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Recommended Citation

Linda D. Jellum, *You're Fired! Why the ALJ Multi-Track Dual Removal Provisions Violate the Constitution & How to Fix Them*, 26 *Geo. Mason L. Rev.* 705 (2019).

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“YOU’RE FIRED!” WHY THE ALJ MULTI-TRACK
DUAL REMOVAL PROVISIONS VIOLATE THE
CONSTITUTION AND POSSIBLE FIXES

*Linda D. Jellum**

INTRODUCTION

When you light fireworks, you look forward to the ensuing explosion. Sometimes, however, all you get is a fizzle. Such was the outcome of the highly anticipated¹ case of *Lucia v. SEC*.² This case held that the Administrative Law Judges (“ALJs”)³ of the Securities and Exchange Commission (“SEC”) were inferior officers who must be constitutionally appointed.⁴ This holding was hardly surprising,⁵ especially given the Solicitor General’s decision to switch sides after *Lucia*’s petition was filed with the Supreme Court.⁶ Indeed, the Court had to appoint Amicus Curiae Anton Metlitsky to

* Ellison Capers Palmer Sr. Professor of Tax Law, Mercer University School of Law. I would like to thank Director Adam White for inviting me to participate in the C. Boyden Gray Center for the Study of the Administrative State’s and George Mason Law Review’s project on “Agency Adjudications and the Rule of Law.” Special thanks to Professors Richard Pierce, Michael Asimow, and Michael Greve for their thoughtful insights. My research assistant, Caitlin Wise, J.D. expected 2019, did a tremendous job reviewing, cite-checking, and laughing at my work. This Article builds on my prior co-authored piece: Linda D. Jellum & Moses Tincher, *The Shadow of Free Enterprise: The Unconstitutionality of the Securities & Exchange Commission’s Administrative Law Judges*, 70 SMU L. REV. 3 (2017). However, this Article is more comprehensive, approaches the topic differently, and evaluates potential solutions.

¹ See, e.g., Margaret Newkirk & Greg Stohr, *Trump’s War on ‘Deep State’ Judges*, BLOOMBERG BUSINESSWEEK (Apr. 20, 2018, 4:00 AM), <https://www.bloomberg.com/news/articles/2018-04-20/supreme-court-lucia-case-could-remove-agency-judge-protections> (“In a Supreme Court docket full of big cases, *Lucia* ‘may be the sleeper,’ says Brianne Gorod, chief counsel for the Constitutional Accountability Center, a liberal think tank in Washington . . . Judge Carlos Lucero of the 10th Circuit Court of Appeals wrote that the effort to attach the officer designation ‘threatens to unravel much of our modern regulatory framework’ and ‘places the legitimacy of our administrative agencies in serious doubt.’”).

² 138 S. Ct. 2044 (2018).

³ See generally Brief Amicus Curiae of Administrative Law Scholars in Support of Neither Party at 8, *Lucia v. SEC*, 138 S. Ct. 2044 (2018) (No. 17–130) (“The vast majority of ALJs, 1,655 out of 1,926, work for the Social Security Administration (SSA) . . . Agencies like the SEC routinely hire ALJs who have previously worked for SSA. Thus, the initial appointment of an ALJ is usually made by SSA from the list of eligible applicants created by OPM. Other agencies then choose ALJs from the large population of ALJs who work for SSA.”)

⁴ *Lucia*, 138 S. Ct. at 2055.

⁵ See Linda D. Jellum & Moses M. Tincher, *The Shadow of Free Enterprise: The Unconstitutionality of the Securities & Exchange Commission’s Administrative Law Judges*, 70 SMU L. REV. 3, 31–34 (2017) (arguing that SEC ALJs were inferior officers who were unconstitutionally appointed).

⁶ *Lucia*, 138 S. Ct. at 2050.

argue the SEC's original position that the SEC ALJs were merely employees.⁷

While Metlitsky did his best,⁸ the argument was a loser from the start. Supreme Court precedent had already granted inferior officer status on many a lesser functionary,⁹ including a district court clerk,¹⁰ a federal marshal,¹¹ and, most relevantly in *Freytag v. Commissioner of Internal Revenue*,¹² Tax Court special trial judges.¹³ In fact, Justice Kagan's majority opinion in *Lucia* could simply have said, "SEC ALJs are inferior officers, duh. See our unanimous, did I mention unanimous?, decision in *Freytag*."¹⁴

Of course, Justice Kagan was more eloquent than that, but her opinion was crafted extremely narrowly. Despite Metlitsky and the government's request that the Court more clearly define the "significant authority" element of officer status, Justice Kagan declined, saying simply that "our precedent[] makes that project unnecessary."¹⁵ Had such guidance been offered, there might be no question who else might be an inferior officer. Instead, Justice Kagan minimized *Lucia*'s impact by resting entirely on stare decisis.¹⁶ Fizzle number one.

Fizzle number two: Justice Kagan correctly sidestepped the game-changing issue of whether the multi-track, statutory removal restrictions on SEC ALJs violate the United States Constitution.¹⁷ When granting certiorari, the Court refused to include the removal issue.¹⁸ Despite this refusal, the Solicitor General asked the Court to address the issue in its merits brief.¹⁹ The

⁷ *Id.* at 2051 n.2.

⁸ *Id.* ("Anton Metlitsky . . . has ably discharged his responsibilities.").

⁹ The Court has found various examples of inferior officers. *See, e.g.*, *Edmond v. United States*, 520 U.S. 651, 666 (1997) (military judges); *Weiss v. United States*, 510 U.S. 163, 182 (1994) (Souter, J., concurring) (military judges); *Morrison v. Olson*, 487 U.S. 654, 671 (1988) (independent counsel); *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 354 (1931) (United States commissioner in district court proceedings); *Myers v. United States*, 272 U.S. 52, 176 (1926) (postmaster first class); *Rice v. Ames*, 180 U.S. 371, 378 (1901) (extradition commissioners); *United States v. Eaton*, 169 U.S. 331, 343 (1898) (vice consul temporarily exercising the duties of a consul); *United States v. Allred*, 155 U.S. 591, 594–95 (1895) ("commissioners of the Circuit Courts"); *United States v. Perkins*, 116 U.S. 483, 484 (1886) ("cadet-engineer"); *Ex parte Siebold*, 100 U.S. 371, 397–98 (1879) (election supervisor); *United States v. Germaine*, 99 U.S. 508, 511 (1879) ("thousands of clerks in the Departments of the Treasury, Interior, and the others"); *United States v. Moore*, 95 U.S. 760, 762 (1878) ("assistant-surgeon").

¹⁰ *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 258 (1839).

¹¹ *Siebold*, 100 U.S. at 397–98.

¹² 501 U.S. 868 (1991).

¹³ *Id.* at 881–82.

¹⁴ This decision would have been even more obvious had the Court of Appeals for the District of Columbia not misinterpreted *Freytag*.

¹⁵ *Lucia v. SEC*, 138 S. Ct. 2044, 2051 (2018).

¹⁶ Administrative judges are one example.

¹⁷ *Lucia*, 138 S. Ct. at 2050–51 n.1.

¹⁸ *Id.*

¹⁹ *See* Brief for the Respondent at 21, *Lucia v. SEC*, 138 S. Ct. 736 (2018) (No. 17-130).

Court again declined, politely saying, “No court has addressed that question, and we ordinarily await ‘thorough lower court opinions to guide our analysis of the merits.’”²⁰

With the removal issue appropriately sidestepped, the fizzle was complete. As Professor Andy Popper noted with some confusion, “[*Lucia*] was supposed to be the biggest ad law decision of the last decade.”²¹ Yes, supposed to be; however, stay tuned. The question of the constitutionality of the ALJ removal limitations is coming. Indeed, on November 28, 2018, Raymond J. Lucia, Co. filed a new complaint alleging that “[t]hese multiple layers of tenure protection violate Article II of the United States Constitution.”²² And, the potential ramifications are enormous. Insert explosion here!

Given that it is only a matter of time before this removal issue reaches the Supreme Court, this Article explains why the ALJ removal structure violates Article II of the United States Constitution and separation of powers. Moreover, unlike cases in which the courts have found removal provisions violate the Constitution and have severed the offending provisions,²³ here, there is no easy fix. Federal statute 5 U.S.C. § 7521 protects ALJs from at-will removal, reductions in pay or pay grade, suspensions, and furloughs.²⁴ It applies to all ALJs who are appointed under 5 U.S.C. § 3105.²⁵ Hence, the Court’s holding has the potential to affect all ALJs: those working for independent agencies (hereinafter “Independent ALJs”) and those working for executive agencies (hereinafter “Executive ALJs”).²⁶

ALJs are central to the work that federal agencies do. ALJs hold administrative hearings and make initial decisions on topics ranging from environmental violations to black lung benefits.²⁷ ALJs are “judicial workhorses, handling five times as many cases—more than 1.5 million a year, according to the administrative judiciary’s estimate—as are filed in federal district court.”²⁸ Without ALJs, the administrative piece of the adjudicative state

²⁰ *Lucia*, 138 S. Ct. at 2050–51 n.1 (quoting *Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012)).

²¹ E-mail from Andrew Popper, Ann Loeb Bronfman Distinguished Professor of Law & Gov’t, Am. Univ. Washington Coll. of Law, to author (June 21, 2018, 2:24 PM) (on file with author).

²² Complaint for Declaratory and Injunctive Relief at 21, *Raymond J. Lucia Co. v. SEC*, No. 18CV2692DMSJLB (S.D. Calif. (November 28, 2018)).

²³ See, e.g., *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 508 (2010) (severing the unconstitutional removal provision from the remainder of the act); *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 198 (D.C. Cir. 2018) (Kavanaugh, J., dissenting) (recommending severability of the unconstitutional removal provision).

²⁴ 5 U.S.C. § 7521(b) (2012).

²⁵ 5 U.S.C. § 7521(a) (2012).

²⁶ These are my terms. Because the removal structure differs depending on the type of agency, distinguishing between the two is sometimes necessary.

²⁷ See e.g., *Whitman v. American Trucking Ass’ns, Inc.*, 531 U.S. 457, 457 (2001); *Energy West Mining Co. v. Oliver*, 555 F.3d 1211, 1216–17 (10th Cir. 2009).

²⁸ *Newkirk & Stohr*, *supra* note 1.

could fall apart. Thus, removal may be the most important administrative law issue to be resolved in the coming years.

Currently, ALJs are protected from at-will removal by multiple statutes delineating a difficult removal process.²⁹ In short, ALJs have for-cause removal protection, as do many of those who would remove them.³⁰ This multi-track removal protection system was put into place for a very good reason: to protect the independence of ALJs, who are employees of the agencies for which they work.³¹ Prior to Congress enacting the Administrative Procedure Act (“APA”), many individuals criticized examiners, as they were called then, as biased arms of their agencies.³² As a result, Congress put the removal protections in place to help insulate ALJs from their employing agencies and further impartiality.³³ While promoting ALJ independence and impartiality is certainly desirable, the provisions of the APA must still comport with Article II and separation of powers. However, the Supreme Court has held that just two levels of tenure protection violate the Constitution.³⁴ In the case of ALJs, there is a “Matryoshka doll of tenure protections.”³⁵

This Article explains why the for-cause removal provisions for ALJs are unconstitutional and offers three potential solutions to remedy this problem. Part I provides background information, which explains that the APA was a compromise of competing interests. Some wanted ALJs to be completely independent from their agencies to further unbiased decision-making and independence, and others feared agencies would lose control over setting policy, should ALJs have such an independent function.³⁶ Ultimately, Congress compromised by including provisions to make the ALJs more independent, while also ensuring that agencies retained complete control to set policy.³⁷

As part of the independence piece of the compromise, ALJs would henceforth be removable only for cause.³⁸ Further, to remove an ALJ, an agency, whose members might also be removable only for cause, had to make its case during a formal hearing before a different ALJ, who was removable only for cause and worked for a separate agency, whose members were also only removable for cause.³⁹ In short, the process Congress created involves multiple levels of for-cause protection.⁴⁰

²⁹ See discussion *infra* Part I.B.

³⁰ See 5 U.S.C. § 7521(a)–(b)(1) (2012).

³¹ See discussion *infra* Part I.A.

³² See discussion *infra* Part I.A.

³³ ADMIN. CONFERENCE OF THE U.S., RECOMMENDATION 92-7, THE FEDERAL ADMINISTRATIVE JUDICIARY, at 8 (1992).

³⁴ *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 514 (2010).

³⁵ *Id.* at 497.

³⁶ See discussion *infra* Part I.A.

³⁷ See discussion *infra* Part I.A.

³⁸ 5 U.S.C. 7521(a) (2012).

³⁹ See discussion *infra* Part I.B.

⁴⁰ See discussion *infra* Part I.B.

Next, Part II of this Article points out that the Constitution does not expressly provide the President with removal power; however, such power has been located within Article II and separation of powers.⁴¹ Specifically, the Supreme Court early on presumed the President had removal power because the framers of the Constitution did not explicitly take it away.⁴² Building on the understanding that the President’s removal power is implicit in the Constitution, Part III details the Supreme Court cases that have addressed removal. Unfortunately, as Part III suggests, the Court has not been consistent in this area, but then again, that is nothing new these days.

Though the Court’s decisions have been inconsistent, its precedents show a definite pattern. The Court began the discussion with an expansive view of the President’s removal power that Congress could not easily restrict.⁴³ Removal limitations would not be implied, and the Court made clear it would only tolerate limitations on appointing authorities *other than* the President.⁴⁴ Then, coinciding with the arrival of the first independent agencies, the Court backtracked in a series of cases. First, the Court decided to allow Congress to restrict the President’s removal power regarding officers having quasi-judicial and quasi-legislative functions;⁴⁵ however, this distinction was hard to maintain. Most agency officials have multiple powers. So, the Court decided to allow Congress to restrict the President’s power to remove purely executive, inferior officers so long as the President’s ability to faithfully execute the laws remained unimpeded.⁴⁶ With these cases, the Supreme Court’s test had morphed. The type of power was no longer relevant; rather, the President’s ability to control the officer became determinative.⁴⁷ But even this new test was short-lived. Judicial hostility towards restrictions on presidential removal powers returned. While the Court has not yet returned to its earlier expansive view of the President’s removal power, Part III of this Article concludes by discussing the views of the two newest appointments to the Court, and predicts that the Court is certainly headed in that direction.⁴⁸

In Part IV, this Article explains why the multi-track removal provisions protecting ALJs are unconstitutional, even if their purpose is meritorious, and perhaps even necessary.⁴⁹ Given that the Supreme Court has held that dual

⁴¹ See discussion *infra* Part II.

⁴² *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 492 (2010).

⁴³ *Myers v. United States*, 272 U.S. 52, 119, 126–27 (1926).

⁴⁴ See discussion *infra* Part III.A.1.

⁴⁵ *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 628–29 (1935).

⁴⁶ *Morrison v. Olson*, 487 U.S. 654, 690–91 (1988).

⁴⁷ See discussion *infra* Part III.A.2.

⁴⁸ See discussion *infra* Part III.A.3.

⁴⁹ See discussion *infra* Part IV.A.

for-cause removal provisions are unconstitutional, it does not take a math major to conclude that more than dual for-cause removal provisions are also unconstitutional. Hence, the Court will likely hold 5 U.S.C. § 7521 unconstitutional, because the statutory scheme creates multiple dual for-cause removal protections.⁵⁰

Assuming this assumption is correct and the Supreme Court is likely to hold 5 U.S.C. § 7521 unconstitutional, and that protecting ALJ independence within constitutional constraints is a worthy endeavor, one might ask, how can the Court resolve this mess? Part IV of this Article considers three possible solutions, none of which is perfect.⁵¹ First, the removal protection that applies to all civil service employees could similarly protect ALJs. Second, the Court could narrow *Humphrey's Executor*⁵² to hold that Congress can limit a President's power to remove principal officers who exercise adjudicatory powers exclusively. Third, the Court could overrule *Humphrey's Executor* entirely and hold that Congress cannot limit a President's power to remove any principal officer. This Article explains the pluses and minuses of each. Finally this Article concludes by offering some thoughts about the impact this issue will have on those attempting to dismantle the administrative state.⁵³

I. THE APA AND THE FOR-CAUSE REMOVAL PROVISIONS OF ALJS

Before the APA was enacted, the public expressed significant concern that hearing examiners—as ALJs were then called—were not impartially presiding over agency hearings; rather, the examiners acted as the arms of the agency.⁵⁴ The public demanded independence.⁵⁵ However, agencies argued that they needed to maintain control over their hearing examiners in order to control policymaking.⁵⁶ With the APA, Congress implemented protections to safeguard both of these competing interests. Part I of this Article details Congress's compromise.

⁵⁰ See discussion *infra* Part IV.A.

⁵¹ See discussion *infra* Part IV.B.

⁵² 295 U.S. 602 (1935).

⁵³ See discussion *infra* Part IV.

⁵⁴ See *Ramspeck v. Fed. Trial Exam'rs Conf.*, 345 U.S. 128, 131 (1953); Change of Title to Administrative Law Judge, 37 Fed. Reg. 16,787 (Aug. 19, 1972) (now codified at 5 C.F.R. pt. 930B).

⁵⁵ See *Ramspeck*, 345 U.S. at 131.

⁵⁶ See Paul R. Verkuil et al., *The Federal Administrative Judiciary*, in 2 ADMIN. CONF. OF THE U.S., RECOMMENDATIONS AND REPORTS 770, 801–02 (1992).

A. *The APA Compromise*

At the beginning of the nineteenth century, agencies used “examiners”⁵⁷ to preside over their hearings. Agencies hired examiners directly, often as a result of cronyism,⁵⁸ then controlled their assignments, compensation, promotions, and retention.⁵⁹ Further, examiners could not issue final or binding decisions; the agency had final decision-making authority,⁶⁰ which is still true today.⁶¹ In short, examiners were “mere tools of the agency.”⁶²

By the 1930s, the public raised concerns about the ability of these hearing examiners to decide cases fairly, independently, and impartially under the system then in place.⁶³ Members of Congress received multiple complaints that these examiners were biased in favor of the agency and against private parties.⁶⁴ These bias concerns suggested that some examiner independence was essential. Yet, if examiners were too independent from the agency that employed them, the agencies might lose control of policymaking. Where to draw the line was a question Congress struggled with for fifteen years.

⁵⁷ The term “examiners” came into use in 1906. 3 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 17.11 (2d ed. 1980). In 1972, the examiners’ title was changed to ALJ. Change of Title to Administrative Law Judge, 37 Fed. Reg. at 16,787.

⁵⁸ An ABA Report concluded that:

[A]ppointments to administrative tribunals are all too generally classed as patronage and, it is to be feared, the decisions of some of them are occasionally dealt with as a form of patronage. It is not easy to maintain judicial independence or high standards of judicial conduct when a political sword of Damocles continually threatens the judge’s source of livelihood. While a few federal administrative tribunals have, in spite of all obstacles, preserved a high degree of independence from political pressure and political considerations, unfortunately there are others which have yielded and as a result the cause of justice has suffered.

REPORT OF THE SPECIAL COMMITTEE ON ADMINISTRATIVE LAW, 57 ANNU. REP. A.B.A. 539, 546 (1934); see also Jeffrey S. Lubbers, *Federal Administrative Law Judges: A Focus on Our Invisible Judiciary*, 33 ADMIN. L. REV. 109, 111 (1981).

⁵⁹ See Malcolm Rich, *Adapting the Central Panel System: A Study of Seven States*, 65 JUDICATURE 246, 246 (1981) (“The agencies controlled the compensation and job tenure of their hearing officers and could ignore their decisions and enter de novo rulings instead.”); Verkuil et al., *supra* note 56, at 801.

⁶⁰ Lubbers, *supra* note 58, at 111 (“Furthermore, the role of the presiding officer in an agency’s decisional process was often unclear; many agencies would ignore the officer’s decisions without giving reasons, and enter their own de novo decisions.”).

⁶¹ Administrative Procedure Act, 5 U.S.C. § 557(b) (2012) (“On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision . . .”).

⁶² See *Ramspeck v. Fed. Trial Exam’rs Conf.*, 345 U.S. 128, 131 (1953) (noting that hearing examiners were “mere tools of the agency concerned and subservient to the agency heads in making their proposed findings of fact and recommendations”).

⁶³ See Lubbers, *supra* note 58, at 111.

⁶⁴ See *Ramspeck*, 345 U.S. at 131.

Congress finally drew the line in 1946 when it enacted the APA.⁶⁵ The APA compromised between these competing concerns.⁶⁶ Congress ensured that agencies kept their ability to make policy by giving the agency the authority to substitute its decision for the examiner's decision.⁶⁷ Congress also provided for the independence of examiners by removing agency power over their hiring,⁶⁸ case assignment,⁶⁹ compensation,⁷⁰ discipline,⁷¹ supervision,⁷² and, most importantly for the purposes of this Article, their removal.⁷³

As for removal, Congress prohibited at-will removal.⁷⁴ Although Congress did not give examiners life tenure, as is granted to Article III judges, Congress provided that examiners could be removed only for good cause or due to a reduction in workforce.⁷⁵ If an agency wanted to terminate one of its

⁶⁵ Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* (2012).

⁶⁶ See generally George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. Rev. 1557 (1996). The removal protections for ALJs were a central part of the overall scheme of the APA. *Lucia v. SEC*, 138 S. Ct. 2044, 2060 (2018) (Breyer, J., concurring in part and dissenting in part) (citing *Ramspeck*, 345 U.S. at 130; *Wong Yang Sung v. McGrath*, 339 U.S. 33, 46 (1950)).

⁶⁷ 5 U.S.C. § 557(b). See Verkuil *et al.*, *supra* note 56, at 803.

⁶⁸ Congress vested the appointment of ALJs in each agency. 5 U.S.C. § 3105 (2012). While Congress gave agencies the power to appoint examiners, Congress also gave the Civil Service Commission the power to determine who was qualified to be hired. Lubbers, *supra* note 58, at 111. The Commission reorganized in 1978. *Our Mission, Role & History*, U.S. OFFICE OF PERS. MGMT., <https://www.opm.gov/about-us/our-mission-role-history> (last visited Nov. 21, 2018). The Office of Personnel Management (“OPM”) took over responsibility for civil service personnel management. *Id.* Pursuant to this system, agencies selected their examiners from a list of qualified applicants that OPM provided when an opening occurred. Consequently, although examiners usually worked for one agency, they only became eligible to be hired through a process OPM oversaw. This two-step process provided some independence for the examiners. See Lubbers, *supra* note 58, at 111–12. However, on July 10, 2018, President Trump eliminated OPM from the hiring process. See Executive Order 13843, 83 Fed. Reg. 32,755, 32,755–56 (July 13, 2018).

⁶⁹ 5 U.S.C. § 3105.

⁷⁰ Congress provided that ALJ compensation was to be determined based on tenure rather than performance. 5 U.S.C. § 4301(2)(D) (2012) (noting that ALJs are not employees and thus not subject to the employee performance appraisal systems mandated under 5 U.S.C. § 4302 (2012)); 5 U.S.C. § 5372 (2012).

⁷¹ 5 U.S.C. § 7521 (2012) (permitting an agency to take disciplinary action against an administrative law judge “only for good cause”).

⁷² 5 U.S.C. § 554(d)(2).

⁷³ 5 U.S.C. § 7521(a) (providing that “[a]n action may be taken against an administrative law judge appointed under section 3105 of this title by the agency in which the administrative law judge is employed only for good cause established and determined by the Merit Systems Protection Board . . .”). Note that the Merit Systems Protection Board “for the purpose of section 7521 . . . may investigate, prescribe regulations, appoint advisory committees as necessary, recommend legislation, subpoena [sic] witnesses and records, and pay witness fees as established for the courts of the United States.” 5 U.S.C. § 1305 (2012).

⁷⁴ 5 U.S.C. § 7521.

⁷⁵ 5 U.S.C. § 7521; 5 C.F.R. § 1201.137 (2018). In addition, the APA required that ALJs be assigned cases on a rotating basis and that ALJs not perform duties inconsistent with their role as ALJs. 5 U.S.C. § 3105 (2012); 5 C.F.R. § 930.212 (2007). Finally, Congress provided that examiners could “not be

examiners, the agency would make that recommendation to another agency, the Merit Systems Protection Board (“MSPB”). By way of a formal adjudication in front of an MSPB ALJ, the MSPB would determine whether good cause existed, not the employing agency.⁷⁶ Importantly, both the MSPB ALJ and the members of the MSPB are protected from at-will removal as well.⁷⁷

B. *The Multi-Track For-Cause Removal Provisions Protecting ALJs*

ALJs are protected from more than one level of at-will removal. If an agency wishes to discipline or fire one of its ALJs, it must file a petition with the MSPB.⁷⁸ During the ensuing formal adjudication, the firing agency must persuade an ALJ from the MSPB that the firing agency has good cause for the ALJ’s removal.⁷⁹ Convincing an MSPB ALJ to uphold a firing agency’s decision to remove a fellow ALJ can be difficult.⁸⁰ Then, if the MSPB agrees with its ALJ’s decision not to remove the firing agency’s ALJ, the firing agency can do nothing further, and the President can do nothing further.⁸¹ Everyone involved, even the members of the MSPB,⁸² are protected from at-will removal. Hence, ALJs are protected from removal from multiple for-cause limitations: their own, the MSPB ALJ’s, and the MSPB head’s.

Additionally, most, if not all, Independent ALJs—those who work for the independent agencies—work for agency heads also protected from at-will removal.⁸³ Hence, Independent ALJs fall under an additional level of removal protection: their agency heads’ protection. The following figure provides a visual of the multi-track for-cause removal provisions discussed in this Part:

responsible to, or subject to supervision by, anyone performing investigative or prosecutorial functions for an agency.” Lubbers, *supra* note 58, at 111; 5 U.S.C. § 554(d)(2) (2012). Congress also required agencies to separate their prosecuting functions from their adjudicating functions. Thus, any agency employee who investigated or prosecuted a case could not supervise or direct the work of those individuals who adjudicated the same case. 5 U.S.C. § 554(d)(2) (2012). Additionally, those individuals who investigated or prosecuted a case could not be part of the decision-making process, subject to a few exceptions. *Id.* (“This subsection does not apply . . . to the agency or a member or members of the body comprising the agency.”). Lastly, Congress restricted some ex parte communications. 5 U.S.C. § 557(d) (2012).

⁷⁶ 5 U.S.C. § 7521(a).

⁷⁷ 5 U.S.C. § 1202(d) (2012) (providing that the president may remove them “only for inefficiency, neglect of duty, or malfeasance in office.”).

⁷⁸ 5 U.S.C. § 7521(a).

⁷⁹ 5 U.S.C. § 7521.

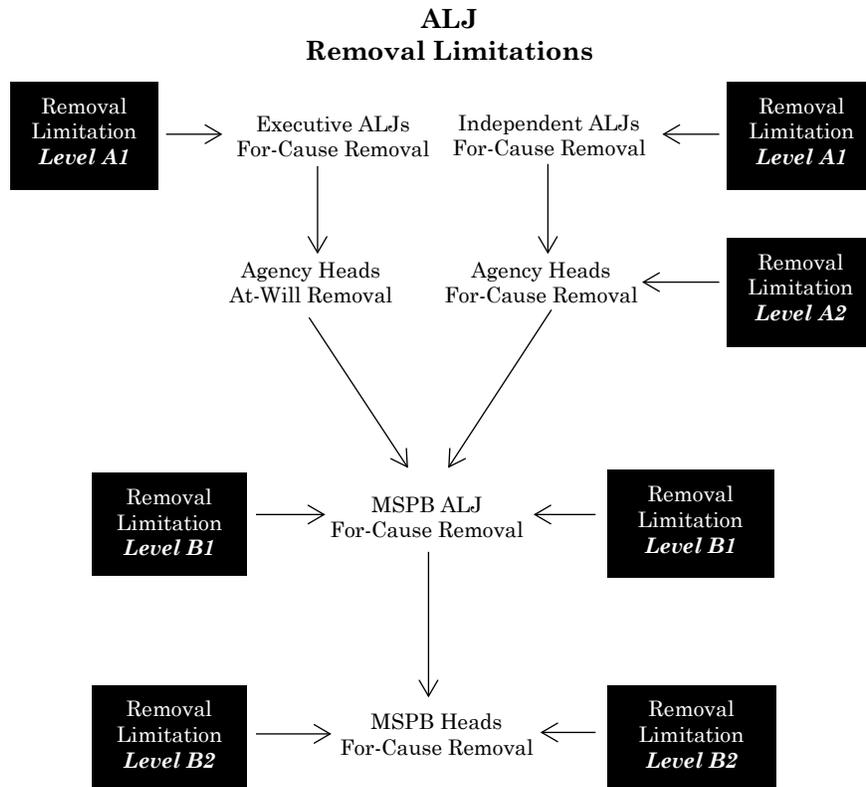
⁸⁰ *See, e.g., Long v. SSA*, 635 F.3d 526, 528, 530–31 (Fed. Cir. 2011) (affirming the MSPB’s decision to reverse an ALJ’s finding in favor of another ALJ).

⁸¹ 5 U.S.C. §§ 1202(d), 7521.

⁸² 5 U.S.C. §§ 1202, 7521.

⁸³ *See Humphrey’s Ex’t v. United States*, 295 U.S. 602, 628–29 (1935).

[Figure 1]



As this figure demonstrates, all ALJs have potentially three levels of for-cause removal protection: their own, the MSPB ALJ’s protection, and the members of the MSPB’s protection. However, Independent ALJs have an additional layer of protection: their agency heads’ for-cause removal protection. As you can see, these removal provisions are not in a straight line; rather, there are two different tracks. Hence, this Article refers to these protections as “multi-track.” The Independent ALJs, thus, have two tracks of dual for-cause removal protection. Essentially, this means they are not going anywhere, absent falling-down-drunk incompetence.

II. LOCATING THE PRESIDENT’S REMOVAL POWER

The Constitution vests in the President the power to execute the laws.⁸⁴ To execute the laws, the President must have help from subordinates.⁸⁵ In the

⁸⁴ U.S. CONST. art. II, § 1, 3.

⁸⁵ *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1, 12 (D.C. Cir. 2016) (citing *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 483 (2010)), *vacated, reh’g granted en banc*,

First Congress, James Madison stated that “if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws.”⁸⁶ For this reason, the Constitution explicitly provides for the appointment of principal and inferior officers and the creation of executive departments.⁸⁷

Concurrently, the Constitution requires the President to take care that the laws are faithfully executed.⁸⁸ To take care that the laws are faithfully executed, the President must have the ability to oversee and supervise the officers and departments helping him perform his duties.⁸⁹ To oversee and supervise these executive officers, the President must be able to remove officers who ignore his direction; otherwise, a subordinate could ignore the President’s direction, and the President could do nothing about it.⁹⁰

Yet, unlike for appointments, the Constitution does not explicitly identify how officers are to be removed, other than the cumbersome impeachment process.⁹¹ As Justice Breyer has stated, “with the exception of the general ‘vesting’ and ‘take care’ language, the Constitution is completely ‘silent with respect to the power of removal from office.’”⁹² Hence, members of the First Congress—many of whom had taken part in the Constitution’s drafting⁹³—had to determine whether the President could remove executive officers.⁹⁴ Congress concluded “that the executive power included a power to oversee executive officers through removal; because that traditional executive power

2017 U.S. App. LEXIS 2733 (D.C. Cir. Feb. 16, 2017), *reinstated, reh’g granted in part*, 881 F.3d 75 (D.C. Cir. 2018).

⁸⁶ *Id.* at 13 (quoting 1 ANNALS OF CONGRESS 463 (Madison) (1789) (Joseph Gales ed., 1834)).

⁸⁷ See U.S. CONST. art. II, § 2.

⁸⁸ U.S. CONST. art. II, § 3.

⁸⁹ *PHH Corp.*, 839 F.3d at 12–13 (citing *Free Enterprise Fund*, 561 U.S. at 498–502).

⁹⁰ *Id.*; *Bowsher v. Synar*, 478 U.S. 714, 726 (1986) (“Once an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey.”) (quoting *Synar v. United States*, 626 F. Supp. 1374, 1401 (1986)); see generally *Myers v. United States*, 272 U.S. 52 (1926).

⁹¹ See *Free Enterprise Fund*, 561 U.S. at 492 (quoting Letter from James Madison to Thomas Jefferson (June 30, 1789), 16 Documentary History of the First Federal Congress 893 (2004)) (“The view that ‘prevailed’ . . . was that the executive power included a power to oversee executive officers through removal; because that traditional executive power was not ‘expressly taken away, it remained with the President.’”). The Constitution contains only one removal provision. That provision states that “all civil Officers of the United States shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.” U.S. CONST. art. II, § 4. The impeachment process is seldom used. WILLIAM F. FUNK & RICHARD H. SEAMON, ADMINISTRATIVE LAW 60 (5th ed. 2016) (“[T]he only method of removal prescribed in the Constitution is impeachment. Since the grounds for impeachment are limited and the impeachment process is cumbersome, officers are seldom impeached.”).

⁹² *Free Enterprise Fund*, 561 U.S. at 516 (Breyer, J., dissenting) (quoting *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 258 (1839)).

⁹³ *Id.* at 492 (majority opinion) (quoting *Bowsher v. Synar*, 478 U.S. 714, 723–24 (1986)).

⁹⁴ *Id.*

was not ‘expressly taken away, it remained with the President.’”⁹⁵ The understanding that a President’s removal power comes along with his power to oversee executive officers is well settled today:⁹⁶

The Constitution that makes the President accountable to the people for executing the laws also gives him the power to do so. That power includes, as a general matter, the authority to remove those who assist him in carrying out his duties. Without such power, the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else.⁹⁷

However, as Part III of this Article explains, the removal power is not absolute.⁹⁸ The Supreme Court has held that Congress may sometimes limit the President’s power to remove an officer to ensure that officer’s independence.⁹⁹ The Executive’s desire for unfettered removal power clashes with the legislature’s desire to limit that power in such situations, like the one here. Congress has limited the President’s ability to remove ALJs by providing for multiple levels of for-cause removal protection. The question then becomes whether Congress can do so without violating the Constitution.

III. PROTECTING & CABINING THE PRESIDENT’S REMOVAL POWER

The Constitution does not explicitly define the Executive’s power to remove officers. However, Congress has explored ways to limit the President’s removal power. Part III of this Article identifies some of these cases and explains how the Court has interpreted and defined the President’s ability to remove officers within the constraints of the Constitution.

A. *The Supreme Court’s Three-Phase Approach to Removal*

Likely because the Constitution does not explicitly define the Executive’s power to remove officers, the Supreme Court has provided conflicting

⁹⁵ *Id.* (quoting Letter from James Madison to Thomas Jefferson (June 30, 1789), 16 Documentary History of the First Federal Congress 893 (2004)).

⁹⁶ *Id.*

⁹⁷ *Id.* at 513–14.

⁹⁸ See discussion *infra* Part III.

⁹⁹ See, e.g., *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 619, 625, 628–29 (1935) (The Court upheld a removal provision limiting the president’s ability to remove a commissioner of the Federal Trade Commission (“FTC”) for “inefficiency, neglect of duty, or malfeasance in office,” in part because the FTC was designed to be independent and free from domination and control of the president.); *Morrison v. Olson*, 487 U.S. 654, 693 (1988) (The Court notes that “the congressional determination to limit the removal power of the Attorney General was essential . . . to establish the necessary independence of the office.”).

direction in the cases addressing this issue since *Marbury v. Madison*.¹⁰⁰ However, this Article groups these cases into three phases. Phase one: protecting the President’s removal power from Congressional intrusion and limitation; phase two: limiting the President’s removal power to protect officer independence; and phase three: limiting removal restrictions that impede the President’s ability to perform his constitutional duties.

1. Phase One: Protecting the President’s Removal Power

The Supreme Court¹⁰¹ first addressed the validity of executive removal in 1839 in *Ex parte Hennen*.¹⁰² In *Hennen*, an inferior officer sought mandamus after he was removed from his position as a district court clerk.¹⁰³ The Court rejected the clerk’s argument that his removal was unconstitutional under Article II.¹⁰⁴ The relevant statute contained no removal limitation, and the Court refused to imply one.¹⁰⁵ Silence, the Court held, meant that the executive retained full removal power.¹⁰⁶ The Court reasoned that when Congress fails to provide for removal of inferior officers, (1) Congress likely does not intend those officers to hold their term for life;¹⁰⁷ (2) the power of removal is incidental to the power of appointment;¹⁰⁸ and (3) because “[t]he appointment of clerks of Courts properly belongs to the Courts of law,” the courts would also have removal power.¹⁰⁹

¹⁰⁰ 5 U.S. (1 Cranch) 137 (1803). “[A]s the law creating the office [of the justice of the peace], gave the officer a right to hold it for five years, independent of the executive, the appointment was not revocable; but vested in the officer legal rights, which are protected by the laws of this country.” *Id.* at 162. The Court subsequently rejected this statement as *obiter dictum* in *Myers v. United States*, 272 U.S. 52, 141–42 (1926).

¹⁰¹ While state supreme courts had addressed this issue (*see, e.g., Avery v. Inhabitants of Tyringham*, 3 Mass. 160 (1807)), this case is the first where the U.S. Supreme Court discussed executive removal power.

¹⁰² 38 U.S. (13 Pet.) 230 (1839).

¹⁰³ *Id.* at 256.

¹⁰⁴ *Id.* at 261–62.

¹⁰⁵ *See id.* at 258–59 (reasoning that while the first section of the Act of May 18, 1820, 3 Story, 1790 did limit the tenure of *certain* officers to a four-year term, “clerks of Courts are not included within this law, and there is no express limitation in the Constitution, or laws of Congress, upon the tenure of the [clerks’] office.” Thus, because the tenure for the office of clerks is not fixed, these officers are “removable at pleasure.”).

¹⁰⁶ *See id.* at 258–60 (maintaining that because “[t]he Constitution is silent with respect to the power of removal from office, where the tenure is not fixed,” the tenure of the clerks’ office “must be held at the will and discretion of some department of the government, and subject to removal at pleasure.” Also, “although no power to remove is expressly given, yet there can be no doubt, that these clerks hold their office at the will and discretion of the head of the department.”).

¹⁰⁷ *Id.* at 259.

¹⁰⁸ *Hennen*, 38 U.S. at 259.

¹⁰⁹ *Id.* at 258.

Similarly, in *Parsons v. United States*,¹¹⁰ the Court again refused to imply a removal limitation in a statute that did not expressly contain one.¹¹¹ The Court held that Congress had not intended to limit the President's power to remove an inferior officer, in this instance a district attorney.¹¹² The relevant act provided that "[d]istrict attorneys shall be appointed for a term of four years" and did not contain any provision addressing removal.¹¹³ Like it had in *Hennen*, the Court refused to imply a removal limitation.¹¹⁴

With these two cases, the Court held that removal limitations will not be implied. Rather, Congress must provide a clear statement in the statute when it wants to limit the President's power to remove an officer. In contrast, in *United States v. Perkins*,¹¹⁵ the Court reviewed an act in which Congress had included a removal limitation.¹¹⁶ In *Perkins*, a naval cadet, an inferior officer, was honorably discharged because his services were no longer required during peacetime.¹¹⁷ He sued for lost salary.¹¹⁸ The relevant act barred his peacetime discharge except "for misconduct."¹¹⁹

The issue for the Court was whether Congress could limit the Executive's removal authority when appointment was vested in the head of a department, rather than in the President directly.¹²⁰ The Court held that Congress could limit removal under these circumstances.¹²¹ According to the Court, when Congress "vests the appointment of inferior officers in the heads of Departments it may limit and restrict the power of removal as it deems best for the public interest."¹²² In other words, Congress's power to vest appointments in an entity other than the Executive provided Congress with the concomitant power to limit removal of that inferior officer.¹²³ Notably, the President retained removal power over the head of the department (the Secretary of the Navy): the principal officer.¹²⁴

Hence, Congress could limit the ability of a department to remove an inferior officer it appointed. So far, the Court had only examined the issue of

¹¹⁰ 167 U.S. 324 (1897).

¹¹¹ *Id.* at 338–39.

¹¹² *Id.*

¹¹³ *Id.* at 327–28.

¹¹⁴ *Id.* at 343.

¹¹⁵ 116 U.S. 483 (1886).

¹¹⁶ *Id.* at 483–84 (citing Rev. Stat. §§ 1229, 1525).

¹¹⁷ *Id.* at 483.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 483–85 (citing Rev. Stat. §§ 1229, 1525).

¹²⁰ *See id.* at 484 ("Whether or not Congress can restrict the power of removal incident to the power of appointment of those officers who are appointed by the President by and with the advice and consent of the Senate under the authority of the Constitution (article 2, section 2) does not arise in this case and need not be considered.")

¹²¹ *Perkins*, 116 U.S. at 485.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

removal in the case of *inferior* officers; the Court had yet¹²⁵ to address the legitimacy of removal limitations regarding *principal* officers. But that was about to change.

In 1926, in *Myers v. United States*,¹²⁶ the Court held that the President has unfettered power under the Constitution to remove officers he appointed with the advice and consent of the Senate.¹²⁷ The plaintiff, Myers, was appointed to be a postmaster in Portland, Oregon, for a four-year term.¹²⁸ Before the term’s conclusion, President Woodrow Wilson removed him.¹²⁹ Myers sued to recover his salary from the date of his removal.¹³⁰

The relevant act provided, “Postmasters of the first, second and third classes shall be appointed and may be removed by the President by and with the advice and consent of the Senate and shall hold their offices for four years unless sooner removed or suspended according to law.”¹³¹ The Senate had not consented to Myers’s removal.¹³² The issue for the Court was whether the removal limitation (requiring the advice and consent of the Senate) was constitutional.¹³³ Importantly, Chief Justice Taft, a former president himself, wrote the opinion, which was extremely protective of the President’s power to remove those who worked for him or her. The Court held that the removal limitation was unconstitutional.¹³⁴ Congress cannot limit the Executive’s power to remove officers he appoints, namely principal officers.¹³⁵

The Court examined in excruciating detail¹³⁶ the views of the First Congress regarding the nature of the executive power and the importance of the Take Care Clause.¹³⁷ The Court then concluded that because the President must have “confidence in the intelligence, ability, judgment or loyalty of [his executive subordinate], he must have the power to remove him without delay.”¹³⁸ To require the President to file for-cause charges and submit those

¹²⁵ In *United States ex rel. Goodrich v. Guthrie*, 58 U.S. (17 How.) 284, 302–03 (1855), the issue of whether the president had the power to remove a territorial judge was argued but not decided.

¹²⁶ 272 U.S. 52 (1926).

¹²⁷ *Id.* at 163–64, 172.

¹²⁸ *Id.* at 106.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at 107 (quoting Act of Congress of July 12, 1876, 19 Stat. 80, 81, c. 179).

¹³² *Myers*, 272 U.S. at 107.

¹³³ *Id.* at 106–08.

¹³⁴ *Id.* at 176.

¹³⁵ *Id.* at 163–64.

¹³⁶ *Id.* at 109–35. See also *Parsons v. United States*, 167 U.S. 324, 328–31 (1897) (describing the same history in fewer pages).

¹³⁷ *Myers*, 272 U.S. at 108. The Court also cited the Commander in Chief Clause, the Appointments Clause, the Impeachment Clause, and the Faithfully Execute Clause. *Id.* at 108–09 (citing U.S. CONST. art. II, §§ 2, 3, & 4).

¹³⁸ *Id.* at 134.

charges to the Senate “might make impossible that unity and co-ordination in executive administration essential to effective action.”¹³⁹

Because the Court had upheld a removal limitation in *Perkins*, the Court had to reconcile that case with the one before it. The Court reasoned that *Myers* was consistent with *Perkins* because the provision in *Perkins* limited a department’s ability to remove an officer, not the President’s ability to do so.¹⁴⁰

The Court also noted that in the provision at issue in *Myers*, Congress had retained removal power for itself and, thus, had aggrandized its own power at the expense of the Executive.¹⁴¹ In contrast, in the removal provision at issue in *Perkins*, Congress had not aggrandized itself.¹⁴² Further, the *Myers* Court suggested that the removal limitation at issue in *Perkins* was merely incidental.¹⁴³ The Court reasoned that incidental restrictions on the Executive were legitimate so long as Congress did not keep removal power for itself.¹⁴⁴ The Court underscored that it had never allowed Congress

to draw to itself . . . the power to remove or the right to participate in the exercise of [the removal] power. To do this would be to go beyond the words and implications of that clause and to infringe the constitutional principle of the separation of governmental powers.¹⁴⁵

One difference the *Myers* Court did not focus on, but perhaps should have, was that the officer in *Perkins* was an inferior officer and the officer in *Myers* was a principal officer. Resting the different holdings on this distinction would have made some sense; principal officers work more closely and directly with their appointing presidents, so the president might expect more loyalty from them and control over them.¹⁴⁶ Indeed, more than ninety years

¹³⁹ *Id.*

¹⁴⁰ According to the Court in *Myers*, whether an officer is principal or inferior should have no bearing on whether the limitation on the president’s removal power is constitutional; rather, the focus should turn to *who* holds this power in compliance with the Constitution. So, even though the Court may have incorrectly held that the postmaster in that case was a principal officer, when in all likelihood he was inferior, this difference did not matter to the Court. *See id.* at 161.

¹⁴¹ *Id.* at 162, 168.

¹⁴² *See Myers*, 272 U.S. at 162.

¹⁴³ *Id.* at 161.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *See* Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 ALA. L. REV. 1205, 1228 (2014) (“The person that controls removal commands the subordinate’s loyalty—a simple truth of administration that an officer will seek to please the person that decides whether the officer stays or goes.”); Akhil Reed Amar, *Some Opinions on the Opinion Clause*, 82 VA. L. REV. 647, 667 (1996) (“A better reading of the ‘principal Officer’ language is that it exemplifies the Founders’ expectation that the President will ordinarily directly pick, act through, and monitor only a handful of personal lieutenants—his inner circle. As Hamilton observed in *The Federalist* No. 72, department heads ‘ought to be considered as the assistants or deputies of the Chief Magistrate, and on this account they ought to derive their offices from his appointment, at least from his nomination, and ought to be subject to his superintendence.’”).

later, Chief Justice Roberts suggested in *Free Enterprise Fund v. Public Company Accounting Oversight Board*¹⁴⁷ that the nature of the officer’s status was determinative in these early removal cases.¹⁴⁸ It was not, but it should have been.

At the end of these Phase One cases, the Court had held that removal limitations would not be implied. Further, Congress could limit a department’s ability to remove an inferior officer it appointed so long as the limitation was merely “incidental,” whatever that means. In contrast, removal restrictions on the President would not be allowed, especially if Congress retained a role in the removal for itself.

What did not matter at this point in the Court’s approach was the type of power the officer exercised: executive, quasi-legislative, and quasi-adjudicatory. In *Myers*, the officer exercised executive powers; however, the Court suggested in dicta that its holding would likely extend to officers exercising *quasi-adjudicatory* powers as well.¹⁴⁹ The President’s unfettered removal power flowed from his “constitutional duty of seeing that the laws be faithfully executed.”¹⁵⁰ Hence, presidents must retain the power to remove those who work for them, regardless of the type of power they exercised.¹⁵¹ However, this dicta would give way in Phase Two.

2. Phase Two: Cabining the President’s Removal Power to Further Independence

Ten years after *Myers*, the Court reversed course in *Humphrey’s Executor*. The relevant act in *Humphrey’s Executor* established the Federal Trade

¹⁴⁷ 561 U.S. 477 (2010).

¹⁴⁸ *Id.* at 510 (holding that because “the Board members are inferior officers,” the Commission has the power to remove Board members at will).

¹⁴⁹ *Myers*, 272 U.S. at 135.

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. Then there may be duties of a quasi-judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President can not 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.

Id.

¹⁵⁰ *Id.*

¹⁵¹ The Court’s reliance on the Take Care Clause gave the dissent pause. As if foreshadowing the current controversy regarding the SEC ALJs, Justice Holmes warned that drawing arguments “from the executive power of the President, and from his duty to appoint officers of the United States (when Congress does not vest the appointment elsewhere), to take care that the laws be faithfully executed, and to commission all officers of the United States, seem to [be] spider’s webs inadequate to control the dominant facts.” *Id.* at 177 (Holmes, J., dissenting).

Commission (“FTC”), an independent agency, and contained a for-cause removal provision protecting the FTC Commissioners.¹⁵² Pursuant to this for-cause removal provision, the President could remove an FTC Commissioner¹⁵³ only for “inefficiency, neglect of duty, or malfeasance in office.”¹⁵⁴ Unlike the act at issue in *Myers*, in this act, Congress did not retain removal power for itself.¹⁵⁵

The Court upheld the for-cause removal limitation, which should have been unconstitutional pursuant to its holding in *Myers*.¹⁵⁶ The Court distinguished *Myers* in three ways.¹⁵⁷ The most critical difference between the two cases was the type of power the officers exercised.¹⁵⁸ The postmaster in *Myers* performed purely executive functions and had no quasi-legislative or quasi-judicial power.¹⁵⁹ Because he performed purely executive functions, the Court reasoned that the officer had to be responsive to the President.¹⁶⁰

In contrast, the FTC Commissioners performed both quasi-legislative and quasi-judicial powers,¹⁶¹ which required that they be independent from the President.¹⁶² Because of the different nature of the job duties, the Court said that *Myers* did not apply to “an officer who occupies no place in the executive department and who exercises no part of the executive power vested by the Constitution in the President.”¹⁶³ The Court acknowledged that *Myers* had said removal limitations on quasi-judicial officers were unconstitutional as well;¹⁶⁴ however, the Court rejected its statement as non-controlling dicta.¹⁶⁵

¹⁵² Federal Trade Commission Act, 15 U.S.C. § 41 (2012).

¹⁵³ *Id.* Because the Federal Trade Commission Act, 15 U.S.C. §§ 41, 42, required that all Commissioners be appointed by the president with the advice and consent of the Senate, the Court assumed that FTC Commissioners were principal officers. *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 619–20 (1935). Like it had in *Myers*, however, the Court did not mention the distinction between principal and inferior officers.

¹⁵⁴ 15 U.S.C. § 41 (2012).

¹⁵⁵ *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 631–32 (1935).

¹⁵⁶ *Id.* at 632.

¹⁵⁷ *Id.* at 627.

¹⁵⁸ *Id.* at 631–32.

¹⁵⁹ *Id.* at 627.

¹⁶⁰ *Id.* at 631–32.

¹⁶¹ *Humphrey’s Ex’r*, 295 U.S. at 628.

¹⁶² *Id.* at 627–28 (“A postmaster is an executive officer restricted to the performance of executive functions. He is charged with no duty at all related to either the legislative or judicial power. The actual decision in the *Myers* case finds support in the theory that such an officer is merely one of the units in the executive department and, hence, inherently subject to the exclusive and illimitable power of removal by the Chief Executive, whose subordinate and aid he is . . . [The Commission’s] duties are performed without executive leave and, in the contemplation of the statute, must be free from executive control.”).

¹⁶³ *Id.* at 628.

¹⁶⁴ *Id.* at 631–32.

¹⁶⁵ *Id.* at 627–28.

In addition to the difference in the officers’ powers, the Court raised two other important distinctions. First, the Court noted that Congress had intended the FTC and its Commissioners to be independent from the President, unlike the post office and postmasters.¹⁶⁶ Allowing the President unfettered removal would hinder independence. Second, unlike postmasters, FTC Commissioners’ tenure was time-limited.¹⁶⁷ Thus, removal was already built into the system. The Court reasoned that both factors further supported the legitimacy of the removal limitations.¹⁶⁸

As a result of *Myers* and *Humphrey’s Executor*, the Court had created the *Myers–Humphrey’s* distinction¹⁶⁹: Congress could not limit the President’s power to remove purely executive officers; however, Congress could limit the President’s power to remove quasi-legislative and quasi-judicial officers, especially when such officers’ tenure was already time-limited.¹⁷⁰ The Court’s strong protection of the President’s removal power weakened with the advent of this distinction, but it was about to weaken even more significantly.

The *Myers–Humphrey’s* distinction held firm for half a century. Thus, in 1958, the Court applied the distinction in *Wiener v. United States*¹⁷¹ to hold that Congress could limit the President’s power to remove a member of the War Claims Commission.¹⁷² The plaintiff, Wiener, had refused to resign when asked to do so by President Eisenhower.¹⁷³ Wiener filed suit to recover his unpaid salary.¹⁷⁴ The relevant act did not have an explicit removal provision but effectively provided that the Commissioners served three-year terms.¹⁷⁵ The issue for the Court was whether the act contained an *implied* for-cause removal provision.¹⁷⁶ Recall that the Court had refused to imply for-cause removal limitations in *Hennen* and *Parsons*.¹⁷⁷ While *Hennen* and *Parsons* involved inferior officers, their protective holdings could easily apply to a principal officer under *Myers*. The Court should have held that it

¹⁶⁶ *Id.* at 628–30.

¹⁶⁷ *Humphrey’s Ex’r*, 295 U.S. at 620 (setting a seven-year term). *See also* *Shurtleff v. United States*, 189 U.S. 311, 316 (1903) (holding that while an inferior officer had limited tenure, Congress had not explicitly intended to limit the president’s general removal power). Note that the limited tenure of the officer had also played no role in the Court’s decision in *Hennen*, *Parsons*, and *Myers*.

¹⁶⁸ *Humphrey’s Ex’r*, 295 U.S. at 626, 628.

¹⁶⁹ *Jellum & Tincher*, *supra* note 5, at 44.

¹⁷⁰ *Humphrey’s Ex’r*, 295 U.S. at 631–32; *Myers v. United States*, 272 U.S. 52, 128 (1926).

¹⁷¹ 357 U.S. 349 (1958).

¹⁷² *Id.* at 356.

¹⁷³ *Id.* at 350.

¹⁷⁴ *Id.* at 350–51.

¹⁷⁵ The commission itself was limited to a three-year life, meaning the Commissioners’ terms were also restricted to three years. *Id.* at 350.

¹⁷⁶ *Id.* at 351, 356.

¹⁷⁷ *See supra* notes 105, 114.

would not imply a removal provision without a clear statement from Congress. But, the Court did not.

Instead, the Court upheld the removal provision, citing *Myers* and *Humphrey's Executor*.¹⁷⁸ First, the Court reasoned that Congress was aware that the holding in *Humphrey's Executor* rested on the *Myers–Humphrey's* distinction when it enacted the War Claims Act of 1948.¹⁷⁹ Second, the Court decided that because War Claims Commissioners exercised quasi-judicial powers, Congress would have intended them to be “‘entirely free from the control or coercive influence, direct or indirect,’ of either the Executive or the Congress.”¹⁸⁰ Third, the Court noted that *Humphrey's Executor* prevented Congress from limiting the President’s ability to remove purely executive officers, not quasi-judicial officers.¹⁸¹ Thus, the Court concluded that Congress had simply forgotten to address removal.¹⁸² This “failure of explicitness” was not fatal, given the powers of the Commissioners.¹⁸³ The Court held that the President had no power to remove these officers, who were “‘member[s] of an adjudicatory body.’”¹⁸⁴

The holding in *Wiener* is odd for several reasons. First, the Court failed to distinguish, let alone mention, *Hennen* or *Parsons*, in which the Court had required Congress to be explicit when it wanted removal limitations.¹⁸⁵ Second, the Court implied a removal limitation based solely on Congress’s likely awareness of its holding in *Humphrey's Executor*, even though Congress provided no removal provision in the act itself.¹⁸⁶ Finally, the Court relied entirely on the *Myers–Humphrey's* distinction to uphold the removal provision because this distinction furthered officer independence.¹⁸⁷ With *Wiener*, the Court itself, not Congress, limited the President’s removal power. This holding simply cannot be correct.

The *Wiener* Court had used the *Myers–Humphrey's* distinction to insert itself into crafting removal limitations. In contrast, in 1986 in *Bowsher v. Synar*,¹⁸⁸ the Court used the *Myers–Humphrey's* distinction to strike down an express removal provision.¹⁸⁹ In *Wiener*, Congress had not provided a removal limitation; yet, the Court implied one anyway. In *Bowsher*, Congress provided an express removal provision, but it aggrandized its own power.¹⁹⁰

¹⁷⁸ *Wiener*, 357 U.S. at 351–52.

¹⁷⁹ *Id.* at 353, 356.

¹⁸⁰ *Id.* at 355–56 (quoting *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629 (1935)).

¹⁸¹ *Id.* at 352.

¹⁸² *See id.* at 352–53.

¹⁸³ *Id.*

¹⁸⁴ *Wiener*, 357 U.S. at 356.

¹⁸⁵ *See supra* notes 105, 114.

¹⁸⁶ *Wiener*, 357 U.S. at 352–53.

¹⁸⁷ *Id.* at 356.

¹⁸⁸ 478 U.S. 714 (1986).

¹⁸⁹ *Id.* at 724–25.

¹⁹⁰ *Id.* at 720–21, 728–29.

So, the Court rejected it.¹⁹¹ And in both cases, the Court entirely ignored *Hennen*, *Parsons*, and *Perkins*.

The relevant act in *Bowsher*¹⁹² provided that the officer, the comptroller general, could be removed for cause¹⁹³ by a joint resolution of Congress, which was subject to presidential veto.¹⁹⁴ The Act’s legislative history clearly indicated that Congress included the removal provision specifically so that “[i]f [the comptroller general] does not do his work properly, [Congress], as practically his employers, ought to be able to discharge him from his office.”¹⁹⁵

Like it had in the unconstitutional removal provision at issue in *Myers*, Congress inserted itself into the removal process. Not surprisingly then, the Court struck down the provision in *Bowsher* as unconstitutional.¹⁹⁶ The Court reasoned that the comptroller general’s functions were the “very essence” of executing the law;¹⁹⁷ hence, Congress could not limit the President’s removal power.¹⁹⁸ Additionally, the Court lamented that Congress had once again aggrandized its own power at the expense of the Executive.¹⁹⁹

In *Bowsher*, as in *Myers*, the Court held that Congress did not have authority to retain for itself any power over the removal of an officer.²⁰⁰ Further, because the officer exercised purely executive powers, removal power belonged exclusively to the President.²⁰¹ While more protective of the President’s removal powers than *Humphrey’s Executor*, *Bowsher* actually added little to the analysis: the *Myers–Humphrey’s* distinction was determinative, and Congress could not constitutionally reserve removal power for itself.

Critically, up to this point of Phase Two, the Court had said nothing about whether its new approach to removal limitations differed based on the type of officer involved: principal or inferior. That issue was the next one the Court would address. And, in doing so, the Court would issue one of its most poorly reasoned opinions of all time.

¹⁹¹ *Id.* at 726.

¹⁹² The Gramm-Rudman-Hollings Act is also known as the Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. 99-177, 99 Stat. 1038 (1985) (codified as amended at 2 U.S.C. § 901 *et seq.* (2012)).

¹⁹³ Congress had limited the for-cause removal to cases involving permanent disability, inefficiency, neglect of duty, malfeasance, committing a felony, or committing other conduct involving moral turpitude. *Bowsher*, 478 U.S. at 728 (citing 31 U.S.C. § 703(e)(1)(B)).

¹⁹⁴ *Id.* at 718–19.

¹⁹⁵ *Id.* at 728 (quoting Representative Hawley, 58 Cong. Rec. 7136 (1919)).

¹⁹⁶ *Id.* at 733–34.

¹⁹⁷ *Id.* at 733.

¹⁹⁸ *Id.* at 733–34.

¹⁹⁹ *Bowsher*, 478 U.S. at 727.

²⁰⁰ *Id.* at 726–27.

²⁰¹ *Id.* at 733.

Two years after *Bowsher*, in *Morrison v. Olson*,²⁰² the Court explicitly rejected the determinacy of the *Myers–Humphrey*’s distinction.²⁰³ The act at issue in *Morrison*²⁰⁴ established a “purely executive” *inferior* officer²⁰⁵ “to investigate and, if appropriate, prosecute certain high-ranking Government officials” involved in criminal activity.²⁰⁶ The act provided that only the Attorney General could remove an independent counsel and only “for good cause.”²⁰⁷ The independent counsel performed “core executive functions,”²⁰⁸ so the removal provision should have been unconstitutional under the *Myers–Humphrey*’s distinction.²⁰⁹

However, the Court had held in *Perkins* that when Congress vests appointment of an officer in a department, Congress can then limit that department’s ability to remove the officer.²¹⁰ The *Morrison* Court needed only to cite to *Perkins* to hold the removal limitation constitutional. The Court chose another route. Relegating *Perkins* to a “see also” footnote,²¹¹ the Court instead attempted, but failed, to reconcile *Bowsher*, *Myers*, *Humphrey’s Executor*, and *Wiener*.²¹²

First, the Court noted that *Humphrey’s Executor* had made clear that the Constitution did not give the President “illimitable power of removal” over all executive officers.²¹³ Second, the Court stressed that “[u]nlike both

²⁰² 487 U.S. 654 (1988).

²⁰³ *Id.* at 689–91.

²⁰⁴ The Ethics in Government Act of 1978 was the relevant act at issue in *Morrison*. Pub. L. 95–521, 92 Stat. 1824 (1978) (codified as amended 5 U.S.C. §§ 101 *et seq.* (2012)); *Morrison*, 487 U.S. at 659 (citing 28 U.S.C. §§ 49, 591 *et seq.* (1982 ed., Supp. V)).

²⁰⁵ *Morrison*, 487 U.S. at 689.

²⁰⁶ *Id.* at 660.

²⁰⁷ *Id.* at 663.

²⁰⁸ *Id.* at 669.

²⁰⁹ What about the current Special Counsel? Former Special Counsel Robert Mueller was an inferior officer. He worked for the Attorney General, a principal officer. So, Congress could have constitutionally prohibited his at-will removal. Congress did not do so. However, the Department of Justice (“DOJ”), which created the position, did. 28 C.F.R. § 600.7(d). To remove Mueller, the President would have had to direct Deputy Attorney General Rod Rosenstein to fire Mueller, claiming either that there was cause or that the DOJ’s removal restriction violated his removal power. While the President could have directed the DOJ to revoke its special counsel regulations and then fire Muller directly, that choice was unlikely because it would have required the DOJ to conduct a time-consuming rulemaking.

Under the Supreme Court’s removal cases, this provision likely does violate the president’s removal power. Removal provisions for inferior officers are not implied; they must be explicit. In this case, Congress did not enact a removal limitation; likely, Congress had learned a hard lesson from the Independent Counsel experience at issue in *Morrison*, 487 U.S. 654 (1988). In fact, Congress did not create the Office of Special Counsel. The DOJ did. 28 C.F.R. §§ 600.4–600.10. Legally then, President Trump could have directed Rosenstein to fire Mueller or even fire Mueller directly. Politically, firing Mueller would have been significantly more difficult. Perhaps that is why Mueller was never fired.

²¹⁰ *United States v. Perkins*, 116 U.S. 483, 485 (1886).

²¹¹ *Morrison*, 487 U.S. at 689 n.27.

²¹² *Id.* at 686.

²¹³ *Id.* at 687 (quoting *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 629 (1935)).

Bowsher and *Myers*, [*Morrison* did] not involve an attempt by Congress itself to gain a role in the removal of executive officials other than its established powers of impeachment and conviction.”²¹⁴ In other words, no congressional aggrandizement existed.

Third, the majority acknowledged that it had “undoubtedly” relied “on the terms ‘quasi-legislative’ and ‘quasi-judicial’ to distinguish the officials involved in *Humphrey’s Executor* and *Wiener* from those in *Myers*.”²¹⁵ However, the Court explained, its new “considered view” was that the *Myers–Humphrey’s* distinction was not determinative²¹⁶ because “the determination of whether the Constitution allows Congress to impose a ‘good cause’-type restriction on the President’s power to remove an official cannot be made to turn on whether or not that official is classified as ‘purely executive.’”²¹⁷ The Court did not explain why the distinction was no longer relevant.

The Court did explain that while the type of functions an officer performs could be relevant to the analysis,²¹⁸ the more important question was whether the constraint on presidential removal “unduly trammel[ed] on executive authority.”²¹⁹ A removal restriction unduly trammels on executive authority when it interferes with a president’s ability to ensure that the laws are faithfully executed.²²⁰ In a never-before-seen approach, the Court merged the President’s removal power with the take care obligation.

The majority crafted a functional balancing test to determine whether the President’s ability to faithfully execute the law was actually unduly impeded such that the removal limitation would be unconstitutional.²²¹ The test had two prongs. Pursuant to the first prong, the Court examined whether the President’s need to control the officer was “*so central* to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the President.”²²² The Court reasoned that the independent counsel in *Morrison* was an inferior officer who had limited jurisdiction and tenure and who lacked policymaking and significant

²¹⁴ *Id.* at 686.

²¹⁵ *Id.* at 689.

²¹⁶ *Id.*

²¹⁷ *Morrison*, 487 U.S. at 689.

²¹⁸ *Id.* at 691.

²¹⁹ *Id.*

²²⁰ The Court said:

[O]ur present considered view is that the determination of whether the Constitution allows Congress to impose a “good cause”-type restriction on the President’s power to remove an official cannot be made to turn on whether or not that official is classified as “purely executive.” The analysis contained in our removal cases is designed not to define rigid categories of those officials who may or may not be removed at will by the President, but to ensure that Congress does not interfere with the President’s exercise of the “executive power” and his constitutionally appointed duty to “take care that the laws be faithfully executed” under Article II.

Id. at 689–90.

²²¹ *Id.* at 690–93.

²²² *Id.* at 691–92 (emphasis added).

administrative authority.²²³ Thus, the Court concluded that the independent counsel was not “so central.”²²⁴

Pursuant to the second prong, the Court examined whether the good cause removal provision “*sufficiently deprive[d]* the President of control over the independent counsel to interfere impermissibly with his constitutional obligation to ensure the faithful execution of the laws.”²²⁵ The Court in *Morrison* noted that the President retained the ability to remove the Attorney General without cause, and the Attorney General had the ability to remove the independent counsel for “misconduct.”²²⁶ Importantly, the majority noted that Congress believed the removal limitation was essential to ensuring the independence of the office.²²⁷ Here, congressional desire for independence trumped the President’s power to remove a purely executive officer. Thus, the Court concluded that the President was not “sufficiently deprive[d]” of control.²²⁸

In short, the Court held that some limits on the President’s removal powers will be tolerated (the *so central* prong), so long as the President is mostly able to ensure the laws are faithfully executed (the *sufficiently deprives* prong). Hence, the good cause limitation at issue in *Morrison* did not impermissibly interfere with the President’s obligation to ensure the faithful execution of the laws.²²⁹ Regardless of whether the Court’s holding was correct, its reasoning was result-oriented, which the dissent rightfully points out.

Justice Scalia was the lone dissenter.²³⁰ He began his opinion by reminding the majority of the importance of separation of powers.²³¹ He then explained the political kerfuffle that led to the relevant act—a kerfuffle between President Reagan and Congress.²³² He argued that the act was unconstitutional because (1) the officer involved was a principal officer; (2) criminal prosecution was a “purely executive power”; and (3) the act deprived the President of the ability to exercise “exclusive control” of that executive power.²³³ Rejecting the majority’s new “so central–sufficiently deprives” two-pronged test, Scalia said simply, “It is not for us to determine . . . how much of the purely executive powers of government must be within the full control of the President. The Constitution prescribes that they *all* are.”²³⁴ He

²²³ *Morrison*, 487 U.S. at 691.

²²⁴ *Id.* at 691–92.

²²⁵ *Id.* at 693 (emphasis added).

²²⁶ *Id.* at 692.

²²⁷ *Id.* at 693.

²²⁸ *Id.*

²²⁹ *Morrison*, 487 U.S. at 692.

²³⁰ *Id.* at 697 (Scalia, J., dissenting).

²³¹ *Id.* at 699.

²³² *Id.* at 699–703.

²³³ *Id.* at 705, 716.

²³⁴ *Id.* at 709.

concluded that the statute deprived the President of substantial control over purely executive powers and impermissibly affected the balance of powers among the branches.²³⁵

Was Justice Scalia correct that the independent counsel was a principal officer,²³⁶ or was the majority correct that the independent counsel was an inferior officer?²³⁷ In a latter case, Justice Scalia defined an inferior officer as one who has a supervisor who is directly accountable to the President.²³⁸ Using this test, the independent counsel in *Morrison* was an inferior officer because that officer had a supervisor, the Attorney General, who was directly accountable to the President.²³⁹ So, the majority seems to have gotten this point correct.

Morrison’s majority holding and undefined balancing test have been rightly criticized for departing from precedent and separation of powers principles.²⁴⁰ In contrast, Justice Scalia’s dissent better respected both. Indeed, former Attorney General Janet Reno paraphrased Scalia’s dissent when criticizing the act to the Senate Committee on Governmental Affairs.²⁴¹ And Justice Kagan has called Scalia’s dissent “one of the greatest dissents ever written and every year it gets better.”²⁴²

With *Morrison*, a majority of the Court rejected the dispositive effect of the *Myers–Humphrey*’s distinction. In its place, the majority emphasized the importance of determining whether removal provisions actually impede the President’s ability to faithfully execute the laws. Removal provisions actually impede the President’s ability to faithfully execute the laws when the President’s need to control an officer’s exercise of discretion is “so central” to the functioning of the executive branch and when the President’s ability to control that officer is “sufficiently deprived.” Blame the majority for this awkward mishmash; then rejoice in knowing that *Morrison*’s mishmash was short-lived.

²³⁵ *Morrison*, 487 U.S. at 714–15.

²³⁶ *Id.* at 717–18.

²³⁷ *Id.* at 671 (majority opinion).

²³⁸ *Edmond v. United States*, 520 U.S. 651, 663 (1997).

²³⁹ *See id.* at 666.

²⁴⁰ *See, e.g.*, Michael B. Rappaport, *Replacing Independent Counsels with Congressional Investigations*, 148 U. PA. L. REV. 1595, 1599 n.14 (2000) (citing numerous newspaper articles criticizing the Independent Counsel Act).

²⁴¹ Terry Eastland, *Scalia’s Finest Opinion*, THE WEEKLY STANDARD (March 11, 2016, 12:40 AM), <https://www.weeklystandard.com/terry-eastland/scalias-finest-opinion>. Apparently, Justice Scalia considered his dissent in *Morrison* to be his best opinion as well. *Id.*

²⁴² Terry Nagel, *Supreme Court Justice and Circuit Judges Give SLS Students Insider’s Look at Becoming a Judge*, THE STANFORD LAWYER (February 5, 2015), <https://law.stanford.edu/press/supreme-court-justice-and-circuit-judges-give-sls-students-insider-look-at-becoming-a-judge/>.

3. Phase Three: Rejecting Removal Restrictions That Impede the President's Ability to Faithfully Execute the Law

The officer in *Morrison* was subject to only one level of for-cause removal; thus, the case left open the question of whether more than one level of for-cause removal limitations would be constitutional.²⁴³ In 2010, the Supreme Court answered this question with a resounding “No!”

In *Free Enterprise Fund*, the Court examined the validity of the for-cause removal provision Congress wrote into the Sarbanes-Oxley Act of 2002.²⁴⁴ In this legislation, Congress created a private, non-profit corporation:²⁴⁵ the Public Company Accounting Oversight Board (“Board”).²⁴⁶ Unusually, Congress vested the power to appoint and remove the five Board members in the SEC.²⁴⁷ However, the SEC Commissioners could remove individual members of the Board “only ‘for good cause shown.’”²⁴⁸ Thus, Congress placed appointment power of these inferior officers in a department and limited the department’s ability to remove them at will.²⁴⁹

Under *Perkins* and *Morrison*, removal limitations on departments that appoint inferior officers are constitutional.²⁵⁰ Case closed, right? Nope. There was a further wrinkle. Unlike the Secretary of the Navy in *Perkins* and the Attorney General in *Morrison*, the SEC Commissioners were themselves removable only for cause.²⁵¹ Or, at least, the parties in *Free Enterprise Fund* stipulated to this effect and the Court, without considering the issue at all, simply accepted the parties’ stipulation.²⁵² This was a significant concession and likely an inaccurate one.²⁵³

²⁴³ *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 495 (2010).

²⁴⁴ Sarbanes-Oxley Act of 2002 (or Act), Pub. L. 107–204, 116 Stat. 745 (2002) (codified as amended 15 U.S.C. §§ 7201–02, 7211 *et seq.* (2012)).

²⁴⁵ According to the statute, Board members are not Government “officer[s] or employee[s].” *Free Enterprise Fund*, 561 U.S. at 484 (citing 15 U.S.C. §§ 7211(a), (b) (2012)). Although the Board members were not Government officials for statutory purposes, the Court considered the board “‘part of the Government’ for constitutional purposes . . .” *Id.* at 485–86 (quoting *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 397 (1995)).

²⁴⁶ *Free Enterprise Fund*, 561 U.S. at 484.

²⁴⁷ *Id.* at 484, 486. Also, the SEC oversees the Board. *Id.* at 486 (citing 15 U.S.C. §§ 7211(e)(6), 7217(b)–(c) (2012)). The Board members have staggered, five-year terms. *Id.* at 484.

²⁴⁸ *Id.* at 486 (citing 15 U.S.C. § 7211(e)(6) (2012)).

²⁴⁹ *Id.* at 486.

²⁵⁰ See *supra* notes 210, 223, 226.

²⁵¹ *Free Enterprise Fund*, 561 U.S. at 487.

²⁵² *Id.* (“The parties agree that the Commissioners cannot themselves be removed by the President except under the *Humphrey’s Executor* standard of ‘inefficiency, neglect of duty, or malfeasance in office.’”) (citation omitted).

²⁵³ This issue was necessary to the Court’s holding; yet, the Court did not actually determine that the SEC Commissioners were removable only for cause. One wonders why the Court did not apply the constitutional avoidance doctrine, interpret the statute to not include for-cause removal and, thereby, avoid the removal question. It appears that the majority was set on reviewing the constitutionality of this very powerful board.

It is very likely that, had the Court actually analyzed this issue, the Court would have rejected the stipulation. Congress had enacted the act establishing the SEC²⁵⁴ the year before *Humphrey’s Executor* reversed *Myers*. *Myers* had held that removal limitations on the President were *per se* unconstitutional. Thus, Congress likely assumed that any removal limitations on the President would violate the Constitution; hence, Congress did not include a removal limitation in the act.²⁵⁵ All this to say that Congress likely did not intend for there to be a removal limitation. Yet, the Court, upon the parties’ stipulation, implied a removal limitation where none existed, violating *Hennen* and *Perkins*.²⁵⁶ Further, the Court could have avoided the constitutional issue altogether pursuant to the constitutional avoidance doctrine by concluding that the SEC Commissioners were removable at will. Indeed, Justice Breyer, in dissent, accurately noted that whether the SEC Commissioners had removal protection was so essential to the majority’s holding that resolution of the issue should not have been based on the parties’ stipulation.²⁵⁷

In any event, the Court presumed that the members of the Board had dual for-cause removal protection: they could only be removed for cause by SEC Commissioners, who themselves could only be removed for cause.²⁵⁸ Pursuant to *Perkins* and *Humphrey’s Executor*, each layer of for-cause removal protection should have been constitutional independently. Recall that the Court’s holding in *Perkins* allows Congress to restrict an appointing department’s removal power for inferior officers;²⁵⁹ hence, the removal limitation on the Board members would be constitutional. The Court’s holding in *Humphrey’s Executor* allows Congress to restrict the president’s ability to remove quasi-judicial and quasi-legislative principal officers;²⁶⁰ therefore, the removal limitation on the SEC Commissioners would likely be constitutional. Thus, the question for the Court in *Free Enterprise Fund* was whether by combining the for-cause removal layers, these provisions become unconstitutional.²⁶¹

²⁵⁴ Securities Exchange Act of 1934, 48 Stat. 881 (1934) (codified as amended 15 U.S.C. §§ 78a *et seq.* (2012)).

²⁵⁵ See *Free Enterprise Fund*, 561 U.S. at 487.

²⁵⁶ *But see* *Wiener v. United States*, 357 U.S. 349, 356 (1958) (holding that the president’s power to remove a War Claims Commissioner was impliedly limited even though the statute was silent regarding removal).

²⁵⁷ *Free Enterprise Fund*, 561 U.S. at 545–46 (Breyer, J., dissenting).

²⁵⁸ *Id.* at 486–87 (majority opinion). As the D.C. Circuit Court has noted, “[J]ust because two structural features raise no constitutional concerns independently does not mean Congress may combine them in a single statute.” *Ass’n of Am. R.R.s v. DOT*, 721 F.3d 666, 673 (D.C. Cir. 2013).

²⁵⁹ See discussion *supra* Part III.A.1.

²⁶⁰ See discussion *supra* Part III.A.2.

²⁶¹ *Free Enterprise Fund*, 561 U.S. at 483.

In examining the merits of the constitutionality of dual for-cause removal provisions, the Court framed the issue as whether “the President [could] be restricted in his ability to remove a principal officer, who is in turn restricted in his ability to remove an inferior officer, even though that inferior officer determines the policy and enforces the laws of the United States?”²⁶² The answer, according to the Court was “no.”²⁶³ The Court reasoned that dual for-cause removal provisions prevented the President from ensuring that the laws were faithfully executed because the President could not oversee the officers who worked for him.²⁶⁴

In finding that dual for-cause removal protections impeded a President’s ability to faithfully execute the laws, the Court examined its prior holdings. First, the Court said that *Myers* had “reaffirmed the principle that Article II confers on the president ‘the general administrative control of those executing the laws,’” so he “must have some ‘power of removing those for whom he can not continue to be responsible.’”²⁶⁵

Second, the Court observed that *Humphrey’s Executor* had limited *Myers* by permitting Congress to limit the President’s ability to remove *principal* officers who acted in “‘quasi-legislative and quasi-judicial’” capacities, rather than in “‘purely executive’” capacities.²⁶⁶ Here, the Board members exercised executive power.²⁶⁷ Thus, the Court returned to the *Myers–Humphrey’s* distinction it had only recently rejected in *Morrison*.²⁶⁸ However, the Court explained that *Humphrey’s Executor* addressed principal officers, not inferior officers, such as the Board members.²⁶⁹

Third, the Court mentioned that *Perkins* had held that when Congress vests the appointment of inferior officers in the heads of departments, it can limit the department’s removal power.²⁷⁰ Here, appointment was vested in a department: the SEC.

Fourth, and finally, the Court distinguished *Morrison*. In *Morrison*, the act at issue prevented the Attorney General from removing the independent counsel at will, but the President had the power to remove the Attorney General at will.²⁷¹ Here, the President had no ability to remove the SEC Commissioners, absent cause. So the Court examined whether dual for-cause limitations “stripped” the President of “his ability to execute the laws—by holding his subordinates accountable for their conduct.”²⁷² The Court reasoned that

²⁶² *Id.* at 483–84.

²⁶³ *Id.* at 484.

²⁶⁴ *Id.*

²⁶⁵ *Id.* at 492–93 (quoting *Myers v. United States*, 272 U.S. 52, 117, 164 (1926)).

²⁶⁶ *Id.* at 493 (quoting *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 627–29 (1935)).

²⁶⁷ See *Free Enterprise Fund*, 561 U.S. at 498.

²⁶⁸ See discussion *supra* Part III.A.2.

²⁶⁹ *Free Enterprise Fund*, 561 U.S. at 493.

²⁷⁰ *Id.* at 494.

²⁷¹ See *id.* at 494–95.

²⁷² *Id.* at 496.

one level of for-cause removal on executive, inferior officers would be constitutional because the President retained the power to remove the principal officers if they failed to remove an incompetent inferior officer.²⁷³ However, the added layer of tenure protection was problematic because the President would be unable to remove either an incompetent inferior officer (e.g., a member of the Board) or an incompetent principal officer (e.g., an SEC Commissioner) when the principal officer failed to remove the incompetent inferior officer.²⁷⁴ Thus, the Court concluded that one for-cause removal limitation on purely executive, *inferior* officers was constitutional under *Morrison*; however, more than one violates both Article II and separation of powers.²⁷⁵

Then, as if foreshadowing the current controversy regarding ALJs, the Court asked: if two levels of for-cause tenure protection were constitutional, then “why not a third?”²⁷⁶ Multiple for-cause removal provisions would create “a Matryoshka doll of tenure protections” for officers who “would be immune from Presidential oversight, even as they exercised power in the people’s name.”²⁷⁷ Hence, the Court concluded that more than one for-cause tenure limitation “subverts the President’s ability to ensure that the laws are faithfully executed—as well as the public’s ability to pass judgment on his efforts.”²⁷⁸ To remedy the constitutional infirmity, the Court severed “the unconstitutional tenure provisions . . . from the remainder of the statute.”²⁷⁹

Justice Breyer dissented. He criticized the majority for failing to “create a bright-line rule” causing “uncertainty about the scope of its holding.”²⁸⁰ He worried that a broad application of the holding in *Free Enterprise Fund* could dismantle the entire administrative state by putting the job security of “thousands of high-level Government officials . . . and their administrative actions and decisions constitutionally at risk.”²⁸¹ He specifically foreshadowed that if dual for-cause removal provisions violated the Constitution, then the removal of more than 1,584 ALJs in over twenty-five agencies would be unconstitutional.²⁸²

²⁷³ *Id.* at 495.

²⁷⁴ The Court seemed particularly troubled because, not only were there two levels of for-cause removal protection, but for one of them, “Congress [had] enacted an unusually high standard that must be met before Board members [could] be removed.” *Id.* at 503. “A Board member cannot be removed except for willful violations of the Act, Board rules, or the securities laws; willful abuse of authority; or unreasonable failure to enforce compliance . . .” *Free Enterprise Fund*, 561 U.S. at 503. The Court described the Board’s for-cause standard as “a sharply circumscribed definition” that requires “rigorous procedures that must be followed prior to removal.” *Id.* at 505.

²⁷⁵ *Id.* at 496–98.

²⁷⁶ *Id.* at 497.

²⁷⁷ *Id.*

²⁷⁸ *Id.* at 498.

²⁷⁹ *Free Enterprise Fund*, 561 U.S. at 508.

²⁸⁰ *Id.* at 536 (Breyer, J., dissenting).

²⁸¹ *Id.* at 540–41 (Breyer, J., dissenting).

²⁸² *See id.* at 542–43 (Breyer, J., dissenting).

In a footnote, the Court responded to Breyer's prophetic concern by suggesting that it was unlikely that its holding would apply to ALJs for three reasons. First, the majority argued that it was not clear whether ALJs were officers or employees.²⁸³ *Lucia* eliminated that reason.²⁸⁴

Second, citing the *Myers–Humphrey's* distinction, the majority reasoned that ALJs perform adjudicative rather than enforcement or policymaking functions, so “of course” removal restrictions would be more suspect.²⁸⁵ The majority's “of course” reasoning was disingenuous given, first, none of the Supreme Court cases up to that point had applied the *Myers–Humphrey's* distinction to removal restrictions on inferior officers; second, the Court downplayed the importance of the distinction in *Morrison*; and, third, the Court separated quasi-adjudicative functions from executive and quasi-legislative functions when *Humphrey's Executor* had separated executive functions from quasi-legislative and quasi-adjudicative functions.²⁸⁶ Moreover, the assertion was wrong; the members of the Board performed adjudicative functions,²⁸⁷ and ALJs have a policymaking function.²⁸⁸

Third, the majority noted that the Board members' for-cause removal provision was significantly more protective than traditional for-cause removal provisions such as the one protecting ALJs.²⁸⁹ That fact, at least, was true. While the Court's footnoted response to Justice Breyer's concerns about the impact on ALJs was dicta at best and confusing at worst, this footnote will likely play a central role when this issue is decided.²⁹⁰

Finally, and most recently, the Supreme Court carefully dodged the issue of whether the multiple for-cause removal restrictions on SEC ALJs violate the Constitution in *Lucia v. SEC*,²⁹¹ despite the Solicitor General's repeated attempts to raise the issue.²⁹²

²⁸³ *Id.* at 507 n.10 (majority opinion) (citing *Landry v. FDIC*, 204 F.3d 1125 (D.C. Cir. 2000)).

²⁸⁴ *Lucia v. SEC*, 138 S. Ct. 2044, 2049 (2018).

²⁸⁵ *Free Enterprise Fund*, 561 U.S. at 507 n.10.

²⁸⁶ See discussion *supra* Part III.A.2.

²⁸⁷ *Free Enterprise Fund*, 561 U.S. at 531 (Breyer, J., dissenting).

²⁸⁸ This was one reason the DOJ had concluded that ALJs were inferior officers. See generally Dep't of Justice, *Secretary of Education Review of Administrative Law Judge Decisions: Memorandum Opinion for the General Counsel Department of Education*, 15 OP.S OF THE OFFICE OF LEGAL COUNSEL 8, 14 (1991).

²⁸⁹ *Free Enterprise Fund*, 561 U.S. at 509.

²⁹⁰ Trying to make sense of this footnote, Professor Kevin Stack suggested that Chief Justice Roberts may have been trying to distinguish the Board members from ALJs by suggesting that Board members perform adjudicative functions as well as executive and legislative functions, while ALJs perform only adjudicative functions. Kevin M. Stack, *Agency Independence after PCAOB*, 32 CARDOZO L. REV. 2391, 2412 n.117 (2011). If so, Roberts could certainly have been clearer about his intention.

²⁹¹ *Lucia v. SEC*, 138 S. Ct. 2044, 2050–51 n.1 (2018).

²⁹² See Reply Brief for Respondent Supporting Petitioners at 15-16, *Lucia v. SEC*, 138 S. Ct. 2044 (2018) (No. 17-130).

In contrast, the dissenting Justice Breyer addressed the issue head-on;²⁹³ however, none of the Justices joined this part of his opinion. He said “*Free Enterprise Fund*’s technical-sounding holding about ‘multilevel protection from removal’ remain[s] potentially dramatic.”²⁹⁴ He noted that Congress had provided ALJs with at least two levels of removal protection—just what *Free Enterprise Fund* had held to be unconstitutional.²⁹⁵ Justice Breyer believed that Congress had intended the ALJ removal provisions to remain in place and, thus, would prefer the Court hold that ALJs were only employees to avoid having to find the removal provisions unconstitutional.²⁹⁶ Anticipating the arguments, he said:

If the *Free Enterprise Fund* Court’s holding applies equally to the administrative law judges—and I stress the “if”—then to hold that the administrative law judges are “Officers of the United States” is, *perhaps*, to hold that their removal protections are unconstitutional. This would risk transforming administrative law judges from independent adjudicators into *dependent* decisionmakers, serving at the pleasure of the Commission.²⁹⁷

Stressing the “if” and “perhaps” in his statement, he pointed out that the majority had disagreed with this conclusion in *Free Enterprise Fund*.²⁹⁸ As previously noted, the Court had offered three reasons why the Board members in *Free Enterprise Fund* were distinguishable from ALJs. The first of those reasons is now gone; ALJs are officers.²⁹⁹

The second is unworkable.³⁰⁰ As noted earlier, the majority in *Free Enterprise Fund* both resurrected and altered the *Myers–Humphrey*’s distinction. In so doing, the Court rejected *Morrison*’s “so central–sufficiently deprives” test.³⁰¹ The Court’s new *Myers–Humphrey*’s distinction separates executive *and* quasi-legislative functions from quasi-adjudicatory functions, suggesting removal limitations on quasi-adjudicative functions, and only quasi-adjudicative functions, are valid.³⁰²

This new *Myers–Humphrey*’s distinction might offer the functionalist members of the Court a way to save the ALJ removal protections from constitutional infirmity; however, it is unlikely that this distinction will save the day. One problem with the distinction is that it will be difficult to apply

²⁹³ *Lucia*, 138 S. Ct. at 2059–62 (Breyer, J., concurring in part and dissenting in part).

²⁹⁴ *Id.* at 2059 (quoting *Free Enterprise Fund*, 561 U.S. at 484).

²⁹⁵ *Id.* at 2060.

²⁹⁶ *Id.* at 2061–62.

²⁹⁷ *Id.* at 2060 (citing *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 540–42 (2010) (Breyer, J., dissenting)).

²⁹⁸ *Id.* at 2060 (citing *Free Enterprise Fund*, 561 U.S. at 506).

²⁹⁹ *Lucia*, 138 S. Ct. at 2061 (Breyer, J., concurring in part and dissenting in part) (citing *Free Enterprise Fund*, 561 U.S. at 507 n.10).

³⁰⁰ *See id.* at 2060 (citing 5 U.S.C. § 7521(a) (2012)).

³⁰¹ *See discussion supra* Part III.A.3.

³⁰² *Lucia*, 138 S. Ct. at 2053–55 (majority opinion).

because the dividing line between functions is fuzzy at best. Few, if any, agency officials perform only one function. For example, ALJs affect policy and the Board members perform quasi-adjudicative functions. Further, since *Free Enterprise Fund* was decided, two formalists have joined the Court, a consideration that is explained in the next Section of this Article.³⁰³ Hence, while those wishing to save ALJ removal protection will proclaim that this distinction alone should suffice, their cries will fall on deaf ears.

Finally, the third reason the Court in *Free Enterprise Fund* offered for distinguishing ALJs relates to the strictness of the removal provisions on the Board members.³⁰⁴ ALJ removal provisions are less severe. Yet, the severity of a for-cause removal provision simply cannot be the constitutional dividing line. Either for-cause removal provisions are constitutional, or they are not.

B. *Two Formalists Join the Supreme Court*

Since *Free Enterprise Fund* was decided, the composition of the Supreme Court has moved to the right. Justice Gorsuch replaced Justice Scalia, and Justice Kavanaugh replaced Justice Kennedy. Both Justices Scalia and Kennedy joined the majority in *Free Enterprise Fund*. Were their replacements more functionalist on this issue, ALJ removal provisions might be safe. However, neither Justice Gorsuch nor Justice Kavanaugh is a functionalist. If anything, the two are at least as formalist as Justice Scalia, and certainly more formalist than Justice Kennedy.³⁰⁵

1. Justice Gorsuch

While still on the Tenth Circuit, Judge Gorsuch never addressed appointment or removal issues.³⁰⁶ Justice Gorsuch joined the Supreme Court in

³⁰³ See discussion *infra* Part III.B.

³⁰⁴ *Lucia*, 138 S. Ct. at 2061 (Breyer, J., concurring in part and dissenting in part).

³⁰⁵ For an example of Justice Gorsuch's formalist approach, see *Oil States Energy Services, LLC v. Greene's Energy Group, LLC*, 138 S. Ct. 1365, 1386 (2018) ("Ceding to the political branches ground they wish to take in the name of efficient government may seem like an act of judicial restraint. But enforcing Article III isn't about protecting judicial authority for its own sake. It's about ensuring the people today and tomorrow enjoy no fewer rights against governmental intrusion than those who came before."). Also, in *Ortiz v. United States*, 138 S. Ct. 2165 (2018), Justice Gorsuch signed onto Justice Alito's dissenting opinion. Justice Alito would have held that the Supreme Court did not have appellate jurisdiction to review the decision of an Article I court (The United States Court of Appeals for the Armed Forces.). 138 S. Ct. at 2190 (Alito, J., dissenting) (arguing that the court was indisputably part of the Executive branch and the Constitution vests all judicial power, "every single drop of it," in the Supreme Court and other inferior Article III courts).

³⁰⁶ While on the Tenth Circuit, Justice Gorsuch briefly discussed the Recess Appointments Clause. *Teamsters Local Union No. 455 v. NLRB*, 765 F.3d 1198, 1200 (10th Cir. 2014).

2017.³⁰⁷ Since joining the Court, he has signed on to the majority’s opinion in *Lucia*, which dodged the removal issue, but did hold that SEC ALJs are inferior officers, not employees.

The only other Supreme Court opinion that might provide some insight into his approach to appointments issues is *Oil States Energy Services, LLC v. Greene’s Energy Group, LLC*.³⁰⁸ The issue in this case was whether the Patent and Trademark Office could conduct patent reviews without violating Article III.³⁰⁹ The majority held that it could.³¹⁰ Justice Gorsuch dissented, arguing that a political appointee could not resolve the dispute; an Article III judge was constitutionally required.³¹¹ He reasoned that political appointees, unlike Article III judges, were not independent.³¹²

While Justice Gorsuch’s dissent does not address removal or ALJs specifically, it does offer some insight. First, he approaches these issues from a formalist perspective. Second, he views independence of adjudicators as critical for fair, impartial decision-making.

2. Justice Kavanaugh

In comparison, Justice Kavanaugh’s approach to removal is less opaque. Two cases are instructive. First, when *Free Enterprise Fund* was before the D.C. Circuit, then-Judge Kavanaugh dissented.³¹³ The majority quoted his dissenting opinion twice, agreeing that the agency’s structure lacked historical precedent and unduly expanded legislative power.³¹⁴ Second, he recently reiterated his constitutional reservations about novel agency structures. In 2016, the D.C. Circuit addressed the constitutionality of the Consumer Financial Protection Board (“CFPB”), an independent agency established in 2010 and headed by a single director.³¹⁵ That director was removable only for cause, specifically “inefficiency, neglect of duty, or malfeasance in office” during a five-year term.³¹⁶ Independent agencies are more typically headed

³⁰⁷ Press Release, The White House, Supreme Court Justice Neil Gorsuch Sworn-in at the White House (Apr. 13, 2017), <https://www.whitehouse.gov/articles/supreme-court-justice-neil-gorsuch-sworn-white-house/>.

³⁰⁸ 138 S. Ct. 1365 (2018).

³⁰⁹ *Id.* at 1370.

³¹⁰ *Id.*

³¹¹ *Id.* at 1386 (Gorsuch, J., dissenting).

³¹² *Id.*

³¹³ *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 537 F.3d 667, 685 (D.C. Cir. 2008) (Kavanaugh, J., dissenting), *aff’d in part, rev’d in part*, 561 U.S. 477 (2010).

³¹⁴ *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 500, 505–06 (2010).

³¹⁵ *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1, 6 (D.C. Cir. 2016), *vacated*, No. 15-1177, 2017 U.S. App. LEXIS 2733 (D.C. Cir. Feb. 16, 2017), *reinstated in part en banc*, 881 F.3d 75 (D.C. Cir. 2018).

³¹⁶ *Id.* at 15 (citing 12 U.S.C. § 5491(c)(3) (2012)).

by multi-member bodies.³¹⁷ The issue for the court was whether this single-director headed agency structure was constitutional.³¹⁸ In *Humphrey's Executor*, the Supreme Court held that Congress could limit the President's ability to remove the heads of independent agencies, so the removal provision appeared constitutional.³¹⁹

However, a mortgage lender subject to a \$109 million CFPB enforcement order challenged the order's validity by, in part, challenging the constitutionality of the CFPB's structure.³²⁰ A three-judge panel of the D.C. Circuit found the structure to be unconstitutional.³²¹ Judge Kavanaugh wrote the majority opinion. He framed the issue as whether the court should extend *Humphrey's Executor's* holding to a single-director independent agency.³²² His answer was no, stating that this "first of its kind . . . historical anomaly"³²³ violated Article II of the Constitution.³²⁴

Kavanaugh noted that the text of the Constitution alone did not resolve the issue (which is true in every removal case), so he turned to "history and tradition."³²⁵ The history and tradition demonstrated that other similarly structured independent agencies³²⁶ could not serve as historical precedent because those agencies were created recently and were "constitutionally contested."³²⁷ Kavanaugh pointed out that those agencies differed from the CFPB because they did not have the power to bring law enforcement actions against private citizens, a "core" executive power.³²⁸

Importantly, Kavanaugh believed the CFPB director was "the single most powerful official in the entire United States Government . . . when measured in terms of unilateral power."³²⁹ Finally, Kavanaugh suggested that safeguards traditionally used to control agencies—unfettered removal for executive agencies and multi-member boards for independent agencies—helped protect individual liberty by preventing arbitrary decision-making and abuse of power, and by fostering more deliberative decision-making.³³⁰ In

³¹⁷ *Id.* at 6.

³¹⁸ *Id.* at 7.

³¹⁹ See discussion *supra* Part III.A.2.

³²⁰ *PHH Corp.*, 839 F.3d at 7.

³²¹ *Id.* at 12.

³²² *Id.* at 7. Judge Henderson dissented from this part of the decision because there was no need to reach the constitutional issue; the petitioners were entitled to full relief based solely on the statutory challenge. *Id.* at 57–58 (Henderson, J., concurring in part and dissenting in part).

³²³ *Id.* at 17 (majority opinion).

³²⁴ *Id.* at 16.

³²⁵ *Id.* at 21–22 (citing *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2560 (2014)).

³²⁶ There are currently three other independent agencies with this type of structure: the Social Security Administration, the Office of Special Counsel, and the Federal Housing Finance Agency. *PHH Corp.*, 839 F.3d at 18. One former agency also had this structure: the Independent Counsel. *Id.* at 20.

³²⁷ *Id.* at 19–20.

³²⁸ *Id.*

³²⁹ *Id.* at 16.

³³⁰ *Id.* at 26.

sum, he concluded that the single-director independent agency structure was unconstitutional because there was no historical practice for it, and the omitted safeguards impacted individual liberty.³³¹ The government moved for rehearing en banc, which was granted.³³²

The full court reversed, holding that the for-cause limitation was consistent with Article II.³³³ The majority analyzed the constitutionality of the removal provision by addressing two questions: first, whether the “means of independence [was] permissible;”³³⁴ and second, whether the type of functions the agency performed required independence, which should be protected by for-cause removal.³³⁵

Answering the first question, the majority found the CFPB’s removal provision to be identical to the removal provision the Supreme Court had approved in *Humphrey’s Executor*.³³⁶ In both cases, the officer could be fired only for “inefficiency, neglect of duty, or malfeasance in office.”³³⁷ Such a “mild constraint on removal” contrasted with “the cumbersome or encroaching removal restriction[.]” in *Free Enterprise Fund*, which the Court held to be unconstitutional.³³⁸ Additionally, the majority noted that Congress had not aggrandized itself with the CFPB’s removal limitation, unlike in *Myers* and *Bowsher*.³³⁹ Further, Congress had not added an additional for-cause layer, as it had done in *Free Enterprise Fund*.³⁴⁰ The majority concluded by noting that “[t]he Supreme Court has never struck down a statute conferring the standard for-cause [removal] protection at issue here.”³⁴¹

Answering the second question, the majority turned to a consistent theme in these removal protection arguments: the importance of independence. The majority reasoned that when an agency or official needs to be independent from the executive to function properly, for-cause removal limitations do not impermissibly burden the President’s Article II powers.³⁴²

³³¹ *Id.* at 36. Judge Henderson dissented from the panel’s constitutional holding on the ground that it was unnecessary and, thus, inappropriate under the doctrine of avoidance to reach the removal-power question. *Id.* at 56–60 (Henderson, J., concurring in part and dissenting in part). She changed her opinion upon full en banc review. *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 83 (D.C. Cir. 2018) (en banc).

³³² *PHH Corp.*, 881 F.3d at 77.

³³³ *Id.* at 84.

³³⁴ *Id.* at 78.

³³⁵ *Id.*

³³⁶ *Id.* at 77, 93.

³³⁷ *Id.* at 78 (citing 12 U.S.C. § 5491(c)(3) (2012)); *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 619 (1935) (citing 15 U.S.C. § 41 (2012)).

³³⁸ *PHH Corp.*, 881 F.3d at 78.

³³⁹ *Id.* at 78 (citing *Bowsher v. Synar*, 478 U.S. 714 (1986); *Myers v. United States*, 272 U.S. 52 (1926)).

³⁴⁰ *Id.* at 93 (noting the “onerous” provision at issue in *Free Enterprise Fund*).

³⁴¹ *Id.* at 78.

³⁴² *Id.* at 79 (citing *Morrison v. Olson*, 487 U.S. 654, 691 n.30, 686–96 (1988); *Wiener v. United States*, 357 U.S. 349, 356 (1958); *Humphrey’s Ex’r*, 295 U.S. at 631).

Independence is essential for the CFPB to function as a financial consumer protection agency, similar to the FTC.³⁴³ Pointing to the new *Myers–Humphrey’s* distinction, the majority noted that the CFPB did not exercise “core executive functions, such as those entrusted to a Secretary of State or other Cabinet officer who . . . must directly answer to the President’s will.”³⁴⁴ Or, as the concurrence put it, “[R]emoval restrictions of officers performing adjudicatory functions intrude far less on the separation of powers than removal restrictions of officers who perform purely executive functions.”³⁴⁵ Therefore, the removal limitation was constitutional.³⁴⁶

Removal opinions are not for the faint at heart. Then-Judge Kavanaugh’s dissent from the full court’s opinion begins almost ninety pages in and continues for thirty-six more pages.³⁴⁷ He repeats much of the reasoning from his panel opinion: the single-director independent agency has no historical support and is “a gross departure from settled historical practice,”³⁴⁸ the director’s powers are executive and “enormous,”³⁴⁹ and the President has no ability to control a one-person director that the President cannot remove, which substantially diminishes presidential power.³⁵⁰ He concludes that “[u]nder Article II, an independent agency that exercises substantial executive power may not be headed by a single Director.”³⁵¹ His formalist and cautious approach to removal issues demonstrates that he is unlikely to approve of the multi-track, for-cause ALJ removal protections as a Supreme Court Justice.

IV. EVALUATING ALJ REMOVAL CONSTITUTIONALITY & FIXES

The cases described in Part III show the Supreme Court alternating between fully protecting the President’s removal power to accepting significant limitations on that power and back again. This Part explains why the ALJ multi-track, dual-removal protections violate the Constitution. While individually, each for-cause layer is constitutional, collectively they fail. This Part then evaluates possible fixes.

³⁴³ *Id.* at 94 (citing *Morrison*, 487 U.S. at 687, 691 n.30; *Wiener*, 357 U.S. at 353; *Humphrey’s Ex’r*, 295 U.S. at 631).

³⁴⁴ *PHH Corp.*, 881 F.3d at 84.

³⁴⁵ *Id.* at 115 (Wilkins, J., concurring).

³⁴⁶ *Id.* at 84 (majority opinion). The majority rejected PHH’s argument that the single director model changed the analysis. *Id.* at 96.

³⁴⁷ *See id.* at 164–200 (Kavanaugh, J., dissenting).

³⁴⁸ *Id.* at 166.

³⁴⁹ *PHH Corp.*, 881 F.3d at 166.

³⁵⁰ *Id.* at 166–67 (contrasting independent multi-member agencies in which an incoming president can at least select the chair).

³⁵¹ *Id.* at 167.

A. *The ALJ Removal Scheme is Unconstitutional*

ALJs are inferior officers. Removal limitations on inferior officers are constitutional. In *Perkins* and *Morrison*, the Court held that Congress can limit the ability of department heads to remove their inferior officers, even executive inferior officers.³⁵² However, in *Hennen* and *Parsons*, the Court was clear that when Congress wishes to protect inferior officers from at-will removal, Congress must include an express removal provision; one will not be implied.³⁵³

Removal limitations on principal officers are trickier. They may be constitutional depending on the officer’s powers. In *Myers* and *Humphrey’s Executor*, the Court held that for-cause removal provisions on executive officers are unconstitutional, for-cause removal provisions on quasi-legislative or policymaking officers may be constitutional, and for-cause removal provisions on quasi-adjudicatory officials are constitutional, especially when the purpose of the removal provision is to ensure the independence of the protected officer.³⁵⁴

Additionally, and irrespective of whether the provision protects inferior or principal officers, removal provisions in which Congress retains removal power for itself are per se unconstitutional.³⁵⁵ And, for-cause removal limitations must be reasonable (traditional?), not excessive.³⁵⁶ These are the rules regarding the constitutionality of single for-cause removal provisions.

The rule (note the singular here) regarding the constitutionality of multiple for-cause removal provisions is much easier to articulate: under *Free Enterprise Fund* they are unconstitutional, even if each removal provision would be constitutional independently.³⁵⁷ Multiple for-cause removal provisions are unconstitutional, according to the Court, because they interfere with the President’s ability to take care that the laws are faithfully executed.³⁵⁸ The President must retain some ability to remove a recalcitrant inferior officer, whether the President has the power to remove that inferior officer directly or has the power to remove the principal officer overseeing the inferior officer, as in *Morrison*.

From these rules comes the inevitable conclusion that no one wants to hear: that ALJ multi-track removal provisions violate the Constitution, even though each provision would be constitutional independently. Here is why. First, ALJs are inferior officers who have traditional, for-cause removal

³⁵² See discussion *supra* Part III.A.1.

³⁵³ See discussion *supra* Part III.A.1. *But see* *Wiener v. United States*, 357 U.S. 349, 356 (1958) (limiting the removal of a principal officer when no such provision was included in the statute).

³⁵⁴ See discussion *supra* Part III.A.1.

³⁵⁵ See discussion *supra* Parts III.A.1 & III.A.2.

³⁵⁶ See discussion *supra* Part III.A.3.

³⁵⁷ See discussion *supra* Part III.A.3 (discussing *Free Enterprise Fund*).

³⁵⁸ See *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 492–93 (2010).

protection. Their department or agency appoints them.³⁵⁹ As previously noted, Congress can limit a department's or agency's ability to remove its ALJs so long as the for-cause removal provision is not excessive and Congress has not retained a role in the removal process for itself.³⁶⁰ Here, the removal protections are traditional and do not involve Congress. Moreover, ALJs are quasi-adjudicators, and Congress included for-cause removal provisions specifically to further ALJ independence and impartiality.³⁶¹ Hence, this first level of removal protection is not only constitutional, it is laudable.

Second, the majority of ALJs work for independent agencies.³⁶² These *Independent* ALJs have a second layer of removal protection because the independent agency heads are themselves typically protected from at-will removal.³⁶³ Pursuant to the *Myers–Humphrey's* distinction (original or as amended), Congress can limit the removal of these agency heads so long as they exercise quasi-adjudicatory functions (and perhaps quasi-legislative functions, but that is a bit unclear). As with ALJs, Congress includes removal limitations on the heads of the independent agencies to further their independence from the President.³⁶⁴ While the for-cause removal limitation for each agency head would need to be examined to confirm that it is not excessive, Congress did not retain a role in the removal process, and the official performs quasi-adjudicative or quasi-legislative functions, so this second level of removal protection is also constitutional.

³⁵⁹ 5 U.S.C. §§ 3105 (“Each agency shall appoint as many administrative law judges as are necessary . . .”), 556(b)(3) (directing ALJs who preside at agency adjudications to be appointed pursuant to § 3105) (2012). *See also* Exec. Order No. 13,843, 83 Fed. Reg. 32,755 (July 10, 2018). In this order, President Trump changed the process agencies used to select their ALJs. The prior process involved another agency, Office of Personnel Management (OPM), identifying three qualified candidates from which the agency could hire. The E.O. takes OPM out of the process entirely.

³⁶⁰ *See* discussion *supra* Part III.A.3.

³⁶¹ 5 U.S.C. § 7521(a) (2012) (providing that “[a]n action may be taken against an administrative law judge appointed under section 3105 of this title by the agency in which the administrative law judge is employed only for good cause established and determined by the Merit Systems Protection Board . . .”). Note that the Merit Systems Protection Board, “for the purpose of section 7521 . . . may investigate, prescribe regulations, appoint advisory committees as necessary, recommend legislation, subpoena [sic] witnesses and records, and pay witness fees as established for the courts of the United States.” 5 U.S.C. § 1305 (2012). Congress also provided that ALJ compensation was to be determined based on tenure rather than performance. *See generally* 5 U.S.C. §§ 5372, 4301(2)(D) (2012).

³⁶² U.S. OFFICE OF PERS. MGMT., ADMINISTRATIVE LAW JUDGES: ALJS BY AGENCY (2018), <https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=ALJs-by-Agency>. The National Labor Relations Board has thirty-four. *Id.* Indeed, more than 1,600 ALJs work for the Social Security Administration (SSA). *Id.* The SSA is an independent agency whose head can be removed from the office only for cause. 42 U.S.C. § 902(a)(3) (2012). *See generally* Mathew B. Tully, *A Pending Supreme Court Case Calls Constitutionality of Administrative Law Judges’ Decisions into Question*, FEDSMITH.COM (Oct. 23, 2017), <https://www.fedsmith.com/2017/10/23/pending-supreme-court-case-calls-constitutionality-administrative-law-judges-decisions-question/>.

³⁶³ *See, e.g.,* *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 620 (1935).

³⁶⁴ *See* *Morrison v. Olson*, 487 U.S. 654, 707 (1988); Jack M. Beeraman, *An Inductive Understanding of Separation of Powers*, 63 ADMIN. L. REV. 467, 490–91 (2011).

While divided they stand, united they fall.³⁶⁵ Multiple for-cause removal protections violate the Constitution because they prevent the President from overseeing those who work for him.³⁶⁶ Here, there are multiple levels of removal protection, which prevent the President from exercising direct or indirect control over a poorly performing ALJ. For example, imagine a different world from the one today. Imagine a president who is above reproach and an SEC that is misbehaving. If an SEC ALJ drank one too many cocktails before every adjudication, and the SEC Commissioners chose not to try to fire the ALJ (assume political reasons for this choice), the President could not do so either. Moreover, the President could not remove the SEC Commissioners either.

There may be one very small reason for optimism. ALJs who work for executive agencies (Executive ALJs) do not have this second level of for-cause protection within their own agency. Hence, their removal protection possibly would be constitutional because of basic math: one good, two bad.

However, Executive ALJs, like Independent ALJs, cannot be fired easily. If an agency wants to fire an inebriated ALJ, the agency must bring a formal adjudication before an MSPB ALJ. Like the agency ALJ, the MSPB ALJ has for-cause removal protection: level one.³⁶⁷ The members of the MSPB review their ALJ’s decision. The MSPB is an independent agency whose members also have for-cause removal protection: level two.³⁶⁸ All ALJs, Independent and Executive ALJs, are protected by this process. Thus, all ALJs are protected by this dual for-cause protection system.

To be sure, this dual for-cause system of protection is separate from the for-cause removal provisions protecting ALJs. In other words, there are not three levels of protection for Executive ALJs, nor four levels of protection for Independent ALJs. Rather, there are two separate, parallel tracks of protection. This parallel track similarly prevents the President from exercising direct or indirect control over a poorly performing ALJ. Assuming an agency tries to fire its ALJ, the MSPB ALJ might not find good cause (maybe she likes a cocktail or two as well), and the MSPB accepts its ALJ’s decision. Hence, just like in the first hypothetical, our soused ALJ remains in office, this time over the agency and the President’s objections, and the President cannot remove either the MSPB ALJ or the MSPB members.

In *Free Enterprise Fund*, the Supreme Court remedied the constitutional infirmity by severing the unconstitutional removal provision protecting

³⁶⁵ Cf. Aesop, *The Four Oxen and The Lion*, in Aesop’s FABLES (1867), <http://etc.usf.edu/lit2go/35/aesops-fables/392/the-four-oxen-and-the-lion/>.

³⁶⁶ *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 495–96 (2010). *But see* David Zaring, *Enforcement Discretion at the SEC*, 94 TEX. L. REV. 1155, 1191–95 (2016) (arguing that whatever the doctrinal problems with removal, ALJs are too traditional to find unconstitutional now).

³⁶⁷ *See, e.g., Free Enterprise Fund*, 561 U.S. at 486–87; *MFS Sec. Corp. v. SEC*, 380 F.3d 611, 619–20 (2d Cir. 2004).

³⁶⁸ 5 U.S.C. § 1202(d) (2012).

inferior officers (the members of the Board).³⁶⁹ The statutes protecting ALJs from at-will removal cannot simply be severed; they would have to be declared invalid. And, the implications would be staggering and destructive.

First, the impact would be substantial. There were only five board members in *Free Enterprise Fund*. In contrast, there are 1,584 ALJs in over twenty-five agencies.³⁷⁰ ALJs have served as the cornerstone of the administrative adjudicatory system for many years, serving many regulated entities and agencies. ALJs have served this important function for so long that it may seem counterintuitive to find their removal unconstitutional, especially when historical practice has been used to support the constitutionality of “novel” agency structures.³⁷¹

Second, the effect would be detrimental. Quasi-adjudicators, like ALJs, are arguably protected from executive removal for good reason: to promote independence. As noted, before the APA was enacted, there was considerable concern that hearing examiners did not exercise independent judgment, both because they were required to perform prosecutorial and investigative functions in addition to their judicial work,³⁷² and because they were subordinate to the agency heads.³⁷³ Congress intentionally included provisions in the APA to help ensure hearing examiners’ independence.³⁷⁴ Congress rightly concluded that effective adjudication requires that litigants believe the process is fair and the decision-makers impartial.³⁷⁵ Thus, ALJs must be free to adjudicate without threat of retaliation.³⁷⁶ Protecting ALJs from arbitrary and retaliatory removal furthers independence and impartiality.³⁷⁷ One could easily

³⁶⁹ *Free Enterprise Fund*, 561 U.S. at 509.

³⁷⁰ *Id.* at 542–43 (Breyer, J., dissenting).

³⁷¹ *See, e.g.*, *PPH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 103 (D.C. Cir. 2018).

³⁷² *See, e.g.*, *Wong Yang Sung v. McGrath*, 339 U.S. 33, 37–38 (1950).

³⁷³ *Butz v. Economou*, 438 U.S. 478, 513–14 (1978) (citing *Ramspeck v. Fed. Trial Exam’rs Conference*, 345 U.S. 128, 131 (1953)).

³⁷⁴ For example, when conducting a hearing, an ALJ cannot be responsible to or subject to the supervision or direction of employees or agents who perform investigative or prosecutorial functions for the agency. 5 U.S.C. § 554(d)(2) (2012). Nor may an ALJ consult any person or party, including other agency officials, concerning a fact at issue in the hearing, unless on notice and opportunity for all parties to participate. 5 U.S.C. § 554(d)(1). Moreover, and at issue here, ALJs can be removed only for good cause established and determined by the MSPB after a formal adjudication. 5 U.S.C. § 7521(a). Finally, Congress ensured that ALJ compensation is also free from executive control. *See generally* 5 U.S.C. §§ 5372, 4301(2)(D).

³⁷⁵ *Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (stating that biased decision-making is constitutionally unacceptable, especially in a system that “endeavor[s] to prevent even the probability of unfairness”) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). *See also* *Town of Winthrop v. FAA*, 535 F.3d 1, 14 (1st Cir. 2008). After all, “due process demands impartiality on the part of those who function in judicial or quasi-judicial capacities.” *Schweiker v. McClure*, 456 U.S. 188, 195 (1982).

³⁷⁶ A former ALJ alleged she felt pressured to rule in favor of the SEC and that she was told to work under the presumption that the defendants were guilty until proven innocent. Jean Eaglesham, *SEC Wins with In-House Judges*, WALL ST. J. (May 6, 2015, 10:30 PM), <http://www.wsj.com/articles/sec-wins-with-in-house-judges-1430965803>.

³⁷⁷ *See Butz*, 438 U.S. at 514 (considering whether agency employees had immunity from prosecution for allegedly ultra vires acts).

say that ALJ removal protection is necessary for the system to function as it should. If a court were to invalidate the ALJ removal protection layer, the independence and impartiality of administrative hearings would be lost. The system would return to the pre-APA days, when hearing examiners were considered mere instruments of their agencies.

In sum, the potential repercussions for invalidating the ALJs’ for-cause removal provisions are significantly greater than were the repercussions for invalidating the removal provision that applied to a board with just five members. The question, then, is whether the Court can protect ALJ independence within constitutional constraints. The next Section addresses that question.

B. *Evaluating Potential Fixes*

Assuming that the Supreme Court is likely to hold 5 U.S.C. § 7521 unconstitutional, and that protecting ALJ independence within constitutional constraints is a worthy endeavor, then the question is, how might the Court resolve this mess? There is no perfect resolution; however, there are three potential options. First, the removal protection that applies to all civil service employees might cover ALJs. Second, the Court could narrow *Humphrey’s Executor* to hold that Congress can limit a President’s power to remove principal officers who exercise quasi-adjudicatory powers exclusively. And third, the Court could overrule *Humphrey’s Executor* entirely and hold that Congress cannot limit a President’s power to remove any principal officer. This Section explores the pluses and minuses of each option next.

1. Civil Service Removal Protection

First, if the Court were to hold 5 U.S.C. § 7521 unconstitutional, it is unclear whether ALJs would then be protected under the Civil Service Reform Act of 1978.³⁷⁸ All civil servants enjoy a form of removal protection that is less robust than the protection ALJs enjoy. Specifically, when the government fires or suspends a civil servant, she may appeal the decision to the MSPB within thirty days.³⁷⁹ After an informal hearing, an administrative judge (“AJ”) renders an initial decision.³⁸⁰ The AJ will uphold the agency’s decision to terminate or suspend an employee for “unacceptable

³⁷⁸ Pub. L. No. 95-454, 92 Stat. 1111 (1978) (now codified as 5 U.S.C. §§ 1101 *et seq.* (2012)).

³⁷⁹ 5 C.F.R. § 1201.22(b)(1) (2018). The Board maintains a website for employees to complete online forms to file a claim: <https://e-appeal.mspb.gov/>. The contents of the form are identified in the agency’s regulations. 5 C.F.R. § 1201.24(a).

³⁸⁰ 5 C.F.R. § 1201.111 (2018).

performance”³⁸¹ so long as the decision is supported by “substantial evidence.”³⁸² Either party may then appeal the AJ’s initial decision to the MSPB, which determines whether the AJ’s decision contained “erroneous findings of material fact,” was “based on an erroneous interpretation [or application] of statute or regulation,” or failed to address “[n]ew and material evidence . . . that . . . was not available when the record closed.”³⁸³

This process does not differ substantially from the process used in cases of ALJ removal. When an agency wishes to fire or suspend its ALJ, the agency, rather than the ALJ, must file a complaint with the MSPB.³⁸⁴ The MSPB will then hold a formal hearing before an MSPB ALJ.³⁸⁵ The MSPB ALJ “will authorize the agency to take a disciplinary action, and will specify the penalty to be imposed, only after a finding of good cause as required by 5 U.S.C. 7521 has been made.”³⁸⁶ Section 7521 does not define “good cause,” but the term is traditionally understood to mean “inefficiency, neglect of duty, or malfeasance in office.”³⁸⁷ The MSPB will uphold the agency’s decision to terminate or suspend the ALJ for cause so long as the decision is supported by substantial evidence.³⁸⁸ The process for appealing the ALJ’s decision is identical to the process for appealing the AJ’s decision.³⁸⁹

Thus, the primary difference between the two processes is the basis for the disciplinary action: civil servants can be removed if the agency can prove by substantial evidence that the employee exhibited “unacceptable performance,” while ALJs can be removed only if the agency can prove by substantial evidence that the ALJ exhibited “inefficiency, neglect of duty, or malfeasance in office.” While “unacceptable performance” is certainly a lower standard than “inefficiency, neglect of duty, or malfeasance in office,” it is still a standard that would prevent removal of adjudicators for retaliatory reasons, thereby protecting impartiality. For example, AJs, who adjudicate

³⁸¹ 5 U.S.C. § 4303(a) (2017).

³⁸² 5 C.F.R. § 1201.56(b)(1)(i) (2018). Substantial evidence is defined in 5 C.F.R. § 1201.4(p) (“The degree of relevant evidence that a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree. This is a lower standard of proof than preponderance of the evidence.”). If the action was due to any other legitimate reason, then the standard is a preponderance of the evidence. 5 C.F.R. § 1201.56(b)(1)(ii). A preponderance of the evidence is defined in 5 C.F.R. § 1201.4(q) (“The degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue.”).

³⁸³ 5 C.F.R. § 1201.115(a), (b), (d) (2018). *See, e.g.,* *Weaver v. Dep’t of Navy*, 2 M.S.P.B. 297, 299 (1980), *review denied*, 669 F.2d 613, 613 (9th Cir. 1982) (*per curiam*).

³⁸⁴ 5 C.F.R. § 1201.137(b) (2018).

³⁸⁵ 5 C.F.R. § 1201.140(a)(1) (2018).

³⁸⁶ *Id.* § 1201.140(b).

³⁸⁷ *See, e.g.,* *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 487 (2010) (quoting *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 620 (1935)).

³⁸⁸ 5 U.S.C. § 706(2)(E) (2012).

³⁸⁹ 5 C.F.R. § 1201.140(a)(2) (2018) (noting that the review provisions in Subpart C apply to the MSPB review).

the vast number of “informal,” or Type B and C adjudications,³⁹⁰ have civil-servant removal protection. They view themselves as independent of their agencies, and some argue that the process seems to be working.³⁹¹ Thus, were the Supreme Court to declare 5 U.S.C. § 7521 unconstitutional, the removal protection in 5 U.S.C. § 4303 may be sufficiently protective to ensure ALJ independence while simultaneously permitting greater presidential oversight.

More likely, however, the Supreme Court will not substitute a less stringent removal protection for an unconstitutional one. If for-cause removal protections violate the Constitution because they tie the President’s hands, then making those protections a little less protective would not seem to remedy the constitutional infirmity. Either the President has the power to fire those who work for him, or he does not.

2. Narrowing *Humphrey’s Executor*

Second, the Court could significantly narrow *Humphrey’s Executor* by holding that it prevents Congress from limiting the President’s power to remove officers who exercise adjudicatory powers only, whether they be principal or inferior officers, and whether they be executive or independent officers.

Professor Richard Pierce makes this argument.³⁹² He notes that *Myers* can be read narrowly as expressing the Supreme Court’s concern about congressional aggrandizement rather than as support “for the broad proposition that Congress cannot limit in any way the power of the president to remove any executive officer.”³⁹³ In *Myers*, the Court specifically addressed the President’s power to remove territorial judges, noting that the President “could not properly exercise any supervision or control [over such judges] after their appointment and confirmation.”³⁹⁴ Further, the Court specifically refused to decide whether the President must have the power to remove officers who have only adjudicatory responsibilities because the issue was not before the Court.³⁹⁵ Professor Pierce argues that *Myers* is consistent with his view that

³⁹⁰ See Michael Asimow, *Best Practices for Evidentiary Hearings Outside the Administrative Procedure Act*, 26 GEO. MASON L. REV. (forthcoming 2019) (manuscript at 3) (dividing informal hearings into two types based on the degree of procedures offered by each).

³⁹¹ See E-mail from Michael Asimow, Visiting Professor of Law, Stanford Law School, and Professor of Law Emeritus, UCLA School of Law, to author (Sept. 18, 2018, 5:51 PM) (on file with author).

³⁹² Richard J. Pierce, Jr., *The Court Should Change the Scope of the Removal Power by Adopting a Pure Functional Approach*, 26 GEO. MASON L. REV. (forthcoming 2019) (manuscript at 16–17) (arguing that the President should have the power to remove any officer who makes policy decisions, but not the power to remove those who adjudicate disputes between individuals and the government).

³⁹³ *Id.* (manuscript at 4).

³⁹⁴ *Myers v. United States*, 272 U.S. 52, 157 (1926).

³⁹⁵ *Id.* at 157–58.

“the Court has always recognized that officers who perform solely adjudicatory powers, as distinguished from ‘quasi judicial’ powers, can be insulated from potential plenary control by the president and can be insulated from at will removal by the president.”³⁹⁶

Turning to *Humphrey’s Executor*, Professor Pierce urges a narrow reading of that case as well. Specifically, he notes that when *Humphrey’s Executor* was decided, the FTC “had no power to issue rules or to make policy decisions on behalf of the government.”³⁹⁷ Rather, it had the power to adjudicate disputes (quasi-judicial power) and to advise Congress on the need for legislation (quasi-legislative power).³⁹⁸ Hence, *Humphrey’s Executor* held only that Congress can limit the President’s ability to remove officers who do not make policy decisions.

Finally, Professor Pierce points to *Wiener*, in which the Supreme Court implied a for-cause removal provision for a member of the War Claims Tribunal. Because the tribunal’s sole function was adjudication,³⁹⁹ the Court concluded that Congress wanted this adjudicative body to be free from outside pressure.⁴⁰⁰ Hence, the President was unable to remove a member without cause.

Professor Pierce suggests that these three cases support a functional understanding of Congress’s ability to limit the President’s removal power.⁴⁰¹ Congress may limit the President’s power to remove officers who perform only adjudicative functions (and perhaps quasi-legislative, but that is unclear). But Congress may not limit the President’s ability to remove officers who perform policymaking functions.⁴⁰²

Professor Pierce’s proposal has appeal. He brings coherence to an incoherent body of law. Moreover, his proposal would protect both ALJs from retaliatory removal, and independent agency heads who solely adjudicate, such as the members of the MSPB, perhaps. However, his approach suffers the same problem as the *Myers–Humphrey’s* distinction: many agencies perform adjudicatory as well as other functions and the lines are simply not that clear. Perhaps the answer is that the line is at least clear enough to protect ALJs, and that is enough.

³⁹⁶ E-mail from Richard Pierce, Lyle T. Alverson Professor of Law, George Washington University Law School, to author (Sept. 11, 2018, 8:04 AM) (on file with author).

³⁹⁷ Pierce, *supra* note 392 (manuscript at 5).

³⁹⁸ *Id.*

³⁹⁹ *Wiener v. United States*, 357 U.S. 349, 355 (1958).

⁴⁰⁰ *Id.* at 356.

⁴⁰¹ Pierce, *supra* note 392 (manuscript at 13–15).

⁴⁰² *Id.* (manuscript at 8) (“The Court has never upheld a for cause limit on the president’s power to remove an officer who has the power to make policy decisions.”).

3. Overturning *Humphrey’s Executor*

Third, the Court could reverse *Humphrey’s Executor*⁴⁰³ entirely and hold that provisions that limit a President’s ability to remove a principal officer are unconstitutional, regardless of whether that officer works for an independent agency or an executive agency, and regardless of the type of power that officer exercises. This solution would leave in place the Court’s holdings in *Perkins* and *Morrison*: Congress can place removal limitations on departments that appoint inferior officers so long as the President retains removal power over the principal officer supervising the inferior officer.⁴⁰⁴ Further, this solution would respect the Court’s holding in *Free Enterprise Fund*: multiple removal provisions violate the Constitution.⁴⁰⁵ Surprisingly, the solution would even leave the Court’s holding in *Morrison* unscathed, assuming the independent counsel actually was an inferior officer: Congress can limit the department’s ability to remove an inferior officer, even one who performs purely executive functions.⁴⁰⁶

If the Court were to adopt this solution to the ALJs’ multi-track removal provisions, it would find 5 U.S.C. § 7521 constitutional. This statute protects inferior officers exercising quasi-adjudicatory powers from removal by their department heads.⁴⁰⁷ Protecting ALJs from at-will removal furthers the twin goals of ensuring ALJ independence and providing unbiased hearings. ALJs would be free to make their findings based on the evidence, not the preferences of their employer or their fear of retaliation.

Further, pursuant to this solution, the Court would reject for-cause removal protections preventing the President from removing the heads of agencies, including the independent agencies. Thus, the members of the MSPB, among other independent agency heads, would no longer be protected from at-will removal.

One potential problem with this solution is that some, but not all, Article I judges are considered principal officers.⁴⁰⁸ Whether every Article I judge is

⁴⁰³ *Wiener v. United States*, 357 U.S. 349 (1958), should also be reversed, but for a different reason. The statute at issue in *Wiener* did not include a removal provision. *Id.* at 352. The Supreme Court implied one, holding that removal provisions are never implied. *Id.* at 356. It did this despite its earlier cases, *Hennen* and *Parsons*. *Ex Parte Hennen*, 38 U.S. 230, 239 (1839) (stating that “[p]owers are only implied from necessity” if there is a “cogent reason” to do so). *See also Parsons v. United States*, 167 U.S. 324, 343 (1897).

⁴⁰⁴ *See* discussion *supra* Parts III.A.1–2.

⁴⁰⁵ *See* discussion *supra* Part III.A.3.

⁴⁰⁶ *See* discussion *supra* Part III.A.2.

⁴⁰⁷ 5 U.S.C. § 7521 (2012).

⁴⁰⁸ For example, Congress impliedly concluded that bankruptcy judges were inferior officers and vested the courts of appeal with appointment power. 28 U.S.C. § 152(a)(1) (2012). In contrast, Congress likely concluded that veterans court judges and judges in the federal court of claims were principal officers because the president, with the advice and consent of the senate, appoints them. 38 U.S.C. § 7253(b) (2016); 28 U.S.C. § 171(a) (2012). To be sure, the method of appointment is not determinative of officer

an inferior or principal officer would require analysis that is beyond the scope of this Article. Recall that *Edmond v. United States*⁴⁰⁹ defined inferior officers as those subordinate to principal officers.⁴¹⁰ Subordinate means having one's "work . . . directed and supervised at some level by others who were appointed by Presidential nomination with the Senate's advice and consent."⁴¹¹ At least one scholar has suggested that Article I judges would be inferior officers under *Edmond*.⁴¹² In any event, if any of the Article I judges are principal officers, then this option would remove their current for-cause protection; however, impartiality and unbiased decision-making are as important for Article I tribunals as they are for agency adjudications.

There will be outcry about this option. Overruling precedent should not be done lightly. Moreover, Congress intended the independent agencies to be independent of the President for good reason. And with the President in office today, such protection may seem particularly essential. Arguably, however, *Humphrey's Executor* and the Constitution conflict. Either the President is vested with executive power and the responsibility to control those helping him execute that power, or he is not. The Constitution provides the former. And the Constitution does not change based on who is in office: even if the current President has a fondness for the words, "You're fired."

CONCLUSION

In conclusion, the dual-track, multiple for-cause removal provisions protecting ALJs from at-will removal are unconstitutional according to the Supreme Court's removal cases because, in short, two is too many. In *Free Enterprise Fund*, the Supreme Court held that multiple levels of tenure protection violate Article II and separation of powers.⁴¹³ Yet, the repercussions of invalidating the ALJs' for-cause removal protections would be significantly greater and more destructive to the administrative state than were the repercussions for invalidating a removal provision that applied to a board with just five members.

The Court might refuse to extend its holding in *Free Enterprise Fund* to inferior officers exercising quasi-judicatory power, like ALJs.⁴¹⁴ After all, in footnote ten, Chief Justice Roberts specifically tried to distinguish ALJs

status because the Constitution permits Congress to vest the power to appointment inferior officers in multiple bodies, including the president and the courts of law.

⁴⁰⁹ 520 U.S. 651 (1997).

⁴¹⁰ *Id.* at 652.

⁴¹¹ *Id.*

⁴¹² See Tuan Samahon, *Are Bankruptcy Judges Unconstitutional? An Appointments Clause Challenge*, 60 HASTINGS L.J. 233, 292–95 (2008) (arguing all lower court judges other than those on the Supreme Court could be considered inferior officers and appointed by the circuit courts).

⁴¹³ *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 492 (2010).

⁴¹⁴ *Free Enterprise Fund*, 561 U.S. at 507 n.10.

based on the type of power they wield.⁴¹⁵ Similarly, Justice Breyer in *Free Enterprise Fund* and *Lucia* expressed concern that applying *Free Enterprise Fund*’s holding to ALJs would significantly disrupt the administrative state.⁴¹⁶

However, disrupting the administrative state plays right into the conservative agenda.⁴¹⁷ Indeed, President Trump’s litmus test for nominating federal judges was whether they are willing to rein in “what conservatives call ‘the administrative state.’”⁴¹⁸ Conservatives might very well welcome the “destabilize[ation of] the modern federal government.”⁴¹⁹ And, given the recent appointments of Justice Gorsuch and Justice Kavanaugh, their goal just moved one very important step closer to fruition.

⁴¹⁵ *Id.*

⁴¹⁶ *Lucia v. SEC*, 138 S. Ct. 2044, 2064 (2018) (Breyer, J., dissenting); *Free Enterprise Fund*, 561 U.S. at 514 (Breyer, J., dissenting).

⁴¹⁷ See David Z. Morris, *Steve Bannon Says Trump’s Cabinet Picks Are Intended to ‘Deconstruct’ Regulation and Agencies*, FORTUNE (Feb. 25, 2017), <http://fortune.com/2017/02/25/bannon-trump-cabinet-cpac/>; Stanley Kurtz, *The Politics of the Administrative State*, NATIONAL REVIEW (Jan. 8, 2018, 2:57 PM), <https://www.nationalreview.com/corner/politics-administrative-state-mcgroarty-robbins-tuttle/>.

⁴¹⁸ Jeremy W. Peters, *Trump’s New Judicial Litmus Test: Shrinking ‘the Administrative State’*, N.Y. TIMES (Mar. 26, 2018), <https://www.nytimes.com/2018/03/26/us/politics/trump-judges-courts-administrative-state.html> (“With surprising frankness, the White House has laid out a plan to fill the courts with judges devoted to a legal doctrine that challenges the broad power federal agencies have to interpret laws and enforce regulations, often without being subject to judicial oversight.”).

⁴¹⁹ Margaret Newkirk & Greg Stohr, *Federal Courts and Nominations: Trump’s War on ‘Deep State’ Judges*, CONSTITUTIONAL ACCOUNTABILITY CENTER (Apr. 20, 2018), <https://www.theconstitution.org/news/trumps-war-deep-state-judges/> (quoting Brianne J. Gorod of the Constitutional Accountability Center: “It’s not surprising that conservative opponents of the administrative state might welcome [destabilization of the federal government] . . . But it’s quite stunning to see the federal government itself push for this result.”).