ADMINISTRATIVE LAW

WEEK TEN
Professor Julia M. Glencer
Tuesday, October 26, 2021

Chapter VII, Section 3
The President, Administrative Agencies, and the Executive Branch

a. Introduction [*Youngstown* which we read in August]
b. Appointment and Removal [Heart of this slideshow & *Seila Law*]
c. Presidential Direction of Regulatory Outcomes [Select items covered in this slideshow]
d. The Internal Separation of Powers [asynchronous video along with PowerPoint assigned for Thursday of Week Ten]

AGENDA

6:00 to 7:25	Lecture on Appointment & Removal plus Presidential Direction of Regulatory Outcomes
---------- Break ----------	
7:35 to 7:50	Random Assignment of *Seila* Law Discussion Topics & 15 min. to draft & e-mail your response
7:50 to 8:30	*Seila* Law Discussion (as many questions as we get thru . . .)
8:30 to 9:00	Series of Videos (Food for Thought . . .)

KEY CONSTITUTIONAL PROVISIONS

"The executive Power shall be vested in a President of the United States of America."
- U.S. Const., Art. II, § 1.

"[H]e [the President] shall take Care that the Laws be faithfully executed."
- U.S. CONST., Art. II, § 3.

YOUNGSTOWN SHEET & TUBE

- President has explicit powers established in the Constitution; central dispute in *Youngstown* over whether the President also has *implicit or inherent* powers.
- Justice Black –explicit power only
- Justice Vinson – explicit & inherent power
- Justice Jackson – tripartite approach depending on what President is doing (and how it relates to Congress)*
- Justice Frankfurter – historical practice over time may impact the powers held.*

"The scope of presidential power to make law is not the focus of presidential authority disputes in administrative law. Instead, questions here turn on the scope of presidential power to exercise control over the executive branch. In terms of [Justice] Jackson's tripartite framework, administrative law cases generally concern [(1)] whether Congress has authorized the president to exercise such control, [(2)] whether the president has such control even though Congress has been silent, or [(3)] whether the president may exercise such control even though Congress has tried to bar the president's from doing so."
- ADMIN. LAW at 881-882.

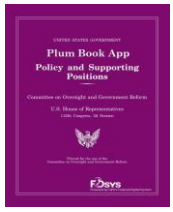
APPOINTMENT

APPOINTMENT

[The President] shall . . . nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments. U.S. Const. Art. II, Sec. 2, cl. 3.

APPOINTMENT vis-à-vis the Admin. Agencies

- "Officers of the United States" = "principal officers" who are to be appointed by the President with the advice and content of the Senate.
- "[I]nferior Officers" = Congress, by ordinary legislation, determines whether such appointments will be made:
  - By the President without Senate involvement
  - By Courts of Law
  - By Heads of Departments
- Employees (lesser subordinate functionaries)



- Presidential nomination with Senate confirmation is the **default method**.
- Congress must affirmatively exercise, "by law," its Appointment Clause power *to exempt inferior officers* from Senate confirmation by assigning their appointment to one of the other Constitutionally-authorized methods.
- Congress has opted NOT to do that for MANY executive officers and thus they are being appointed by Presidential nomination with Senate confirmation.

APPOINTMENT – Key Terms & Open Issues

- "Officers of the United States" = "principal officers" who are to be appointed by the President with the advice and content of the Senate.
- "[I]nferior Officers" = Congress can, by ordinary legislation, determine whether such appointments will be made:
  - By the President without Senate involvement
  - By Courts of Law
  - By Heads of Departments
- Employees
  - Recent phenomena: Government employees v. government contractors

APPOINTMENT – Problems

- Problems with Appointment and that can lead to . . . creative(?) novel (?) uses or evasion efforts. Is this Senate misbehavior?
- Scholars identify contributing factors:
  - Sheer number of positions to fill (over 1200)
  - Vetting process
  - Unwillingness of potential/actual nominees to run this political/media gauntlet; dissuade good candidates
  - Nomination lag by the President
  - More recent effort to "deconstruct" admin state (purposeful lag?)

APPOINTMENT – Problems

- Vacancies in admin. agency leadership
  - Exist due to problems in appointment process compounded by phenomenon of short stints in office
  - Generally thought to harm admin agency activity
    - By fostering inaction & unwillingness to make policy
    - Fewer rule-making proceedings and fewer controversial enforcements
    - Can create confusion and aimlessness as to mission/goals of the admin agency
    - Can prompt lower officials and employees to flee
    - Can undermine public trust, undermine accountability that stems from appointment
  - Perhaps a few upsides . . .
    - Can creates time to get better appointee
    - Slows down admin agency's activity (which the admiration may desire)
    - Might end up prompting more major reform(s) to admin state

APPOINTMENT – Acting Heads

In times of vacancy, there are often "acting heads" of admin. agencies

- Long-standing congressional authority for allowing Presidents to appoint "acting" officers on a temporary basis.
- Presidents often forced to use "acting heads" at start of new administration while confirmation process runs its course.
- Pros and cons to use of "acting heads" –
  - Pros: stability, knowledge, and management specific to that admin agency.
  - Cons: generally disfavored, diminished buy-in & feared susceptibility to Presidential influence.

APPOINTMENT – Acting Heads

President	Confirmed	Recess	Acting (at least 10 days)
Reagan	33	1	25 (11)
Bush	20	1	20 (16)
Clinton	28	1	27 (11)
Bush, W.	34	0	22 (13)
Obama	32	0	23 (14)
Trump (2.5 years)	21	0	28 (25)

From 2019 Supplement to Admin Law, 56 (citing Anne Joseph O'Connell, Brookings Report: Acting Leaders (July 22, 2019)).

Matthew Whitaker
Acting U.S. Attorney General
(February 15, 2019 – March 2, 2019)

APPOINTMENT – Recess Appointments

"The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."

- U.S. CON., Art. II, Sec. 2, cl. 3.

APPOINTMENT – Recess Appointments

- ***NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014).**
  - Three NLRB members appointed by President Obama on January 4, 2012, during recess of Senate.
  - Recess was Dec. 18, 2011 to Jan. 23, 2012.
  - The Senate held *pro forma* sessions every Tuesday & Friday.

- Employer Noel Canning (which didn't like NLRB order) challenged the legality of the appointment of three NLRB members.
- Unanimous judgment (illegal recess appointment), but reached by different paths

Issue 1 Does "the recess of the Senate" include inter and intra-session recesses?	**Issue 2** Does "vacancies that may happen" include vacancies that pre-date and continue to exist during the recess?	**Issue 3** In calculating the length of the recess, do pro forma sessions count (i.e., reset the clock)?
Majority: Yes. Constitutional text ambiguous and "recess" must be read broadly to cover whenever Senate is "away."	Yes. And historical practice supports that.	Yes, they do count and thus reset the clock. "Three days is too short a time" to bring a recess within the scope of recess appointment clause.
Scalia (+3): No. Recess means only *the* gap between sessions, not little breaks in a on-going session.	No. Recess appointment power limited to vacancies that arise during the recess in which they are filled.	[*Obviates this question but labels majority's use of "3 days" absurd and without textual support.*]

APPOINTMENT AND REMOVAL

Appointment . . .

- *is* covered by Constitutional text (but, as we know, disputes over the meaning of that text exist . . .)
- U.S. CONST., Art. II, § 2, cl. 2 (Nomination & Categories of Officers)
- U.S. CONST., Art. II, § 2, cl. 3 (Recess Appointments)
- U.S. CONST., Art. II, § 3 (Take Care)

Removal . . .

- is NOT covered by *explicit* Constitutional text (except impeachment)
  - Presidential removal power governed
    - by history
    - by line of evolving (complex) cases
      - *Myers* (1926) (Postmaster of Portland)
      - *Humphrey's Exec.* (1935) (FTC Com'nr)
      - *Morrison* (1988) (Independent Counsel)
      - *Free Enterprise Fund* (2010) (double-protected Board)
  - Scope/extent of Presidential removal power is *still* an unresolved issue!

APPOINTMENT

"[The President] shall . . . nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. Art. II, Sec. 2, cl. 3.

"[H]e [the President] shall take Care that the Laws be faithfully executed."

U.S. CONST., Art. II, § 3.

REMOVAL

REMOVAL: History & Patterns

- Creation of first admin. agencies gave us two patterns:

President has Removal Power	Statutory Protections Limit President Removal Power

• Foreign Affairs & War Dept.
• Closely allied to President
• But built on lack of consensus as to reason:
  • Constitutional right?
  • Just the best policy
	• Treasury Dept. (Comptroller) & Post Office
	• More independence and closer alliance with Congress
	• Not called an "Executive Dept." and shielded by statutes from Presidential direction & removal

REMOVAL: History & Patterns

Series of legislative acts offering protections against removal:

- Tenure in Office Act of 1867
  - Battle over Pres. Jackson's removal of Sec. of War Stanton
  - Ground for impeachment (one of many)
  - Pres. Jackson argued Tenure in Office Act unconstitutional
- Pendleton Act of 1883 (federal civil service protections)

REMOVAL: Major Case

***Myers v. United States*, 272 U.S. 52 (1926)**

- Postmaster General fired Portland, Oregon Postmaster (Fraud? Or vendetta by Postmaster G?)
- *Statutory Protection Limited President's Removal Power*: "Postmasters . . . shall be appointed and may be removed by the President with the advice and consent of the Senate" for 4 year term unless otherwise removed/suspended by law.
- President refused to seek Senate consent; Portland Postmaster sued.
- **Former President**/now Supreme Court Chief Justice Taft wrote **VERY Executive power -friendly opinion** (often cited as source of "unitary" executive theory/concept).

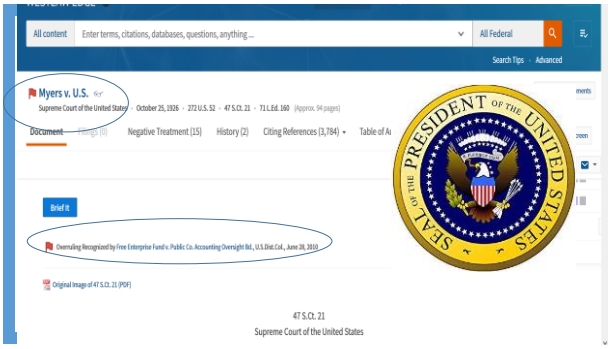
- Constitution make President responsible for "effective enforcement of the law" and President needs officials to help enforcement the law.
- President needs "as an indispensable aid" a "disciplinary influence" on those who act for him – a "reserve power of removal."
- "The degree of guidance in the discharge of their duties that the President may exercise over executive officers varies with the character of their service as prescribed in the law under which they act. The highest and most important duties which his subordinates perform are those in which they act for him. In such cases they are exercising not their own but his discretion. This field is a very large one. It is sometimes described as political. *Each head of a department is* and must be the **President's alter ego** in the matters of that department where the President is required by law to exercise authority."

"[T]he 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. In this field **his cabinet officers must do his will . . . The moment that he loses confidence in the intelligence, ability, judgment, or loyalty of any one of them, he must have the power to remove him without delay.** To require him to file charges and submit them to the consideration of the Senate might make impossible that unity and co-ordination in executive administration essential to effective action."

"The ordinary duties of officers prescribed by statute **come under the general administrative control of the President by virtue of the general grant to him of the executive power, and he may properly supervise and guide their construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which article 2 of the Constitution evidently contemplated in vesting general executive power in the President alone.** Laws are often passed with specific provision for adoption of regulations by a department or bureau head to make the law workable and effective. The ability and judgment manifested by the official thus empowered, as well as his energy and stimulation of his subordinates, are subjects which the President must consider and supervise in his administrative control. Finding such officers to be negligent and inefficient, the President *should* have the power to remove them."

"[T]here may be duties so peculiarly and specifically committed to the discretion of a particular officer as to raise a question whether the President may overrule or revise the officer's interpretation of his statutory duty in a particular instance. Then there may be duties of a quasi judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President *cannot in a particular case* properly influence or control. But even in such a case he may 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. **Otherwise he does not discharge his own constitutional duty of seeing that the laws be faithfully executed."**

- What about *inferior* officers?
  - The suggestion in *Myers* was that the power to remove *inferior* officers is an incident of the power to appoint them and thus also part of the Executive power.
  - Congress (because it can give the appointment power to heads) can place restrictions of the power of those heads to remove, but cannot draw to *itself* the power to remove inferior officers.
  - THAT would be an infringement of the Separation of Powers.



REMOVAL: Major Case

***Humphrey's Executor v. United States*, 295 U.S. 602 (1935).**

- Unanimous upholding of statutory removal protection for FTC Commissioner against President's power of removal.
- Humphrey was holdover from Hoover admin; new President Roosevelt fired him and his estate sued for back pay.
- *Statutory Protection Limited President's Removal Power*: FTC Commissioners served 7 year terms; removable by President ONLY for "inefficiency, neglect of duty or malfeasance in office."
- Court found Congressional intent was to make FTC independent body of experts *independent of executive authority* (except in selection – still needed President nomination), free to exercise its judgment without threat of President's unlimited removal.
- Court distinguished *Myers* using a (confusing) distinction between executive power & executive function . . .

***Humphrey's Executor* distinguishing *Myers* . . .**

"The narrow point actually decided [in *Myers*] was only that the **President** had power to remove a postmaster of the first class, without the advice and consent of the Senate as required by act of Congress . . . A postmaster is an **executive** officer restricted to the performance of **executive** functions. He is charged with no duty at all related to either the legislative or judicial power. . . . [S]uch an officer is merely one of the units in the **executive** department and, hence, inherently subject to the exclusive and illimitable power of removal by the **Chief Executive**, whose subordinate and aid he is. . . . [T]he necessary reach of [*Myers*] goes far enough to include all purely **executive** officers. It goes no farther; much less does it include an officer who occupies no place in the executive department and who exercises no part of the executive power vested by the Constitution in the President."

- Hmmmm.
- I thought we weren't supposed to be admitting that admin agencies have legislative power? (SHH!!!)
- Well, whatever this empowered being called the FTC is,
- it is surely NOT EXECUTIVE!
- *Or is it?*
- Aren't all "administrative agencies" overseen by the Executive?
- So . . . ARE there really FOUR Branches of Government?

REALITY CHECK . . .

- We *know* admin agencies are armed with and exercise legislative (*quasi*-legislative) and judicial (*quasi*-judicial) power . . .
- We *know* that delegation of quasi-legislative power is tested using the "intelligible principle" standard . . .
- We *know* there are a host of adjudicatory bodies in the admin state . . .
- We *do* consider the admin agencies to be part of the Executive Branch . . .
- But you can surely see how some can question – *right now, right at this very moment* – all of this . . .

MYERS/HUMPHREY'S LINE

Myers

- President must faithfully execute the law.
- Broad view of Presidential power (often called "unitary executive theory")
- Believes conventionally accepted limitations on Presidential power (especially on removal) are unconstitutional.
- President Reagan, President W. Bush (VP Cheney), now President Trump
- (*But don't forget, Presidents Clinton & Obama also exercised far-reaching Presidential powers . . .*)

Humphrey's

- Congress became (and still is) more venturesome in designing agency structures that don't fit the pattern and seek to limit Presidential power (especially removal).
- Concern now is with passive, weakened Congress too tied up to be finding effective ways to counteract the growing power of the Executive.

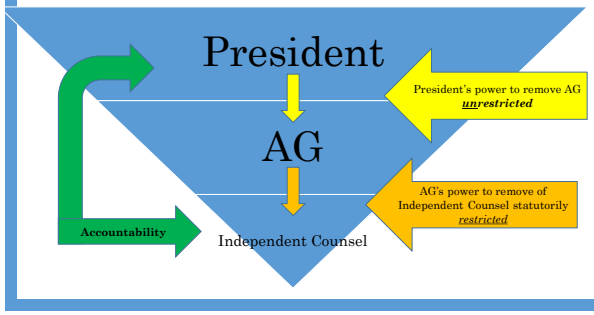
REMOVAL: Major Case

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

- Assistant AG Ted Olson, being investigated for suspecting lying under oath before Congressional Committee in dispute between Congress & EPA, challenged constitutionality of appointment & removability of Independent Counsel under Ethics in Government Act (Act).
- Under the Act, AG conducted prelim. investigation of suspected crime; if further investigation req'd told *Special Division of three D.C. Cir. judges* who could appoint an Independent Counsel.
- Under the Act, Independent Counsel's power could be ended (1) if Special Division determined investigation had run its course; or (2) if, by personal action of AG, AG found (a) good cause, (b) physical disability; (c) mental incompetence, or (d)"any other condition" substantially impairing performance of duty. President had NO DIRECT ROLE.

Rehnquist J. for Majority – CONSTITUTIONAL

- Re-invigorated *Myers* over *Humphrey's* yet accepted that Executive's power over removal can be limited by Congress. (Rejected *Humphry's* categories)
- Appointment: Independent counsel was "inferior officer" so OK to be appointed by "Special Division."
- Removal:
  - Not a situation where Congress gave itself role in removal – that WOULD be Separation of Powers problem.
  - Here, Executive HAS control of removal of **Independent Counsel** thru AG.
  - Analysis focuses on whether Congress' statutory protections guiding removal interfere with exercise of Executive Power.
  - Under *Myers*, some officials must always be under FULL CONTROL of Executive – no interference permitted.
  - Imposition of good cause protection against removal of this officer – which *is* a reduction of power – does not categorically interfere, nor does it interfere *enough* to impede Executive.



Scalia, J. (lone dissent) – UNCON.

- Accused majority of sweeping *Humphrey's* into the constitutional dustbin
- *Categorically opposed to allowing Congress to limit Executive power* over removal of officer exercising **Executive power** through statutory protections.
- Article II does not give the President control of only *some* of the Executive power; it gives the President control over ALL of it.
- Congress cannot be permitted to incrementally siphon off some of that power through protections against removal of an officer exercising **Executive power**.
- The line of permissible restriction on removal was visible between *Myers* & *Humphrey's* – it lay at the point where powers exercised by officials was no longer purely executive.
  - Independent Counsel, as a prosecutor, exercises purely **Executive power**.
  - Check against prosecutorial abuse of discretion is political; need direct accountability through President.

AFTER *MORRISON* . . .

- Justice Rehnquist in *Morrison* tried to reformulated the inquiry away from classifications of *type of power* (purely executive v. quasi-legislative or quasi-judicial):
  - "The analysis contained in our removal cases is designed not to define rigid categories of those officials who may or may not be removed at will by the President, but to ensure that Congress does not interfere with the President's exercise of the 'executive power' and his constitutionally appointed duty to 'take care that the laws be faithfully executed' under Article II."
- Justice Scalia in *Morrison* argued that the "vesting clause" in Article II vests "*all* of the executive power" in the President. END OF STORY!

AFTER *MORRISON* . . .

- Almost seems like a showdown coming over the meaning of two Constitutional provisions in Article II – the "take care" clause and the "vesting" clause – neither of which say anything *explicit* about removal.
- Your textbook asks:
  - "Should the absence of an expressly conferred presidential removal power matter?"
  - "Is unlimited removal power a necessary prerequisite for "tak[ing] care that the laws be faithfully executed"?"
  - We must also ask about reading them consistently to give the President even MORE Executive Power

REMOVAL: Major Case

Free Enterprise Fund v. Public Co. Acct'ing Oversight Bd., 561 U.S. 477 (2010).

Let's call this the "double layer protection" case.

(Remember Justice Scalia's prediction in *Morrison*? That Justice Rehnquist's approach was an "open invitation for Congress to experiment"?)

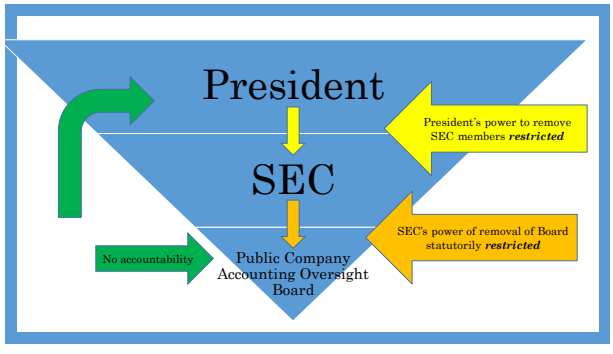
Right at the start of *Free Enterprise* (a.k.a. the double protection case), Chief Justice Roberts recognizes both the vesting clause and the Take Care clause.

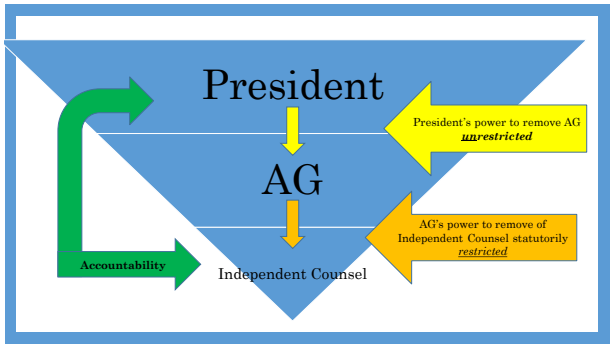
He also tries to keep the existing case law (*Myers*, *Humphreys* & *Morrison*) intact.

Is it possible to walk this tightrope?

"Article II vests "[t]he executive Power . . . in a President . . . who must "take Care that the Laws be faithfully executed." . . . In light of "[t]he impossibility that one man should be able to perform all the great business of the State," the Constitution provides for executive officers to "assist" . . . Since 1789, the Constitution has been understood to empower the President *to keep these officers accountable*—by removing them from office, if necessary. See generally *Myers* . . . This Court has determined, however, that this [removal] authority is not without limit. In ***Humphrey's Executor*** . . . we held that Congress can, under certain circumstances, create independent agencies run by principal officers appointed by the President, whom the President may not remove at will but only for good cause. Likewise, in . . . ***Morrison*** . . . the Court sustained similar restrictions on the power of principal executive officers—themselves responsible to the President—to remove their own inferiors. The parties do not ask us to reexamine any of these precedents, and we do not do so.

- Sarbanes-Oxley Act of 2002 in wake of accounting debacles
- Created Public Company Accounting Oversight Board (modeled on private self-regulating entities such as NYSE).
  - Act placed this new Board under *oversight* of the Security & Exchange Commission (SEC).
  - SEC *appointed* this Board's members
    - *Oversight* of procedures & sanctions but SEC could not remove Board member except for "good cause"
      - And this "good cause" provision was "unusually high" because it was tied to WILFUL conduct. [In other words, simple disagreement with the policies it was following would NOT be good cause. (Truly the key here)]
    - SEC members cannot be removed by the President except for the *Humphrey's* approved standard of inefficiency, neglect of duty or malfeasance in office (which Congress borrowed from the FTC Act (upheld in *Humphrey's*) & fed into other statutory schemes). [*But the dissent questions where this comes from; not in SEC Act.*]





- District Court & Court of Appeals said CONSTITITIONAL
- Supreme Court (5:4) held removal restriction (not Board itself) UNCONSTITUTIONAL because it violated Separation of Powers
- Majority articulated strong vision of executive power, built on ***accountability*** and **real bite in the "Take Care" clause**.
  - Prior cases (including those that authorized Congressional restrictions limiting President's removal power) involved only one layer of protection.
  - This Act protects Board members from removal except for good cause and then "withdraws from the President" any decision on whether "good cause" exists because he cannot (in turn) control or easily remove the SEC members.
  - "The result is a Board [***exercising executive power***] that is not accountable to the President, and a President who is not responsible to the Board."

"**Th[is] arrangement is contrary to Article II's vesting of the executive power in the President.** Without the ability to oversee the Board, or to attribute the Board's failings to those whom he *can* oversee, the President is no longer the judge of the Board's conduct. . . . He can neither ensure that the laws are faithfully executed, nor be held responsible for a Board member's breach of faith. This violates the basic principle that the President "cannot delegate ultimate responsibility or the active obligation to supervise that goes with it," **because Article II "makes a single President responsible for the actions of the Executive Branch."** . . . By granting the Board *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. **The Act's restrictions are incompatible with the Constitution's separation of powers."**

"Our Constitution was adopted to enable the people to govern themselves, through their elected leaders. The growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life, heightens the concern that it may slip from the Executive's control, and thus from that of the people."

"In its pursuit of a 'workable government,' Congress cannot reduce the Chief Magistrate to a cajoler-in-chief."

"**The Constitution** that makes the President accountable to the people for executing the laws **also gives him the power to do so.** That **power** includes, as a general matter, the authority to remove those who assist him in carrying out his duties. Without such **power**, the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else. . . . While we have sustained in certain cases limits on the President's removal power, the Act before us imposes a new type of restriction—two levels of protection from removal for those who nonetheless exercise significant executive power. Congress cannot limit the President's authority in this way."

- Majority tried hard to contain its decision to the unique structure of this Board.
  - Stressed the lack of any decision as to the status of other employees, and how other subordinates are controlled
  - Stressed not meant to cast doubt on the civil service system of staffing admin agencies.
  - Stressed no impact on ALJ's.
- The Board was <u>not</u> found to be unconstitutional; the removal restriction was deemed UNCONSTITUTIONAL.
- Remedy? *Sever* the removal restriction!
  - "Concluding that the removal restrictions are invalid leaves the Board removable by the Commission at will, and leaves the President separated from Board members by only a single level of good cause tenure."

Dissent (written by Breyer, J.)

- Starts out by referencing strong power of Congress: the "Necessary & Proper clause" affording Congress authority to create and structure governmental offices.
- Observes that neither legislative nor executive powers are absolute.
  - "The Necessary and Proper Clause **does not grant** Congress power to free all Executive Branch officials from dismissal at the will of the President. **Nor does the separation-of-powers principle grant** the President an absolute authority to remove any and all Executive Branch officials at will. Rather, depending on, say, the nature of the office, its function, or its subject matter, Congress sometimes may, consistent with the Constitution, limit the President's authority to remove an officer from his post."

No explicit Constitutional provisions to govern here.
This is a NON-TEXTUAL QUESTION.
Thus, the ***required*** method of analysis focuses on "how a particular provision, taken in context, is likely to function."
Required by?
Justice Jackson's *Youngstown* exhortation to foster a "workable government."

- Dissent articulates some familiar points: Need for the Court to respect the other two branches and their "political reality"
  - Need for the Court to hesitate to undo a political understanding
  - Need for the Court to foster *flexibility* that accounts for modern reality of the vastly complex & vastly diverse administrative state.
  - Need for the Court to use the proper analysis – which is to *prevent encroachment* on the Executive Power by another branch seeking to aggrandize its own power.
    - Here, very little actual encroachment:
      - Removal power not all that influential really; these restrictions are not likely to diminish it much.
      - SEC has strong control of Board (controls its budget; can assign it duties) and President's control over the SEC has been deemed Constitutionally sufficient. [*Humphrey's*?]
      - Dissent sees as less of an encroachment than that permitted in *Morrison*.

Harder Question: Come on . . . Isn't this *really* Congress seeking to aggrandize itself?

- Dissent says no – seems to be giving its power to SEC
- But *could* these unique structures eat away at the Executive Branch power?
  - Should the President have some way to remove officials who are NOT fostering his policy desires?
  - Majority (after giving Art. II real "bite") tries to set a *brighter-line* rule to address that possibility; dissent doesn't think this case raises the problem (and fears a bright-line rule undermines the need for flexibility to assess the "case-by-case hydraulic pressure problem" that characterizes the Separation of Power analysis.)
  - Dissent tees up "Parade of Horribles" in terms of impact

REALLY *is* ODD . . .

"One last question: How can the Court simply assume without deciding that the SEC Commissioners themselves are removable only "for cause"? . . . Unless the Commissioners themselves are in fact protected by a "for cause" requirement, the Accounting Board statute, on the Court's own reasoning, is not constitutionally defective. [*Justice Breyer gave this question extended analysis . . . but then said:*] I do not need to decide whether the Commissioners are in fact removable only "for cause" because I would uphold the . . . Board's removal provision as constitutional regardless. But were that not so, a determination that the silent SEC statute means no more than it says would properly avoid the determination of unconstitutionality that the Court now makes."

PRESIDENTAL DIRECTION OF REGULATORY OUTCOMES

MECHANISMS OF DIRECT CONTROL

- Executive Orders & Presidential Memoranda (to direct or request specific admin agency action)
- Signing Statements
- Politicizing agencies (largely by appointing politically responsive officials)
- Executive-overseen centralized review of admin agency activity
- Purporting to act when Congress won't or can't (Pres. Obama's "We Can't Wait" theme extolled to the public as mechanisms used aggressively)
- Positive Command Memos (turning admin state into extension of White House)
- Policy Czars (not terribly useful but increased ability to jawbone)
- Delayed applications of laws and grant of executive waivers from laws
- Embracing new interpretations of unchanged, older laws

"Self-help" by the Executive Branch as it tries to fulfill its Constitutional duties in the midst of Congressional dysfunction?

Or possible "lawlessness" and seizure of "unparalleled Executive Power" by a runaway, power-grabbing Executive Branch?

Alarm raised by *both* Democrats and Republicans.

Is this the rise of the all-powerful Unitary Executive with seeds plotted and watered thru many different Administrations?

Is a Unitary Executive a good thing or a bad thing?

Does it have a Constitutional basis or not?

- "The President's directory authority has so far provided *little occasion for judicial review*." ADMIN. LAW at 971 (emphasis added).
- Courts would likely invoke Justice Jackson's tripartite framework from *Youngstown*.
  - Central question would be whether Congress has authorized or prohibited the presidential action in question.
  - Congress most often delegates authority to a Secretary of a Department or an admin agency head without mention of a role for the President.
  - The question then is whether the President has *independent constitutional authority* under Article II to direct and control the policymaking at issue and/or (if we wish to avoid a constitutional issue) whether the Congressional act can somehow be read to allow for such a role.

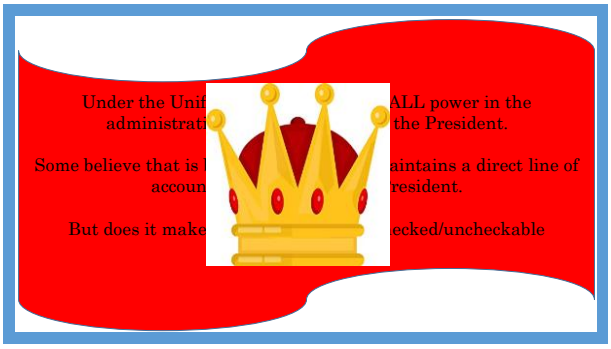
WHAT *IS* THE UNITARY EXECUTIVE THEORY?

- Useful definition: "[I]t is the President, under our Constitution, who must always be the ultimate empowered and responsible actor. This is because the Constitution establishes that the President *exclusively* controls the power to execute all federal laws, and therefore it must be the case that all inferior executive officers act in his stead."

  ADMIN. LAW at 973 (internal quotation omitted, emphasis original).

WHAT *IS* THE UNITARY EXECUTIVE THEORY?

- Useful example: "Suppose the Secretary of the Treasury, in the exercise of her purportedly exclusive statutory discretion, decided to fine a bank for violation of certain banking laws. Because [she] would be ultimately exercising the President's executive power, the President must be able, in effect, to reverse or nullify the Secretary's decision by withdrawing his delegation of the executive power, which the Constitution gives to him alone." *Id.*



THINGS TO PONDER . . .

- Even if the Founding Fathers didn't originally build a unitary executive, given the size and complexity of the modern administrative state, is a strong unitary executive *the best way of keeping faith* with the fundamental goals of the Constitution?
- If the Constitution refers to other "officers" to aid the President, is that only a grant of *supervisory (influence-style) authority?*
- Might the whole conception of a *unitary* executive, especially if built on accountability, be a *chimera* when the Executive Branch is full of individuals with a variety of motives, all of whom are overwhelmed by rivers of information?