Hamilton, Chief Justice Marshall, Justice Story, Chancellor Kent, Webster, Clay, and Calhoun).

112. *Id.* at 164–68.

113. *Id.* at 176 (concluding "that the Tenure of Office Act of 1867, in so far as it attempted to prevent the President from removing executive officers who had been appointed by him by and with the advice and consent of the Senate, was invalid, and that subsequent legislation of the same effect was equally so").

114. *Id.* at 163–64.

115. *Id.* at 171 (explaining that the "reasonable implication" of the President's obligation to take care that the laws be faithfully executed was that the President, in the absence of an express limitation, has authority over removals "as part of his executive power").

116. *Id.*

117. *Id.* at 133.

118. *Id.* at 135.

119. *See id.*

confirmed officials, Taft conceded that, where Congress exercises its constitutional authority to vest appointment of an inferior officer in an agency head, it can also limit the agency head's removal authority.[120] Congress therefore could have constitutionally restricted removals of postmasters first-class, such as Myers, by the simple expedient of vesting the power to appoint them in the postmaster general.[121] This congressional power to insulate lower level officials from removal gave the *Myers* Court space to assert that its holding did not pose any threat to civil service protections built during the late nineteenth century to overturn the spoils system.[122] Acknowledging this power hardly fits easily, however, with an uncompromising vision of the President as supreme master of all things executive.

Second, Taft conceded the existence of definitional limits on directive authority that should sound familiar by now. In a sentence that calls directly to mind Madison's concerns over the comptroller as well as Cushing's concerns over the Peruvian claims, Taft observed, "[T]here 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."[123] Taft did not, however, limit the scope of agency decisional independence just to "quasi-judicial" determinations. Instead, he added, without further explanation, "Of 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."[124] In sum, the Chief Justice followed the familiar unitarian model of claiming all executive power for the President but leaving the category game available as a means to insulate some agency decisions from full presidential control.

D. Humphrey's Executor *Applies the Category Game to Authorize "Independent" Agencies.*

Nine years after the Supreme Court rejected a claim of improper removal brought on behalf of a dead postmaster in *Myers v. United States*,[125] it accepted a claim of improper removal brought on behalf of a dead commissioner in *Humphrey's Executor v. United States*.[126] Late in the Hoover administration, Humphrey was nominated and confirmed for a second seven-year term as an FTC

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120. *Id.* at 127.

121. *See id.* at 173–74.

122. *Id.* (explaining that the holding in *Myers* posed no threat to the Civil Service Law given that its reforms applied only to inferior officers whose appointments were, with the major exception of the postmasters, largely vested in agency heads).

123. *Id.* at 135. Chief Justice Taft did, however, add that the President may take decisions that she cannot direct into account in determining whether to remove an officer "on the ground that the discretion regularly entrusted to that officer by statute has not been on the whole intelligently or wisely exercised." *Id. But see id.* at 157–58 (declaring that the *Myers* decision did not reach issues regarding presidential authority to remove non-Article III judges; distinguishing these non-Article III "judges" from "executive officers").

124. *Id.* at 135.

125. *Id.* at 176–77. By the time this case reached the Supreme Court, Myers had died and his intestate was pressing his claim. *Id.* at 106.

126. 295 U.S. 602 (1935).

commissioner.[127] Humphrey was, to put the matter mildly, hostile to the Roosevelt Administration's approach to governance, and President Roosevelt requested his resignation, citing policy differences rather than any malfeasance.[128] After Humphrey refused, the President 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."[129]

The Court, in what has been characterized as an anti-New Deal effort to rein in Roosevelt's power,[130] upheld the constitutionality of this provision.[131] At the outset of its analysis, the Court narrowed *Myers* with brutal efficiency, explaining that the "actual decision" in *Myers*, as opposed to its scores of pages of academic dicta, was based on the premise 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."[132] As *Myers* boiled down to the proposition that Congress cannot require the President to obtain Senate permission to remove "purely executive officers," its holding 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."[133]

To a modern eye, the conclusion that *Myers* does not apply to nonexecutive officials might seem little help to Humphrey given that the FTC carries out the classically "executive" task of implementing the FTC Act. According to the Supreme Court in 1935, however, the FTC could not "in any proper sense be characterized as an arm or an eye of the executive."[134] 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."[135] 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

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127. Daniel A. Crane, *Debunking* Humphrey's Executor, 83 GEO. WASH. L. REV. 1835, 1841 (2015) (documenting that Humphrey "made vociferously clear his opposition to almost any coercive action by the FTC to reign in business and lambasted the FTC's interventionist agenda").

128. *Humphrey's Ex'r*, 295 U.S. at 619 (quoting President Roosevelt's letter to Humphrey).

129. *Id.* (quoting Federal Trade Comm'n Act, ch. 311, § 1, 38 Stat. 717, 718 (codified at 15 U.S.C. § 41 (2012)).

130. Morrison v. Olson, 487 U.S. 654, 724 (1988) (Scalia, J., dissenting).

131. *Humphrey's Ex'r*, 295 U.S. at 629 (holding that Congress can require good cause for presidential removal of officials performing quasi-legislative or quasi-judicial functions).

132. *Id.* at 627.

133. *Id.* at 628.

134. *Id.* (characterizing the FTC as "an administrative body created by Congress to carry into effect legislative policies embodied in the statute").

135. *Id.*

aid of the legislative power."[136] 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."[137]

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.[138] Allowing the President to direct or influence the Commission's decisions would undermine its ability to function as an expert, nonpartisan body.[139] Good-cause limits on removal were necessary to block such pernicious directive control, "[f]or it is quite evident that one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter's will."[140]

E. Morrison *Abandons Quasi-Categories for a More Direct Approach.*

About a half century on from *Humphrey's Executor*, the Supreme Court adopted a new framework for assessing statutory restrictions on presidential removal authority in *Morrison v. Olson*, in which the Court upheld the constitutionality of independent counsels.[141] Congress created independent counsels as part of the Ethics in Government Act enacted in the aftermath of Watergate.[142] Simplifying, the Act provided for a judicial panel known as the "Special Division," on the Attorney General's request, to appoint an independent counsel to investigate and, if appropriate, prosecute high-ranking officials.[143] Within their defined jurisdictions, independent counsels enjoyed "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice."[144] To protect their independence, the Act provided that independent counsels

> . . . may be removed from office, other than by impeachment and conviction, only by the personal action of the Attorney General and only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties.[145]

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136. *Id.* (citing Federal Trade Comm'n Act, ch. 311, § 6, 38 Stat. 717, *repealed by* Pub. L. 103–272, § 7(b), 108 Stat. 1379 (1994)).

137. *Id.* (citing Federal Trade Comm'n Act, ch. 311, § 7, 38 Stat. 717, *repealed by* Pub. L. 103–272, § 7(b), 108 Stat. 1379 (1994)).

138. *Id.* at 630.

139. *See id.* at 625 (explaining that Congress intended the FTC to function as a "body of experts" free from "suspicion of partisan direction").

140. *Id.* at 629.

141. 487 U.S. 654, 660 (1988).

142. *Id.*

143. *See id.* at 660–64 (summarizing pertinent provisions of Title VI of the Ethics in Government Act of 1978, 28 U.S.C. §§ 591–599 (Supp. V 1982)). After several reauthorizations, these independent counsel provisions sunsetted by operation of 28 U.S.C. § 599.

144. *Id.* at 662 (quoting 28 U.S.C. § 594(a)).

145. *Id.* at 663 (quoting 28 U.S.C. § 596(a)(1)).

It was never likely that the Court in 1988 was going to invalidate this good-cause protection as unconstitutional with Watergate still such a strong memory. Upholding it under the *Humphrey's Executor* model, however, would have been difficult 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.[146] The move of characterizing action as "quasi-adjudicative," for instance, was therefore dubious. Second, it is difficult to identify any function more clearly "executive" in nature than prosecution. *Myers*, which before *Morrison* was still the ostensibly controlling precedent on this point, barred restrictions on removal of "purely executive" officers.

Chief Justice Rehnquist, writing for the seven-Justice majority, evaded *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."[147] In other words, the key to *Myers* was that Congress had aggrandized itself by giving the Senate a role in the removal process. As the independent counsel provisions of the Act did not grant control over removals to Congress (or a portion of it), *Myers* did not control.[148]

After disposing of *Myers*, the Chief Justice turned a revisionist eye toward *Humphrey's Executor*. He conceded that *Humphrey's Executor* had characterized agency powers as "quasi-legislative" and "quasi-judicial" to distinguish the Court's treatment of the "purely executive" postmaster in *Myers*.[149] 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.'"[150] 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.[151]

Stripped of the now-dubious category game, 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."[152] Accordingly,

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146. *See id.* at 689 n.28 (explaining that the powers of the FTC in 1935 would be regarded as "executive" in 1988).

147. *Id.* at 686 (internal quotation marks omitted) (quoting Myers v. United States, 272 U.S. 52, 161 (1926)) (citing Bowsher v. Synar, 478 U.S. 714 (1986)).

148. *Id.* (explaining that "[u]nlike both *Bowsher* and *Myers*, this case does not involve an attempt by Congress itself to gain a role in the removal of executive officials other than its established powers of impeachment and conviction").

149. *Id.* at 689.

150. *Id.* (footnote omitted).

151. *Id.* at 699 n.28 (citing Bowsher v. Synar, 478 U.S. 714, 761 n.3 (1986) (White, J., dissenting)) (noting that "it 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").

152. *Id.* at 689–90 (footnote omitted).

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."[153]

After announcing this transformed framework, the Court applied it in two short paragraphs. It rejected the contention that the removal restrictions protecting the independent counsel violated separation of powers, opining that it "simply d[id] not see how the President's need to control the exercise of [independent counsel] 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."[154] More particularly, because the Act gave the Attorney General authority to remove an independent counsel for "good cause," 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."[155] In short, the Court indicated that it is constitutionally permissible for some agencies to enjoy some decisional independence so long as the President retains effective power to ensure that they exercise their powers within the bounds of the law.

Justice Scalia's blistering dissent has become a holy writ among adherents to the strong unitary executive theory. In Scalia's view, the majority was correct to abandon the analytic framework of *Humphrey's Executor*, which he condemned for depending on unclear and irrational line-drawing and 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*.[156] On the other side of the ledger, however, the majority's new don't-interfere-too-much-with-the-President framework was wildly wrong. For one obvious thing, 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.[157] Making matters even worse, the majority's rule was no rule at all but instead left the constitutionality of restrictions on presidential authority to the free-floating, ad hoc judgment of five Justices.[158]

F. Free Enterprise Fund *Applies* Morrison*'s Don't-Interfere-Too-Much Test.*

The Court's first major application of *Morrison*'s don't-interfere-too-much doctrine arrived in 2010 in *Free Enterprise Fund v. Public Company Accounting*

153. *Id.* at 691.
154. *Id.* at 691–92 (footnote omitted).
155. *Id.* at 692.
156. *Id.* at 726 (Scalia, J., dissenting). It only seems fair to note that the dissenters in *Myers*, who included the luminaries Justice Brandeis and Justice Holmes, added their own one hundred and seventeen pages to the *Myers* pile. *See* Myers v. United States, 272 U.S. 52, 178 (1926) (McReynolds, J., dissenting); *id.* at 240 (Brandeis, J., dissenting); *id.* at 295 (Holmes, J., dissenting).
157. *Morrison*, 487 U.S. at 705 (Scalia, J., dissenting).
158. *Id.* at 712.

Oversight Board.[159] Congress created the Public Company Accounting Oversight Board in 2002 in the aftermath of major accounting scandals and gave it expansive powers to regulate the auditing industry.[160] Congress nested the Board inside the Securities and Exchange Commission, and the Commission had authority both to appoint Board members and to remove them "for good cause shown" after notice and an opportunity for a hearing.[161] An accounting firm challenged the constitutionality of the Board, contending that the removal scheme was unconstitutional because Board members were protected by two layers of good-cause removal protection from presidential control, which was too attenuated to satisfy *Morrison*'s don't-interfere-too-much test.[162]

One problem with this challenge was that SEC commissioners do not, in point of fact, enjoy express statutory protection from presidential removal—presumably because Congress created the agency during the decade between *Myers* and *Humphrey's Executor* when the constitutionality of such limitations was especially dubious.[163] Remarkably, the majority in *Free Enterprise*, after noting that the parties agreed that the President required good-cause to remove commissioners, solved this problem by agreeing to "decide the case with that understanding."[164]

Chief Justice Roberts's five-Justice majority opinion reads like a straightforward application of *Morrison*'s don't-interfere-too-much test by a person inclined to think, like Justice Scalia, that any amount of congressional interference with presidential control of executive power is too much. The Chief Justice began his analysis by quoting the Vesting Clause and then cited Madison for the proposition that "if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws."[165] After briefly tracing the law governing presidential removal from the Decision of 1789 through *Morrison*, he then spent several pages explaining that double good-cause restrictions left the President's control over the Board too weak to satisfy the requirements of the Vesting and Take Care Clauses under *Morrison*.[166] He explained:

> 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

159. *See* 561 U.S. 477, 495–98 (2010) (concluding that double for-cause protections for agency officials subverted the President's authority to ensure that the laws are faithfully executed).

160. *Id.* at 484–85.

161. 15 U.S.C. § 7211(e)(6) (authorizing the Commission to remove Board members "for good cause shown" in accordance with the terms of 15 U.S.C. § 7217(d)(3)).

162. *See Free Enter. Fund*, 561 U.S. at 483–84 (summarizing the two-layer challenge).

163. *Id.* at 546–47 (Breyer, J., dissenting) (criticizing the majority for assuming rather than deciding whether SEC commissioners are protected by for-cause limits on removal).

164. *Id.* at 487 (majority opinion).

165. *Id.* at 492 (quoting 1 ANNALS OF CONG. 463 (1789) (Joseph Gales ed., 1834) (Rep. Madison)).

166. *Id.* at 495–98.

> 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.[167]

The Chief Justice added a slippery-slope argument into the mix, noting that if two layers of insulation were acceptable, three or even five layers might follow with officers ensconced in "a Matryoshka doll of tenure protections" and "immune from presidential oversight, even as they exercised power in the people's name."[168] Such diffusion of responsibility would eliminate the President's accountability for governmental actions and therefore the ability of the electorate to hold her responsible for them.[169] To remedy this threat, the Court struck the requirement that the Commission have good cause to remove Board members, thus leaving only a single level of good-cause protection between the President and the Board members.[170]

Justice Breyer, writing for four dissenters, sought to remake *Morrison*'s don't-interfere-too-much test into a rough cost-benefit analysis that gives weight to the traditional benefits of accuracy and fairness that *Humphrey's Executor* had protected via the category game.[171] In his view, the good-cause limitation on removal of Board members posed little threat to presidential authority in part because agency independence, realistically, is a function of many different factors, such as control over budget requests and funding.[172] The benefits of protecting the Board's independence included enhancing the integrity of its adjudicative functions and its technical expertise, which was especially important given the complexity of financial regulation.[173] More broadly, he noted that a government that regulates matters "as complex as, say, nuclear power production" needs to protect its expertise.[174]

G. Seila *(Sort of) Doesn't Overrule* Humphrey's Executor *and* Morrison.

At long last we are in a position to appreciate the Supreme Court's most recent exploration of the limits of presidential control of administrative machinery, 2020's *Seila Law LLC v. Consumer Financial Protection Bureau*, in which a five-Justice majority held that a statutory provision requiring the President to have good cause to fire the director of the CFPB was unconstitutional.[175] Along the way, the Court, although it expressly declined to overrule *Humphrey's Executor* and *Morrison*, strongly indicated that they were wrongly decided due to their inconsistency with unitarian theory.[176]

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167. *Id.* at 496.
168. *Id.* at 497.
169. *Id.* at 497–98.
170. *Id.* at 508–09.
171. *See id.* at 524–32 (Breyer, J., dissenting) (explaining that minimal threat posed to presidential power by statutory restriction on removal of Board members was outweighed by benefits of protecting independence).
172. *Id.* at 524.
173. *Id.* at 531–32.
174. *Id.* at 532.
175. 140 S. Ct. 2183, 2192 (2020).
176. *See id.* at 2197–201.

Chief Justice Roberts's opening paragraph described the structure and powers of the CFPB and its director in a way that clearly foreshadowed his ultimate conclusion:

> 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.[177]

The Chief Justice also emphasized that the CFPB's independence was further strengthened by its funding mechanism, which enabled it to obtain funds from the Federal Reserve rather than from congressional spending bills that the President might sign or veto.[178]

After stressing the independence and power of the CFPB, the Chief Justice turned to the core theme of unitary executive theory, proclaiming, "Under our Constitution, the 'executive power'—all of it—is 'vested in a President,' who must 'take Care that the Laws be faithfully executed.'"[179] The "all" in the preceding quote is especially notable—it does not appear in the Vesting Clause itself, but it did appear as a point of emphasis in Justice Scalia's *Morrison* dissent.[180] Later, the Chief Justice, after quoting the Vesting and Take Care Clauses, reiterated that "[t]he entire 'executive power' belongs to the president alone."[181]

According to the Chief Justice, history and precedent, notably in the form of the Decision of 1789 and *Myers v. United States*, confirmed that the President's executive power "included a power to oversee executive officers through removal."[182] In *Myers*, Chief Justice Taft, after conducting "an exhaustive examination," had concluded that the President has "general administrative control of those executing the laws" and must possess power to remove them in order to discharge her duties under the Take Care Clause.[183] Moreover, in 2010's *Free Enterprise Fund v. Public Company Accounting Oversight Board*, the Court had "adhered to the general rule that the president possesses 'the authority to remove

177. *Id.* at 2191.

178. *Id.* at 2193–94.

179. *Id.* at 2197 (quoting U.S. CONST. art II, § 1, cl. 1).

180. Morrison v. Olson, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting) (declaring that Article II's Vesting Clause does not vest "*some of* the executive power, but *all of* the executive power" in the President).

181. *Seila*, 140 S. Ct. at 2197.

182. *Id.* (quoting Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 492 (2010) (quoting Letter from James Madison to Thomas Jefferson (June 30, 1789), *in* 16 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 893 (2004)) (citing Myers v. United States, 272 U.S. 52 (1926)).

183. *Id.* at 2197–98 (quoting *Myers*, 272 U.S. at 163–64).

those who assist him in carrying out his duties.'"[184] This authority was necessary because, without it, "the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else."[185]

As we have seen, the meaning of the Decision of 1789 is, to put the matter mildly, far less clear than the Chief Justice's reliance on it may suggest,[186] and *Myers*'s paean to presidential authority, written by an ex-president, prompted three dissents (two from Justices Brandeis and Holmes),[187] and was rather brutally rejected just nine years later by a unanimous Court in *Humphrey's Executor*.[188] Picking apart the majority opinion's favorite supporting authority is less important for the present purpose, however, than examining its treatment of the two big flies in its unitarian ointment, *Humphrey's Executor* and *Morrison*.

Starting with *Humphrey's Executor*, the Chief Justice observed that "[r]ightly or wrongly" that case had depended on the 1935 Court's assessment that the FTC exercised no "executive *power* in the constitutional sense" but instead exercised "quasi-legislative or quasi-judicial powers" as "a legislative or as a judicial aid."[189] Soon after coyly suggesting that *Humphrey's Executor*'s framework might have been "right" or might have been "wrong," the Chief Justice added a footnote confirming that it was wrong, announcing, "[T]he conclusion that the FTC did not exercise executive power has not withstood the test of time."[190] He added that although "the activities of administrative agencies" may appear legislative or judicial in form, "under our constitutional structure they *must be* exercises of . . . the 'executive Power.'"[191] This expansive characterization of executive power was not surprising given that the Court had already relied on it in *Morrison* to justify overruling *Humphrey's Executor*'s reliance on "quasi" categories to justify agency independence.[192] In sum, the majority in *Seila* revived *Humphrey's Executor*'s category game (after killing it off in *Morrison*) only to hold that it is invalid because it enables infringement of the President's "executive power."

Rather than overrule *Humphrey's Executor* after rejecting its framework, the majority instead distinguished it, holding that it did not control in *Seila* because of the massive differences between the FTC and the CFPB in terms of organization and powers. The FTC was headed by a bipartisan board composed of five persons serving staggered seven-year terms.[193] These design features were intended to ensure expert decision-making along nonpartisan lines.[194] The CFPB, by contrast,

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184. *Id.* at 2198 (quoting *Free Enter. Fund*, 561 U.S. at 513–14).

185. *Id.* at 2191 (quoting *Free Enter. Fund*, 561 U.S. at 514).

186. *See supra* Section I.A (discussing the fundamental ambiguity of the Decision of 1789).

187. *Myers*, 272 U.S. at 178 (McReynolds, J., dissenting); *id.* at 240 (Brandeis, J., dissenting); *id.* at 295 (Holmes, J., dissenting).

188. Humphrey's Ex'r v. United States, 295 U.S. 602, 626–27 (1935).

189. *Seila*, 140 S. Ct. at 2198 (quoting *Humphrey's Ex'r*, 295 U.S. at 628).

190. *Id.* at 2198 n.2 (quoting Arlington v. FCC, 569 U.S. 290, 305 n.4 (2013); Morrison v. Olson, 487 U.S. 654 (1988)).

191. *Id.* (quoting *Arlington*, 569 U.S. at 305 n.4).

192. *Morrison*, 487 U.S. at 690–91.

193. *Seila*, 140 S. Ct. at 2198–99.

194. *Id.*

was headed by a single person who obviously could not be nonpartisan in the same sense or constitute a collective "body" of experts.[195] Moreover, as compared to the FTC commissioners, the director wielded a far more potent set of rulemaking, adjudicative, and enforcement powers.[196]

Turning to the second problem precedent, the Court characterized *Morrison* as holding that good-cause restrictions on removal are permissible for "inferior officers with limited duties and no policymaking or administrative authority."[197] This characterization seriously distorts the logic of *Morrison*. The Court did advert in one sentence in that case to the "inferior" status of independent counsels in the course of justifying its holding that the good-cause restriction on their removal was constitutional.[198] As Justice Scalia observed in his dissent, had the Court regarded inferior status as determinative for the removal issue, it presumably would have disposed of this point by relying on the century-old precedent of *United States v. Perkins*, which squarely held that good-cause restrictions on the removal of inferior officers appointed by agency heads are constitutionally permissible.[199] If we take as given *Seila*'s creative recharacterization of *Morrison*, however, the latter plainly was inapplicable to the CFPB Director, who is certainly a "principal" rather than "inferior" officer.[200]

By expressly refusing to overrule its (new) versions of *Humphrey's Executor* and *Morrison*, the *Seila* Court nominally left space to continue to uphold the constitutionality of the traditionally recognized independent agencies, such as the FTC, FCC, NLRB, and many others in the familiar alphabet soup. Nonetheless, *Seila* contains language and themes that store up trouble for the future of these agencies even if the Court continues to leave *Humphrey's Executor* and *Morrison* damaged but in place. The Court opined that these two precedents mark "the outermost constitutional limits of permissible congressional restrictions on the President's removal power."[201] *Humphrey's Executor*, as recast, creates an exception "for multimember expert agencies that do not wield substantial executive

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195. *Id.* at 2200. The Court's effort to cast the number of commissioners as a dispositive issue is strained at best given that, in *Humphrey's Executor*, the Court emphasized the importance of upholding good-cause restrictions on removal to protect the independence of "judges of the legislative Court of Claims." Humphrey's Ex'r v. United States, 295 U.S. 602, 629 (1935) (citing Williams v. United States, 289 U.S. 553, 565–67 (1933)); *see also Seila*, 140 S. Ct. at 2240–41 (Kagan, J., concurring in part and dissenting in part) ("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.").

196. *Seila*, 140 S. Ct. at 2200 (majority opinion).

197. *Id.* at 2199–200.

198. Morrison v. Olson, 487 U.S. 654, 691 (1988).

199. *Id.* at 723–24 (Scalia, J., dissenting); *see also Seila*, 140 S. Ct. at 2236 (Kagan, J., concurring in part and dissenting in part) (noting, wryly, that "Justice Scalia's dissent emphasized that the counsel's inferior-office status played no role in the Court's decision" and "[w]ere that *Morrison*'s basis, a simple citation [to United States v. Perkins, 116 U.S. 483, 484–85 (1886)] would have sufficed").

200. *Seila*, 140 S. Ct. at 2200.

201. *Id.* at 2199–200 (internal quotation marks omitted) (quoting PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75, 196 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting)).

power."[202] Independent agencies today commonly wield combinations of rulemaking, adjudicative, and enforcement authorities that one might think add up to "substantial executive power" on any accounting.[203] *Morrison*, as recast, now covers only "inferior officers" who wield "no policymaking or administrative authority."[204] The major independent agencies are generally stand-alone departments headed by principal officers, and they all exercise at least some kind of "administrative" authority.[205]

A still deeper problem is that, notwithstanding the controlling plurality's refusal to overrule the two problem precedents outright, *Seila* is rife with language indicating that they should be overruled. Confirming *Morrison* in this regard, *Seila* makes plain that *Humphrey's Executor*'s legal framework should be eliminated given that all Justices embrace a definition of "executive power" too broad to accept the "quasi" category game.[206] This leaves the possibility of applying *Morrison*'s don't-interfere-too-much test, at least to "inferior" officers, to protect agency decisional independence. *Morrison*, however, depends on the supposition that the President's executive power does not require that she control all discretionary decision-making by agencies.[207] This is very difficult to square with *Seila*'s insistence that "all" executive power in its "entire[ty]" belongs to the one-and-only President.[208] Post-*Seila*, exceptions to the general rule of plenary presidential removal (and control) may persist but not for any reason embraced by a majority in *Seila*.

Six of the Justices sought to resolve this tangle of contradictions. Justice Thomas, joined by Justice Gorsuch, would have seized the occasion to create a categorical rule barring statutory limits on presidential removal authority and condemning independent agencies as "a direct threat to our constitutional structure and, as a result, the liberty of the American people."[209]

Justice Kagan, joined by the other three relatively liberal Justices, authored a partial dissent that contested point-by-point the majority's treatment of

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202. *Id.*

203. *See id.* at 2238–39 (Kagan, J., concurring in part and dissenting in part) (noting that there is "nothing unusual" about the CFPB's set of regulatory, adjudicative, and enforcement powers, which are shared by "(among others) the FTC and SEC").

204. *Id.* at 2200 (majority opinion).

205. *See* Free Enter. Fund v. Public Co. Accounting Oversight Bd., 561 U.S. 477, 549 app. A (2010) (Breyer, J., dissenting) (identifying 24 stand-alone "departments" headed by officials with statutory protection from presidential removal); Edmond v. United States, 520 U.S. 651, 662–63 (1997) (holding that an officer is a "principal officer" if their work is not "directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate").

206. *Seila*, 140 S. Ct. at 2198 n.2; *id.* at 2234 n.7 (Kagan, J., concurring in part and dissenting in part) (agreeing with characterization of agency power as "executive" in nature).

207. *See supra* text accompanying notes 154–55 (discussing this aspect of *Morrison*).

208. *Seila*, 140 S. Ct. at 2191, 2197 (majority opinion). *But see* Morrison v. Olson, 487 U.S. 654, 724 (1988) (Scalia, J., dissenting) (contending that good-cause limitations on removal of inferior officers by principal officers do not impinge on the President's executive power so long as the President can control principal officers).

209. *Seila*, 140 S. Ct. at 2211 (Thomas, J., concurring in part and dissenting in part).

constitutional text, history, and precedent, making a pragmatic case for the continued independence of the CFPB and for the positive values served by agency independence generally.[210] Justice Kagan characterized the majority's "general rule" against good-cause restrictions on removal as nonexistent and the majority's two exceptions to this general rule "as gerrymandered so the CFPB falls outside them."[211] She contended that the correct rule had been set forth in *Morrison*, where the Court had explained that removal restrictions are permissible so long as they do not "impede the President's ability to perform his constitutional duty."[212] This standard presupposes that the Constitution does not require that the President be able to direct all "discretionary decisions or judgment calls" by an agency official exercising statutory discretion.[213] Rather, it suffices that the President is able to ensure that agency officials are performing their duties competently and legally.[214]

II. TOWARD A DO-IT-YOURSELF UNITARY EXECUTIVE

As Part I demonstrates, the Supreme Court and other authorities have for a very long time relied on two ways of thinking about the President's executive power to justify pockets of agency decisional independence. The more prominent line of authority until fairly recently, most closely associated with *Humphrey's Executor* but in fact far older, accepts that the President must have plenary control over all exercises of "executive power" but insulates some agency functions by characterizing them as nonexecutive.[215] Another line of authority, most closely associated with *Morrison* but with its own deep roots, denies the premise that the President's "executive power" must extend to fine-grained control of all agency discretionary decisions.[216] Under the *Morrison* approach, Congress can impose good-cause restrictions on removal of agency officials so long as these restrictions do not interfere too much with the President's exercise of the executive power and her duty to "take care" that the laws of the United States are faithfully enforced.[217]

Although Chief Justice Roberts's majority opinion in *Seila* expressly declined to overturn either *Humphrey's Executor* or *Morrison*, it contains language

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210. *See id.* at 2224–45 (Kagan, J., concurring in the judgment with respect to severability and dissenting in part; joined by Justices Ginsburg, Breyer, and Sotomayor).

211. *Id.* at 2225.

212. *Id.* at 2235 (quoting *Morrison*, 487 U.S. at 691).

213. *Id.*

214. *Id.*

215. *See supra* text accompanying notes 62–65 (discussing Madison's proposal for the comptroller); *supra* text accompanying notes 87–90 (discussing Attorney General Cushing's use of the *designatio personae* concept); *supra* text accompanying notes 123–24 (discussing the appearance of "quasi" limits on presidential control of agencies in Myers v. United States, 272 U.S. 52 (1926)); *supra* Section I.D (discussing Humphrey's Ex'r v. United States, 295 U.S. 602 (1935)).

216. *See Morrison*, 487 U.S. at 689 n.28; *see also supra* notes 59–62 (collecting remarks from the First Congress's debate over the Decision of 1789 indicating that the President should not possess plenary control over the decisions of agency heads); *supra* text accompanying notes 70–77 (discussing Attorney General Wirt's 1823 opinion concluding that the President lacked authority to review claims assigned by statute to determination by agency officials).

217. *Morrison*, 487 U.S. at 690–91.

and logic that flatly contradict their rationales. The majority—joined by the dissent on this point—confirmed its acceptance of a modern, expansive understanding of "executive power" that precludes returning to the category game of *Humphrey's Executor*.[218] Furthermore, the majority embraced a maximalist approach to the President's Vesting Clause authority that cannot plausibly be squared with the *Morrison* framework,[219] which the Court has recharacterized as applying only to removals of inferior officers in any event.[220] Taking these points in combination, the *Seila* Court, in effect, destroyed the doctrinal justifications for the continued existence of independent agencies but left the victim to die another day rather than delivering the final blow. Given these circumstances, those who wish to preserve the values that have been served by agency independence should look for new ways to protect them.

A. The Vesting Clause As "Takeover" Authority

Let us start such a process by conceding, for the sake of argument, that the strong unitarians are right that the Vesting Clause authorizes the President to act as the "decider" for the purpose of making any discretionary decision that Congress has vested by statute in an agency.[221] On this view, we might say that the President can *take over* any discretionary agency function. As explained below, however, conceding that the President enjoys *takeover* authority does not necessarily imply that the President has *directive* authority to compel an agency head to exercise her statutory authority in a particular way. The difference between these two types of authority becomes more than metaphysical in those cases where the law imposes procedural constraints on the "decider." To see this difference, consider that, even if we grant that the President can, thanks to the Vesting Clause, take over the role of decider for an adjudication that Congress has assigned to an agency head, it should not follow that the President can give a binding order to the agency head requiring her to conduct an adjudication and then reach the President's predetermined result.[222]

The core intuition supporting claims of directive authority is that the President, as sole and undisputed head of the executive branch, should have the power to command lower-level executive actors to take any actions falling within their legal authority. Judicial review doctrines in turn encourage us to think of agency legal authority as encompassing a zone bounded by law and rationality.[223]

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218. *Seila*, 140 S. Ct. at 2198 n.2 (majority opinion); *id.* at 2234 n.7 (Kagan, J., concurring in part and dissenting in part).

219. *See id.* at 2191 (majority opinion).

220. *Id.* at 2200; *see also supra* text accompanying notes 197–199 (discussing the implausibility of this characterization of *Morrison*).

221. *Cf.* Strauss, *supra* note 9, at 696–97 (framing the problem of determining the limits of presidential authority in terms of whether the President is better regarded as an "overseer" or the "decider").

222. *See infra* text accompanying notes 248–60 (explaining how this principle sheds light on Portland Audubon Soc'y v. Endangered Species Comm., 984 F.2d 1534 (9th Cir. 1993)).

223. *See, e.g.*, Citizens to Pres. Overton Park v. Volpe, 401 U.S. 402, 416 (1970) (describing review for abuse of discretion as "narrow;" adding that a reviewing court "is not empowered to substitute its judgment for that of the agency").

When reviewing agency fact-finding, courts inquire whether an agency's determination was supported by "substantial evidence" or was "arbitrary."[224] Both of these standards merely require a court to determine whether a reasonable decision-maker, based on evidence in the administrative record, could reach the agency's factual conclusion.[225] When reviewing significant policy decisions, courts review for arbitrariness by determining whether the agency supported its decision with "reasoned decisionmaking."[226] The story is more complicated for review of agency determinations of law, which is governed by a notoriously complicated set of doctrines. That said, where the *Chevron* doctrine applies, courts essentially apply reasonability review to an agency's construction of its own enabling act.[227]

Viewing agency discretion through the pervasive lens of deferential judicial review fosters a habit of thinking that an agency head has legal authority to make any choice that a reviewing court would later affirm. In one sense, this proposition is trivially true. If both action *A* and action *B* have "reasonable" factual and legal support, then the agency, provided it follows the right procedures and offers a suitably reasoned explanation, can choose either action with some confidence that its decision should survive judicial review. This way of thinking about discretionary choice may in turn lend itself to the idea that the President should be able to override an agency's choice of action *A* and instead force the agency to choose action *B*. After all, by hypothesis, a reviewing court would regard either choice as legal and reasonable, and the President is in charge of "all" executive power.

Seen through the lens of congressional intent, however, this account's conclusion that the agency head has statutory authorization from Congress to choose either action *A* or action *B* is mistaken because it confuses a deferential standard of judicial review with congressional expectations for agency action. Determining (or manufacturing) congressional intent is always a fraught business. Nonetheless, it would be very odd to impute to Congress an intent that essentially says to an agency: "After you have completed your factual, legal, and policy analysis and completed any required procedures, feel free to take whatever action you think you can persuade a reviewing court is reasonable." Instead, it borders on self-evident that Congress, when it delegates discretionary power to an agency, must intend that the agency choose the action that it has concluded *best* implements its statutory authority. If this proposition is correct, then, bracketing constitutional concerns for the moment, an agency head violates her statutory obligations any time she takes a

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224. 5 U.S.C. § 706(2)(E) (applying "substantial evidence" review to facts found via on-the-record proceedings); *id.* at § 706(2)(A) (establishing arbitrariness review as the default standard under the APA).

225. Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951) (describing substantial evidence review as review for reasonability); Constitution Pipeline Co. v. N.Y. State Dep't of Envtl. Conservation, 868 F.3d 87, 102 (2d Cir. 2017) (explaining that a court should uphold a fact determination under the arbitrariness standard where there is "sufficient evidence in the record to provide rational support").

226. Michigan v. EPA, 576 U.S. 743, 750 (2015) (explaining that federal agencies must engage in "reasoned decisionmaking" that is logical and rational).

227. *Id.* at 751 ("*Chevron* directs courts to accept an agency's reasonable resolution of an ambiguity in a statute that it administers.").

discretionary action that does not reflect her best judgment—even if she takes this action in obedience to presidential direction (and even if the action would survive deferential judicial review).

Not everyone agrees with this proposition, however. Most notably, Justice Kagan, while still a legal academic, made a very prominent case for a default rule that statutory delegations of authority to agencies implicitly grant directive authority to the President.[228] On this approach, although the Clean Air Act expressly grants authority to the EPA Administrator to promulgate NAAQS that in her judgment are "requisite to protect the public health,"[229] the Act also adds in invisible ink that the President can impose her judgment instead. Justice Kagan's analysis rested in part on the indisputable reality that presidents have many potent ways of exercising influence over executive agency officials—e.g., "the President nominates them without restriction, can remove them at will, and can subject them to potentially far-ranging procedural oversight."[230] Congress, which did not just fall off the turnip truck, understands these mechanisms of presidential influence perfectly well.[231] For Justice Kagan, this congressional awareness, combined with the difficulty of drawing practical distinctions between the effects of presidential "command" and "influence," justifies a presumption that when Congress delegates discretionary authority to an agency, it also delegates directive authority to the President to control its exercise.[232] Congress can rebut this presumption by signaling that it intends agency decisional independence, which it has done in the past by imposing statutory restrictions on presidential removal authority.[233] This analysis culminates in the conclusion that the President has *statutory* authority to direct the discretionary actions of executive agencies but not independent agencies.[234]

This case for reading presidential directive power as a matter of statutory construction into congressional delegations of authority to agencies suffers from several flaws. One compelling objection is that, as Professor Stack has documented, Congress has a long history of delegating statutory authority to agency heads subject to express presidential control.[235] This practice raises the natural inference that when Congress wants the President to control the exercise of an agency's statutory authority, Congress says so.[236]

On a broader note, Congress structures and empowers agencies to enable them to make informed judgments regarding how to solve social problems. The EPA Administrator, though necessarily a political figure, is also someone whom the Senate has confirmed as suitable for the task of determining environmental protections in accord with statutory instructions. To aid her in this task, Congress has created a massive expert bureaucracy to gather information, assess it, and make

228. *See generally* Kagan, *supra* note 28 (developing this claim).
229. 42 U.S.C. § 7409(b)(1).
230. Kagan, *supra* note 28, at 2327.
231. *Id.*
232. *Id.* at 2328.
233. *Id.* at 2327.
234. *Id.* at 2251.
235. Stack, *supra* note 10, at 278–83 (discussing "mixed" delegations that expressly allocate authority to both the President and an agency).
236. *Id.* at 288.

policy recommendations. Of course, in reaching an expert judgment regarding what rule to adopt, everyone accepts that the agency can and should receive suitable input from White House officials (or other agencies).[237] Also, as a matter of political reality, one should expect the Administrator's judgments to be more responsive to White House concerns than they would be if the world were free of political relationships. Nonetheless, it is difficult to see why Congress, when enacting a statute such as the Clean Air Act, would prefer that the EPA Administrator submit to presidential preferences formed outside the expert agency process rather than follow her own best judgments formed after a rigorous factfinding and policymaking process within that agency.

Note also that reading presidential directive power into statutory delegations of authority to agencies embeds a kind of lying in the law. Sticking with our EPA example, suppose that the Administrator's best judgment, formed after following extensive procedures designed to gather and assess highly technical information, is that she should promulgate a NAAQS setting particulate matter levels at *X* ppm, but she nonetheless bows to the President's preference of *2X* ppm. When promulgating this new rule, the agency will need to offer a reasoned explanation for it. This explanation, if fully truthful, might include a passage like: "The EPA determined that particulate matter in the ambient air should be limited to *X* ppm. We are adopting *2X* ppm instead because the President told us that was the thing to do." Instead, we should expect the agency to explain why it concluded that the *2X* ppm standard was the best. Accepting presidential directive authority not only enables the White House to block agencies from putting their best judgments into effect—it also buries those judgments. This analysis leads back to our earlier conclusion: unless the Constitution requires a different result, an agency head has a statutory obligation to exercise her statutory discretion according to her best judgment rather than follow someone else's judgment—even the President's.

According to the majority's analysis in *Seila*, however, the Constitution *does* require a different result because Article II's Vesting Clause grants the President ultimate authority to control all exercises of the "executive power."[238] Note well, however, that the bare text of the Vesting Clause only speaks to the issue of *who* has control of this executive power to implement the laws.[239] It does not speak to *what* the laws require in terms of substance or *how* to implement them in terms of process. The executive power to implement the laws does not carry with it the power to violate them (which would, in any event, violate the President's duties under the Take Care Clause).[240] It follows that, if a law requires whoever makes a decision—i.e., the "decider"—to follow a particular process, then the President, to

237. *See* Sierra Club v. Costle, 657 F.2d 298, 406 (D.C. Cir. 1981) (providing a canonical judicial discussion of the legitimate role of presidential influence and inter-agency coordination in shaping executive policymaking).

238. Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2191 (2020).

239. U.S. CONST. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America.").

240. *See* U.S. CONST. art. II, § 3 (providing that the President "shall take Care that the Laws be faithfully executed").

lawfully act as the decider, must follow this process.[241] She does not have legal authority to both act as the decider but also leave it to the agency head to comply with the decider's statutory obligations.

To illustrate this idea, suppose that an agency, after working through a notice-and-comment rulemaking process as required by statute, is on the verge of adopting rule *A*. The President has not participated in this process at all but nonetheless commands the agency to promulgate rule *B*, and the agency complies. Under these circumstances, the President, rather than the agency, is acting as the "decider." In that case, the President must comply with the notice-and-comment requirements that Congress has imposed on the decider to inform the rulemaking process and encourage adoption of better rules.[242]

One possible objection to the preceding analysis is that it does not consider the implications of *Franklin v. Massachusetts*, in which the Supreme Court concluded that the President is not an "agency" within the meaning of the Administrative Procedure Act ("APA") and that her actions are therefore not subject to review for abuse of discretion by the APA's terms.[243] The APA's definition of "agency" does not, on its face, suggest this result. This definition begins by casting an incredibly broad net, including "each authority of the Government of the United States," but then provides a short list of exceptions, including, among others, Congress and the courts.[244] This list of exceptions does *not* include the President. The Supreme Court nonetheless held, "[o]ut of respect for the separation of powers and the unique constitutional position of the President," that this "textual silence is not enough to subject the President to the provisions of the APA," which instead "would require an express statement by Congress."[245] Given this much, one might argue that, even if the Vesting Clause itself does not alter the statutory procedural obligations that the President must follow to seize the role of the "decider," Congress did in the APA. Suppose, for instance, that the APA requires an agency to follow notice-and-comment procedures to adopt a legislative rule. If the President uses her Vesting Clause authority to seize control of this rulemaking power, she, too, will have to comply with the APA. Compliance with the APA will be far easier for the President, however, because the APA (as read by *Franklin*) demands nothing from the President.

A good answer to this objection is that it requires extension of *Franklin* to a new context based on an implausible construction of congressional intent. In *Franklin* itself, the Court discussed the application of the APA to a claim that the President had violated the terms of a statutory delegation that ran directly to the

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241. *See* Kovacs, *Supersecretary*, *supra* note 27, at 75 (observing that the President, to execute the laws faithfully, must, among other things, implement Congress's choices regarding required procedure).

242. *Cf.* Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin., 407 F.3d 1250, 1259 (D.C. Cir. 2005) (listing purposes of notice and comment).

243. 505 U.S. 788, 800–01 (1992). For a detailed argument that the Supreme Court's holding that the APA does not apply to the President's exercise of statutory powers is flat-out wrong, see generally Kovacs, *Constraining*, *supra* note 27.

244. 5 U.S.C. § 551(1).

245. *Franklin*, 505 U.S. at 800–01.

President.[246] It is certainly fair to say that the prospect of applying the entire body of law that has grown up around the APA to every exercise by the President of her own statutory authority presents substantial separation-of-powers concerns and the danger of unexpected consequences. This concern applies with far less force, however, where the issue is whether to apply APA standards to isolated occasions where the President seizes control of an agency's statutory authority. More to the point, extending *Franklin* to this type of situation would impute to Congress something like the following very odd intent:

> We have granted this agency discretion to take various actions provided it follows procedures designed, among other purposes, to ensure that those actions are fair, well-informed, and serve the public interest. Of course, if the President, contrary to our expectation, seizes control of this discretion, then she does not have to follow any of them.

The implausibility of this intent leads back to the conclusion that we should not read the APA (or other procedural law) as implicitly excusing the President from carrying out an agency's procedural requirements when exercising the agency's power.[247]

This principle that the President must do the decider's work if she wishes to act as the decider neatly illuminates (and is illuminated by) the Ninth Circuit's notable decision in *Portland Audubon Society v. Endangered Species Committee*.[248] This case involved a formal adjudication conducted by the Endangered Species Committee, a group of high-level officials also known as the "God Squad," which granted an exemption from the Endangered Species Act to allow timber sales in the habitat of the Northern Spotted Owl.[249] Environmental groups sued, charging that White House officials had violated the APA's bar on ex parte contacts during formal adjudications from "interested person[s] outside the agency."[250] The Ninth Circuit agreed, declaring that, under well-settled principles of administrative and constitutional law, such ex parte contacts "are antithetical to the very concept of an administrative court reaching impartial decisions through formal adjudication."[251] The court added, "There is no presidential prerogative to influence quasi-judicial administrative agency proceedings through behind-the-scenes lobbying."[252]

But why, a committed unitarian might wonder, doesn't the Vesting Clause grant precisely this "presidential prerogative" to determine the fate of the owls? The

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246. *Id.* (discussing statutory claim based on 2 U.S.C. § 2a, which requires the President to send a report on final apportionments of congressional seats based on the decennial census to Congress).

247. *See* Kagan, *supra* note 28, at 2351 (contending that, where the President directs an agency action, "the President effectively has stepped into the shoes of an agency head, and the review provisions usually applicable to that agency's action should govern").

248. 984 F.2d 1534 (9th Cir. 1993).

249. *Id.* at 1537–38.

250. *Id.* at 1538–39 (noting that charges were based on reports that "at least three Committee members had been 'summoned' to the White House and pressured to vote for the exemption"); *see also* 5 U.S.C. § 557(d)(1) (forbidding ex parte contacts from "interested persons outside the agency" during formal proceedings).

251. *Portland Audubon Soc'y*, 984 F.2d. at 1543.

252. *Id.* at 1546.

God Squad was exercising executive power, and "*all*" of this power, according to *Seila*, belongs to the President.[253] Moreover, just a year before *Portland Audubon*, the Supreme Court had bent over backwards in *Franklin v. Massachusetts* to avoid applying the APA to the President.[254] Given this much, one might think that the Ninth Circuit should have concluded that the APA's bar on ex parte contacts, which applies to "interested person[s] outside the agency," ought not apply to the President.[255]

According to Professor Adrian Vermeule's diagnosis, the key to understanding *Portland Audubon*'s result is that the Ninth Circuit did not actually rely on law to reach its conclusion.[256] Instead, the court implicitly relied on unwritten conventions that have governed presidential control of agency decision-making "across many administrations of both parties and in a diverse range of settings."[257] One very strong convention is that presidential interference with the results of on-the-record hearings "is simply not done."[258] Presidents, although they may be the fountains of all executive power, are simply not supposed to interfere when the Federal Aviation Administration decides to revoke a pilot's license or the EPA decides to sanction a firm for polluting.[259]

The principle that the decider must do the decider's work provides an additional legal rationale for why *Portland Audubon* reached the right result. The God Squad granted an exemption from Endangered Species Act requirements after a formal adjudication, which, by statute, requires an on-the-record adjudicative process to help ensure a rational and fair result.[260] On a strong unitarian view of the matter, President Bush, using the ultimate control of the executive power granted by the Vesting Clause, could have taken over this process of implementing the law himself—i.e., he could have conducted the formal adjudication if he possessed sufficient time and interest to assess the relevant evidence, issue a decision for which he took public responsibility, etc. The President's executive power under the Vesting Clause did not, however, authorize him to leave the God Squad in place as the adjudicator while at the same time distorting its substantive judgment. In other words, President Bush may have had constitutional authority to make himself the

253. Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2191 (2020). *But see Portland Audubon Soc'y*, 984 F.2d at 1546 (concluding that application of the APA's bar on ex parte contacts would not interfere with presidential prerogatives as the President has no authority "to influence the outcome of administrative adjudications through ex parte communications").

254. *See* 505 U.S. 788, 800–01 (1992); *cf.* Kovacs, *Constraining*, *supra* note 27 (arguing against *Franklin*'s conclusion that the APA does not apply to the President).

255. *But see Portland Audubon Soc'y*, 984 F.2d at 1545 (rejecting arguments that the President is not an "interested person" or "outside the agency").

256. Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1225 (2013).

257. *Id.* at 1225–26.

258. *Id.* at 1226.

259. *Id.*

260. *See* 5 U.S.C. §§ 554, 556–557 (providing extensive procedures for formal adjudications); *see also Portland Audubon Soc'y*, 984 F.2d at 1540 (observing that "[c]ertain administrative decisions closely resemble judicial determinations and, in the interests of fairness, require similar procedural protections").

adjudicator; he did not have constitutional authority to direct the God Squad how to adjudicate.

B. How Presidential Takeovers of Agency Statutory Authority Might Work

This Section briefly explores what it might mean in practice for the President to properly take over an agency's statutory power. The difficulty of doing so will naturally depend on the procedural demands of the type of action at issue (which Congress could, in theory, change if sufficiently provoked). There are some types of actions that the President presumably would never choose to control because doing so would require too much of her personal time and energy. Process burdens need not block a President from taking over many agency actions, however, either because the action demands little if any process, e.g., issuance of a policy statement, or because the President could delegate the day-to-day work of carrying out procedural requirements to subordinates, e.g., notice-and-comment rulemaking. For any of these actions subject to judicial review, however, the President should have to take public responsibility for seizing control of an agency's power and offer a reasonable explanation for her subsequent action.

Requiring the President to comply with agency procedural constraints should preclude her, as a practical matter, from taking over certain agency functions. Consider, for example, that formal adjudications under the APA are usually performed by administrative law judges ("ALJ") who conduct hearings where they decide on the admissibility of evidence and assess its weight.[261] Although on a maximalist reading of the Vesting Clause, the President ought to be able to step into the shoes of an ALJ and conduct such a hearing, we can confidently predict that no President ever will do so given other demands on her time.

The President could, however, find the procedural burdens of taking over high-level agency decisions relatively manageable. Given the sheer number of decisions a large agency must make, it would be unrealistic, to say the least, to expect an agency head to master all the details relating to every action the agency takes. Instead, an agency head must generally act as upper management, providing overall direction to the agency and fostering political accountability by providing a point of contact between the bureaucracy and the President.[262] In response to these bureaucratic facts of life, administrative law has found ways to allow agency heads to determine how deeply they wish to immerse themselves in the details of the decision-making process. Sticking with formal adjudication as an example, the APA authorizes ALJs to conduct initial hearings but also authorizes agency heads to conduct de novo review of ALJ decisions.[263] The procedures for internal review depend on agency rules or enabling acts but are generally appellate in nature—i.e., the parties submit their arguments in writing and may have the chance for oral

261. 5 U.S.C. § 556(b).

262. *See, e.g.*, Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683, 724–25 (2016) (observing that presidential control of agencies furthers positive values of "political accountability and regulatory coherence").

263. 5 U.S.C. § 557(b).

argument.[264] Typically, the work of actually drafting an opinion is not performed by agency heads themselves but instead is "delegated in most cases to opinion writing sections or other specialized staff."[265] An agency head need not worry that a pesky litigant will someday quiz her regarding the details of a decision because administrative law applies a very strong presumption of regularity that blocks efforts to plumb the "mental processes of administrative decisionmakers."[266]

Similarly, notice-and-comment rulemaking, the default process under the APA for promulgating a legislative rule, can demand relatively little of an agency head. Although the core statutory requirements of notice-and-comment rulemaking are quite simple,[267] Congress, presidents, and the courts have teamed up to encrust this process with many additional requirements, making it difficult to implement for significant legislative rules.[268] It is common for this process to take years of work as agencies produce lengthy, highly technical proposals, impact analyses, and final rules.[269] No one expects an agency head who is legally in charge of a rulemaking to draft proposed rules, respond to public comments, or even to read in detail final rules that may spread across dozens of triple-columned pages of the Federal Register.[270] Instead, the role of the agency head is political and managerial in nature.[271]

By hypothesis, the President, when exercising an agency's statutory power, should be able to use the same managerial tools and resources as the agency head. As a result, one can imagine the President "taking control" of a formal adjudication or of a notice-and-comment rulemaking without too much interference with her day job. In a formal adjudication, the President might take over an agency's review of an ALJ's decision, direct that the parties' briefs be sent to her, and instruct an assistant to draft a decision for her later signature. Turning to notice-and-comment

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264. *See* A GUIDE TO FEDERAL AGENCY ADJUDICATION 113 (Jeffrey B. Litwak, ed., 2d ed. 2012) (characterizing internal administrative review as similar to judicial review); *see, e.g.*, 47 C.F.R. § 1.276 (2019) (setting forth procedures for appeal and review by the FCC of initial decisions).

265. *See* Sharon B. Jacobs, *Administrative Dissents*, 59 WM. & MARY L. REV. 541, 596 (2017) (describing work process of administrative commissions).

266. Dep't of Commerce v. New York, 139 S. Ct. 2551, 2573–74 (2019) (quoting Citizens to Pres. Overton Park v. Volpe, 401 U.S. 402, 420 (1971)) (explaining that a "'strong showing of bad faith or improper behavior'" is required to overcome "the general rule against inquiring into 'the mental processes of administrative decisionmakers'").

267. *See* 5 U.S.C. § 553 (establishing the basic template for notice-and-comment rulemaking).

268. Sidney A. Shapiro & Richard W. Murphy, *Arbitrariness Review Made Reasonable: Structural and Conceptual Reform of the "Hard Look,"* 92 NOTRE DAME L. REV. 331, 338–49 (summarizing judicial, legislative, and executive encrustations on the notice-and-comment process).

269. *See id.* at 350–51 (noting the phenomenon of "incredibly long, impenetrable statements of basis and purpose that emerge from complex and controversial rulemakings").

270. *See id.* at 364 (noting the implausibility of expecting an agency head to have read and absorbed a "concise general statement" that may span scores of pages of the Federal Register).

271. Cary Coglianese, *The Emptiness of Decisional Limits: Reconceiving Presidential Control of the Administrative State*, 69 ADMIN. L. REV. 43, 75 (2017) ("After all, administrators do not research and draft rules all on their own; they nevertheless still make 'the decision' by signing the final documents that their staffs prepare.").

rulemaking, under the proposed understanding of unitarian theory, the President could not exercise directive authority to force the agency head to promulgate a rule that the agency head rejects. The President could, however, use her constitutional control of the executive power to take this action in her own name. To carry out this task, she would be able to use any internal agency resources available to the agency head as well as White House resources. The upshot might be that the President would order White House officials to manage agency staffers as they develop the President's preferred rule with minimal personal involvement by the President herself.

Agency actions that are not subject to extensive procedural requirements would not present these sorts of managerial complications. Agencies need not, for instance, use notice-and-comment procedures to develop guidance documents, including interpretive rules and policy statements, that they use to control internal agency operations and to guide the public.[272] If an agency does not need to use a particular procedure to take an action, then, under the proposed framework, neither would the President.

So far, this analysis of what it might mean in practice for a President to take charge, as it were, of agency procedures might seem rather anti-climactic. Some types of actions would present some procedural bother, but given presidential resources, it should be manageable if the President thinks an issue important enough.

There are, however, two more critical and widely applicable procedural requirements to consider. One relates to transparency. An agency head, who has a legal obligation to exercise her statutory discretion according to her best judgment,[273] should not defraud the public by signing off on an action that does not represent her best judgment. Instead, if the President is the true "decider" of a publicly disclosed action, such as a rule or an adjudicative decision, then the President should indicate that it was issued under her authority. It bears emphasis that this conclusion reinforces a theme often emphasized by unitarians that presidential control of agency action enhances the President's accountability to the electorate.[274]

A second critical requirement is a duty of reasoned decision-making and explanation that should apply to any action subject to judicial review. The Supreme Court has shown a marked tendency to give presidents special insulation from judicial review.[275] As discussed above, in *Franklin v. Massachusetts*, the Court

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272. *See* 5 U.S.C. § 553(b) (creating an exception to notice and comment for interpretative rules and general statements of policy); *id.* at 552(a)(1)(D) (requiring publication of, inter alia, policy statements and interpretive rules).

273. *See supra* notes 221–238 and accompanying text (making the case that this duty exists).

274. *See* Rao, *supra* note 5, at 1215 ("Recognizing the president's control over the executive branch reinforces his responsibility—an important alignment of power and accountability.").

275. *See, e.g.*, Jonathan R. Siegel, *Suing the President: Nonstatutory Review Revisited*, 97 COLUM. L. REV. 1612, 1612 (1997) (noting that the Supreme Court, in addition to holding that the President is not an "agency" subject to APA review, has also "traditionally

relied on separation-of-powers concerns to justify concluding that the President should not be regarded as an "agency" within the meaning of the APA and is therefore not subject to its judicial review provisions.[276] Moreover, in those cases where a limited form of nonstatutory judicial review of presidential action is available, courts tend to be extremely deferential.[277] Where, however, the President takes over an agency statutory power, that power should not otherwise expand or contract in any way. It follows that judicial review, as a fundamental legal constraint on agency statutory power, should apply to the President's exercise of an agency's power just as if the President were the agency.[278]

Significant agency discretionary decisions are generally subject to arbitrariness review for "reasoned decisionmaking."[279] According to the Supreme Court's canonical *State Farm* gloss, to survive this form of review, an agency must demonstrate that it based its discretionary decision on consideration of the "relevant factors," that it analyzed all "important aspects of the problem," and that it avoided a "clear error" in judgment.[280] In addition, where an agency shifts from an old policy to a new one, it must acknowledge the change in course, give due consideration to any serious reliance interests its old policy may have engendered, and offer a reasoned explanation for the changed policy itself.[281] To justify her use of an agency statutory power to take some action, the President must take public responsibility for an explanation that satisfies all of these requirements.

C. Presidents Should Generally Find That Hostile Takeovers Are Not Worth It.

Some of the preceding Section's efforts to imagine how presidential takeovers of agency statutory authority might work in practice have an air of speculative unreality. The notion of a President taking over review of a formal adjudication, for instance, defies deep-seated conventions regarding how governance should work.[282] Also, even if the President could minimize the personal bother of managing a notice-and-comment rulemaking to an acceptable degree, publicly displacing agency machinery would suggest serious governmental dysfunction. This implausibility is, however, a feature rather than a bug for the

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held that a federal court may not entertain a suit seeking an injunction directed at the President").

276. 505 U.S. 788, 800–01 (1992); *see also supra* note 245 and accompanying text (discussing *Franklin*'s holding on the inapplicability of the APA to the President).

277. *See* Kovacs, *Constraining*, *supra* note 27, at 79–83 (discussing case law on review of presidential actions).

278. *See* Kagan, *supra* note 28, at 2351 (contending that, where the President directs an agency action, "the President effectively has stepped into the shoes of an agency head, and the review provisions usually applicable to that agency's action should govern"); *cf.* Kovacs, *Constraining*, *supra* note 27, at 110–12 (proposing that "[t]he Statutory President's actions should be reviewed under the same standard as any other statutory delegate;" discussing other scholars' approaches to the problem).

279. Michigan v. EPA, 576 U.S. 743, 750 (2015).

280. Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins., 463 U.S. 29, 43 (1983).

281. FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009).

282. *See* Vermeule, *supra* note 256, at 1226 (explaining that presidential interference with on-the-record proceedings "is simply not done").

purpose of understanding how agency decisional independence could persist in a unitarian world. Presidents should seldom find that the benefits of taking over an agency's statutory authority justify the costs in terms of procedural burdens, political exposure, and legal risk.

As a threshold matter, under the proposed framework, a presidential takeover of agency authority is only necessary where the President and an agency disagree in some important way regarding a particular course of action. Where they agree on an action, there is no impediment to the President eagerly claiming credit for it in a Rose Garden ceremony (as Justice Kagan has observed they like to do) but then leaving it to the agency itself to carry out any procedural requirements.[283]

Disagreements between presidents and agency heads certainly occur, but again, presidents have potent means of "persuasion" at their disposal.[284] Without belaboring the point, presidents appoint the heads of executive agencies and have legal authority to fire them at will.[285] The President's role as leader of her political party naturally enhances her power to persuade agency heads from that party. Given these and other levers of influence, agency heads have strong incentives to "agree" with the President's preferences—or at least to say that they do.

The statutory protections from removal enjoyed by the heads of independent agencies complicate this picture but less so than one might think. The vast majority of independent agencies are run by boards composed of multiple members serving staggered terms,[286] and about half of these are subject to a partisan-balance requirement designed to limit either major party to a bare majority.[287] As a result of this structure, a new President may find that various independent agencies remain in the control of members of the opposing party who are protected from removal. The President should soon have a chance to appoint replacements, however, given regular retirements on staggered schedules as well as the early retirements that often attend a change in administration.[288] In most cases, it should not take very long for the balance of power on a multi-member board to shift to

283. *See* Kagan, *supra* note 28, at 2301–03 (discussing President Clinton's proclivity for "appropriating" credit for agency action).

284. *See, e.g.*, *id.* at 2298 ("Agency officials may accede to his preferences because they feel a sense of personal loyalty and commitment to him; because they desire his assistance in budgetary, legislative, and appointments matters; or in extreme cases because they respect and fear his removal power.").

285. *See, e.g.*, Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1138 (2000) (noting that protection from presidential removal has been "the critical criterion by which scholars typically distinguish between 'independent' and executive agencies").

286. Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (And Executive Agencies)*, 98 CORNELL L. REV. 769, 790, 793–95 (2013); *cf.* Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2201 (2020) (observing that Congress has only rarely "provided good-cause tenure to principal officers who wield power alone rather than as members of a board or commission;" striking good-cause restriction on removal of the Director of the Consumer Financial Protection Bureau based on this distinction).

287. Datla & Revesz, *supra* note 286, at 797.

288. *Id.* at 820–21.

persons from the President's party.[289] More immediately, the President generally has power to designate which member of a multi-member board serves as its chair, controlling "day-to-day administration of the agency, agency personnel, and the agency's agenda."[290]

Suppose nonetheless that an agency head and the President are, as sometimes happens, at loggerheads regarding some important agency action. For the President to push matters to the stage of an outright takeover, she would need to determine that the benefits of resolving the issue in her favor are worth the price to be paid. This price would include management costs that vary according to the type of action at issue, e.g., promulgation of a notice-and-comment rule as opposed to a policy statement.[291] For some actions, these management costs by themselves would be enough to dissuade the President, but for other actions they might not be.

The price of a takeover would also include the cost of public disagreement with the agency regarding a matter in the agency's regulatory domain. This cost would naturally vary according to the nature of the disagreement, its relation to agency expertise, and the political landscape. In some circumstances, it could be very steep. For instance, if the President takes control of the EPA Administrator's Clean Air Act authority to issue NAAQS governing emissions of an air pollutant,[292] then the President has, at the very least, indicated strong disagreement with the EPA Administrator's regulatory preference and cannot avoid political responsibility for the outcome.[293] One might think that this action, in addition to humiliating the Administrator, would destroy her authority within the agency and lead to her resignation, which would presumably reflect badly on the President.[294]

In addition to carrying political costs, the President's disagreement with the Administrator would also increase legal risks on judicial review. As part of the rulemaking process, the President would need to approve, in her own name, an explanation for her preferred rule, which courts would subject to arbitrariness review for reasoned decision-making.[295] Although such review is supposed to be deferential, a reviewing court would know that the EPA Administrator would have reached a different conclusion. The court, being wise to the ways of the world, would also know that this difference of opinion was probably not motivated by the

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289. *Id.* at 820 (explaining why "[p]residents gain control over independent agencies more quickly than a formal reading of the enabling statutes would predict").

290. *Id.* at 796.

291. *See supra* notes 261–272 and accompanying text (discussing how presidents might manage various agency procedures).

292. 42 U.S.C. § 7409(b)(1) (granting the Administrator authority to promulgate national ambient air quality standards which, in her judgment, are "requisite to protect the public health" with "an adequate margin of safety").

293. *Cf.* Datla & Revesz, *supra* note 286, at 814 (explaining that presidents, to evade political responsibility, "often prefer to use agencies as a political shield by defending controversial decisions as the product of agency expertise").

294. *See, e.g.*, *id.* at 813–14 (discussing the costs of exercising the President's removal power).

295. *See supra* notes 275–81 and accompanying text (contending that, where the President takes over an agency's statutory power, the President's resulting action should be subject to judicial review just as if the President were the agency).

President's disagreement with the Administrator on some point of technical expertise. Instead, the presidential intervention would suggest that White House functionaries determined they wanted a particular regulatory result for political reasons and then forced development of a post hoc, pretextual explanation to support it.[296] These circumstances would not be propitious for judicial review.

Presidential interventions in agency adjudications, especially those that determine individual rights, would pose additional problems of their own. Even strong defenders of presidential authority have long been concerned to protect "quasi-adjudicative" decisions from presidential interference—as demonstrated by Madison's short-lived proposal in 1789 to protect the independence of the comptroller's decisions on claims against the United States.[297] The basic problem with presidential control of adjudications is not that presidents have some sort of inherent incapacity that makes them worse adjudicators than agency officials. Suppose, for instance, that the federal government in 1789 were so small that President Washington could run it all by himself. In that case, there would presumably have been no objection to him, rather than the comptroller, determining claims against the United States in the usual course of bureaucratic business. Precisely because the federal government has always been too big for the President to run by herself, however, we cannot expect the President to determine the general run of adjudications that Congress has charged an agency to determine.[298] It follows that the President will take over control of an adjudication only if it both comes to her attention, and she realizes she has some powerful special interest in it.

Due process, which will apply where an adjudication threatens to deprive a person of liberty or property, guarantees a neutral decision-maker.[299] To satisfy this guarantee, an adjudicator must be free of both bias and the appearance of bias.[300] It is not difficult to imagine a court concluding that the President, by reaching out to grab hold of a particular adjudication among countless possibilities, necessarily violates at least the appearance of neutrality.[301]

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296. *Cf.* Strauss, *supra* note 9, at 753–54 (observing that "presidential" interventions very seldom come from the President herself but instead from White House functionaries and, in ordinary administration, are generally politically driven).

297. *See supra* notes 62–66 and accompanying text (discussing Madison's short-lived proposal to insulate the independence of the comptroller's decisions because they partook of a "judicial" character).

298. *See* President and Accounting Officers, 1 Op. Att'y Gen. 624, 625, 628–29 (1823) (Attorney General Wirt) (discussing the absurdity of the President deciding all matters charged to agency officials); *see supra* notes 75–78 and accompanying text (discussing Attorney General Wirt's opinion).

299. *See* U.S. CONST. amend. V.

300. *See, e.g.*, Franklin v. McCaughtry, 398 F.3d 955, 962 (7th Cir. 2005) (observing that a decisionmaker cannot render a decision that complies with due process if there has been prejudgment of the facts); Cinderella Career & Finishing Sch., Inc. v. FTC, 425 F.2d 583, 590–91 (D.C. Cir. 1970) (finding due process violation where FTC commissioner appeared to have prejudged the facts of a formal adjudication).

301. *But see* Vermeule, *supra* note 256, at 1227 (suggesting that the contention that presidential intervention in an administrative adjudication violates the due process guarantee of neutrality begs the question of whether the President may simply be regarded as "the paramount decisionmaker within the proceeding").

Independent of due process, publicly disclosed presidential interference in adjudications would carry political and legal costs for the simple reason that this practice would look—not to put too fine a point on the matter—absolutely terrible. As Professor Vermeule observed, strong conventions that have endured across many administrations bar this sort of interference, and their violation would send shock waves through the relevant legal and administrative communities.[302] On a political level, overriding administrative machinery would likely create the appearance that the President was abusing her power to hurt enemies or benefit friends. In those cases where a losing party seeks judicial review, a court would naturally be suspicious that the intervention was prompted by corrupt motives and arbitrary.

This brief exploration of presidential incentives is necessarily incomplete and speculative. Presidents might sometimes find it in their interests to mount hostile takeovers of agency statutory authority to impose their preferences. Still, given the costs and benefits involved, it seems safe to hazard that presidents should generally find that it is better for them to try to achieve their ends by persuading agency heads rather than by seizing their power.

D. Have We Been Debating How Many Administrators Can Sit on The Head of a Pin This Whole Time?

This Article's main project has been to help preserve a psychology of independent agency decision-making in the event that the Supreme Court follows through on the unitarian logic of *Seila Law LLC v. Consumer Financial Protection Bureau*.[303] To this end, this Article has contended that the President must, when exercising power that Congress has vested in an agency, honor all the legal constraints that Congress has imposed on the agency's exercise of this power. In short, if the President wants to be the "decider," she must do the decider's work. Both the framing of the problem and the proposed solution, however, have assumed the truth of an important proposition that this Article has not defended—namely, that there is a meaningful difference between the President exercising legal control over an agency's statutory authority as opposed to the President using her potent tools of "persuasion" to get what she wants. Leading commentators disagree regarding the truth of this proposition, and given the nature of the problem, they will probably do so indefinitely.

The leading proponent of the view that it is meaningful and important in this context to distinguish between command and persuasion is the scholar who introduced the elegant "overseer–decider" framing, Professor Peter Strauss.[304] For him, the overseer–decider distinction implicates "an ineffable but central question

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302. *Id.* at 1225–26.

303. *See* 140 S. Ct. 2183, 2197–98 (2020) (stressing that "[t]he entire 'executive Power' belongs to the President alone").

304. *See* Strauss, *supra* note 9, at 696. Professor Strauss's perspective is of special interest given his service as General Counsel for an independent agency with substantial technical expertise—the Nuclear Regulatory Commission. Peter L. Strauss, *On Capturing the Possible Significance of Institutional Design and Ethos*, 61 ADMIN. L. REV. 259, 268–70 (2009) (describing this service "as a general education in the bearing of institutional relationships and realities").

about psychology of office" that relates to the balance between politics and law that administrative law seeks to strike.[305]

Accepting the President as the "decider" for all discretionary agency decisions instills a psychology of obedience. If the President says "jump" to an agency head, then her job is to jump. This type of presidential control of agency action shoves the balance of governance towards political decision-making by shifting authority to White House officials who likely have political motivations, but limited relevant expertise, and who are not subject to the procedural and transparency requirements that typically control agencies.[306]

Styling the President as the "overseer," by contrast, promotes a psychology of (respectful) independence. The exercise of independent judgment by an agency head "operat[ing] at the head of a professionally staffed agency" pushes the balance of governance away from political obedience to the White House and toward the type of "reasoned decisionmaking and application of expert judgment that remain major rationales of the administrative state."[307] Professor Strauss concedes that "[i]n the real world," the overseer–decider distinction is arguably a fragile one imperiled by "the impulses of political loyalty to a respected superior and of a wish for job continuity."[308] Still, he believes that the stiffened spine of an agency head that comes with knowing that she has legal responsibility to make a decision—rather than a legal obligation to submit to the President's purported preferences—can make a positive difference.[309]

On the other side of this issue, Professor Cary Coglianese argues that using the overseer–decider distinction to limit presidential decisional control "tilts at windmills."[310] In his assessment, the brute political fact is that presidents exercise "clear decisional control over actions" by agencies even while claiming to leave agencies in legal charge of their affairs.[311] He contends that the overseer–decider distinction is unclear, unenforceable, and "of virtually no consequence in the everyday power struggles between the White House and administrative agencies."[312] Professor Coglianese adds that Professor Strauss's claim that "a decisional limit offers a valuable behavioral reinforcement to administrators" lacks empirical proof and really boils to "belief, or actually faith."[313]

Certainly, no rigorous empirical study documents the effects of a psychology of independence versus submission among high office holders, and it is difficult to imagine how such a study could be conducted in a meaningful way. Still, there are historical examples of agency heads asserting their independence.[314] Also, by introspection, we are all familiar with the difference between exercising

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305. Strauss, *supra* note 9, at 712–13.
306. *Id.* at 754.
307. *Id.* at 713–14.
308. *Id.* at 714.
309. *Id.* at 714–15.
310. Coglianese, *supra* note 271, at 50.
311. *Id.* at 49–50.
312. *Id.*
313. *Id.* at 77.
314. *See* Strauss, *supra* note 9, at 705–08 (identifying examples).

independent judgment and being subject to command. The available evidence, limited though it may be, surely leaves discretionary space for reasonable minds, such as those of Professors Strauss and Coglianese, to reach differing judgments regarding the effects of the psychology of officeholders on governance. The judgment any given person reaches will no doubt largely be a function of her "priors," intuitions, and experiences.

As the existence of this Article indicates, this Author finds Professor Strauss's diagnosis more compelling both as a description but also, frankly, as an aspiration. To admit one of the Author's priors, the current historical moment does not call for increasing the president's power to bend agencies to her will. We should want agency heads to regard themselves as something more than the President's minions and reasonably—or at least plausibly—expect this attitude to promote better governance.

The Supreme Court's recent maximalist approach to the unitary executive poses a challenge to those hoping to preserve the possibility of an "independent" psychology of office. This Article's response to this challenge accepts for the sake of argument that the President can seize control of any discretionary authority that Congress has granted an agency by statute. It also insists, however, that to take over the role of the "decider" legally, the President must do all the decider's work. Until the President expressly does so, the job of the decider remains with the agency head, who should exercise her best independent judgment rather than defer to the judgment of a President (or, more likely, White House functionaries) who did not do the work.

III. AN IMPLICATION OF TAKEOVER AUTHORITY FOR REMOVAL AUTHORITY

As we have seen, from the Decision of 1789 through *Seila*, discussions of the President's directive power to control agency discretionary decisions are commonly intertwined with analysis of the President's authority to remove agency officials.[315] Before closing, this Article will briefly explain why its proposed approach, conceding that the President can seize control of an agency's statutory power and act as the "decider" so long as she does the decider's work, strengthens the case for the constitutionality of good-cause restrictions on presidential removal of agency officials.

In large part, the clash over the constitutionality of good-cause restrictions reflects differing conceptions of the scope of the President's authority to control agency discretionary actions. The unitarians start from the proposition that the President has directive authority over all agency discretionary actions.[316] This authority enhances governmental "energy," coordination of effort within the government, and enables the electorate to hold the President properly accountable

315. *See generally supra* Part I (discussing highlights from two centuries of arguments concerning presidential directive and removal authority).

316. *See supra* note 5 (collecting unitarian commentaries).

for government actions.[317] To maximize presidential control over agency discretion across a vast administration, the President must have authority to remove any agency head who has departed from the President's wishes in the past or might do so in the future. Agency heads, aware of the sword hanging over the necks, will pay careful attention to presidential wishes and know that if they stray from them too far, the President will replace them.[318] Requiring "good cause" for removal is unconstitutional because it impedes the President from exercising maximum control.[319]

The contrary view, which allows good-cause restrictions so long as they do not impede the President's discharge of the executive power or her obligations under the Take Care Clause, denies the premise that the President must be able to control all discretionary decisions by agency officials.[320] Denial of this premise left space for the Court to conclude in *Morrison* that the President, to discharge her constitutional functions, need not control the independent counsel's prosecutorial decisions insofar as they fell within her legal discretion.[321]

Under this Article's proposed framework, good-cause restrictions on the President's removal authority should be permissible even if one concedes the unitarian point that the President has constitutional authority to take over agency statutory discretion. Although the good-cause standard (or a close relative) has appeared in statutory limits on removal for over a century, its meaning remains unsettled.[322] That said, if an agency official were to violate the terms of a lawful exercise of binding authority by the President, this transgression should constitute a form of defiance sufficient to justify termination under a good-cause standard.[323] It

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317. *See* Calabresi & Prakash, *supra* note 5, at 639 (noting the Framers "wished to construct a unitary Executive since they felt it was conducive to energy, dispatch, and responsibility"); Rao, *supra* note 5, at 1215 (noting that "[r]ecognizing the President's control over the executive branch reinforces his responsibility—an important alignment of power and accountability").

318. *See* Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2197 (2020) (quoting Bowsher v. Synar, 478 U.S. 714, 726 (1986)) (explaining that the presidential power to control agency officials must include power to remove them so that they will "fear" and "obey"); Rao, *supra* note 5, at 1228 (noting that, "[w]ithout any action on the President's part, officers subject to removal by the President will be encouraged to exercise their discretion in line with the President's policies").

319. *See Seila*, 140 S. Ct. at 2213 (Thomas, J., concurring in part and dissenting in part) (citing Myers v. United States, 272 U.S. 52, 115, 134, 150, 172, 176 (1926), for the proposition that the President must have "unrestricted" removal power).

320. Morrison v. Olson, 487 U.S. 654, 690–92 (1988).

321. *Id*. at 692 (noting that the good-cause removal provision left the President with "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").

322. Jane Manners & Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 COLUM. L. REV. 1, 4 (2021) (observing that "[n]either Congress nor the Supreme Court has ever defined" the meaning of for-cause removal provisions and that "appeals court judges have been unable to agree on their scope").

323. *Cf.* Cass R. Sunstein & Adrian Vermeule, *Presidential Review: The President's Statutory Authority Over Independent Agencies*, 109 GEO. L.J. 637, 640 (2021) (identifying a "minimalist" view that permits the President to terminate a head of an independent agency "for serious improprieties" that do not involve policy).

should follow that, in any case where the President does the work required to take over an agency's discretionary statutory authority, the President would also have good cause to remove an agency head who defies the President's direction.

A proponent of strong presidential authority might at this point object that the real point of plenary removal authority is not to enable the President to control particular decisions but instead to allow her to exercise maximum influence over the general approach and tenor of her administration—i.e., to ensure that agency heads are always "working to the President." This argument is tantamount, however, to contending that the President ought to be able to decide how the laws should be executed while ignoring legal constraints on their implementation because the President is too busy to honor them. The real crux of the problem is that, given the size of the executive branch, the notion that the President could carry out all of its functions by herself is, as Attorney General Wirt recognized in 1823, flatly absurd—which is why we have agencies in the first place.[324] The answer to this conundrum is not to permit the President to exercise an agency's statutory authority without the bother of complying with its legal limitations. Rather, the better answer is that, where the President is too busy to execute an agency's statutory authority legally and rationally, she should leave this task to the agency itself. The President would retain, of course, the role of "overseer," which would include a power and duty to remove an agency head who has abused her statutory authority or otherwise violated the law. In such a case, the President should have good cause for the removal.[325]

In sum, good-cause restrictions on removal authority should not prevent the President from controlling any agency discretionary decision for which she is willing to do the work that the law requires of the "decider." Where the President does not do this work, she should instead play a more limited supervisory role. When acting in this capacity, she should have good cause to remove any agency official who violates the law or otherwise abuses her discretion. Under either scenario, at-will removal authority is not necessary to protect the President's authority to control agency decision-making.[326]

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324. *See supra* notes 70–80 and accompanying text (discussing Attorney General Wirt's 1823 opinion).

325. *See* Manners & Menand, *supra* note 323, at 9 (explaining that the "INM" standard (i.e., inefficiency, neglect of duty, malfeasance in office) permits removal "where officials act wrongfully in office, neglect their statutory duties, or perform them in such an inexpert or wasteful manner that they impair the public welfare").

326. The collapse of the functional argument that the President must have plenary removal power to maintain her directive power does not by itself fully settle the issue of whether good-cause restrictions on removal are constitutional. For instance, there is still the purely definitional argument that one of the elements of the "executive power," as understood at the Constitution's adoption, is the power to remove agency officials. Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2197 (2020). For what it is worth, not all early authorities agreed with this definitional claim. *See supra* note 53 (collecting statements from representatives during the debate over the Decision of 1789 who rejected the claim that removal is an element of the "executive power").

CONCLUSION

In 2020's *Seila Law LLC v. Consumer Financial Protection Bureau*, the Supreme Court, in keeping with a strong version of the unitary executive theory, emphasized that Article II's Vesting Clause grants "all" executive power to the President.[327] In close to the same breath, it radically recharacterized and narrowed the two leading precedents supporting the existence of independent agencies, *Humphrey's Executor v. United States* and *Morrison v. Olson*, yet expressly declined to overrule them.[328] The combined effect of these moves was to avoid ruling that independent agencies are unconstitutional yet destroy the legal underpinnings for their continued existence.[329]

In response to the possibility that the Court may follow through on the logic of *Seila*, this Article has explored an alternative means for protecting agency decisional independence that relies on a type of bank shot. Bowing to what might prove inevitable, it begins by accepting the unitarian claim that the President can take control of any discretionary power that Congress has granted to an agency. It insists, however, that, where the President uses her Vesting Clause power to seize control of agency statutory discretion, she must comply with the procedural constraints that Congress placed on the agency head. The "decider," even if it is the President, must do the decider's work. Moreover, her resulting action should be subject to judicial review just as if the President were the agency. Once these burdens are recognized, presidents should generally find that it is in their interests to leave agencies in charge of making agency decisions—just as Congress intended.

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327. *Seila*, 140 S. Ct. at 2197.

328. *Id.* at 2192, 2198–201 (recharacterizing but declining to "revisit" Humphrey's Ex'r v. United States, 295 U.S. 602 (1935), and Morrison v. Olson, 487 U.S. 654 (1988)).

329. *Cf. id.* at 2212 (Thomas, J., concurring in part and dissenting in part) (observing that, "with today's decision, the Court has repudiated almost every aspect of *Humphrey's Executor*").