Presidential Power to Fire

By Paul Engel

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- Can Congress make executive agencies that are not subject to the President?
- Is the President the sole holder of the executive powers of the United States?
- Do independent agencies alter the very structure of the United States?

I've talked before about the unitary executive. However, a recent case before the Supreme Court brings into question not only whether or not the President has the power to fire employees in the executive branch, but the very structure of the federal government.

During oral arguments, both the justices and attorneys spent a lot of time focusing on previous cases and hypothetical situations. Today I will focus on three core constitutional questions, stare decisis, the alteration of government, and the separation of powers. We start with arguments for the petitioner, Solicitor General Sauer for President Trump.

GEN. D. JOHN SAUER, Solicitor General

GENERAL SAUER: Mr. Chief Justice, and may it please the Court:

In Seila Law, this Court held that the President's power to remove and thus supervise those who wield executive power on his behalf follows from the text of Article II, was settled by the First Congress, and has been confirmed by precedent, including at least nine decisions of this Court from Ex Parte

Hennen through Trump against United States.

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As I pointed out in the beginning, much of the arguments revolve around pervious court decisions. I will touch on some of them in the section on Stare Decisis. Probably the most cited case is called Humphrey's Executor.

Humphrey's must be overruled. It has become a decaying husk with bold and particularly dangerous pretensions. It was grievously wrong when decided, and cases from Morrison to Trump have thoroughly eroded its foundations. The Court has repudiated Humphrey's reasoning and confined it to its facts, but it continues to generate confusion in the lower courts and it continues to tempt Congress to erect at the heart of our government a headless fourth branch insulated from political accountability and democratic control.

As Justice Thomas wrote in Seila Law, Humphrey's poses a direct threat to our constitutional structure and, as a result, the liberty of the American people. And, as Seila Law held, the modern expansion of the federal bureaucracy sharpens the Court's duty to ensure that the executive branch is overseen by a President accountable to the people.

I welcome the Court's questions.

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Is the Humphrey's decision a "decaying husk" that has been repudiated by the Supreme Court? Then why is this argument still being made? Why is a decision Justice Thomas claims is a direct threat to our constitutional structure still at the heart of an argument? More will be revealed as we review the questioning.

Before we go to questioning, let's hear from Amit Agarwal arguing the respondent's side.

AMIT AGARWAL, ESQ.

1. AGARWAL: Mr. Chief Justice, and may it please the Court:

The President's constitutional duty to execute the law does not give him the power to violate that law with impunity. But Petitioners claim that the President was free to fire Commissioner Slaughter without cause in violation of the FTC Act as authoritatively construed by this Court. And, they urge, even if that firing was illegal, there is nothing that any court anywhere at any time could do to remedy that violation. The district court correctly rejected both arguments, and its judgment should be affirmed.

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This question of the President's duty to execute the law is both fundamental to this case, and to showing the misunderstanding of the law by attorneys and justices alike.

On the merits, multi-member commissions with members enjoying some kind of removal protection have been part of our story since 1790. So, if Petitioners are right, all three branches of government have been wrong from the start. Congress and prior Presidents have been wrong to jointly create early founding-era commissions and more than two dozen traditional independent agencies since 1887. And this Court was wrong to repeatedly bless those laws and to unanimously uphold the exact same removal provision at issue here in Humphrey's Executor almost a century ago.

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Except the legislation creating "Sinking Fund," as it was

eventually called, does not put any protection on the members empowered to spend the money. It does create a group, which many called a "commission," made up of members, not all of which are part of the executive branch.

That the purchases to be made of the said debt, shall be made under the direction of the President of of the said debt, shall be made under the direction of the President of the Senate, the Chief Justice, the Secretary of State, the Secretary of the Senate, the Chief Justice, the Secretary of State, the Secretary of the Treasury, and the Attorney General for the time being;

Stat 1: 186–87

Mr. Agarwal then moves his argument to history, precedent, and stare decisis.

Finally, stare decisis militates against overruling a century of precedent at this late date. The political branches are more than up to the task of finding reasonable legislative solutions that strike an appropriate balance. That kind of legislative solution is far preferable than abandoning a foundational precedent on which so much of modern governance is based.

I welcome the Court's questions.

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The justices had many questions for Mr. Agarwal about the ability of Congress to create agencies with different powers, conclusive vs preclusive, that would determine if they were under the control of the President or not. Mr. Agarwal frequently referred back to court precedent.

Since Mr. Agarwal is so interested in stare decisis, let's

start our analysis there.

Stare Decisis

Justice Sotomayor brings up a common fallacy in our jurisprudence, that age equals truth.

This Court even in Seila Law and all of the cases you've mentioned since have said that Humphrey's is good – is controlling law. You're asking us to overturn a case that has been around for over a hundred – nearly a hundred years, correct?
GENERAL SAUER: Ninety years, I believe.
JUSTICE SOTOMAYOR: Ninety years. What other cases have we overturned that have had a pedigree of a hundred years?

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First of all, Humphrey's is not law, it's a court opinion and nothing more. The Constitution vests the power to create law solely with Congress.

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

U.S. Constitution, Article I, Section 1

As General Sauer pointed out in his opening arguments:

Humphrey's Executor stands as an indefensible outlier from that line of authority. Its holding that federal agencies can exercise quasi-legislative and quasi-judicial powers that form no part of the executive power has not withstood the test of time. That holding was gutted and refurbished in Morrison, but this Court correctly rejected the refurbished version as providing an amorphous test with no limiting principle. Respondent now proposes a third update to Humphrey's, which this Court has already rejected as making no logical or

constitutional sense.

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According to the Solicitor General, the Humphrey's opinion has already been gutted by other court decisions. Perhaps it's time to put it out of our misery.

However, Justice Kagan seemed to imply that, since we've been doing it so long, the court shouldn't touch it.

JUSTICE KAGAN: But – but we can all admit that for – for – whether you want to call it for constitutional purposes, that in a real-world kind of way, that's what they're doing.

Now some people think that we should never have gone down that road, but that's what we're doing.

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My mother used to say, "Two wrongs don't make a right." The same thing could be said about courts. Letting a wrong continue just because it's been there a while, doesn't make it right.

Altercation of Government

Justice Sotomayor made quite an accusation while questioning General Sauer.

You're asking us to destroy the structure of government and to take away from Congress its ability to protect its idea that a – the government is better structured with some agencies that are independent.

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That is quite an accusation, attempting to destroy the

structure of government. Before we get into the details, I think General Sauer had the perfect response.

GENERAL SAUER: I think what – the fundamental alteration of the structure of the government was ushered in by Humphrey's, and then the Congress kind of took Humphrey's and ran with it in the building of the modern administrative state and the proliferation of independent agencies that are insulated from democratic control.

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It wasn't President Trump attempting to fundamentally alter the structure of government, it was the court in the Humphrey's decision. Congress then took and ran with it.

Sotomayor went on:

JUSTICE SOTOMAYOR: According to the laws that Congress makes, and that's the point Justice Jackson was emphasizing. What you're saying is the President can do more than what the law permits.

GENERAL SAUER: I think I would repeat what I said before. There's a strong line of precedent recognizing that the text and structure of the Constitution confer on the President the exclusive and illimitable power to remove executive officers and, as a result of that, Humphrey's should be overruled.

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First, let's look at Justice Sotomayor's statement that the President wants to do more than the law, or at least the laws passed by Congress, allow. Except laws made by Congress are not the only laws of the land.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or

which shall be made, under the Authority of the United States, shall be the supreme Law of the Land;

U.S. Constitution, Article VI, Clause 2

Apparently the "constitutional law" class that Justice Sotomayor took in law school did not cover the actual language of the supremacy clause. The Constitution is the supreme law of the land. Only laws of the United States made following the Constitution are also considered supreme. So when Congress passes a law that violates the Constitution, not only does it not supersede the Constitution, but according to Alexander Hamilton, it's not valid.

No legislative act, therefore, contrary to the Constitution, can be valid.

Federalist Paper #78

Is Justice Sotomayor suggesting that the President is bound by an invalid and illegal law? General Sauer points to precedent that all executive power is vested in the President. A better argument would have been the actual language of the supreme law of the land, the Constitution.

The executive Power shall be vested in a President of the United States of America.

U.S. Constitution, Article II, Section 1, Clause 1

And it wasn't just Justice Sotomayor. Justice Alito apparently could not comprehend the Constitution either.

JUSTICE ALITO: Well, I mean, there's an argument that the Constitution doesn't say anything about the President's removal authority and, therefore, Congress should have free rein in that area – in that – on that question. When did the Court cross that bridge?

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[Arguments]

Except the Constitution did not create a government that can do anything it wants as long as it's not prohibited. It created three branches and listed specific, enumerated powers for each, and that is all the power it has. The fact that the Constitution didn't say the President has removal authority doesn't change the fact that it did not grant to Congress the power to execute laws.

Justice Kagan brought up another important question that most people haven't talked about.

JUSTICE KAGAN: Well, let me ask you how you would justify and — and how you would justify consistent with the proposition that all executive power is vested in the President.

Let's start with Article I courts. How would you justify keeping those courts?

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Except there is not such thing as an Article I court in the Constitution.

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. Constitution, Article III, Section 1]

Congress doesn't have the power to create so-called Article I courts, only inferior courts under Article III. That means that the legislative acts that created these fictitious courts are invalid and void. Meaning not only do those courts not legally exist, but their decisions are at best meaningless and at worst a violation of federal law, i.e., the deprivation of rights under color of law.

Justice Jackson added her ignorance to the questioning of General Sauer as well.

You're asking us to infer this based on the Constitution's structure, and I don't know why we'd make that inference when the power to create agencies and set everything up lies with Congress.

GENERAL SAUER: I agree with very much of what you said, and so did James Madison. So he made the point in the Decision of 1789 that Congress has authority to create the – the office and give it – set its emoluments and structure that office. But, once Congress has done that, its power there stops.

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Yes, the President and General Sauer are asking you to fulfill your oath of office, and support the Constitution of the United States. What a concept! Apparently General Sauer needed to give Justice Jackson a basic civics lesson. Congress creates the agency, defining its power and structure, and that's it. After that it's up to the executive branch to execute that law, as long as it doesn't violate the supreme law. Apparently, she did not learn the lesson.

And I don't understand why it is that the thought that the President gets to control everything can outweigh Congress's clear authority and duty to protect the people in this way.

GENERAL SAUER: Congress has a broad authority in structuring the federal government, but what it lacks authority to do is to create these headless agencies, agencies who have no boss and are not answerable to the voters –

JUSTICE JACKSON: Why?

GENERAL SAUER: – and confer on them broad –

JUSTICE JACKSON: Why? Why does it lack the – the Constitution

does not say that Congress cannot create an independent agency, so what is it about your argument that requires us to reach that result?

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While the Constitution doesn't specifically say Congress cannot create an independent agency, it doesn't say it can. And since Article II is quite clear that the executive power is vested in the President, Congress has no authority to create an agency to execute the law outside of his control.

JUSTICE JACKSON: The text of the Constitution includes the Necessary and Proper Clause, which gives Congress the authority to determine, set up, et cetera, these agencies to protect the will – the – the interests of the people.

So we have a conflict, I guess, and I'm just wondering why the President's interests in the way that you describe them win.

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The only conflict in that statement is between you and the Constitution, Justice Jackson. The Necessary and Proper Clause reads:

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

U.S. Constitution, Article I, Section 8, Clause 18

General Sauer's response I think made the point well.

GENERAL SAUER: It is not proper under the Necessary and Proper Clause for Congress to peel away executive power from the President and give it to someone who's not answerable to the

voters.

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Meanwhile, Justice Jackson points to the real problem with the position represented by Mr. Agarwal.

JUSTICE JACKSON: Because Presidents have accepted that there could be both an understanding of Congress and the presidency that it is in the best interest of the American people to have certain kinds of issues handled by experts who – and I think you were – in your colloquy with Justice Kagan, you identified the fact that these boards are not only experts, but they're also nonpartisan. So the – the seats are actually distributed in such a way that we are presumably eliminating political influence because we're trying to get to science and data and actual facts related to how these decisions are made.

And so the real risk, I think, of allowing non – of allowing these kinds of decisions to be made by the President, of saying everybody can just be removed when I come in, is that we're going to get away from those very important policy considerations.

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The problem is, these agencies, not to mention the logic behind them, are anathema of both a constitutional republic and a government of, by, and for the people. She is claiming that the people be governed not simply by their elected representatives, but by an unelected class of so-called "experts." Not only is that unconstitutional, but an abandonment of the republic. Just because some presidents and congresses have done it does not make it right, nor make it legal.

Separation of Powers

Lastly, let's look at some of the questioning around separation of powers.

JUSTICE KAGAN: General, would you agree with me, and I hope you will agree with me because this seems to be the one thing on which everybody can agree, that if there's one thing we know about the founders, it's that they wanted powers separated. They wanted the executive, the legislative, the judicial. They didn't want them all in one place. They wanted them separated across the government, across the different branches.

Easy enough to agree with, right?

GENERAL SAUER: I agree, with an important caveat that the Court said in Seila Law that the one, you know, sort of exception to all this division was the presidency itself, where the Framers consciously adopted a unified and energetic executive.

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Yes, the Framers of the Constitution wanted the executive, legislative, and judicial powers separated, which is why creating agencies with executive or judicial powers under the sole control of Congress violates said separation of powers. I think General Sauer was reacting to another argument about the fact that both Congress and the courts have multiple members while the President does not. He had a similar interchange with Justice Jackson.

GENERAL SAUER: The constitutional design sets up three branches of government. It forbids Congress from controlling what the executive branch does, and it also forbids Congress from shaving away the President's control over the unitary executive branch.

JUSTICE JACKSON: And what I'm – what I'm positing is that –

that Congress's decision here is not shaving away the President's control.

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Yet that's exactly what this type of legislation is doing: Claiming that someone other than the President controls the executive powers of the United States. As a matter of fact, as I pointed out in the section on Altercation of Government, Congress has shaved some of the judicial power from the courts as well. Speaking of the judicial power, Justice Sotomayor argued:

But you're putting at risk the independence of the Tax Court, of the Federal Claims Court, Article I courts. You're putting at risk the civil service. I don't see how your logic could be limited.

GENERAL SAUER: As to the non-Article III courts, we haven't challenged the removal restriction as to the non-Article III courts in this case.

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Except, as I've already pointed out, there's no provision in the Constitution for an Article I court, since the judicial power of the United States is vested in the Article III courts. That means that these so-called "Article I courts" are not just unconstitutional, but a usurpation of both the judicial powers and the Constitution of the United States.

Conclusion

What did I conclude from these arguments? Sadly, I think this case shows the abject failure of our legal system to educate its members on the supreme law of the land. The very fact that General Sauer needed to remind the court of this fact should

sadden all of us.

GENERAL SAUER: The President is going to have all the executive power, which is what the Constitution dictates. And the way you framed it there, I think, makes the separation-of-powers problems in the alternative view here even worse because you have just described these, you know, rulemakings and adjudications as really judging and legislating. If they really were that, which this Court has unanimously said they must not be, they cannot be, but, if they were that, then Congress is not just affecting the executive, it's – it's – it's creating junior varsity legislatures, which would be unconstitutional under Justice Scalia's dissent in Mistretta. It's peeling away adjudicative authority, you know, the power – the judicial power from – from Article III courts.

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Even here, the Solicitor General of the United States believes that the courts, and not the Constitution, are the supreme law of the land, that judges rule, and laws are secondary. This is evidenced by the statement that creating "independent agencies" with legislative powers is unconstitutional, not because it violates the language of the Constitution, but is the dissenting opinion of an associate justice of the Supreme Court.

Another example of the state of our legal system is a statement made by Mr. Agarwal regarding the Take Care Clause.

1. AGARWAL: It would – one textual basis in the Constitution for that would be the Take Care Clause of Article II, Section 3, which does require the President to take care that the laws be faithfully executed, and this Court could hold that in some – that that requires that the President have constitutionally adequate means of supervision,

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Mr. Agarwal just argued that, while the President is required to "take Care that the Laws be faithfully executed," just not the supreme law of the land. He claims the courts determine when and where he can exercise his executive powers, not the Constitution.

How far our legal system has fallen.

These so-called "independent agencies" expose more than just the question of a President's power to fire, but whether or not we are a republic at all. It seems there are those in all three branches of the federal government who wish to abandon their oaths and convert the republic into oligarchy of experts.

This case is about much more than a President's power to fire, but the very health and structure of the republic.

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