Will agencies' weaknesses become a source of presidential strength?

By Shay Dvoretzky, Esq., Parker Rider-Longmaid, Esq., and Emily Kennedy, Esq., Skadden, Arps, Slate, Meagher & Flom LLP

APRIL 24, 2025

In its first three months, the Trump Administration has imposed sweeping change on everything from foreign affairs and birthright citizenship to the scope of Title VII. Any of these issues may become fodder for Supreme Court review. But one focal point of particular interest is how the new Administration is using agencies to accomplish its goals.

Between mass firings, shifting policies, and funding freezes, the Executive Branch has taken actions that tee up significant questions about the scope of presidential power over agencies. And the answers will have major ramifications for regulated parties and the pace of change any time a new president takes office.

Recent Supreme Court decisions cabin agencies' authority in critical ways, including limiting their policymaking authority over questions of major political and economic significance (*West Virginia v. Environmental Protection Agency (EPA)*), restricting their use of in-house court proceedings (*Securities and Exchange Commission (SEC) v. Jarkesy*), overruling *Chevron* deference (*Loper Bright Enterprises v. Raimondo*), and opening the door to new regulatory challenges to longstanding rules (*Corner Post, Inc. v. Board of Governors of the Federal Reserve System*), (See a previous article here: https://bit.ly/3RIyebP).

The trend is already continuing this Term. In *City and County of San Francisco v. EPA*, the Court narrowly construed the EPA's authority under the Clean Water Act to issue discharge permits. And the Court may soon revive the nondelegation doctrine — the idea that because the Constitution commits the power to make laws to Congress, Congress cannot confer that authority on others. A robust nondelegation doctrine would invalidate statutory grants of authority that give agencies too much discretion or leeway (See a previous article here: https://bit.ly/4jf9tzZ).

But when agencies' power is restricted, where does it go? In some contexts, the responsibilities claimed by the agency get shifted to courts. For example, *Loper Bright* shifted agencies' roles in interpreting statutes to courts. And *Jarkesy* made clear that only Article III courts — and not the SEC's in-house tribunals — can adjudicate civil penalties for securities fraud.

In other instances, including the major questions doctrine and nondelegation, restraints on agencies' power could mean that responsibilities get shifted back to Congress.

Few of the Court's recent administrative-law decisions have had similar ramifications for the Executive Branch. But in the coming months, the Court likely will be asked to constrain agencies in a way that would expand executive power and accelerate change whenever a new administration takes office.

Between mass firings, shifting policies, and funding freezes, the Executive Branch has taken actions that tee up significant questions about the scope of presidential power over agencies.

The Trump Administration has asked the Court for emergency relief in three particularly noteworthy cases involving executive authority over agencies. While the procedural posture of the emergency requests did not afford the Court an opportunity to address the underlying merits, each case presents significant constitutional questions that are likely to make their way before the Justices soon.

Two cases in which the Trump Administration has sought emergency relief implicate the President's ability to impound congressionally appropriated funds. *In Department of State v. AIDS Vaccine Advocacy Association*, the Court declined to lift a district court order requiring the Executive Branch to pay almost $2 billion to recipients of certain federal foreign-assistance funding for work they had already completed.

And in *Department of Education v. California*, the Court agreed to pause a district court order reinstating millions of dollars

in federal grants that Congress had created in response to a teacher shortage.

The underlying disputes in these cases raise numerous constitutional questions, including whether Congress may categorically circumscribe Presidential impoundment of appropriated funds. These questions are likely to come before the Justices again, whether in a later phase of these cases or in one of the numerous other pending challenges to terminated federal grants and funding. The answers could have significant ramifications for executive power over agency spending, especially vis-à-vis Congress.

A decision overruling Humphrey's Executor *would have far-reaching effects, putting power over independent agencies more securely in the President's hands and enabling new administrations to more quickly change agencies' priorities and policies upon taking office.*

In another matter implicating the balance of power between Congress and the President, President Trump asked the Justices to vacate a district court's order that temporarily reinstated Hampton Dellinger as head of the Office of Special Counsel after President Trump had removed him. The Court ultimately dismissed the request as moot, and Dellinger no longer seeks reinstatement. But challenges to President Trump's removal of officials from other agencies are percolating in lower courts.

On April 7, 2025, the District of Columbia U.S. Circuit Court of Appeals granted rehearing en banc in *Harris v. Bessent*, a case involving the removal of officers from the National Labor Relations Board (NLRB) and the Merit Systems Protection Board (MSPB). As with Dellinger's termination, *Harris* raises important questions about the President's authority to fire certain agency officials at will.

Regardless of how the en banc D.C. Circuit rules, the Justices will almost certainly be asked to weigh in and revisit longstanding precedent allowing Congress to limit the President's ability to remove members of independent agencies.

In *Humphrey's Executor v. United States* (1935), the Court held that Congress can create multi-member, expert agencies with officials removable by the President only for cause, as long as the agencies don't exercise executive authority. The case arose when President Franklin D. Roosevelt fired a member of the Federal Trade Commission for political reasons, even though a statute protected FTC Commissioners from removal except for "inefficiency, neglect of duty, or malfeasance in office."

Although the President generally has authority to remove executive officers without cause, the Court upheld the statute's removal restrictions because the FTC wasn't "an arm or an eye of the executive," but instead "act[ed] in part quasi legislatively and in part quasi judicially."

In recent years, the Supreme Court has pulled back from *Humphrey's Executor* and reaffirmed the President's authority to remove without cause single heads of agencies exercising significant executive power. In *Seila Law v. Consumer Financial Protection Bureau (CFPB)* (2020), the Court struck down removal restrictions on the director of the CFPB, explaining that the President's obligation under Article II of the U.S. Constitution to "take care that the laws be faithfully executed" requires him to possess "the authority to remove those who assist him in carrying out his duties."

The Court limited but did not overrule *Humphrey's Executor*, noting that the CFPB — in contrast to the FTC as it existed in 1935 — "wields significant executive power and is run by a single individual." Justice Clarence Thomas and Justice Neil Gorsuch would have jettisoned *Humphrey's Executor* altogether.

The Court subsequently applied *Seila Law* to hold that the structure of the Federal Housing Finance Agency (FHFA), which also was run by a single director who could be removed only for cause, was unconstitutional (*Collins v. Yellen*).

The Trump Administration has said that it will urge the Supreme Court to overrule *Humphrey's Executor* and that it will no longer defend the constitutionality of removal restrictions on members of multi-member commissions. A decision overruling *Humphrey's Executor* would have far-reaching effects, putting power over independent agencies more securely in the President's hands and enabling new administrations to more quickly change agencies' priorities and policies upon taking office.

Whether or not *Humphrey's Executor* survives, the Trump Administration has indicated that it will rely on recent Supreme Court decisions constraining agency power to justify sweeping changes to agencies' structure, function, policies, and priorities. A Feb. 19, 2025, Executive Order instructs agencies to identify regulations that they believe exceed their statutory authority — a directive that channels *Loper Bright* and *West Virginia*. And if the Court revives the nondelegation doctrine later this Term, its ruling could help justify agencies' decisions to rescind regulations that the Administration believes are unlawful delegations of legislative power. Other holdings, like *Jarkesy*, may support new or rescinded regulations governing agencies' practices and procedures.

Challenges to new or rescinded regulations are likely to make their way before the Justices and will test the bounds of executive power. In some contexts, recent Supreme Court

decisions like *Ohio v. EPA* — which reaffirmed that agencies have to strictly follow procedural requirements — may hamper change by requiring the agencies to follow proper rulemaking procedures before rescinding or revising rules, including thorough justifications for any changes in position.

And because *Loper Bright* strips agencies of deference, there's no guarantee that courts will agree that an agency's new reading of a statute is best. At the same time, *Loper Bright* and *Corner Post* open the door to courts embracing new understandings of previously established law. And decisions constraining agency authority, like *West Virginia*, could accelerate change by empowering agencies to justify new positions on the grounds that the prior position lacked statutory authority.

The bottom line for businesses is to vigilantly monitor Executive Orders and agency actions. We're likely to see a lot of flux as the new Administration enforces its policies, and this may lead to a period of uncertainty and instability for regulated entities. It also creates opportunities, as agency recissions or modifications of rules are open to challenge, and regulated parties should be prepared to intervene to defend or oppose modification of rules that affect them. And when they do, it will be interesting to see whether the Supreme Court's decisions cabining agency power end up hastening or hindering the pace of change.

The opinions expressed in this article are those of the author(s) and do not necessarily reflect the views of Skadden or its clients.

The writers are regular, joint contributing columnists on the U.S. Supreme Court for Reuters Legal News and Westlaw Today.

About the authors



Shay Dvoretzky (L), a partner in **Skadden, Arps, Slate, Meagher & Flom LLP**'s Washington, D.C., office, is the head of the firm's Supreme Court and appellate litigation group. He has argued numerous cases in the U.S. Supreme Court and briefed and argued cases across a range of subject areas in all the federal courts of appeals and numerous state appellate courts. He can be reached at shay.dvoretzky@skadden.com. **Parker Rider-Longmaid** (C), a partner in the Supreme Court and appellate litigation group in the firm's Washington, D.C., office, has significant argument and briefing experience before federal and state appellate and trial courts. He has argued before the U.S. Supreme Court and many circuit courts and led briefing and strategy in the Supreme Court and all the federal circuit courts of appeals. He can be reached at parker.rider-longmaid@skadden.com. **Emily Kennedy** (R), a firm counsel in the Supreme Court and appellate litigation group in the firm's Washington, D.C., office, has argued cases before multiple federal courts of appeals. She has drafted numerous merits- and cert-stage briefs filed in the U.S. Supreme Court, as well as state and federal appellate courts across the country. She can be reached at emily.kennedy@skadden.com.

This article was first published on Reuters Legal News and Westlaw Today on April 24, 2025.