You’re Fired! Why the ALJ Multi-Track Dual Removal Provisions Violate the Constitution & How to Fix Them

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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 anticipated case of *Lucia v. SEC.* This case held that the Administrative Law Judges (“ALJs”) of the Securities and Exchange Commission (“SEC”) were inferior officers who must be constitutionally appointed. This holding was hardly surprising, especially given the Solicitor General’s decision to switch sides after Lucia’s petition was filed with the Supreme Court. Indeed, the Court had to appoint Amicus Curiae Anton Metlitsky to

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* 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.’”).


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.


6 *Lucia,* 138 S. Ct. at 2050.
argue the SEC’s original position that the SEC ALJs were merely employees.\footnote{Id. at 2051 n.2.}

While Metlitsky did his best,\footnote{Id. (“Anton Metlitsky . . . has ably discharged his responsibilities.”).} the argument was a loser from the start. Supreme Court precedent had already granted inferior officer status on many a lesser functionary,\footnote{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”).} including a district court clerk,\footnote{Ex parte Hennen, 38 U.S. (13 Pet.) 230, 258 (1839).} a federal marshal,\footnote{Siebold, 100 U.S. at 397–98.} and, most relevantly in \textit{Freytag v. Commissioner of Internal Revenue},\footnote{501 U.S. 868 (1991).} Tax Court special trial judges.\footnote{Id. at 881–82.} In fact, Justice Kagan’s majority opinion in \textit{Lucia} could simply have said, “SEC ALJs are inferior officers, duh. See our unanimous, did I mention unanimous?, decision in \textit{Freytag}.”\footnote{This decision would have been even more obvious had the Court of Appeals for the District of Columbia not misinterpreted \textit{Freytag}.}

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.”\footnote{Lucia v. SEC, 138 S. Ct. 2044, 2051 (2018).} Had such guidance been offered, there might be no question who else might be an inferior officer. Instead, Justice Kagan minimized \textit{Lucia}’s impact by resting entirely on stare decisis.\footnote{Administrative judges are one example.} 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.\footnote{Lucia, 138 S. Ct. at 2050–51 n.1.} When granting certiorari, the Court refused to include the removal issue.\footnote{Id.} Despite this refusal, the Solicitor General asked the Court to address the issue in its merits brief.\footnote{See \textit{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—as are filed in federal district court.”28 Without ALJs, the administrative piece of the adjudicative state

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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)).
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

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29 See discussion infra Part I.B.
31 See discussion infra Part I.A.
32 See discussion infra Part I.A.
35 Id. at 497.
36 See discussion infra Part I.A.
37 See discussion infra Part I.A.
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. Specifically, the Supreme Court early on presumed the President had removal power because the framers of the Constitution did not explicitly take it away. 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. Removal limitations would not be implied, and the Court made clear it would only tolerate limitations on appointing authorities other than the President. 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; 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. 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. 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.

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. Given that the Supreme Court has held that dual

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41 See discussion infra Part II.
44 See discussion infra Part III.A.1.
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 Executor52 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.
55 See Ramspeck, 345 U.S. at 131.
A. The APA Compromise

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

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. Members of Congress received multiple complaints that these examiners were biased in favor of the agency and against private parties. 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.

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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:

[Appointments 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.


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. The APA compromised between these competing concerns. 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. Congress also provided for the independence of examiners by removing agency power over their hiring, case assignment, compensation, discipline, supervision, and, most importantly for the purposes of this Article, their removal.

As for removal, Congress prohibited at-will removal. 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. If an agency wanted to terminate one of its

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

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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.”).
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.
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. To execute the laws, the President must have help from subordinates. In the

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84 U.S. CONST. art. II, §§ 1, 3.
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.” For this reason, the Constitution explicitly provides for the appointment of principal and inferior officers and the creation of executive departments.

Concurrently, the Constitution requires the President to take care that the laws are faithfully executed. 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. 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.

Yet, unlike for appointments, the Constitution does not explicitly identify how officers are to be removed, other than the cumbersome impeachment process. 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.’” Hence, members of the First Congress—many of whom had taken part in the Constitution’s drafting—had to determine whether the President could remove executive officers. Congress concluded “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.’”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

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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*. 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 Court first addressed the validity of executive removal in 1839 in *Ex parte Hennen*. In *Hennen*, an inferior officer sought mandamus after he was removed from his position as a district court clerk. The Court rejected the clerk’s argument that his removal was unconstitutional under Article II. The relevant statute contained no removal limitation, and the Court refused to imply one. Silence, the Court held, meant that the executive retained full removal power. 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; (2) the power of removal is incidental to the power of appointment; and (3) because “[t]he appointment of clerks of Courts properly belongs to the Courts of law,” the courts would also have removal power.

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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.


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*, the Court again refused to imply a removal limitation in a statute that did not expressly contain one. 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. 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. Like it had in *Hennen*, the Court refused to imply a removal limitation.

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*, the Court reviewed an act in which Congress had included a removal limitation. In *Perkins*, a naval cadet, an inferior officer, was honorably discharged because his services were no longer required during peacetime. He sued for lost salary. The relevant act barred his peacetime discharge except “for misconduct.”

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. The Court held that Congress could limit removal under these circumstances. 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.” 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. Notably, the President retained removal power over the head of the department (the Secretary of the Navy): the principal officer.

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

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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 yet\textsuperscript{125} to address the legitimacy of removal limitations regarding principal officers. But that was about to change.

In 1926, in \textit{Myers v. United States},\textsuperscript{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.\textsuperscript{127} The plaintiff, Myers, was appointed to be a postmaster in Portland, Oregon, for a four-year term.\textsuperscript{128} Before the term’s conclusion, President Woodrow Wilson removed him.\textsuperscript{129} Myers sued to recover his salary from the date of his removal.\textsuperscript{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.”\textsuperscript{131} The Senate had not consented to Myers’s removal.\textsuperscript{132} The issue for the Court was whether the removal limitation (requiring the advice and consent of the Senate) was constitutional.\textsuperscript{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.\textsuperscript{134} Congress cannot limit the Executive’s power to remove officers he appoints, namely principal officers.\textsuperscript{135}

The Court examined in excruciating detail\textsuperscript{136} the views of the First Congress regarding the nature of the executive power and the importance of the Take Care Clause.\textsuperscript{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.”\textsuperscript{138} To require the President to file for-cause charges and submit those

\begin{itemize}
    \item \textsuperscript{125} In United States \textit{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.
    \item \textsuperscript{126} 272 U.S. 52 (1926).
    \item \textsuperscript{127} Id. at 163–64, 172.
    \item \textsuperscript{128} Id. at 106.
    \item \textsuperscript{129} Id.
    \item \textsuperscript{130} Id.
    \item \textsuperscript{131} Id. at 107 (quoting Act of Congress of July 12, 1876, 19 Stat. 80, 81, c. 179).
    \item \textsuperscript{132} \textit{Myers}, 272 U.S. at 107.
    \item \textsuperscript{133} Id. at 106–08.
    \item \textsuperscript{134} Id. at 176.
    \item \textsuperscript{135} Id. at 163–64.
    \item \textsuperscript{136} Id. at 109–35. \textit{See also} Parsons v. United States, 167 U.S. 324, 328–31 (1897) (describing the same history in fewer pages).
    \item \textsuperscript{137} \textit{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).
    \item \textsuperscript{138} Id. at 134.
\end{itemize}
charges to the Senate “might make impossible that unity and co-ordination in executive administration essential to effective action.”

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.

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. In contrast, in the removal provision at issue in *Perkins*, Congress had not aggrandized itself. Further, the *Myers* Court suggested that the removal limitation at issue in *Perkins* was merely incidental. The Court reasoned that incidental restrictions on the Executive were legitimate so long as Congress did not keep removal power for itself. 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.

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. Indeed, more than ninety years

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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. Pursuant to this for-cause removal provision, the President could remove an FTC Commissioner only for “inefficiency, neglect of duty, or malfeasance in office.” Unlike the act at issue in Myers, in this act, Congress did not retain removal power for itself.

The Court upheld the for-cause removal limitation, which should have been unconstitutional pursuant to its holding in Myers. The Court distinguished Myers in three ways. The most critical difference between the two cases was the type of power the officers exercised. The postmaster in Myers performed purely executive functions and had no quasi-legislative or quasi-judicial power. Because he performed purely executive functions, the Court reasoned that the officer had to be responsive to the President. In contrast, the FTC Commissioners performed both quasi-legislative and quasi-judicial powers, which required that they be independent from the President. 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.” The Court acknowledged that Myers had said removal limitations on quasi-judicial officers were unconstitutional as well, however, the Court rejected its statement as non-controlling dicta.

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.
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. Allowing the President unfettered removal would hinder independence. Second, unlike postmasters, FTC Commissioners’ tenure was time-limited. Thus, removal was already built into the system. The Court reasoned that both factors further supported the legitimacy of the removal limitations.

As a result of Myers and Humphrey’s Executor, the Court had created the Myers–Humphrey’s distinction: 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. 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 to hold that Congress could limit the President’s power to remove a member of the War Claims Commission. The plaintiff, Wiener, had refused to resign when asked to do so by President Eisenhower. Wiener filed suit to recover his unpaid salary. The relevant act did not have an explicit removal provision but effectively provided that the Commissioners served three-year terms. The issue for the Court was whether the act contained an implied for-cause removal provision. Recall that the Court had refused to imply for-cause removal limitations in Hennen and Parsons. 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

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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).
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. 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. Second, the Court decided that because War Claims Commissioners exercised quasi-adjudicatory 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.” Third, the Court noted that Humphrey’s Executor prevented Congress from limiting the President’s ability to remove purely executive officers, not quasi-adjudicatory officers. Thus, the Court concluded that Congress had simply forgotten to address removal. This “failure of explicitness” was not fatal, given the powers of the Commissioners. The Court held that the President had no power to remove these officers, who were “member[s] of an adjudicatory body.”

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. 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. Finally, the Court relied entirely on the Myers–Humphrey’s distinction to uphold the removal provision because this distinction furthered officer independence. 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, the Court used the Myers–Humphrey’s distinction to strike down an express removal provision. 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.

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. And in both cases, the Court entirely ignored *Hennen*, *Parsons*, and *Perkins*.

The relevant act in *Bowsher* provided that the officer, the comptroller general, could be removed for cause by a joint resolution of Congress, which was subject to presidential veto. 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.”

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. The Court reasoned that the comptroller general’s functions were the “very essence” of executing the law; hence, Congress could not limit the President’s removal power. Additionally, the Court lamented that Congress had once again aggrandized its own power at the expense of the Executive.

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. Further, because the officer exercised purely executive powers, removal power belonged exclusively to the President. 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.
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(c)(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 Morrison204 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]nlke both

203 Id. at 689–91.
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.

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. 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.” However, the Court explained, its new “considered view” was that the Myers–Humphrey’s distinction was not determinative 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.’” 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, the more important question was whether the constraint on presidential removal “unduly trammel[ed] on executive authority.” A removal restriction unduly trammels on executive authority when it interferes with a president’s ability to ensure that the laws are faithfully executed. 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. 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.” 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

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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. Thus, the Court concluded that the independent counsel was not “so central.”

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.” 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.” Importantly, the majority noted that Congress believed the removal limitation was essential to ensuring the independence of the office. 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.

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. 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. He began his opinion by reminding the majority of the importance of separation of powers. He then explained the political kerfuffle that led to the relevant act—a kerfuffle between President Reagan and Congress. 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. 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.”

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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.

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236 Id. at 717–18.
237 Id. at 671 (majority opinion).
239 See id. at 666.
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. 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. In this legislation, Congress created a private, non-profit corporation: the Public Company Accounting Oversight Board (“Board”). Unusually, Congress vested the power to appoint and remove the five Board members in the SEC. However, the SEC Commissioners could remove individual members of the Board “only for good cause shown.” Thus, Congress placed appointment power of these inferior officers in a department and limited the department’s ability to remove them at will.

Under *Perkins* and *Morrison*, removal limitations on departments that appoint inferior officers are constitutional. 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. 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. This was a significant concession and likely an inaccurate one.

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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 SEC\textsuperscript{254} the year before 

\textit{Humphrey’s Executor} reversed \textit{Myers}. Myers had held that removal limitations on the President were \textit{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.\textsuperscript{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 \textit{Hennen} and \textit{Perkins}.\textsuperscript{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.\textsuperscript{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.\textsuperscript{258} Pursuant to \textit{Perkins} and \textit{Humphrey’s Executor}, each layer of for-cause removal protection should have been constitutional independently. Recall that the Court’s holding in \textit{Perkins} allows Congress to restrict an appointing department’s removal power for inferior officers;\textsuperscript{259} hence, the removal limitation on the Board members would be constitutional. The Court’s holding in \textit{Humphrey’s Executor} allows Congress to restrict the president’s ability to remove quasi-adjudicatory and quasi-legislative principal officers;\textsuperscript{260} therefore, the removal limitation on the SEC Commissioners would likely be constitutional. Thus, the question for the Court in \textit{Free Enterprise Fund} was whether by combining the for-cause removal layers, these provisions become unconstitutional.\textsuperscript{261}

\begin{footnotes}
\footnote{255} See \textit{Free Enterprise Fund}, 561 U.S. at 487.
\footnote{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).
\footnote{257} \textit{Free Enterprise Fund}, 561 U.S. at 545–46 (Breyer, J., dissenting).
\footnote{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).
\footnote{259} See discussion \textit{supra} Part III.A.1.
\footnote{260} See discussion \textit{supra} Part III.A.2.
\footnote{261} \textit{Free Enterprise Fund}, 561 U.S. at 483.
\end{footnotes}
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?” The answer, according to the Court was “no.” 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.

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.”

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. Here, the Board members exercised executive power. Thus, the Court returned to the Myers–Humphrey’s distinction it had only recently rejected in Morrison. However, the Court explained that Humphrey’s Executor addressed principal officers, not inferior officers, such as the Board members.

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. 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. Here, the President had no ability to remove the SEC Commissioners, absent cause. So the Court examined whether dual for-cause limitations “striped” the President of “his ability to execute the laws—by holding his subordinates accountable for their conduct.” 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. 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. 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.

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?” 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.” 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.” To remedy the constitutional infirmity, the Court severed “the unconstitutional tenure provisions . . . from the remainder of the statute.”

Justice Breyer dissented. He criticized the majority for failing to “create a bright-line rule” causing “uncertainty about the scope of its holding.” 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.” 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.

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.\(^{283}\) \textit{Lucia} eliminated that reason.\(^ {284}\)

Second, citing the \textit{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 \textit{Myers–Humphrey}’s distinction to removal restrictions on inferior officers; second, the Court downplayed the importance of the distinction in \textit{Morrison}; and, third, the Court separated quasi-adjudicative functions from executive and quasi-legalistic functions when \textit{Humphrey’s Executor} had separated executive functions from quasi-legalistic 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 \textit{Lucia v. SEC},\(^ {291}\) despite the Solicitor General’s repeated attempts to raise the issue.\(^ {292}\)

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


\(^{285}\) \textit{Free Enterprise Fund}, 561 U.S. at 507 n.10.

\(^{286}\) See discussion supra Part III.A.2.

\(^{287}\) \textit{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. \textit{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)}.

\(^{289}\) \textit{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, \textit{Agency Independence after PCAOB}, 32 CARDOZO L. REV. 2391, 2412 n.117 (2011). If so, Roberts could certainly have been clearer about his intention.


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 “\textit{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 \textit{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:

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

Stressing the “if” and “perhaps” in his statement, he pointed out that the majority had disagreed with this conclusion in \textit{Free Enterprise Fund}.\(^{298}\) As previously noted, the Court had offered three reasons why the Board members in \textit{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 \textit{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

\(^{293}\) \textit{Lucia}, 138 S. Ct. at 2059–62 (Breyer, J., concurring in part and dissenting in part).
\(^{294}\) \textit{Id.} at 2059 (quoting \textit{Free Enterprise Fund}, 561 U.S. at 484).
\(^{295}\) \textit{Id.} at 2060.
\(^{296}\) \textit{Id.} at 2061–62.
\(^{298}\) \textit{Id.} at 2060 (citing \textit{Free Enterprise Fund}, 561 U.S. at 506).
\(^{299}\) \textit{Lucia}, 138 S. Ct. at 2061 (Breyer, J., concurring in part and dissenting in part) (citing \textit{Free Enterprise Fund}, 561 U.S. at 507 n.10).
\(^{300}\) See \textit{id.} at 2060 (citing 5 U.S.C. § 7521(a) (2012)).
\(^{301}\) See discussion \textit{supra} Part III.A.3.
\(^{302}\) \textit{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. 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. 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.

1. Justice Gorsuch

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

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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.\textsuperscript{307} Since joining the Court, he has signed on to the majority’s opinion in \textit{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 \textit{Oil States Energy Services, LLC v. Greene’s Energy Group, LLC}.\textsuperscript{308} The issue in this case was whether the Patent and Trademark Office could conduct patent reviews without violating Article III.\textsuperscript{309} The majority held that it could.\textsuperscript{310} Justice Gorsuch dissented, arguing that a political appointee could not resolve the dispute; an Article III judge was constitutionally required.\textsuperscript{311} He reasoned that political appointees, unlike Article III judges, were not independent.\textsuperscript{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.

\textbf{2. Justice Kavanaugh}

In comparison, Justice Kavanaugh’s approach to removal is less opaque. Two cases are instructive. First, when \textit{Free Enterprise Fund} was before the D.C. Circuit, then-Judge Kavanaugh dissented.\textsuperscript{313} The majority quoted his dissenting opinion twice, agreeing that the agency’s structure lacked historical precedent and unduly expanded legislative power.\textsuperscript{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.\textsuperscript{315} That director was removable only for cause, specifically “inefficiency, neglect of duty, or malfeasance in office” during a five-year term.\textsuperscript{316} Independent agencies are more typically headed

\begin{itemize}
\item \textsuperscript{308} 138 S. Ct. 1365 (2018).
\item \textsuperscript{309} Id. at 1370.
\item \textsuperscript{310} Id.
\item \textsuperscript{311} Id. at 1386 (Gorsuch, J., dissenting).
\item \textsuperscript{312} Id.
\item \textsuperscript{314} Id. at 485.
\end{itemize}
by multi-member bodies.\textsuperscript{317} The issue for the court was whether this single-director headed agency structure was constitutional.\textsuperscript{318} In \textit{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.\textsuperscript{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.\textsuperscript{320} A three-judge panel of the D.C. Circuit found the structure to be unconstitutional.\textsuperscript{321} Judge Kavanaugh wrote the majority opinion. He framed the issue as whether the court should extend \textit{Humphrey’s Executor}’s holding to a single-director independent agency.\textsuperscript{322} His answer was no, stating that this “first of its kind . . . historical anomaly”\textsuperscript{323} violated Article II of the Constitution.\textsuperscript{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.”\textsuperscript{325} The history and tradition demonstrated that other similarly structured independent agencies\textsuperscript{326} could not serve as historical precedent because those agencies were created recently and were “constitutionally contested.”\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{330}

\begin{itemize}
\item \textsuperscript{317} \textit{Id.} at 6.
\item \textsuperscript{318} \textit{Id.} at 7.
\item \textsuperscript{319} See discussion \textit{supra} Part III.A.2.
\item \textsuperscript{320} \textit{PHH Corp.}, 839 F.3d at 7.
\item \textsuperscript{321} \textit{Id.} at 12.
\item \textsuperscript{322} \textit{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. \textit{Id.} at 57–58 (Henderson, J., concurring in part and dissenting in part).
\item \textsuperscript{323} \textit{Id.} at 17 (majority opinion).
\item \textsuperscript{324} \textit{Id.} at 16.
\item \textsuperscript{325} \textit{Id.} at 21–22 (citing NLRB v. Noel Canning, 134 S. Ct. 2550, 2560 (2014)).
\item \textsuperscript{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. \textit{PHH Corp.}, 839 F.3d at 18. One former agency also had this structure: the Independent Counsel. \textit{Id.} at 20.
\item \textsuperscript{327} \textit{Id.} at 19–20.
\item \textsuperscript{328} \textit{Id.}
\item \textsuperscript{329} \textit{Id.} at 16.
\item \textsuperscript{330} \textit{Id.} at 26.
\end{itemize}
The full court reversed, holding that the for-cause limitation was consistent with Article II. The majority analyzed the constitutionality of the removal provision by addressing two questions: first, whether the “means of independence [was] permissible;” and second, whether the type of functions the agency performed required independence, which should be protected by for-cause removal.

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. In both cases, the officer could be fired only for “inefficiency, neglect of duty, or malfeasance in office.” 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. Additionally, the majority noted that Congress had not aggrandized itself with the CFPB’s removal limitation, unlike in Myers and Bowsher. Further, Congress had not added an additional for-cause layer, as it had done in Free Enterprise Fund. 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.”

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.

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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.
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.
Independence is essential for the CFPB to function as a financial consumer protection agency, similar to the FTC. 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.” 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.” Therefore, the removal limitation was constitutional.

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. 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,” the director’s powers are executive and “enormous,” and the President has no ability to control a one-person director that the President cannot remove, which substantially diminishes presidential power. He concludes that “[u]nder Article II, an independent agency that exercises substantial executive power may not be headed by a single Director.” 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. 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.

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.

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. And, for-cause removal limitations must be reasonable (traditional?), not excessive. 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. 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. 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

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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*).
protection. Their department or agency appoints them.\textsuperscript{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.\textsuperscript{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.\textsuperscript{361} Hence, this first level of removal protection is not only constitutional, it is laudable.

Second, the majority of ALJs work for independent agencies.\textsuperscript{362} These Independent ALJs have a second layer of removal protection because the independent agency heads are themselves typically protected from at-will removal.\textsuperscript{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.\textsuperscript{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.

\textsuperscript{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.

\textsuperscript{360} See discussion supra Part III.A.3.

\textsuperscript{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).


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

While divided they stand, united they fall. Multiple for-cause removal protections violate the Constitution because they prevent the President from overseeing those who work for him. 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. 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. 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

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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/.
inferior officers (the members of the Board). 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. 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.

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, and because they were subordinate to the agency heads. Congress intentionally included provisions in the APA to help ensure hearing examiners’ independence. Congress rightly concluded that effective adjudication requires that litigants believe the process is fair and the decision-makers impartial. Thus, ALJs must be free to adjudicate without threat of retaliation. Protecting ALJs from arbitrary and retaliatory removal furthers independence and impartiality.

One could easily

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370 *Id.* at 542–43 (Breyer, J., dissenting).
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. 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. After an informal hearing, an administrative judge (“AJ”) renders an initial decision. The AJ will uphold the agency’s decision to terminate or suspend an employee for “unacceptable

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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).

performance"\textsuperscript{381} so long as the decision is supported by "substantial evidence."\textsuperscript{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."\textsuperscript{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.\textsuperscript{384} The MSPB will then hold a formal hearing before an MSPB ALJ.\textsuperscript{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."\textsuperscript{386} Section 7521 does not define "good cause," but the term is traditionally understood to mean "inefficiency, neglect of duty, or malfeasance in office."\textsuperscript{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.\textsuperscript{388} The process for appealing the ALJ’s decision is identical to the process for appealing the AJ’s decision.\textsuperscript{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

\begin{itemize}
  \item \textsuperscript{381} 5 U.S.C. § 4303(a) (2017).
  \item \textsuperscript{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.").
  \item \textsuperscript{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).
  \item \textsuperscript{384} 5 C.F.R. § 1201.137(b) (2018).
  \item \textsuperscript{385} 5 C.F.R. § 1201.140(a)(1) (2018).
  \item \textsuperscript{386} Id. § 1201.140(b).
  \item \textsuperscript{388} 5 U.S.C. § 706(2)(E) (2012).
  \item \textsuperscript{389} 5 C.F.R. § 1201.140(a)(2) (2018) (noting that the review provisions in Subpart C apply to the MSPB review).
\end{itemize}
the vast number of “informal,” or Type B and C adjudications,\textsuperscript{390} have civil-
servant removal protection. They view themselves as independent of their
agencies, and some argue that the process seems to be working.\textsuperscript{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 string-
ent 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 rem-
edy 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 re-
move officers who exercise adjudicatory powers only, whether they be prin-
cipal or inferior officers, and whether they be executive or independent of-
ficers.

Professor Richard Pierce makes this argument.\textsuperscript{392} He notes that *Myers*
can be read narrowly as expressing the Supreme Court’s concern about con-
gressional 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.”\textsuperscript{393} In *Myers*, the Court specifically addressed the Pres-
ident’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.”\textsuperscript{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.\textsuperscript{395} Professor Pierce argues that *Myers* is consistent with his view that


\textsuperscript{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).

\textsuperscript{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).

\textsuperscript{393} Id. (manuscript at 4).

\textsuperscript{394} Myers v. United States, 272 U.S. 52, 157 (1926).

\textsuperscript{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.”

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.” Rather, it had the power to adjudicate disputes (quasi-judicial power) and to advise Congress on the need for legislation (quasi-legislative power). 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, the Court concluded that Congress wanted this adjudicative body to be free from outside pressure. 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. 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.

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.

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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.*
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 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. Further, this solution would respect the Court’s holding in Free Enterprise Fund: multiple removal provisions violate the Constitution. 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.

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. 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. Whether every Article I judge is

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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.


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 defined inferior officers as those subordinate to principal officers. 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.” At least one scholar has suggested that Article I judges would be inferior officers under Edmond. 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. 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-adjudicatory power, like ALJs. 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.

520 U.S. 651 (1997).
Id. at 652.
Id.
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).
Free Enterprise Fund, 561 U.S. at 507 n.10.
based on the type of power they wield.\textsuperscript{415} Similarly, Justice Breyer in \textit{Free Enterprise Fund} and \textit{Lucia} expressed concern that applying \textit{Free Enterprise Fund}'s holding to ALJs would significantly disrupt the administrative state.\textsuperscript{416}

However, disrupting the administrative state plays right into the conservative agenda.\textsuperscript{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.’”\textsuperscript{418} Conservatives might very well welcome the “destabilize[ation of] the modern federal government.”\textsuperscript{419} And, given the recent appointments of Justice Gorsuch and Justice Kavanaugh, their goal just moved one very important step closer to fruition.

\textsuperscript{415} \textit{Id.}


\textsuperscript{418} Jeremy W. Peters, \textit{Trump’s New Judicial Litmus Test: Shrinking ‘the Administrative State’}, \textsc{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.”).

\textsuperscript{419} Margaret Newkirk & Greg Stohr, \textit{Federal Courts and Nominations: Trump’s War on ‘Deep State’ Judges}, \textsc{Constitutional Accountability Center} (Apr. 20, 2018), https://www.theusconstitution.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.”).