UNIVERSITY OF MIAMI
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Practice Question III:
Model Answer

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The MACA bill presents several constitutional issues. First, the sole requirements specified for the Commission in deciding which federal statutes should no longer be enforced are that the statute (1) be "regulatory," and (2) "undermines the economy." Does this constitute an "intelligible principle" under non-delegation doctrine? The terms of MACA are very broad. Probably most federal statutes are regulatory in the sense of requiring or at least incentivizing changes in behavior. In identifying what "undermines the economy" the Commission will have considerable discretion. But the Supreme Court hasn't found a statute unconstitutional under the non-delegation doctrine since the 1930s, and has upheld broad mandates like regulating "in the public interest, convenience, and necessity." This may reflect a sense that courts are not well-equipped to determine how specific legislation realistically can or should be, and that the judgment on that is best left to Congress.

In my view, [the nondelegation doctrine should be revived. Justices may not be legislative experts, but given Congress's propensity to make broad delegations of its power, they are the only ones capable of putting meaningful restraint on the accretion of Presidential power.] **OR** [the Court should continue to give Congress a lot of deference in delegating its power, given the need for executive discretion in implementing laws and the difficulties of specifying a judicial test for adequate specificity that would meaningfully apply to the full range of statutes.][1]

A second issue concerns the plans for appointing the Commission members. Article II vests the appointment power in the President, subject to the Senate's advice and consent. The MACA bill would condition that consent on a 2/3 majority. This might seem fine because Art. II doesn't specify what kind of majority, referring only to consent. Still, the Framers intended to create a democracy, which suggests a majority requirement that doesn't let a minority of "no" votes hinder passage. Also, the Constitution specifically provides for a super-majority vote in specified instances, including ratification of a treaty, conviction for impeachment, and overriding a veto – and does not so specify for appointments.

The 2/3 requirement might also not fare well in light of the *Morrison* special prosecutor case, where the Court asked whether the act, taken as a whole, unduly interfered with the role of the Executive Branch. A 2/3 consent requirement as to a single agency might not drastically change the balance of powers. On the other hand, if Congress starting generally imposing a 2/3 requirement on appointments, that could make it harder for the President to appoint the team he wants to have in the executive branch, undermining his ability to take care that the laws be faithfully executed.

[The 2/3 majority provision shouldn't be permitted. It implicitly conflicts with the text, which reserves supermajority requirements to a few matters. To the extent that the Framers wanted a brake on the legislative process, they did so by creating a bicameral legislature and providing for a Presidential veto.] **OR** [The 2/3 provision should be upheld. The text doesn't specifically say "majority." Congress should have the flexibility to deal with the administration of the laws in the way it thinks best; courts should defer to the political branches on separation of powers issues unless what they do is flagrantly in conflict with the text.]

A third issue concerns the limit on removal of Commission members. *Humphrey's Executor* upheld Congress's power to limit Presidential removal of executive branch officials to cases where there was good cause for removal (such as neglect of duty or malfeasance). While that case did refer to what it termed the FTC's "quasi-judicial" and "quasi-legislative" powers as a

[1] What's in brackets are alternatives. What matters is not what position you take, but how well you support it. Other positions besides what may be included in this answer are possible as well.

reason for finding the limitation constitutional, the *Morrison* special prosecutor case later held that *Humphrey's Executor* stood for the proposition that Congress can limit removal so long as it does not itself participate in the removal. It distinguished the *Myers* case involving the postmaster, in which the Court struck down a requirement that the Senate give its advice and consent to firing postmasters. The Court could take a deferential approach, leaving it to Congress to determine whether a degree of independence for multi-member commissions is best for maintaining checks and balances. And it could distinguish *Seila Law*, which struck down a good cause limitation on the President's firing of the head of the CFPB. There, the Court noted that Congress had enacted good cause limitations on removal only with respect to multi-member commissions like the FTC.

It's possible, though, that the Court would find the limitation on removing Commission members unconstitutional. *Seila Law* put a lot of emphasis on the opening Art. II § 1 reference to "the executive Power" being vested in the President, in contrast to Art. I § 1, which states that "All legislative Powers herein granted" are vested in Congress. It also emphasized the President's duty to take care that the laws be faithfully executed; to do this, the President needs the help of executive branch members he or she can rely on. The Court also claimed that the Framers intended there to be an energetic executive, capable of getting things done. This concentrated authority, *Seila Law* said, is consistent with democracy and accountability because the President is elected. The portrayal of an energetic executive accountable only to the people was reiterated in *Trump v. United States*, concerning immunity from prosecution, where the Court deemed removal of executive branch officials a core power, absolutely immune from prosecution, even to the point of not allowing testimony on this point in the prosecution of a President on a non-immune ground.

For these reasons the Court might extend *Seila Law* to all appointed executive positions, not just to agencies like the CFPB, which had a single commissioner. *Seila Law* described *Humphrey's Executor* as exceptional and as at the outermost limits of Congress's power to limit removal. Moreover, the Commission will be quite powerful, as was the CFPB, and the Commissioners have even longer terms than the CFPB head had. With terms set at 10 years, even a two-term President might not have the chance to make an appointment. Also, *Seila Law* was not deferential to Congress's judgment that the structure it chose there – which created a great deal of insulation from the President – was best suited to the major regulatory tasks Congress was giving the CFPB. The Court has recently stayed lower court decisions enjoining the President from firing commission members removable only for good cause. While these stay decisions may not be binding (especially on the Supreme Court), they suggest that the Court may be ready to overrule *Humphrey's Executor*.

In my view, [the Court should overrule *Humphrey's Executor* and treat removal of any executive branch official as an exclusive power of the President. The text is clear that the President has "the Executive power." Also, the President has a duty to execute the laws, and needs officials in whom he or she has full confidence to help him. Voters can provide accountability by taking how well the executive branch is functioning.] **OR** [the Constitution is a sketch, not a blueprint. The broad text of Art. II doesn't effectively address modern institutions like the rise of administrative agencies. The Court should defer to efforts by the political branches to work through separation of powers concerns.] **OR** [the Court needs to maintain a mix of deference and assertiveness. In the Framers' particular *conception*, Congress was the branch most likely to overreach. But the Court should respect their general *concept* – balance of powers, with ambition counteracting ambition – and refrain from striking down legislative restraints on executive action, especially since modern party loyalty already makes it hard for Congress to assert itself when the same party controls both branches. For the same reason, the Court should *not* be deferential to presidential overreach, as in *Youngstown* (the Steel Seizure Case).]