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ARTICLE

Separation of Powers: Presidential Appointment Power over Independent Agencies

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Abstract. Insulating independent agency officials from presidential removal raises separation of powers concerns. Two dominant jurisprudential schools address this topic: the functionalist and the formalist. Under both approaches, the functions of an independent agency can be divided into judicial, legislative, and executive. The U.S. Supreme Court recently held that certain protections against presidential removal are unconstitutional. In these instances, the Court merely severed the removal provisions from the statute, preserving the agency's executive powers. Instead, Congress should carve out the executive functions of such agencies and create a separate agency with only those executive powers, for which there should be presidential removal power. The legislative and judicial functions of each agency, however, should continue, with insulation from presidential removal preserved. This Comment applies that proposed framework to the agencies currently pending review before the Supreme Court—with particular attention to the Board of Governors of the Federal Reserve—to illustrate how such restructuring would operate in practice.

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Table of Contents

Introduction.....54

I. The Functionalist Approach.....55

II. The Formalist Approach.....60

III. Application of the Two Approaches to Current Cases.....65
- A. The Federal Reserve Board.....65
- B. Pending Cases Involving Other Independent Agencies.....69

Conclusion.....75

Introduction

Two competing schools have characterized separation of powers analysis in American constitutional law: the functionalist and the formalist.[1] In 2000, Professor M. Elizabeth Magill observed that "[T]he Supreme Court vacillates between what are described as formalist and functionalist approaches, fully embracing neither, and sometimes borrowing from both."[2] The subsequent years have not altered the accuracy of that description,[3] although the Supreme Court has recently shifted more toward the formalist approach.[4] Under either approach, the doctrine of separation of powers means that one branch cannot interfere with the exercise of authority given to another branch.

Recent controversy over the President's authority to remove members of independent agencies, despite Congress's imposition of for-cause removal protections, squarely implicates the separation of powers. This conflict can be resolved under either functionalist or formalist approaches; indeed, the formalist approach helps inform how functionalist objectives can be achieved. However, this resolution will require Congress to act. The Court has mused that it could "blue-pencil" various provisions of law so as to solve separation of powers problems of this kind. The product that would emerge from such a severability process, however, would not be the law that passed Congress. It would be a legislative product created by the Court. It is more respectful of separation of powers to leave the job of re-crafting a law to Congress, once the Court has ruled part of a law unconstitutional.[5] Congress reasserting its role in this context would restore its ability to create structures "necessary and proper for carrying into Execution" the Constitutional authorities of Congress.[6]

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[1] John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1949 (2011) ("[F]unctionalism and formalism describe the approaches of many judges and scholars."); M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1129 (2000) (arguing that the two have much in common, criticizing the dichotomous approach). *See generally* Shalev Gad Roisman, *Balancing Interests in the Separation of Powers*, 91 U. CHI. L. REV. 1331 (2024) (proposing interest balancing as a third alternative to resolve interbranch clashes, analogous to individual rights infringement analysis).

[2] Magill, *supra* note 1, at 1138 & n.37 (collecting cases).

[3] *See* Aziz Z. Huq & Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 YALE L.J. 346, 435 (2016) ("Across a wide variety of doctrinal contexts, the Court cycles between rules and standards, and back again. This cycling cuts across and blends the categories of formalism and functionalism.").

[4] *See generally, e.g.*, Seila Law LLC v. CFPB, 140 S. Ct. 2183 (2020) (utilizing a formalist approach for interpreting the removal power).

[5] *See* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 509–10 (2010). For a more in-depth discussion of this point, *see* Campbell, *infra* note 47.

[6] U.S. CONST. art. I, § 8, cl. 18.

In recent years, the Supreme Court struck down statutory provisions guaranteeing the insulation of independent federal agency officials from dismissal except for cause.[7] But this leaves a statute that Congress never intended: creating an agency with delegated powers but without the check on those powers designed by Congress. A more constitutionally appropriate approach—and one available in the cases currently pending—would be for the Court to invalidate the statute establishing the independent agency, leaving Congress to reconsider the allocation of executive, legislative, and adjudicative authority. Congress could then separate the agency's executive functions and reconstitute them under executive authority, while allowing the agency's legislative and adjudicative functions to continue, insulated from presidential removal.[8]

I. The Functionalist Approach

The functionalist approach rests on the premise that efficient governance may necessitate reallocating authority between the branches of government. In practice, this concern often manifests as an effort to insulate certain administrative actors from presidential control when such insulation is necessary to preserve their institutional function. For example, an independent counsel charged with investigating senior executive officials could not perform that role if subject to executive supervision. Similarly, the Federal Reserve Board—designed to remove monetary policy from political influence—could not fulfill its mandate if the President were free to replace its members for their policy decisions.

So, a structural reason for relocating a governmental power outside of the President's control is an obvious first requirement. Cass Sunstein and Adrian Vermeule describe this as part of a "weak" unitary executive approach: "Congress has considerable room to structure the administrative state as it sees fit, especially where tradition suggests that agency independence is essential, as with respect to agencies that engage in financial regulation. Justice Kagan's dissenting opinion in *Seila Law* embraces this position."[9]

A second requirement is that the structure must not take power away from one branch and give it to another.[10] This is different from working

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7 *See* Collins v. Yellen, 141 S. Ct. 1761, 1783–87 (2021); *Seila Law*, 140 S. Ct. at 2203–04; *Free Enter. Fund*, 561 U.S. at 492–95.

8 The judicial functions of administrative law judges would have to consist with the Court's constitutional limits on such non-Article III courts. *See* Stern v. Marshall, 564 U.S. 462, 488–92 (2011). However, any such problems are already presented in the current version of independent agencies' organic statutes, so providing for a continued judicial role in the newly crafted statutes advocated here does not surface any new impediments.

9 Cass R. Sunstein & Adrian Vermeule, *The Unitary Executive: Past, Present, Future*, 2020 SUP. CT. REV. 83, 89 (footnotes omitted).

10 This requirement is found in Manning's "clause-centered" approach to separation of powers. "If legislation regulating the powers of the coordinate branches neither contradicts an identifiable

out an understanding between the executive and the legislative branches in areas of their joint authority.[11] It is also different from a violation of the non-delegation doctrine, where Congress has given its authority to an independent or executive agency that Congress created without sufficient "intelligible principles"[12] for the agency to apply. This constraint on the functionalist approach prevents Congress from surrendering any of its authority directly to the President, or vice-versa.[13] A new structure, such as an administrative agency, or a special panel of judges,[14] could, however, receive delegated authority, provided the granting branch retains all its powers.

Under the functionalist approach, where Congress and the President have worked out a compromise between their domains, or where Congress has imposed its solution to a shared power dilemma by overriding a presidential veto, the courts should accommodate the compromise.[15] If the outcome is within the collective powers of the

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background understanding of one of the Vesting Clauses nor effectively reallocates power from its specified branch, interpreters should not invalidate such legislation by reading abstract notions of the separation of powers into those otherwise open-ended clauses." Manning, *supra* note 1, at 1948.

[11] The classic development of this category is Justice Jackson's concurrence in the *Steel Seizure Case*. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

[12] J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).

[13] *See, e.g.*, Myers v. United States, 272 U.S. 52, 176 (1926) (invalidating a law giving the U.S. Senate veto power over a President's removing a postmaster); Bowsher v. Synar, 478 U.S. 714, 733–34 (1986) (invalidating the delegation of the President's budgetary power to an appointee removable by Congress).

[14] *See, e.g.*, 28 U.S.C. § 991 (establishing the U.S. Sentencing Commission); 28 U.S.C. § 592 (establishing the independent counsel in the 1978 Ethics in Government Act) (expired 1999); Morrison v. Olson, 487 U.S. 654, 693–94 (1988).

[15]

> Our account of the separation of powers—which we call the republican separation of powers in contrast with the juristocratic separation of powers—argues that Congress and the President, working through the interbranch legislative process, should decide whether any particular institutional arrangement is compatible with the Constitution's separation of powers.

Nikolas Bowie & Daphna Renan, *The Separation-of-Powers Counterrevolution,* 131 YALE L.J. 2020, 2030 (2022). The approach of Bowie and Renan leads them to conclude, "[w]e are aware of no statutory design, enacted to date, that we think would violate this standard." *Id.* They characterize the first seventy years of the nation's history as "Congress and the President [having] determined for themselves how the Constitution separated the legislative and executive powers. When the Court weighed in on these legislative-executive debates, it was merely to enforce whatever statutory conclusions the other two branches had reached." *Id.* at 2046.

The functionalist approach described here is less sweeping, as it requires proof of a functionalist need for the structure being analyzed and is not permissive of a direct assignment of one branch's functions to another—the two criteria discussed in the text.

Bowie and Renan lump the line-item veto, the one-house veto, and restrictions on Presidential removal power as examples of functionalist solutions to governance issues that should not merit judicial condemnation under the separation-of-powers doctrine.

executive and legislative branches, then a functionalist view would not condemn how those branches have chosen to effectuate the division of authority between them. Where the joint plan exceeds the constitutional authority of both branches, however, as it would if it violated the rights of states or individuals, then the plan is *ultra vires* and should be struck down for that reason.

Defenses of the functionalist approach can be found in two well-reasoned U.S. Supreme Court dissents.

Regarding the legislative veto, Congress gave authority to an agency of the executive branch, subject to Congress's right to undo that grant of authority upon adopting a concurrent resolution or a resolution of a single house, neither of which was vetoable.[16] The dissent by Justice White in *INS v. Chadha*[17] makes the most cogent case for this device under a functionalist form of analysis. His reasoning was as follows. Since any bill has to pass both houses of Congress to become law, a reservation by a single house of the right to revoke its approval in any particular application of a statutory scheme granted no more authority than either house of Congress already possessed. The executive branch could not logically complain of being denied one of its powers by the legislative veto since it would not have had the power in the first place had Congress not delegated it to the Executive. Under the functionalist approach, the legislative veto therefore cannot be understood as an encroachment by one branch upon the powers of another. The Congress chose to divide up its authority and to exercise some of it at one time and some of it later. It did so out of a justified desire to supervise how the executive exercised the authority Congress undoubtedly possessed.

Another defense of the functionalist approach in a Supreme Court dissent concerns the line-item veto.[18] As the product of an agreement between the executive and the legislative branches, the 1996 Line-Item Veto Act[19] allocated authority that all Justices conceded existed in the Constitution. Justices Scalia and Breyer both dissented from the Court's

> But so long as Congress and the President are exercising their authority to make laws that they deem appropriate for "carrying into Execution" the powers of the federal government—introducing removal restrictions on the President, legislative vetoes, line-item vetoes, or any number of other institutional reforms tried and untried over time—their handiwork simply does not implicate a judicially enforceable separation-of-powers principle.

Id. at 2115–16 (footnote omitted).

16 For example, the trade powers given to the President under the original International Economic Emergency Powers Act were subject to being canceled by Congress repealing the President's declaration of an emergency by a concurrent resolution. 50 U.S.C. §§ 1701, 1706(b); 50 U.S.C. § 1622.

17 462 U.S. 919 (1983); *id.* at 986–87 (White, J., dissenting). *See* Manning, *supra* note 1, at 1956.

18 Clinton v. New York, 524 U.S. 417, 453 (1998) (Scalia, J., concurring in part and dissenting in part); *id.* at 469–70 (Breyer, J., dissenting).

19 Pub. L. No. 104-130, 110 Stat. 1200.

decision to strike down this functionalist reallocation of authority between the legislative and executive branches.

> Insofar as the degree of political, "lawmaking" power conferred upon the Executive is concerned, there is not a dime's worth of difference between Congress's authorizing the President to cancel a spending item, and Congress's authorizing money to be spent on a particular item at the President's discretion. And the latter has been done since the founding of the Nation.[20]
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> Chief Justice Marshall, in a well-known passage, explained,
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>> "To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur."
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> This passage . . . calls attention to the genius of the Framers' pragmatic vision, which this Court has long recognized in cases that find constitutional room for necessary institutional innovation.[21]

There are also majority rulings that have followed the functionalist approach. The Court used a functionalist approach to uphold the constitutionality of the independent counsel.[22] The ability of President Nixon to fire Special Prosecutor Archibald Cox, who was investigating the Watergate scandal, was the error that the 1978 Ethics in Government Act sought to correct. Independence was essential to the purpose of the post-Watergate law.

> [T]he congressional determination to limit the removal power of the Attorney General was essential, in the view of Congress, to establish the necessary independence of the office. We do not think that this limitation as it presently stands sufficiently deprives the President of control over the independent counsel to interfere impermissibly with his constitutional obligation to ensure the faithful execution of the laws.[23]

The essentiality of independence to the goal of the statute could not have been clearer.

Regarding the second prong of the functionalist approach, that power not be shifted from one branch to another, it was key that in signing the 1978 Ethics in Government Act, which created the independent counsel authority, President Carter gave up none of his authority to prosecute government corruption that he possessed before 1978. It was a panel of

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[20] *Clinton*, 524 U.S. at 466 (Scalia, J., concurring in part and dissenting in part).

[21] *Id.* at 472 (Breyer, J., dissenting) (citation omitted) (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819)).

[22] Morrison v. Olson, 487 U.S. 654, 696 (1988). "In upholding the restriction [in *Morrison*], the Court reaffirmed the holdings of both *Myers* and *Humphrey's Executor* but shifted the analysis away from whether the officer being removed is 'purely executive' as opposed to 'quasi-judicial' or 'quasi-legislative,' and toward a more functional analysis." Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 482 (2012).

[23] *Morrison*, 487 U.S. at 693.

judges who appointed the independent counsel. That the President could not fire the independent counsel created no separation of powers issue since the President did not appoint the independent counsel. His power to appoint and remove United States Attorneys, by contrast, was not limited at all—nor their authority to pursue the exact same defendants as did the independent counsel.

Humphrey's Executor v. United States,[24] the exemplar of a formalist approach to be discussed below, also voiced a functionalist approach. The Court noted that making FTC Commissioners subject to the President's removal power on policy grounds (as opposed to being so subject only for cause) would undercut the Congressional goal in establishing the FTC.

> The power of removal here claimed for the President falls within this principle, since its coercive influence threatens the independence of a commission, which is not only wholly disconnected from the executive department, but which, as already fully appears, was created by Congress as a means of carrying into operation legislative and judicial powers, and as an agency of the legislative and judicial departments.[25]

As for the second prong of functionalism, the FTC did not shift to the President any of Congress's authority, or vice-versa. A new agency was created, combining legislative, executive, and judicial functions, but diminishing none of the powers of the Congress, President, or federal courts.

Under functionalism, executive powers can be exercised by government officials who are not answerable to the President. There is Constitutional text and structure that supports this. The appointments power in Article II, Section 2, allows Congress to vest the power to appoint "inferior Officers" in the "Heads of Departments." Since the same clause begins with giving that power to the "President alone" when Congress wishes, it seems redundant to give it to Heads of Departments whom the President can direct. Officers other than "inferior" must be appointed by the President and confirmed by the Senate. These are the policymaking positions. For administering positions, however, the Constitution provides that Heads of Departments may be trusted with the appointment power, if Congress so wishes. To fire individuals from such positions, the President would have to fire the Head of Department first, if the Department Head did not follow the President's instructions.

This structure creates some tension between the President and a Head of Department. The President may prefer to remove an inferior officer but might not believe it worth firing a cabinet secretary who disagrees with the President about keeping that particular individual, who would then continue in office. As considered below in the formalist separation of powers approach, the Constitution's contemplation of such tension strains the strict unitary executive theory.

A second Constitutional provision also points toward the

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[24] 295 U.S. 602, 618 (1935).

[25] *Id.* at 630.

conclusion that executive authority need not be possessed uniquely by the President. Article II, Section 2, allows the President to require "Opinion[s], in writing, of the principal Officer in each of the Executive Departments," that is, from individuals whom he appointed and could fire at will.[26] An executive branch comprising department heads not entirely under the direction of the President seemed contemplated—otherwise why would this obvious incident of being a Cabinet officer need to be specified?[27]

An agency whose directors the President may not remove at will does not pose a problem under the functionalist approach. But this will be a problem under the formalist approach.

II. The Formalist Approach[28]

The formalist approach begins by assigning every application of federal government power to one of the three branches.[29] Where one branch asserts power properly attributable to another, the courts under a formalist approach identify a violation of separation of powers and strike down the infringement.[30]

The famous concurrence by Justice Jackson in *Youngstown Sheet & Tube Co. v. Sawyer* (*Steel Seizure Case*)[31] illustrates the process of typifying functions as either executive or legislative. Justice Jackson observed that there were areas of significant overlap between presidential and congressional authority.[32] His view has been taken as the more controlling in subsequent Court jurisprudence, including a recognition that the three vessels of federal government power are not "airtight."[33] Nevertheless,

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[26] U.S. CONST. art. II, § 2, cl. 1.

[27] Sunstein & Vermeule, *supra* note 9, at 93.

[28] Justice White, in his *Bowsher* dissent, describes the majority's approach in that case, and in two others, *Northern Pipeline* and *INS v. Chadha*, as a "distressingly formalistic view of separation of powers." Bowsher v. Synar, 478 U.S. 714, 759 (1986) (White, J., dissenting). I am using the term "formalist" as a less pejorative description than "formalistic."

[29]

> The Justices of the Supreme Court have engaged a variety of approaches to characterize contested power, including tests that: (1) principally emphasize the disputed function itself, (2) prioritize the formal identity of the officer, (3) look to the pragmatic effects of the power, and (4) question whether functions can ever be suitably categorized.

Tuan N. Samahon, *Characterizing Power for Separation-of-Powers Purposes*, 52 U. RICH. L. REV. 569, 571 (2018). "The terms 'legislative,' 'executive,' and 'judicial' were clearly understood, as an original matter, to have substantive content." *Id.* at 589 & n.126.

[30] Manning warns against the apparent ease of applying this separation function: "this approach systematically understates the document's indeterminacy." Manning, *supra* note 1, at 2022.

[31] 343 U.S. 579 (1952).

[32] *Id.* at 637 (Jackson, J., concurring).

[33] In *United States v. Nixon*, 418 U.S. 683 (1974),

Justice Jackson had no trouble in recognizing that the creation of the Taft-Hartley Act was legislative, and the replacement of workers by soldiers was executive. Justice Black's opinion for the majority also easily catalogued the regulation of strike activity as congressional and the prosecution of the Korean War as presidential.

In 1935, the *Humphrey's Executor* Court applied a formalist analysis to the Federal Trade Commission ("FTC"). The FTC was construed not to have any executive functions, leaving it as a "quasi-legislative" and "quasi-judicial" entity.[34] The structure, accordingly, did not present any separation of powers problems that might have arisen had the FTC exercised executive authority,[35] and the Court upheld the provision in the FTC Act that protected Commissioners from being fired except for cause. The necessity for the President to have firing authority applied only to executive functions.

It remains a major flaw in *Humphrey's Executor* that the Court ignored the obviously executive functions of the FTC in bringing lawsuits against those alleged to have participated in unfair methods of competition and unfair or deceptive acts or practices. The Court's very contortions to arrive at its result adds salience to the conclusion that the Court felt that U.S. government officials empowered to carry out executive functions had to be removable by the President at his discretion. So, the Court simply

> the Court squarely rejected the argument that the Constitution contemplates a complete division of authority between the three branches. Rather, the unanimous Court essentially embraced Mr. Justice Jackson's view, expressed in his concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*. "In designing the structure of our Government and dividing and allocating the sovereign power among three co-equal branches, the Framers of the Constitution sought to provide a comprehensive system, *but the separate powers were not intended to operate with absolute independence.*"

Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 443 (1977) (citations omitted) (quoting United States v. Nixon, 418 U.S. at 707). The Court in *Nixon v. Administrator of General Services* continued:

> Like the District Court, we therefore find that appellant's argument rests upon an "archaic view of the separation of powers as requiring three airtight departments of government." Rather, in determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions.

Id. (footnote omitted) (citation omitted).

[34] Humphrey's Ex'r v. United States, 295 U.S. 602, 625, 628 (1935) (noting that the FTC was created as "a body which shall be independent of executive authority, *except in its selection*.").

[35] *Id.* at 627–28 (distinguishing the purely executive postmaster in *Myers v. United States*, 272 U.S. 52 (1926), from the FTC commissioners). The Court thus avoided the problem of whether executive power could constitutionally be exercised by an agent not able to be removed by the President. This difficulty could have been overcome by recognizing that not all executive authority has to be exercised by individuals removable by the President, as argued below. Evidently unwilling to confront that reality, the Court chose simply to ignore the fact that the Commission had the authority to investigate and sue to enjoin civil actions under 15 U.S.C. § 45, an archetypical executive function.

elided the executive functions from its characterization of the FTC.[36]

Separation of powers under the formalist approach was violated in both *Bowsher v. Synar*,[37] and *Myers v. United States*[38] Congress (or part of it) was given a power previously enjoyed by the President alone.[39] Presidential authority to limit expenditures that had been appropriated by Congress was given to an officer subject to Congressional removal in *Bowsher*. Presidential power to remove postmasters was made subject to a Senate veto in *Myers*.[40]

The present Supreme Court has followed a formalist approach. The Court in *Seila Law, LLC v. Consumer Financial Protection Board*[41] assumed that an administrative official had to be removable by the President at will

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[36] The Court in *Humphrey's Executor* "curiously located the FTC outside the executive department, and left unexplained and virtually unacknowledged the FTC's substantial enforcement powers, surely executive in kind." Kevin M. Stack, *Agency Independence After* PCAOB, 32 CARDOZO L. REV. 2391, 2403 (2011) (footnote omitted); *see* Huq & Michaels, *supra* note 3, at 363 & n.60.

[37] 478 U.S. 714 (1986); *id.* at 736.

[38] 272 U.S. 52 (1926); *id.* at 163–64.

[39] The Court in *Seila Law* referred to this as part of an approach to the President's removal power that it sidestepped in favor of ruling that the President's power to remove was "the rule, not the exception." Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2206 (2020). The exception had been proposed by the court-appointed amicus curiae, that in analyzing a governmental structure under separation of powers, the Court would strike down instances where a statute gave the Senate a veto over the President's authority to remove a postmaster, in *Myers*, 272 U.S. at 163–64, or gave to an official removable only by Congress (the Comptroller General) executive authority over administering (as opposed to creating) budgets, as in *Bowsher v. Synar*, 478 U.S. 714, 736 (1986)

Justice Kagan's separate opinion, by contrast, embraced this consideration, recognizing that separation of powers concerns were satisfied so long as "Congress could not impede through removal restrictions the President's performance of his own constitutional duties." *Seila Law*, 140 S. Ct. at 2233 (Kagan, J., concurring in part and dissenting in part).

While rejecting this focus in the context of the removal power, Chief Justice Roberts, in his majority opinion, did not cast doubt upon the usefulness in the more general field of separation of powers of asking whether the practice under consideration displayed an attempt to allocate to one branch authority currently exercised by another.

[40] Comparably, the weakness the Court observed in some of the jurisdiction vested in the Article I bankruptcy judges was that the power had been taken away from Article III judges. The U.S. Supreme Court has ruled bankruptcy courts cannot be given powers taken away from federal district courts. N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 87 (1982) (plurality opinion). That conclusion is consistent with both the functionalist and formalist rationales discussed in this Comment. Each perceives separation of powers problems when a statute does not simply create a new agency but takes an existing power away from one of the branches.

> We conclude that 28 U.S.C. § 1471 (1976 ed., Supp. IV), as added by § 241(a) of the Bankruptcy Act of 1978, has impermissibly removed most, if not all, of "the essential attributes of the judicial power" from the Art. III district court, and has vested those attributes in a non-Art. III adjunct. Such a grant of jurisdiction cannot be sustained as an exercise of Congress' power to create adjuncts to Art. III courts.

Id. at 87.

[41] 140 S. Ct. 2183 (2020).

since that official exercised executive authority.[42] So the Court undid the Consumer Financial Protection Bureau's Director's protection against being removed by the President and then allowed the Director to proceed with executive functions under the statute. Similarly, once it struck down the limitation on the SEC's ability to fire members of the Public Accounting Oversight Board, the Court left operational the Board's functions as appropriate for an agency of the executive branch.[43]

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[42] *Id.* at 2197. Protection against removal was held to violate the Appointments Clause. *Id.*; *see* U.S. CONST. art. II, § 2, cl. 2 (The President "by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States . . . ."). The Court has long held that the power to appoint implies the power to remove, in order to vindicate the President's obligation to "take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3, cl. 5; *see Myers*, 272 U.S. at 161.

[43] Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 508 (2010). The Supreme Court's decision in *Free Enterprise Fund* "would preserve the constitutional foundation for good-cause removal protections for dedicated adjudicators, but sweep aside that foundation for officials with more than adjudicative functions." Stack, *supra* note 36, at 2392–93. Stack draws his line between agencies with adjudicative functions on the one side, and those with legislative (e.g., rulemaking) and Executive branch functions on the other, with insulation from the President permissible only for the adjudicative function. *Id.* at 2403–04; *see* Paul R. Verkuil, *The Purposes and Limits of Independent Agencies*, 1988 DUKE L.J. 257, 261 (1988).

Under the approach recommend here, an agency's functions can be parsed into three silos, and only the administrative need be exercised by an individual removable by the President. Professor Stack characterized the Supreme Court's jurisprudence as of 2011 as a bit more confused than this. "The Supreme Court has suggested that agency rulemaking, agency adjudication, and enforcement are exercises of executive power." Stack, *supra* note 36, at 2395 (footnotes omitted) (first citing INS v. Chadha, 462 U.S. 919, 953 (1983); then citing Pan. Refin. Co. v. Ryan, 293 U.S. 388, 427–28 (1935); then citing *Chadha*, 462 U.S. at 966 n.10 (Powell, J., concurring in the judgment) (noting that agency adjudication is a function that "forms part of the agencies' execution of public law"); and then citing Morrison v. Olson, 487 U.S. 654, 691 (1988) (characterizing independent counsel's prosecutorial function as executive)).

The passage from *Panama Refining* cited by Professor Stack, while using the term "executive duty," relates how an administrative agency fills in the details of a legislative power. *See* 293 U.S. at 427. In context, the term "executive" does not undermine that the kind of power being exercised by an "executive" official is, in actuality, a legislative function.

> The Congress, the Court said, thus fixed "a primary standard" and committed to the Secretary of the Treasury "the mere executive duty to effectuate the legislative policy declared in the statute." "Congress legislated on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute."

Id. (quoting and citing *Red "C" Oil Mfg. Co. v. Bd. of Agric.*, 222 U.S. 380, 394 (1912)).

As for the other cases cited, Justice Powell's concurrence in *Chadha* only states that the Administrative Procedure Act applies to the adjudicative functions of an executive agency, not that those adjudicative functions are executive in nature. "We have recognized that independent regulatory agencies and departments of the Executive Branch often exercise authority that is 'judicial in nature.' This function, however, forms part of the agencies' execution of public law and is subject to the procedural safeguards, including judicial review, provided by the Administrative Procedure Act." *Chadha*, 462 U.S. at 966 n.10 (Powell, J., concurring in the judgment) (citations omitted) (quoting Buckley v. Valeo, 424 U.S. 1, 140–41 (1976) (citing 5 U.S.C. § 551 *et seq.*)). Lastly, the citation to *Morrison* merely states that the prosecution function is executive in nature, saying nothing about whether any

The independent counsel created by the 1978 Ethics in Government Act was analyzed above as an example of the functionalist approach to separation of powers. The Court's conclusion would not have been so easily reached under a formalist analysis. Indeed, Justice Scalia's dissent stands as the foremost exponent of the "unitary executive" theory, whereby no executive power can be exercised except by the President. However, the independent counsel was not appointed by the President (or the Attorney General). Hence, it was not essential that she be removable by the President. The panel of judges that chose her was Constitutionally empowered to do so, provided she was an "inferior Officer." So having downplayed some functions of the judicial panel that fell within an executive silo,[44] the Court was able to approve the constitutionality of the mechanism for appointing an independent counsel. Her actions thereafter, while clearly executive, were permissibly not under the President's direction—by action of the inverse of the syllogism in *Myers*.[45]

Following a formalist Court decision striking down a law, there will often be a need to re-address the policy problem that first prompted the law. The necessary consequence is the need to break the problem down into parts that are amenable to being addressed by each of the relevant branches in its own domain. The Supreme Court has opined that it could do this reconstruction itself in several alternative ways.[46] However, once a court has ruled that a restructuring is needed, it is more appropriate for Congress to work out the terms of the separation in a new statute, since the Court in choosing to reconstruct a compromise would be committing

rulemaking or adjudicative functions (not present in that statute) were executive. 487 U.S. at 691 (only discussing the independent counsel's "law enforcement functions").

Thus, there turns out to be no Supreme Court authority for the proposition that a power judicial or legislative in nature becomes executive in nature simply by being located in an executive agency.

[44] *Morrison*, 487 U.S. at 678–89. Upholding the independent counsel under a unitary executive framework was less straightforward. The Supreme Court overcame the Article II, section 2, requirement that officers of the United States be appointed by the President (and, inferentially, subject to being fired by him) by holding that the independent counsel was not a major "officer of the United States." Article II, section 2 refers to "inferior Officers," who explicitly could be appointed by the "Courts of Law" if Congress so intended. Various other powers of the "Special Division" of judges that could have been construed as allowing the judges to supervise the independent counsel were swept aside by the *Morrison* Court as not serious enough to constitute an encroachment by the judiciary on executive functions. *Id.* at 680–81.

[45] That syllogism was that the power to appoint is the power to remove; the inverse is if the President lacks the power to appoint, he lacks the power to remove (unless Congress explicitly gives him this power). *See Myers*, 272 U.S. at 161.

[46] *Free Enter. Fund*, 561 U.S. at 509 ("It is true that the language providing for good-cause removal is only one of a number of statutory provisions that, working together, produce a constitutional violation. In theory, perhaps, the Court might blue-pencil a sufficient number of the Board's responsibilities so that its members would no longer be 'Officers of the United States.' Or we could restrict the Board's enforcement powers, so that it would be a purely recommendatory panel.").

its own violation of separation of powers, by, in effect, legislating.[47]

The classification of powers as legislative, executive, and judicial is not always amenable to Linnaeus-like precision. "[T]he Court squarely rejected the argument that the Constitution contemplates a complete division of authority between the three branches."[48] Professor Magill rejected the entire enterprise of creating such a taxonomy. "The effort to identify and separate governmental powers fails because, in the contested cases, there is no principled way to distinguish between the relevant powers."[49]

I disagree. None of the cases subject to recent "shadow-docket" decisions by the Supreme Court on stay orders, at least, presents such difficulty.[50] Without claiming to be able to catalogue powers in the abstract, this Comment attempts to show in what follows that, in practical application, there are distinguishable legislative, executive, and judicial functions in all the agencies whose structures are currently under review.

III. Application of the Two Approaches to Current Cases

If the Court upholds the asserted right of the President to remove members of independent administrative agencies, only the executive functions of those members need be subjected to presidential control. Other functions of such agencies can continue insulated from the President's direction. Congress would have to re-create each agency's structure to make this distinction; for the Court to do so would require venturing far into the legislative domain. But it could be done, as the examples in this section will show.

A. *The Federal Reserve Board*

The first requirement of the functionalist approach to separation of powers—that an officer, once appointed, be independent from the President—is easily met in the instance of Federal Reserve Board ("the Fed") Governors. Congress's purpose in creating the Fed (to take monetary policy away from the political branches) would be frustrated by allowing the President to fire the Chairman of the Fed and the members of the Federal Open Market Committee ("FOMC"), the monetary policymaking body of the Federal Reserve System that includes all the Fed governors, among others. The United States experienced political control over

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47 *See* Tom Campbell, *Severability of Statutes*, 62 HASTINGS L.J. 1495, 1498–99, 1501–02 (2011).

48 Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 443 (1977).

49 M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 604 (2001).

50 *Interim Docket*, SCOTUSBLOG, https://perma.cc/8XX8-KCEE. *See supra* notes 48–49; *infra* notes 51–52.

printing money and wanted it to end.[51] The establishment of the Federal Reserve System in 1913, and the agreement between the Fed and Treasury of 1951, saw to this.[52] If the President could replace FOMC members to set interest rates as the President saw fit, political control of monetary policy would have shifted, not stopped.

During the pendency of the current appeal of Federal Reserve Governor Lisa Cook, the Supreme Court has allowed her to stay at the Fed.[53] This contrasts with their treatment of members of the FTC,[54] National Labor Relations Board ("NLRB"),[55] and Merit Systems Protection Board ("MSPB"),[56] each of whom, having been removed by the President, was kept out of office pending appeal.[57] Justice Kagan's dissent in the NLRB and MSPB case[58] lays bare the per curiam's inconsistency regarding the Fed. There was much to criticize in the majority's threadbare reference to the Fed's historical provenance in the First and Second Banks of the United States.[59] A more candid explanation would have been that if the

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[51] Brief of Former Treasury Sec'ys et al. as Amici Curiae Supporting Respondent at 18–20, Trump v. Cook, No. 25A312 (U.S. Sept. 25, 2025).

[52] Jessie Romero, *The Treasury-Fed Accord*, FED. RSRV. HIST. (Nov. 22, 2013), https://perma.cc/47PP-G59Q ("Independence and insulation from political pressures are essential to the ability of a nation's central bank to conduct monetary policy. During World War II and its aftermath the Federal Reserve did not enjoy such independence. In 1951, however, the Treasury Department and the Fed reached an agreement now known as the Treasury-Federal Reserve Accord. This accord effected the 'liberation of monetary policy' and laid the foundation for the modern Federal Reserve.") (citations omitted).

[53] Application to Stay the Preliminary Injunction of the U.S. Dist. Court for D.C. and Request for Admin. Stay at 38, Trump v. Cook, No. 25A312 (U.S. Sept. 18, 2025); Trump v. Cook, 146 S. Ct. 79, 79 (2025) (mem.) (order deferring ruling on application for stay pending oral argument).

[54] Trump v. Slaughter, 146 S. Ct. 18, 18 (2025) (mem.) (granting stay of order enjoining removal of executive officials).

[55] Trump v. Wilcox, 145 S. Ct. 1415, 1416–17 (2025) (per curiam) (granting stay of order enjoining removal of an executive official).

[56] *Id.*

[57] The U.S. Court of Appeals for the District of Columbia Circuit stayed the removal of the Registrar of Copyrights, however, and the Supreme Court has let that stand. *See* Perlmutter v. Blanche, No. 25-5285, 2025 WL 2627965, at *1 (D.C. Cir. Sept. 10, 2025). *See also* Amy Howe, *Supreme Court Defers Decision on Whether Trump Can Fire Head of U.S. Copyright Office*, SCOTUSBLOG (Nov. 26, 2025), https://perma.cc/8UKQ-ACPN.

[58] *Wilcox*, 145 S. Ct. at 1417–21 (Kagan, J., dissenting).

[59] *See* Cathy A. Harris's Opposition to Application for a Stay Pending Appeal and for an Admin. Stay at 3, 15–16, Trump v. Wilcox, No. 24A966, (U.S. May 22, 2025).

> Finally, respondents Gwynne Wilcox and Cathy Harris contend that arguments in this case necessarily implicate the constitutionality of for-cause removal protections for members of the Federal Reserve's Board of Governors or other members of the Federal Open Market Committee. We disagree. The Federal Reserve is a uniquely structured, quasi-private entity that follows in the distinct historical tradition of the First and Second Banks of the United States.

Wilcox, 145 S. Ct. at 1417 (citations omitted) (citing Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2202 n.8 (2020)).

Court eventually reinstated members of the FTC, NLRB, and MSPB, the harm from interim decisions of those agencies acting without the removed members would have been less devastating than the unilateral imposition of the President's preference on interest rates, whose effect on the economy would be widespread and instantaneous. That reflects a very functionalist viewpoint.

The Federal Reserve also meets the second strand of the functionalist approach to separation of powers. No power has shifted between branches by insulating governors of the Federal Reserve Board from removal relative to the operations of the FOMC. Congress delegated its constitutional power to "coin Money [and] regulate the Value thereof" to the Board. Restricting the President's right to fire Federal Reserve governors took no power away from the President that the President possessed regarding the coining of money. That was a congressional, not a presidential, power.

Unlike the President, Congress is not ordered by the Constitution to see that the laws be faithfully executed. Subject to the nondelegation doctrine, Congress can set up a scheme that leads to specific policy results without violating separation of powers.[60] Congress is thus free to delegate to an agency rulemaking authority that the Court in *Humphrey's Executor* called "quasi-legislative."[61] That is what Congress did in delegating its monetary authority to the Federal Reserve Board.

The Appointments Clause[62] makes the President responsible for appointing all officers of the United States, but that does not make all such officers wielders of executive power. Under a functionalist approach, an appointee of the President who does not exercise executive functions need not be removable by the President. If such an appointee does not follow the President's direction, that does not constitute an impediment to the President seeing that the laws be faithfully executed, since the appointee is not acting as an executive.

Under the functionalist approach, therefore, the Federal Reserve governors do not have to be removable by the President.

A formalist approach to separation of powers, however, yields a different conclusion. Under the formalist approach, the functions of the Federal Reserve would be dissected into legislative and executive kinds. The power to regulate the safety and soundness of banks would fall under the executive heading.[63] The Federal Reserve Board has the responsibility

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[60] Similarly, some judicial functions may be vested in courts that do not operate under Article III. That is the function of administrative law judges in adjudications, Administrative Procedure Act, 5 U.S.C. § 554, and federal magistrates created under Article I, *see* United States v. Raddatz, 447 U.S. 667, 681 (1980).

[61] *See* Humphrey's Ex'r v. United States, 295 U.S. 602, 629 (1935).

[62] U.S. CONST. art. II, § 2, cl. 2.

[63] The need to monitor whether a bank's reserves are dangerously low, for instance, makes supervision by sequential legislation, or a series of lawsuits, totally impractical. The ability to apply

of supervising private banks that are part of the Federal Reserve System.[64] To perform these functions in a manner consistent with the President's duty to see that the laws be faithfully executed, a presidential appointee would have to be removable by him.

There is a stark difference between deciding whether a bank is operating safely and soundly (an executive function) and establishing monetary policy for the nation (the legislative function). The Fed's regulatory authority, therefore, could be carved off from its power to set monetary policy. The regulatory function might be exercised by the Comptroller of the Currency instead, an executive officer responsible to the President,[65] who already performs this oversight function for banks and thrifts directly under the Department of the Treasury.[66] Indeed, in 2010, a similar shift of function occurred when the Office of Thrift Supervision was closed and the Comptroller took up the duties of that office.[67]

If the Court eventually rules that a President may fire a Federal Reserve Board governor without cause, the result need not jeopardize the independence of the Fed in setting monetary policy even under a formalist approach. Legislative functions like coining money do not have to be subject to the President's direction; indeed, the formalist approach would consider such direction a violation of separation of powers. What the Fed would have to surrender is its functions analogous to those of the executive branch: the supervision of private banks which are members of the Federal Reserve System.

To accomplish this result, Congress must act. It is beyond even the most aggressive application of severability for the Supreme Court to append to the Federal Reserve Act a provision that the Fed's banking supervisory functions be performed by another agency.[68] The most that

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broad rules to specific instances is an inherent executive advantage. *See* TOM CAMPBELL, SEPARATION OF POWERS IN PRACTICE 25 (2004).

64 *See* Victoria Yin & Genevieve Podleski, *Federal Reserve Banks*, FED. RSRV. HIST. (May 24, 2021), https://perma.cc/2GXJ-JMEQ.

65 "The Comptroller of the Currency shall be appointed by the President, by and with the advice and consent of the Senate, and shall hold his office for a term of five years unless sooner removed by the President, upon reasons to be communicated by him to the Senate." 12 U.S.C. § 2.

66 12 U.S.C. § 1(b)(1)–(2).

67 12 U.S.C. § 5412.

68 Under the severability doctrine, the Court can strike down part of a statute and let the rest continue in force. To append new language exceeds traditional severability authority. Nevertheless, four Justices have suggested it might do so where the statutory scheme would otherwise be nonsensical. *See, e.g.*, Green v. Bock Laundry Mach. Co., 490 U.S. 504, 529 (1989) (Scalia, J., concurring) (proposing that the word "defendants" should be read as "criminal defendants"); *id.* at 534–35 (Blackmun, J., dissenting) (proposing that the word "defendants" should be read as "plaintiffs and defendants").

Even if the Court does not add words but only subtracts them, by severing part of a statute and allowing the rest to continue in force, the Court is engaged in impermissible legislating. The judicial action most respectful of a co-equal branch would be to consider the entire act of Congress

the Court could do is to strike down the (executive-like) banking regulatory functions of the Fed, because of the insulation of its Governors from the President's removal power. If the Court applied its traditional severability analysis, then the rest of the Federal Reserve Act, especially the powers of the FOMC, would continue unhindered.

It is at this point that the functionalist approach helps inform the formalist solution. The functionalist analysis' first prong identifies the important government reasons that lie behind the structures under challenge (here, the independence of the monetary authority). The formalist approach then can propose how these can be lodged in each of the three silos of federal government authority. Uninformed by the functionalist analysis, the Court might purport to solve its formalist concerns by simply making Federal Reserve Governors removable by the President even without cause. This is the solution the Court adopted in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, ostensibly as the resolution least intrusive upon the editorial prerogatives of the legislative branch.[69] In fact, however, it is more disrespectful of the legislative branch's design for making the administrative officer independent of the President than striking down the whole statute would be and letting Congress try again. That is what the Court should do with the Federal Reserve Act once it finds that the "for cause only" protection of the Federal Reserve Governors is incompatible with their executive (but not their legislative) functions.

B. *Pending Cases Involving Other Independent Agencies*

Currently, there is a challenge to the Merit Systems Protection Board Members, National Labor Relations Board Members, Consumer Product Safety Commissioners, and FTC,[70] none of whom can be removed by the

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invalid, sending the policy issue back to Congress to decide whether Congress wants to proceed with the statute minus the unconstitutional clause. This is also a much less speculative undertaking than guessing whether Congress would have intended the original bill to become law if it knew part would not be upheld, *see* Alaska Airlines v. Brock, 480 U.S. 678, 685 (1987) ("The more relevant inquiry in evaluating severability is whether the statute will function in a *manner* consistent with the intent of Congress."), an exercise that ignores the myriad compromises, many unexpressed in any retrievable records, that made the original law's passage possible. *See* Campbell, *supra* note 47, at 1501 & n.25.

[69] Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 509 (2010).

[70] *See supra* notes 48–52. Each of the removed individuals remains out of office pending the resolution of the merits of each case, pursuant to decisions of the U.S. Supreme Court in its "shadow docket." *Interim Docket*, *supra* note 50. In one other case, involving the President's attempt to fire a Federal Reserve Board Governor for cause, the government's request for a Supreme Court stay of the Court of Appeals for the District of Columbia Circuit's stay on the removal of the Federal Reserve Board Governor was set over for the oral argument in chief. *See* Trump v. Cook, 146 S. Ct. 79, 79 (2025) (mem.). The Register of Copyrights was also removed by President Trump; her status was also deferred until the rulings on the FTC and Federal Reserve Board members; until then, she stays in her position. Howe, *supra* note 57.

President except for cause. Members of each of these agencies issue regulations that Congress can overturn; a legislative function, ultimately situated in Congress. Each agency also brings complaints, an executive function, and decides the outcome in proceedings pursuing those complaints, a judicial function.

To varying degrees, political independence is valuable to the proper functioning of each of these agencies. The first prong of the functionalist approach is most easily met for the MSPB, as a designedly neutral arbiter between federal employees and the federal employer (personified by the President). Next easiest would be the NLRB, whose institutional neutrality is based on its being perceived as not overtly pro-labor or pro-management (even though a President might choose to be one or the other.[71]) At the other end of the spectrum would be the Librarian of Congress's functions, which include appointing the Register of Copyrights. It is a bit more difficult to understand how the efficient operation of the Register or the Librarian would be jeopardized by presidential removal power.

Under the second prong, raising separation of powers concerns if judicial, legislative, or executive functions were taken away from one branch and given to another, none of these statutory schemes are open to challenge. In each of these pending cases, Congress created a federal agency that exercised executive functions but did not award those functions to the legislative or judicial branches. Similarly, to the extent any agency exercised judicial authority, it was not taken away from the federal courts.

The functionalist approach to separation of powers would thus perceive no difficulty in upholding the current form of each of these agencies.

The formalist approach, however, would require further action by Congress to separate the executive functions from the legislative and judicial ones in every independent agency successfully challenged for exercising hybrid authority. As with the Federal Reserve Board, this is not an impossible task.

Agencies' rulemaking functions can be subsumed by quasi-legislative agencies (to use *Humphrey's Executor*'s phrasing). The non-delegation and major questions doctrines would continue to serve as a constraint upon Congress's authority to empower such legislative action, but their applicability would not become any more stringent. As the Court pointed out in *Mistretta v. United States*,[72] very broad instructions from Congress have sufficed, over decades of Supreme Court jurisprudence, to constitute

[71] President Biden chose to align himself with labor on the spectrum of labor-management relations. *ICYMI: President Biden: I'm 'the Most Pro-Union President in American History. And I Make No Apologies for It*,' AFL-CIO (June 29, 2023), https://perma.cc/AXS3-WC82.

[72] 488 U.S. 361 (1989).

"intelligible principles" to satisfy the non-delegation doctrine.[73] However, even if the Court is now prepared to constrain such delegations of power more strictly, that task would be the same whether or not the legislative power is delegated to a federal agency that possesses executive power as well. Hence, the task of separating out the powers within a federal agency that are legislative from those that are executive could proceed, with only the exercise of the latter being obliged to be through an individual removable by the President.[74]

Does this mean executive authority may only be vested in the President or agents directly responsible to him? Vesting executive authority in an entity beyond the President's reach does not put it in the legislative or judicial silo. It is the unitary executive theory, not the formalist separation of powers concept, that creates an obstacle here.

Legislative authority need not be confined to Congress. Rulemaking authority is given to federal administrative agencies, and those rules have the force of law until a statute reverses them.[75] Similarly, judicial power can be given to a body outside of Article III. That is the function of administrative law judges and bankruptcy judges.[76]

The unitary executive theory, however, prevents a similar approach to executive authority. "The entire 'executive Power' belongs to the President alone."[77] Accordingly, while the functionalist approach could countenance executive authority being exercised by an agency other than the President, so long as it was not the Congress or the courts, the formalist approach does not. The result is that officers exercising executive functions—if appointed by the President—must be subject to presidential removal[78] Sunstein and Vermeule report how this conclusion can be derived from the "Decision of 1789," during deliberations of the first Congress on the President's removal power.[79] This is not an unworkable outcome, once the permissibility of hiving off the legislative and judicial functions of an independent agency is acknowledged.

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73 *Id.* at 372–74.

74 Similarly, judicial functions residing in any agency could be given either to existing courts, or special courts that Congress has the authority to establish. "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1; *Cf.* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 60 (1982) (plurality opinion) (observing that the Constitution enshrines judicial independence and institutional protections for it).

75 5 U.S.C. § 553.

76 5 U.S.C. § 554. However, the U.S. Supreme Court has ruled Bankruptcy Courts cannot be given powers taken away from federal district courts. *N. Pipeline Constr. Co.*, 458 U.S. at 87; *see* Bowsher v. Synar, 478 U.S. 714, 736 (1986).

77 Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2197 (2020).

78 The independent counsel would stay outside of the President's removal power, however, since the removal power stems from the appointment power; and the Constitution allows Congress to vest that appointment power in the courts, which it did in connection with the independent counsel.

79 Sunstein & Vermeule, *supra* note 9, at 91.

Before sketching out how this might be done, I wish to reserve an objection to the conclusion that the strong form of the unitary executive theory is compelled by the U.S. Constitution. As stated above, supra page 64, the Constitution provides that inferior governmental officers (including, seemingly, those exercising executive functions) can, if Congress directs, be chosen by judicial panels. The *Myers* Court's syllogism would vest the power to remove in the same Constitutional entity that appoints.[80] Hence, it is constitutionally permissible for Congress to establish by law some inferior "officers of the United States" exercising executive authority whom the President cannot remove since he did not appoint them.[81] The contrary inference would be absurd: a judicial panel could appoint an individual whom the President could then fire, creating a vacancy which the judicial panel could fill with another individual, whom the President could then fire, seemingly endlessly. The fact that the Constitution grants Congress the right to let a judicial panel appoint inferior officers of the United States undercuts the unitary executive theory that if an officer has executive power, he or she must be under the President's direction.[82]

However, the approach this Comment advocates can deal with the strong unitary executive theory, as described in the following treatment of each agency whose structure is currently under challenge. If Congress wanted to establish agencies whose functions were independent of the President, it could do so under a formalist approach by first pruning and then replanting those functions. Only the executive functions of presently independent agencies must come under the President's authority to direct. The rest of what we know as the administrative process can continue.

The NLRB would not require any change at all. Under existing law, the decision to bring cases (which is the principal executive function in the National Labor Relations Act) is exercised by the General Counsel, who is not under the direction of the Members of the NLRB in this function.[83] Shorn of any executive functions, Members of the NLRB should not be subject to the President's removal power, and so they could

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[80] "The power to remove inferior executive officers, like that to remove superior executive officers, is an incident of the power to appoint them, and is in its nature an executive power." Myers v. United States, 272 U.S. 52, 161 (1926).

[81] Obviously, Congress would specify some term of years for such officers or give some other entity the authority to declare their service at an end.

[82] The President's duty to "take Care that the Laws be faithfully executed," U.S. CONST. art. II, § 3, would be met by his supervision that the law that created the office whose holder cannot be removed by the President was respected. Making sure such an individual has adequate office space and staff, for instance, would satisfy the President's obligation, even if the President had no influence over that individual's actions. *See* Sunstein & Vermeule, *supra* note 9, at 93.

[83] 29 U.S.C. § 153(d).

continue with their statutory immunity.[84] They could continue to try unfair labor practices in administrative proceedings, with ALJ's ("Administrative Law Judge") and Board members protected in their judicial-branch-like functions from removal by the President. Protecting the Members of the NLRB from being dismissed except for cause would not impede any exercise of executive functions. As for the General Counsel, the statute provides no similar protection,[85] so nothing need change there.

The MSPB rules on complaints lodged against federal agencies for violations of federal employees' statutory rights. It also prepares and issues reports.[86] These duties are judicial and legislative in nature. Decisions to bring cases before the Board, however, are made by the Office of Special Counsel, which is separate from the MSPB. That is an executive function, and the officer authorized to exercise that function may well be subject to the President's unreviewable removal authority. That challenge in the present context was mooted by the resignation of the Special Counsel following President Trump's removal of him.[87] As to the MSPB members, a formalist approach to separation of powers would not prohibit protection from removal except for cause. They do not apply executive authority. As to the Special Counsel, immunity from presidential removal might violate the formalist approach. That issue is not presently before the Supreme Court.

If the Court eventually holds that the Special Counsel be subject to the President's power of dismissal with or without cause, a solution is at hand in the independent counsel and Equal Employment Opportunity Commission models. A rewritten statute could create an office whose incumbent would be appointed by a panel of federal judges (like the independent counsel under the 1978 Ethics in Government Act) and whose duty would be either to advocate the individual employee's claim, or to issue a "right-to-sue" letter so the employee could proceed on his or her own to a hearing before the MSPB.[88] An even simpler solution would be for Congress to create a cause of action by any federal employee to sue in federal court for a violation of the laws and regulations dealing with

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84 29 U.S.C. § 153(a) ("Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.")

85 29 U.S.C. § 153(d); Goonan v. Amerinox Processing, Inc., No. 1:21-cv-11773-NLH-KMW, 2021 WL 2948052, at *5 (D.N.J. July 14, 2021)("Based on the plain language of these provisions, the President may relieve the General Counsel of his or her duties without the process required for Board members." (emphasis omitted)).

86 5 U.S.C. § 1204(a)(3).

87 Bessent v. Dellinger, 145 S. Ct. 1326, 1327 (2025) (order dismissing petition as moot).

88 The "Notice of Right to Sue" letter would permit an individual employee to proceed to federal court, or to proceed with administrative adjudication, in the event the newly appointed Merit Systems Protection Board Employee's Advocate chose not to pursue the case herself. For the comparable authority in the EEOC, *see* 42 U.S.C. § 2000e-5(f)(1); U.S. EQUAL EMP. OPPORTUNITY COMM'N, *Filing a Lawsuit*, https://perma.cc/Z4D6-W7B2.

federal employment.

The Federal Trade Commission would lose its right to bring actions (probably to the Department of Justice for antitrust cases, and to the Department of Commerce for fair and misleading advertising or sales practices cases, or to private parties with standing in either category), but the Commissioners and ALJ's would continue to hear those cases, and to promulgate rules[89] without being removable by the President. The Court performed just such a dissection of functions regarding the FTC in *Humphrey's Executor*, though it assumed away all executive functions.

The Consumer Product Safety Commission ("CPSC") consists of five Commissioners who are appointed by the President and protected from removal by him except for cause.[90] Almost all the functions of the Commission are legislative: performing studies and promulgating rules about individual consumer products. If there is an "imminent hazard,"[91] the Commission may seek relief in court, and if there is a "substantial product hazard" the Commission may order relief.[92] These (as well as some other functions)[93] are executive in nature. The CPSC is obliged to ask the U.S. Attorney General to pursue such actions before

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[89] "The vast majority of these substantive rules pertained to consumer protection issues. Only one substantive rule was grounded solely in competition; that rule was not enforced and subsequently was withdrawn." FED. TRADE COMM'N, COMMISSION FILE NO. P201200-1, DISSENTING STATEMENT OF COMMISSIONER CHRISTINE S. WILSON REGARDING THE NOTICE OF PROPOSED RULEMAKING FOR THE NON-COMPETE CLAUSE RULE COMMISSION 11 (2023) (footnotes omitted), https://perma.cc/FDF9-2BS7; *see* 15 U.S.C. § 57a.

Rulemaking for the competition side of the FTC's jurisdiction has been very contentious. The FTC's April, 2024, attempt to promulgate antitrust rules was held ultra vires by a federal district court in Texas. "In sum, the Court concludes the text and the structure of the FTC Act reveal the FTC lacks substantive rulemaking authority with respect to unfair methods of competition, under Section 6(g) [dealing with unfair methods of competition, as opposed to unfair and deceptive acts and practices]." Ryan, LLC v. Fed. Trade Comm'n, 746 F. Supp. 3d 369, 387 (N.D. Tex. 2024).

The FTC subsequently withdrew the rule and announced it did not have such authority. Fed. Trade Comm'n, Statement of Chairman Andrew N. Ferguson Joined by Commissioner Melissa Holyoak Ryan, LLC v. FTC 1 (2025), https://perma.cc/JFM5-PYF8. ("Today, the Federal Trade Commission withdrew its notice of appeal in Ryan, LLC v. FTC, No. 24-10951 (5th Cir. 2025). In doing so, it acceded to the vacatur of the Commission's Non-Compete Clause Rule. . . . Little more need be said about the legal viability of the Rule. The Rule's illegality was patently obvious." (footnote omitted)).

The FTC could continue to promulgate rules under the consumer protection, rather than competition, side of its jurisdiction after a formalist excision of its executive functions, since rulemaking is a legislative, not an executive function.

[90] 15 U.S.C. § 2053(a).

[91] 15 U.S.C. § 2061(a).

[92] 15 U.S.C. § 2064(d).

[93] These include the right to conduct inspections, 15 U.S.C. § 2065(a), to subpoena evidence, 15 U.S.C. § 2076(b)(3), to seek criminal penalties, 15 U.S.C. § 2070, and to seek injunctions, 15 U.S.C. § 2071(a).

pursuing them on its own[94]—indicating that the scheme of the Act would not seriously be harmed if they were all given to the U.S. Department of Justice exclusively. That would be the obvious solution were the Court to rule separation of powers required overturning the for-cause limitation on the President's power to remove a Commissioner. A more radical solution would be to return all the powers of the CPSC to the Department of Health and Human Services ("HHS"), from which these powers were taken in 1972[95] (when today's HHS was known as "HEW," the Department of Education, and Welfare), and whose Secretary is unquestionably subject to removal by the President at his discretion.

The Register of Copyrights is appointed by the Librarian of Congress,[96] who is herself appointed by the President to a 10-year term.[97] The statute for neither office grants protection against removal except for cause. President Trump fired the incumbent Register. She has challenged his authority to do so, claiming that only the Librarian of Congress can remove her. President Trump also fired the Librarian of Congress and appointed the Deputy Attorney General as her replacement. The Register of Copyrights has challenged the President's authority to make that switch, arguing that the Librarian of Congress performs legislative, not executive, functions. However, the Register of Copyrights' functions appear to be overwhelmingly executive, making the outcome of this challenge predictable under a formalist separation of powers analysis. The functions of the Librarian of Congress might include more legislative functions than the Registrar's. Since the statute offers no protection against being fired even without cause, the solution, if the Court does uphold President Trump's power, is to direct just the outcome he has imposed: a Register of Copyrights exclusively within the executive branch.[98]

Conclusion

In his analysis of independent and executive agencies, Professor Paul Verkuil asked, "[t]he shearing of functions leaves the independent agency with a more tightly fitted garment. But does it reduce the agency's effectiveness and is it impractical?"[99] The shearing of executive branch functions from independent agencies would resolve the pending separation of powers issues. Neither the functionalist nor the formalist

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94 15 U.S.C. §§ 2064(g), 2076(b)(7).

95 *See, e.g.*, 15 U.S.C. § 2079.

96 17 U.S.C. § 701(a).

97 2 U.S.C. § 136-1.

98 This outcome might also be predicted even under the functional approach, as the first prong (a strong reason for independence from the President) seems lacking in the functions of the Copyright Office.

99 Verkuil, *supra* note 43, at 268.

separation of powers doctrine prohibits the President's expansive removal authority over incumbents in those agencies, once they are limited to executive functions. The remaining judicial (adjudicative) and legislative (rulemaking) functions may be exercised by incumbents in the remnant of each such agency, protected from being fired by the President without cause. This result holds even under the most expansive unitary executive approach. However, the Court cannot accomplish the shearing and reconstituting function on its own. Congress must take up its responsibility to rewrite the laws in the aftermath of Supreme Court rulings in the pending cases.