

Presidential Review: The President’s Statutory Authority over Independent Agencies

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Many presidents have been interested in asserting authority over independent regulatory agencies such as the Federal Trade Commission, the Federal Communications Commission, the Nuclear Regulatory Commission, the Securities and Exchange Commission, and the Federal Reserve Board. The underlying debates raise large constitutional questions, above all about the meaning and justification of the idea of a “unitary executive.” In the first instance, however, the President’s authority over independent agencies depends not on the Constitution but on a common statutory phrase, which allows the President to discharge the heads of such agencies for “inefficiency, neglect of duty, or malfeasance in office.” This phrase—the INM standard—is best understood to create a relationship of presidential review—and a particular remedy for legal delinquency flowing from that review. It allows the President to discharge members of independent agencies not only for laziness and torpor (inefficiency) or for corruption (malfeasance) but also for neglect of their legal duties, which includes egregiously erroneous decisions of policy, law, or fact, either repeatedly or on unusually important matters. Connecting this understanding to the Take Care Clause, we reject both a minimalist approach, which deprives the President of any kind of decisionmaking authority over policy made by independent agencies, and also a maximalist approach, which would treat the independent agencies as essentially identical to executive agencies in terms of presidential oversight authority. This approach has strong implications for how to understand the President’s supervisory authority over independent agencies. It suggests that he has such authority insofar as he is attempting to ensure against “neglect of duty,” but not if he is displacing their policymaking discretion.

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I. DOES THE PRESIDENT HAVE AUTHORITY OVER INDEPENDENT REGULATORY AGENCIES?

Does the President have authority over the independent regulatory agencies?¹ May he fire their members?² May he control the decisions of the Federal Trade Commission (FTC), the Nuclear Regulatory Commission (NRC), the Federal Communications Commission (FCC), the National Labor Relations Board (NLRB), the Federal Reserve Board, and the Consumer Financial Product Bureau (CFPB)?³ These are among the most fundamental questions in American public law.

Such questions are usually approached as a matter of constitutional law.⁴ The key text is Article II, Section 1, which vests “executive [p]ower” in one person:

1. For present purposes, we understand “independent regulatory agencies” to refer to agencies whose heads are not subject to at-will discharge by the President. For additional discussion, see generally Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163 (2013).

2. The defining decision, offering a qualified answer of “no,” is *Humphrey’s Executor v. United States*, 295 U.S. 602, 629 (1935). In the same vein are *Wiener v. United States*, 357 U.S. 349, 356 (1958), and *Morrison v. Olson*, 487 U.S. 654, 691–92 (1988).

3. See *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2192 (2020) (answering the question of control with a firm “yes” in the context of the CFPB, as a matter of constitutional law).

4. See *id.* See generally STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* (2008) (providing constitutional and historical analysis to the unitary executive theory); Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021 (2006) (discussing an early legislative construction of the Constitution regarding executive power).

“[A] President of the United States.”⁵ It is broadly agreed that the presidency is “unitary,” at least in the sense that the Constitution rejects a plural executive-by-committee, and that the “Decision of 1789,” resulting in broad presidential authority over executive agencies, is relevant to the discussion.⁶ Notwithstanding that agreement, the precise meaning of “unitariness” is disputed,⁷ and reasonable people disagree intensely about the appropriate understanding of the constitutional text, the relevant history, and the relevance of institutional and other changes over time, including the rise of the modern administrative state.⁸

For many decades, the Supreme Court has agreed that Congress has the constitutional authority to make some agencies “independent” of the President.⁹ But that conclusion has been under continuing and newly intense pressure,¹⁰ and under the Constitution, the meaning of “independence” remains highly uncertain.¹¹ The Supreme Court’s decision in *Seila Law LLC v. CFPB*, which struck down the provision granting independence to the CFPB, emphasized those Sections of Article II that grant the executive power to the President (and no one else), and that give to the President (and no one else) the power to “take Care that the Laws be faithfully executed.”¹² *Seila Law* emphasized that under the Constitution, the Executive Branch is unitary and the President is in charge of it.¹³ At the same time, *Seila Law* emphasized that the CFPB was headed by a single director (rather than a multimember commission) and suggested that, so long as an independent agency is headed by a multimember commission and “do[es] not wield substantial executive power,”¹⁴ it is constitutionally acceptable. The Court’s complex and ambiguous decision has magnified the long-standing uncertainty because the Court showed a great deal of skepticism about the whole idea of independent administration. Indeed, *Seila Law* might well be taken to cast current independent agencies, which wield substantial executive power, into serious constitutional doubt.¹⁵

5. U.S. CONST. art. II, § 1; see *Seila Law*, 140 S. Ct. at 2197.

6. See Prakash, *supra* note 4, at 1022–23.

7. Compare *Seila Law*, 140 S. Ct. at 2197, with *id.* at 2227–28 (Kagan, J., dissenting).

8. For various views, see generally Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15 (2010); Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599 (2010); Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769 (2013); Aziz Z. Huq, *Removal as a Political Question*, 65 STAN. L. REV. 1 (2013); Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41; Paul R. Verkuil, *The Status of Independent Agencies After Bowsher v. Synar*, 1986 DUKE L.J. 779; and Vermeule, *supra* note 1.

9. For example, *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477, 483 (2010), takes the independent agency form as acceptable, though it would not be difficult to read the opinion as uncomfortable with it.

10. See *Seila Law*, 140 S. Ct. at 2192.

11. See *id.*

12. *Id.* at 2191 (quoting U.S. CONST. art. II, § 1, cl. 1; *id.* art. II, § 3).

13. See *id.*

14. *Id.* at 2199–200.

15. See Cass R. Sunstein & Adrian Vermeule, *The Unitary Executive: Past, Present, Future*, 2021 SUP. CT. REV. (forthcoming 2021) (manuscript at 2–3) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3666130 [<https://perma.cc/6DLJ-USKZ>]).

In the midst of that uncertainty, it is important to recognize that the President's authority over the independent regulatory agencies turns on relevant statutes, not directly on the Constitution at all—although the constitutional background will influence judicial interpretation of those statutes.¹⁶ In the usual formulation, Congress allows the President to discharge heads of independent agencies for “inefficiency, neglect of duty, or malfeasance in office.”¹⁷ The INM standard,¹⁸ as we call it, can be taken both to limit and to grant presidential authority. More than a century after the INM standard was first used, its meaning has yet to be settled.¹⁹

It is easy to identify two polar views of presidential authority over independent regulatory agencies. The first insists on *policy independence*.²⁰ Some language from *Humphrey's Executor* inclines in this direction; for example, the Court suggested that Congress wanted the FTC to “be independent of executive authority, except in its selection, and free to exercise its judgment without the leave or hindrance of [the President].”²¹ According to that view, the President may discharge heads of independent agencies only for serious improprieties that do not involve policy in any way. With respect to presidential authority, we can characterize this view as *minimalist*. If, for example, a commissioner takes a bribe, he has engaged in “malfeasance,” and he may be discharged for that reason. So too, a decision to take a six-month vacation in Hawaii would constitute “neglect of duty.” Crucially, even on the minimalist view, this amounts to de facto abdication of the

16. See John F. Manning, *The Independent Counsel Statute: Reading “Good Cause” in Light of Article II*, 83 MINN. L. REV. 1285, 1288 (1999) (arguing that, to avoid a “serious constitutional question,” the “good cause” removal provision in the Ethics in Government Act should be interpreted to allow removal for insubordination). Examples of relevant statutes with language restricting the President's removal power include 5 U.S.C. § 1211(b) (2018) (Office of Special Counsel); 12 U.S.C. § 5491(c)(3) (2018) (CFPB); 15 U.S.C. § 41 (2018) (FTC); and 49 U.S.C. § 1111(c) (2018) (NTSB).

17. A helpful overview is Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1135 (2000) (describing the “inefficiency, neglect of duty, or malfeasance in office” (INM) standard as the basic removal provision). See, e.g., Act of Oct. 6, 2006, Pub. L. No. 109-304, § 301(b)(3), 120 Stat. 1485, 1488 (applying the INM standard to the removal of commissioners of the Federal Maritime Commission); ICC Termination Act of 1995, Pub. L. No. 104-88, § 701(a)(3), 109 Stat. 803, 933 (Surface Transportation Board); Federal Mine Safety and Health Act of 1977, Pub. L. No. 95-164, § 113, 91 Stat. 1290, 1313 (Federal Mine Safety and Health Commission); Federal Aviation Act of 1958, Pub. L. No. 85-726, § 201(a)(2), 72 Stat. 731, 741 (Civil Aeronautics Board); Bituminous Coal Act of 1937, ch. 127, § 2(a), 50 Stat. 72, 73 (National Bituminous Coal Commission); Act of Sept. 26, 1914, ch. 311, § 1, 38 Stat. 717, 718 (FTC).

18. Judge Griffith used the same abbreviation in *PHH Corp. v. CFPB*, 881 F.3d 75, 127 (D.C. Cir. 2018) (en banc) (Griffith, J., concurring).

19. The Court expressed such a view in *Seila Law*, 140 S. Ct. at 2206; we take up that view below. See *infra* Section II.A.

20. For a valuable discussion with a historical focus, see generally Jane Manners & Lev Menand, *Presidential Removal: Defining Inefficiency, Neglect of Duty, and Malfeasance in Office*, 121 COLUM. L. REV. (forthcoming 2021) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3520377 [<https://perma.cc/4CSJ-8EYT>]).

21. *Humphrey's Ex'r v. United States*, 295 U.S. 602, 625–26 (1935) (emphasis omitted).

office and thus a neglect of duty. But the President may not discharge commissioners because of any kind of policy disagreement.

Suppose, for example, that a member of the FTC makes a series of merger decisions that the President believes to be arbitrary, or adopts a lenient approach to mergers that would, in the President's view, lead to the creation of monopolies throughout the economy. Or suppose that the Consumer Product Safety Commission adopts a pro-market approach that, in the President's view, is inconsistent with the governing statute and will leave consumers (and their children) vulnerable to serious risks. If commissioners have policy independence, no President has, in such circumstances, a statutory basis for discharge. Of course, it remains possible that the President could contend that, so construed, the INM standard is unconstitutional under Article II.²² But the statutory question would be at an end.

The idea of policy independence is important at all stages of a presidential term, because any President is likely to think, on occasion, that members of independent agencies, or independent agencies as a whole, are making at least some decisions that he abhors. But Presidents are especially likely to be hampered by independence in their initial years, when independent agencies contain large numbers of commissioners who have been appointed by their predecessors.

The second polar view is that the President has *broad policymaking control*.²³ According to that view, the President is allowed to discharge commissioners if their conclusions on significant issues seem to him to be inconsistent with what sound understandings of policy and law demand. With respect to presidential authority, we can characterize this view as *maximalist*. A President might conclude that FTC commissioners have neglected their duty if they interpret their organic statute incorrectly (by his lights) or make bad choices about public policy—for example, by giving consumers too little protection against fraudulent advertising. A President might condemn an insufficiently aggressive regulation from the Nuclear Regulatory Commission, subjecting people to excessive risks as a demonstration of “inefficiency.”²⁴

This view would ensure a thin and perhaps even nonexistent distinction between the President's authority over independent agencies and his corresponding authority over executive agencies. But to those who embrace this view, it is the best reading of the INM standard. Those who support this view believe that if Congress genuinely wants to ensure independence then it must choose different and clearer language—not by INM, but instead by allowing removal only for

22. The Executive Branch made this argument in *Humphrey's Executor*, but the Court rejected it, finding “it plain under the Constitution that illimitable power of removal is not possessed by the President.” *Id.* at 626–29.

23. See, e.g., *PHH Corp.*, 881 F.3d at 124 (Griffith, J., concurring).

24. See *id.* at 131–32. Judge Griffith focused in particular on dictionary definitions of inefficiency, urging that “it is the broadest of the three INM removal grounds and best illustrates the minimal extent to which the INM standard restricts the President's ability to supervise the Executive Branch.” *Id.* In our view, this is a contentious understanding of inefficiency, and the broadest of the three grounds, most tightly connected with the President's constitutional authority, is neglect of duty.

“gross improprieties.” The maximalist position would seem especially attractive if it is deemed necessary to avoid serious constitutional questions about the power of Congress to infringe on presidential authority under the Take Care Clause and the Vesting Clause of Article II; it might be an appealing use of the avoidance canon.²⁵

As we shall see, the Supreme Court has firmly rejected maximalism.²⁶ We aim to defend a third view here—a middle way which rests on the idea that INM clauses create a relationship of *presidential review* vis-à-vis the independent agencies. More specifically, and with a particular emphasis on the N (and hence on the crucial idea of neglect of duty), the President is entitled to discharge commissioners for acting in a way that he reasonably believes to be not merely wrong but a clear violation of their statutory responsibility. Arbitrary action counts as neglect of duty, though for reasons to be explained, it is doubtful that a single arbitrary action, of the sort that courts strike down under the Administrative Procedure Act (APA), counts as a legitimate basis for discharge.²⁷ Rather, a pattern of arbitrariness would almost always be necessary. Although we connect the INM standard to the language of the Take Care Clause and the Vesting Clause—and hope that originalists might be willing to accept our conclusions—ours is not an originalist argument focusing on the original public meaning of constitutional clauses. Rather, it is a textual and structural one,²⁸ premised on the best reading of statutory text and taken in light of institutional roles in the administrative state and background constitutional principles.

Our approach firmly rejects minimalism; it does permit discharge for reasons that involve policy, at least in an aggregate sense over an array of decisions. Under our approach, emphasizing neglect of duty, the President may discharge a commissioner for making a series of decisions that he reasonably believes to be arbitrary (and so in violation of legal duty). But like the Supreme Court in *Seila Law*,²⁹ we also reject maximalism because our approach forbids the President from discharging commissioners merely because he believes that their decisions are wrong. The difference is significant. Under our view, the President must show that a commissioner has acted in ways that clearly represent a neglect of duty. As compared with maximalism, that is an important limitation on his

25. The avoidance canon argues in favor of construing statutes so as to avoid serious constitutional questions. See generally John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223. The maximalist position would do exactly that.

26. See *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2192 (2020).

27. We deal with the question of single decisions below. See *infra* Section II.B.

28. Cf. CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969) (exploring an approach to constitutional interpretation based not on the original understanding but on structural considerations). Jane Manners and Lev Menand reach a similar conclusion, with an emphasis on the historical origins of the INM standard and in particular with reference to neglect of duty and malfeasance, which they identify with “unfaithful execution.” See Manners & Menand, *supra* note 20 (manuscript at 8–9).

29. See 140 S. Ct. at 2206 (declining to revisit the *Humphrey’s Executor* Court’s implicit rejection of an interpretation of the INM standard that would leave the President free to remove an officer based on disagreements about agency policy).

authority. We are aware that, briefly stated, the position we aim to defend raises many questions—on one side because of the risk of presidential overreach, and on the other, because of the risk of unduly constraining the constitutionally grounded authority of the President. We will explore these concerns in due course.

The INM language governs removal, but it also has strong implications for the question of presidential supervision.³⁰ As a matter of practice, presidents have avoided interfering with the substantive policy choices of independent agencies partly because of concerns about their legal authority.³¹ Rejection of minimalism suggests that those concerns are easily overstated. Under our approach, emphasizing neglect of duty, the President has considerable authority to cabin the judgments of independent agencies, certainly through establishing general policies and processes, and on appropriate occasions by influencing their decisions with respect to particular issues. If the President can control independent agencies for neglecting their legal duties, it follows that he can supervise independent agencies, not to overrule their decisions simply because he disagrees with them, but to ensure that they come within what he reasonably believes to be the permissible bounds of law, fact, or discretion.

It is true that aggressive presidents might try to collapse the line that separates the two—a problem that could put considerable pressure on both government lawyers and federal courts. But that is no unique objection to our reading of INM clauses; it is a general problem that can arise wherever the line between presidential authority and that of independent agencies is set. The only rule that would eliminate it is one that entirely subordinates all agencies wielding executive power to presidential control in all their functions—a rule that the Supreme Court has never once entertained, even in *Myers v. United States*,³² the apogee of the unitary executive. As we will see, *Myers* recognized several exceptions to both presidential removal and direction, and the same is true of the Court's ruling in *Seila Law*, which can be seen as *Myers* 2.0.

The remainder of this Article is organized as follows. Part II explores the meaning of the INM standard, taken in its context. Part III applies our proposed standard to the problem of removal with reference to both easy and hard cases. Part IV investigates the question of supervisory authority, asking whether and when the President can oversee policy judgments by independent agencies. Part V briefly concludes.

30. See Peter L. Strauss, *Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 716–17 (2007).

31. The best evidence can be found in past and present executive orders governing White House review of regulations, which do not apply to independent agencies. See, e.g., Exec. Order No. 12,291, 3 C.F.R. § 127 (1982), reprinted in 5 U.S.C. § 601, at 431–34 (1982) (revoked 1994); Exec. Order No. 13,563, 3 C.F.R. § 215 (2012), reprinted in 5 U.S.C. § 601, at 816–17 (2012). In Executive Order 13,579, President Barack Obama suggested that independent agencies “should” follow Executive Order 13,563, but he pointedly avoided the word “shall.” See 3 C.F.R. § 256 (2012), reprinted in 5 U.S.C. § 601, at 817–18 (2012).

32. 272 U.S. 52 (1926).

II. INM, WITH AN EMPHASIS ON THE N

In federal law, the INM standard seems to have first appeared in 1887, with the creation of the Interstate Commerce Commission.³³ As noted, the standard has become common. It is often adopted by Congress with little or no discussion of its meaning; it is a kind of “off the rack” provision—a legal convention or phrase of art—meant to signal independence of some kind.³⁴ Although it has a revealing and long history,³⁵ to which we will make reference, we will focus mostly on the natural meaning of the text, read in light of the constitutional background³⁶ and structural goals—emphasizing that the legislative history is sparse and inconclusive even if deemed relevant.³⁷ It is remarkable but true that after well over a century of practice, the meaning of INM remains unsettled.³⁸ And in spite of its central importance, the literature on the topic remains puzzlingly undeveloped.³⁹

A. THE UNSETTLED MEANING OF THE INM STANDARD

In the Supreme Court, the meaning of the INM standard remains unsettled, and the Justices have given some sharply conflicting signals. *Bowsher v. Synar*—an apparently defining decision—raised an assortment of questions about the INM standard.⁴⁰ There, the Court dealt with a statute that authorized the Comptroller General to be removed by joint resolution of Congress on any one of five grounds: (1) permanent disability, (2) inefficiency, (3) neglect of duty, (4) malfeasance, or (5) a felony or conduct involving moral turpitude.⁴¹ For the Court, a key question was whether the Comptroller General was thereby made an agent of Congress, subject to its will, or essentially independent. The Court chose the former view. In doing so, it pointed to a statement by a member of Congress, declaring that: “Congress at any moment when it found [the Comptroller General] was inefficient and was not carrying on the duties of his office as he should and as the Congress expected, could remove him”⁴² That statement seems to suggest

33. See Act of Feb. 4, 1887, ch. 104, § 11, 24 Stat. 379, 383. The best discussion of the historical context is Manners & Menand, *supra* note 20 (manuscript at 68–81).

34. See Breger & Edles, *supra* note 17, at 1144–45.

35. See Manners & Menand, *supra* note 20 (manuscript at 41–81).

36. We do not outline that background here. For discussion, see *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2232–36 (2020) (Kagan, J., dissenting); Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 642–45 (1994); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2319–31 (2001); and Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 106–12 (1994).

37. See Manners & Menand, *supra* note 20 (manuscript at 74–81). On some of the snippets of legislative history, see *PHH Corp. v. CFPB*, 881 F.3d 75, 132–33, 136–37 (D.C. Cir. 2018) (en banc) (Griffith, J., concurring).

38. See generally *PHH Corp.*, 881 F.3d 75 (including multiple concurring and dissenting opinions that reach different conclusions on the meaning of INM).

39. A valuable discussion appears in Manners & Menand, *supra* note 20.

40. 478 U.S. 714 (1986).

41. *Id.* at 727–28; see 31 U.S.C. § 703(e)(1)(B) (2018).

42. *Bowsher*, 478 U.S. at 728 (quoting 61 CONG. REC. 1081 (1982)).

that under the INM standard, the principal (whether Congress or the President) has a great deal of authority over the agent.⁴³

In a crucial passage, the Court added: “The statute permits removal for ‘inefficiency,’ ‘neglect of duty,’ or ‘malfeasance.’ These terms are very broad and, as interpreted by Congress, could sustain removal of a Comptroller General for any number of actual or perceived transgressions of the legislative will.”⁴⁴ That conclusion, apparently essential to the Court’s holding, would seem to apply to precisely the same terms (INM) used in statutes specifying the President’s power to remove independent agency heads. And if so, the statutory and constitutional questions are settled *simultaneously*. If the INM standard is “very broad” and could allow removal of an agency head “for any number of actual or perceived transgressions of the” presidential will,⁴⁵ we are squarely in the domain of maximalism. If Congress has not even tried to exercise its authority to create a genuinely independent agency—if the INM standard leaves the President with broad removal power—there is no constitutional problem.

In the decades since *Bowsher* was decided, no consensus has emerged on whether the Court’s ruling applies to the INM standard. In fact, the Court’s more recent cases plainly suggest that it does not—the standard creates at least some degree of policy independence. *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, which struck down a statute offering two layers of insulation through the INM standard,⁴⁶ is unintelligible without that assumption. If the INM standard does not create policy independence—notwithstanding *Bowsher*—then two layers (or three or seven) should not matter because the layers would be thin indeed. *Free Enterprise Fund* seems to reject the maximalism of *Bowsher* or anything close to it. And in speaking of the INM standard, the Court did not even mention *Bowsher*.

That is a genuine puzzle. Why wasn’t *Bowsher* relevant? The best explanation points to context. Even if the statutory text is identical, Congress’s use of that standard to specify and limit its *own* authority over the Comptroller General might be understood differently from Congress’s effort to specify and limit *the President’s* authority over a member of an independent regulatory commission. In the latter context, after all, it is agreed that Congress is seeking to create some real space between the President’s policymaking authority and that of the commission member.⁴⁷ Recall these four words from *Bowsher*: “as interpreted by Congress.”⁴⁸ It is not clear to what those words are meant to refer, but nothing of

43. See Verkuil, *supra* note 8, at 797 n.100 (noting that the *Humphrey’s Executor* standard “could be construed so as to encompass a general charge of maladministration, in which event even if the terms of removal are deemed to be exclusive they could still be satisfied by a removal by the President on the ground of policy incompatibility”).

44. *Bowsher*, 478 U.S. at 729.

45. *Id.*

46. 561 U.S. 477, 514 (2010).

47. See *id.* at 495.

48. *Bowsher*, 478 U.S. at 729.

the kind can be said about the INM standard as applied to *presidential* removal authority.

The rejection of maximalism became unambiguous in *Seila Law*, where the Court struck down the INM standard insofar as it limited the President's authority to remove the CFPB Director,⁴⁹ principally on the ground that an independent agency is constitutionally unacceptable unless it consists of a multimember commission.⁵⁰ Importantly, the Court might have avoided the constitutional question by ruling that INM allows the President the kind of policymaking control that Article II requires. That conclusion would, of course, have had large implications for the President's relationship to a host of independent agencies, and the Court pointedly refused to offer it. The Court's analysis was surprisingly brisk:

Humphrey's Executor implicitly rejected an interpretation that would leave the President free to remove an officer based on disagreements about agency policy. In addition, while both *amicus* and the House of Representatives invite us to adopt whatever construction would cure the constitutional problem, they have not advanced any workable standard derived from the statutory language. *Amicus* suggests that the proper standard might permit removals based on *general* policy disagreements, but not *specific* ones; the House suggests that the permissible bases for removal might vary depending on the context and the Presidential power involved. They do not attempt to root either of those standards in the statutory text. Further, although nearly identical language governs the removal of some two-dozen multimember independent agencies, *amicus* suggests that the standard should vary from agency to agency, morphing as necessary to avoid constitutional doubt. We decline to embrace such an uncertain and elastic approach to the text.⁵¹

The Court added, "Without a proffered interpretation that is rooted in the statutory text and structure, and would avoid the constitutional violation we have identified, we take Congress at its word that it meant to impose a meaningful restriction on the President's removal authority."⁵² In that way, the Court rejected an approach of constitutional avoidance and (importantly) firmly rejected maximalism. At the same time, these words need not mean that the President entirely lacks policymaking control over independent agencies. But they certainly mean that the statutory provision that grants independence is a "meaningful restriction"—which indicates, in the Court's view, that the constitutional issue could not be avoided. To get slightly ahead of the story, we will suggest an approach that is firmly rooted in the statutory text and structure, that is indeed a workable standard, that lies between minimalism and maximalism, and that should serve to avoid

49. *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2191–92 (2020).

50. *See id.* at 2211. The constitutional issue is beyond the scope of the present discussion. For analysis, see generally Sunstein & Vermeule, *supra* note 15.

51. Sunstein & Vermeule, *supra* note 15 (manuscript at 19) (quoting *Seila Law LLC v. CFPB*, No. 19-7, slip op. at 28 (U.S. June 29, 2020)).

52. *Id.* (manuscript at 20) (quoting *Seila Law*, slip op. at 29).

potential constitutional doubts about the independence of multimember commissions. In fact, that is our principal goal.

B. WHAT THE INM STANDARD MEANS

Interpretation of the INM standard would be easier if it were accompanied by an assortment of legal materials, giving a rich sense of context. And indeed, the standard does have a long history, dating back to English common law sources involving both municipal corporations and officeholding.⁵³ In the United States, the phrase “neglect . . . of duty” can be found as early as 1796, and it seemed to create authority, on the part of higher level officials, to remove people who would otherwise be entitled to serve specified terms.⁵⁴ In 1842, Indiana specifically allowed a court to remove a court’s sheriff “for inefficiency, neglect of duty, or maleconduct in office.”⁵⁵ Nonetheless, we think that it would be a considerable overstatement to say that the INM standard was a term of art prior to its initial use in the Interstate Commerce Act enacted in 1887.⁵⁶

The history of that Act does offer useful hints.⁵⁷ Corruption was a central concern, but so were incompetence and failure to execute the duties of the office.⁵⁸ Maximalism seems to have been ruled out of bounds.⁵⁹ It is plain that the text must be understood in the context of a congressional effort simultaneously to authorize and to limit presidential authority over certain officials and also in the context of the constitutional structure and background principles, properly understood. As we shall explain, the ordinary meaning, taken in context, strongly favors the approach for which we shall be arguing, and the avoidance canon supports it as well.

With respect to the meaning of INM, it seems self-evident that the minimalist position captures a significant part of the picture—as a set of *sufficient* conditions for removal, regardless of whether they are also *necessary* conditions. If an FTC commissioner accepts a bribe, the commissioner has engaged in malfeasance; so too if the commissioner steals from the government or misuses public funds. If FCC commissioners fail to do their job, in some literal sense (for example, by refusing to show up, spending time on crossword puzzles, or perhaps repeatedly failing to meet legal deadlines), they have neglected their duty.⁶⁰ Finally, if a

53. See Manners & Menand, *supra* note 20 (manuscript at 41–42).

54. *Id.* (manuscript at 59) (internal quotation marks omitted).

55. *Id.* (manuscript at 62–63) (internal quotation marks omitted).

56. See *id.* (manuscript at 69). We have learned a great deal from Manners and Menand, *supra* note 20, and would add only that the long and instructive history of the Interstate Commerce Act, on which they elaborate, does not offer much specificity about the meaning of the INM standard.

57. See *id.* (manuscript at 69–81) (discussing the historical context and enactment of the Interstate Commerce Act).

58. *Id.* (manuscript at 65–66).

59. See *id.* (manuscript at 71–72).

60. Here the difference between the minimalist reading of neglect of duty and our reading is that the former allows the President to discharge when (but only when) an officer has *de facto* abdicated an office. Our reading, by contrast, will allow presidential review for a more broadly understood neglect of duty, as discussed below.

commissioner on the NRC works slowly and takes months to do what would take most people days, that commissioner has been inefficient. None of this should be controversial.

It also seems apparent that the ordinary meaning of the text rules the maximalist position out of bounds. Suppose that a President disagrees with a decision of the FCC—say, for example, about how to understand the statutory ban on “obscene, indecent, or profane language.”⁶¹ The President would understand it more broadly than the FCC would, though (let us stipulate) both views are reasonable as a matter of policy. Or suppose that the President disagrees with some factual conclusions of the NRC with respect to safety issues; the President assesses the risks differently from the agency. The mere disagreement cannot be regarded as sufficient for removal. On the basis of its plain text, the INM standard does not allow removal merely because the President has a different view on a question of law, policy, or fact.

On either originalist or non-originalist grounds, it would be possible to conclude that the INM standard is unconstitutional if it is understood as a restriction on the President’s authority to control policymaking by those who implement the law.⁶² We have said that we do not mean to resolve the constitutional questions here. And it would not be impossible to use the avoidance canon to move in the direction of maximalism. The only point is that it would be an unusually aggressive use of that canon, and note that in *Seila Law*, the Supreme Court refused to engage in that enterprise.⁶³ Strictly as a matter of statutory interpretation, if the INM standard means anything, it means that the President cannot discharge a member of an independent agency simply because he disagrees with the agency’s conclusions about policy or fact. The avoidance canon applies only in the presence of ambiguity, suitably defined; it is not a license to obliterate the core applications of a statutory phrase.⁶⁴

We could imagine understandings of the term “inefficient” that would tend toward maximalism. One dictionary defines “inefficient” as “not producing the effect intended or desired.”⁶⁵ Pressing on that definition and motivated by the avoidance canon, a textualist might argue, in good faith, that the President could remove commissioners on the ground that their decisions will not have the intended or desired effect. Intended or desired by whom? A fair question. However it is answered, *Seila Law* plainly rejected such a broad understanding of the “I” in the INM standard. The Court did not carefully parse the text, but it did

61. 18 U.S.C. § 1464 (2018); see *FCC v. Fox Television Stations*, 556 U.S. 502, 505–10 (2009) (addressing the FCC’s authority to interpret the statutory ban).

62. See *Manners & Menand*, *supra* note 20 (manuscript at 3–4, 82–83).

63. See *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2206–07 (2020); see also *Rust v. Sullivan*, 500 U.S. 173, 190–91 (1991) (counseling against use of the avoidance canon to distort statutes rather than to choose one of two fair readings).

64. See *Rust*, 500 U.S. at 190 (noting the threshold requirement of “two possible interpretations of a statute” (quoting *Blodgett v. Holden*, 275 U.S. 142, 148 (1927))).

65. *Inefficient*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/inefficient> [https://perma.cc/WY9K-ZUGR] (last visited Dec. 25, 2020).

say this: “*Humphrey’s Executor* implicitly rejected an interpretation that would leave the President free to remove an officer based on disagreements about agency policy.”⁶⁶ Whatever inefficiency means, it does not allow the President to remove an officer simply because he thinks that the officer has made the wrong policy choice.

C. NEGLECT OF DUTY: THE PRESIDENT AS REVIEWER

Does the President have any room to remove commissioners when he disapproves of their decisions? In our view, the INM standard is a unitary phrase that is best understood as a kind of legal drafting convention, usually adopted as a whole.⁶⁷ For concreteness and simplicity, however, and because of their clear relationship to Article II, let us pause over three words: neglect of duty.⁶⁸ In our

66. *Seila Law*, 140 S. Ct. at 2206.

67. It should be noted, however, that Congress has enacted at least one other statute that includes only two of the three INM removal grounds: soon after the Court decided *Humphrey’s Executor*, Congress added a removal provision to the National Labor Relations Act but turned the INM standard into the NM standard by eliminating inefficiency. See Act of July 15, 1935, Pub. L. No. 74-198, ch. 372, § 3(a), 49 Stat. 449, 451 (codified at 29 U.S.C. § 153(a) (2018)) (“Any member of the Board may be removed by the President . . . for neglect of duty or malfeasance in office, but for no other cause.”).

68. In an impressive and lengthy opinion, plainly rejected in *Seila Law*, 140 S. Ct. at 2197, Judge Griffith took a different approach. See *PHH Corp. v. CFPB*, 881 F.3d 75, 131–32 (D.C. Cir. 2018) (en banc) (Griffith, J., concurring). He “concentrate[d] on ‘inefficiency’ because it is the broadest of the three INM removal grounds and best illustrates the minimal extent to which the INM standard restricts the President’s ability to supervise the Executive Branch.” *Id.* Relying on dictionaries from the relevant period, Judge Griffith wrote:

Dictionaries consistently defined the word “inefficiency” to mean ineffective or failing to produce some desired result. For example, one prominent turn-of-the-century dictionary defined “efficient” as “[a]cting or able to act with due effect; adequate in performance; bringing to bear the requisite knowledge, skill, and industry; capable; competent.” . . . These dictionaries indicate that an individual acts inefficiently when he fails to produce some desired effect or is otherwise ineffective in performing or accomplishing some task.

Id. at 132. Judge Griffith urged that the same view is reflected in relevant legislative history. For example, he pointed to a remark of a senator who, during the debate over whether to include the INM standard for officials of the Civil Aeronautics Authority, feared that inefficiency did not provide sufficient independence for agency officials and even lamented:

If we provide that the President may remove a man for inefficiency, to my mind we give him unlimited power of removal. Under such authority he could have removed Mr. Humphrey, had he assigned that as a reason. . . . I do not see anything to be gained by discussing the legal question if we are to leave the word ‘inefficiency’ in the provision.

Id. at 133 (alteration in original) (quoting 83 CONG. REC. 6865 (1938) (statement of Sen. William Borah)). But the dictionary definition could easily be understood more narrowly, see Kent H. Barnett, *Avoiding Independent Agency Armageddon*, 87 NOTRE DAME L. REV. 1349, 1386 & n.191 (2012) (citing NEW OXFORD AMERICAN DICTIONARY 867 (2001)), and the isolated comment by one senator in one debate does not tell us much.

Judge Griffith did muster additional grounds for his broad understanding of inefficiency. See, e.g., *Budget Hearing—Consumer Financial Protection Bureau: Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Fin. Servs.*, 112th Cong. 8 (2012) (statement of Rep. Barney Frank, Ranking Member, H. Comm. on Fin. Servs.) (“[T]his notion that the Director cannot be removed is fanciful. . . . No one doubts that if a change in Administration comes, and the new President *disagrees* with the existing Director, he or she can be removed. And proving that you were not *inefficient*, the burden of proof being on you, would be overwhelming.” (emphases added)). But in our view, these and

view, those three words deserve especially careful attention; they provide important clues about how best to read the INM standard.

If commissioners act in patent defiance of law, they are neglecting their (statutory) duty, at least in the literal sense. The same is true if a commissioner acts arbitrarily, at least if some governing law, such as the APA, makes it unlawful to do that.⁶⁹ And if commissioners find a fact without substantial evidence, or arbitrarily, they are once more neglecting a (literal) duty. If the President is allowed to discharge a commissioner for neglect of duty, it would seem clear that the President has the authority to ensure obedience to law.

From the constitutional point of view, this neglect-of-duty approach has an important advantage: it links the President's statutory authority to the Take Care Clause.⁷⁰ It recognizes the President's authority to oversee the independent agencies insofar as he is attempting to ensure faithful execution of the laws.⁷¹ By recognizing that authority, it softens the constitutional concern and perhaps even eliminates it, at least in one view of constitutional requirements. In *Free Enterprise Fund*, the Court placed a great deal of emphasis on the Take Care Clause, suggesting that the problem with the two layers of insulation was that the President was deprived of his authority under that Clause.⁷² If the President can discharge commissioners for neglecting their (legal) duties, it would seem that he has, under the Take Care Clause, exactly what he needs. He does not have policy-making control; nothing we have said is inconsistent with *Seila Law*. But the INM standard squarely refers to neglect of duty, and hence drawing attention to the natural understanding of those words is hardly in tension with the statutory text.

But with its emphasis on neglect of duty, what precisely does this approach entail? We do not mean to support the distinction squarely rejected in *Seila Law*, between general and particular policy disagreements.⁷³ We do not mean to point to policy disagreements at all. The question is *legal* duty. In our view, the INM standard should be read so as to put the President in a position somewhat analogous to that of a reviewing court. The President can find a neglect of legal duty

other materials are quite thin. As a matter of ordinary understanding of the English language, at every relevant time, the term neglect of duty is much meatier, and it becomes more relevant still in light of its evident connection with the Take Care Clause, emphasized in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477, 484 (2010).

69. See 5 U.S.C. § 706(2)(A) (2018).

70. For a similar effort making that link, see Manners & Menand, *supra* note 20 (manuscript at 17–18).

71. A valuable, relevant treatment appears in Barnett, *supra* note 68, at 1364–67. Barnett might be read, among other things, to support the view that, although the President is obliged to take care that the laws be faithfully executed, one of the laws that he must faithfully execute might limit his authority over administrators. See *id.* The problem is that such laws might be independently unconstitutional. If the President is constitutionally authorized to ensure faithful execution of the laws, a statute that limits his ability to do so offends the Constitution, regardless of what Congress says.

72. See *Free Enter. Fund*, 561 U.S. at 496.

73. See *supra* note 29 and accompanying text.

under standards analogous to those outlined in *Auer*,⁷⁴ *Chevron*,⁷⁵ *State Farm*,⁷⁶ or *Universal Camera*⁷⁷ and respond accordingly. Under this approach, the President might ask not whether the agency has exceeded its authority, but whether it has clearly done so (*Chevron*); not whether the agency has chosen the right policy, but whether it has considered legally relevant factors and addressed reasonable alternatives (*State Farm*); or not whether the agency has found the facts correctly, but whether it has adequate evidence for its conclusions (*Universal Camera*).⁷⁸

Under this approach, we also need to know what form a presidential response would take. Are we speaking of removal or supervision? The two must be discussed separately. If we are speaking of removal, it would be a grant of considerable power to the President to say that in the face of what he considers to be a single *Chevron* violation, the President would be entitled to discharge a member of an independent regulatory commission. That would mean that a commissioner of, say, the FCC could be removed for voting in favor of even a single unlawful decision. That would be an implausibly aggressive understanding of what it means to neglect one's duty. In the course of any substantial period—for example, two years—many agencies will make at least one decision that does not survive judicial review. By itself, a mistake should not be counted as neglect of duty. There is significant space between the two.

For removal, what is necessary would something much more than an isolated mistake—such as a series of serious mistakes, suggestive of what the President reasonably believes to be consistent or glaring indifference to legal requirements. We acknowledge that this formulation leaves ambiguity and, accordingly, hard cases.⁷⁹ And we would add that a truly egregious isolated case, in which an official has not merely made a mistake but has made a patent and highly consequential departure from a legal duty, could plausibly justify discharge. We offer an example below.⁸⁰ But our focus is on a pattern of neglect and not on imaginable hard cases.

The *locus classicus* for this distinction between isolated error and a pattern of neglect of legal duty is, again, the opinion in *Myers*⁸¹—a more nuanced opinion than casual discussion acknowledges. In the Court's discussion of formal adjudication in the Executive Branch, it wrote:

[T]here may be duties of a quasi judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect

74. *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (deferring to an agency's interpretation of its own regulation because it was neither plainly erroneous nor inconsistent with the regulation).

75. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844–45 (1984).

76. *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

77. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487–88 (1951).

78. See *supra* notes 75–77.

79. For discussion of certain harder cases, see *infra* Section II.D.4.

80. See *infra* Section II.D.4.

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

interests of individuals, the discharge of which the President cannot in a particular case properly influence or control. But even in such a case he may consider the decision after its rendition as a reason for removing the officer, on the ground that the discretion regularly entrusted to that officer by statute has not been on the whole intelligently or wisely exercised. Otherwise he does not discharge his own constitutional duty of seeing that the laws be faithfully executed.⁸²

The passage is not without ambiguity, but one reading is that although a presidential intervention into one particular formal adjudication—a “ticket good for one day [and train] only”⁸³—risks favoritism or political bias, it is entirely legitimate for the President to review the adjudicator’s performance over a series of decisions (on the whole), by definition involving a number of different parties, and to decide that the adjudicator’s performance is beyond the acceptable boundaries of expertise or prudence. Our submission then is that if members of an independent agency have neglected their duty on multiple occasions by voting for and supporting outcomes that the President believes to be unlawful, there is sufficient ground for removal. This formulation is not meant to create an arithmetic straitjacket. It is natural to wonder about how many occasions are “multiple.” Two are not; ten certainly are. There is no escaping a degree of judgment here from both the President and Executive Branch lawyers, focusing on both the number of cases of neglect and their egregiousness.

With respect to supervision, taken up in more detail below, the analysis should be similar. If the President reasonably believes that a commission has acted in violation of existing law in a single case, he cannot overrule the decision for that reason alone. In such cases, we might have nothing more than a reasonable difference of opinion, and in those circumstances, the President cannot tell an independent agency that it must do as he prefers. But the President can take steps to ensure that independent agencies act in conformity with their legal obligations.⁸⁴ This authority gives him considerable supervisory authority. Let us spell out these points by reference to particular cases.

D. THE STANDARD APPLIED: REMOVAL

1. Easy Cases: Group One

Under any approach, including ours, many imaginable cases are straightforward: the President has the power of discharge. In such cases, the INM standard is unmistakably clear. For example:

82. *Id.* at 135; *cf.* *Nash v. Bowen*, 869 F.2d 675, 680–81 (2d Cir. 1989) (upholding Social Security Act reforms based on aggregate performance of administrative law judges).

83. See Richard M. Re, *On “A Ticket Good for One Day Only,”* 16 GREEN BAG 2D 155, 155 (2013).

84. In some cases, the statutory obligation is not sharply defined and grants the agency broad discretion. Even in such cases, there are prohibitions on arbitrariness or on decisions lacking substantial evidence, and agencies must do their duties by avoiding inconsistency with such prohibitions.

- (a) A member of the Federal Reserve Board has repeatedly missed meetings. This member has not done the required work and has neglected to complete numerous assignments. The member's colleagues on the Board are disappointed and embarrassed; they have to pick up the slack. The President can discharge the member on grounds of palpable inefficiency.
- (b) A member of the Consumer Product Safety Commission has taken a bribe from a company under the Commission's investigation. That action is plainly malfeasance, and the President can discharge the member for that reason.
- (c) The Social Security Commissioner has repeatedly missed statutory deadlines. The evidence suggests that the Commissioner is not performing the job. Although honest, the Commissioner has failed to produce multiple reports required by Congress or to issue mandatory regulations. These failures count as neglect of duty, and the Commissioner can be discharged for that reason.

In cases (a) through (c), our approach encompasses minimalist approaches.

2. Easy Cases: Group Two

Conversely, if the President has only the authority to correct what he reasonably believes to be a clear neglect of legal duty, numerous actual and imaginable cases are just as straightforward: the President lacks the power of removal. For example:

- (d) The Nuclear Regulatory Commission issues a new regulation, designed to reduce risks of a nuclear accident. The President believes that it is unnecessary. In his view, the regulation will do little good and will impose excessive burdens on the nuclear industry. Though many and perhaps most people agree with the President's assessment, the Commission's decision falls within the bounds of reasonableness. The President may not remove members of the Commission who voted in favor of the regulation.
- (e) The Securities and Exchange Commission (SEC) issues a rule governing "conflict minerals."⁸⁵ In the President's view, the rule goes well beyond what is required by the authorizing statute, and its costs greatly exceed its benefits.⁸⁶ This case is different from case (d) because there is a legal question, which in the President's view, the agency has resolved incorrectly. But so long as the agency's view is not self-evidently unreasonable, the same (easy) result as case (d) obtains, and for the same reason.
- (f) The Federal Trade Commission (FTC) allows a merger between social media companies. In the President's view, the merger is inconsistent with the Commission's regulations and also with the underlying statute. The President's view is perfectly reasonable, but the Commission has also acted

85. For the details of the actual rule, see Conflict Minerals, 77 Fed. Reg. 56,274, 56,275–77 (Sept. 12, 2012) (codified at 17 C.F.R. pts. 240, 249b).

86. For relevant discussion, see *National Ass'n of Manufacturers v. SEC*, 748 F.3d 359, 369–70 (D.C. Cir. 2014).

in a way that is easily defensible by reference to governing law. Same result as (d) and (e).

3. Easy Cases: Group Three

Unlike minimalist approaches, our approach would allow the President to discharge a member of an independent regulatory agency in the following circumstances:

- (g) A member of the Nuclear Regulatory Commission believes that because of private incentives, nuclear power plants are now safe, and that they will be for the imaginable future. The member opposes any and all federal regulation even when statutes require it. The President may discharge the member on two grounds: the member is neglecting their (legal) duty under the governing statute and the member has adopted a theory of regulation that—let us stipulate—essentially all reasonable people roundly reject, which means that the member’s approach is arbitrary within the meaning of the APA. In either case, we are dealing with neglect of duty within the meaning of the relevant statute.
- (h) A member of the National Labor Relations Board (NLRB) votes regularly with labor unions. More than that, the member does so even in cases in which the law and the facts do not favor the union. For example, the Board member has said that there is evidence of “anti-union animus” on the part of employers even in cases in which no reasonable person could find such evidence. The President may discharge on the ground that the member has neglected a legal duty. The Board member is frequently acting in ways that are consistent with legal obligations.
- (i) A member of the Federal Reserve Board believes that, even at modest levels, inflation is a serious problem for the economy and also that unemployment is tolerable, even if it becomes quite high. The member votes to keep interest rates high during a period in which the national unemployment rate is skyrocketing and increasing numbers of people find themselves without work. As a matter of law, the member is nearly isolated in their opinion about how to discharge their statutory duty; the member is also acting in a way that is inconsistent with mainstream economic thinking, broadly defined, such that their actions are arbitrary under the APA. The President can discharge the member.

4. Harder Cases: Group Four

We acknowledge that, under our approach, some cases cannot be counted as straightforward. For example:

- (j) A member of the Federal Trade Commission concludes that certain advertisements are neither unfair nor deceptive; within the Commission, that member’s is the only vote to this effect, and the underlying reasoning is

difficult to understand. The member appears to have ignored both the law and the facts. At the same time, this particular vote is a departure from the member's normal behavior, which is well within the bounds of reason. The best conclusion is that the President cannot discharge the member for an isolated error, even if it is unquestionably an error. The qualification is that if the isolated error, reasonably deemed an egregious neglect of duty, occurs in a case of extraordinary importance, the issue becomes more difficult.

- (k) The Social Security Commissioner calls for and oversees a large-scale revision of the Social Security Disability Guidelines,⁸⁷ with the purpose and effect of making disability benefits more broadly available. The revision causes a public outcry. Most people, including the President, believe that it goes too far insofar as it makes disability benefits available to people who are not, in their view, truly disabled. The new regulation will be challenged in court, and most people think that it will be struck down, but given principles of judicial deference to agency action, many people believe that it will be upheld. This is not an easy case. On the one hand, the President can reasonably believe that the Commissioner has acted arbitrarily and inconsistently with the governing statute in an extraordinarily important rulemaking, helping to define the agency's entire mission. On the other hand, the Commissioner can reasonably believe that the action is both lawful and reasonable. Because of the reasonableness of the Commissioner's belief, the better view is that there has been no neglect of duty; it is easier than case (j).
- (l) The Federal Communications Commission (FCC) issues a new regulation restoring the fairness doctrine.⁸⁸ The President believes that the regulation violates the First Amendment and transgresses statutory limits on the FCC's power, the President also believes that the new regulation is arbitrary and capricious under the APA. Most observers agree with him on at least two of those points, and in fact, the regulation is invalidated in court on constitutional grounds. Though this is not an easy case, the better view is that the President cannot discharge a commissioner for voting in favor of the regulation. We have noted that many agency decisions are invalidated, and invalidation cannot be enough to justify a presidential discharge. The question is whether there has been a neglect of duty in our sense, and so long as the FCC reasonably believed that it acted lawfully, its members should not be vulnerable to presidential discharge.
- (m) A member of the NLRB has a strong view: labor unions have been systematically mistreated by both federal courts and the NLRB. The member votes for unions in numerous cases, not in a way that flouts the law, but in a way that suggests a kind of "result orientation." The President believes that this amounts to neglect of duty. This is not an obvious case; we need to know more. If the member is repeatedly resolving difficult issues in favor of unions, there is no neglect of duty, and the President cannot

87. For relevant discussion, see generally *Heckler v. Campbell*, 461 U.S. 458 (1983).

88. See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 369 (1969).

remove the member. All we have is a dispute over policy. But if the member is not taking hard questions seriously, and a thumb is always on the scale in a way that suggests indifference to factual disputes and hence a kind of repeated arbitrariness, the President probably has the authority to remove the member.

Note that there is an underlying concern here involving the precise relationship between judicial invalidation and presidential review. Our focus has been on presidential judgments, but what if some court has actually spoken? Roughly speaking, let us say that under standard doctrines of judicial review in administrative law, agencies lose only when they are clearly wrong. In routine cases, agencies' statutory interpretations will be upheld unless the interpretations violate the text under *Chevron* step one or are found unreasonable under *Chevron* step two;⁸⁹ their policy choices will be upheld unless arbitrary or capricious; their findings of fact will be upheld unless a court concludes they are arbitrary or unsupported by substantial evidence; and so on. Does this imply that whenever a court overturns an agency, the agency neglected its duty for purposes of the INM standard, thus justifying presidential removal?

Certainly not. There is an ample domain of cases in which an agency and a court can reasonably disagree over whether the agency has acted lawfully.⁹⁰ Such situations are the routine stuff of judicial review and should not be mysterious. The President is not entitled to discharge an agency head merely because that head has voted in favor of a decision that was invalidated. If, by contrast, a court has upheld a decision or a series of decisions, the President would be forbidden from removing an agency head who has voted in favor of such decisions. Validation is a demonstration that the agency has not violated its legal duty.

III. PRESIDENTIAL SUPERVISION

The supervisory power refers to the President's capacity to influence and oversee an agency's decisions, not merely to remove its leaders. Supervisory authority is usually taken to follow from removal authority, which means that the existence and extent of the power to supervise are inferences from the power of removal. It would be possible to say that under the INM standard, a President can remove those leaders only *ex post*, and cannot influence or oversee their decisions in an ongoing way. But according to long-standing understandings, the power of removal implicitly carries with it a power of supervision.⁹¹

89. This is a simplification, of course. See *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–44 (1984) (describing the two-step inquiry in greater detail).

90. See, e.g., *Michigan v. EPA*, 576 U.S. 743, 750–51, 759 (2015); *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 708 (1995).

91. See *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2191–92 (2020) (“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 was confirmed in the landmark decision *Myers v. United States*.” (citation omitted)).

A. EXECUTIVE AGENCIES

What does that supervisory power include, and what are its limits? For orientation, let us begin with executive agencies, over which the President is understood to have a great deal of supervisory power. For present purposes, we will understand executive agencies as those whose heads are not protected from presidential removal by the INM standard or anything close to it. For example, the Departments of Agriculture, Commerce, Defense, Energy, Health and Human Services, State, and Transportation are executive agencies; so is the Environmental Protection Agency. And although an understanding of the President's supervisory power over executive agencies is not, strictly speaking, necessary to an understanding of his supervisory authority over independent agencies, it is more than helpful by way of background.

It is agreed that the President may impose purely *procedural* requirements on executive agencies—for example, by requiring them to produce cost–benefit analyses before issuing certain important regulations.⁹² It is also agreed that the President may exercise *substantive supervisory power* by requiring agencies to adhere to certain principles or to follow certain policy commitments.⁹³ Any such requirements may not transgress statutory requirements. But if the President says that an executive agency may not proceed unless the benefits justify the costs, or may issue a regulation only if it has removed two other regulations,⁹⁴ he is probably on firm ground, at least insofar as presidential control is exercised within the confines of the law.

The reason for the word “probably” is the continuing debate about whether the supervisory power includes the *directive power*.⁹⁵ That power is understood to exist if the President can order an agency head, in particular cases, to act or to refrain from acting—for example, to issue a regulation to reduce greenhouse gas emissions, to issue a regulation to close or open air travel during a pandemic, to refrain from issuing a regulation to protect food safety, or to adopt a specific policy with respect to asylum applicants. There are three questions relevant to assessing the directive power: (1) whether the President has the directive power as a matter of constitutional right; (2) if, contrary to (1), Congress has the constitutional authority to eliminate the directive power, whether it does so by conferring relevant authority (such as rulemaking) on agency heads, including the heads of

92. See Exec. Order No. 12,866, 3 C.F.R. § 638 (1994), *reprinted in* 5 U.S.C. § 601, at 802–06 (2012) (requiring agencies to create a regulatory plan for “the most important significant regulatory actions that the agency reasonably expects to issue,” which must include a summary of the “anticipated costs and benefits” and available alternatives).

93. See *id.*

94. See Exec. Order No. 13,771, 82 Fed. Reg. 9339, 9339 (Feb. 3, 2017) (stating that “it is important that for every one new regulation issued, at least two prior regulations be identified for elimination” because the Executive Branch must be “prudent and financially responsible in the expenditure of funds”).

95. See Kagan, *supra* note 36, at 2326–28.

purely executive agencies; and (3) whether Congress has the authority suggested by (2).

With respect to (1), it would be possible and perhaps tempting to read the vesting of executive power in “a president of the United States” to mean that the executive power is the President’s alone; the vesting clause might seem to recognize the directive power.⁹⁶ Realistically, any cabinet head is likely to do as the President wishes regardless of the legal status of the directive power. But as a formal matter, any President would like to know that the directive power exists, and in some (admittedly rare) cases, it might matter if a cabinet official wants to take a firm stand.

With respect to (2), in *Myers v. United States*, the Court raised a serious question about the existence of the directive power.⁹⁷ The Court endorsed the idea of a strongly unitary executive.⁹⁸ At the same time, it pointedly and somewhat mysteriously said, “Of course there may be duties so peculiarly and specifically committed to the discretion of a particular officer as to raise a question whether the President may overrule or revise the officer’s interpretation of his statutory duty in a particular instance.”⁹⁹ The basic idea in *Myers*, then, seems to be that Congress may deny the President the directive power, at least when the issue is the proper interpretation of an officer’s statutory duty.¹⁰⁰ In view of the *Myers* Court’s emphasis on the Take Care Clause, that fact is worth underlining.¹⁰¹ Though the Court invoked the constitutional text to support the idea of a strongly unitary executive, the Justices were nonetheless willing to acknowledge the possibility that when an officer has one interpretation of his statutory duty, and the President another, the officer cannot be overruled.¹⁰²

Importantly, however, these words are tentative, with not one but two indications that they were not meant to settle much (“there may be” and “as to raise a question whether”).¹⁰³ But the sentence signals the possibility that Congress has the authority to forbid the President from ordering executive officers to do as he wishes—and thus to insist that such officers have the authority to make the ultimate call. If that is correct, then the real question is one of statutory interpretation: Has Congress exercised that authority in particular cases? Has Congress said, as a matter of law, that duties have been “peculiarly and specifically committed to the discretion of a particular

96. See CALABRESI & YOO, *supra* note 4, at 3–4. Attorneys general, in the early days of the republic, expressed varying views on the question. For a clear summary, see Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 DUKE L.J. 963, 977 (2001).

97. 272 U.S. 52, 106 (1926).

98. See *id.* at 134–35.

99. *Id.* at 135.

100. See *id.*

101. See *id.* at 117.

102. See *id.* at 135.

103. See *id.*

officer”?¹⁰⁴ Has it said that with respect to executive officers who are given, for example, rulemaking authority?

With respect to (3), there are competing views with respect to Congress’s authority in this area.¹⁰⁵ Some people believe that whenever Congress has given specific authority to an agency head—for example, a grant of rulemaking authority to the Secretary of Transportation—the best conclusion is that the President lacks the directive power.¹⁰⁶ In their view, the relevant statutes are plain, because the agency head, and not the President, has been given the authority to make rules. The only question is whether the grant of that authority to the agency head transgresses constitutional boundaries. But embracing (3), Justice Kagan has argued that because Congress has the authority to create independent agencies, the very grant of power to an executive official ought to be taken as a matter of convenience only and as reflective of a congressional expectation that, if the President likes, he may tell his subordinates what to do.¹⁰⁷ Without resolving whether Congress has the constitutional authority to deprive the President of directive power over executive officials, Kagan urges that the mere grant of authority to an executive official ought not to be taken as reflective of a congressional desire to do that.¹⁰⁸ Her conclusion might well be supported by the avoidance canon, at least if we believe that depriving the President of the directive power would raise problems under Article II.

104. *See id.*

105. The Supreme Court seems to have rejected an unlimited directive power in *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 610 (1838):

The executive power is vested in a President; and as far as his powers are derived from the [C]onstitution, he is beyond the reach of any other department, except in the mode prescribed by the [C]onstitution through the impeaching power. But it by no means follows, that every officer in every branch of that department is under the exclusive direction of the President. Such a principle, we apprehend, is not, and certainly cannot be claimed by the President.

There are certain political duties imposed upon many officers in the executive department, the discharge of which is under the direction of the President. But it would be an alarming doctrine, that [C]ongress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the [C]onstitution; and in such cases, the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President.

But the passage is hardly unambiguous. It can be taken to say that “political duties” of certain kinds are “under the direction of the President,” without clarifying whether that is a matter of statutory requirement or constitutional compulsion. To say that some duties may be freed from “the direction of the President” is not to say which duties may be so freed.

106. *See* Kevin M. Stack, *The President’s Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 295–96 (2006); Percival, *supra* note 96, at 1005–07; Robert V. Percival, *Rediscovering the Limits of the Regulatory Review Authority of the Office of Management and Budget*, 17 ENVTL. L. REP. 10,017, 10,019–20 (1987).

107. *See* Kagan, *supra* note 36, at 2326–27.

108. *See id.*

B. INDEPENDENT AGENCIES

Now let us turn to independent agencies, recalling that for present purposes, we are understanding them to be headed by people who are protected by the INM standard. The question is how to understand the meaning of that standard insofar as it bears not on removal, but on supervision. If Congress has said that the President may discharge agency heads only for INM, what kind of supervisory power does he possess over those agency heads?

Our approach to presidential authority offers a distinctive answer to that question. We have emphasized that with respect to removal, the key question is whether agency heads have neglected their duty. The same is true with respect to supervision. If the President is seeking to supervise policy judgments of agency heads in order to ensure that they decide specific questions as he thinks best, he is unquestionably violating the INM standard. To that extent, the President lacks supervisory power as a matter of statutory interpretation. (As before, it is possible to mount a constitutional objection.) But what if he is attempting to ensure that agency heads actually do their jobs in some minimal sense? What if he is attempting to ensure that they are efficient? That they do not neglect their duty? That they do not engage in malfeasance? The President is acting within appropriate bounds, whether he is engaging in supervision in some broad sense or actually directing the agency heads what to do.

In our view, inefficiency and malfeasance are relatively straightforward.¹⁰⁹ As we have noted, a dictionary definition of inefficiency could be taken to be quite broad, but that interpretation was rejected in *Seila Law* by reference to what the Court saw as the implicit holding of *Humphrey's Executor*.¹¹⁰ A broad understanding of inefficiency would also be inconsistent with the context that gave rise to the INM standard.¹¹¹ The standard does authorize the President to tell commissioners to show up for work, to do their jobs expeditiously, and to produce in accordance with a respectable schedule. He can also set out standards to combat wrongdoing and corruption. The harder issues lie elsewhere. With respect to procedural requirements, broad policy guidance, and specific direction, the relevant question is clear: is the assertion of presidential authority an effort to ensure against some kind of neglect of duty? But the answer to that question is less clear.

Various procedural requirements, actual and imagined, are easy to justify on neglect-of-duty grounds. Suppose that the President is demanding some kind of explanation of agency action—for example, with a requirement that agencies identify the legal authority that justifies their decisions.¹¹² A somewhat harder

109. If we were to embrace a broad understanding of “efficiency,” the analysis would be more complicated, and the President would have more expansive authority.

110. See *supra* note 68 (noting the *Seila Law* Court’s plain rejection of the broad view of inefficiency, which was described in Judge Griffith’s concurring opinion in *PHH Corp.*).

111. See *Manners & Menand*, *supra* note 20 (manuscript at 74–75) (describing the “inefficient [railroad] commissioner” as one “unable to comprehend the technical reports and complicated account books of the railroads he oversaw, or dishonest and unscrupulous in the exercise of his duties”).

112. See, e.g., Exec. Order No. 12,866, 3 C.F.R. § 638 (1994), *reprinted in* 5 U.S.C. § 601, at 802–06 (2012).

case would arise if he requires independent agencies to catalogue the costs and benefits of what they are planning to do.¹¹³ If the President's goal here is to ensure that agencies follow his preferred policies, he has exceeded the bounds of his authority. But if he is attempting to ensure that they are acting within the bounds of their legal duty,¹¹⁴ any such mandate is lawful and all the more clearly so insofar as the requirement is merely procedural. Something similar can be said for other exercises of substantive supervisory power, such as actual and hypothetical supervisory power. The President is entitled to direct independent agencies to follow general policies and principles insofar as their failure to do so would count as neglect of duty.¹¹⁵

In this light, we could imagine both easy and hard cases. Suppose, for example, that the President wants the SEC to offer an account of the legal foundation of its regulations. If that is all he wants, the President can fairly say that he is trying to ensure against neglect of duty; a requirement that the SEC provide an account of the legal foundations of its regulations would be consistent with the INM standard. What about a general requirement that independent agencies catalogue the costs and benefits of what they do? If the President can plausibly argue that he is imposing that requirement to ensure against neglect of duty, the INM standard allows him to proceed. To know whether an argument to that effect is plausible, we would have to parse the underlying statutes to see if a failure to consider costs and benefits counts, in fact, as a neglect of legal duty.

If, by contrast, the President says that the SEC must consider the impacts of its decisions on climate change, and if the SEC (rightly) concludes that it lacks the authority to do that, then the President cannot order the SEC to do as he wishes. A harder case would arise if the President directs the SEC to consider the impacts of its decisions on climate change, and if the President and the SEC have a reasonable difference of opinion about whether the SEC has the authority to do so. If the SEC reasonably believes that it lacks that authority, it would probably be hard to argue that its failure to do as the President wishes represents a neglect of duty.

What about a requirement that, to the extent permitted by law, agencies make cost-benefit analysis the rule of decision? That would be harder. The question is whether such a requirement can be seen as an effort to ensure that agencies do not neglect their duty. For present purposes, it should be sufficient to say that some cases clearly fall inside and outside the line. The President is certainly entitled to take steps to ensure against plainly unlawful rulemaking or plainly arbitrary policymaking, where arbitrariness is understood in the general terms of the APA. The President is forbidden from requiring independent agencies to follow policies

113. See, e.g., Exec. Order No. 13,563, 3 C.F.R. § 215 (2012), *reprinted in* 5 U.S.C. § 601, at 816–17 (2012).

114. See *Michigan v. EPA*, 576 U.S. 743, 759–60 (2015) (holding that agencies must “consider” costs as well as benefits under a provision of the Clean Air Act). We do not mean to express a view on when, if ever, agencies must engage in cost-benefit analysis under the Administrative Procedure Act.

115. See Exec. Order No. 13,579, 3 C.F.R. § 256 (2011), *reprinted in* 5 U.S.C. § 601, at 817–18 (2012).

that the agencies reasonably believe to be wrong or mistaken (and that agencies could therefore decline to follow without neglecting their legal duty). When cases are hard, it is because of a lack of clarity about whether the President's judgment reflects a decision to impose his own policy choice when others are reasonable, or whether the President is genuinely ruling legally irresponsible choices, violative of an agency's legal duty, out of bounds. The central point is that whatever the President does, it must fit under the general idea of preventing neglect of duty as substantive law understands it.

What about the directive power? Here again, the answer depends on whether the President is seeking to prevent violations of the INM standard. It follows that the President could not direct a member of, say, the Federal Trade Commission to vote in accordance with the President's own policy preferences. But if that member seeks to go on vacation for two years or to take a bribe, the President can direct otherwise. And if a member of an independent agency seeks to act in a way that self-evidently and patently violates the law, the President is entitled to say: I direct you not to vote that way.

C. ON POLICING LINES

With respect to neglect of duty, the line that we are drawing might well be difficult to police—a concern that maps onto that in *Seila Law*, where the Court was troubled by the difficulty of producing a workable standard.¹¹⁶ We hope that the line is clear enough, even though we acknowledge that under our approach, hard intermediate cases cannot be avoided. We have discussed several such cases. Is the existence of such cases a decisive objection?

In principle, it might well be better to have a hard-and-fast line. But under any approach, it is difficult to avoid hard cases. One way to do so would be to adopt maximalism and to allow the President to control independent agencies essentially as he wishes. But that approach was decisively rejected in *Seila Law* and *Humphrey's Executor*.¹¹⁷ Another way to avoid or at least to reduce hard or intermediate cases would be to adopt minimalism, which would not allow anything like policymaking control by the President. But even under minimalism, it would be necessary to decide what kinds of inefficiencies and malfeasance are legitimate bases for removal. In any case, minimalism would violate the natural meaning of the statutory words—neglect of duty—and severely compromise the President's authority under the Take Care Clause. In our view, hard intermediate cases are not too high a price to pay for preventing violations of both the governing statute and the Constitution. And if the analysis here is correct, most cases fall on one or the other side of the line.

There is a practical problem. Any President might well be tempted to say that commissioners are neglecting their duties if they do not do what he thinks best. If the Chair of the Federal Reserve Board does not cut interest rates when the

116. See *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2206 (2020).

117. See *id.* at 2192; *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629 (1935).

economy is struggling, the President might insist that the Chair has not merely made a mistake but instead committed an egregious wrong, amounting to neglect of duty.¹¹⁸ If a member of the Nuclear Regulatory Commission does not take an aggressive stand on safety issues, the President might urge that the member has not merely erred but instead defaulted on his legal responsibility. If a member of the National Labor Relations Board does not do what the President thinks should be done to protect labor unions, the President might conclude that he has neglected his duty. In many imaginable cases, a presidential claim to this effect might be sincere but altogether wrong, turning our proposed approach into a close sibling of maximalism, which we have rejected. The problem might be heightened by another practical reality: any member of an independent agency would know that a president might try to overreach, and for that reason, might do his anticipated bidding.

What is the remedy? There are two institutional answers, and there is one response on a conceptual level. The first institutional answer involves the Executive Branch itself. To a greater or lesser extent, Presidents are restrained by their lawyers in the White House and the Department of Justice.¹¹⁹ When things are working as they should (which is admittedly not always the case), those constraints are real, and they deter the President from crossing legal lines. Deliberative processes are usually not disclosed to the public, but we can report, from personal experience and from personal accounts of those we trust, that when White House Counsel or the Attorney General tell a President that he lacks the legal authority to do what he wishes, the President ordinarily yields. The second institutional answer involves the federal courts. As *Humphrey's Executor* shows, a removed member of an independent commission has an ability to go to court to contest the removal.¹²⁰ It is true that any such proceeding is time-consuming, expensive, and after the fact. No one should doubt that power can be abused, and the remedies for abused power can be inadequate.

More importantly, however, it is a misconception to think that the occasional blurriness of legal lines is a *unique* objection to our suggested reading of INM clauses. One more time: It is an objection to any rule other than perhaps the most extreme possible rule such as minimalism or maximalism (an approach that the Court has never adopted, even in *Myers*). Any plausible rule will establish some line or some imperfectly precise standard for evaluating presidential action, and it can then be fairly argued that the presidency can test the limits.¹²¹ Potentially

118. On multiple occasions, President Donald Trump has signaled his view that the Federal Reserve has been egregiously wrong. See, e.g., Heather Long, *Federal Reserve Makes Small Interest Rate Cut. Trump Slams Central Bank for Having 'No Guts.'* WASH. POST (Sept. 18, 2019, 4:45 PM), <https://www.washingtonpost.com/business/2019/09/18/federal-reserve-cuts-interest-rates-quarter-point-counter-trumps-trade-war>.

119. For a sustained argument to this effect, see generally JACK GOLDSMITH, *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11* (2012).

120. *Humphrey's Ex'r*, 295 U.S. 602, 618–19.

121. It is true that the minimalist position, forbidding the President from exercising any kind of control over policy judgments, might seem to create a hard-edged constraint on overreaching. But for reasons that we have offered, that position runs up against the best understanding of the INM standard especially when it is read against the constitutional background.

hard cases and the risk of abuse, by themselves, are not decisive objections to taking the neglect of duty standard seriously.

CONCLUSION

The extent of presidential authority over the independent regulatory commission remains one of the great unanswered questions in American public law. Most of the proposed answers attempt to specify what it means to say that the Executive Branch is “unitary.” On both originalist and non-originalist grounds, there are reasonable arguments in favor of the view that, as a matter of constitutional right, the President must have substantial ability to remove and supervise all those who execute federal law.¹²² There are also reasonable counterarguments, pointing to ambiguities in the historical record, changed circumstances, and the importance of diffusing power and ensuring against White House control of certain subject areas, such as monetary policy and communications.¹²³ For our purposes, the most important conclusion is that if agencies are genuinely insulated from presidential oversight, there are serious constitutional questions.

Our emphasis here has been on long-neglected words in the INM standard: neglect of duty. Those words fit remarkably well with a core responsibility of the President, which is to take care that the laws be faithfully executed. If the President believes that commissioners have neglected their (legal) duties, he would seem to have authority to remove them under the clear language of the INM standard. At the same time, serious questions remain. Under the INM standard, it would be implausible to say that the President can remove, say, a member of the National Labor Relations Board on the ground that he voted for a rule that a federal court invalidated. It would be even more implausible to say that the President can remove a member for voting for a rule that, in the President’s view, a court *should* invalidate. Although that interpretation would not adopt the maximalist position, it would come far too close to it. The more sensible understanding is that “neglect” of duty refers to something egregious, such as frequent or repeated disrespect for legal standards or egregious disrespect on especially prominent occasions.

That interpretation of the INM standard, based on a conception of presidential review, greatly softens the constitutional objection. To be sure, those who believe in a strongly unitary presidency would not be entirely satisfied. In their view, all agency heads must be at-will employees, and the President must have plenary powers of supervision and perhaps direction over them.¹²⁴ In our view, that conclusion is difficult to defend. But our goal here has not been to resolve the constitutional issue. It has been to suggest that the prior issue is statutory, and that existing statutes grant the President a significant degree of authority over the supposedly independent agencies—authority that includes much, and on a reasonable view all, of what he is entitled to have under the Take Care Clause.

122. See, e.g., CALABRESI & YOO, *supra* note 4, at 3–4; Lessig & Sunstein, *supra* note 36.

123. See, e.g., Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211, 211 (1989).

124. See CALABRESI & YOO, *supra* note 4, at 3–4.