

# The Removal Power: A Critical Guide

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## Introduction

In *Seila Law v. Consumer Financial Protection Bureau* (CFPB), the Supreme Court held that the creation of an independent agency headed by a single director with for-cause removal protections violated the executive-power provisions of the Constitution. This essay summarizes the scholarly and judicial debates over the removal power, specifically over the meaning of “the executive power,” the historical practice, and the Court’s crucial precedents. Although it seeks to provide a reasonable survey of the competing positions, it stakes out and tentatively defends particular answers. It then critically assesses the Court’s decision in *Seila Law*. In summary, the Court took a minimalist approach by refusing to extend earlier precedents upholding for-cause removal provisions to the “new” situation of single-director agencies. Nevertheless, it is unclear what is left of the reasoning of the earlier, functionalist precedents after *Seila Law*. The decision thus represents the Court’s continued return to formalist constitutional interpretation in separation-of-powers cases. The essay then also assesses the dissent, which is littered with citations to the academic literature and other historical materials. Interrogating those sources shows that most do not actually support the dissent’s position.

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Part I canvasses four plausible readings of Article II's Executive Vesting Clause:<sup>1</sup> the cross-reference theory, the residual theory, and two versions of the law-execution theory. Which theory is correct has implications for the removal power. The prevailing formalist theory is the residual theory, which maintains that all "executive" power is vested in the president except as otherwise limited in the Constitution, and that removal is an "executive" power that is therefore vested in the president. I shall suggest (and I have elsewhere argued) that the residual theory is likely wrong. But that should not affect the removal question: "Removal" is part of "the executive power" to execute law. In fact, Chief Justice William Howard Taft, the author of *Myers v. United States*,<sup>2</sup> rejected the residual theory.

Part II briefly canvasses the historical record and responds to related recent scholarship. Without retreading too much old ground, it argues that removal was likely understood to be part of "the executive power" to execute law under the British Constitution and that recent scholarship maintaining the contrary is not persuasive. This part then turns to American practice. It argues that the proponents of a presidential removal power in the 1789 removal debates are best understood as arguing that the removal power was part of "the executive power" to execute law. Although the ultimate conclusion of the First Congress in the "Decision of 1789" is open to conflicting interpretations, what matters is the force of the arguments. This part then argues that there is no distinction between agencies enforcing financial legislation and agencies enforcing other types of legislation.

Part III (briefly) explains the Court's most important precedents. It argues that Chief Justice Taft did not embrace a residual theory of executive power in *Myers v. United States*, but rather the position that the removal power is part of "the executive power" to execute law. It then maintains that *Humphrey's Executor v. United States*,<sup>3</sup> decided only nine years after *Myers*, was wrongly decided. Although there is most assuredly government power that can be exercised

<sup>1</sup> "The executive Power shall be vested in a President of the United States of America." U.S. Const. art. II, § 1. To avoid confusion with the Constitution's other vesting clauses, I interchangeably refer to this clause as the Executive Power Clause, the Executive Vesting Clause, or Article II's vesting clause.

<sup>2</sup> 272 U.S. 52 (1926).

<sup>3</sup> 295 U.S. 602 (1935).

by more than one branch, *Humphrey's* stands for the mistaken and unconstitutional proposition—at least if the Executive Vesting Clause is a grant of power—that there is some government power that need not be exercised by *any* of the named constitutional actors. As I shall explain, however, *Humphrey's* is possible to defend on originalist grounds if the only power the president has to execute law is that which can be derived from the duty of faithful execution. Finally, this part examines the two most recent of the important removal decisions, *Morrison v. Olson*<sup>4</sup> and *Free Enterprise Fund v. PCAOB*,<sup>5</sup> one of which was thoroughly functionalist, the other of which was semiformalist.

Part IV then critically assesses *Seila Law v. CFPB* in light of these debates over meaning, historical practice, and precedent. It concludes that not much is left of the functionalist precedents after *Seila Law*, notwithstanding the plurality's attempt to issue a limited decision. It then critically assesses the dissent's arguments, particularly its use of academic literature and historical materials.

## I. Four Textual Possibilities

Article II provides that “[t]he executive Power shall be vested in a President of the United States of America.”<sup>6</sup> This formulation is distinct from the Vesting Clause of Article I, which provides that “[a]ll legislative Powers herein granted” are vested in Congress.<sup>7</sup> There is, however, a subsequent enumeration of presidential powers. The president is commander-in-chief, may grant pardons, and may demand the opinions in writing of the principal officers of the executive departments.<sup>8</sup> The president also has the power, shared with the Senate, to make treaties and appointments (although Congress may delegate the appointment of inferior officers to the president alone, to the heads of departments, or to the courts).<sup>9</sup> The president then has a series of duties, mostly to Congress: from time to time to give Congress information about the state of the union; to convene

<sup>4</sup> 487 U.S. 654 (1988).

<sup>5</sup> 561 U.S. 477 (2010).

<sup>6</sup> U.S. Const. art. II, § 1.

<sup>7</sup> U.S. Const. art. I, § 1.

<sup>8</sup> U.S. Const. art. II, § 2, cl. 1.

<sup>9</sup> U.S. Const. art. II, § 2, cl. 2.

Congress on extraordinary occasions and adjourn it in the event the House and Senate disagree about adjournment; to “take Care that the Laws be faithfully executed”; to “Commission all the Officers of the United States”; and to “receive Ambassadors and other public Ministers.”<sup>10</sup>

What to make of the apparent general grant of “the executive power” along with the subsequent enumeration? Does the enumeration suggest that the executive power merely identifies who is to exercise the subsequently granted powers? If the Vesting Clause is a grant of substantive power, is the subsequent enumeration superfluous? There are four possible ways to read the text and its implication for the removal power.

#### A. *The Cross-Reference Theory*

The “cross-reference” theory maintains that the Executive Vesting Clause simply establishes *who* is to exercise the executive power. Justice Robert Jackson advanced this view in his *Youngstown* concurrence: “I cannot accept the view that [the executive power] clause is a grant in bulk of all conceivable executive power but regard it as an allocation to the presidential office of the generic powers thereafter stated.”<sup>11</sup> The cross-reference theory may still be the most prominent view in the academy.

There are two reasons, however, to be skeptical of the cross-reference theory. First, if the clause merely identifies who is to exercise the subsequently granted powers, then the Take Care Clause must be a grant of power to execute the laws. That clause, however, is framed as a duty and not a power, although, to be sure, it is not implausible to think that a duty implies the necessary power. Perhaps more convincingly, the Vesting Clause in Article III, which is formulated in the same manner as the parallel clause in Article II,

<sup>10</sup> U.S. Const. art. II, § 3. Michael McConnell thinks the clause respecting commissioning officers was left over from an earlier draft of the Constitution when the Senate had most of the appointment power. See Michael W. McConnell, *The President Who Would Not Be King* (forthcoming 2020). In any event, that clause, and the receptions clause, serves to clarify a presidential duty where power is otherwise shared with the Senate.

<sup>11</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 641 (1952) (Jackson, J., concurring).

must be a grant of substantive power to judges; otherwise, nothing in Article III allows judges to exercise any power.<sup>12</sup>

If the cross-reference theory is correct, then there is no basis for an unlimited presidential removal power on originalist grounds. The removal power would have to derive solely from the duty (and whatever power that implies) to take care that the laws be faithfully executed. The extent to which the president must (or should) have control over subordinates would seem to require an entirely functional analysis. It could be inferred that the president must have the power to remove at-will any principal executive officer to be able properly to supervise the faithful execution of the laws, but that the president need not have such control over inferior officers. It is also plausible, however, to infer that Congress may limit the ability of the president to remove even principal officers to specified causes. The standard grounds for removal in such provisions—malfeasance, neglect, and inefficiency—although not necessarily coterminous with faithless execution, could all be understood as faithless execution.

To sharpen the difference between the implications of the cross-reference theory and the implications of the other possible readings of the Executive Vesting Clause, consider what the president would not be able to do if the removal power derived solely from the Take Care Clause. If the law granted discretion but the president was not tasked with personally executing the law, then the president would have no grounds to remove an officer who exercised discretion contrary to the president's wishes. So long as the subordinate officer's exercise of discretion was within the bounds of the law, there would be no faithless execution. This means the president could not insist on the policy priorities of the administration. The president could not direct an administrative officer as to how to interpret an ambiguous statute, nor direct prosecutors as to how they should exercise their prosecutorial discretion. Each officer tasked by Congress with discretionary duties would be able to decide how to exercise that discretion.

<sup>12</sup> U.S. Const. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 *Harv. L. Rev.* 1155, 1176 (1992) (arguing that Article III's vesting clause is the "only explicit constitutional source of the federal judiciary's authority to act").

### B. *The Residual Theory*

The prevailing view among formalists may be termed the “residual theory.” According to this view, Article II’s Vesting Clause vests all executive-type powers in the president, including those traditionally exercised by the British monarch. The subsequent enumeration in Article II—and elsewhere in the Constitution—is then largely a limitation on the president’s ability to exercise specific executive powers, or perhaps a confirmation of them.<sup>13</sup> Michael W. McConnell explains this view: the Vesting Clause “vests all national powers of an executive nature in the President, except for that portion of the executive power that is vested elsewhere (mostly in Congress in Article I, Section 8), and except for the limitations and qualifications on the particular executive powers that are set forth in the text.”<sup>14</sup> Article I, for example, assigns a number of traditionally executive or prerogative powers to Congress, such as the powers to declare war, issue letters of marque, coin money, and regulate fleets and armies.<sup>15</sup> Article II assigns some of this “executive” power (over treaties and appointments) to the president and the Senate together. Historically the king could prorogue Parliament,<sup>16</sup> but the American president may only adjourn Congress in the event of a disagreement between the two houses. Further, the president has a duty to execute Congress’s laws *faithfully*.

<sup>13</sup> Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism & Foreign Affairs*, 102 Mich. L. Rev. 545, 549 (2004) (the residual theory “reconciles the text of the Constitution with the breadth of presidential power by stipulating that the Article II Vesting Clause grants the President all powers that are in their nature ‘executive,’ subject only to the specific exceptions and qualifications set forth in the rest of the Constitution”); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 Yale L.J. 231, 253 (2001) (“[T]he President’s executive foreign affairs power is residual, encompassing only those executive foreign affairs powers not allocated elsewhere by the Constitution’s text. The Constitution’s allocation of specific foreign affairs powers or roles to Congress or the Senate are properly read as assignments away from the President. Absent these specific allocations, by Article II, Section 1, all traditionally executive foreign affairs powers would be presidential.”).

<sup>14</sup> McConnell, *supra* note 10, at 185.

<sup>15</sup> See Ilan Wurman, *In Search of Prerogative*, 70 Duke L.J. (forthcoming 2020) (discussing the historically prerogative powers).

<sup>16</sup> 1 William Blackstone, *Commentaries on the Laws of England* \*180 (“[A]s the king has the sole right of convening the parliament, so also it is a branch of the royal prerogative, that he may (whenever he pleases) prorogue the parliament for a time, or put a final period to its existence.”).

As I have argued at length elsewhere, the residual theory is probably mistaken.<sup>17</sup> First, the preponderance of the textual evidence from the 17th and 18th centuries is that “the executive power,” in the singular, referred to the power to execute law.<sup>18</sup> John Locke, for example, distinguished “the executive power” from a “federative” power over war, treaties, ambassadors, and the like—powers that the residual theorists typically associate with “executive” power.<sup>19</sup> And Blackstone, in a chapter on the king’s suite of prerogative powers, includes as a subset of those prerogatives “the executive power of the laws,” which he seems to equate to law-execution.<sup>20</sup> There is some countervailing evidence, but at a minimum the textual evidence does not prove the residual theory.<sup>21</sup>

There are other reasons to doubt the residual theory. First, the Constitutional Convention voted to grant the national executive authority only to execute law and to appoint officers not otherwise provided for. If the Executive Vesting Clause were a plenary grant of all prerogative powers, then the Committee of Detail would have blatantly ignored this instruction.<sup>22</sup> To be sure, the Constitution does assign some additional powers to the president—the commander-in-chief power, the pardon power—but otherwise it assigns most of the traditionally prerogative powers to Congress. Reading the grant of executive power to be a grant of law-execution power would be more consistent with the committee’s instruction as well as with the textual evidence. And, as I have previously argued, a residual grant is inconsistent with the apparent desire of the delegates to deny the

<sup>17</sup> Wurman, *supra* note 15.

<sup>18</sup> *Id.*; see also Julian Davis Mortenson, Article II Vests Executive Power, Not the Royal Prerogative, 119 Colum. L. Rev. 1169 (2019).

<sup>19</sup> John Locke, The Second Treatise, Two Treatises on Government 364–65 (Peter Laslett ed., 2004) (1689).

<sup>20</sup> Under the same heading, Blackstone explains that the king is the chief prosecutor and may issue proclamations as to the “manner, time, and circumstances of putting [the] laws in execution.” Blackstone, *supra* note 16, at \*259–61. He also says that the king may create judicial tribunals “for, though the constitution of the kingdom hath entrusted him with the whole executive power of the laws, it is impossible, as well as improper, that he should personally carry into execution this great and extensive trust,” and so “courts should be erected, to assist him in executing this power.” *Id.* at \*257.

<sup>21</sup> See Wurman, *supra* note 15.

<sup>22</sup> *Id.*

national government any power to erect corporations, which was a prerogative power. When making that determination, the delegates did not conceive of the possibility that the Vesting Clause might nevertheless vest such a power in the president alone.<sup>23</sup> More still, not a single opponent of ratification so much as mentioned the possibility of a residual grant, even among those who feared the scope of powers conferred upon the national executive.<sup>24</sup>

If the residual reading is correct, the implications for the removal power are different from the implications of the cross-reference reading. If it can be shown that removal was an executive or prerogative power, then that power, whatever its scope, must belong to the president by virtue of the Executive Vesting Clause. The Take Care Clause would not limit the extent to which the president must have this power. The scope of the removal power under the residual theory would likely be historically contingent. It is possible, for example, that the historical removal power was only understood to encompass principal or high officers of state, and not inferior officers. In any event, as Part II explains, at a minimum such a removal power seems to have included the high officers, and therefore at least for-cause removal provisions relating to such officers would probably be unconstitutional.

### C. *The Law-Execution Theories*

There is a third possible reading of the Executive Vesting Clause: the clause is indeed a substantive grant of power, but only the power to execute law. Scholars who have advanced this reading in recent years include Julian Mortenson,<sup>25</sup> John Harrison,<sup>26</sup> Matthew Steilen,<sup>27</sup> Seth Barrett Tillman,<sup>28</sup> and, most recently, myself.<sup>29</sup> There are two accounts

<sup>23</sup> *Id.*

<sup>24</sup> McConnell, *supra* note 10, at 71.

<sup>25</sup> Julian Davis Mortenson, *The Executive Power Clause*, 167 U. Pa. L. Rev. (forthcoming 2020); Mortenson, *Royal Prerogative*, *supra* note 18.

<sup>26</sup> John C. Harrison, *Executive Power* (June 3, 2019) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3398427](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3398427).

<sup>27</sup> Matthew J. Steilen, *How to Think Constitutionally about Prerogative: A Study of Early American Usage*, 66 *Buff. L. Rev.* 557 (2018).

<sup>28</sup> Seth Barrett Tillman, *The Old Whig Theory of the Executive Power*, *New Reform Club* (blog), Jan. 18, 2019, <https://reformclub.blogspot.com/2019/01/the-old-whig-theory-of-executive-power.html>.

<sup>29</sup> Wurman, *supra* note 15.



of this theory, a “thin” account and a “thick” account. The thin account does not appear to allow for a constitutionally mandated presidential removal power; the thick account does.

### 1. Thin account

What I call the thin account of the law-execution reading of the Executive Power Clause appears to be Mortenson’s account, and possibly the account of some of the other scholars who have taken the law-execution view of the executive power. Reading “the executive power” to refer to the single power of law-execution is persuasive for the reasons the residual theory is unpersuasive. The law-execution reading is more consistent with the textual uses of the term “the executive power” in the 17th and 18th centuries, more consistent with the proceedings at the Constitutional Convention, and more consistent with the silence of the Ratification debates.

The thin account of the law-execution reading maintains that the president can only execute law with the precise tools, and with the precise limitations, imposed by Congress. Justice James McReynolds, in dissent in *Myers v. United States*, argued:

Concerning the insistence that power to remove is a necessary incident of the President’s duty to enforce the laws, it is enough now to say: The general duty to enforce all laws cannot justify infraction of some of them. Moreover, Congress, in the exercise of its unquestioned power, may deprive the President of the right either to appoint or to remove any inferior officer, by vesting the authority to appoint in another. Yet in that event his duty touching enforcement of the laws would remain. He must utilize the force which Congress gives. He cannot, without permission, appoint the humblest clerk or expend a dollar of the public funds.<sup>30</sup>

Or, as Justice Louis Brandeis wrote in response to something like the residual theory, the power to remove at least inferior officers “is not a power inherent in a chief executive”; rather, “[t]he President’s power of removal from statutory civil inferior offices, like the power of appointment to them, comes immediately from Congress.”<sup>31</sup> “The end to which the President’s efforts are to be

<sup>30</sup> 272 U.S. at 187 (McReynolds, J., dissenting).

<sup>31</sup> *Id.* at 245 (Brandeis, J., dissenting).

directed is not the most efficient civil service conceivable, but the faithful execution of the laws consistent with the provisions therefor made by Congress.”<sup>32</sup>

It is not entirely clear whether Justices McReynolds and Brandeis believed the Executive Power Clause was a grant of substantive power at all, but to the extent it was, they argued that the power to execute law cannot include the power to ignore congressional laws on removal.<sup>33</sup> The bottom line is that one can believe “the executive power” is the power to execute law and that such a power does not entail a power of removal.

## 2. Thick account

I have argued that the grant of “the executive power” in the Constitution was indeed likely only a grant of the power to execute law and did not include a residuum of royal powers.<sup>34</sup> But, I argued, the Founders seem to have understood that this “executive power” to execute law included a variety of incidental, derivative, or component powers. For example, the power of appointment was part and parcel of “the executive power” because the chief executive could not possibly hope to execute the law alone. As Mortenson has explained, many at the Founding considered “the appointment of publick officers” as “closely linked to the executive power—sometimes as a strict conceptual element of the thing itself, other times more loosely as an indispensable buttress for its meaningful exercise.”<sup>35</sup> Blackstone explained that the king also had a power, incident to the executive power, to issue proclamations (or executive orders) as to the “manner, time, and circumstances of putting [the] laws in execution.”<sup>36</sup>

Based on the history that I summarize in Part II, I concluded that the power to appoint, direct, and remove subordinate officers was understood to be part of “the executive power” of law-execution.<sup>37</sup> Put another way, the residuum theory is not necessary to find a

<sup>32</sup> *Id.* at 247.

<sup>33</sup> Justice Brandeis was at least willing to concede to precedent that perhaps Congress could not limit the removal of principal officers.

<sup>34</sup> Wurman, *supra* note 15.

<sup>35</sup> Mortenson, *supra* note 25, at 54.

<sup>36</sup> Blackstone, *supra* note 16, at \*261.

<sup>37</sup> Wurman, *supra* note 15.

constitutionally mandated presidential removal power. Indeed, both James Madison in the famous removal debates of 1789, and Chief Justice Taft in *Myers*, seem to have adhered to a law-execution view of the executive power, but nevertheless found that this power entailed the power to remove.

D. Summary

The implications of the various textual theories for the removal power may be represented as follows:

	<b>Residual</b>	<b>Thin-Law Execution</b>	<b>Thick-Law Execution</b>	<b>Cross Reference</b>
<b>Removal</b>	Presidential	Congressional discretion	Presidential	Congressional discretion/ only for faithless execution/ functional analysis

II. The Historical Debate

At least under the residual and law-execution theories, the extent to which the removal power is “executive” or part of “the executive power” will be based partly on history. Historical practice might also inform the extent to which removal is essential “to take care that the laws be faithfully executed.” Although the history can certainly be read in more ways than one, it appears that the best reading of the history is that the president must at least have the ability to remove principal officers at will.

A. British Practice

As my coauthors and I explained in our amicus brief to the Court, the delegates to the Constitutional Convention were attentive to the powers of the monarch as set forth in William Blackstone’s *Commentaries*, allocating almost every single power discussed in Blackstone to Congress, to the president, or to the president with a senatorial check, or eliminating some from the reach of federal power altogether.<sup>38</sup> The power to remove principal executive officers, however,

<sup>38</sup> Brief for Separation of Powers Scholars at 6–11, *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2019) (No. 19-17); Blackstone, *supra* note 16, at \*245–69; McConnell, *supra* note 10; Wurman, *supra* note 15.

was one of the few royal powers not explicitly discussed by the Framers nor discussed very much by Blackstone. But the weight of the evidence is that removal was part of the executive power, necessary to law execution.

In the 18th-century British Constitution, like in the U.S. Constitution, the “supreme executive power” of the nation was vested in a single person.<sup>39</sup> Matthew Hale wrote in his 17th-century work *Prerogatives of the King* that “the supreme administration of this monarchy is lodged in the king, and that not only titularly, but really.”<sup>40</sup> The king, according to Blackstone, was understood to be the “fountain of justice and general conservator of the peace of the kingdom.”<sup>41</sup> Accordingly, the king was the “proper person to prosecute for all public offenses and breaches of the peace”; he could grant pardons; and he could nominate judges.<sup>42</sup> Writing in 1774, James Wilson described the king as “intrusted” with “the direction and management of the great machine of government.”<sup>43</sup>

To discharge these responsibilities, however, the king required ministers and officers, who, according to Blackstone, therefore “act[ed] by commission from, and in due subordination to him.”<sup>44</sup> The king thus created offices and appointed and supervised officers. Additionally, the power to remove principal executive officers unquestionably belonged to the executive magistrate as a necessary component of the executive power to carry law into execution. Blackstone wrote that the king is “the fountain of honour, of office, and of privilege.”<sup>45</sup> As to “officers,” Blackstone wrote, this meant that “the law supposes, that no one can be so good a judge of their several merits and services, as the king himself who employs them,” from which principle “arises the prerogative of erecting and disposing of offices.”<sup>46</sup>

<sup>39</sup> Blackstone, *supra* note 16, at \*183.

<sup>40</sup> Sir Matthew Hale’s *The Prerogatives of the King* 11 (D.E.C. Yale ed., Selden Society 1976).

<sup>41</sup> Blackstone, *supra* note 16, at \*257.

<sup>42</sup> *Id.* at \*259.

<sup>43</sup> James Wilson, *On the Legislative Authority of the British Parliament*, 2 Works of James Wilson 505, 520 (J. Andrews ed., 1896) (1774).

<sup>44</sup> Blackstone, *supra* note 16, at \*243.

<sup>45</sup> *Id.* at \*261.

<sup>46</sup> *Id.* at \*262.

In a section of his *Commentaries* entitled “Of Subordinate Magistrates,” Blackstone described the principal officers—namely, “the lord treasurer, lord chamberlain, the principal secretaries, [and] the like”—as “his majesty’s great officers of state” and explained that these offices are not “in any considerable degree the objects of our laws.”<sup>47</sup> In other words, the principal officers of state were executive, not legislative, creatures. In a famous incident just four years before the Constitutional Convention, King George III cashiered Prime Minister Charles James Fox, notwithstanding Fox’s majority support in the House of Commons, and replaced him with William Pitt the Younger, who continued in office despite a no-confidence vote in the Commons.<sup>48</sup>

Other officers involved in the execution of the laws, such as sheriffs and justices of the peace, also served at the pleasure of the Crown.<sup>49</sup> Removal restrictions appear to have existed only for officers exercising judicial or ministerial functions,<sup>50</sup> and possibly for certain local or municipal officials who related to “mere private and strictly municipal rights, depending entirely upon the domestic constitution of their respective franchise.”<sup>51</sup>

Other parts of Blackstone likewise indicate that the power to appoint, control, and remove officers was part of “the executive power.” Blackstone wrote that the king had a right to erect a particular kind of office—courts—because it was “impossible” for the king to exercise “the whole executive power of the laws” on his own.<sup>52</sup> (At the Constitutional Convention, Madison similarly argued that the executive authority would need assistants to help execute the laws, and he thus stated that the power to carry into execution the laws and to

<sup>47</sup> *Id.* at \*327.

<sup>48</sup> Michael Duffy, *The Younger Pitt 18–27* (2013); Murray Scott Downs, *George III and the Royal Coup of 1783*, 27 *The Historian* 56, 72–73 (1964) (noting that it was “manifestly [the king’s] constitutional prerogative of dismissing his ministers and dissolving the parliament”).

<sup>49</sup> Blackstone, *supra* note 16, at \*331 (sheriffs); *id.* at \*341 (justices of the peace).

<sup>50</sup> Act of Settlement, 12 & 13 Wm. 3. c. 2 (judges in Britain); Blackstone, *supra* note 16, at \*336–37 (coroners).

<sup>51</sup> Blackstone, *supra* note 16, at \*328.

<sup>52</sup> *Id.* at \*257.

appoint officers not already provided for were in their nature “executive” powers.)<sup>53</sup>

Finally, as noted earlier, Blackstone described a power to issue proclamations as to “the manner, time, and circumstances of putting [Parliament’s] laws in execution.”<sup>54</sup> These proclamations were “binding upon the subject” when they “only enforce[d] the execution of such laws as are already in being.”<sup>55</sup> And if they were binding on subjects, presumably these executive directives would have been binding on executive officers, too.

In sum, Blackstone’s discussion indicates that the power to appoint and direct assistants was part of “the executive power of the laws.” The power to create offices, dispose of (appoint to and remove from) those offices, and direct those officers was part of the king’s power to carry law into execution.

Daniel Birk has recently suggested, however, that the king did not in fact have an inherent removal power in the 18th century, citing a number of statutes in which this power was limited.<sup>56</sup> As I have suggested elsewhere, Birk’s evidence does not quite prove the proposition that removal is not part of the executive power.<sup>57</sup>

First, many of Birk’s examples of nonremovable principal officers are lifelong, hereditary officeholders from as early as the 14th century up to the 17th century, when offices were considered to be personal property and where such tenures were entirely up to the king.<sup>58</sup> It is not at all clear, however, that much of this survived into the late 18th century, and there is some reason to doubt that such examples provide insight into the meaning of a constitution rooted in popular sovereignty. It is of little weight that James I appointed Francis Bacon as his attorney general for life, or that in those early

<sup>53</sup> 1 The Records of the Federal Convention of 1787, 66–67 (Max Farrand ed., 1966) (1911).

<sup>54</sup> Blackstone, *supra* note 16, at \*261.

<sup>55</sup> *Id.*

<sup>56</sup> Daniel D. Birk, Interrogating the Historical Basis for a Unitary Executive, 73 *Stan. L. Rev.* (forthcoming 2021).

<sup>57</sup> Wurman, *supra* note 15.

<sup>58</sup> *Id.* at Part III.A.1.

centuries Parliament tried to regulate tenure to restrict hereditary and lifetime tenures.<sup>59</sup>

Second, many of Birk's examples involve officers exercising judicial, ministerial, or municipal functions.<sup>60</sup> Even Blackstone recognized the monarch could not remove such officers at will, but arguably none of these functions are, strictly speaking, part of "the executive power" to execute law.<sup>61</sup>

Finally, a handful of statutes do create "commissioners" of various sorts, some of which contain for-cause removal provisions.<sup>62</sup> These independent commissions appear to be exercising not executive power, but rather Parliament's historical inquisitorial power.<sup>63</sup> The statutes Birk cites seem to fall within this power. They were enacted "for better examining and auditing the publick accounts of this kingdom";<sup>64</sup> "to examine, take, and state the publick accounts of the kingdom," "to report what balances are in the hands of accountants," and "what defects there are in the present mode of receiving, collecting, issuing, and accounting for publick money";<sup>65</sup> "to enquire

<sup>59</sup> Birk, *supra* note 56. Blackstone, of course, argued that principal officers were entirely under the control of the king. Blackstone, *supra* note 16, at \*327 ("the lord treasurer, lord chamberlain, the principal secretaries, [and] the like," namely "his majesty's great officers of state," are not "in any considerable degree the objects of our laws").

<sup>60</sup> Birk, *supra* note 56, at Part III.A.1, III.A.3.

<sup>61</sup> See Act of Settlement, *supra* note 50 (granting lifetime tenure to judges in Britain); Blackstone, *supra* note 16, at \*336–37 (coroners not removable at pleasure of the king); *id.* at \*328 (local and municipal officials relate to "mere private and strictly municipal rights, depending entirely upon the domestic constitution of their respective franchise").

<sup>62</sup> Birk, *supra* note 56; see Audit of Public Accounts Act 1780, 20 Geo. 3 c. 54 (Eng.); Inquiry into Fees, Public Offices Act 1785, 25 Geo. 3 c. 19 (Eng.); Audit of Public Accounts Act 1785, 25 Geo. 3 c. 52 (Eng.); American Loyalists Act 1786, 26 Geo. 3 c. 68 (Eng.); Losses from Cession of East Florida Act 1786, 26 Geo. 3 c. 75 (Eng.); Crown Land Revenues, etc. Act 1786 26 Geo. 3 c. 87 (Eng.).

<sup>63</sup> See, e.g., 2 Cobbett's Parliamentary History of England 69 (1806) (House of Commons asserting in 1626 that it was "the antient, constant, and undoubted right and usage of parliaments, to question and complain of all persons, of what degree soever, found grievous to the common-wealth, in abusing the power and trust committed to them by their sovereign."); 21 Cobbett's Parliamentary History of England 436 (1814) (the Lord Chancellor stating in a 1780 debate that the matter of members of parliament receiving public contracts is subject to the "inquisitorial" power of Parliament).

<sup>64</sup> 25 Geo. 3 c. 52.

<sup>65</sup> 20 Geo. 3 c. 54.

into the fees, gratuities, perquisites, and emoluments, which are, or have been lately, received in the several publick offices therein mentioned; to examine into any abuses which may exist in the same"; and also "to report such observations as shall occur to them, for the better conducting and managing the business transacted in the said offices";<sup>66</sup> to "enquire into the losses and services of all such persons who have suffered in their right properties, and possessions, during the late unhappy dissensions in America";<sup>67</sup> "to enquire into the losses of all such persons who have suffered in their properties, in consequence of the cession of the province of East Florida to the king of Spain";<sup>68</sup> and "to enquire into the state and condition of the woods, forests, and land revenues, belonging to the crown."<sup>69</sup> It is not clear that these legislative commissions did anything but make recommendations, although the last of these commissioners were permitted to sell public lands.<sup>70</sup>

In short, the evidence from British practice tends to support the proposition that the chief magistrate had the authority to remove at will at least principal officers involved in the execution of the law.

### *B. American Practice*

In the *Seila Law* case, the evidence of American practice was particularly contested. The significance of the "Decision of 1789" was questioned, and some scholars argued that financial agencies and departments were historically treated differently than other executive departments. Both points were championed by the dissenters.

#### 1. The Decision of 1789

The Constitution, of course, assigns some of the traditionally royal law-execution powers to Congress. It assigns the power to create offices to Congress,<sup>71</sup> and the power to appoint to office to the president and Senate together (for principal officers).<sup>72</sup> Yet it does not assign

<sup>66</sup> 25 Geo. 3 c. 19.

<sup>67</sup> 26 Geo. 3 c. 68.

<sup>68</sup> 26 Geo. 3 c. 75.

<sup>69</sup> 26 Geo. 3 c. 87.

<sup>70</sup> *Id.*

<sup>71</sup> U.S. Const. art. I, § 8, cl. 18.

<sup>72</sup> U.S. Const. art II, § 2, cl. 2.



the removal power in this manner. The question thus arose in the First Congress, when it sought to establish the first departments of the national government, whether their principal officers had to be removed by the president with the advice and consent of the Senate; whether the Constitution vested that power in the president alone; or whether Congress in its discretion could delegate that power to the president alone.<sup>73</sup> Madison first argued that “the executive power” was vested in the president, but that the Constitution had assigned some of that power to the Senate:

The Constitution affirms, that the Executive power shall be vested in the President. Are there exceptions to this proposition? Yes, there are. The Constitution says, that in appointing to office, the Senate shall be associated with the President, unless in the case of inferior officers. Have we a right to extend this exception? I believe not.<sup>74</sup>

Madison thus argued that all “the executive power” not assigned away from the president belonged to the president. The question according to Madison, then, was: “Is the power of displacing, an Executive power?” Madison conceived “that if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws.”<sup>75</sup> “[I]f any thing in its nature is executive,” Madison added later on, “it must be that power which is employed in superintending and seeing that the laws are faithfully executed.”<sup>76</sup>

Representative Fisher Ames agreed with Madison. “The Constitution places all Executive power in the hands of the President,” exhorted Ames, “and could he personally execute all the laws, there

<sup>73</sup> 1 Annals of Cong. 381, 484 (1789) (Joseph Gales ed., 1834). Also, some representatives argued that impeachment was the only mode of removing officers—an argument that was not seriously advanced because, as Madison pointed out, impeachment is a method by which Congress can remove officers; that says nothing of the president’s power. *Id.* at 375. Much of this discussion on the Decision of 1789 borrows from Wurman, *supra* note 15, and Brief for Separation of Powers Scholars, *supra* note 38.

<sup>74</sup> 1 Annals of Cong. 463. As Madison said subsequently, “[T]he Executive power shall be vested in a President of the United States. The association of the Senate with the President in exercising that particular function, is an exception to this general rule; and exceptions to general rules, I conceive, are ever to be taken strictly.” *Id.* at 496.

<sup>75</sup> *Id.* at 463.

<sup>76</sup> *Id.* at 500.

would be no occasion for establishing auxiliaries; but the circumscribed powers of human nature in one man, demand the aid of others.”<sup>77</sup> Because the president cannot possibly handle all the minutiae of administration, he “must therefore have assistants.”<sup>78</sup> But “in order that he may be responsible to his country, he must have a choice in selecting his assistants, a control over them, with power to remove them when he finds the qualifications which induced their appointment cease to exist.”<sup>79</sup> The executive power thus includes, Ames concluded, a “choice in selecting [] assistants, a control over them, with power to remove them.”<sup>80</sup>

Madison’s argument is often taken as evidence of the residual theory. But note that Madison’s and Ames’s arguments are consistent with the law-execution reading of the “the executive power.” There is no indication in the debates that anyone in Congress understood them to be referring to the entire suite of royal authorities when they said “the executive power.” The discussion was entirely in the context of “appointing, overseeing, and controlling those who execute the laws.” When Madison discussed “exceptions” to the proposition that the executive power is vested in the president, he referred only to the appointment power—historically part of the law-execution power.

Whether or not Madison or Ames articulated the residual theory or merely a law-execution theory of the executive power, it is clear that they believed that the removal power, at least over principal officers, was constitutionally vested in the president.

The predominant alternative theory on the table in 1789, advanced by several representatives in the debate, was that the Necessary and Proper Clause<sup>81</sup> is an assignment away from the president because Congress’s power to establish (or abolish) offices might include the power to set conditions on the removal of officers. As we explained in our amicus brief, however, the Necessary and Proper

<sup>77</sup> *Id.* at 474.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> U.S. Const. art. I, § 8, cl. 18 (“Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”).

Clause does not give Congress power to derogate from the president's executive power; it only gives power to help carry the executive power into execution. A restriction on the power to remove would not be in furtherance of the president's power but arguably a hindrance to it.

James Madison addressed this argument as follows:

[W]hen I consider, that, if the Legislature has a power, such as is contended for, they may subject and transfer at discretion powers from one department of our government to another; they may, on that principle, exclude the President altogether from exercising any authority in the removal of officers; they may give to the Senate alone, or the President and Senate combined; they may vest it in the whole Congress, or they may reserve it to be exercised by this House. When I consider the consequences of this doctrine, and compare them with the true principles of the Constitution, I own that I cannot subscribe to it.<sup>82</sup>

In other words, if the power to establish and abolish offices included the power to restrict removal, then it is unclear what limits on the power to restrict there might be. Madison thus argued that such a doctrine would be entirely incompatible with the "true principles of the Constitution."

Even under a cross-reference theory, the Take Care Clause may support the view that the president must have the ability to remove at least principal executive officers; as explained, such an analysis would be a functionalist one. Madison argued that "[i]f the duty to see the laws faithfully executed be required at the hands of the Executive Magistrate, it would seem that it was generally intended he should have that species of power which is necessary to accomplish that end."<sup>83</sup> Similarly, Ames argued:

In the Constitution the President is required to see the laws faithfully executed. He cannot do this [unless] he has a control over officers appointed to aid him in the performance of his duty. Take this power out of his hands, and you virtually strip him of his authority; you virtually destroy his responsibility.<sup>84</sup>

<sup>82</sup> 1 Annals of Cong. 495–96.

<sup>83</sup> *Id.* at 496.

<sup>84</sup> *Id.* at 539–40.

Some modern scholars have argued that the Take Care Clause supports limiting the president's ability to remove executive officers. In particular, these scholars argue that the president can only remove officers in good faith.<sup>85</sup> As previously explained, it is certainly plausible to make such an argument under the cross-reference reading of the Executive Power Clause, because any such analysis would be a functionalist one.

In any event, with the various arguments on the table, the House in 1789 devoted over five full days of debate to the question of the president's removal power. After the first day, a majority agreed to retain the clause that the principal officer would be "removable by the President,"<sup>86</sup> and further rejected a proposal to include the modifying phrase "by and with the advice and consent of the senate."<sup>87</sup>

After the fifth day, the House altered the bill to ensure that its language would not be construed as a *conferral* of the removal power. The amended provision stated that "whenever the said principal officer shall be removed from office by the President," the departmental papers would then be under the control of the department's clerk.<sup>88</sup> As Representative Egbert Benson, the sponsor of this amendment, explained, the alteration was intended "so that the law may be nothing more than a declaration of our sentiments upon the meaning of a Constitutional grant of power to the President."<sup>89</sup> The amendment passed by a vote of 30-18,<sup>90</sup> and the Senate agreed by a vote of 10-10, with Vice President John Adams breaking the tie.<sup>91</sup>

Despite the close nature of the vote in the Senate, Madison thought that Congress's decision on this question, which has come to be

<sup>85</sup> See, e.g., Andrew Kent et al., *Faithful Execution and Article II*, 132 *Harv. L. Rev.* 2111, 2112 (2019) ("Our history supports readings of Article II . . . that limit Presidents to exercise their power in good faith. . . . So understood, Article II may thus place some limits on the pardon and removal authority.").

<sup>86</sup> 1 *Annals of Cong.* 371, 383.

<sup>87</sup> *Id.* at 382.

<sup>88</sup> *Id.* at 578.

<sup>89</sup> *Id.* at 505.

<sup>90</sup> *Id.* at 580.

<sup>91</sup> William Maclay, *Journal of William Maclay*, United States Senator from Pennsylvania, 1789-1791, 116 (Edgar S. Maclay ed., 1890), <https://memory.loc.gov/ammem/amlaw/lwmj.html>.

known as the “Decision of 1789,”<sup>92</sup> would become the “permanent exposition of the Constitution.”<sup>93</sup> And with a few highly controversial exceptions—such as the Tenure of Office Act, enacted by radical Republicans to prevent Andrew Johnson from removing certain members of Abraham Lincoln’s cabinet—so it remained. Alexander Hamilton and Chief Justice John Marshall wrote that Congress’s decision reflected its constitutional interpretation that the removal power was constitutionally vested in the president.<sup>94</sup>

Some of the most prominent scholars of the 20th century suggested, however, that the Decision of 1789 was no decision at all because, they argued, the majority in favor of Benson’s amendment was actually cobbled together by representatives who believed the removal power was *constitutionally* vested in the president and those who believed Congress could *confer* such power.<sup>95</sup> It is certainly possible to read the vote in this manner. But any reader of the debates would be cognizant of the fact that the representatives were overwhelmingly arguing in constitutional terms. As Madison reminded the representatives toward the end of the debate, “Gentlemen have all along proceeded on the idea that the Constitution vests the power in the President.”<sup>96</sup>

Even if the Decision of 1789 is ambiguous—as the dissent in *Seila Law* argued and as recent scholarship once again argues<sup>97</sup>—few scholars or judges suggest that the Decision of 1789 governs by its own force. And those who do should probably walk back such claims. “Liquidating” ambiguous constitutional meaning requires a series of discussions and adjudications.<sup>98</sup> The better lessons from the

<sup>92</sup> See, e.g., *Humphrey’s Ex’r*, 295 U.S. 602, 630 (1935).

<sup>93</sup> 1 *Annals of Cong.* 495.

<sup>94</sup> See 15 Alexander Hamilton, *The Papers of Alexander Hamilton* 40 (Harold C. Syrett ed., 1969); 5 John Marshall, *The Life of George Washington* 200 (1807).

<sup>95</sup> Myers, 272 U.S. at 285 n.75 (Brandeis, J., dissenting); Edward S. Corwin, *Tenure of Office and the Removal Power Under the Constitution*, 27 *Colum. L. Rev.* 353, 362–63 (1927); David P. Currie, *The Constitution in Congress: The Federalist Period, 1789–1801*, 40–41 (1997).

<sup>96</sup> 1 *Annals of Cong.* 578.

<sup>97</sup> Jed H. Shugerman, *The Indecision of 1789: Strategic Ambiguity and the Imaginary Unitary Executive* (Part I) (May 5, 2020) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3596566](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3596566).

<sup>98</sup> William Baude, *Constitutional Liquidation*, 71 *Stan. L. Rev.* 1 (2019).

debate are the various arguments that were put on the table. It is not unreasonable to think that Madison and Ames simply got it right: their arguments are compelling interpretations of the Constitution.

## 2. Financial institutions

In recent decades, some scholars have claimed that financial and other “Article I” agencies are distinct from “Article II” agencies tasked with assisting the president in exercising inherent constitutional power. A number of scholars made this precise argument in their briefs to the Supreme Court in the *Seila Law* case and to the D.C. Circuit in the related *PHH Corp.* litigation.<sup>99</sup> For example, in their brief to the D.C. Circuit in *PHH Corp.*, a number of scholars made the claim that the CFPB’s

independence is consistent with governmental structures dating back to the earliest days of the Republic. At that time, the first Congress distanced the Department of the Treasury from the President’s direct control, in stark contrast to its choices for the Departments of State and War. Around the same time, Congress created the relatively independent Office of the Comptroller and the National Bank. Thus began a long national history of granting independence to financial institutions and regulators, which has continued through the present day.<sup>100</sup>

More generally, Professors Lawrence Lessig and Cass Sunstein have argued for “another conception of the original understanding” inspired by the distinction made by 19th-century theorists between “politics” and “administration.”<sup>101</sup> Applying this distinction, Lessig and Sunstein argue that executive power “derive[s] from Article II,” but administrative power “stem[s] from Article I.”<sup>102</sup> “Applying the nineteenth century vision as mechanically as possible to some

<sup>99</sup> See Brief of Harold H. Bruff et al. as Amici Curiae in Support of Court-Appointed Amicus Curiae, in Support of the Judgment Below, *Seila Law v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020) (No. 19-7); Brief of Separation of Powers Scholars as Amici Curiae in Support of CFPB, *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75 (D.C. Cir. 2018) (No. 15-1177).

<sup>100</sup> Brief of Separation of Powers Scholars, *supra* note 99, at 2.

<sup>101</sup> Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 *Colum. L. Rev.* 1, 35 (1994).

<sup>102</sup> *Id.* at 71.

modern developments,” they argue, “we think that Congress could not constitutionally make the Department of Defense into an independent agency; but it could allow at least a degree of independence for such modern institutions as the National Labor Relations Board and the Federal Communications Commission”<sup>103</sup>—and, presumably, the CFPB.

As argued in our amicus brief, however, the Founding generation recognized no such distinction, which appears to be an anachronistic imposition of late 19th-century views. For example, the treasury department was designated an executive department under the Articles of Confederation, in the Convention, during the ratifying debates, and during the First Congress’s debates.<sup>104</sup> Treasury officials were also designated “executive” officers in the First Congress’s act providing salaries to executive branch officials.<sup>105</sup> And the president received written opinions from Treasury Secretary Alexander Hamilton—relying upon the Opinions Clause that speaks of “principal Officer[s] in each of the executive Departments.”

In their Supreme Court brief, the scholars writing in support of the CFPB argued that the treasury statute was silent on the removability of the comptroller, and that the comptroller was given “significant authority and independence”; for example, Congress even gave the comptroller the power to institute proceedings to recover money owed to the treasury.<sup>106</sup> It is hard to conclude from these general observations, however, that the comptroller exercised discretion in any way “independently” of the secretary of the treasury.

These scholars also pointed to the early Sinking Fund Commission and to the Bank of the United States as examples of federal financial institutions over which the president did not have direct control.<sup>107</sup> The Sinking Fund Commission could make open-market debt purchases at the direction of the vice president, the chief justice, the secretary of state, the secretary of treasury, and the attorney general. Two of these officers (the vice president and the chief justice)

<sup>103</sup> *Id.*

<sup>104</sup> Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. Ill. L. Rev. 701, 804.

<sup>105</sup> Act of Sept. 11, 1789, ch. 13, § 1, 1 Stat. 67, 67.

<sup>106</sup> Brief of Harold H. Bruff, *supra* note 99, at 14–15.

<sup>107</sup> *Id.* at 16–17.

were not removable by the president at all. I am not confident that the statutory appointment of the vice president or the chief justice was constitutional, but in any event it does not undermine the central point: the president could clearly direct and remove a majority of the officers who constituted the commission. As for the Bank of the United States, it was not considered an arm of the federal government at all. It was a private, profit-making corporation, of which the United States was a minority shareholder.<sup>108</sup>

Professors Lessig and Sunstein further assert that constitutional text supports their view that there is a distinction between “executive departments” headed by “principal officers,” and Article I “administrative” departments headed by “heads of department” but not “principal officers.”<sup>109</sup> It is of course true that the Constitution uses various terms to denominate principal officers. The Opinions Clause refers to “principal officer[s]” of the “executive [d]epartments.”<sup>110</sup> The Appointments Clause distinguishes between “inferior officers” and “Heads of Departments.”<sup>111</sup> Moreover, Lessig and Sunstein point out, the First Congress denominated the secretaries of foreign affairs and war as “principal officers” but the secretary of treasury as a “head of department.”<sup>112</sup> They suggest that these textual differences make sense for the 19th-century understanding that certain departments are inherently executive, derived from Article II, and that the Opinions Clause ensures the president has authority to control the principal officers of these departments, but not the heads of all the departments of government.<sup>113</sup>

The evidence most likely does not bear out this view, however. The reference to “executive” departments in the Opinions Clause was probably in response to proposals that would have given the

<sup>108</sup> *Bank of United States v. Planters’ Bank of Ga.*, 22 U.S. (9 Wheat.) 904, 908 (1824) (noting that the government is not a party in cases against the bank); see also *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 399 (1995) (“[A] corporation is an agency of the Government . . . when the State has specifically created that corporation for the furtherance of governmental objectives, and not merely holds some shares but controls the operation of the corporation through its appointees.”).

<sup>109</sup> Lessig & Sunstein, *supra* note 101, at 34–38.

<sup>110</sup> U.S. Const. art. II, § 2, cl. 1.

<sup>111</sup> U.S. Const. art. II, § 2, cl. 2.

<sup>112</sup> Lessig & Sunstein, *supra* note 101, at 35.

<sup>113</sup> *Id.* at 37–38.



president power to demand opinions from the chief justice and officers of the House and the Senate.<sup>114</sup> As for the distinction between “principal officers” and other “heads of departments,” the Framers used these terms interchangeably—I have seen no evidence that they thought of them differently, and indeed the members of the First Congress used both terms routinely in the removal debate. Moreover, as noted, treasury was referred to as an executive department under the Articles of Confederation, at the Constitutional Convention, in the ratification debates, and throughout the First Congress; the secretary was denominated an “executive officer” in the act providing for his salary; and the president received written opinions from Alexander Hamilton—relying upon the Opinions Clause that speaks of “principal Officer[s] in each of the executive Departments.”

### III. Formalism, Functionalism, and Precedent

Besides text and history, the Court in *Seila Law* was not writing on a clean slate. Several precedents bear on the question of the president’s removal power. This part briefly canvasses the four most important—*Myers*, *Humphrey’s*, *Morrison*, and *Free Enterprise Fund*—and highlights only the points important for understanding the *Seila Law* decision.

#### A. *Myers v. United States*

In *Myers v. United States*, Chief Justice Taft, a former president, held that the power to remove any officer appointed by and with the advice and consent of the Senate—including inferior officers so appointed—constitutionally belonged to the president by virtue of the Executive Vesting Clause. At issue was the removal of a first-class postmaster, whom President Woodrow Wilson removed despite the requirement in the statute that any such removal also be with the “advice and consent” of the Senate.

In some respects, Taft’s decision was an expansion of the Decision of 1789, which merely stood (arguably) for the proposition that principal officers must be removable by the president. Taft extended this proposition to all officers appointed by and with the advice and consent of the Senate, including inferior ones such as the postmaster.

<sup>114</sup> 2 The Records of the Federal Convention of 1787, 342, 367; Steven G. Calabresi & Saikrishna B. Prakash, The President’s Power to Execute the Laws, 104 Yale L.J. 541, 628–29 (1994).

The idea was that Congress can choose to vest the appointment of inferior officers in the heads of departments, and, if it does so, it can then restrict how those principal officers can remove the inferior ones, as the Court held in *United States v. Perkins*.<sup>115</sup> But unless Congress actually vests the appointment of the inferior officer in a head of department and as a condition restricts the removal of the inferior officer at the hands of the superior one, Congress could not restrict the ability of the president to remove any officer.

Note that even if Congress were to vest the appointment of an inferior officer in a head of department and restrict the ability of that head to remove the inferior officer, that does not mean the president could not remove such an officer. Neither the Court in *Perkins* nor the Court in *Myers* said that the president could not remove such officers at will—only that *if* the principal officer removes the inferior officer, that principal officer must follow Congress's instructions in doing so. Whether the president can remove such inferior officers is still an unanswered question.<sup>116</sup> Chief Justice Taft also noted that the Court has never said Congress could restrict the president's power to remove an inferior officer if Congress vested the appointment of that officer in the president alone. Indeed, Taft argued there was reason to doubt Congress could do so.<sup>117</sup>

The upshot of *Myers* was that any officer, principal or inferior, appointed by and with advice and consent, could be freely removed by the president. Congress could restrict the removal of inferior officers when their appointments were vested in a head of department; but even here the Court had never held that the president could not order the removal of such officers.

The basis of the Court's reasoning, importantly, was not the view that the Executive Vesting Clause was a residual grant of all executive

<sup>115</sup> 116 U.S. 483 (1886).

<sup>116</sup> To which we might soon get an answer if the erstwhile U.S. Attorney for the Southern District of New York files a lawsuit against the Trump.

<sup>117</sup> *Myers*, 272 U.S. at 161–62 (“Whether the action of Congress in removing the necessity for the advice and consent of the Senate, and putting the power of appointment in the President alone, would make his power of removal in such case any more subject to Congressional legislation than before is a question this Court did not decide in the *Perkins* case. Under the reasoning upon which the legislative decision of 1789 was put, it might be difficult to avoid a negative answer, but it is not before us and we do not decide it.”).

or prerogative powers. In 1916, 10 years before Taft published the opinion in *Myers*, he had published a book on the powers and duties of the president. He argued that Presidents James Garfield and Theodore Roosevelt's "ascribing an undefined residuum of power to the president is an unsafe doctrine and that it might lead under emergencies to results of an arbitrary character."<sup>118</sup> He elaborated on his own view:

The true view of the Executive function is, as I conceive it, that the President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary to its exercise. Such specific grant must be either in the Federal Constitution or in an act of Congress passed in pursuance thereof. There is no undefined residuum of power which he can exercise because it seems to him to be in the public interest. . . . The grants of Executive power are necessarily in general terms in order not to embarrass the Executive within the field of action plainly marked for him, but his jurisdiction must be justified and vindicated by affirmative constitutional or statutory provisions, or it does not exist.<sup>119</sup>

Nothing in *Myers* suggests that Taft's views had evolved. Quite the opposite. Taft wrote:

The vesting of the executive power in the President was essentially a grant of the power to execute the laws. But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates. This view has since been repeatedly affirmed by this court.<sup>120</sup>

Further, the Court's "conclusion on the merits," Taft summarized, "is that Article 2 grants to the President the executive power of the Government—i.e., the general administrative control of those executing the laws, including the power of appointment and removal of executive officers—a conclusion confirmed by his obligation to take care that the laws be faithfully executed."<sup>121</sup>

<sup>118</sup> William Howard Taft, *Our Chief Magistrate and His Power* 144 (1916).

<sup>119</sup> *Id.* at 139–40.

<sup>120</sup> *Myers*, 272 U.S. at 117.

<sup>121</sup> *Id.* at 163–64.

*B. Humphrey's Executor v. United States*

*Myers* thus stood, and still stands, for the proposition that the removal power in such instances is the president's. The Senate cannot retain a role for itself. But can Congress, while not retaining any role for itself, place some restrictions on the president's exercise of the removal power? This was the issue in *Humphrey's Executor*.

When Congress created the Federal Trade Commission (FTC), it provided that "any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office."<sup>122</sup> Importantly, the removal power still belonged to the president, but Congress purported merely to restrict the president's use of that power to "cause." President Franklin Roosevelt nevertheless sought to remove a commissioner whom President Herbert Hoover had appointed because, as Roosevelt wrote the commissioner, "You will, I know, realize that I do not feel that your mind and my mind go along together on either the policies or the administering of the Federal Trade Commission, and, frankly, I think it is best for the people of this country that I should have a full confidence."<sup>123</sup>

In *Humphrey's*, the Supreme Court first held that the statute by its terms precluded the president from removing a commissioner for reasons other than those specified in the statute. The Court reasoned,

The commission is to be nonpartisan; and it must, from the very nature of its duties, act with entire impartiality. It is charged with the enforcement of no policy except the policy of the law. Its duties are neither political nor executive, but predominantly quasi-judicial and quasi-legislative.<sup>124</sup>

The Court concluded that the "general purposes of the legislation . . . demonstrate the Congressional intent to create a body of experts who shall gain experience by length of service—a body which shall be independent of executive authority, except in its selection, and free to exercise its judgment without the leave or hindrance of any

<sup>122</sup> *Humphrey's Ex'r*, 295 U.S. at 619.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 624.

other official or any department of the government.”<sup>125</sup> Indeed, the statute created a five-member commission on which “[n]ot more than three of the commissioners shall be members of the same political party.”<sup>126</sup>

The Court held this arrangement constitutional. The Court concluded that the reach of *Myers* affirming the Decision of 1789 “goes far enough to include all purely executive officers,” but “goes no farther;—much less does it include 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.”<sup>127</sup> The presidential removal power was inapplicable to the FTC, which was “an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid.”<sup>128</sup> Thus the FTC “acts in part quasi-legislatively and in part quasi-judicially.”<sup>129</sup> In sum, the Court concluded, an unfettered presidential removal power “threatens the independence of a commission, which is not only wholly disconnected from the executive department, but which, as already fully appears, was created by Congress as a means of carrying into operation legislative and judicial powers, and as an agency of the legislative and judicial departments.”<sup>130</sup>

In our brief, we argued that the Court’s holding in *Humphrey*’s cannot be reconciled with the Constitution’s text or structure. The opinion relies on the fallacy that there is a category of legislative-like or judicial-like power that need not be exercised by Congress or the judiciary, but which is also not part of “[t]he executive Power.” As the Court has said before, however, exercises of executive power often take legislative or judicial *form*, but they are

<sup>125</sup> *Id.* at 625–26 (emphasis omitted).

<sup>126</sup> *Id.* at 620 (quoting Federal Trade Commission Act, Pub. L. No. 63-203, ch. 311, § 1, 38 Stat. 717, 718 (1914)).

<sup>127</sup> *Id.* at 627–28.

<sup>128</sup> *Id.* at 628.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 630.

still ultimately exercises of executive power.<sup>131</sup> Or to put the point another way, and as I have argued elsewhere,<sup>132</sup> there is certainly government power that can be exercised by more than one branch. Some adjudications (over public rights cases, for example) could be conducted entirely within the executive branch, or Congress could assign their adjudication to the courts. Many regulations could certainly be passed as legislation by Congress, but Congress can also leave such matters to the executive. The problem with *Humphrey's Executor* is that it stands for the proposition that there is some government power that need not be exercised by *any* of the named constitutional actors.

Of course, *Humphrey's Executor* could be consistent with the constitutional text if one adopts the cross-reference theory. Under that theory, there is no actual grant of law-execution power to the president. The only power that the president has in this regard is what can be implied from the duty to take care that the laws be faithfully executed. Merely disagreeing with how other executive officers are executing the law does not mean they are faithlessly executing the law. Often the law allows discretion, and so long as the subordinate officer is staying within the bounds of legal discretion, the officer is faithfully executing the law.

The parties in *Seila Law* argued that *Humphrey's* was in any event distinguishable from the CFPB. Even if the Supreme Court were not inclined to revisit *Humphrey's*, it at least could hold that for-cause removal provisions are unconstitutional when the agency is headed by a single director. As we explained in our brief, what made the FTC a “judicial” and “legislative” aid in *Humphrey's* was the nature of the commission as much as its duties. The commission was to be “nonpartisan” and “act with entire impartiality.” It was “a body of experts who shall gain experience by length of service.”

<sup>131</sup> See *City of Arlington v. FCC*, 569 U.S. 290, 305, n.4 (2013) (“Agencies make rules . . . and conduct adjudications. . . and have done so since the beginning of the Republic. These activities take ‘legislative’ and ‘judicial’ forms, but they are exercises of—indeed, under our constitutional structure they *must be* exercises of—the ‘executive Power.’”) (citation omitted); cf. *Mistretta v. United States*, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting) (noting that “a certain degree of discretion, and thus of lawmaking, *inheres* in most executive or judicial action.”).

<sup>132</sup> Ilan Wurman, *The Specification Power*, 168 U. Pa. L. Rev. 689 (2020); Ilan Wurman, *Nondelegation at the Founding*, 130 Yale L.J. (forthcoming 2021).

We suggested that in *Humphrey's* the Court perhaps was embracing the distinction of early 19th-century theorists between "politics" and "administration." But a key component of this distinction is that administrative officials worthy of insulation from politics must be impartial. As Woodrow Wilson wrote, "The field of administration is a field of business. . . . [A]dministration lies outside the proper sphere of *politics*."<sup>133</sup> Frank Goodnow wrote that "there is a large part of administration which is unconnected with politics, which should therefore be relieved very largely, if not altogether, from the control of political bodies," because it embraces "semi-scientific" fields.<sup>134</sup> Administrative officials "should be free from the influence of politics because . . . their mission is the exercise of foresight and discretion, the pursuit of truth, the gathering of information," "efficient" organization, and "the maintenance of a strictly impartial attitude toward the individuals with whom they have dealings."<sup>135</sup>

Simply put, if the exception to the presidential removal power is to apply, we argued that it should apply only when the prerequisites identified by the Court in *Humphrey's* are present. A single principal officer, who is a partisan of one political party and who enjoys a sweeping portfolio over all the nation's consumer protection laws, is far removed from the FTC. The CFPB director, who has no need to convince, reason, or debate fellow commissioners, can hardly be counted on to be nonpartisan, impartial, or to act as an "expert."

In his amicus brief defending the CFPB, Paul Clement turned this argument around: if the problem is that for-cause removal provisions create too much insulation between the president and actual law-execution, then the problem is compounded by multimember commissions. This is undoubtedly true *if the Court wants to be originalist*. On any understanding of the text or the history, the answer does not depend on whether there is a multimember agency or a single officer. But the point is that *Humphrey's Executor* was a functionalist decision untethered to the text. Or, to the extent it is consistent with the cross-reference theory, it is still an entirely functionalist matter how much control the president must have to ensure faithful execution. And if we are arguing on functionalist grounds, then

<sup>133</sup> Woodrow Wilson, *The Study of Administration*, 2 *Pol. Sci. Q.* 197, 209–10 (1887).

<sup>134</sup> Frank J. Goodnow, *Politics and Administration: A Study in Government* 85 (1900).

<sup>135</sup> *Id.*

*Humphrey's* is justified on the “functional” basis of administrative expertise and deliberation—arguments that simply do not apply to single directors.

*C. Morrison v. Olson*

In *Morrison v. Olson*, the Supreme Court established an entirely new functionalist analysis for analyzing removal power questions. It is not clear how much of this approach survives (more anon), but *Morrison* remains an important precedent.

In 1978, Congress enacted the Ethics in Government Act, giving a special court the power to appoint, at the recommendation of the attorney general, an “independent counsel” to investigate high-level government misconduct.<sup>136</sup> This independent counsel had the “full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice.”<sup>137</sup> In other words, the counsel was a prosecutor, and was to be “independent” of the president—the president could not remove the counsel, and the attorney general could only remove her for good cause.<sup>138</sup>

The Supreme Court upheld the constitutionality of the independent counsel in a 7-1 decision. The lone dissent was Justice Antonin Scalia, who famously wrote: “Article II, § 1, cl. 1, of the Constitution provides: ‘The executive Power shall be vested in a President of the United States.’ As I described at the outset of this opinion, this does not mean some of the executive power, but *all of* the executive power.”<sup>139</sup> And prosecution was clearly part of “the executive power.” Indeed, Blackstone argues that the king is the chief prosecutor because the public has delegated to him all powers and rights “with regard to the execution of the laws.”<sup>140</sup> There have been several attempts in the literature to claim that “prosecution” was never an executive function, at least not one that had to be done by the president, and so Congress can limit the president’s control over

<sup>136</sup> 28 U.S.C. § 49.

<sup>137</sup> 28 U.S.C. § 594(a); see generally *id.* § 591 et seq. (full statute).

<sup>138</sup> *Morrison v. Olson*, 487 U.S. 654, 660–63 (1988).

<sup>139</sup> *Id.* at 705 (Scalia, J., dissenting) (emphasis original).

<sup>140</sup> Blackstone, *supra* note 16, at \*258–59.



prosecution. Elsewhere I have sought to demonstrate that these arguments are probably mistaken.<sup>141</sup>

The Court in *Morrison* agreed that prosecution was a “purely executive” function, thus distinguishing it from the functions in *Humphrey’s*, but argued that that did not resolve the case. “[O]ur present considered view,” the Court explained,

is that the determination of whether the Constitution allows Congress to impose a “good cause”-type restriction on the President’s power to remove an official cannot be made to turn on whether or not that official is classified as “purely executive.” The analysis contained in our removal cases is designed not to define rigid categories of those officials who may or may not be removed at will by the President, but 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.<sup>142</sup>

The inquiry thus boiled down to a purely functionalist one: whether the restrictions “interfere impermissibly with [the president’s] constitutional obligation to ensure the faithful execution of the laws.”<sup>143</sup> The Court held that the independence of the independent counsel, who the Court also held was an inferior officer, did not “interfere impermissibly.”

#### D. *Free Enterprise Fund v. PCAOB*

The Court’s most recent foray (aside from *Seila Law*) into the removal question was *Free Enterprise Fund v. PCAOB*. Unlike in *Morrison*, the agency there (the Public Company Accounting and Oversight Board, which was under the umbrella of the Securities and Exchange Commission [SEC]) was part of a traditional “independent” agency.<sup>144</sup> Unlike *Humphrey’s*, however, it involved an inferior officer. The novelty was two layers of for-cause removal provisions: the president could only remove SEC commissioners for cause, and

<sup>141</sup> Wurman, *supra* note 15.

<sup>142</sup> *Morrison*, 487 U.S. at 689–90.

<sup>143</sup> *Id.* at 693.

<sup>144</sup> Although the organic statute does not restrict the removal of SEC commissioners, it has long been assumed that the president can only remove them for cause.

those commissioners in turn could only remove PCAOB members for cause. Recall that in *Perkins*, the Court held that Congress could restrict the ability of a principal officer to remove an inferior, and in *Humphrey's* the Court held that Congress could restrict the ability of the president to remove a principal officer (at least of an independent agency). Could these two restrictions be combined?

The Court said no: “[S]uch multilevel protection from removal is contrary to Article II’s vesting of the executive power in the President. The President cannot ‘take Care that the Laws be faithfully executed’ if he cannot oversee the faithfulness of the officers who execute them.”<sup>145</sup> It is unclear how much of this opinion depends on the Court’s reading of the Vesting Clause. The Court seems to presume that the grant of executive power is at least a grant of the power to execute law; but its analysis turns largely on its view of how much power is necessary to ensure the faithful execution of the laws. Importantly, however, the Court did not cite or rely on *Morrison’s* functionalist “impermissibly interferes” test. It cited *Morrison* for the same proposition that it cited *Perkins*—that Congress could restrict the ability of a principal officer to remove an inferior officer.<sup>146</sup>

#### IV. The *Seila Law* Decision

That brings us to *Seila Law*. In a nutshell, five justices held that the for-cause removal provision insulating the director of the CFPB was unconstitutional. Two of these justices (Clarence Thomas and Neil Gorsuch) would have overruled *Humphrey’s Executor*. Those two also would have found that the removal provision was not severable from the remainder of the statute. The three other justices (John Roberts, Samuel Alito, and Brett Kavanaugh), along with the four dissenters, held that the removal provision was severable and therefore remanded to the lower courts to determine whether the enforcement action against petitioner *Seila Law LLC* had been ratified by a director (an acting director more specifically) who was removable at will. This part will not address the severability or remedial questions, only the removal power question.

<sup>145</sup> *Free Enter. Fund*, 561 U.S. at 484.

<sup>146</sup> *Id.* at 483 (“[I]n *United States v. Perkins* and *Morrison v. Olson*, the Court sustained similar restrictions on the power of principal executive officers—themselves responsible to the President—to remove their own inferiors.”) (internal citations omitted).

A. Majority Opinion

Chief Justice Roberts's majority opinion<sup>147</sup> did not examine in depth much of the debate discussed above. After all, the Court had already done so in *Free Enterprise Fund*, and so the majority largely fell back on that decision. It is not entirely clear which reading of the Executive Power Clause the majority adopts, but it does appear to believe it is a grant of some kind of substantive power (at a minimum the power to execute law):

Article II provides that "[t]he executive Power shall be vested in a President," who must "take Care that the Laws be faithfully executed." The entire "executive Power" belongs to the President alone. But because it would be "impossib[le]" for "one man" to "perform all the great business of the State," the Constitution assumes that lesser executive officers will "assist the supreme Magistrate in discharging the duties of his trust."<sup>148</sup>

The president's removal power, moreover, "has long been confirmed by history and precedent."<sup>149</sup> It was "discussed extensively" in the First Congress.<sup>150</sup> Relying on *Free Enterprise Fund* and a letter from James Madison to Thomas Jefferson, the Court again noted that the view that "prevailed" as "most consonant" with the Constitution was that the power of removal was constitutionally vested in the president.<sup>151</sup>

The majority held that there were only two "exceptions" to this general rule: the exception of *Humphrey's Executor* and *Morrison v. Olson*. The Court agreed with the petitioner (and a variety of amici) that the *Humphrey's* exception was limited to bipartisan, multimember commissions whose commissioners could check and balance each other and decide things impartially on the basis of expertise. The Court then did with *Morrison* what it did with that decision

<sup>147</sup> I do not refer to this opinion as the plurality opinion because of the agreement of five justices on the merits of the removal question.

<sup>148</sup> *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2197 (2020) (majority opinion) (citations omitted).

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

in *Free Enterprise Fund*: it argued that *Morrison* stood for the same proposition as *Perkins*, namely that Congress could insulate inferior officers from removal. Gone entirely was the actual functionalist test of that opinion.

The Court then reached its main holding: that these two exceptions did not apply to, and should not be extended to, the case of a single-director agency. Importantly, the Court first noted that single-director independent agencies were a novelty. The only other examples of such an arrangement were the comptroller of the currency during the Civil War, and there the removal protection was repealed by Congress the following year; the Office of Special Counsel, which “does not bind private parties” but only enforces certain rules against government officials; the Social Security Administration, which drew an objection from President Bill Clinton for the very reason that it was amended to be headed by a single director and which in any event “lacks the authority to bring enforcement actions against private parties”;<sup>152</sup> and finally the Federal Housing Finance Agency, which regulates primarily government-sponsored entities and whose single-director structure the Fifth Circuit has held to be unconstitutional.

The majority did not find the historical anomaly to be dispositive, though surely it was suggestive. The majority’s central point was that the Constitution, unlike its strategy with respect to legislative power, centralizes all executive power in a single individual. To ensure that individual is accountable for the exercise of this undivided executive power, he or she is to be elected, and by the people of the whole nation. “The resulting constitutional strategy is straightforward: divide power everywhere except for the Presidency, and render the President directly accountable to the people through regular elections.”<sup>153</sup> The CFPB is unconstitutional because it violates this strategy:

The CFPB’s single-Director structure contravenes this carefully calibrated system by vesting significant governmental power in the hands of a single individual accountable to no one. The Director is neither elected by the people nor meaningfully controlled (through the threat of removal) by someone who

<sup>152</sup> *Id.* at 2202.

<sup>153</sup> *Id.* at 2203.

is. The Director does not even depend on Congress for annual appropriations. Yet the Director may *unilaterally*, without meaningful supervision, issue final regulations, oversee adjudications, set enforcement priorities, initiate prosecutions, and determine what penalties to impose on private parties. With no colleagues to persuade, and no boss or electorate looking over her shoulder, the Director may dictate and enforce policy for a vital segment of the economy affecting millions of Americans.<sup>154</sup>

The majority thus adopted the view that if there is to be an “exception” to the general rule of presidential removal, the agency must be headed by multiple commissioners. There must be “colleagues to persuade.”<sup>155</sup> This makes it more likely that the purpose of the “exception” will be fulfilled—that is, such agencies will exercise power impartially and based on expertise. The Court held the single-director structure was enough to invalidate the CFPB, but it also noted that at least two other features heightened the constitutional problem. First, the five-year term meant that some presidents may never get to appoint a director. Second, the CFPB received its funding entirely outside the appropriation process, and so the president could not even control the agency through his role in the appropriations process.

### B. Concurring Opinion

On the merits of the removal question, Justice Thomas, joined by Justice Gorsuch, concurred in the chief justice’s opinion. But, Thomas noted, “with today’s decision, the Court has repudiated almost every aspect of *Humphrey’s Executor*,” and therefore in a future case he “would repudiate what is left of this erroneous precedent.”<sup>156</sup> Justice Thomas argued that “[t]he Constitution does not permit the creation of officers exercising ‘quasi-legislative’ and ‘quasi-judicial powers’ in ‘quasi-legislative’ and ‘quasi-judicial agencies.’”<sup>157</sup> Indeed, “[n]o such powers or agencies exist” because “Congress lacks the authority to delegate its legislative power” and “it cannot

<sup>154</sup> *Id.* at 2203–04.

<sup>155</sup> *Id.* at 2204.

<sup>156</sup> *Id.* at 2212 (Thomas, J., concurring).

<sup>157</sup> *Id.* at 2216.

authorize the use of judicial power by officers acting outside of the bounds of Article III.”<sup>158</sup> Nor, Thomas added, can Congress “create agencies that straddle multiple branches of Government.”<sup>159</sup> Simply put, “[t]he Constitution sets out three branches of Government and provides each with a different form of power—legislative, executive, and judicial.”<sup>160</sup>

Importantly, Justices Thomas and Gorsuch reiterated 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.”<sup>161</sup> They cited *Morrison* for the proposition but also footnote seven of Justice Elena Kagan’s dissent in *Seila Law*. In that footnote, Justice Kagan wrote:

The majority is quite right that today we view *all* the activities of administrative agencies as exercises of “the ‘executive Power.’” But we well understand, just as the *Humphrey’s* Court did, that those activities may “take ‘legislative’ and ‘judicial’ forms.” The classic examples are agency rule-makings and adjudications, endemic in agencies like the FTC and CFPB.<sup>162</sup>

This concession suggests that all nine justices on the Supreme Court believe that the reasoning of *Humphrey’s Executor* was erroneous. There is no such thing as quasi-legislative or quasi-judicial power that need not be exercised by at least one of the constitutionally named departments. If for-cause removal provisions can be sustained at all, it must be because the president only has whatever power to execute law that is implied by the duty to take care that the laws be faithfully executed.

### C. *Dissenting Opinion*

Justice Kagan, with whom Justices Ruth Bader Ginsburg, Stephen Breyer, and Sonia Sotomayor joined, dissented. As is typical of Justice Kagan’s opinions, this one is a masterful piece of writing with

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 2217 (internal citations omitted).

<sup>162</sup> *Id.* at 2234 n.7 (Kagan, J., dissenting) (internal citations omitted).

some incredible “zingers.” But I am not convinced that she has the better argument.

Justice Kagan begins with the text: “Nothing in [the Constitution] speaks of removal.” “And it grants Congress authority [via the Necessary and Proper Clause] to organize all the institutions of American governance, provided only that those arrangements allow the President to perform his own constitutionally assigned duties.”<sup>163</sup> Not only is the majority’s “rule” regarding presidential removal therefore incorrect, but its “exception” is wrong too. Nothing in *Humphrey’s Executor* or *Morrison* limits the reach of those decisions to multimember commissions or inferior officers, Kagan argues. Surely on this score the dissent is correct. The Court was, undeniably, trying to limit what it finds to be objectionable precedents without quite overruling them, which raises the usual question of whether such an approach wreaks more havoc on the law by creating untenable distinction after untenable distinction. Perhaps it does, and it would have been better for the Court to overrule *Humphrey’s Executor* and *Morrison*.

Justice Kagan then begins her historical analysis with two pieces of evidence:

First, in [the Founding] era, Parliament often restricted the King’s power to remove royal officers—and the President, needless to say, wasn’t supposed to be a king. See Birk, *Interrogating the Historical Basis for a Unitary Executive*, 73 *Stan. L. Rev.* (forthcoming 2021). Second, many States at the time allowed limits on gubernatorial removal power even though their constitutions had similar vesting clauses. See Shane, *The Originalist Myth of the Unitary Executive*, 19 *U. Pa. J. Const. L.* 323, 334–344 (2016). Historical understandings thus belie the majority’s “general rule.”<sup>164</sup>

Justice Kagan does not actually interrogate the cited articles, however. Part II.A explained why Birk’s argument is unconvincing at least as applied to principal officers. And Justice Kagan relies on Peter Shane’s article for the proposition that state constitutions with similar executive vesting clauses “allowed limits on gubernatorial removal power.” Shane’s article, however, is about legislative

<sup>163</sup> *Id.* at 2225.

<sup>164</sup> *Id.* at 2228.

appointments under the state constitutions, and not removals.<sup>165</sup> As Mortenson argues, appointments were understood to be part of the executive power except as otherwise provided for by law.<sup>166</sup> Both Madison and James Wilson defined the executive power at the Constitutional Convention as including the power “to appoint to offices *in cases not otherwise provided for*.”<sup>167</sup>

Indeed, the Constitution specifically assigns part of the appointment power to the Senate or to Congress as a whole. The whole premise of the Decision of 1789 is that removal is different from appointment. Appointments are more amenable to legislative input because various legislators are likely to know the potential officers in their states and districts. But it is the president who is in the best position to know whether such officers are discharging their duties appropriately once appointed.

Justice Kagan then cites Edwin Corwin’s 1927 article, *Tenure of Office and the Removal Power under the Constitution*,<sup>168</sup> for the proposition that “New York’s Constitution of 1777 had nearly the same [vesting] clause, though the State’s executive had ‘very little voice’ in removals.”<sup>169</sup> I was intrigued by this citation. If the language of the similar executive power clause in New York’s Constitution, widely acknowledged to be a model for the U.S. Constitution, did not convey a removal power, then that would be serious evidence against a removal power. But it turns out not to be true—at least, the citation

<sup>165</sup> Indeed, Shane explains, “Not much is added to [his] analysis [of state constitutions] by an inquiry into gubernatorial removal powers. The federal Constitution, of course, makes no mention of presidential removal power. This is the pattern of most state constitutions as well, except insofar as they authorize gubernatorial removals of judicial or militia officers on address by two-thirds of a few of the state legislatures. . . . [And] the early state constitutional texts pertaining explicitly to removal powers generally do not add anything to an original public meaning argument for a unitary executive in the states, but the topic is generally left to implication, as it is in the federal Constitution.” Peter M. Shane, *The Originalist Myth of a Unitary Executive*, 19 U. Pa. J. Const. L. 343–44 n.66 (2016). The only mention of a removal power dispute under state law, moreover, is a single example from Pennsylvania after the famous removal debate in Congress. *Id.* at 351.

<sup>166</sup> Mortenson, *supra* note 25, at 55.

<sup>167</sup> 1 The Records of the Federal Convention of 1787, *supra* note 53, at 66–67 (cleaned up) (Madison); *id.* at 70 (Wilson) (“Executive powers are designed for the execution of Laws, and appointing Officers not otherwise to be appointed.”).

<sup>168</sup> 27 Colum. L. Rev. at 385.

<sup>169</sup> *Seila Law*, 140 S. Ct. at 2228 (Kagan, J., dissenting).



does not prove it. Corwin did indeed say that New York's constitution "gave the executive of that state very little voice in either appointments or removals."<sup>170</sup> For this proposition Corwin cites the "take care" clause of the New York constitution and pages 36–37 and 53 of Charles Thach's well known work *The Creation of the Presidency*.<sup>171</sup> None of those pages mentions anything about removal, however.

Justice Kagan next cites two famous passages from *The Federalist*:

In Federalist No. 77, Hamilton presumed that under the new Constitution "[t]he consent of [the Senate] would be necessary to displace as well as to appoint" officers of the United States. He thought that scheme would promote "steady administration": "Where a man in any station had given satisfactory evidence of his fitness for it, a new president would be restrained" from substituting "a person more agreeable to him." By contrast, Madison thought the Constitution allowed Congress to decide how any executive official could be removed. He explained in Federalist No. 39: "The tenure of the ministerial offices generally will be a subject of legal regulation, conformably to the reason of the case, and the example of the State Constitutions."<sup>172</sup>

The majority does not have much to say about these statements from Hamilton and Madison except to say they later changed their views. I think there's much more to say, to wit: It is not clear that either statement suggests the president does not have a removal power. Start with Hamilton's statement.<sup>173</sup> Hamilton's entire paragraph is about "the business of appointments." Thus, he speaks of "displacing" an officer after a *new president* is elected. This seems most logically to be a reference to the advice and consent of the Senate to a new appointment. The president would not need the advice and consent to remove an officer, but to displace the officer (that is, replace the officer with a new one), the president certainly would

<sup>170</sup> Corwin, *supra* note 95.

<sup>171</sup> Charles C. Thach, *The Creation of the Presidency* (1922).

<sup>172</sup> Seila Law, 140 S. Ct. at 2229 (Kagan, J., dissenting).

<sup>173</sup> I am indebted to Josh Blackman for this insight. Josh Blackman, "Justice Kagan on Hamilton in Federalist No. 77," Reason: Volokh Conspiracy, July 1, 2020, <https://reason.com/2020/07/01/justice-kagan-on-hamilton-in-federalist-no-77/>.

need the advice and consent of the Senate.<sup>174</sup> As for Madison's statement, it is true that Congress regulates the "tenure" of "offices" by establishing the length of the term—the length of time before a new individual has to be nominated and appointed to the position. That is not controversial. It is not clear that Madison meant to suggest anything about presidential removal.

Justice Kagan finally arrives at the Decision of 1789. She argues that the Decision of 1789 is ambiguous, which, as explained, is certainly a plausible interpretation of the debates. Kagan then argues that, in any event, Congress always treated financial institutions differently. Justice Kagan relies on the arguments discussed in Part II.B.2 but does not address any of the counterarguments. The dissenting opinion even adds two points that the amici in support of the CFPB had advanced in the *PHH* case but abandoned in their *Seila Law* case.

First, Justice Kagan noted that the "Comptroller of the Treasury's settlements of public accounts" was "final and conclusive," thereby "preventing presidential overrides" and marking "the Comptroller

<sup>174</sup> Here is the full text:

It has been mentioned as one of the advantages to be expected from the cooperation of the Senate, in the business of *appointments*, that it would contribute to the stability of the administration. The consent of that body would be necessary to displace as well as to appoint. *A change of the Chief Magistrate*, therefore, would not occasion so violent or so general a revolution in the officers of the government as might be expected, if he were the sole disposer of offices. Where a man in any station had given satisfactory evidence of his fitness for it, a new President would be restrained from attempting a change *in favor of a person* more agreeable to him, by the apprehension that a discountenance of the Senate might frustrate the attempt, and bring some degree of discredit upon himself. Those who can best estimate the value of a steady administration, will be most disposed to prize a provision which connects the official existence of public men with the approbation or disapprobation of that body which, from the greater permanency of its own composition, will in all probability be less subject to inconstancy than any other member of the government.

To this union of the Senate with the President, *in the article of appointments*, it has in some cases been suggested that it would serve to give the President an undue influence over the Senate, and in others that it would have an opposite tendency, a strong proof that neither suggestion is true.

The Federalist No. 77 at 458 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis added).

as exercising independent judgment.”<sup>175</sup> But ordinarily finality and conclusiveness has to do with the availability of judicial review in matters of public rights—not with presidential supervision.<sup>176</sup> Second, Justice Kagan wrote that “even James Madison, who at this point opposed most removal limits, told Congress that ‘there may be strong reasons why an officer of this kind should not hold his office at the pleasure’ of the Secretary or President.”<sup>177</sup> She fails to mention that Madison’s actual proposal included the proviso “unless sooner removed by the President.”<sup>178</sup> Additionally, his observation was limited to the settling of individual claims against the government, and therefore would not have applied very broadly:

I question 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. The necessary examination and decision in such cases partake too much of the Judicial capacity to be blended with the Executive. I do not say the office is either Executive or Judicial; I think it rather distinct from both, though it partakes of each, and therefore some modification, accommodated to those circumstances, ought to take place.<sup>179</sup>

The very next day, in any event, Madison “withdrew the proposition which he yesterday laid upon the table.”<sup>180</sup> We can’t know for

<sup>175</sup> Seila Law, 140 S. Ct. at 2230–31 (Kagan, J., dissenting).

<sup>176</sup> Whether an executive branch agency or official could act conclusively—or whether her acts would be judicially reviewable—had to do with the rights/private-legal distinction in the 19th century. As Caleb Nelson has written, “the public/private distinction had considerable resolving power; it formed the basis for a framework that was used throughout the nineteenth century to separate matters that required ‘judicial’ involvement from matters that the political branches could conclusively adjudicate on their own.” Caleb Nelson, *Adjudication in the Political Branches*, 107 *Colum. L. Rev.* 559, 564 (2007). Courts routinely determined whether agency determinations were “conclusive” as opposed to being subject to judicial review. *Id.* at 577–82 (citing numerous cases). Attorney General William Wirt did think, however, that this provision of the treasury statute meant that the president could not personally interfere with the settling of accounts. *The President & Accounting Offices*, 1 *U.S. Op. Atty. Gen.* 624 (1823).

<sup>177</sup> Seila Law, 140 S. Ct. at 2231 (Kagan, J., dissenting).

<sup>178</sup> 1 *Annals of Cong.* 612.

<sup>179</sup> *Id.* at 614.

<sup>180</sup> *Id.* at 615.

sure why, but maybe he came to see an inconsistency in his position. Although this episode is rather ambiguous, it hardly proves much support for the dissenting position. One would think that the full contours of the episode should have been discussed.

Justice Kagan also relied on a letter from Thomas Jefferson and a handful of attorney general opinions for the proposition that the president could not interfere with the decisions of the comptroller.<sup>181</sup> This evidence suggests that the president cannot personally execute laws when their execution is tasked to subordinate officers, and perhaps it suggests the president cannot generally direct those officers, either. But none of that suggests the president could not freely remove officers.

Justice Kagan does cite one attorney general opinion for the proposition that “Congress could restrict the President’s authority to remove such officials, at least so long as it ‘express[ed] that intention clearly.’”<sup>182</sup> But this opinion only had to do with inferior officers whose appointments Congress vested in the president alone (and thus it was similar to the *Perkins* case). Attorney General Wirt’s opinion said that if Congress did not further specify the tenure of such an inferior officer, then the office is of course held during the pleasure of the president. Although that is somewhat suggestive that the president might not be able to remove at-will such an officer if Congress does impose restrictions, that question was not squarely presented to the attorney general. And even if it had been, the question would again only apply to inferior officers. It is true that in a better known opinion, unfortunately not cited by the dissenting opinion, Attorney General Wirt was much more explicit that the president could only remove officers for faithless execution.<sup>183</sup> That is undeniably some evidence that some prominent individuals in government

<sup>181</sup> Letter from T. Jefferson to B. Latrobe (June 2, 1808), in Thomas Jefferson and the National Capital 429, 431 (S. Padover ed., 1946) (“[W]ith the settlement of the accounts at the Treasury I have no right to interfere in the least,” because the Comptroller of the Treasury “is the sole & supreme judge for all claims of money against the U.S. and would no more receive a direction from me” than would “one of the judges of the supreme court.”); 1 Op. Att’y Gen. 636, 637 (1824) (“the President has no right to interpose in the settling of accounts” because Congress had “separated” the comptroller from the president’s authority); 1 Op. Att’y Gen. 678, 680 (1824) (same).

<sup>182</sup> 1 Op. Att’y Gen. 212, 213 (1818).

<sup>183</sup> The President & Accounting Offices, 1 U.S. Op. Att’y Gen. 624, 625–26 (1823).

in the 19th century rejected a general removal power, as indeed did many in the First Congress in the great removal debate.

Although I have criticized significant parts of Justice Kagan's historical analysis, a high point of her opinion was its response to the chief justice's argument about the novelty of the CFPB. Justice Kagan rightly noted that "novelty is not the test of constitutionality when it comes to structuring agencies," and that "Congress regulates in that sphere under the Necessary and Proper Clause, not (as the majority seems to think) a Rinse and Repeat Clause."<sup>184</sup> That's surely true. But nor does the Necessary and Proper Clause permit just any innovation. Congress can seek to effectuate the president's powers; it cannot try to supplant them.

Perhaps the most important takeaway from the opinions in the *Seila Law* case, in summary, is that history is contested and never clear cut. The majority would do well to accept the ambiguity of the Decision of 1789 and state clearly that its force has to do with the force of the arguments of Madison and Ames. The dissenters, for their part, would do well to recognize the existence of academic literature counter to the literature they cited. There is a growing body of scholarship suggesting that the Executive Power Clause was a substantive grant of power, even if only to execute law. The implications are potentially very different from what follows if the president's power is only what can be inferred from the Take Care Clause. The dissent would also do well to accept that nothing in principle separates financial agencies from other types of agencies, except perhaps Congress's historical interest in more carefully monitoring and constructing the duties of such agencies.

## Conclusion

The *Seila Law* decision represents the same approach the Court took in *Free Enterprise Fund*: narrowly construe the functionalist exceptions of *Humphrey's* and *Morrison* and decline to extend them to new circumstances. The dissenters are surely right, however, that nothing in the Constitution really distinguishes between single-director agencies and multimember agencies, unless the analysis is entirely a functionalist one under the Take Care Clause. It may be better in the future to recognize that the reasoning of *Humphrey's* has

<sup>184</sup> *Seila Law*, 140 S. Ct. at 2241 (Kagan, J., dissenting).

been abandoned. If it can be justified at all, it is only on the grounds that the Executive Vesting Clause is not a grant of substantive power. In that case, the analysis of all removal cases will depend on how much power can be implied from the president's duty to take care that the laws be faithfully executed. If the Executive Vesting Clause is at least a grant of law-execution power, however, then *Humphrey's* and *Morrison* simply can no longer stand and should be overruled.