

# A Hard Look at the President's Removal Power (A Hard Look, Season 6, Episode 7)

## Transcription and Show Notes

### Episode Title

A Hard Look at the President's Removal Power

### Episode Description

On this episode of *A Hard Look*, we examine the President's power to remove independent agency officials. We're going all the way back to the 1935 landmark decision in *Humphrey's Executor v. United States*. Helping us navigate this discussion is Daniel Wolff, Partner at Crowell & Moring LLP, and head of the firm's administrative law practice. Tune in for an in-depth discussion on the future of the executive authority and regulatory independence.\*

**\*Editorial Note:** This episode was recorded in March 2025, and the state of any ongoing cases discussed may have changed since then.

### Show Notes

#### Recommend Readings:

- *Humphrey's Executor v. United States* (1935)
- *Myers v. United States* (1926)
- *Morrison v. Olson* (1988)
- *Seila Law LLC v. Consumer Financial Protection Bureau* (2020)
- *Trump v. Wilcox* (2025)

### Episode Transcription

#### [INTRO MUSIC]

#### Victoria Paul (00:03)

Welcome back to A Hard Look, a podcast by the Administrative Law Review. Your Hard Look hosts today are Sophia Navedo and Victoria Paul, third-year law students at American University, Washington College of Law.

Today, we are diving into a pressing issue that could reshape the balance of power in our government: the president's authority to remove independent agency officials. In recent years, we've seen a concentrated effort to erode the principles set forth in *Humphrey's Executor v. the United States*: the 1935 Supreme Court case that established protections for independent regulatory agencies. Under the new Trump administration, high profile removals of independent agency heads signaled a shift toward a more expansive view of executive power. And now with an increasingly conservative Supreme Court, there is real speculation that *Humphrey's Executor* could be overturned or altered, fundamentally changing the relationship between the executive branch and regulatory agencies. What would that mean for the future of independent governance? Would it lead to a more accountable executive, or would it inject excessive political influence into agencies designed to be neutral? Stick around to hear from a legal expert as they help us to unpack these questions.

#### [TRANSITION MUSIC]

## **A Hard Look at the President's Removal Power (A Hard Look, Season 6, Episode 7) Transcription and Show Notes**

### **Victoria Paul**

Today, we will hear from Daniel Wolff of Crowell and Mooring LLP, who leads the firm's administrative law litigation practice, representing clients both in federal and state courts and matters arising under the Administrative Procedure Act, other federal statutes and the U.S. Constitution.

Daniel will help us understand the legal foundations of Humphrey's Executor, whether its framework can withstand today's political and judicial scrutiny, and also discuss the practical consequences of a potential shift in the court's approach to presidential removal authority. Before we begin, please note that the positions, views, and ideas advanced by speakers on this podcast are representative of themselves alone and cannot be fairly attributed to the Administrative Law Review, Washington College of Law, the American Bar Association, nor any of the organizations that the speakers may be affiliated with.

### **Victoria Paul (02:08)**

Dan, thank you for joining us today. To set the stage, let's start with Humphrey's Executor. This case is often cited as a pillar of independent agency structure. Could you walk us through the court's core reasoning in this decision and its constitutional underpinnings?

### **Daniel Wolff (02:22)**

Yeah, well, first, thanks for having me. ~ It's an honor. And I will say for myself that I am a practicing lawyer. So, you know, the comments that I'm going to offer here are sort of observations and hopefully from a practical point of view, I am not offering my own, you know, sort of constitutional theories. I want to answer these questions with an eye toward explaining, you know, how we got here and what this means, but not offer strong opinions as though maybe if I were a professor, but it does, really starts with Humphrey's Executor in terms of current the current discussion over the unitary executive theory. But that case concerned the removal of an FTC commissioner by FDR. This was the beginning of the New Deal. The FTC had been created several years earlier by Congress as a multi-member commission with sort of an important function in commerce. But the positions of the commissioners were set for a term of years. And the removal of those commissioners was conditioned for what we now

think of as for cause removal. The goal was to have it be independent or apolitical, or at least not as political as the cabinet level departments. So that was the basic structure and it had some analogs at the time, like the Interstate Commerce Commission. So it wasn't like it was out there all by itself, but it was one of the early so-called independent agencies. Independent agency is not itself a term in the Constitution. The concept

flows directly from the removal provisions that give the agency heads of these bodies, whether it's multi-member bodies or single head bodies, protections from political influence. And that was the whole point. But FDR, and this is, you know, in the case, it's cited that there was this correspondence between FDR and the commissioner. And FDR said, look, I don't think we have the same vision for what the FTC should be doing. So I want you to step down. when the commissioner refused, he was terminated.

And so it resulted in a lawsuit that was not brought in, you know, in Article III court. It was brought in the Court of Claims. It was basically for damages, for lost wages. And it went up to

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the Supreme Court and, you know, the decision was that the FTC was set up to be not part of the executive branch. In fact, the court goes some length, and this was an opinion by Justice Sutherland, to explain that this was not an executive function. This was quasi-judicial, quasi-legislative, wasn't really performing anything more than sort of nominal executive functions.

And that was important. It was important then, and we can talk about this a little bit later, but it becomes important to how Humphrey's Executor is viewed today in terms of what it actually means. So, but on that basis that it was not performing an executive function, the court said it's perfectly fine for Congress as the lawmaking body to restrict removal for certain for-cause provisions. There's nothing wrong with it. And if the president terminates, then in that case, compensation was authorized to make up for the loss of pay.

#### **Victoria Paul (05:12)**

Can you define for our audience what the unitary executive theory is and the constitutional provisions that support or inform it?

#### **Daniel Wolff (05:22)**

Yeah, you'll get different definitions from different people, but I think a sort of a consensus view, the core unitary executive theory is that the Constitution places executive power in a single person and that person is the president. And the president gets to decide every high level official, principal officers who execute the law on his behalf as agents of the president. And the two places you would look are in Article 2, Section 1 which says, and I'm just going to quote it, the executive power shall be vested in a president of the United States of America. So that's what people refer to as the vesting clause. And then if you look at section three of article two, it says, among other things, he shall take care that the laws be faithfully executed and shall commission all the officers of the United States. And the reason why people look at the take care clause is because the theory goes that

If there is someone that Congress places in the executive branch, whether it's an FTC commissioner or an NLRB board member or what have you, that is not removable at will by the president, then you run the risk of that independent, either single agency head or multi-member body acting as a body acting inconsistently with the president's authority.

So just imagine if the president of the United States has a perspective on antitrust law or competition law, but the FTC voting as a multi-member body has a different position. Then you would have a conflict between the president and the FTC and those that strongly to the unitary executive theory would say that's not consistent with either the vesting clause or the take care clause because you're impeding the ability of the president to take care and the way that he views or she views, hopefully some future White House, how policy should be set. And again, I want to stress for purposes of this podcast that this is not unique to this president. Lots of presidents have looked at asserting unitary executive and look, FDR was an example of that. He said quite bluntly to the FTC commissioner he was trying to get rid of, we don't see eye to eye. I want you gone.

So no one should view that what's going on now as unique. Ronald Reagan had a very, I think, strong view of unitary executive. Now the difference is Ronald Reagan didn't act on it in the way that President Trump is acting on it. I think Reagan was influenced at the time both by his advisors and probably Humphrey's executive was still thought of back in the early 80s as holding strong.

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And like other principles of administrative law, whether you're talking about Chevron deference or otherwise, know, the administrative law canon has been chipped away in big part over the last couple of decades. So I think President Reagan was facing a different, let's say legal climate than President Trump is. And look, I think President Trump is just recognizing that there's an opportunity here. And I know I'm going long-winded on this question. You just wanted to know what unitary executive was but I do want to fit this moment into context that it's not as though President Trump is making any of this up. He's taking advantage of, think, what everyone on both sides of the question would recognize as an opportunity, because the decisions of the Supreme Court, which I know we'll get to over the last, say, 10 years, have certainly laid the foundation for the knockout punch.

### **Victoria Paul (08:54)**

We appreciate the context and really offering this is something that has been discussed for years in interpreting the president's ultimate power over the executive branch. So thank you.

### **Sophia Navedo (09:04)**

So as you mentioned, the court made a distinction between executive officers who can be removed at will and quasi-legislative or quasi-judicial officers whose removal may require a cause. In today's political and judicial climate, does that distinction still hold or are we witnessing a shift towards a unitary executive theory?

### **Daniel Wolff (09:21)**

First of all, think, you in some version we've always had the unitary executive theory. I it's as old as the country itself. There has been a debate from 1789 forward as to what the right lines of demarcation are between the three branches of government. But the answer to your question is, I don't think it holds. And that's not my opinion. I think the reasoning of Humphrey's Executor is anachronistic and it doesn't have a whole lot of life left into it in this day and age. In terms of what the court actually said,

It said at the time that such a body, and it was referring to the FTC, cannot in any proper sense be characterized as an arm or eye of the executive. And I just don't think that would carry water in 2025. I think anyone would look at the FTC and frankly, all of the independent agencies and say they're all carrying out in large measure executive functions. And there's only one place in our constitutional system for them. And that's the executive branch that sits under neath the president. really I think of the vesting clause as the dominant clause.

If all executive authority is vested in the office of the president, then that really anchors the unitary executive theory because it's hard to imagine, to those who would espouse the unitary executive theory, it's hard to imagine why if the constitution, which is our governing document, gives all executive authority to the president, how does that not include the right to remove officers from their position?

And so going back to, does the difference between, as Humphrey's executive put it, the difference between executive functions in quasi-judicial or quasi-legislative hold up? I think the answer is no. And in fact, even in more modern Supreme Court jurisprudence, for example, in Morrison, which was decided in the late 1980s, it sort of cast away the Humphrey's executive reasoning. And then there, the court was looking at the Office of Independent Counsel and decided that as an inferior officer, it was protected, but not really

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for the reasons set out in *Humphrey's Executor*, because it was recognized that the office performs executive functions. The real question is, does the performance of that office and the inability of the president to remove the officer from that office impede the ability of the president to run the executive branch to its fullest authority? So I don't think the rationale of *Humphrey's Executor* survives with respect to modern Supreme Court jurisprudence.

And I don't think if we just look at the FTC itself, that *Humphrey's Executor* gives a whole lot of hope for it being upheld on those grounds. I mean, there may be other reasons and I don't want to presuppose. mean, I know that we will talk about the fate of *Humphrey's Executor*. There may be other reasons to find that the office of these so-called agency heads of independent agencies should be upheld as functions of law, as the acts of Congress. But I don't think the rationale of *Humphrey's Executor* is going to be what saves the day for them.

### **Victoria Paul (12:13)**

Can you clarify or illustrate the difference between quasi-legislative and quasi-judicial functions versus executive functions that agencies may be seen to execute today?

### **Daniel Wolff (12:25)**

I think what Congress was driving at is that Congress had created a body, you know, to go out and investigate competition and to make findings. And that's the quasi-judicial. Make findings and then make rulings based on those findings. And that's the quasi-legislative. You know, part of what the court was dealing with in 1935 was a decision from, you know, 10 years earlier, the *Myers* decision, which was decided by Chief Justice Taft and concerned the postmaster.

The *Myers* decision is a pretty strong endorsement of unitary executive theory. It's also an exegesis on ~ constitutional law. And so if one really wants to study up, you could read the *Myers* decision, and I'm not saying that's the only place to look, but it is itself a piece of academic writing. It's a piece of scholarship. And so in 1935, *Humphrey's Executor* had to distinguish *Myers*. And frankly, it didn't like the outcome.

So Justice Sutherland was looking for a different way to explain it. And it said, well, look, the postmaster is purely executive, but that's not what we have with the FTC. The FTC is, and use the words, quasi-judicial or quasi-legislative. And it said it in multiple ways. I read a passage earlier how it sort of was emphatic, could not be characterized as an arm or an eye of the executive. Now,

I just don't think that that reasoning would hold up in 2025. And again, I'm not the FTC expert myself, but the FTC in carrying out its functions does very much execute laws as assigned to it by Congress. And again, the constitution doesn't speak of independent agencies. speaks of the executive branch.

Then there's obviously agents of the president carrying out the functions on behalf of the White House. Again, I'm not trying to frame up for any outcome-oriented reason the reasoning of *Humphrey's Executor*, but I do think that Justice Sutherland was trying to reason in a way that could get the outcome that that court wanted to not have to take on Chief Justice Taft's decision head on that had been decided only less than 10 years earlier in *Myers*.

But I just don't think that anyone could really with a straight face say today that the FTC or

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really any of these agencies aren't performing the actions of the executive branch. I mean, they're not part of Article III courts. They just aren't. And they're not part of Congress. They just aren't. And so there's really, and I think this was Justice Thomas's concurrence in *Seila Law*. You know, there's really no other place to look. You only have the executive branch.

So inherently anything within the executive branch is executing the laws. So really it's like you're in a cul-de-sac, you don't have any place to go.

### **Sophia Navedo (15:22)**

As identified, the Constitution grants the President significant authority over executive branch officials. How do the recent firings of independent agency commissioners under the Trump administration align with or challenge the President's constitutional powers, especially regarding independent agencies?

### **Daniel Wolff (15:39)**

Well, I mean, if we just look over the last month, this administration's removal of various folks, whether we're talking about the EEOC or the NLRB or more recently the FTC or even the Office of Special Counsel, which was the Dellinger case. I mean, all of this obviously very much aligns with this president's view of its authority and the Solicitor General Sarah Harris has penned now several letters to Congress informing it that it will not defend the sanctity of these positions because this administration views consistent with the unitary executive theory that all officers are subject to the removal authority of the president.

If you believe in a strong Congress, then people often come at this question from the perspective of Congress's encroachment into the executive branch. But that's just a perspective. You can easily turn that around and say, well, if we have three equal branches of government, then why aren't we viewing this unitary executive theory as an encroachment on Congress? And the reason for that is if you view Congress as being the lawmaking body, then if just take the take care clause, the president must take care to execute faithfully the laws. Well, he executes faithfully whatever the law is that Congress hands to him as the executive branch.

So it aligns with this administration, but it certainly contrasts with ... I think the text of the law and then also those who don't endorse the unitary executive theory. Those who believe that, you know, as I was saying, the president must take care to execute whatever it is the law that whatever the law is that Congress gives to the president.

And so if Congress in its lawmaking capacity, passes a law that creates these agency heads and gives them terms ... of service with ~ removal protections, then that's the law. And it doesn't violate or impede the president's authority to be the chief executive officer of the executive branch, because all he's ever been allowed under the constitution to do is to execute the laws as given to him. So.

That's for the person who wants to pick up the torch and sing the praise of a strong Congress. But then there are those who say, yes, Congress can pass a law, but once it creates a body that becomes part of the executive branch, it must pass the torch to the president to execute. You know, it's really a matter of perspective as to whether these current terminations are consistent with the Constitution because what the Constitution requires

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is in the eye of the beholder. mean, there is so much good scholarship in this area. mean, you can have a, every Stephen Calabresi thrust, can have a Cass Sunstein and it goes back again to the founding that this question has been debated. The answer to the question is in the eye of the beholder. But just to sum it up, this administration made clear from day one that it had a strong view of the centralized authority of the president and it was going to assert that view at every opportunity.

I'll just give you a recent example. I observed three hours of argument earlier this week in the consumer research VFCC case at the Supreme Court. That case involves the non-delegation doctrine, another hot button topic. But in the course of defending the FCC's authority against a charge of non-delegation by Congress, the Solicitor General, Sarah Harris, who is doing a very commendable job defending the FCC and its authority as given to it by Congress in response to a question by Justice Kavanaugh when he asked, should it matter to us for non-delegation purposes, whether this is a so-called independent agency or a cabinet level agency?

Sarah Harris, without breaking stride said, well, we don't actually think of the FCC as having for cause removal protections. So in our view, There is no distinction between the FCC and any other agency and therefore that question really isn't material to the outcome of how you should decide this case. But I raise that as an anecdote because this administration is being very careful no matter what the forum they are in to take the position that the president is absolute and has authority to remove at least officers. And we can talk about how far down that goes. Does it go to inferior officers? Does it go to civil servants?

But if we're at least talking about principal officers, this administration has been consistent. And I think we should expect it to continue to be consistent until the courts say otherwise, that the president has absolute removal authority.

#### **Sophia Navedo (20:30)**

Honestly, the anecdote absolutely made sense. do really appreciate you saying it's an eye of the beholder because at least a lot of things that I've been reading. I think it is very much a perspective.

So with that said, let's turn to what's at stake if Humphrey's Executor is overturned. With a conservative majority on the Supreme Court, many legal experts believe that Humphrey Executor is at risk. How likely do you think it is that the court will overturn it? What factors would the court consider in deciding whether to do so?

#### **Daniel Wolff (20:57)**

Well, I'm already on record, I think, in at least two different ~ media placements as saying I think it will be overturned. So I'm not going to back away from that. And we can talk about the factors. do think that whether the answer to both whether and when are still open to question.

But I do think that the Seila Law decision from several years ago really lays the foundation. know, in terms of likelihood, you know, I've already expressed and answered some earlier questions that I don't think the rationale of Humphrey's Executor holds up in 2025. I don't think that the notion that the FTC does not exercise executive power is something that really anyone on either side of the debate would defend. Maybe, I actually shouldn't, I shouldn't say

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nobody, but I think probably very few would say it doesn't execute executive power. I also think if you look at the more recent decision from the Supreme Court, really they're looking at does the constraint on removal impede the president's ability to run the executive branch. I think that's the more key consideration.

And again, I think if you'd think of a body as just take the FTC that has some heft, certainly in competition space in terms of regulating within the bounds of accepted antitrust behavior or competition behavior.

You know, I think the FTC would be seen as having fairly sizable authority. And if the president couldn't control that, then that would impede the president's ability to run the government. So just kind of think the cake is baked. And it's just, it's really more a question of when it's going to happen, which brings us to sort of current events because we have one of the cases, the Wilcox case, which involves the NLRB board member. Certainly there's that.

There's as of this week, a lawsuit brought by the terminated Democrat FTC members. You we know that Dellinger, who was the special counsel had brought a case, but he, after the DC circuit stayed the lower courts preliminary injunction, he dropped his case. But I think that the NLRB or FTC cases and probably both of them taken together will be what get up to most likely get up to the Supreme Court and be the test case.

But in terms of factors, what will influence that? Well, obviously constitutional scholarship. And like I said, the Myers decision is a piece of scholarship. Frankly, think Judge Howell's decision in the Wilcox case is a piece of scholarship, really a fantastic piece of writing. Again, without scoring whether it's right or wrong on the wall, it's just a really good 45 page opinion that's just really, really good, especially considering how quickly she had to write it.

Stari decisis factors into this, although we've seen with this court, when a majority doesn't feel like earlier courts have gotten the constitution right, stary decisis hasn't really been a strong bulwark against overturning precedent. So, I don't put too much weight on stary decisis, but it's certainly a factor. But then I also think current events are a factor. So, this goes to the not question of whether, but the question of when.

The courts are supposed to take the cases presented to them and not really look at current events, but we know, I mean, we just know as an empirical matter, I think we would all hope that the justices read the news, whether it's the Wall Street Journal or the Washington Post or the New York Times. And we know that Chief Justice Roberts now has famously commented on a remark of President Trump calling for the impeachment of certain judges. so we know they're paying attention. And why do I raise that?

Because I think, and maybe not with all of the justices, most of them sort of desire temperance. While I do very much think that a majority probably sees Humphrey's executive as teed up for being overturned, I don't know if now is the right time, especially in the wake of the immunity decision, the presidential immunity decision last year, and the president taking aim through executive orders at law firms and calling for the impeachment of judges for decisions he doesn't like. I just don't think that that's helping the cause here.

Again, it may not influence the ultimate decision, whether it's this year, two years or five years or 10 years from now, but it may influence when the court takes the case because the court



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doesn't have to take the case. For example, if we just take the Wilcox case, which is on appeal to the DC Circuit from the district court, let's say the DC Circuit upholds Judge Howell's opinion. Court could leave it at that and just let the DC Circuit for now have the last word. And they just keep their hands clean of this. A lot of people thought that they wouldn't take

Trump's immunity case last year, they would just let it stop with the DC circuit. And a lot of people are wondering why they did take it. But that's always a mechanism that the Supreme Court has is even though it's a super important question that everyone knows the Supreme Court should and eventually will take, it doesn't have to take it now. And then the last factor I'll say in terms of how they might be able to deal with this, again, I'm just theorizing here.

But if you look at the Myers decision and you look at the Humphreys Executor decision, you look at multiple other decisions like the Shurtleff decision from 1903, which concerned a merchandise appraiser. All of those were cases in the Court of Claims, which we now call the Court of Federal Claims, which is an Article I court created by Congress for purposes of deciding damages cases under the Tucker Act against the United States.

I'm not proposing an answer to the jurisdictional question, but one way the court could view this is that even if it agrees that these terminated members of these independent agencies have a right to their position by law and that Congress has a right under the Constitution to engraft for-cause removal protections onto these positions, the remedy, you know, we have to remember there's liability and then there's remedy.

And remedy doesn't necessarily lie in Article III courts to get an injunction. The remedy might lie in the Court of Federal Claims to get back pay or forward pay depending on, you know, to the end of the term. And that's another way for the court to deal with this. I don't know if the court will deal with it that way. I'm just saying that's another way for the court to deal with this is to view this not as a right to injunctive relief as a remedy, but a right to damages. Because I think that this court, a majority of this court at least, even if they wanted to agree with Congress that they could put on four cause restrictions.

I think would be very uncomfortable saying that the president doesn't have the right or has to, as a matter of injunction, take back somebody that he has already terminated. And so that goes to the remedy. And it's just another factor here that I think plays into how the court could deal with these cases.

#### **Sophia Navedo (27:25)**

Thank you for mentioning, I guess the timeline, because that was actually one of my follow up questions just out of curiosity what you thought maybe the strategy was, addressing this now or potentially waiting a few years would make an impact. And do you think it is worth then just kind of staying silent on the matter or addressing it sooner rather than later?

#### **Daniel Wolff (27:43)**

Well, so it's not for me to say what's worth it or not to the Supreme Court. What I'm commenting on here is a court that is paying attention to current events as we know it is, a court that is mindful that this administration is moving very quickly to dismantle the administrative state. And again, that comment doesn't come with judgment. It's just what's happening. And frankly, again, it's doing it opportunistically because it has been enabled in large measure by a lot of more recent decisions of the Supreme Court.

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Knowing all that, the Supreme Court may just want to say, you know what, we're going to take a pause here and we're going to let the lower courts sort of have at least the current last word. And so we're not going to get involved in this cycle and we're going to wait for another cycle. And by cycle, maybe that's, it's not necessarily a four year cycle. Maybe it's a two year cycle. Maybe it's after Congress.

Maybe it's after the midterm elections of 2026, or maybe it is after the next election. So I don't know what they'll do, and I don't want to presuppose that I know what they should do because I'm not trying to make a policy argument here. I'm just observing that there are structural mechanisms in terms of how the Supreme Court decides, takes and decides cases that could allow them to avoid getting their toes wet now.

And of course, some of that might change depending on the outcome at the DC Circuit, especially in the NLRB case. You know, if the DC Circuit overturns Judge Howell. So now board member Wilcox is out of a job. That may influence as well whether the court takes the case or not. So, you know, the posture of the case coming to it from the Circuit Court also makes a difference. Okay. The ultimate point the answer to your question is nothing compels the Supreme Court to hear these cases, you know, now or ever. I mean, I think they ultimately will because they see an institutional responsibility to decide these weighty, meaty questions, but they don't have to do it now.

#### **Victoria Paul (29:40)**

So, the center of the removal power debate is, as you identified, balancing executive control with institutional independence. So weighing the impact of a decision on the issue, if the president can remove independent agency heads at will, how might that affect regulatory stability and the agency's ability to function without political interference?

#### **Daniel Wolff (30:04)**

Well, I'll take the latter question first because that's super easy. The whole point to this, the whole point to the unitary executive theory is that it's all political and there can't be independence. That is the essence of the theory. So if the president is allowed to, you know, proceed with removing the folks that he views as antagonistic to his administration, then it absolutely upsets the legislative prerogative as articulated through the statute itself.

And so, we get rid of that independence. I don't think there's any debate about that. I mean, that's why people feel so strongly about this. And you can argue as a policy matter whether that's good or bad, but we don't interpret the Constitution. I maybe at one point in history, or at points in history that we have, but no one interprets the Constitution based on what makes good policy. The Supreme Court's going to interpret the Constitution on what it views the Constitution to say.

So, you know, whether it's good or bad policy will go by the wayside. The whole point from those that espouse the unitary executive theory is to make this political. That's the point. Everything is political. Everything rolls up to the president. And that was true in FDR's day and Humphrey's Executor, or in the actions leading to Humphrey's Executor. And that's true now.

So now if the president is not ultimately decided by the Supreme Court or at least in the short term a majority of the lower courts, if it's seen that the president doesn't have this authority,

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then that will maintain the status quo because I should say at least since Humphreys Executor the status quo has at least for these multi-member bodies has been that they can exist and be independent and they can vote in favor of policies that don't necessarily have the blessing of the president.

In terms of regulatory consistency, again, I think that's in the eye of the beholder. I think someone who espouses unitary executive would say it would be better for consistency to not have removal protections because now we're all rowing in the same direction. But for those who see consistency as being consistent with how the law has been carried out for at least 100 years, then they would say that this is inconsistent because now we're going from a status quo anti of regulatory independence for these independent agencies who don't bend to the will of the president because they have that safeguard from political influence.

Well, if you take that political influence away, they no longer have that safeguard. So now, of course, they're going to act in a way that's consistent with the president. We see that, look, we see that with the current FTC. I've said already, I'm not an FTC expert, but I, you know, I read enough news to know that the current chair of the FTC is on board with the Trump agenda and...

and therefore is already rowing in the same direction. But the whole reason to get rid of the two Democrat appointees was to make sure that that view is solidified at the FTC and the same as playing out in these other agencies.

### **Victoria Paul (32:58)**

That's a great point that the unitary executive theory rests on the principle that there ought not to be that independence. I don't think I thought about it that way.

So if a court does move to expand the president's removal power, what mechanisms, if any, could be put in place to prevent excessive politicization? Are there any legislative or structural reforms that could help ensure accountability without impeding on this executive power that the president would have?

### **Daniel Wolff (33:29)**

So I first just want to make a comment on the question in terms of expanding the removal authority. Again, there's nothing in the Constitution that talks about removal authority. I think people on both sides of the debate, think one would endorse the question as phrased, expanding removal authority. The other side would say, wait a minute, there's no removal authority to expand.

The only question is whether it exists or not. So if it exists, which I think to the question would be framed as the expansion of removal authority for those who espouse unitary executive theory, it has always existed. But for the removal authority, i.e. the unitary executive theory to be upheld by the court, there's really nothing Congress can do, right? Because that's what the court will be overturning.

The structural safeguards that exist as a function of statute will by virtue of ~ one or more decisions endorsing the removal of these multi-member commissioners or board members, will to say both with respect to the laws at issue specifically, but also as a matter of staryy decisis for everything else that sort of falls into the same camp that Congress can't put in

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structural protections.

And again, it's the flip side of unitary executive. The whole point of it is that everything is political. If the Supreme Court endorses that view, then it will also be endorsing the view that there's nothing Congress can do about it because that's the separation of powers demarcation. There's a constitutional limitation on how far Congress can go.

Now, in terms of other mechanisms, though, I mean, look, the best, although it's also the hardest, structural mechanism is a constitutional amendment. Write it into the Constitution, whichever way you go, right? If you want to recognize removal authority. And I say whichever way you go because, you know, even if the Supreme Court sides with the current administration, that's only good until the majority of the Supreme Court is wearing a different color vest and overturns that precedent, right? The only way to engrave this as a matter of durable law is to put it in the constitution, either write into Article 2, the absolute right of removal, or write it a different way, write it into Article 1, that among its enumerated powers is the right to set limits on the removal authority of the president of bodies created by Congress. Is that going to happen? I don't think in our lifetime.

But what are the other structural mechanisms? Well, they already exist and really, know, writ large, it's democracy, big D democracy. President is subject to four year election cycle. Congress, the House of Representatives is subject to a two year election cycle. Senate, six year election cycle. Look, if this is reported on, and frankly, that's another structural mechanism, the fourth estate, the media, it absolutely is essential that they are the ultimate government watchdog and they have to be able to message.

It's a lot harder these days, right? When you just, everything is so saturated, and it's mostly on the internet now. Who's controlling how people are getting their news? That becomes super important. You know, I don't want to overlook that there is this little thing called impeachment, but you know, obviously in the current climate, that's not going to be invoked because the same party controls both house of Congress, but in some future, in some future, you know, administration, there might be a hostile Congress and where they might threaten impeachment.

So there's a lot of both existing mechanisms and mechanisms that could be enacted. But the fix here is not congressional. If the Supreme Court endorses the unitary executive theory, then it is saying Congress, you have no role here, which is, you know, it's not good for those that believe in a strong Congress. But even now, it doesn't look like Congress really believes in itself. So—

### **Sophia Navedo (37:14)**

Not a lie, a great observation.

We definitely thank you for being here. The Journal has been really happy to have a lot of incredible guests over the season, but we've been really fortunate to get perspectives like yours to just make sure that our audience has as much information and insight as they can.

### **Daniel Wolff (37:33)**

I'm glad you guys are doing this. It's a worthwhile topic. I appreciate the opportunity to be on your show.

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I look forward to listening.

### **[TRANSITION MUSIC]**

#### **Sophia Navedo (37:45)**

We'd like to once again thank Mr. Wolff for sharing his insights today. We enjoyed hearing his perspectives on the president's removal power, and we hope you did too. As discussed,

Humphrey's executive has served as precedent for nearly a century, ensuring that certain regulatory bodies maintain independence from direct executive control. However, we're left considering how changes to removal power affect agency accountability, stability, and governance, and wondering what legal doctrines may emerge if the court decides to overturn Humphrey's Executor. As administrative law continues to adapt and morph, the courts will play a decisive role in shaping its trajectory.

### **[OUTRO MUSIC]**

If you enjoyed this episode, please take a second to leave a review and rating on your favorite listening app and be sure to subscribe and check out our show notes for links to relevant resources.

We'd love to cover your questions on administrative law, so let us know what you'd like us to cover this season. Stay informed, stay engaged, and as always, thank you for tuning into A Hard Look.

### **[OUTRO MUSIC FADES OUT]**