THE IRONY OF *HUMPHREY'S EXECUTOR* & THE SEPARATION OF POWERS DOCTRINE

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ABSTRACT

The vestiges of the *Humphrey's Executor*[1] exception for independent agencies are crumbling. Just as with *Chevron*,[2] the Roberts Court—particularly in the turbulent wake of *Free Enterprise*,[3] *Lucia*,[4] and *Seila Law*[5]—has seemed to suggest that *Humphrey's* days are numbered. When *Consumers' Research v. Consumer Product Safety Commission*[6] finally arrived at the doorstep of the high Court, the inevitable had seemingly arrived—*Humphrey's* was finally to fall. Yet there were not four votes to hear the case.[7] The Fifth Circuit was so hotly divided amongst itself as to *Humphrey's* continued meaning and applicability to modern administrative agencies that a bare-thin majority (9-8) concluded that—since the "cert petition writes itself"[8]—the Supreme Court should clean the *Humphrey's* skeleton from the precedential closet, not the lower courts. Indeed, in declining to intern *Humphrey's*, the majority seemed to agree

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[1] Humphrey's Ex'r v. United States, 295 U.S. 602 (1935).
[2] *See* Loper Bright Enterprises v. Raimondo, 603 U.S. 144 (2024).
[3] Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477 (2010).
[4] Lucia v. Sec. & Exch. Comm'n, 585 U.S. 237 (2018).
[5] Seila L. LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197 (2020).
[6] Consumers' Rsch. v. Consumer Prod. Safety Comm'n, 592 F. Supp. 3d 568 (E.D. Tex. 2022), *rev'd and remanded,* 91 F. 4th 342 (5th Cir. 2024), *aff'd,* No. 24-40317, 2024 WL 3064726 (5th Cir. May 21, 2024) (order denying *en banc* review).
[7] *Id.*, *cert. denied sub nom.*, No. 23-1323, 2024 WL 4529808 (Oct. 21, 2024).
[8] *Id.*, 98 F. 4th 646, 650 (5th Cir. 2024) (Willet, J., concurring) (order denying *en banc* review).

with the dissenters that the case's outcome was no longer justifiable in the face of the leviathan that constitutes the vast swath of the modern executive agencies. Yet, here, I argue quite the contrary. Far from overturning the holding of *Humphrey's Executor*, I argue that the Roberts Court must return judicial application of *Humphrey's* to its core and central holding—the Executive may be restricted in removing *only* those officers of the United States whose "duties are neither political nor executive"[9] and "cannot in any proper sense be characterized as an arm or an eye of the executive."[10] Here lies the irony of *Humphrey's*—what was originally (by its own text) a case to preserve the separation of powers, *Humphrey's* now serves the opposite: to derogate responsibility and impermissibly allow Congress to devoid the American people of accountability in those who undertake to execute the nation's laws. This paper begins by examining the separation of powers doctrine in light of the holding in *Humphrey's*, as well as corollary cases that give rise to such. With this foundation, I examine a vast departure from the clear text of *Humphrey's Executor*, to which I argue reached an absurd outer inflection point in *Morrison v. Olson*.[11] While the Roberts Court declined to certify *Consumers' Research*, the trajectory of *Humphrey's* demands correction.

INTRODUCTION: *HUMPHREY'S EXECUTOR* AS A SEPARATION OF POWERS CASE

Most first-year law school students, and even many pre-law undergraduates, study *Humphrey's Executor*.[12] A stalwart case, representing the height of the New Deal Era and President Roosevelt's reframing of the nation's administrative state, *Humphrey's* establishes a basic but fundamental constitutional holding that has stood for nearly a century—Congress can prevent the President from firing certain executive officers "but for cause." These officers, eligible for tenure protections, were originally limited to "administrative bod[ies] created . . . to carry into effect legislative policies . . . and to perform other specified duties as a legislative or as a judicial aid," provided that "[s]uch a body cannot in any proper sense be characterized as an arm or an eye of the executive."[13]

Most legal scholars point to the fact that the Federal Trade Commission (as existent in 1935) was, crucially, "in part quasi-legislative[] and in part quasi-judicial[],"[14] and in no way executive, as the principal reason to sustain the

[9] Humphrey's Ex'r v. United States, 295 U.S. 602, 624 (1935).
[10] *Id*. at 628.
[11] Morrison v. Olson, 487 U.S. 654 (1988).
[12] *Humphrey's Ex'r*, 295 U.S. at 602.
[13] *See id.* at 628.
[14] *See id.*; *see also* Consumers' Rsch. v. Consumer Prod. Safety Comm'n, 98 F. 4th 646, 651 (5th Cir. 2024) (Oldham, J., dissenting) (order denying *en banc* review) ("Congress may restrict the President's power to remove members of a 'multimember expert agenc[y] that do[es] not wield substantial executive Power.'" (quoting Seila L. LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197, 218 (2020))); *see also* Daniel A. Crane, *Debunking Humphrey's Executor*, 83 GEO. WASH. L. REV. 1835, 1844 (2016) ("Because the FTC was not acting as a law enforcer, but instead as a judge and

tenure protections afforded the Federal Trade Commission's ("FTC") commissioners from plenary presidential removal. Yet this misses the point. The Constitution speaks nill of "quasi-legislative" or "quasi-judicial" powers, and perhaps this is why the Court has since backed away from this line of reasoning.[15] Instead, the Constitution enshrines "a due foundation for the separate and distinct exercise of the different powers of government."[16] In other words, the tenure protections afforded the FTC's commissioners by Congress were not permissible as constitutional ends in and of themselves, but rather as *means* of achieving the well-established constitutional ends of separating the powers of the federal government in order to better secure individual liberty. By Justice Sutherland's own account for the majority in *Humphrey's*, this is precisely the case. The Court reasoned that "[t]he fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others . . . makes one master in his own house [and thus] precludes him from imposing his control in the house of another who is master there."[17] Thus, the one and *only* reason Congress could constitutionally insulate the FTC's commissioners (as empowered in 1935) from absolute presidential removability was because Congress, and not the president, was the FTC's "master," and the FTC was in "the house of" Congress and the Judiciary. Moreover, since the president was not the "master" of the FTC, and the FTC was not "in his own house," the president was thus "preclude[d] . . . from imposing his control" over the FTC by way of plenary removal powers.

It should not come as a shock that the FTC, along with the vast majority of the so-called independent agencies that proliferated in the wake of *Humphrey's*, look very different today. Numerous commissions,[18] perhaps some 48 agencies and nearly 600 commissioner-like officers of the United States,[19] are tasked

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legislator, the President did not need to control FTC Commissioners in order to perform his constitutional obligation to see that the laws were faithfully executed.").

[15] The Court has since backed away from the "quasi" powers standard. *See* Morrison v. Olson, 487 U.S. 654, 688 (1988).

> We undoubtedly did rely on the terms "quasi-legislative" and "quasi-judicial" to distinguish the officials involved in *Humphrey's Executor* and *Wiener* [*v. United States*, 357 U.S. 349 (1958)] from those in *Myers* [*v. United States*, 272 U.S. 52 (1926)], but our present considered view 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."

Id.

[16] THE FEDERALIST NO. 51, 348 (James Madison) (Jacob E. Cooke ed., 1961).

[17] *Humphrey's Ex'r*, 295 U.S. at 629–30.

[18] *See* Paul R. Verkuil, *The Purposes and Limits of Independent Agencies*, 2/3 DUKE L.J. 257 (1988) (noting that, by 1988, "the Unified Agenda of Federal Regulations, published by OMB's Regulation Information Service Center" had recognized fourteen independent agencies).

[19] Perhaps undertaking a more expansive analysis than Verkuil, in his dissent in *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, Justice Breyer identifies "48 such agencies" (by "a conservative estimate") composed of "federal departments, offices, bureaus, and other agencies whose heads are by statute removable only 'for cause.'" Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S.

with regulating and overseeing complex and rapidly changing industries and subject matters. They perform a vast range of administrative rulemaking and adjudicative functions that influence the lives of millions of Americans on a daily basis.[20] Even the FTC itself—which once could not "in any proper sense be characterized as an arm or an eye of the executive"—in its "predominant character" "has become that of a traditional law enforcement department."[21] In parallel, most of the modern administrative state's independent agencies are "very far from the quartet of qualities announced in *Humphrey's Executor*,"[22] that quartet being the FTC's then-qualities of being "(1) nonpolitical and nonpartisan, (2) uniquely expert, (3) 'quasi-legislative,' and (4) 'quasi-judicial,' rather than executive."[23] As it sits today, most—if not all—of the independent agencies are "executive"; they have "potent tools to pursue [their] objectives: broad discretion to make rules, sweeping investigatory and enforcement powers, and extensive adjudicatory authority."[24]

Let us not forget the fact that "that the *Humphrey's* exception simply does not sweep in all traditional independent agencies headed by multimember boards."[25] Instead, it is the doctrine of separation of powers which demands that "one master in his own house" must be in sole "control in the house"—by *Humphrey's* own holding. By this, then, "the fact-bound holding of *Humphrey's Executor* does not encompass the . . . removal protections" of *any* independent agencies that wield executive power.[26]

What is plain on its face is that *Humphrey's Executor* simply no longer applies with respect to many—if not most—of the modern independent agencies. Yet the courts continue to apply it as if it does.[27] Herein the irony arises. *Humphrey's Executor* aimed at protecting the separation of powers, preventing the president from exercising control—indeed, the most coercive control, the threat of termination—over officers who did not wield executive power. Modern times, however, reveal that *Humphrey's Executor* is used by the Article III

477, 541 (2010) (Breyer, J., dissenting). Out of these 48 agencies, Justice Breyer determines that the "good cause" tenure afforded to these officers extends to "573 . . . high-ranking officials." *See id.*

[20] *Cf., e.g.,* Seila L. LLC v. Consumer Fin. Prot. Bureau*,* 591 U.S. 197, 203 (2020) (holding that the modern Consumer Financial Protection Bureau "wields vast rulemaking, enforcement, and adjudicatory authority over a significant portion of the [United States]").

[21] *See* Crane, *supra* note 14, at 1868. As Crane recognizes, this is particularly so "on the antitrust side, where the Commission does no rulemaking and little adjudication, essentially dividing enforcement responsibility with the Justice Department based on superior expertise and prior experience, and participates with the Justice Department in promulgating guidelines spelling out the agencies' joint perspective on a variety of enforcement topics." *Id.* at 1868–69.

[22] *See id.* at 1869.

[23] *See id.* at 1836.

[24] Consumers' Rsch. v. Consumer Prod. Safety Comm'n, 98 F. 4th 646, 652 (5th Cir. 2024) (Oldham, J., dissenting) (order denying *en banc* review).

[25] *Id.* at 654.

[26] *Id*. at 655.

[27] *See*, *e.g.*, *id.*

courts to do quite the opposite—derogate the separation of powers by sustaining tenure protections of officers of administrative agencies who wield vast and potent amounts of the chief executive's power. This exercise of the executive's power is crucial; it did not exist in *Humphrey's*, but it does exist in our administrative state today.

As Fifth Circuit Judge James Ho argues, the continued application of *Humphrey's* in the modern era results in the fact that "[t]here is no accountability to the people [because] so much of our government is so deeply insulated from those we elect."[28] When the president cannot remove those exercising *his*[29] executive power, we subject the executive (impermissibly, under Article II) "to the project of a council, whose concurrence is made constitutionally necessary to the operations of the ostensible executive."[30] When the president cannot remove those exercising *his* executive power, he is subject to "[a]n artful cabal" who is "able to distract and to enervate the whole system of administration."[31] And, more colloquially, when the president cannot remove those exercising *his* executive power, "Congress . . . reduce[s] the Chief Magistrate to a cajoler-in-chief."[32] Thus, the continued application of *Humphrey's Executor*, ironically, does the very thing that it aimed to prevent: derogation of the distinct separation of the federal powers between the Article I, II, and III branches of government.

More simply, the FTC—along with many of the other independent agencies alongside it—are now, today, "in the house" of the president. In a position "so obvious that the government does not even contest it," modern administrative agencies exercise "power [that] is executive" in nature, "because that is the only kind of power an agency can exercise under our Constitution."[33] Thus, "the fact-bound holding of Humphrey's Executor does not encompass the . . . removal protections"[34] of most modern administrative commissions. Yet our courts continue to pretend that it does.

EXCLUSIVE VESTING OF EXECUTIVE POWER

The vesting of the nation's executive powers flows from one—and only one—source: Article II of the Constitution. Section 1, Clause 1, still unamended and intact as existent in the Constitution of 1789, mandates that "[t]he executive

[28] *Id.* (order denying *en banc* review) (Ho, J., dissenting).
[29] *See* Morrison v. Olson, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting) ("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 . . . this does not mean some of the executive power, but *all* of the executive power.").
[30] *See* THE FEDERALIST NO. 70, *supra* note 16, at 476 (Alexander Hamilton).
[31] *Id.*
[32] Free Enterprise Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 502 (2010).
[33] *See id.* (Oldham, J., dissenting) (slip op. at 12).
[34] *See id.* (slip op. at 17).

Power shall be vested in a President of the United States of America."[35] And, as Justice Scalia reminds us, this does not mean "some of the executive power, but *all* of the executive power."[36]

The Framers, in drafting "[t]he Constitution[,] sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility."[37] For Madison, "essential to the preservation of liberty" was that "each department should have a will of its own."[38] This independent will would follow, as a matter of course, only through the "separate and distinct exercise of the different powers of government."[39] Article II, Section 1, makes clear that, out of the whole of the federal government's raw powers, which are so divided for the sake of the "preservation of [individual] liberty," the Constitution places "[t]he executive power . . . in [the] President" alone.[40]

Attacks on *Humphrey's Executor* generally flow from this distinction—that only the President, in our constitutional scheme, possesses the executive powers; but for such attacks to have merit, and for the sake of not begging the question, it first must be true that Article II, Section 1, in fact *does* vest the President with the whole of the nation's raw and unadulterated executive powers.

Answering this question is best accomplished by turning to the text of the Constitution, and then to the Framers thereof themselves. Consider the following propositions. For one, the Framers provide that the President can make treaties as an exercise of his executive power, but only "by and with the Advice and Consent of the Senate."[41] If the executive power is truly placed in the President, in the *absolute*, then the mass of his powers would surely include the ability to engage in foreign affairs—namely, the execution of treaties—entirely of his own accord and free from seeking leave or approval from anyone other than himself. Yet the Framers did not do as such, but explicitly carved out of the executive powers entrusted into the President the unilateral and sole ability to make, and enter into execution of, treaties with foreign nations. Instead, he must seek the Senate's advice and consent.

Take also the division of executive power insomuch as the President alone may choose the nation's "Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States" that the Constitution does not otherwise explicitly "provide[] for."[42] Except the President does not possess the power of making such appointments entirely of

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[35] U.S. CONST. art. II, § 1, cl. 1.
[36] *See* Morrison v. Olson, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting).
[37] Immigr. & Naturalization Serv. v. Chadha, 462 U.S. 919, 951 (1983).
[38] *See* THE FEDERALIST NO. 51, *supra* note 16, at 348.
[39] *See id*.
[40] *See Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 501 (2010).
[41] U.S. CONST. art. II, § 2, cl. 2.
[42] *See id.*

his own accord. Rather, the power of seating the nation's ambassadors, judges, and officers is seemingly shared between the President and the Senate (who thereto from he must also seek "Advice and Consent"). Stated differently, while the President is entrusted with "nominat[ing] . . . [and] appoint[ing]" the nation's high officials, it is the Senate which retains the executive power of confirmation over such appointments.[43] Even the President's executive prerogative as the "Commander in Chief of the Army and Navy of the United States,"[44] upon a first and precursory glance, cannot be understood in an absolute and unfettered sense, as it is Congress—not the President—who holds the executive power to commencement war.[45]

What is, then, to be said to be the executive powers to which the President is entrusted? Can they be understood in an absolute (constitutional) sense if one or both houses of Congress is entrusted, during specific enumerated times, with executive prerogatives? While the Framers, in Article II, Section 1, seem to imply an absolute grant to the President, the explicit reservation of executive powers from the President, in some instances—commencing wars, finalizing treaties, confirming officer nominations—conversely seems to refute the notion that the Framers sought a unitary executive entrusted with the unfettered executive power of the then-newly formed United States.

Hamilton, the great theorist of executive power, has the answer. For him, the conflict in the apparently absolute grant of the executive powers to the President, but reservation of limited executive powers to Congress, merely exhibited that the President retains all executive powers not otherwise explicitly delegated. As he wrote in a letter to Madison in June of 1793, concerning this apparent logical conflict, Hamilton reasoned that "[t]he general doctrine of our Constitution then is, that the *executive power* of the nation is vested in the President; subject only to the *exceptions* and *qualifications*, which are expressed in the instrument."[46] Simply put, then, "[w]ith these exceptions, the *executive power* of the United States is completely lodged in the President."[47] Hamilton also recognized that these explicit grants of executive power to those other than the President were rigid and finite:

> [A]s the participation of the senate in the making of Treaties and the power of the Legislature to declare war are exceptions out of the general 'Executive Power' vested in the President, they are to be construed strictly—and ought to be extended no further than is essential to their execution.[48]

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[43] *See id.*
[44] *Id.* cl. 1.
[45] *See id*. art. I, § 8, cl. 11.
[46] 7 ALEXANDER HAMILTON, *Pacificus No. I*, *in* WORKS OF ALEXANDER HAMILTON 76, 81 (John C. Hamilton ed., 1851).
[47] *Id.*
[48] *Id.* at 84.

This analysis, of strict construction on the limited participation of Congress in the executive powers, is affirmed in *Myers*.[49]

As Hamilton continued to Madison in 1793: "The division of the executive power in the Constitution, creates a *concurrent* authority in the cases to which it relates."[50] What, then, does this "concurrent authority" mean for a matter of constitutional analysis of the vesting of executive power? The example Hamilton gives is that "in the instance stated, treaties can only be made by the president and senate jointly; but their activity may be continued or suspended by the President alone."[51] Hamilton thus understood that the whole of the executive powers are absolutely afforded to the President, and that the Framers required sharing of certain executive powers—explicitly enumerated and provided for ("to be extended no further")—along with the President's total and complete vesting. The President must choose and confirm fitness for office, by his executive powers, the nation's principal officers, but the Senate too has an executive prerogative in this matter (restricted solely to confirmation).

How then does the Constitution vest executive power? There seems to be an overall distinction in the concurrency of the executive prerogative between *motive* executive power (to *act*) and *confirmatory* executive power (merely to *affirm* an action by another). For example, the President is vested with sole powers over the armed forces under Article II, Section 2. While Congress is to "declare war" under U.S. Const., Art. I, Sect. 8, Cl. 11, Congress is powerless to actually commence the physical conflict, to start the fighting or the firing of shells. Congress has a *confirmatory* executive authority to either agree with the President in the engagement of a war, issuing a declaration of such, or disagree and withhold a declaration all the same. If the President wants to command the Armed Forces into battle, he requires Congress's affirmative grant, using its concurrent (*confirmatory*) executive prerogative, before he can do so. Same for Congress: if the Legislature wants to engage in a war, it requires a President who is willing to use his executive prerogative to actually engage in one that Congress so authorizes. A President who wants war, but is denied authoritative declaration of such by Congress, is in the same position as a Congress that declares a war to exist, but is met by a President who refuses to command the Armed Forces to act in such—no war is to be had.

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[49] *See* Myers v. United States, 272 U.S. 52, 118 (1926) ("The requirement of the second section of Article II that the Senate should advise and consent to the Presidential appointments, was to be strictly construed.").

[50] HAMILTON, *supra* note 46, at 83.

[51] *Id.*; *see also* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936) (finding that even absent an explicit grant, foreign affairs being soundly of a national prerogative, "the President alone has the power to speak or listen as a representative of the nation," and additionally, noting that it is the President—and the President alone—who "*makes* treaties," but he does so "with the advice and consent of the Senate," however the President "alone negotiates," as "[i]nto the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it").

The concurrent executive prerogative surrounding wars is identical to the constitutional fabric setup in the Appointments Clause. If the President wants to seat a principal Officer of the United States, he requires an affirmative grant from the Senate to do so (like a declaration in war from Congress). Just as the Congress cannot force the President to command the Armed Forces to engage in a war, the Senate may not force upon the President a particular candidate for a principal office.

Whatever executive powers that reside outside of the President, then, are properly framed by Hamilton. In all cases, the President retains both the motive executive force—*engaging* in foreign relations, *appointing* officers, *commanding* a war—and the confirmatory executive power—the President must agree with the terms of treaties before sending them to the Senate, the President ostensibly agrees with the soundness of the appointments that he makes, and the President also ostensibly must agree with a war before he chooses to engage the Armed Forces in one.[52] The withholding of appointments, treaties, and armed conflict is tantamount to disapproval (or the President's withholding of executive power). Whereas the President possesses both motive and confirmatory executive prerogatives, Congress only has the latter; it must share in the President's wishes for a treaty, principal Officer, or a war, but lacks the motive constitutional force to physically induce or install a state of active war, treaty, or principal Officer upon the nation. Such must flow from the exclusive executive prerogative of the President alone, his motive powers to initiate all executive actions, as it is he and he alone who possesses "[t]he executive Power . . . of the United States."[53]

The greatest distinction that comes from this framing of concurrent executive powers is that it is possible to reconcile, applying Hamilton's understanding, the otherwise contradictory vesting of absolute executive power in the President while also explicitly granting limited executive powers in the Senate and in Congress as a whole. Rightly understood, Justice Scalia is correct in saying that the President possesses all of the nation's executive powers. The President must both desire to install principal Officers, initiate conflict, or engage in treaties, and then move to do such all the same, whereas Congress is constitutionally limited to the former actions of desiring such Officers, conflicts, or treaties, but is powerless in achieving such without the shared desires of the President (and his exercise of motive executive power to achieve such).

The Framers, then, did not contradict or contrive the executive power; the President retains all of it, while the Congress has concurrent powers restricted

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[52] *See* HAMILTON, *supra* note 46, at 81.

> [I]t will not follow, that the executive is in any case excluded from a similar right of judgment, in the execution of its own functions. If on the one hand, the legislature have a right to declare war, it is on the other, the duty of the executive to preserve peace, till the declaration is made.

Id.

[53] *See* U.S. CONST. art. II, § 1, cl. 1.

and contravened to limited and explicit circumstances. Knowing who possesses the executive powers is just as necessary in assessing *Humphrey's Executor* as understanding why the Framers conceived of such an arrangement in the first place. In similar language as that Chief Justice Marshall canonized in *Marbury v. Madison* concerning the role of the judicial branch,[54] Hamilton characterized, on the role of the presidency, that "[i]t is the province and duty of the executive to preserve . . . the blessings of peace."[55] In order to secure "peace," and precisely on this charge, the Constitution requires of the President—and the President alone, through his entrustment with the whole of the executive power—to "take Care that the Laws be faithfully executed."[56] For Hamilton, the "peace" desired of the newly formed union was dependent on the "President [as] the Constitutional *Executor* of the laws," and that "[h]e, who is to execute the laws, must first judge for himself of their meaning."[57] In this way, the ability to execute the laws—to wield and exert executive power, and in turn secure "peace"—turns on the ability to interpret the laws and then to enforce the laws based on those interpretations. Put differently, if one is to exercise the executive powers, he must first be able to interpret such as to enable his application and enforcement of the laws in the first place.

To interpret—in order to execute—the laws must then be successful; as Hamilton posits, if one cannot successfully interpret the laws, one certainly cannot execute them. The Framers sought to maximize the efficacy of executive powers, drawing from the proposition that "[a] feeble Executive implies a feeble execution of the government," wherein "feeble execution is but another phrase for a bad execution; and a government ill executed, whatever it may be in theory, must be, in practice, a bad government."[58] At the time of the founding, to the States—having only just thrown off the bonds of a solitary monarch—the idea of a single executive for the new nation was met with great skepticism and concern. The problem with a pluralistic approach to executive power, though, arises from the fact that "[w]herever two or more persons are engaged in any common enterprise or pursuit, there is always danger of difference of opinion."[59] If multiple, co-equal executives are entrusted to share the executive powers of the state, and at all times be put in situations where they may disagree, for example, on a matter of interpretation, they must by virtue also disagree as to how best to execute the laws—for the course of execution flows from the course of interpretation. So, too, may multiple executives agree on interpretation but disagree on execution. The dangers of such disagreements cannot be understated: they create a "peculiar danger of personal emulation and even

[54] *See* Marbury v. Madison, 5 U.S. 137, 177 (1803) (affirming that "[i]t is emphatically the province and duty of the judicial department to say what the law is").
[55] HAMILTON, *supra* note 46, at 84.
[56] *See* U.S. CONST. art. II, § 3.
[57] *See* HAMILTON, *supra* note 46, at 84.
[58] *See* THE FEDERALIST NO. 70, *supra* note 30, at 471–72.
[59] *See id.* at 439.

animosity. From either, and especially from all these causes, the most bitter dissensions are apt to spring. Whenever these happen, they lessen the respectability, weaken the authority, and distract the plans and operation of those whom they divide."[60]

Executives in strife and division amongst one another are bound to create constitutional turmoil and conflict, "imped[ing] or frustrat[ing] the most important measures of the government, in the most critical emergencies of the state. And what is still worse, they might split the community into the most violent and irreconcilable factions, adhering differently to the different individuals who composed the magistracy."[61] To have multiple executives, then, would have been counterintuitive to the very notions of unity that the Framers were working to create amongst their several States; at all times, the new nation would have been but one bitter disagreement, amongst multiple executives, from a constitutional crisis. Even if there was a unitary executive, division in the executive would still imperil the nation if that unitary executive was subject to "a council, whose concurrence is made constitutionally necessary to the operations of the ostensible Executive."[62] Such "[a]n artful cabal in [a] council" (or even "mere diversity of views and opinions"), Hamilton reasoned, would at all times "be able to distract and to enervate the whole system of administration."[63]

For Hamilton, the location of executive power in a single, unitary Presidency turned on the fact that "[d]ecision, activity, secrecy, and dispatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished."[64] The propensity for increased internal conflict and turmoil, taken together with the inversely proportional decrease in efficiency, was altogether evidencing of the need for one President entrusted with total executive control. A unitary executive was also necessary to ensure that the public should never be "uncertain[] on whom [blame] ought to fall."[65] If the public is deprived of *placing* blame, then the public, too, is deprived of "the opportunity of discovering with facility and clearness the misconduct of the persons they trust, in order either to their removal from office or to their actual punishment in cases which admit it."[66]

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[60] *Id.*
[61] *See id.*
[62] *Id.* at 441.
[63] *See id*. (finding that Hamilton does not argue that such a 'formalized' cabal need exist in order to detract from the President's ability to discharge the laws; but rather, he argues that even "[i]f no such cabal should exist, the mere diversity of views and opinions would alone be sufficient to tincture the exercise of the executive authority").
[64] THE FEDERALIST NO. 70*, supra* note 30, at 437.
[65] *See id.* at 441.
[66] *See id.* at 442–43.

Of course, the Framers were not blind to the fact that the total and complete discharge of the absolute executive powers of the entirety of the United States—such that the Take Care Clause requires—was a monumental task that could not be faithfully administered alone by a single individual. This is as a direct result of the fact that "[t]he 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."[67] Thus, the Framers entrusted principal and inferior officers to aid the President in his duties.[68]

The "unity" in the vesting of *all* of the executive powers, the hallmark of Article II, "may be destroyed in two ways: either by vesting the power in two or more magistrates of equal dignity and authority; *or by vesting it ostensibly in one man, subject, in whole or in part, to the control and co-operation of others, in the capacity of counsellors to him*."[69] This latter threat to the executive power of the United States, the foremost and paramount concern for Hamilton—that the executive would become "subject, in whole or in part, to the control and co-operation of others, *in the capacity of counsellors to him*"—is exactly the manifest constitutional sin that the Court committed in *Humphrey's Executor*: the President became bound to the "control and co-operation" of subordinate "counsellors" of the Federal Trade Commission.[70]

REACHING HUMPHREY'S EXECUTOR: UNITED STATES V. PERKINS AND THE MEYERS STANDARD

Hamilton warned that the gravest threat to the executive power and the President was the subjugation of executive authority to lesser subordinates of the President himself, an executive at the behest, in part or in whole, of his lesser un-equals. As Chief Justice Roberts eloquently put for the majority in *Free Enterprise*, such would "reduce the Chief Magistrate to a cajoler-in-chief."[71]

The high Court first opined on the nature and scope of executive removability in *United States v. Perkins*.[72] There, a naval engineer was discharged by the Secretary of the Navy simply because he was "not required to fill any vacancy."[73] The cause of injury in *Perkins* arose because the termination of the military commission solely for the lack of "vacancy" was made despite a law requiring that "[n]o officer in the military or naval service shall in time of peace be dismissed from service except upon and in pursuance of the sentence of a court-martial to that effect, or in commutation thereof."[74] In a very brief order

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[67] Myers v. United States, 272 U.S. 52, 117 (1926).
[68] *See* U.S. CONST. art. II, § 2, cl. 2.
[69] THE FEDERALIST NO. 70, *supra* note 30, at 472–73 (emphasis added).
[70] *See id*.
[71] *See* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 502 (2010).
[72] *See* United States v. Perkins, 116 U.S. 483, 485 (1886).
[73] *See id*.
[74] *See id*. at 484.

without dissent, the Supreme Court examined "[t]he single question . . . [as to whether] the *Secretary of the Navy*, irrespective of that act, had a lawful power to discharge [Perkins]" in contrast to the statute at hand.[75] Notably, *Perkins* does not address whether Congress could have prevented the President from removing Perkins,[76] but rather—and only—if the Secretary of the Navy could be so prevented.

The United States, defending the Secretary, argued that the Secretary possessed himself "constitutional prerogative of the Executive" that the act of Congress "infringed" upon.[77] Such a prerogative was said to flow from the Secretary's duties as an executive officer.[78] Of course, this is a *prima facie* conflict with the original meaning of Article II: the President—and the President alone—possesses "the executive power," qualified only by the explicit, enumerated "exceptions out of the general 'executive power' vested in the President" that "are to be construed strictly—and ought to be extended no further."[79] Exactly for this reason, the majority in *Perkins*—copied verbatim from the lower court—held that "[t]he head of a Department has no constitutional prerogative of appointment to offices independently of the legislation of Congress, and by such legislation he must be governed, not only in making appointments but in all that is incident thereto."[80] The executive powers of the Secretary of the Navy flowed from the "exceptions out of the general 'executive power'" that lay with Congress: namely, that "the Congress may by Law vest the Appointment of . . . inferior Officers . . . in the Heads of Departments."[81] Accordingly, the executive prerogative lays absolutely with the President, and concurrently, in limited, enumerated cases with Congress. *Perkins* was one such case of limited, concurrent, Congressionally-held executive prerogative, and since it was Congress—not the Secretary of the Navy—who held the prerogative, it was the dictates of Congress that controlled in *Perkins*: "no officer in the military or naval service shall in time of peace be dismissed . . . except upon . . . court-martial."[82]

Perkins, by its own explicit admission, did "not . . . consider[]" the question as to "[w]hether or not Congress can restrict the power of removal incident to the power of appointment of those officers who are appointed by the

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[75] *Id*. (emphasis added).

[76] *See id.*

> Whether or not Congress can restrict the power of removal incident to the power of appointment of those officers who are appointed by the President by and with the advice and consent of the Senate under the authority of the Constitution (article 2, section 2) *does not arise in this case and need not be considered*.

Id. (emphasis added).

[77] *See Perkins*, 116 U.S. at 484.

[78] *See id.* at 485 (stating that the Secretary was "the head[] of [a] Department" to whom "Congress, by law, vests the appointment of inferior officers").

[79] *See* HAMILTON, *supra* note 46, at 84.

[80] *See Perkins*, 116 U.S. at 485.

[81] *See* U.S. CONST. art. II, § 2, cl. 2.

[82] *See Perkins*, 116 U.S. at 484.

President."[83] Nor did *Perkins* examine whether the President, and not a principal Officer (e.g., the Secretary of the Navy), could be prevented from removing inferior officers of the United States.[84]

Such contours of *presidential* removability would remain unanswered and untested until *Myers v. United States* in 1926.[85] Around the same time that the statute in *Perkins* was passed, Congress inserted a clause into a budgetary act of 1876 concerning postmasters of the United States.[86] There, the statute provided that "Postmasters of the first, second, and third classes shall be appointed and may be removed by the President by and with the advice and consent of the Senate, and shall hold their offices for four years unless sooner removed or suspended according to law."[87]

The limitations held constitutionally permissible, in *Perkins*, concerned (a) Congressional executive prerogative to "vest the Appointment of . . . inferior Officers . . . in the Heads of Departments" and (b) whether the "Head of [a] Department[]" possessed inherent executive prerogative—independent of the President's absolute powers and Congress's limited concurrent powers—to remove such inferior officers. To be clear, though, *Perkins* does not establish, of itself, that Congress does indeed possess executive (prerogative) appointment powers. Instead, the limitations enumerated in *Perkins* are presumed to address the more-narrow question of whether "[t]he head of a Department has . . . constitutional prerogative of appointment to offices independently of the legislation of Congress."[88] In *Perkins*, the Supreme Court affords no treatment to the *antecedent* question as to whether it was Congress or the Secretary of the Navy who properly held such appointment powers. Instead, the Court defers—verbatim—to the lower court of claims and lumps this power—of both the vesting

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[83] *See id.*

[84] *See id.* (noting that the *only* defense offered by the Secretary of the Navy was that he himself, by the nature of *his* office, possessed some of the President's executive prerogative). Of course, however, the Court in *Perkins* held that in the immediate case "[t]he head of a department ha[d] no constitutional prerogative," but rather—in appointing Perkins as a lesser Officer the United States—that the Secretary was acting under *Congress*' limited concurrent powers under Article II, Section 2, and as authorized by "the legislation of Congress." *See id.* In this sense, the Secretary of the Navy was acting neither under the executive prerogatives of the President nor the limited concurrent executive prerogatives of Congress, but rather raised a claim of a nonexistent inherent prerogative in his own office. Since no such prerogative exists in the Secretary of the Navy—such only exists (a) absolutely in the President and (b) with extremely limits, and concurrently so, in Congress—the Secretary lost before the Court in *Perkins*. This was the narrow question that was provided, and an answer was provided by the Court no further. The President has (all of the) executive prerogative; had the Secretary been acting pursuant to a dictate from the President—and, thus, it would have been the President's executive prerogative in defense of the Secretary's actions—the question in *Perkins* would have looked quite different.

[85] *See* Myers v. United States, 272 U.S. 52, 52 (1926).

[86] *See* Act of July 12, 1876, ch. 179, 19 Stat. 80 (establishing financial compensation and defining duties for officers of postmasters of the United States).

[87] *Id.* § 6.

[88] *See* United States v. Perkins, 116 U.S. 483, 485 (1886).

of appointment powers and those very appointment powers themselves—together between Congress and the Secretary.[89]

Put differently, the holding in *Perkins* rests on a failure to address the antecedent question of whether the Appointments Clause, which empowers Congress to "*vest* the Appointment of . . . inferior Officers,"[90] constitutes an appointment power, in and of itself, for Congress.[91] To be sure, this antecedent question is given no treatment in *Perkins*, but rather assumed, *in arguendo*, to answer, narrowly, "[t]he head of a Department has *no* constitutional prerogative . . . independently."[92] Where the actual appointment power lay—with Congress, in and of Congress or simply to vest such appointment power—was not an issue in *Perkins*.

Congress's limited role in appointments, under Article II, is lumped together with the Secretary of the Navy's, and in doing so, the *Perkins* majority treats the power to *vest* the making of appointments as synonymous with the power of *making* appointments. Such cannot be further from the meaning of the Constitution (and in fairness, of course, the *Perkins* majority were not asked to address such, but only the "independent" "constitutional prerogative" of "[t]he head of a Department"). Two cases—*Buckley v. Valeo*[93] and *Bowsher v. Synar*[94]—outline precisely why, contrary to the presumption (*in arguendo*) of *Perkins*, Congress constitutionally possesses *only* the power to *vest* the power to make appointments—and *not* the power to make appointments itself.

Turning first to *Buckley*, in the midst of the Vietnam War and the backdrop of the domestic turmoil surrounding it, Congress passed the Federal Election Campaign Act of 1971.[95] Along with a laundry list of reform measures in the original text, Congress then amended the Act,[96] in part, to create the Federal Elections Commission[97] ("FEC"). As with many of the other agencies herein considered, the FEC was to be apolitical (from varying "political part[ies]"),[98] comprised of commissioners experienced in the field[99] who serve for staggered

[89] *See id.* ("The constitutional authority in Congress to thus vest the appointment implies authority to limit, restrict, and regulate the removal by such laws as Congress may enact in relation to the officers so appointed.").
[90] U.S. CONST. art. II, § 2, cl. 2 (emphasis added).
[91] Perhaps such constitutional negligence arises from the Court's treatment of the question in *Perkins* being given less than three pages of the U.S. Report—but only 736 words by my count—of which approximately half (381 words) is (are) copied-and-pasted, verbatim, from the lower Court of Claims.
[92] *See id*.
[93] Buckley v. Valeo, 424 U.S. 1 (1976).
[94] Bowsher v. Synar, 478 U.S. at 765–66 (1986).
[95] *See* Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972).
[96] *See* Federal Election Campaign Act of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974).
[97] *See id.* at 1280.
[98] *See*, *e.g.*, *id.* at 1281.
[99] *Id.* at 1281 (stating that "[m]embers shall be chosen on the basis of their maturity, experience, integrity, impartiality, and good judgment.").

"terms of 6 years"[100] and (presumably) were removable only for good cause. And, too, like many of the independent agencies herein considered, the FEC differed from the structure of FTC, that was approved in *Humphrey's Executor* (see below), in one key way: the eight-member FEC was comprised of two non-voting officials from the House and the Senate, as well as two appointed by the President pro tempore of the Senate; two appointed by the Speaker of the House of Representatives; and two appointed by the President. Also, all six voting members, including those two appointed by the President, required "the confirmation of a majority of both Houses of Congress",[101] as opposed to the Advice and Consent Clause, which permits only confirmation of Presidential appointees by the Senate (or by the President alone).

What does all of this mean for present purposes? To start, recognize that Article II, Section 2, Clause 2, "expressly authorizes Congress to *vest* the appointment power of certain officers."[102] It should go without saying that, as the Court recognizes, Congress is neither "the President alone," nor "the Courts of Law," nor the "Head[] of [a] Department[]."[103] Thus, Congress cannot *make* appointments itself, because "the second part of the Clause authorizes Congress [only] to vest the appointment of the officers," and given that "there is no provision of the Constitution remotely providing any alternative means for selection,"[104] it is altogether plain that Congress has no appointment powers. Not only must appointment powers be treated as separate from the power "to vest . . . appointment," affirms the majority in *Buckley*—finally addressing the antecedent question from *Perkins*—but Congress only possesses powers of vesting and not powers of appointments. Put differently, the Framers and the Constitution "deny Congress any authority itself to appoint those who were 'Officers of the United States.'"[105]

To put it plain, while Congress may provide the method of the making of appointments, it may not *make* appointments. It is undisputed, here, that "Congress may undoubtedly . . . create 'offices' . . . and provide such *method* of appointment to those 'offices' . . . [b]ut Congress' [sic] power . . . is inevitably bounded by the express language of Art. II, § 2, cl. 2" that removes Congress's ability to *make* appointments.[106]

Now throw *Bowsher* in the mix. Contrary to much debate over the true meaning behind the separation of powers occurring over the past two centuries, there Congress attempted "[t]o permit an officer controlled by Congress to

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[100] *Id*.
[101] *See id*.
[102] Buckley v. Valeo, 424 U.S. 1, 126–27 (1976) (emphasis added).
[103] *Id.* at 125, 127 ("[N]either Congress nor its officers were included within the language of 'Heads of Departments' in [Article II, Section 2] cl. 2").
[104] *See id.* at 126–27 (emphasis added).
[105] *Id.* at 128–29.
[106] *Id.* at 138–39.

execute the laws."[107] In addressing the permissibility of this novel arrangement, the majority begin by reaffirming that "[t]he Framers provided a . . . Legislative Branch and a *separate and wholly independent* Executive Branch, which each branch *responsible ultimately to the people*."[108] The idea that this separation would at times prove burdensome or a hinderance is not incidental but intentional and by design:

> That this system of division and separation of powers produces conflicts, confusion, and discordance at times is inherent, but it was deliberately so structured to assure full, vigorous, and open debate on the greatest issues affecting the people and to provide avenues for the operation of checks on the exercise of governmental power.[109]

Moreover, it is precisely upon these notions of accountability to the people, by way of strictly separated powers, that "the Constitution does not permit Congress to execute the laws"[110] insomuch as the Framers, intentionally and purposively "chose to permit impeachment of executive officers," as the *sole* method of removal held by Congress, "*only* for 'Treason, Bribery, or other high Crimes and Misdemeanors.'"[111]

To finally address the antecedent question in *Perkins*, then: Congress has no appointment powers. To determine whether Congress has removal powers (outside of impeachment), the question necessarily becomes whether removal powers flow from appointments powers or from some other source. If, as I contend here, removal powers are incidental to appointment powers—and since it is now undeniable that Congress has no appointment powers under the Constitution—then, in turn, it is entirely plain that Congress must have no removal powers. On the contrary, if removal powers are not incidental to appointment powers, then perhaps Congress may have constitutional prerogatives over the removal of Officers of the United States.

To address this, now comes *Myers*. Undertaking an early mode of the analysis now commonly known as originalism, Chief Justice Taft turned to the history of Article II and "the first session of the First Congress" for interpretative guidance.[112] Recognizing that "[t]here is no express provision respecting removals in the Constitution" (save impeachment),[113] nor was such considered "in the Constitutional Convention," Taft begins his historical analysis with the

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[107] Bowsher v. Synar, 478 U.S. 714, 726 (1986).
[108] *Id*. at 722 (emphasis added).
[109] *Id*.
[110] *See id*. at 726.
[111] *See id*. at 729 (emphasis added). Moreover, the reason why Congress is not entrusted with *any* removal powers, save impeachment, is because "the removal powers over . . . [an officer] dictate that he will be subservient to Congress." *See id*. at 730. Thus, officers who are entrusted executive powers *cannot* be subservient to Congress (as such contravenes the doctrine of separation of powers).
[112] *See* Myers v. United States, 272 U.S. 52, 109 (1926).
[113] *Id*.

Articles of Confederation.[114] Citing six of the journals of the Continental Congress, spanning May 1776 to December 1780, Taft concludes that "during the Revolution and while the Articles [of Confederation] were given effect, Congress exercised the power of removal."[115] It would seem that Congress did possess removal powers in its earliest form. However, early plans for a new constitution would explicitly depart from such a standard. For example, "the Virginia Plan . . . gave to the Executive 'all the executive powers of the Congress under the Confederation.'"[116] Naturally, such explicit language "would seem therefore to have intended to include the power of removal which had been exercised by [Congress under the Confederation]."[117]

The Virginia Plan was obviously not adopted without significant deliberation and modification.[118] The ensuing document, the Constitution of 1789, instead provided the language: "The executive Power shall be vested in a President of the United States of America."[119] A new government was thus formed. In one of the newly minted Congress's first official acts in 1789, "Madison moved . . . that there should be established three executive departments."[120] And with the creation of the first executive departments came the dilemma now under consideration in this paper: who is to hold the power of removal over the officers of such departments? Considering this very question (whether the Secretary is "to be removable by the President"), the Annals of Congress—as reflects Taft—recounts that "[t]he question was now taken and carried, by a considerable majority, in favor of declaring the power of removal to be in the President."[121]

From the very beginning, then, the Congress (in the earliest days of its very first session) understood Article II, Section 1, to have transferred the powers of removal (that the Continental Congress had previously enjoyed) to the President.[122] Indeed, the first Congress, in crafting the Departments, explicitly confirmed that it had "all along proceeded on the idea that the Constitution vests the power [of removal] in the President."[123] And, indeed, this "discussion" by

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[114] *See id*. at 110.
[115] *Id*.
[116] *Id*.
[117] *Id*.
[118] *See generally Myers*, 272 U.S. at 110–11 (demonstrating that the Virginia Plan was not adopted without debates and lots of changes).
[119] U.S. CONST. art. II, § 1, cl. 1.
[120] *See Myers*, 272 U.S. at 111.
[121] *See id.* at 111–12.
[122] *See id.* at 112–13 (noting that Taft discusses at length how the legislative history of the first acts of Congress evolved to confirm such an interpretation, and that in early stages, the legislation included language that "appeared somewhat like a grant" of removal authority of the first principal Officers *from* Congress *to* the President); *see also id.* at 113 (stating that Congress, fearing exactly this implication—that such language "certainly may be construed to imply a legislative grant of the power" of removal—"wished everything like [this] ambiguity expunged, and the sense of the House explicitly declared, and therefore seconded the motion.").
[123] *See id.* at 113.

the first Congress, concerning the President's vesting of removal powers over executive officers, "was a very full one."[124]

We need not guess the *Myers* Court's interpretations of this congressional history. Instead, the majority in *Myers* recognizes that:

> As [the President] is charged specifically to take care that [the laws] be faithfully executed, the reasonable implication, even in the absence of express words, was that as part of his executive power he should select those who were to act for him under his direction in the execution of the laws. The further implication must be, in the absence of any express limitation respecting removals, that as his selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he cannot continue to be responsible.[125]

Nor could the power over removal be seen as a legislative or judicial power, vested in Congress and the Courts respectively.[126] The power of removal of executive officers had a long tradition, reaching back into the "state and colonial governments," as "really [being a] vesting part of the executive power."[127] Or, perhaps Taft reasoned, a historical analysis of practices and traditions could stretch farther back into history, before the colonies had even been conceived of, and back to "the British system" predating the colonies, where "the Crown, which was the executive, had the power of appointment and removal of executive officers, and it was natural, therefore, for those who framed our Constitution to regard the words 'executive power' as including both."[128]

What rule of interpretation is to be gleamed from this history of practice and tradition? Simply put: "as a constitutional principle the power of appointment carrie[s] with it the power of removal."[129] Note that the principle rests on the "appointment" powers, *not* advice and consent powers ("[t]he power of removal is incident to the power of appointment, not to the power of advising and consenting to appointment").[130] And even if the Senate were to be said to have some "appointment" powers—which *Buckley* concludes it cannot—"the power

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[124] *See id.* at 114.
[125] *Myers*, 272 U.S. at 117.
[126] *See id.* at 117–18 ("If such appointments and removals were not an exercise of the executive power, what were they? They certainly were not the exercise of legislative or judicial power in government as usually understood.").
[127] *Id.* at 118.
[128] *See id.* (stating that it cannot be argued under this comparison—of the Presidential power of removal to a monarchical power—as "incompatible with our republican form of Government").
[129] *Id.* at 119.
[130] *Id.* at 121 (holding that "[t]he history of the clause by which the Senate was given a check upon the President's power of appointment makes it clear that [the Framers were] not prompted by any desire to limit removals"). *But see Myers*, 272 U.S. at 119 (noting that because "the power of appointment by the Executive is restricted in its exercise by the provision that the Senate" advises and consents to such appointments, that "this make[s] the Senate part of the removing power").

of removal . . . is different in its nature from that of appointment."[131] All of this discussion is surmised by the overarching point that "had it been intended to give to Congress power to regulate or control removals in the manner suggested, it would have been included among the specifically enumerated legislative powers in Article [I], or in the specified limitations on the executive power in Article [II]."[132] No such inclusions exist. Thus, in no way can anyone, other than the President who possesses the executive powers, be said to have power over removals of executive Officers.

There cannot be a distinguishment in the President's ability to remove principal versus inferior officers.[133] This is because that while "Congress, in committing the appointment of such inferior officers to the heads of departments, may prescribe incidental regulations controlling and restricting the latter in the exercise of the power of removal," it also cannot "enable[] Congress to draw to itself, or to either branch of it, the power to remove or the right to participate in the exercise of that power."[134] The power of removal, then, is an absolute one. At all times, the absolute power to remove an executive officer of the United States must live *somewhere*. As held in *Perkins*, Congress can restrict principal Officers from removing subordinate Officers who were appointed subject to Congress allowing the "Heads of Departments" to make such appointments. But such a restriction does not simply evaporate the power of removal, in part or in whole, when an Officer's tenure is protected against a principal Officer, the restricted removal powers barred from that principal Officer, indeed the remaining "power of removal must remain where the Constitution places it, with the President."[135]

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[131] *Id.* at 121 (quoting Taft when stating that "[t]he power to prevent the removal of an officer who has served under the President is different from the authority to consent to or reject his appointment").

[132] *Id.* at 128.

[133] *See id.* at 159.

> [E]ven though the legislative decision of 1789 included inferior officers, yet under the legislative power given Congress with respect to such officers, it might directly legislate as to the method of their removal without changing their method of appointment by the President with the consent of the Senate. *We do not think the language of the Constitution justifies such a contention*.

Id. (emphasis added).

[134] *See id.* at 161.

[135] *Myers*, 272 U.S. at 161. To be fair, in *Myers*, the Court *does* grapple with the idea that "Congress is only given power to provide for . . . removals of inferior officers after it has vested, and on condition that it does vest, their appointment in other authority than the President with the Senate's consent." *Id.* at 164. However, this, too, is qualified upon an understanding that no construction of such removal considerations, and limitation on the President, can "make it impossible for the President, in case of political or other differences with the Senate or Congress, to take care that the laws be faithfully executed." *See id*. It seems altogether clear that Congress *itself* is constitutionally barred from making any such "appointments," but must rather simply choose where, "by law," to "vest the Appointment of such inferior Officers." *See* U.S. CONST., art. II, § 2, cl. 2. Rightly understood, then, the Congress has *no* appointment powers, but merely the powers to prescribe "by law" the *power of appointment* "in the President alone, in the Courts of Law, or in the Heads of Departments." *See id.* Congress can never make appointments itself; thus, it has no power of

Nor can there be said to be a distinguishment between the *types* of functions performed by the various Officers that might enable some tenure protections against absolute Presidential removal. For indeed:

> There is nothing in the Constitution which permits a distinction between the removal of the head of a department or a bureau, when he discharges a political duty of the President or exercises his discretion, and the removal of executive officers engaged in the discharge of their other normal duties. The imperative reasons requiring an unrestricted power to remove the most important of his subordinates in their most important duties must, therefore, control the interpretation of the Constitution as to all appointed by him.[136]

The question presented above, leading to the discussion of *Myers*, was whether removal powers are incidental to appointment powers, and if so, whether Congress possesses appointment powers (enabling it to define the use of accompanying removal prerogative). Of course, in applying *Myers*, part of this question is painstakingly simple—the "constitutional principle [is that] the power of appointment carrie[s] with it the power of removal."[137] In in the century following *Myers*, the second half of the question was answered—Congress is "expressly authorize[d] . . . to *vest* the appointment [power]," but "neither Congress nor its officers were included" in those whom such a power may be vested.[138] A simple logical analysis necessarily controls: if Congress has *no* power to make appointments (only to *vest* that power in others), and "the power of *appointment* carrie[s] with it the power of removal," then Congress has no removal powers.

Returning to the very beginning and earliest fragments of our jurisprudence, the ("universally admitted") constitutional "principle" has been that the "Government . . . [being] one of enumerated powers . . . can exercise only the powers granted to it."[139] It necessarily follows that Congress, in exercising its "powers," is constitutionally forbidden from exercising "powers [not] granted to it," and accordingly, "it follows that Congress cannot grant to an officer . . . what it

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appointment, but only the power to determine who *does* possess that power of appointment. These cannot be treated as synonymous, for if they were, then the Congress would be permitted to make appointments itself—which the Constitution expressly withholds. Taken together with the "constitutional principle [that] the power of appointment carrie[s] with it the power of removal," *Myers*, 272 U.S. at 119, on the very fact that Congress has no power of appointment for itself, it cannot be constitutionally so that Congress has *any* power of removal, even when it vests appointment powers, *contra id.* at 164 (holding that "Congress is only given power to provide for . . . removals of inferior officers after it has vested . . . appointment in other authority"). Moreover, the controlling fact remains that "had it been intended to give to Congress power to regulate or control removals, it would have been included among the specifically enumerated . . . in Article [I], or in . . . Article [II]." *Id*. at 128.

[136] *Myers*, 272 U.S. at 134.

[137] *Id*. at 119.

[138] Buckley v. Valeo, 424 U.S. 1, 127 (1976).

[139] *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819).

does not possess."[140] *Perkins* and *Myers* both establish that the power of removal is plenary and incidental to the power of *making* appointments of the Officers, principal or inferior, of the United States. *Buckley* and *Bowsher* unambiguously, and in no uncertain terms, establish that Congress has no power to "make" appointments—but is entrusted, instead, with the far more modest power of deciding who, from the constitutionally prescribed list in Article II, Section 2, can make such appointments. Therefore, if Congress can exercise only the powers granted to it, and those powers expressly do not include the ability to make appointments (under *Buckley*), then the following, as a matter of constitutional law, is altogether plain on its face—Congress has no removal powers except for impeachment. Accordingly, the Framers intentionally stipulate that "[o]nce [an] appointment has been made and confirmed, . . . the Constitution explicitly provides for removal of Officers . . . by Congress only upon impeachment by the House . . . and conviction by the Senate."[141] In the same way that Congress cannot command the Courts how to rule on a matter,[142] neither, too, may Congress grant inferior officers of the United States tenure protections, "good cause" or otherwise, from the President; just as Congress cannot restrict the judiciary from wielding the judicial powers in certain ways, neither can Congress bend the explicit executive prerogative (of removing the Officers of the United States) from the President and the President alone.

Nor can Congress transfer powers conferred under the Constitution; they must remain where the Framers placed them within the weaving and stitching of the constitutional fabric. To start, Congress cannot confer or abrogate its legislative powers. While Congress may "authoriz[e] a member of the executive branch to carry out [a legislative] policy and plan . . . and to make the adjustments necessary to conform . . . to the standard underlying that policy and plan," it altogether remains that what Congress cannot do, under the Constitution, is delegate outside of the legislative branch the ability to determine "what its policy and plan [is]."[143] Thus, Congressional powers must remain exactly where the Constitution places them—in Congress.[144] Moreover:

> In [the Framers] carrying out that constitutional division into three branches it is a breach of the National fundamental law if Congress gives up its legislative power and transfers it to the President, or to the Judicial branch, *or if by law it attempts to invest itself or its*

[140] *See* Bowsher v. Synar, 478 U.S. 714, 726 (1986).
[141] *See id*. at 723 (emphasis added).
[142] *See* United States v. Klein, 80 U.S. (13 Wall.) 128, 146–47 (1871) (explaining how "[c]ongress . . . passe[s] the limit which separates the legislative from the judicial power" when it attempts to "prescribe a rule for the decision of a cause in a particular way"; this breach is resultant of attempts by "the legislature [to] prescribe rules of decision to the Judicial Department of the government in cases pending before it").
[143] *See* J. W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 405 (1928).
[144] *See* U.S. CONST., art. I, § 1.

members with either executive power or judicial power.[145]

The principle endowed by the Framers is not the more-narrow conclusion that one branch cannot transfer or confer its own powers, voluntarily, to another branch. Instead, the Framers sought to go further, and also forbid "attempts [by one branch] to invest itself or its members with either [powers of the other]."[146] This, of course, does not forbid interbranch cooperation,[147] but rather requires that, in so coordinating, constitutional "power [is] exercised . . . by the body vested with that power" and not by another.[148] That the constitutional powers cannot be transferred has been repeatedly affirmed by the Supreme Court.[149]

To put it plainly, then, the Constitutional allows one branch to "seek[] assistence [sic] from another branch," but such assistance cannot extend to "power [being] exercised . . . by the body [not] vested with that power" by the Constitution.[150] In summary, Congress may wield or withhold—in part or in whole—the powers that the Constitution confers upon it. However, the Framers thought it best to bar the exercise of Congress (or any other branch) of powers *not* conferred, but rather expressly withheld, and afforded to another branch. Seeing as the whole of the executive prerogative of making appointments is expressly denied to Congress,[151] that the power of appointment necessarily confers the power of removal,[152] and the Congress cannot "invest itself or its members" with powers constitutionally prescribed to other branches,[153] one constitutional interpretation becomes evidently clear: Congress has no incidental powers of removal,[154] to which it might confer tenure protections of any kind, to principal and inferior Officers of the United States.

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[145] *J. W. Hampton, Jr., & Co.*, 276 U.S. at 406 (emphasis added).

[146] *See id.*

[147] *See id.* ("This is not to say that the three branches are not co-ordinate parts of one government.").

[148] *Id.* at 406–07.

[149] *See*, *e.g.*, Panama Refin. Co. v. Ryan, 293 U.S. 388, 421 (1935) ("Congress manifestly is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested."); *see also* Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952).

> In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute.

Id.

[150] *J. W. Hampton & Jr., Co.*, 276 U.S. at 406–07.

[151] *See* Buckley v. Valeo, 424 U.S. 1, 138–39 (affirming that "[c]ongress may undoubtedly . . . create 'offices' . . . and provide such *method* of appointment to those 'offices' . . . [b]ut Congress' [sic] power . . . is inevitably bounded by the express language of Art. II, § 2, cl. 2" that removes Congress' [sic] ability to *make* appointments (emphasis added)).

[152] *See* Myers v. United States, 272 U.S. 52, 119 (1926).

[153] *See J. W. Hampton Jr., & Co.*, 276 U.S. at 406.

[154] It goes without saying that Congress at all times retains the impeachment powers conferred upon it. Here, I refer only to removal powers and protections that flow pursuant to appointment powers.

TURNING TO HUMPHREY'S

Twelve years prior to *Myers*, Congress passed the Federal Trade Commission Act of 1914.[155] The first of the so-called independent agencies, the FTC was "composed of five commissioners appointed by the President, by and with the advice and consent of the Senate."[156] Their duties were to be apolitical,[157] staggeed in tenure,[158] and independent of private affairs, as to foreclose upon any appearances of impropriety.[159] The novelty of the Federal Trade Commission Act, though, came by way of the tenure protections afforded the FTC commissioners: a "commissioner may be removed by the President [only] for inefficiency, neglect of duty, or malfeasance in office."[160] Such a tenure protection has generally been referred to, in jurisprudence, as a "good cause" protection.[161]

Namesake of the case, FTC Commissioner William Humphrey, was commissioned to the FTC in 1931, but was asked to resign in 1933 by President Roosevelt despite Humphrey's commission not being set to expire until 1938.[162] After Humphrey declined to do so, Roosevelt "removed [him] from the office of Commissioner of the Federal Trade Commission" later in 1933.[163] The cause of action was, of course, Humphrey's contention that he had not committed an "inefficiency, neglect of duty, or malfeasance" as prescribed by Congress; given that such had not occurred, Humphrey contended, he was not removable by the President (Humphrey died; his estate sued for back wages, hence the case being brought by "Humphrey's Executor").

Despite the majority's holding, the FTC of 1935 cannot be understood as a mere advisory agency; instead, it "exercis[es] . . . power."[164] Such powers included the ability to bring "charges" and conduct "hearing[s]" in front of itself, issue "orders," and to enforce any damages and orders issued against

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[155] *See* Federal Trade Commission Act of 1914, Pub. L. No. 203, 38 Stat. 717, 724 (showing that the Act was passed on September 26, 1914, twelve years prior to *Myers*).
[156] *See* 15 U.S.C. § 41 (2006).
[157] *See id.* (explaining that the duties of Commissioners had to be varied across partisan lines by detailing that "[n]ot more than three of the Commissioners shall be members of the same political party").
[158] *See id.* (detailing that the first Commissioners were afforded staggered terms of "three, four, five, six, and seven years," commencing the staggering with their successors enjoying seven-year terms (proceeding from the end-date of the initial staggering, continuing such into perpetuity)).
[159] *See id.* ("No Commissioner shall engage in any other business, vocation, or employment.").
[160] *Id*.
[161] *See, e.g.*, Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 483 (2010) ("In Humphrey's Executor . . . we held that Congress can . . . create independent agencies run by principal officers appointed by the President, whom the President may not remove at will but only for *good cause*." (emphasis added)).
[162] *See* Humphrey's Ex'r v. United States, 295 U.S. 602, 618 (1935).
[163] *See id.*
[164] *See id.* at 620.

respondents in "the appropriate circuit court."[165] Together, these powers resulted in "wide powers of investigation," by the *Humphrey's* Court's own admission.[166]

Based on the composition of the Commission—as discussed above, apolitical and independently composed by statute—the majority in *Humphrey's* conclude that Congress's intent was to create a "commission [that] is to be nonpartisan; and it must, from the very nature of its duties, act with entire impartiality."[167] After considering "the language of the act, the legislative reports, and the general purposes of the legislation as reflected by the debates [in Congress on the Act]," the Court concludes that Congress created "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 other official or any department of the government."[168] I put aside, for the moment, whether the Constitution even allows for the creation of a commission of constitutional Officers "free [in] judgement without the . . . hinderance of any official . . . of the government."[169]

Based on the characteristics of the FTC, as constituted in 1935, the majority in *Humphrey's* distinguished that case from *Myers* by pointing out that the FTC was "unlike" a "postmaster."[170] Postmasters were, held the Court, "an executive officer restricted to the performance of executive functions," and were "charged with no duty at all related to either the legislative or judicial power."[171] On the contrary, and in purported direct contrast to postmasters, "[t]he Federal Trade Commission is 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."[172] And, since the FTC was only performing "duties as a legislative or as a judicial aid," the Court reasoned that "[s]uch a body" could not "in any proper sense be characterized as an arm or an eye of the executive," and "must be free from executive control."[173]

With all of this in mind, *Humphrey's Executor* would seem, on its face, to spring from a very specific exception laid out in *Myers*: "there may be duties of a quasi-judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President cannot in a particular case properly influence

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[165] *See id.* at 620–21.
[166] *See id.* at 621.
[167] *See id.* at 624.
[168] *Humphrey's Ex'r*, 295 U.S. at 625–26 (emphasis added).
[169] *See id.*
[170] *See id.* at 627.
[171] *Id.*
[172] *Id.* at 628. It is not clear from *Bowsher* that this is even permissible. I do not assume it to be.
[173] *See id.*

or control."[174] This language—of "quasi-judicial character"—is nowhere to be found in the Constitution, but is the exact language relied upon in *Humphrey's Executor*, where the FTC was found to act "in the discharge and effectuation of its quasi-legislative or quasi-judicial powers."[175] Yet *Myers* cannot save the ill-fated constitutional deviation set out in *Humphrey's* for, in the very next sentence, Chief Justice Taft qualified his statement of the *Myers* Court's understandings of "quasi-judicial" officers to require the ability of the President to "consider the decision after its rendition as a reason for removing the officer, on the ground that the discretion regularly entrusted to that officer by statute has not been on the whole intelligently or wisely exercised."[176] If the President cannot remove executive officers at will, even those of a quasi- character, "he does not discharge his own constitutional duty of seeing that the laws be faithfully executed."[177] Based on *Myers*, then, the FTC would have been permitted to act free of the President's control (I do not endorse such a view), but—after rendering an order or issuing a judgement for damages, or pursuing such in an Article III court—would be liable to absolute presidential removability on the fact that the President may feel that the FTC commissioners "ha[d] not been on the whole intelligent[] or wise[]."[178]

To this point, the *Humphrey's* majority reasons that it would be erroneous to assume that "Congress is without authority to prescribe causes for removal of members of the trade commission and limit executive power of removal accordingly" because "that power at once becomes practically all-inclusive in respect of civil officers with the exception of the judiciary provided for by the Constitution."[179] At the expense of stating the obvious, the *Humphrey's* Court clearly misunderstands the Constitution—that all civil officers must answer to the President, save judges of the Article III courts, is exactly the point. Return to the earlier discussions of executive power endorsed by the Framers: "[d]ecision, activity, secrecy, and dispatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number,"[180] that it is "essential to the preservation of liberty" that "each department" of the government (legislative, executive, and judicial) "should have a will of its own," secured through the "separate and distinct exercise of the different powers of government."[181]

The majority in *Humphrey's* concludes that "Congress, in creating quasi-legislative or quasi-judicial agencies, [may] require them to act in discharge of

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[174] *See* Myers v. United States, 272 U.S. 52, 135 (1926).
[175] *See Humphrey's Ex'r*, 295 U.S. at 628.
[176] *See Myers*, 272 U.S. at 135.
[177] *See id.*
[178] *See id.*
[179] *See Humphrey's Ex'r*, 295 U.S. at 629.
[180] THE FEDERALIST NO. 70, *supra* note 30, at 472.
[181] *See* THE FEDERALIST NO. 51, *supra* note 16, at 348.

their duties independently of executive control."[182] The Court in *Humphrey's*, then, concludes that the FTC is not responsible to the President. *Myers* does not allow for such: even when considering a "quasi-judicial character imposed on executive officers and members of executive tribunals," the President is constitutionally guaranteed the power to "consider [a] decision after its rendition as a reason for removing the officer, on the ground that [it] has not been on the whole intelligently or wisely exercised."[183] *Bowsher* does not allow for such: "[t]o permit the execution of the laws to be vested in an officer answerable . . . to Congress would . . . [impermissibly] reserve in Congress control over the execution of the laws," as an officer "entrusted with executive powers" cannot be responsible, in any part, to "Congress."[184] As *Bowsher* continues, in no way does the Constitution permit "Congress in effect [to] retain[] control over the execution of [an] Act," as such "intrude[s] into the executive function."[185] *Klein* does not allow for such: "Congress [cannot] pass[] the limit which separates the legislative from the judicial power" by legislating a "rule prescribed" on the Courts as to how they must interpret the law, effectively prejudging a case.[186]

If it is indeed true that the FTC of 1935 could not "in any proper sense be characterized as an arm or an eye of the executive,"[187] what powers was it exercising? In no proper sense can it be said that the FTC commissioners exercised judicial powers under Article III; the commissioners did not enjoy the lifetime tenure afforded judges (that of "good Behaviour"), and were in no way responsible to the "one supreme Court," nor did the commissioners sit in any "inferior Court[]."[188] In Congress charging the FTC with "exercis[ing] . . . power,"[189] it also foreclosed upon the ability of the FTC exercising legislative powers.[190] Yet the Court insists in *Humphrey's* that the Commission is not a member of the third, and only remaining, branch of constitutional government (the executive). This returns to an earlier point set aside—the Constitution does not allow for the creation of "a body which shall be independent of executive authority . . . and free to exercise its judgment without the leave or hindrance of any other official or any department of the government."[191] The Constitution makes one principle clear—the legislative powers reside in Congress, the judicial in the Courts, and the executive in the President. In no way, shape, or form,

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[182] *Humphrey's Ex'r*, 295 U.S. at 629.
[183] *See Myers*, 272 U.S. at 135.
[184] Bowsher v. Synar, 478 U.S. 714 (1986).
[185] *See id.*
[186] *See* United States v. Klein, 80 U.S. 128, 128 (1871).
[187] *See Humphrey's Ex'r*, 295 U.S. at 602.
[188] *See* U.S. CONST., art. III, § 1.
[189] *See Humphrey's Ex'r*, 295 U.S. at 620.
[190] *Cf.* Bowsher, 478 U.S. at 751–52 (comparing the FTC's ability to exercise legislative powers in this case as to *Humphrey's Executor*).
[191] *Contra Humphrey's Ex'r*, 295 U.S. at 625–26 ("In my view, however, the function may appropriately be labeled 'legislative' even if performed by the Comptroller General or by an executive agency.").

does the Constitution provide for the creation of offices "without the leave or hindrance" of one of the three branches of government. The *whole* of the federal power is divided amongst the Article I, Article II, and Article III branches, in which all powers flow from the Constitution and are divided such as the Framers thought sound. To say that an office or commission resides outside of all of these branches, which contain *all* of the federal power under the Constitution, necessarily means that such commission has no federal powers at all.

Purely on the facts of the Federal Trade Commission Act of 1914, the majority in *Humphrey's* conclude that "[t]he Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard."[192] How the Court managed to conclude that "carry[ing] into effect legislative policies" is not an executive power is entirely beyond reason. To be sure, such is also entirely beyond the meaning of the Constitution. The fact that Congress wanted to legislatively create "a body which shall be independent of executive authority" is entirely irrelevant as a means of constitutional interpretation; for the strict mandates of the Constitution provide "the discretion to be exercised is that of the President in determining the national public interest and in directing the action to be taken by his executive subordinates to protect it."[193]

In seeking to enable Congress to act "practically,"[194] the majority strayed from the most fundamental mode of analysis in the entire American system of constitutional interpretation—"'the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution,' for '[c]onvenience and efficiency are not the primary objectives—or the hallmarks—of democratic government.'"[195] Based on the fact alone that the Federal Trade Commission was authorized to wield executive powers, *Humphrey's Executor* was wrong the day it was decided. The majority's treatment of the power to "carry into effect legislative policies" as anything other than purely executive power in nature is entirely devoid of constitutional support; to be sure, such a statement is wildly contrary to the meaning of executive powers, as earlier addressed, under Article II and the Framers' strict understandings of it. And constitutional harm is certainly what the deviation in *Humphrey's Executor*, from the strict mandates of the Constitution, has caused.

Nevertheless, *Humphrey's Executor*, as presented in the introduction above, still turns on its grounding as a separation of powers case. For Justice

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[192] *Id.* at 628.

[193] Myers v. United States, 272 U.S. 52, 134 (1926).

[194] *See Humphrey's Ex'r*, 295 U.S. at 602. *But see* Immigr. & Naturalization Serv. v. Chadha, 462 U.S. 919, 945 (1983) ("Policy arguments supporting even useful 'political inventions' are subject to the demands of the Constitution which defines powers and, with respect to this subject, sets out just how those powers are to be exercised.").

[195] Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 499 (2010) (quoting *Bowsher*, 478 U.S. at 736) (internal quotations and emphasis omitted).

Sutherland and the majority, whatever the character of the powers may be, the distilled fact remained that:

> The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others . . . makes one master in his own house [and thus] precludes him from imposing his control in the house of another who is master there.[196]

While the Court was wrong on the *nature* of the powers being exercised by the FTC, it got the constitutional principle right—removal powers must be confined as to not derogate the separation of powers that the Framers enshrined in the Constitution.

ON PERMISSIBLY PROMOTING AGENCY INDEPENDENCE UNDER THE CONSTITUTION

It bears mentioning that this paper does not take issue with the ends of executive agencies of the federal government being less political and more neutral in their carrying out of the law. Instead, the problem that arises from *Humphrey's Executor* is from the means that Congress used to achieve those ends.

Congress has a wealth of constitutional tools it may use to structure the federal agencies and the statutes used to create them. The Constitution permits it the expansive power to "make all Laws which shall be necessary and proper for carrying into Execution . . . other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof" (the Necessary and Proper Clause).[197] Congress's power includes not only of statutory framing, but also fiduciary appropriation, as "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by [Congress through] Law" (the Appropriations Clause).[198]

Congress has a wide latitude in determining that which is "necessary and proper."[199] Laws need not be both necessary and proper,[200] nor be "absolutely

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[196] *Humphrey's Ex'r*, 295 U.S. at 629–30.

[197] U.S. CONST., art. I, § 8, cl. 18.

[198] U.S. CONST., art. I, § 9, cl. 7.

[199] *See* Randy Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. PA. J. CONST. L. 183, 186 (2003) (explaining that it is unclear—or perhaps at least debated—whether the Necessary and Proper Clause actually confers any powers. The clause was added without any comment nor debate, but rather "already thought implicit [by the Framers] in the enumerated powers" of Congress.); *see also id*. at 191 (stating that Madison's view is that any law could be "necessary" and thus "every possible power might be exercised . . . and every limitation effectually swept away," such that the Necessary and Proper clause extended only in "pursuit of an enumerated end") (internal citations omitted). *Contra id.* at 191, 194, 197 (describing Hamilton's view, ultimately adopted by Chief Justice Marshall in McCulloch, that Madison's framing would "give . . . the same force as if the word absolutely, or indispensably, had been prefixed to it," and that "[s]uch a construction would beget endless uncertainty and embarrassment," paralyzing Congress from being able to legislate at all) (internal citations omitted); *contra id*. at 203–08 (stating that perhaps both views are correct, in the original textual meaning, despite the seeming contradiction).

[200] *See* McCulloch v. Maryland, 17 U.S. 316, 324 (1819) ("The[] words, 'necessary and proper,' . . .

indispensable" in order for them to be "necessary."[201] Statutory constructions also need not be of the "best" method; as such "is not for [a] Court to decide whether [statutory creations] be the *best* possible means to aid [] purposes of the government."[202] Far from being the "best" method, Congress merely must enact "a means that is rationally related to the implementation of a constitutionally enumerated power."[203] This interpretation has prevailed for nearly two-hundred years.[204] Taken together, as then Solicitor General Elena Kagan successfully convinced the Supreme Court to affirm in 2010, "the Necessary and Proper Clause grants Congress broad authority to enact federal legislation."[205]

Appropriations measures are also squarely within congressional domain. Anytime Congress seeks to control the expenditure of funds, "a challenge to the measure's constitutionality does not present a justiciable question in the courts, but is a merely political issue over which Congress has final say."[206] The Political Questions Doctrine forecloses direct challenges to appropriations-choices because "Congress under the Constitution has complete control" over such.[207] The Appropriations Clause may even present an "insuperable obstacle" that constitutionally opposes any expenditures that Congress does not expressly authorize.[208]

Given the two considerations above, Congress still has broad legislative authority to frame independent agencies in ways that can turn on apoliticism and independence. While not an exhaustive list of possible ways to reframe the structures of independent agencies in ways that comport with the Constitution, several viable options are readily apparent and worth mentioning.

To start, the Senate can always refuse to seat appointments of independent-agency commissioners in the place of a predecessor who is removed prior to the conclusion of their term. Under Article II, the President alone is powerless to choose the nation's Officers. Heads of independent agencies—who are, constitutionally speaking, principal officers of the United States[209]—can only be

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are probably to be considered synonymous [sic].").

[201] *See, e.g.*, *id.* at 325 ("If Congress could use no means but such as were *absolutely indispensable* to the existence of a granted power, the government would hardly exist.").

[202] *See id.* (explaining that the decision of what is "best" under the Constitution "must be left to that discussion which belongs to them in the two houses of Congress").

[203] United States v. Comstock, 560 U.S. 126, 134 (2010) (citing Sabri v. United States, 541 U.S. 600 (2004)).

[204] *See, e.g.*, *id.* (affirming that "necessary" means neither "absolutely necessary" nor the best mode, but a "rational[]" one).

[205] *See id.* at 133.

[206] *See* United States v. Lovett, 328 U.S. 303, 313 (1946).

[207] *See id.*

[208] *See* Knote v. United States, 95 U.S. 149, 155 (1877) (noting that the Court does not expressly affirm this interpretation, but only reasons against it, as *Knote* is ultimately disposed on procedural (jurisdictional) grounds).

[209] *See*, *e.g.*, Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 483 (2010) (affirming that commissioners of independent agencies, i.e., those structured as was the FTC in *Humphrey's Executor*, are "principal officers").

seated into office "by and with the Advice and Consent of the Senate." Accordingly, Congress can incentivize, but not mandate, tenure protections. In exercising its power of "Advice and Consent,"[210] while the Senate cannot place conditions on its consent "by early opinion as well as by the record of practice,"[211] it may seemingly refuse to consent to appointees for any reason: "[t]he [Constitution] simply does not specify the grounds for Senate advice and consent any more than it specifies the grounds for presidential appointment."[212] That "there is no specific constitutional limitation on the Senate's power to advise and consent"[213] means that the Senate could refuse to consent to appointments that would replace commissioners of independent agencies who had been removed but for "good cause." Imagine a scenario as follows:

- Congress still creates the FTC (as it did) in 1914, but without the "good cause" removal provision.[214] Instead, the act includes a finding of fact that—since neutrality, stability, and apoliticism accompany terms of office terminated prematurely only for "good cause"—in the strongest terms urges the President to adhere to "good cause" removal protections. Should the President ignore this, the finding reads, the Senate stipulates that it may withhold confirmation of any replacements for Commissioners removed against the "good cause" standard.
- The President can either abide by the Congressional statement of intention, respecting the intended "good cause" protection, or choose to removal commissioners at will.
- After becoming law and initially appointing (with the Senate's confirmation) the FTC commissioners, the President sometime later chooses to remove one of those commissioners without "good cause." He may either choose to keep the office empty and withhold any nomination of a replacement, or proceed with a nomination—knowing in either event that the Senate may refuse to confirm his nominee on the President's decision to ignore the legislative intent.
- The President nominates a replacement; the nomination comes before the Senate.

In the above scenario, the Constitution has not been violated in the way the Court permitted in *Humphrey's Executor*. The President has not been deprived

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[210] U.S. CONST., art. II, § 2, cl. 2.

[211] LESTER S. JAYSON ET AL., CONG. RSCH. SERV., THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 528 (1973).

[212] Christopher Wolfe, *The Senate's Power to Give "Advice and Consent" in Judicial Appointments*, 82 MARQ. L. REV. 355, 364 (1999) (showing the contrast against "the impeachment power, for which the Constitution specifies particular grounds: 'Treason, Bribery, or other high Crimes and Misdemeanors'" (internal citation omitted)).

[213] *Id.*

[214] *I.e.*, in this scenario, the FTC is not changed in any way other than by removing § 1 of the Act of Sept. 26, 1914, ch. 311, 38 Stat. 717, which stipulates that a "commissioner may be removed by the President [only] for inefficiency, neglect of duty, or malfeasance in office."

of his total vesting of the executive power, as no law interferes with his oversight, including his termination, of the FTC commissioners. Nor has Congress strayed into the execution of the laws. Instead, Congress is suggesting compliance with "good cause" tenure protection, but it stops short of mandating such and thereby respects the constitutional boundary that the Article II "Executor" must oversee his appointees in their execution of the law.

That this situation pits the will of the President against the will of Congress is no mistake—it is the entire point of the constitutional fabric. As Madison observed, "[a]mbition must be made to counteract ambition."[215] Could the President make unwise removals, perhaps even self-serving ones? Certainly. Nevertheless, such power is balanced and checked. To start, the "dependence on the people," as the mode of presidential election, "is, no doubt, the primary control on" the President,[216] weighing and imposing upon him forces *against* unwise or politicized removals. Moreover, in requiring the Senate to consent to any replacement appointees, the Framers attended to Madison's method of constitution that "[t]he interest of the man must be connected with the constitutional rights of the place."[217] Since the President is stripped of the right of unilaterally choosing the nation's officers—such as his appointments to replace those he removes—his individual person is thus constitutionally bound in an office that depends on another (the Senate). Despite the very real existence of "opposite and rival interests," this interdependence "cannot be less requisite in the distribution of the supreme powers of the State" because "divid[ing] and arrang[ing] the several offices in such a manner as that each may be a check on the other . . . [is] a sentinel [guarding] over the public rights."[218] Thus, the President acts knowing that the Senate may rebuke his replacement appointee.

Yet the President is not alone in being held constitutionally in check. Continuing with the above scenario, the Senate, too, is bound in an authority "derived from and dependent on the society."[219] If the President can never remove an FTC Commissioner, who makes the most unwise decision conceivable thus resulting in grave damage, difficulty, and hardship to the public, though remaining just short of permitting "good cause" removal, public outcry is certain. In the scenario imaged above, however, the Senate may actually agree with the unwise nature of the commissioner who was so removed, and permit an exception to the general urging expressed in the (hypothetical) statute limiting removal to "good cause." Agreeing with the soundness in the President's decision to remove that unwise commissioner, or perhaps (and properly so) burdened by the public outcry and pressure, the Senate may confirm the President's replacement appointment despite the removal of the predecessor lacking "good cause."

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[215] THE FEDERALIST NO. 51, *supra* note 16, at 349.
[216] *See id.*
[217] *See id.*
[218] *See id.*
[219] *See id.* at 351.

Thus, in such a scenario—departing from the error in *Humphrey's*—the Constitution is made whole. Ambition is made to properly balance and counteract ambition; an overzealous President is held in check by the Senate and the people, while the Senate is pit against the President and its public electors. Such a scenario as this is certainly permissible. Now add the Appropriations Clause. Not only could the Senate itself act, as above, but the House of Representatives shares in the powers as well via the appropriations process. Taking the same scenario as above, let us add the following:

- On the basis of the finding of fact included in the 1931 statute, Congress does not provide any fixed salaries for the FTC Commissioners. Instead, Congress funds each and every commissioner separately and non-transferrably: a commissioner is guaranteed their salary for the entire duration of the term to which they were appointed, regardless of termination prior to the completion of the term—unless that termination is for a "good cause."

This extension of the scenario demonstrates just several of the ways in which unreviewable funding decisions may be used to further counteract a President's prerogative of administrative removability. The President would be held to account to the public for the funds paid to a commissioner despite that individual not performing work, since they are paid in full for terminations lacking "good cause." Furthermore, since funding is tied to a term of tenure of an individual—not to the seat in office—any replacement efforts by the President, even in an acting capacity, would not be funded and thus are not exercisable. Congress would have to affirmatively provide the additional funds needed for any replacement commissioner. It could even, perhaps, afford by statute a lower rate of pay for replacement commissioners, further dissuading the President from departing the "good cause" removal intentions.

Congress even possesses nuclear options if it disagrees with a President's at-will termination decisions. It could use the nuclear option of suspending or even abolishing the FTC, over a presidential veto, if necessary, by a two-thirds vote.[220] Perhaps less drastic, Congress could also stipulate that the FTC only has authority to act if there are no vacancies (due to termination lacking "good cause") on the Commission, under the Necessary and Proper Clause; if such a vacancy occurs, by way of termination lacking "good cause," the FTC immediately loses all statutory authority.

The point here is a modest one. Instead of supplying all the various means and methods in the Article I arsenal that allow Congress to promote, instill, and provoke compliance with a desire for "good cause" removal protections of commissioners of independent agencies, this section merely demonstrates that such constitutionally permissible methods do readily exist. The point is not that

[220] *See* U.S. CONST. art. I, § 7, cl. 2 ("[A]nd if approved by two thirds of that House, it shall become a Law.").

Congress can only act in the ways here recognized, but rather that there are means afforded to Congress that allow it to reach towards the ends of "good cause" protections. Nor do I argue that the methods mentioned above are perfectly permissible, and thus in no way might run afoul of other constitutional restrictions; such were only given short treatment in light of (a) the Necessary and Proper Clause and (b) the Appropriations Clause (not the entirety of the Constitution) to achieve the goal aforementioned—to show possible means do exist in promoting "good cause" tenure protections for administrative agencies. One point remains, in spite of this; while the above, and perhaps numerous other, configurations are seemingly *prima facie* compatible with the Constitution, the method rubber-stamped by the Supreme Court in *Humphrey's Executor* is not.

REACHING THE INFLECTION POINT IN *MORRISON V. OLSON*

Humphrey's Executor set into motion a vast siphoning of executive power from the watchful eyes of the nation's executive. In the years following, the FTC continued to expand its executive actions and functions, and "[alt]hough independent from the President, the Commission has been quite evidently responsive to the will of Congress."[221] In its expansion, along with the proliferation of numerous other agencies modeled after the FTC's structure, the modern FTC now has "[t]he predominant character . . . of a traditional law enforcement department."[222]

In the wake of the Watergate Scandal and the constitutional turmoil caused by the Nixon presidency, Congress enacted the Ethics in Government Act of 1978.[223] Perhaps motivated directly by the 'Saturday Night Massacre,' part of the Act required that the Attorney General "apply to the division of the court for the appointment of a[n independent counsel]" (a prosecutor) upon "receiving specific information"[224] that the President, Vice President, an employee of the "Executive Office," or Department of Justice official[225] "has committed a violation of any Federal criminal law other than a violation constituting a petty offense."[226] The prosecutor was given expansive executive powers—virtually every power entrusted to the Department of Justice itself.[227] Independent

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[221] *See* Crane, *supra* note 14 at 1868.

[222] *See id.*

[223] *See* Walter M. Shaub, Jr, *35th Anniversary of the Ethics in Government Act*, U.S. OFF. OF GOV'T ETHICS (Nov. 8, 2013), https://oge.gov/Web/oge.nsf/Resources/35th+Anniversary+of+the+Ethics+in+Government+Act (noting that the Act came to fruition due to the Watergate scandal); *see also* Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (1978) (defining "ethics" and how it interplays with the President and special counsel).

[224] Ethics in Government Act § 592.

[225] *See id.* at § 591(b).

[226] *Id.* at § 591(a).

[227] *See* Ethics in Government Act § 594.

> [An independent counsel] appointed under this chapter shall have, with respect to all matters in such special prosecutor's prosecutorial jurisdiction established under this

counsel had expansive authorities under the statute to amass an entire office of staff around itself entirely.[228] The prosecutor could even command the Attorney General himself to act at the special counsel's behest, effectively commandeering the entire Department of Justice for the purposes of the prosecutor's own sole and complete discretionary authorities under the Act.[229] Perhaps most unsurprisingly, given the holding in *Humphrey's*, Congress concludes its mass organizing of executive power around a special counsel by providing that:

> [An independent counsel] appointed under this chapter may be removed from office, other than by impeachment and conviction, only by the personal action of the Attorney General and only for extraordinary impropriety, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such [independent counsel]'s duties.[230]

Such a provision is synonymous with a "good cause" tenure protection.[231]

An independent counsel cannot be understood, based on the aforementioned, as exercising anything less than paradigmatic executive power. So too distinguishable from the majority's understanding in *Humphrey's* is that the independent counsel is not a multi-member board of principal officers, but rather a single individual that "clearly falls [i]n the 'inferior officer'" constitutional category.[232]

The majority in *Morrison* reason that the present case was distinguishable from *Bowsher* in the fact that "this case does not involve an attempt by Congress itself to gain a role in the removal of executive officials other than its established powers of impeachment and conviction."[233] Removal, instead, was placed

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> chapter, 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.

Id.

[228] *Id.* at § 594(c) ("[A]s such [independent counsel] deems necessary (including investigators, attorneys, and part-time consultants).").

[229] *See* Ethics in Government Act § 594(d)–(e).

> A[n independent counsel] may request assistance from the Department of Justice, and the Department of Justice shall provide that assistance, which may include access to any records, files, or other materials relevant to matters within such special prosecutor's prosecutorial jurisdiction, and the use of the resources and personnel necessary to perform such special prosecutor's duties.

Id.

[230] *Id.* § 596(a)(1) (noting that Congress has the jurisdiction to oversee the official conduct of any special prosecutor). *But see* Bowsher v. Synar, 478 U.S. 714, 722–23 (1986) ("The Constitution does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts.").

[231] *See* Morrison v. Olson, 487 U.S. 654, 685 (1988) ("[T]he Act restrict[s] the Attorney General's power to remove the independent counsel to only those instances in which he can show 'good cause' . . . .").

[232] *See id.* at 671 ("We need not attempt here to decide exactly where the line falls between the two types of officers, because in our view appellant clearly falls on the 'inferior officer' side of that line.").

[233] *Id.* at 686.

"squarely in the hands of the Executive Branch."[234] To be sure, though, "the removal power" was not "squarely" with "the Executive Branch"[235] because of the good-cause tenure protections; some removal powers were, but such—by their very nature of being limited to good cause—cannot include the whole of removal powers. If the President, then, did not have all of the removal power, who had the rest? Did it just magically evaporate from our constitutional fabric? At risk of stating the obvious, Constitutional power cannot be lost (save for amendment); it cannot vanish by a simple act of Congress. If one branch of the federal government does not have a power, in part or in whole, such power can only reside (a) in the other branches or (b) "are reserved to the States respectively, or to the people."[236] As the Court concludes in *Morrison*, neither the judicial branch nor Congress had any removal powers over the independent counsel, and the President only had some of the removal powers.[237] Are we to conclude, then, that the several States, or perhaps even "the people," were given the plenary power to remove an independent counsel—taken away from the President by the act of Congress? Obviously not, yet the runaway logical train of analysis that began in *Humphrey's* reaches such a prude point in *Morrison*.

This absurdity continues with the *Morrison* majority's conclusion that "the real question is whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty."[238] How such is even relevant, as a mode of constitutional analysis, is utterly beyond reason when the *Morrison* majority also concludes "*Myers* was undoubtedly correct in its holding, and in its broader suggestion that there are some 'purely executive' officials who must be removable by the President at will if he is to be able to accomplish his constitutional role."[239] If it is true—as I contend here—that *Myers* is "undoubtedly correct" that the Take Care Clause requires that the President must enjoy "at will" removal of all those who assist him in the executive duties of the government (or else he cannot "accomplish his constitutional role"), then by *Morrison*'s own reasoning, the question concerning the constitutionality of removal protections turns on whether an official is one "purely executive" in nature. Notably, the question does not turn—by *Morrison*'s own reasoning of *Myers*—on whether the removal restrictions of executive officers "impede the President's ability to perform his constitutional duty" because the

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[234] *Id.*

[235] *Contra id.* at 706–09 (Scalia, J., dissenting) (noting that Congress's enactment of the statute was made with the fact that it would severely restrict the President's power by "describing the 'good cause' limitation as 'protecting the independent counsel's ability to act independently of the President's direct control' since it permits removal only for 'misconduct'").

[236] *See* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

[237] *See Morrison*, 487 U.S. at 682–88 ("The termination provisions of the Act do not give the Special Division anything approaching the power to remove the counsel while an investigation or court proceeding is still underway- this power is vested solely in the Attorney General.").

[238] *See id.* at 691.

[239] *See id.* at 690.

Constitution expressly dictates (again, quoting *Morrison* itself) "'purely executive' officials . . . must be removable by the President at will if he is to be able to accomplish his constitutional role." Instead of adhering to these strict mandates, which the Court recognizes as "undoubtedly correct," the *Morrison* majority invent an entirely new test, seemingly out of thin air, ungrounded in any historical analysis (and, indeed, directly in spite of the well-established constitutional understanding of executive power) by crafting this entirely unfounded standard of whether the removal restrictions of purely executive officers "impede the President."

The independent counsel was unquestionably a purely executive officer: "[t]here is no real dispute that the functions performed by the independent counsel are 'executive.'"[240] Moreover, the independent "counsel exercises no small amount of discretion and judgment in deciding how to carry out his or her duties under the Act."[241] Based on these facts alone, *Morrison* should have struck down the "good cause" tenure protections of the independent counsel. The Constitution unambiguously designates the "President [as] the Constitutional *Executor* of the laws."[242] Given that the independent counsel must make "discretion and judgment in deciding how to carry out his or her duties under the Act," the independent counsel can be seen as doing no less than wielding executive power in its rawest, purest form.[243] Such powers, by the Framers' visions, are rested in "unity" in one alone, in the President; such "unity" of executive powers, the hallmark of Article II, are "destroyed . . . by vesting the power . . . in one man, subject, in whole or in part, to the controul [sic] and co-operation of others, in the capacity of counsellors to him."[244] Given that the independent counsel must "judge for himself" the meaning of laws ("no small amount of discretion and judgment"), to subject the President to anything less than full and complete control over the tenure of the independent counsel is to subject the President "to the controul [sic] and co-operation of others, in the capacity of counsellors to him."[245]

If the *Morrison* Court could not "not see how the President's need to control the exercise of that discretion is so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the President," then the majority clearly did not give proper consideration to what executive power is in the first place. The independent counsel has no authority whatsoever to "take Care that the Laws be faithfully executed."[246] Such a power is the President's, and the President's alone—"[i]t

[240] *Id*. at 691.
[241] *Id*.
[242] *See* HAMILTON, *supra* note 46, at 84.
[243] *See id.* ("He, who is to execute the laws, must first judge for himself of their meaning.").
[244] *See* THE FEDERALIST NO. 70, *supra* note 30, at 473.
[245] *See id.*
[246] *See* U.S. CONST., art. II, § 3.

is *his* responsibility to take care that the laws be faithfully executed."[247] The power to execute the laws, being fully the President's, means that the power to "first judge . . . of their meaning" must also be the President's alone whenever, in any way, such interpretations will be the very basis of the power "to execute the laws."[248] The Constitution does not afford the Article I and Article III branches of abrogating the President's full and utter control over, first, the complete interpretation of the laws in order to, secondly, execute those laws. If at any time one is charged with "no small amount of discretion and judgment in deciding how to carry out his or her duties under" the laws of the United States, such a power must necessarily flow from the powers expressly designated as the President's under Article II.

THE ROBERTS COURT'S MENDING OF THE *HUMPHREY'S EXECUTOR* ERROR

The Roberts Court has been steadily returning the executive power to the constitutionally prescribed standard laid down by the Framers. In a series of cases, first in *Free Enterprise*, then again in *Lucia* and *Seila Law*, the Court has sought to slowly reconcile the erroneous views of executive power laid out in *Humphrey's* and *Morrison*. Has this return to the Constitution gone far enough?

FREE ENTERPRISE V. PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD

The first of the Roberts Court's correction came by way of yet another extreme logical conclusion of *Humphrey's*: if Congress could shield executive commissions in one layer of "good cause" tenure protections, it could shield an *unlimited* number.[249] The Sarbanes-Oxley Act of 2002,[250] in part of a larger series of reforms, created the Public Company Accounting Oversight Board ("PCAOB") "to oversee the audit of public companies that are subject to the securities laws."[251] Composed of five members,[252] was largely modeled after the structure approved by *Humphrey's Executor*: the board was to be made of industry experts as opposed to politicians,[253] the members were to enjoy staggered terms[254] with "good cause" tenure protections,[255] and the members could

[247] Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 493 (2010) (emphasis added).
[248] *See* HAMILTON, *supra* note 46, at 84.
[249] *See Free Enter.*, 561 U.S. at 477 ("[T[he Government was unwilling to concede that even *five* layers between the President and the Board would be too many.").
[250] Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. § 745.
[251] *Id*. at § 101(a).
[252] *Id*. at § 101(e)(1).
[253] *See id*. at ("[I]ndividuals of integrity and reputation who have a demonstrated commitment to the interests of investors and the public, and an understanding of the responsibilities for and nature of the financial disclosures required of issuers under the securities laws and the obligations of accountants.").
[254] *Id*. at § 101(e)(5)(A)(i) ("[T]he terms of office of the initial Board members . . . shall expire in annual increments, 1 on each of the first 4 anniversaries of the initial date of appointment.").
[255] *See* Sarbanes-Oxley Act of 2002 § 101(e)(6) ("A member of the Board may be removed . . . for

not engage in private affairs as to avoid conflicts of interest and impropriety.[256] However, there is one marked distinction between the FTC in *Humphrey's* and the PCAOB in *Free Enterprise*; unlike the FTC commissioners, who were removable by the President, the PCAOB commissioners were only removable by the Securities and Exchange Commission ("SEC").[257] The SEC commissioners, by the majority in *Free Enterprise*, are assumed to also enjoy "good cause" tenure protections but from Presidential removal. (This is under contentious debate in *Jarkesy*, as the SEC is not explicitly provided "good cause" tenure in the authorizing statute.[258] Justice Breyer raises this exact point in his dissent in *Free Enterprise*, but fell on the majority's deaf ears.[259] I proceed under the majority's interpretation in *Free Enterprise*, being that the SEC commissioners do enjoy "for cause" tenure protections.)

Under such a statutory arrangement, the SEC commissioners can only remove PCAOB members for "good cause," and the President can only remove SEC commissioners for "good cause." This creates "[a] second level of tenure protection[s]."[260] Such an additional layer of protection has important significance. Under this scheme, "[t]he President . . . cannot hold the Commission fully accountable for the Board's conduct, to the same extent that he may hold the Commission accountable for everything else it does."[261] The lack of accountability arises from the "good cause" tenure protections afforded to the PCAOB. Such protections result in "[t]he Commissioners are not responsible for the Board's actions."[262]

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good cause shown.").

[256] *Id*. at § 101(e)(3) ("[E]ach member of the Board shall serve on a full-time basis, and may not, concurrent with service on the Board, be employed by any other person or engage in any other professional or business activity.").

[257] *See id*. at § 101(e)(6).

[258] *See* Securities Exchange Act of 1934, Pub L. No. 117–328, 48 Stat. 881 (explaining that while appointment and qualifications requirements are explicitly mentioned, unlike the Federal Telecommunications Commission Act of 1914, 48 the Securities Exchange Act makes no provisions for explicit "good cause" tenure of SEC commissioners); *see also* Jarkesy v. Sec. and Exch. Comm'n, 34 F. 4th 446 (5th Cir. 2022) (holding "SEC Commissioners may only be removed by the President for good cause" despite the lack of any statutory provision to this effect). The assumption in favor of "good cause" tenure protections, despite statutory foundation, draws support from Wiener v. United States, 357 U.S. 349, 350, 356 ("[N]o such power is given to the President directly by the Constitution, and none is impliedly conferred upon him by statute simply because Congress said nothing about it.").

[259] *See* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 546 (2010) (Breyer, J., dissenting) ("It is certainly not obvious that the SEC Commissioners enjoy 'for cause' protection. Unlike the statutes establishing the 48 federal agencies listed in Appendix A, *infra*, the statute that established the Commission says nothing about removal. It is *silent* on the question."); *see also*, *e.g.*, Jameson M. Payne, *Taken for Granted? SEC Implied For-Cause Removal Protection and Its Implications*, YALE J. ON REG. (June 24, 2022), https://www.yalejreg.com/nc/sec-for-cause-removal-protection/ ("This dodge raised vociferous dissent by Justice Breyer, who noted that '[i]t is certainly not obvious that the SEC Commissioners enjoy "for cause" protection.'").

[260] *See* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 496 (2010).

[261] *See id.*

[262] *Id*.

But this raises a very serious point and irreconcilable conclusion with *Humphrey's Executor*. In *Free Enterprise*, the very existence of "good cause" tenure protections for the PCAOB is what results in the SEC's lack of responsibility for the PCAOB's actions. Why should it matter if the SEC, as opposed to the President, is restricted to "good cause" tenure protections, when the Court in *Free Enterprise* recognizes that it is the tenure protections themselves that dilute accountability?

Put differently, the SEC "is not responsible for the Board's actions" because "the Commission cannot remove a Board member at will."[263] The lack of ability to remove the Board members at will is the sole determining factor that diffuses responsibility. But this exact same scenario is what separates the President from the SEC itself. How can it be that the SEC is not responsible for the PCAOB because the PCAOB is given "good cause" tenure, when the President somehow is responsible for the SEC when the SEC enjoys "good cause" tenure all the same? This logical result of *Free Enterprise* demands reconciliation. To be sure that this interpretation is correct, the *Free Enterprise* Court concludes that the SEC would otherwise be responsible for the PCAOB "[w]ithout a layer of insulation [("good cause" tenure protections)] between the Commission and the Board."[264] Thus, if "the Commission could remove a Board member at any time, . . . [then the SEC] would be fully responsible for what the Board does."[265] It is the mere existence of "good cause" tenure protections that diffuses accountability, not that such is between the PCAOB and the SEC (as opposed to being between the SEC and the President).

The unmistakable conclusion from *Free Enterprise* is that accountability must accompany total and complete removal discretion. In *Free Enterprise*, it is clear that the PCAOB is only accountable to the SEC if "the Commission could remove a Board member at any time." The converse of this argument is that if the SEC cannot "remove a Board member at any time," then the SEC would not "be fully responsible for what the Board does."[266] How is this arrangement any different than that between the President and the SEC itself? If the tenure protections alone are what dilute responsibility, such that the PCAOB was not responsible to the SEC, then so, too, must the SEC no longer be responsible to the President.

This conclusion is unavoidable based on the logic in *Free Enterprise*. At all times, "[t]he diffusion of power carries with it a diffusion of accountability."[267] In reverse, it also must be true that wherever a diffusion of responsibility is to be found in our constitutional framework, such diffusion must be the result of a "diffusion of power." The effect ("a diffusion of accountability") must flow

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[263] *See id*.
[264] *Id*. at 495.
[265] *Id*.
[266] *See Free Enter. Fund.*, 561 U.S. at 495–96.
[267] *Id*. at 497.

from the *cause* (a "diffusion of power"). Thus, if there is indeed any diffused accountability, such follows a direct power diffusion.

It should go without saying that the Constitution, of course, does not allow for a diffusion of accountability, over the executive powers, from the President. This is, as a matter of course, because:

> The people do not vote for the "Officers of the United States." They instead look to the President to guide the "assistants or deputies . . . subject to his superintendence." Without a clear and effective chain of command, the public cannot "determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall." That is why the Framers sought to ensure that "those who are employed in the execution of the law will be in their proper situation, and the chain of dependence be preserved; the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community."[268]

And, as if this point could not be clear enough, "[b]y granting . . . executive power without the Executive's oversight, this Act subverts the President's ability to ensure that the laws are faithfully executed—as well as the public's ability to pass judgment on his efforts." Such is, and always has been understood to be, a *prima facie* "incompatib[ility] with the Constitution's separation of powers."[269]

Whether there is to be a difference in one layer, or two layers, or "even *five* layers between the President"[270] and his subordinates is entirely irrelevant as a mode of constitutional analysis. One layer alone "carries with it a diffusion of accountability" under which "executive power [is exercised] without the Executive's oversight." One layer alone of diffused accountability "subverts . . . the public's ability to pass judgement on [the President's] efforts." One layer alone creates "a government that functions [by] being ruled by functionaries." One layer alone destroys the Framers' principle that "[o]ur Constitution was adopted to enable the people to govern themselves, through their *elected* leaders."[271] That one layer of tenure protections between the SEC and the PCAOB results in an unconstitutional lack of accountability, but one layer of tenure protections between the SEC and the President would not, is entirely irreconcilable with logic and the constitutional fabric alike. *One* layer alone of "good cause" tenure protections is unconstitutional.

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[268] *Id*. at 497–98 (internal citations omitted).
[269] *See id.* at 498.
[270] *Id.* at 497.
[271] *Id.* at 499 (emphasis added).

LUCIA V. SECURITIES AND EXCHANGE COMMISSION

At first glance, *Lucia* may not seem as relevant to the present analysis as the explicit overtures in *Free Enterprise*, but a more subtle point certainly can be made. In yet another case concerning the SEC, Raymond Lucia was found liable for violating securities laws before one of the Commission's Administrative Law Judges ("ALJs").[272] Penalties were imposed by the ALJ of "$300,000 and a lifetime bar from the investment industry."[273] The ALJs themselves enjoy a wide range of adjudicatory and enforcement powers in their official capacity. To start, "they exercised 'significant discretion' [when carrying out] 'important [agency] functions.'"[274] ALJs also exercised significant "responsibilities" within the executive branch, for the SEC, "in presiding over adversarial [proceedings]."[275] These responsibilities included "administer[ing] oaths, rul[ing] on motions, and generally 'regulat[ing] the course of' a hearing," all of which enable an ALJ to "critically shape the administrative record."[276] These powers are not advisory, nor are they without teeth. Such as was the case in *Lucia*, ALJs enjoy a wide range of discretionary "power to enforce compliance" with their proceedings, and enjoy a wide array of tools that Justice Kagan, for the majority, surmised as including everything up to the "nuclear option[s] of compliance tools."[277]

There was just a slight problem in *Lucia*: the SEC's ALJs were not chosen by the President, nor by "the Courts of Law," nor by the "Head[] of [a] Department[]" (such as the SEC itself).[278] Instead, the ALJs were chosen by lesser, "[o]ther staff members" within the SEC.[279] The ALJs, then, were appointed outside of any Constitutional processes, despite the wide array of powers they enjoyed.

The point *Lucia* raises is with regard to "the responsibilities involved."[280] The Constitution makes clear, as heavily relied upon above, that when the powers of the United States are vested, there must be "a clear and effective chain of command," of clear responsibility, so that "the public can[] 'determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall.'"[281] Despite the fact that ALJs wielded vast powers, including those to shape the policies of the SEC itself, the entrustment

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[272] *See* Lucia v. Sec. and Exch. Comm'n, 585 U.S. 237, 237 (2018) ("The SEC charged petitioner Raymond Lucia with violating certain securities laws and assigned [an] ALJ . . . to adjudicate the case.").
[273] *Id.* at 242.
[274] *Id.* at 272.
[275] *See id.* at 247.
[276] *See id.* at 248 (citing 17 C.F.R. § 201.111).
[277] *Cf. id.* at 250 (explaining that there is no difference between officers and Commissions' ALJs).
[278] *See* U.S. CONST., art. II, § 2, cl. 2.
[279] *See* Lucia v. Sec. & Exch. Comm'n, 585 U.S. 237, 241 (2018).
[280] *Id.* at 238.
[281] Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 497–98 (2010) (internal citations omitted).

of their appointment to "[o]ther staff members" denied Lucia the "clear and effective chain of command"[282] that the Constitution guaranteed to him and every other member of the public.

In this way, certainly subtle but no less important, *Lucia* clarifies that "the Appointments Clause maintains clear lines of accountability—encouraging good appointments and giving the public someone to blame for bad ones."[283] What *Lucia* solidifies and underscores from *Free Enterprise*, then, is the central role of accountability within the constitutional fabric. In interpreting the executive powers, that which serves to diminish or circumvent accountability is impermissible as a matter of law.

SEILA LAW LLC V. CONSUMER FINANCIAL PROTECTION BUREAU

Seila Law looks and sounds very much like *Free Enterprise*; Chief Justice Roberts, again writing for the Court, addresses a similar fact pattern. The Dodd-Frank Wall Street Reform and Consumer Protection Act[284] enacted a wide range of sweeping market reforms, controls, and oversight mechanisms "[i]n the wake of the 2008 financial crisis."[285] These measures included the Consumer Financial Protection Act of 2010,[286] which created "the Bureau of Consumer Financial Protection" ("CFPB").[287] The Bureau was unmistakably "an Executive agency"[288] once more intended, like the FTC of 1935, to be apolitical in nature, led by those free from private improprieties or the appearances thereof,[289] and afforded "good cause" tenure protections.[290]

Here is the catch: the CFPB was not composed of multiple members or commissioners, but rather by a single "Director."[291] It is worth noting that such a novel configuration is identical in each and every way to the one found constitutional in *Humphrey's Executor*, different only by the fact that Congress swapped multiple commissioners for a single director. Nor did *Humphrey's Executor* turn at all on the number of commissioners—a singular or plural structure—but rather on the fact that the entire "body" of the FTC (its employees and officers alike) was 'designed' to "be independent of executive authority . . . and free to exercise its judgment without the leave or hindrance of any other official or any department of the government."[292] It was not the nature of the FTC, as

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[282] *See Free Enter.*, 561 U.S. at 477.
[283] *Lucia*, 585 U.S. at 253–54 (Thomas, J., concurring) (emphasis added).
[284] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, 124 Stat. 1376 (2010).
[285] *See* Seila L. LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197, 197 (2020).
[286] Consumer Financial Protection Act of 2010, Pub. L. No. 111–203, 124 Stat. 1955.
[287] *See id.*; *see also* 124 Stat. 1964 § 1011(a), 12 U.S.C. 5491.
[288] *See id.*
[289] *See* Consumer Financial Protection Act of 2010 § 1011(d).
[290] *Id.*; *see also id.* § 1011(c)(3) ("The President may remove the Director for inefficiency, neglect of duty, or malfeasance in office.").
[291] *See id.* § 1011(b)(1).
[292] *See* Humphrey's Ex'r v. United States, 295 U.S. 602, 625–26 (1935).

a body, being composed by multiple commissioners that determined its purported validity, but rather that Congress created it to "be independent of executive authority," that the *Humphrey's* majority assessed the FTC. Indeed, little attention is paid in *Humphrey's* to the fact that the FTC had multiple commissioners; the focal point is on the duties the FTC was to perform ("quasi-legislative and quasi-judicial")—not who was supposed to perform those duties.

Roberts begins by reiterating what this paper has been screaming all along: "[t]he President's power to . . . supervise . . . those who wield executive power" turns on the President's ability of "remov[al]."[293] This power of supervision, necessarily including the power of removal, flows expressly from "Article II, was settled by the First Congress, and was confirmed in the landmark decision *Myers v. United States*."[294] Yet Roberts goes on to ignore this fact, finding distinguishment in the fact that "expert agencies led by a *group* of principal officers" are somehow constitutionally permitted to be "removable by the President only for good cause."[295] The idea that a group of individuals may subvert the President's total control over the executive powers of the United States, but a single individual may not, is entirely meaningless within the context of Article II's sole vesting of the executive power in the President. The Constitution does not permit "granting . . . executive power without the Executive's oversight" *period*. There is no constitutional exception to this rule, and certainly not one on the plain and silly distinction that multiple commissioners may do what a single may not. If one individual being granted "good cause" tenure protections contravenes Article II, as is held in *Seila Law*, then so must tenure protections for more than one individual.

Constitutional analysis of restrictions on the President's ability to "take Care that the Laws be faithfully executed" now turns on whether the President is forced to endure disagreement with multiple "control and co-operation of others, in the capacity of counsellors to him,"[296] instead of merely one. The utter constitutional absurdity of it being acceptable to subject the President to the "co-operation" of multiple "counsellors to him," but not to a single "counsellor[] to him," is baffling. Is the Supreme Court to draw out an abacus and merely count the number of "counsellors" to the President, to whom the executive powers are entrusted, in order to determine whether the President can exercise the power of full, or only for "good cause," removal? I struggle to find the location in the Constitution, or in the historical and traditional understanding of the executive powers, where the Framers understood it to be acceptable to submit the

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[293] *See* Seila L. LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197, 204 (2020).

[294] *See id*.; *see also* Myers v. United States, 272 U.S. 52 (1926) ("[A]rticle 2 carr[ies] with it the power of removal, but the express recognition of the power of appointment . . . on the well-approved principle of constitutional and statutory construction that the power of removal of executive officers was incident to the power of appointment.").

[295] *See Seila L. LLC*, 591 U.S. at 204.

[296] *See* THE FEDERALIST NO. 70, *supra* note 30, at 473.

President (and subjugate the executive powers) to many "counsellors," so long as this subjugation was not to one "counsellor[]."

Is not the entire point of Article II's sole vesting of the executive power to never subjugate the President at all? Was the Framers' fixation on, and insistence in, pure "unity" in the executive all for nothing? Return to the founding principle that:

> Wherever two or more persons . . . [encounter a] difference of opinion . . . [in] the supreme . . . magistracy of a country . . . they might impede or frustrate the most important measures of government, in the most critical emergencies of the state. And what is still worse, they might split the community into the most violent and irreconcilable factions.[297]

The Framers were concerned with "two or more persons" destroying the union they had fought so hard to create, in other words, more than one. It seems altogether plain, and irreconcilable, that the executive power being divided in more than two individuals (the President and more than one commissioner) does not violate the notion that "[t]he entire 'executive power' belongs to the President alone,"[298] but that the executive power being divided in exactly two individuals (the President and exactly one director) does violate that constitutional principle.

The principle is clearly that "[t]he entire 'executive power' belongs to the President alone."[299] This counting game must end. It is the "the Constitution . . . [which] empower[s] the President to keep [his] officers accountable,"[300] not the number of officers. The President must enjoy the same supervision and accountability over all of his officers despite their number; if the Constitution does not permit less than complete Presidential accountability (and therefore removal ability) over one officer, then that constitutional rule does not seemingly cease to exist simply because Congress expanded that office to more than one officer.

If this point is not clear nor your head yet dizzy, try and reconcile the fact that the *Seila Law* majority concludes "[t]he Framers deemed . . . the protection of the community against foreign attacks, the steady administration of the laws, the protection of property, and the security of liberty"[301] all entirely dependent on "not . . . bog[ging] the Executive down with the habitual feebleness and dilatoriness that comes with a diversity of view and opinions."[302] Would subjecting the executive to more than one commissioner not subject the executive to

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[297] *Id*. at 439.
[298] *See Seila L. LLC*, 591 U.S. at 213.
[299] *See id*.
[300] *See id*. at 215 (quoting Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 483 (2010)).
[301] *Seila L. LLC*, 591 U.S. at, 223–24 (internal citations omitted) (quoting THE FEDERALIST NO. 70, *supra* note 30).
[302] *Id*. at 224 (internal citations omitted) (quoting THE FEDERALIST NO. 70, *supra* note 30).

even more "diversity of view and opinions" than that of a single director? By the majority's own reasoning in *Seila Law*, it would be better to allow the single-director structure than a multi-member commission, because it would reduce the number of "view[s] and opinions" that the President would be subject to. Alas, the Court need not do as much—because the Constitution allows neither.

CONSUMERS' RESEARCH V. CONSUMER PRODUCT SAFETY COMMISSION

All of the above being stated, it remains plain that the Supreme Court is powerless to redress the error of *Humphrey's Executor* without a case that invites it to do so. Justice Brandeis famously championed this principle of judicial restraint that affirms a canon largely still practiced—"[t]he Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it.'"[303] The day for *Humphrey's Executor* seems imminent.

Consumers' Research was both hotly contested and, as decided by the majority of the initial Fifth Circuit panel, logically incoherent. By the majority's own admission, the *Consumers' Research* challenge to *Humphrey's Executor* exception was "free from *any* logical error."[304] The majority goes further, admitting that *Humphrey's* is no longer even applicable based on its own language, as the modern independent agencies—here, the Consumer Product Safety Commission ("CPSC")—"[exercises] substantial executive power," and "unquestionably" so,[305] thus no longer qualifying for "quasi legislative or quasi judicial" exceptions.[306] Yet the majority somehow relies on *Free Enterprise* and *Seila Law* to conclude that the CPSC, despite its substantial exercise of executive power, is still protected by *Humphrey's Executor*, notwithstanding *Humphrey's Executor* hinging upon the fact that the commission under consideration, there, could not "in any proper sense be characterized as an arm or an eye of the executive."[307] Even if the decision in *Humphrey's Executor* comported with the Constitution, it certainly should not have been dispositive in *Consumers' Research*; the CPSC "unquestionably" wields "substantial executive power" while the FTC in 1935 was in no way seen as exercising executive power (it was).

The Fifth Circuit panel majority in *Consumers'* concludes that, for any lower court "to consider the role of 'executive power' in the Supreme Court's

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[303] Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 346 (1936) (Brandeis, J., concurring) (quoting Liverpool, N.Y. & Phila. S.S. Co. v. Comm'rs of Emigration, 113 U.S. 33, 39 (1885)).

[304] Consumers' Rsch. v. Consumer Prod. Safety Comm'n, 91 F. 4th 342, 355 (5th Cir. 2024) (emphasis added).

[305] *See id.* at 353 ("[U]nder any modern conception, the Commission unquestionably *does* exercise executive power.").

[306] *See id*. at 353.

[307] *See* Humphrey's Ex'r v. United States, 295 U.S. 602, 628 (1935); *see also Consumers' Rsch.* 91 F. 4th at 352 (explaining how Humphrey's Executor is applicable despite the substantial exercise of executive power).

removal doctrine[,]" it would be impossible, because "to do that is to board a train of thought that seems almost predestined for incoherence."[308] The errors from *Humphrey's Executor* have reached such an absurd logical conclusion that no less than the Fifth Circuit Court of Appeals is now refusing to apply judicial precedent because—by the Supreme Court's own handiwork—such would be "predestined for incoherence." Instead, such a runaway "train," they conclude, is the mess of "[o]nly the Supreme Court . . . to reconsider,"[309] passing both the buck and the judicial responsibility. It is worth noting that the United States, in defending the CPSC, agrees that even though *Humphrey's Executor* should no longer apply—based on the accepted facts of today—and that "the 'underpinning of the controlling Supreme Court decision has changed,'" the only judicial remedy that can be afforded by the lower courts is to adhere to Supreme Court precedent until that Court directs otherwise.[310]

It is hard to identify any circumstances in which a constitutional issue was so controversial that the lower courts have refused to apply precedent based on the facts at hand. As the dissent argues in *Consumers'*, "[f]acts are called facts for a reason," and while "[t]he facts in *Humphrey's Executor* have never changed,"[311] the CPSC cannot satisfy the precedential exception. It goes without saying that "applying law to a new set of facts does not adjust a legal rule[]."[312] Instead, "faithfully adher[ing] to the rule [] in *Humphrey's Executor*" would require the lower court to strike down the "CPSC members' for-cause removal protection"[313] that the facts are different necessitates a different precedent be applied to a case at hand—not that the precedent be overruled.

What remains plain is that the entire three-judge panel on the Fifth Circuit unanimously agree that the CPSC cannot possibly qualify for the *Humphrey's Executor* exception based on the facts. There, the majority choose to judicially punt, refusing to apply standard canons of weighing competing caselaw based on distinguishing fact-patterns, and instead declare that the constitutional mess created by *Humphrey's* is not theirs to remedy. While *Free Enterprise*, *Lucia*, and *Seila Law* all managed to avoid a direct confrontation with *Humphrey's* (due to slightly different administrative structure being presented before them), *Consumers' Research* asked what those cases fell short of: Can the *Humphrey's Executor* exception withstand the precedent—*i.e.*, *Buckley, Bowsher*—that followed it? If the refusal of lower courts to apply clearly competing and

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[308] *Consumers' Rsch.*, 91 F. 4th at 353.
[309] *Id*. at 356.
[310] Reply to Brief in Opposition at 1, *Consumers' Rsch.*, 91 F. 4th 342 (No. 23-1323); *see also Consumers' Rsch*, 91 F. 4th at 355–56.
[311] As Circuit Judge Jones recognizes, based on the facts before the Court in 1935, it is dubious at best if "*Humphrey's Executor*. . . even satisf[ied] its own exception." *Consumers' Rsch.*, 91 F. 4th at 357 (Jones, J., dissenting in part) (quoting Seila L. LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197, 250 (2020) (Thomas, J., concurring in part)).
[312] *Id.* at 357.
[313] *Id.* at 358.

unworkable standards does not warrant the intervention of the Supreme Court, what does?[314]

In spite of all of this, there were not four votes to hear the case.[315] Nevertheless, the underlying issues are still alive. Such were present in the highly publicized and contentious firing of former Special Counsel Hampton Dellinger. After the Trump Administration summarily removed Dellinger, the United States District Court for the District of Columbia allowed him to remain in office and barred the administration from installing a replacement[316]—an unprecedented move (the only traditional remedy is to sue for lost wages, as was in *Humphrey's*)[317]—culminating in an emergency appeal to the Supreme Court.[318] Dellinger dropped his bid to remain in office after an unfavorable ruling from the Court of Appeals for the District of Columbia Circuit.[319] Moreover, these issues and themes are currently playing out in cases concerning terminations of the interim Chair of the National Labor Relations Board[320] and two Democratic appointees of the Federal Trade Commission.[321] The Trump administration has even gone as far as formally notifying Congress that it no longer seeks to defend many "good cause" tenure protections as constitutionally permissible—both for principal and inferior officers.[322] While *Consumers'*

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[314] *See* Consumers' Rsch v. Consumer Prod. Safety Comm'n, 145 S. Ct. 414 (2024) (denying cert.).

[315] *Id.*

[316] *See* Dellinger v. Bessent, No. 1:25-CV-00385-ABJ, 2025 WL 450488, at *1 (D.D.C. Feb. 10, 2025), *appeal dismissed*, No. 25-5025, 2025 WL 561425 (D.C. Cir. Feb. 12, 2025). The District Court ordered that:

> [P]laintiff Hampton Dellinger shall continue to serve as the Special Counsel of the Office of Special Counsel, the position he occupied at 7:22 p.m. on Friday, February 7, 2025 when he received an email from the President, and the defendants may not deny him access to the resources or materials of that office or recognize the authority of any other person as Special Counsel.

Id.

[317] *See* Bessent v. Dellinger, 145 S. Ct. 515, 517 (2025) (Gorsuch, J. dissenting from order holding application for stay in abeyance). Justices Gorsuch and Alito, rightly concerned with the implications for the separation of powers raised by the relief granted by the District Court, noted that:

> [O]fficials have generally sought remedies like backpay, not injunctive relief like reinstatement. The closest the parties have come to identifying a precedent for the district court's remedial order in this case is "just a single, unpublished district-court decision purporting to enjoin the President from removing [two] government official[s] from office." And that case involved members of "a temporary, multi-member agency," not an official, like Mr. Dellinger, who wields significant prosecutorial and investigative power as the sole head of a 129-person office.

Id. (citations omitted).

[318] See id.

[319] Dellinger v. Bessent, No. 25-5052, 1:25-CV-00385-ABJ (D.C. Cir. Mar. 10, 2025).

[320] See Wilcox v. Trump, No. 25-334 (BAH), 2025 WL 720914 (D.D.C. Mar. 6, 2025).

[321] See, e.g., Who Are the Two Democratic Commissioners Fired by Trump?, REUTERS (Mar. 18, 2025, 9:08 PM), https://www.reuters.com/world/us/who-are-two-democratic-ftc-commissioners-fired-by-trump-2025-03-19/.

[322] See Letter from Sarah M. Harris, Acting Solic. Gen. of the U.S., to the Hon. Jamie Raskin, Ranking Member of the U.S. House of Reps. Comm. on the Judiciary (Feb. 12, 2025), https://democrats-judiciary.house.gov/uploadedfiles/20250212outraskin530d.pdf (last accessed Mar. 29, 2025); Letter from Sarah M. Harris, Acting Solic. Gen. of the U.S., to the Hon. Charles Grassley, President Pro Tempore of the U.S. Senate (Feb. 20, 2025),

Research may not have finally put the central issues underlying *Humphrey's* and its progeny back before the Supreme Court, the underlying tensions are far from moot. Simply put: the Supreme Court is almost certain to have to weigh in to resolve such issues soon.

CONCLUSION

> No one doubts Congress's power to create a vast and varied federal bureaucracy. But where, in all this, is the role for oversight by an elected President? The Constitution requires that a President chosen by the entire Nation oversee the execution of the laws.[323]

"Good cause" removal protection for those charged with the execution of the laws of the United States does the very thing that the Framers feared: deprive the public of "the opportunity of discovering with facility and clearness the misconduct of the persons they [en]trust, in order either to [effectuate] their removal from office or to their actual punishment in cases which admit . . . it."[324] Should the FTC, the SEC, or the other numerous independent agencies create a rule or commence an enforcement, that, while not constituting "inefficiency, neglect of duty, or malfeasance," nevertheless serves to aggravate and upend the public's "peace" (of which it is "the province and duty of the executive to preserve the blessings of"),[325] the President is powerless to act. The President cannot terminate such commissioners, despite the aggravation of the whole of the United States; the only immediate way to forcefully remove such commissioners prior to the end of their term is impeachment—and given that such is reserved for "Treason, Bribery, or other high Crimes and Misdemeanors,"[326] it is dubious whether impeachment, too, could rectify this standard. In effect, such independent-agency commissioners are entrenched in office. The public cannot elect a different president upon disturbance of independent-agency and demand that the new president take action—for the new president is just as powerless as his predecessor to hold the independent-agency commissioners accountable for "unwise" decisions,[327] under the holding in *Humphrey's Executor*. So, it seems that "the constitutional chain of command turns out to be inaccurate with respect to independent agencies."[328]

To whom are independent agencies accountable for "unwise" (but not inefficient, neglectful, or malfeasant) execution of the laws of the United States?

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https://static01.nyt.com/newsgraphics/documenttools/dffde13e0617be58/18df4de7-full.pdf.

[323] In re Aiken Cnty., 645 F.3d 428, 438 (D.C. Cir. 2011) (Kavanaugh, J., concurring) (quoting Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 499 (2010)).

[324] HAMILTON, *Camillus No. XXXII*, *in* WORKS OF ALEXANDER HAMILTON, *supra* note 46, at 476.

[325] *See* HAMILTON, *supra* note 46, at 84.

[326] U.S. CONST. art. II, § 4.

[327] *See* Myers v. United States, 272 U.S. 52, 67 (1926).

[328] *In re Aiken Cnty.*, 645 F.3d at 440 (Kavanaugh, J., concurring).

Clearly not to the President: "good cause" plainly does not exist for "unwise"—but not inefficient, neglectful, or malfeasant—decisions. Nor are the independent-agency commissioners accountable to the Congress.[329] Nor could they be accountable to Congress if the commissioners are entrusted with the executive powers.[330] Where has the remainder of the accountability, permissibly removed of the President under *Humphrey's Executor*, fallen? Has it somehow been transferred to the Courts of Law? And if such plenary removal powers have not been vested in the Courts, then the only remaining option is that it has been transferred, ostensibly, to the people? For, the only way independent agencies could be accountable, if not in the President, nor in the Congress, nor in the Courts, is if we are to buy my (superfluous) argument above that in removing powers from the President, unable to place them anywhere else in our federal structure, such removal powers surrendered of the three federal branches—being lost of the federal government—"are reserved to the States respectively, or to the people" under the Tenth Amendment. Are we, then, to believe that the States or the people are to enjoy a plenary removal power over the commissioners of the independent agencies, when the President himself cannot under *Humphrey's*? The precedent surrounding and stemming from *Humphrey's* being so devoid of any logic, the Fifth Circuit now refuses to even apply precedent and weigh distinguishing facts to resolve cases and controversies (*see Consumers' Research*).

Where has the accountability gone? To be sure, the *independence* of the independent agencies is nothing more than a lexiconic distraction from the fact that this independence is "independen[ce], . . . from democratic accountability."[331] Or, as Stephen Calabresi and Christopher Yoo frame it, "a congressional power to create independent entities or a headless fourth branch of government."[332] Where does the Constitution permit for such? Indeed, the ill-begotten quest for a constitutional exception that does not exist has spawned logical inconsistencies—beginning with the holding in *Humphrey's*—that have frayed the constitutional fabric to such an extent that, as it stands today, the permissibility of subjecting the President to his "counsellors" turns not on any constitutional basis nor (any longer) on the notions of separation of powers and accountability to the public, but rather on the skills learned of a five-year-old: to count. It seems that somehow counting past one (i.e., the number of commissioners)

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[329] Again, this is rooted in my contention that if independent-agency commissioners are to act in a way which does not constitute "inefficiency, neglect of duty, or malfeasance," it is highly unlikely that the far higher standard of impeachment imposed under Article II could be reached (for "Treason, Bribery, or other high Crimes and Misdemeanors"). *See* Bowsher v. Synar, 478 U.S. 714, 723, 725 (1986).

[330] *See id.* at 732.

[331] *See* In re Aiken Cnty., 645 F.3d 428, 441 (D.C. Cir. 2011) (Kavanaugh, J., concurring) ("*Humphrey's Executor* thus approved the creation of 'independent' agencies—independent, that is, from presidential control and thus from democratic accountability.").

[332] STEPHEN CALABRESI & CHRISTOPHER YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 15 (2008).

makes tenure protections constitutionally permissible when counting *to* one does not. This utter and absolute absurdity is a direct consequence of the error in *Humphrey's Executor*. As long as this counting expedition can find more than one individual to which the President is beholden in helping him "take Care that the Laws be faithfully executed," Congress is apparently free to bind the President from removing that plurality but for "good cause." And so long as *Humphrey's* stands, the entirety of the judicial power remains engage in a mode of constitutional analysis not rooted in history nor tradition, nor textual analysis, but in rudimentary mathematics. Perhaps it is time we abandoned counting and started practicing constitutional law again.