THE UNITARY EXECUTIVE AND THE DUE PROCESS STATE

Emily S. Bremer[*] *and William N. Eskridge Jr.*[**]

In Trump v. Slaughter*, the Supreme Court will consider whether to overrule* Humphrey's Executor v. United States*, a landmark case that affirmed Congress's authority to limit the President's ability to fire members of the Federal Trade Commission (FTC). Proponents argue that this is necessary to ensure unitary executive control over the significant policymaking functions of the FTC and other historically independent administrative agencies. But the legal principles reflected in* Humphrey's Executor *are also the foundation upon which Congress has constructed what we call the "due process state," i.e., the many impartial officers and institutions that the President requires to discharge his Article II duty to ensure the faithful execution of adjudicatory statutes. This Article argues that the unitary executive and the due process state can—and indeed must—coexist.*

INTRODUCTION

In his second administration, President Donald Trump has lived up to the promise of his famous reality-television catchphrase: "You're fired." In the more prosaic language of the law, President Trump has "removed" from office—typically without any stated reason or "cause"—a great number of principal federal officers. These have included two commissioners of the Federal Trade Commission (FTC),[1] a member of the Federal Reserve Board of Governors (Federal

[*] Professor of Law, Notre Dame Law School.

[**] Alexander M. Bickel Professor of Public Law, Yale Law School. We appreciate the excellent research assistance of Sydney Allard (Yale, Class of 2026) and Navid Kiassat (Yale, Class of 2026).

1 Will Weissert & Christoper Rugaber, *Trump Fires Two Democrats on the Federal Trade Commission, Seeking More Control Over Regulators*, ASSOCIATED PRESS (Mar. 18, 2025, 21:52 EST), https://apnews.com/article/trump-ftc-firings-bedoya-slaughter-488bfe5419e48d5acbd95d3f9401404b [https://perma.cc/E5ZE-MCB9].

Reserve),[2] three commissioners of the Consumer Product Safety Commission,[3] a member of the Merit Systems Protection Board (MSPB),[4] a commissioner of the Nuclear Regulatory Commission,[5] two commissioners of the Equal Employment Opportunity Commission,[6] the chair of the Federal Election Commission,[7] the chair of the National Labor Relations Board,[8] three members of the Privacy and Civil Liberties Oversight Board,[9] the director of the Consumer Financial Protection Bureau,[10] the chair of the Federal Labor Relations Authority,[11] the director of the Office of Government Ethics,[12] the commissioner of the

2 Tony Romm, Colby Smith & Ben Casselman, *Trump, in a Move with Little Precedent, Says He Is Firing a Fed Governor*, N.Y. TIMES (Aug. 27, 2025), https://www.nytimes.com/2025/08/25/us/politics/lisa-cook-fired-trump-fed.html [https://perma.cc/6XA4-9CXF].

3 Jaclyn Diaz, *Trump Fires All Three Democrats on the Consumer Product Safety Commission*, NPR (May 9, 2025, 17:44 ET), https://www.npr.org/2025/05/09/nx-s1-5393374/trump-consumer-product-safety-commission-cpsc-firing [https://perma.cc/Z3F6-UC29].

4 Andrea Hsu & Carrie Johnson, *Beyond 'Draining the Swamp': How Trump is Knocking Down Checks on Presidential Power*, NPR (Sep. 17, 2025, 05:00 ET), https://www.npr.org/2025/09/17/nx-s1-5475191/trump-executive-power-supreme-court-whistleblower [https://perma.cc/T8DY-UMDG].

5 John Siegel & Kelsey Tamborrino, *Trump Fires Former Biden Chair from Nuclear Regulatory Commission*, POLITICO (June 16, 2025, 11:46 EDT), https://www.politico.com/news/2025/06/16/trump-fires-democratic-nuclear-commissioner-00407577 [https://perma.cc/WV62-9CNF].

6 Sean Michael Newhouse, *Two Equal Employment Opportunity Commission Democrats Fired*, GOV'T EXEC. (Jan. 28, 2025), https://www.govexec.com/transition/2025/01/two-equal-employment-opportunity-commission-democrats-fired/402568/ [https://perma.cc/439K-BRPX].

7 Andrew Howard, *Trump Ousted the Top Democratic Campaign Finance Regulator. She Says It's Illegal*, POLITICO (Feb. 7, 2025, 12:50 EST), https://www.politico.com/news/2025/02/07/donald-trump-fec-commissioner-firing-014200 [https://perma.cc/4WCF-D3YN].

8 Jake Gibson, *Fired NLRB Commissioner Asks Federal Judge for Reinstatement*, FOX NEWS (Mar. 5, 2025, 14:05 EST), https://www.foxnews.com/politics/fired-nlrb-commissioner-asks-federal-judge-reinstatement [https://perma.cc/9NNE-29JM].

9 Charlie Savage, *Trump Paralyzes Independent Rights Watchdog, Firing Members Selected by Democrats*, N.Y. TIMES (Jan. 27, 2025), https://www.nytimes.com/2025/01/27/us/politics/trump-fires-independent-watchdog-officials.html [https://perma.cc/3M8L-DJUS].

10 Katy O'Donnell, *Chopra Removed from Consumer Bureau Post*, POLITICO (Feb. 1, 2025, 10:30 EST), https://www.politico.com/news/2025/02/01/chopra-removed-from-consumer-bureau-00201926 [https://perma.cc/NE2L-GPJX].

11 Erich Wagner, *Trump Apparently Fires FLRA Chairwoman*, GOV'T EXEC. (Feb. 11, 2025, 17:49 ET), https://www.govexec.com/workforce/2025/02/trump-apparently-fires-flra-chairwoman/402933/ [https://perma.cc/QJC6-SNRY].

12 Myah Ward, *Trump Removes Government Ethics Office Director*, POLITICO (Feb. 10, 2025, 16:12 EST), https://www.politico.com/news/2025/02/10/trump-removes-government-ethics-office-director-00203418 [https://perma.cc/GWK6-YB2R].

Bureau of Labor Statistics,[13] three members of the Tennessee Valley Authority Board of Directors,[14] the head of the Office of Special Counsel,[15] the Librarian of Congress,[16] the Archivist of the United States,[17] three directors of the board of the Corporation for Public Broadcasting,[18] and the President of the United States Institute of Peace.[19] Below the top ranks, President Trump has fired or demoted more than twenty inspectors general from agencies across the federal government,[20] ordered the near-elimination of a number of federal agencies,[21] and used probationary periods[22] and reductions in force to lay off thousands of federal employees.[23]

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13 Ben Casselman & Tony Romm, *Trump, Claiming Weak Jobs Numbers Were 'Rigged,' Fires Labor Official*, N.Y. TIMES (Aug. 1, 2025), https://www.nytimes.com/2025/08/01/business/economy/trump-bls-firing-jobs-report.html [https://perma.cc/VCA9-UPWL].

14 Ryan Wilusz, *Trump Fires Another Biden Appointee, Cutting TVA Board Down to Just Three Members*, KNOX NEWS (June 11, 2025, 16:22 ET), https://www.knoxnews.com/story/news/local/2025/06/11/trump-fires-biden-tva-pick-beth-geer-from-tennessee-valley-authority-board-directors/84153477007/ [https://perma.cc/52DR-NRXU].

15 Associated Press, *The Fired Head of a Federal Watchdog Agency Says He's Ending His Legal Fight*, NPR (Mar. 6, 2025, 13:01 ET), https://www.npr.org/2025/03/05/nx-s1-5319326/trump-hampton-dellinger-watchdog-appeals-court [https://perma.cc/YV74-ZYVG].

16 Lisa Peet, *Librarian of Congress Carla Hayden Is Fired*, LIBR. J. (May 12, 2025), https://www.libraryjournal.com/story/librarian-of-congress-carla-hayden-fired [https://perma.cc/4HW3-HZLH].

17 Kathryn Watson, *Trump Fires Archivist of the United States, Official Who Oversees Government Records*, CBS NEWS (Feb. 7, 2025, 21:50 EST), https://www.cbsnews.com/news/trump-fires-archivist-of-the-united-states-colleen-shogan/ [https://perma.cc/C9VN-FS7B].

18 Wash. Examiner Staff, *Corporation for Public Broadcasting Members Refuse to Leave Jobs After Being Fired by Trump*, DENV. GAZETTE (July 16, 2025), https://www.denvergazette.com/2025/07/16/corporation-for-public-broadcasting-members-refuse-to-leave-jobs-after-being-fired-by-trump-43d7d20e-0d0b-5576-ac4a-8388ebfcb422/ [https://perma.cc/F3X7-7M32].

19 Jacob Wendler, *Academic with History of Incendiary Remarks to Lead U.S. Institute of Peace*, POLITICO (July 25, 2025, 19:35 EDT), https://www.politico.com/news/2025/07/25/darren-beattie-institute-of-peace-00478133 [https://perma.cc/6D5U-PD5Q].

20 Luke Broadwater, *In the Trump Administration, Watchdogs Are Watching Their Backs*, N.Y. TIMES (July 17, 2025), https://www.nytimes.com/2025/07/17/us/politics/inspectors-general-trump.html [https://perma.cc/R8ZY-9687].

21 Exec. Order No. 14217, 90 Fed. Reg. 10577 (Feb. 25, 2025).

22 Eric Katz, *Judge Orders Trump Administration to Rescind Directives on Probationary Employee Firings*, GOV'T EXEC. (Feb. 27, 2025), https://www.govexec.com/workforce/2025/02/judge-orders-trump-administration-rescind-directives-probationary-employee-firings/403358/ [https://perma.cc/55YN-CP72].

23 Stephen Fowler, Andrea Hsu, Selena Simmons-Duffin, Sam Gringlas & Deepa Shivaram, *Trump Administration Says About 4,200 Federal Employees Face Layoffs*, NPR (Oct. 10, 2025, 22:59 ET), https://www.npr.org/2025/10/10/nx-s1-5570933/shutdown-federal-workers-rifs-layoffs-vought [https://perma.cc/YNR2-VWD3].

The legal status of these terminations is variable and uncertain because many of the terminations exceed the President's authority under statutes that have become constitutionally suspect as the Supreme Court has embraced the unitary executive theory. Uncertainty especially afflicts President Trump's terminations of members of "independent" agencies, so-called because Congress statutorily designed them to operate with some insulation from partisan politics. The FTC is paradigmatic. It is "composed of five Commissioners, . . . appointed by the President, by and with the advice and consent of the Senate," to staggered 7-year terms.[24] The statute imposes a partisan-balance requirement, providing that "[n]ot more than three of the Commissioners shall be members of the same political party."[25] It further provides that "[a]ny Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office."[26] In *Humphrey's Executor v. United States*, a landmark 1935 case, the Supreme Court interpreted this statutory language as a limitation on the President's removal power, preventing him from acting on the basis of policy disagreement or a mere preference for commissioners of his own choosing.[27] The Court further upheld the statute against the charge that this limitation worked "an unconstitutional interference with the executive power of the President."[28]

In its recent Article II cases, the Supreme Court has chipped away at the constitutional holding of *Humphrey's Executor*,[29] and in the 2025 Term it will consider whether to overrule the case outright. A pair of cases—*Trump v. Slaughter*[30] and *Trump v. Cook*[31]—provide the vehicle for reconsidering *Humphrey's Executor*. In *Slaughter*, a district court held that President Trump's no-cause removal of Rebecca Slaughter from her position as an FTC Commissioner was unlawful.[32] The D.C. Circuit denied the government's emergency motion for stay of the district court's injunction requiring Slaughter's reinstatement,[33] at which point the government sought like relief from the Supreme Court. The Court granted the stay and, treating the government's application as a

24 15 U.S.C. § 41 (2018).

25 *Id.*

26 *Id.*

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

28 *Id.* at 626.

29 *See* Emily S. Bremer, *Presidential Adjudication*, 110 VA. L. REV. 1749, 1801 (2024).

30 Trump v. Slaughter, No. 25-332 (U.S. argued Dec. 8, 2025).

31 Trump v. Cook, No. 25A312 (U.S. argued Jan. 21, 2026).

32 *See* Slaughter v. Trump, 791 F. Supp. 3d 1, 23 (D.D.C. 2025).

33 *See* Slaughter v. Trump, No. 25-5261, 2025 WL 2551247 at *1 (D.C. Cir. Sep. 2, 2025) (per curiam).

petition for certiorari, granted certiorari prior to judgment.[34] One of the questions presented is whether to overrule *Humphrey's Executor*.[35] The second case, *Cook*, involves the legality of President Trump's for-cause removal of Lisa Cook from her position as a member of the Federal Reserve. As in *Slaughter*, the district court held that Cook's removal was likely unlawful and ordered her reinstatement.[36] In this case, the Supreme Court has deferred action on the government's application for a stay of the injunction pending its review; oral argument was held on January 21, 2026.[37] This sets the Court up to consider whether the Federal Reserve is distinguishable from other independent agencies, as the Court suggested it might be in another recent emergency-docket case.[38]

Slaughter and *Cook* present the Supreme Court with a significant challenge for reasons that extend beyond the removal questions presented. The constitutional holding of *Humphrey's Executor* was grounded in the recognition that Congress often vests executive officers with quasi-legislative and quasi-judicial duties that warrant—even require—some insulation from pure political control.[39] FTC Commissioner Rebecca Slaughter plays an important policymaking role, and the Court will in her case decide what limits Article II places on Congress's authority to limit the President's removal authority for agencies like the FTC. The Court may overrule or narrow *Humphrey's Executor*.

Our focus is not the FTC officials, but instead officials who perform only quasi-judicial functions and do not make policy. One such official, whose case the Court has held in abeyance as it decides the FTC case, arises out of the President's without-cause firing of MSPB member Cathy Harris.[40] Today, we describe the duties of officers like Harris as "adjudicatory" rather than as quasi-judicial, but the demands of those duties remain the same. To faithfully execute the law, officers vested with adjudicatory duties must be able to hold fair hearings and

34 *See* Trump v. Slaughter, Nos. 25A264 & 25-332, 2025 WL 2692050 (U.S. Sep. 22, 2025) (mem.).

35 *See id.*

36 *See* Cook v. Trump, No. 25-cv-2903, 2025 WL 2607761 at *1, *22 (D.D.C. Sep. 9, 2025), *stay pending appeal denied by* No. 25-5326, 2025 WL 2654786 at *1 (D.C. Cir. Sep. 15, 2025) (per curiam).

37 Transcript of Oral Argument, Trump v. Cook, No. 25A312 (U.S. Jan. 21, 2026).

38 *See* Trump v. Wilcox, 145 S. Ct. 1415, 1417 (2025).

39 Humphrey's Ex'r v. United States, 295 U.S. 602, 629 (1935).

40 *Wilcox*, 145 S. Ct. at 1417 (granting emergency stay of district court's injunction reinstating Harris to MSPB); Harris v. Bessent, No. 25-312, 2025 WL 2692048, at *1 (U.S. Sep. 8, 2025) (mem.) (denying certiorari before judgment). The D.C. Circuit recently reversed the district court decisions in these cases, so they may soon be headed back to the Supreme Court on the merits docket. *See* Harris v. Bessent, 160 F.4th 1235, 1242 (D.C. Cir. 2025).

make findings of fact and law exclusively on the record and not based on extra-record considerations. To carry out their constitutional as well as statutory duties, these adjudicatory officials must be impartial and independent. Policymaking within these regimes is controlled by the head of the agency, but through transparent mechanisms like regulations, guidances, and review of initial adjudicatory decisions. This approach ensures political accountability while also making it possible for adjudicating agencies to act as adjuncts to the Article III courts, which provide only deferential, appellate-style review. In several landmark precedents, the Supreme Court has recognized the unique need for adjudicatory officers to be insulated from political control. In *Wong Yang Sung v. McGrath*, the Court recognized Congress's authority to use statutory protections for quasi-judicial officers to ensure fair hearings before impartial officers.[41] In *Wiener v. United States*, the Court held that the very character of the duties vested in members of the War Claims Commission limited the President's removal power.[42]

Although *Wiener* relied on *Humphrey's Executor*, that precedent and *Wong Yang Sung* can and ought to survive the overruling or narrowing of *Humphrey's Executor*. The constitutionality of standard administrative regimes such as those in *Wiener* and *Wong Yang Sung* depends upon Congress's ability to design offices and institutions that are capable of satisfying the minimum requirements of due process. These requirements include the opportunity for fair hearing before an impartial decisionmaker. The Supreme Court had recognized this necessity before *Humphrey's Executor*, including in *Myers v. United States*,[43] a case best known for its robust defense of the President's removal power. Since the New Deal, the Supreme Court has repeatedly reaffirmed these principles of administrative due process.[44] Congress has repeatedly relied upon those principles in landmark super-statutes governing administrative procedure and agency programs like social security.[45]

Ironically, the President's Article II duty to see that the law is faithfully executed itself is endangered if *Slaughter* and *Cook* become vehicles for categorically denying congressional authority to provide for-cause removal protections to the many federal officers who are vested with adjudicative duties. As the Supreme Court has recognized, the President cannot personally execute all the laws and must therefore be able to rely upon a huge number of subordinate officers and

41 Wong Yang Sung v. McGrath, 339 U.S. 33, 50–51 (1950), *superseded by statute on other grounds*, Immigration and Nationality Act, ch. 477, § 242(b), 66 Stat. 163, 209 (1952), *as recognized in*, Marcello v. Bonds, 349 U.S. 302 (1955).

42 Wiener v. United States, 357 U.S. 349, 355–56 (1958).

43 Myers v. United States, 272 U.S. 52, 135 (1926).

44 *See Wong Yang Sung*, 339 U.S. at 50–51; *Wiener*, 357 U.S. at 353–54.

45 *See* discussion *infra* Part II.

employees. Even if the President or agency heads have the legal right to review all decisions made by their subordinate officers and employees, as a practical matter, they are rarely able to exercise that right. Ensuring that agencies are staffed with competent personnel capable of performing the duties given to them is essential. This truth holds in adjudication, but it also manifests in the need for a competent, nonpartisan civil service. Sound administrative structures—which Supreme Court doctrine has facilitated and Congress has constructed—thus empower the President to discharge his Article II duties.

This Article examines the foundational principles of administrative due process and argues that the Supreme Court should decide *Slaughter* and *Cook* in ways that do not undermine essential statutory structures that are on hold, as in *Harris*. It urges the Court to take due care to leave for another day questions about the constitutional status of purely adjudicatory agencies such as the MSPB, inferior adjudicatory officers like Administrative Law Judges (ALJs), and inferior officers and political appointees protected by the civil service laws.

I. ADMINISTRATIVE DUE PROCESS

The Due Process Clauses of the Fifth and Fourteenth Amendments require that governments must provide persons with "due process of law" when they seek to deprive those persons of "life, liberty, or property."[46] Congress has established entitlement programs and a civil service regime that create property rights requiring independent review by impartial officials such as ALJs and the MSPB. Congress's "for cause" protection of their independence is, therefore, rooted in constitutional obligations that make Cathy Harris's case (MSPB) very different from Rebecca Slaughter's case (FTC) or even Lisa Cook's case (Federal Reserve).

A. Statutory Entitlements as Due Process "Property"

In *Mathews v. Eldridge,* the Supreme Court unanimously agreed that beneficiaries of federal safety net programs cannot lose their benefits without due process.[47] Specifically, the Court reasoned, consistent with earlier decisions, that "the interest of an individual in continued receipt of these benefits is a statutorily created 'property' interest

46 U.S. CONST. amend. V; *id.* amend. XIV, § 1.

47 *See* Mathews v. Eldridge, 424 U.S. 319, 332 (1976).

protected by the Fifth Amendment."[48] The Court has not wavered from this approach to statutory entitlements.[49]

Before *Mathews*, the Court had ruled that nonprobationary state employees have a "property" interest in their continued employment and, therefore, cannot be fired or removed without due process.[50] In *Arnett v. Kennedy*, a fractured Court addressed the due process rights of federal employees.[51] Six Justices opined that the federal statute guaranteeing Arnett continued employment absent cause for discharge "conferred on him a legitimate claim of entitlement which constituted a 'property' interest under the Fifth Amendment."[52] Consistent with their views in *Arnett* and with *Mathews*, the Court in *Cleveland Board of Education v. Loudermill* explicitly held that if the government gives a public employee assurances of continued employment or conditions dismissal only on specific reasons, the public employee has a property interest in continued employment.[53] On the other hand, if the public employee is hired for a limited appointment or is at will, then the employee does not have a property interest in continued employment.[54] Under current federal civil service law, nonprobationary federal employees cannot be dismissed except for cause or unacceptable performance.[55] The Court of Appeals for the Federal Circuit has consistently followed *Mathews* and *Loudermill* to hold that such an employee has "a property right in his continued employment."[56]

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48 *Id.* at 332 (first citing Arnett v. Kennedy, 416 U.S. 134, 166 (1974) (Powell, J., concurring in part and concurring in the result in part); then citing Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 576–78 (1972); then citing Bell v. Burson, 402 U.S. 535, 539 (1971); and then citing Goldberg v. Kelly, 397 U.S. 254, 261–62 (1970)).

49 *E.g.*, Nelson v. Colorado, 581 U.S. 128, 139 (2017); FDIC v. Mallen, 486 U.S. 230, 240 (1988).

50 *See, e.g.*, Perry v. Sindermann, 408 U.S. 593, 602–03 (1972); Slochower v. Bd. of Higher Educ., 350 U.S. 551, 559 (1956); Wieman v. Updegraff, 344 U.S. 183, 191–92 (1952).

51 *Arnett*,, 416 U.S. 134.

52 *Id.* at 166 (Powell, J., joined by Blackmun, J., concurring in part and concurring in result in part); *accord. id.* at 180–86 (White, J., concurring in part and dissenting in part); *id.* at 207–09 (Marshall, J., joined by Douglas & Brennan, JJ., dissenting). All six Justices rejected the view set forth in the three-Justice plurality opinion. *See id.* at 151–54 (plurality opinion).

53 Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538–41 (1985).

54 Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 576–78 (1972).

55 *See* 5 U.S.C. § 7513(a) (2018) ("[A]n agency may take an action . . . against an employee only for such cause as will promote the efficiency of the service."); 5 U.S.C. § 4303(a) (2018) ("[A]n agency may reduce in grade or remove an employee for unacceptable performance.").

56 King v. Alston, 75 F.3d 657, 661 (Fed. Cir. 1996); *accord* Stone v. FDIC, 179 F.3d 1368, 1375 (Fed. Cir. 1999).

B. The Requirements of Due Process: Impartial Review

When the government deprives a beneficiary or employee of a statutory entitlement, it must provide that person with due process of law. Constitutional due process requires (1) notice of the deprivation and the reason(s) therefore, (2) an opportunity to be heard at a meaningful time and manner, and (3) a reasoned decision by an impartial officer.[57] "When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality."[58]

"The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law."[59] Additionally, the requirement of an impartial decisionmaker

> preserves both the appearance and reality of fairness, "generating the feeling, so important to a popular government, that justice has been done," by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.[60]

The impartiality requirement applies to quasi-judicial administrative decisionmakers.[61]

The leading case, *Tumey v. Ohio*, set forth this baseline: An official's situation renders him not impartial when it offers "a possible temptation to the average man as a judge to forget the burden of proof" required by law or when it "might lead him not to hold the balance nice, clear, and true between the State and the [private litigant]."[62] The foundational requirement of neutrality for quasi-judicial agency officials drove *Wiener*'s holding that the quasi-judicial duties of

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57 *See* Fuentes v. Shevin, 407 U.S. 67, 80 (1972); Williams v. Pennsylvania, 579 U.S. 1, 8 (2016).

58 Wong Yang Sung v. McGrath, 339 U.S. 33, 50 (1950), *superseded by statute on other grounds*, Immigration and Nationality Act, ch. 477, § 242(b), 66 Stat. 163, 209 (1952), *as recognized in*, Marcello v. Bonds, 349 U.S. 302 (1955); *see* Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process,* 95 YALE L.J. 455, 499–500 (1986).

59 Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980) (citing Mathews v. Eldridge, 424 U.S. 319, 344 (1976)).

60 *Id.* (citation omitted) (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring)).

61 *E.g.*, Schweiker v. McClure, 456 U.S. 188, 195 (1982); *Marshall,* 446 U.S. at 242–43, 248; Gibson v. Berryhill, 411 U.S. 564, 579 (1973).

62 Tumey v. Ohio, 273 U.S. 510, 532 (1927).

the War Claims Commissioners required independence from presidential removal without cause.[63]

Wiener's first premise was that claims that were to be "'adjudicated according to law,' that is, on the merits of each claim, supported by evidence and governing legal considerations," had to be evaluated "by a body that was 'entirely free from the control or coercive influence, direct or indirect,' of either the Executive or the Congress."[64] The second premise was that "one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will."[65]

C. Congressional Duty and Discretion to Provide a Due Process Structure

"The constitutional requirement of procedural due process of law derives from the same source as Congress'[s] power to legislate and, where applicable, permeates every valid enactment of that body."[66] The Court presumes that Congress legislates with these due process concerns in mind, and statutes setting forth the structure of administrative adjudication should be interpreted consistent with the impartiality requirement. Justice Frankfurter put it colorfully in *Wiener*:

> If, as one must take for granted, the War Claims Act precluded the President from influencing the Commission in passing on a particular claim, *a fortiori* must it be inferred that Congress did not wish to have hang over the Commission the Damocles' sword of removal by the President for no reason other than that he preferred to have on that Commission men of his own choosing.[67]

The flip side of Congress's constitutional duty to structure agency adjudications to satisfy due process is its discretion as to how to do so. In *Mathews*, for example, the Court found sufficient that Congress provided an in-person evidentiary hearing, presided over by an ALJ, shortly after statutory beneficiaries lost their benefits.[68] That the ALJ who administered the hearing enjoyed statutorily guaranteed independence was important for the Court's due process analysis.[69] Likewise, Congress's civil service structure requires notice, an opportunity to respond, and a reasoned decision before an impartial official before

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63 *See* Collins v. Yellen, 141 S. Ct. 1761, 1783 n.18 (2021).

64 Wiener v. United States, 357 U.S. 349, 355–56 (1958) (citation omitted) (quoting Humphrey's Ex'r v. United States, 295 U.S. 602, 629 (1935)).

65 *Id.* at 353 (quoting *Humphrey's*, 295 U.S. at 629).

66 Wong Yang Sung v. McGrath, 339 U.S. 33, 49 (1950), *superseded by statute on other grounds*, Immigration and Nationality Act, ch. 477, § 242(b), 66 Stat. 163, 209 (1952), *as recognized in*, Marcello v. Bonds, 349 U.S. 302 (1955).

67 *Wiener*, 357 U.S. at 356.

68 *See* Mathews v. Eldridge, 424 U.S. 319, 339, 349 (1976).

69 *See infra* notes 115–17 and accompanying text.

the government can dismiss a nonprobationary employee.[70] The MSPB, whose members are insulated from direct presidential control by the "for cause" requirement, is an additional assurance of impartiality, allowing the MSPB to review the agency's cause on the merits and for compliance with procedural and neutrality requirements.[71] Under the Civil Service Reform Act (CSRA), the MSPB is the exclusive forum for federal employee claims,[72] but its ability to function as such depends upon the statute's neutrality assurances for the MSPB.[73]

Would federal benefit programs and the civil service regime be unconstitutional if Presidents could remove quasi-judicial officials at will? This is a serious issue that would surely be litigated to the hilt. To avoid unsettling carefully crafted congressional regimes that satisfy due process, the Court in the FTC case (*Slaughter*) should make clear that it is not reaching the issues raised by the MSPB case (*Harris*) or the ALJ cases.[74]

II. CONGRESSIONAL RELIANCE ON ADMINISTRATIVE DUE PROCESS PRINCIPLES

The due process underpinnings of *Wiener* and *Wong Yang Sung* render those precedents not only distinguishable from *Humphrey's* but also more robust, as they rested upon Congress's duty as well as its authority to establish a regime assuring impartial decisionmakers in executive branch adjucatory proceedings. In this Part, we show that the public reliance interests that insulate even flawed precedents from overruling are especially powerful for *Wiener* and *Wong*.[75] Congress relied on its duty and power to protect the independence of quasi-judicial officials in super-statutes such as the Administrative Procedure Act of 1946 (APA),[76] the Social Security Act as amended, the Fair Housing Act as amended, and the CSRA. In even stronger contrast to *Humphrey's*, the Supreme Court has repeatedly relied on that constitutional principle in landmark administrative law decisions.

70 *See* 5 U.S.C. § 7513 (2018).

71 *Id.* § 7701 (2018); *see* Ward v. U.S. Postal Serv., 634 F.3d 1274, 1282 (Fed. Cir. 2011).

72 Elgin v. Dep't of Treasury, 567 U.S. 1, 5–6 (2012).

73 *See* Nat'l Ass'n of Immigr. Judges v. Owen, 139 F.4th 293, 313 (4th Cir. 2025).

74 *E.g.*, Space Expl. Techs. Corp. v. NLRB, 151 F.4th 761 (5th Cir. 2025) (considering the constitutionality of ALJs for the NLRB).

75 *See generally* William N. Eskridge Jr., *Reliance Interests in Statutory and Constitutional Interpretation*, 76 VAND. L. REV. 681 (2023); Randy J. Kozel, Stare Decisis *as Judicial Doctrine*, 67 WASH. & LEE L. REV. 411 (2010).

76 Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946).

A. The Administrative Procedure Act

In the early half of the twentieth century, Congress's primary contribution to ensuring due process was to insert hearing requirements into statutes that authorized administrative adjudication.[77] For example, when the Social Security Act of 1935[78] was substantially revised in 1939, a "hearing" requirement was added, but Congress vested the agency with responsibility to flesh out the procedural details.[79] The agency (then structured as the multi-member, partisan-balanced Social Security Board (SSB)) took this responsibility seriously.[80] It understood that the statutory hearing requirement called for a new stage of the proceeding, to handle disputes arising out of the initial stage of informal, non-hearing adjudication (in essence, internal appeals). The SSB put together "an appeals study group, composed of members of the Board's permanent staff and a distinguished consultant," Professor Ralph Fuchs.[81] The study group's 1940 report (modified by the Board) "describe[d] in considerable detail the procedural methods contemplated, . . . explain[ed] the reasons for the choices made and discusse[d] possible alternatives."[82] It recognized that the process must be designed to satisfy due process, conform to statutory requirements, and fulfill programmatic needs.[83] The report recognized the necessity of ensuring the appointment of hearing officers, then known as "referees," who would possess sufficient legal training to competently conduct hearings and write decisions.[84] By virtue of their position, and despite the agency's plan to provide further review through an Appeals Council, the SSB appreciated that the referees "must bear considerable responsibility in making final dispositions of cases."[85] Like other agencies charged with conducting evidentiary hearings, however, the SSB immediately encountered difficulties in meeting the high standards it had set for itself in the selection of its new hearing officers.[86] Here, as elsewhere throughout the administrative state, the imposition

77 *E.g.*, Communications Act of 1934, Pub. L. No. 73-416, §§ 201(a), 204, 205(a), 209, 48 Stat. 1064, 1070–73; Federal Trade Commission Act, Pub. L. No. 63-203, § 5, 38 Stat. 717, 719–20 (1914); Hepburn Act, Pub. L. No. 59-337, § 4, 34 Stat. 584, 589 (1906).

78 Social Security Act, Pub. L. No. 74-271, 49 Stat. 620 (1935).

79 Social Security Act Amendments of 1939, Pub. L. No. 76-379, § 205, 53 Stat. 1360, 1368–72.

80 *See* S. DOC. NO. 77-10, pt. 3 (1941) (SSB monograph).

81 *Id.* at 14, 34.

82 *Id.* at 14; *see generally id.* at 33–59 (reprinting the report).

83 *See id.* at 36–40.

84 *See id.* at 15–16.

85 *Id.* at 16. n.26.

86 *See id.* at 16 (explaining that most of the initial referees hired did not possess the supposedly essential legal training); Antonin Scalia, *The ALJ Fiasco—A Reprise*, 47 U. CHI. L. REV. 57, 57 (1979).

of hearing requirements left to agency procedural discretion proved wanting.

The principal motivating factor for the APA's 1946 enactment was to address the widespread perception that administrative adjudication was procedurally illegitimate. Critics alleged "an inherently unfair fusion of the functions of prosecutor and judge," with hearings held by incompetent personnel beholden to the partisan whims of their employing agencies.[87] The combination of functions was a problem from top to bottom: agency heads (including the multi-member commissions) were authorized to investigate, prosecute, and adjudicate, often with deferential, appellate-style judicial review of factual findings.[88] These agency heads were assisted by personnel who also, individually, performed the same assortment of duties.[89] Even assuming a high degree of competence and good faith (not always assumed and not always in evidence), wearing both hats surely cultivated in hearing officers a well-meaning bias in favor of the agency's position.[90] This problem was compounded by a tendency for agency heads and commissions to micromanage hearings, depriving their subordinates of the powers necessary to conduct reliable evidentiary hearings and preventing a cultivation in them of a sense of personal responsibility for proceedings and decisions.[91]

The Attorney General's Committee on Administrative Procedure, which conducted the research that supplied the APA's intellectual foundation,[92] recognized the need for procedures thoughtfully designed to enable agencies to fulfill Congress's statutory mandates while ensuring "impartial justice to all private interests" and "full recognition of the rights secured by law."[93] This imperative is especially acute at the hearing stage of the adjudicatory process. In adjudicatory hearings, "[m]ore than in any other administrative activity, the element of controversy plays a major part," and this demands "even greater insistence on impartiality in decision."[94] By requiring an administrative

87 Universal Camera Corp. v. NLRB, 340 U.S. 474, 478 (1951); *see* Wong Yang Sung v. McGrath, 339 U.S. 33, 41–45 (1950), *superseded by statute on other grounds*, Immigration and Nationality Act, ch. 477, § 242(b), 66 Stat. 163, 209 (1952), *as recognized in*, Marcello v. Bonds, 349 U.S. 302 (1955); Joanna Grisinger, *Law in Action: The Attorney General's Committee on Administrative Procedure*, 20 J. POL'Y HIST. 379, 398–400 (2008).

88 *See* Grisinger, *supra* note 87, at 384–85.

89 *See id.* at 394.

90 *See id.* at 396–97.

91 Bremer, *supra* note 29, at 1768.

92 *See* Paul Verkuil, Walter Gellhorn & K.C. Davis, *Present at the Creation: Regulatory Reform Before 1946*, 38 ADMIN. L. REV. 511, 513–14 (1986) (statement of Professor K.C. Davis).

93 ATT'Y GEN.'S COMM. ON ADMIN. PROC., FINAL REPORT, S. DOC. NO. 77-8, at 2 (1941).

94 *Id.* at 43; *see also id.* at 38.

hearing, Congress authorizes agencies to take the first shot at dispute resolution, relegating the Article III courts to a more limited, quasi-appellate role.[95] To fulfill the demands of this adjunct role, the agency's process must satisfy the constitutional demands of due process.

Addressing the structural sources of unfairness that arise from this allocation of adjudicative responsibility requires both horizontal and vertical separation of functions within the agency. Horizontally, those responsible for presiding in due process hearings must be confined to judging—hence, they must be kept out of prosecution and shielded from the behind-the-scenes influence of co-workers engaged in prosecution. Vertically, presiding officers must be afforded sufficient protection to conduct hearings as neutral arbiters—they must be empowered to conduct reliable hearings, required to take responsibility for recommended or initial decisions, and shielded from ex parte pressures that might be exerted by superiors through the employment relationship. Thus, the "enhancement of the status and function of the trial examiner was one of the important purposes of the movement for administrative reform."[96]

The centerpiece of the APA's formal hearing regime addressed these inherent structural challenges by creating the office now known as that of the "Administrative Law Judge" (ALJ).[97] Congress retained the authority to determine by agency-specific statute when a formal hearing would be required,[98] but supplanted agency procedural discretion with uniform procedures designed to ensure fundamental fairness. The position and powers of the ALJ—the default presiding officer in formal hearings—were designed to ensure that the ALJ is able to "command public confidence both by his capacity to grasp the matter at issue and by his impartiality in dealing with it."[99] The APA "automatically vests" ALJs with the powers necessary to conduct hearings, thereby ensuring that "an agency is without power to withhold such powers from its hearing officers."[100] This ensures the ALJ's basic ability to conduct a hearing capable of producing a record that can support a fair, sound decision. ALJs are also subject to an explicit obligation of impartiality, backed by the expectation they will disqualify themselves

95 *See id.* at 76–79.

96 Universal Camera Corp. v. NLRB, 340 U.S. 474, 494 (1951).

97 *See* Wong Yang Sung v. McGrath, 339 U.S. 33, 41–42 (1950), *superseded by statute on other grounds*, Immigration and Nationality Act, ch. 477, § 242(b), 66 Stat. 163, 209 (1952), *as recognized in*, Marcello v. Bonds, 349 U.S. 302 (1955).

98 *See* 5 U.S.C. § 554(a) (2018).

99 S. DOC. NO. 77-8, at 43.

100 U.S. DEP'T OF JUST., ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 74 (1947); *see* 5 U.S.C. § 556(c) (2018).

when they cannot fulfill the obligation.[101] Impartiality is further assured by a separation of functions effectuated by prohibitions on ALJs performing tasks inconsistent with their adjudicative duties[102] and engaging in ex parte communications, including with other personnel within the same agency.[103]

For-cause removal protection for hearing officers is a critical component of the APA's impartiality regime. Although Congress declined the Attorney General's Committee's proposal to create a new administrative agency to centralize the conduct of hearings, Section 11 of the APA contemplated "[c]entralized supervision of the selection of examiners, . . . together with safeguards to their security of tenure."[104] Responsibility for these tasks was initially vested in the Civil Service Commission (CSC) and later split between the Office of Personnel Management (OPM) and the Merit Systems Protection Board (MSPB).[105] Under the APA's regime, the head of an agency may take adverse employment action against an ALJ only for cause, which is determined after a fair hearing before the MSPB.[106]

While in many respects, the APA codified the hearing procedures that the SSB had determined in 1940 were necessary for fair hearings,[107] the APA's structural protections for hearing officers are ones that were beyond the ability of any individual agency to provide. After the APA was enacted, the Social Security Administration (SSA) conformed to the statute's new requirements, including by appointing ALJs to preside in social security hearings, thus ensuring due process to disappointed claimants.[108]

Another fundamental requirement of due process—that an adjudicatory decision be based exclusively on the hearing record—is furthered by the APA's combination of for-cause removal protection with transparent mechanisms for controlling and supervising ALJs.[109] The

101 5 U.S.C. § 556(b) (2018).

102 *Id.* § 3105 (2018).

103 *Id.* § 554(d) (2018).

104 Ralph F. Fuchs, *The Hearing Examiner Fiasco Under the Administrative Procedure* Act, 63 HARV. L. REV. 737, 738 (1950); Administrative Procedure Act § 11, 5 U.S.C. § 3105 (2018).

105 *See* Fuchs, *supra* note 104, at 738; *infra* notes 157–58 and accompanying text.

106 5 U.S.C. § 7521 (2018).

107 Richardson v. Perales, 402 U.S. 389, 409 (1971).

108 See *id.* at 401–02, 410.

109 *See* Goldberg v. Kelly, 397 U.S. 254, 271 (1970) (first citing Ohio Bell Tel. Co. v. Pub. Utils. Comm'n, 301 U.S. 292 (1937); and then citing United States v. Abilene & S. Ry. Co., 265 U.S. 274, 288–89 (1924)); Henry J. Friendly, *"Some Kind of Hearing"*, 123 U. PA. L. REV. 1267, 1282–87 (1975); Emily S. Bremer, *The Rediscovered Stages of Agency Adjudication*, 99 WASH. U. L. REV. 377, 417, 446 (2021).

APA codifies the exclusive-record principle,[110] and it offers adjudicating agencies the option of having its ALJs make either recommended decisions (which must be approved by the agency to become final) or initial decisions (which may become final in the absence of agency head review).[111] Either way, when an agency reviews an ALJ's decision, it "has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."[112] In addition, ALJs are required to decide cases in a manner that is consistent with applicable statutes, regulations, and agency guidance. Failure to do so may constitute cause for the agency to take adverse employment action against the ALJ.[113] This means that agency heads can use ex ante techniques—regulations and guidance—to control policy development through adjudication. These mechanisms of agency head control, combined with the APA's independence protections, leaves all lawful options available to the agency but ensures that final decisions will be transparently made and will not be the result of hidden employment pressures. This promotes confidence in the fairness of the adjudicatory process, prevents decisions based on considerations from outside the record, and facilitates judicial review on the "whole record."[114]

B. Post-APA Congressional and Judicial Reliance

The post-APA administration of the Social Security Act relies heavily on the more than one thousand ALJs who provide the impartial decisionmaking required when the due process state deprives people of statutory benefits. In his brief defending the process for terminating social security disability benefits, Solicitor General Robert Bork relied on the availability of a timely post-termination hearing before an impartial ALJ.[115] The Supreme Court's opinion in *Mathews v. Eldridge* upheld this process primarily because the majority were persuaded that it was reliable;[116] the Court specifically noted that ALJs provided relief for a significant number of beneficiaries, either through correcting errors or establishing a better factual record.[117]

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110 *See* 5 U.S.C. §§ 553(c), 554(a), 556(e) (2018).

111 *See id.* § 557(b).

112 *Id.*

113 *E.g.*, Abrams v. Soc. Sec. Admin., 703 F.3d 538, 543 (Fed. Cir. 2012); Brennan v. Dep't of Health & Hum. Servs., 787 F.2d 1559, 1563 (Fed. Cir. 1986); Auth. of Educ. Dep't Admin. L. Judges in Conducting Hearings, 14 Op. O.L.C. 1, 1 (1990).

114 5 U.S.C. § 706 (2018); *see* Universal Camera Corp. v. NLRB, 340 U.S. 474, 494–97 (1951).

115 Brief for Petitioner at 30, 34–35, Mathews v. Eldridge, 424 U.S. 319 (1976) (No. 74-204), 1975 WL 173410; *id.* app. at 12a–14a, 12a n.24, 13a nn.25–28.

116 *Mathews*, 424 U.S. at 349.

117 *Id.* at 346 & n.29.

The ALJs have jealously guarded their independence, including their for-cause removal protections, and they have been backed up by judges and legislators inspired by due process concerns.[118] For example, the SSA in the early 1980s monitored and reported each ALJ's reversals of state agency denials of disability benefits; some ALJs believed they were being pressured to deny more claims.[119] The Association of ALJs sued the agency to stop the perceived assault on their impartiality, and the Senate Oversight Committee held hearings to address this concern.[120]

Responding to congressional concerns as well as due process pressure, the SSA backed away from the review-and-reprimand program and thereby escaped an injunction—but the district court in *Association of Administrative Law Judges, Inc. v. Heckler* still rebuked the agency.[121]

> [D]efendants retained an unjustifiable preoccupation with allowance rates, to the extent that ALJs could reasonably feel pressure to issue fewer allowance decisions in the name of accuracy. While there was no evidence that an ALJ consciously succumbed to such pressure, in close cases, and, in particular, where the determination of disability may have been based largely on subjective factors, as a matter of common sense, that pressure may have intruded upon the factfinding process and may have influenced some outcomes.[122]

Claimants and ALJs remained concerned that impartial decisionmaking was threatened by various monitor-and-pressure campaigns—and they pushed back in a 1990 hearing before the House Ways and Means Committee.[123] Due process was at the center. "After all is said and done, it remains the right of a citizen to have a fair hearing in his appeal from an SSA denial of his medicare, old age, or

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118 *See* Charles N. Bono, A.L.J., Off. of Hearings & Appeals, Soc. Sec. Admin., Speech at the National Conference of Administrative Law Judges 20th Annual Symposium (Apr. 7, 1995): The Evolution and Role of the Administrative Law Judge at the Office of Hearings and Appeals in the Social Security Administration (Apr. 7, 1995), *in* 15 J. NAT'L ASS'N ADMIN. L. JUDGES 213, 216 (1995).

119 *See id.* at 232.

120 SUBCOMM. ON OVERSIGHT OF GOV'T MGMT. OF THE S. COMM. ON GOVERNMENTAL AFFS., 98TH CONG., THE ROLE OF THE ADMINISTRATIVE LAW JUDGE IN THE TITLE II SOCIAL SECURITY DISABILITY INSURANCE PROGRAM (Comm. Print 1983).

121 Ass'n of Admin. L. Judges, Inc. v. Heckler, 594 F. Supp. 1132, 1135–36, 1141, 1143 (D.D.C. 1984).

122 *Id.* at 1142; *accord id.* at 1143 (rebuking the agency's "insensitivity to that degree of decisional independence the APA affords to administrative law judges and the injudicious use of phrases such as 'targeting', 'goals' and 'behavior modification'" as tending "to corrupt the ability of administrative law judges to exercise that independence in the vital cases that they decide").

123 *See Judicial Independence of Administrative Law Judges at the Social Security Administration: Hearing Before the Subcomm. on Soc. Sec. of the H. Comm. on Ways and Means*, 101st Cong. (1990) [hereinafter *Hearing Before H. Comm.*, 101st Cong.].

disability claim; and a fair hearing in disputed cases requires an independent adjudicator."[124] Many statements invoked the importance of job protections for ALJs, specifically for-cause and only after a hearing by the MSPB. "A judge's decisional independence can be compromised in many ways. . . . [T]he belief that the outcome of a case could lead to . . . being fired, demoted, or reprimanded could compromise a judge's impartiality."[125] Once again, under public due process pressure, the SSA backed away from even the appearance of interfering with the independence, and hence the impartiality, of ALJs.[126]

In the 1990 Ways and Means hearing, the ALJs invoked a Supreme Court decision as an example of their entrenched independence.[127] In *Butz v. Economou*, the Supreme Court considered whether hearing examiners (today's ALJs) enjoyed the same absolute immunity as is enjoyed by judges when sued in their official capacity.[128] The lower court had afforded the hearing examiners only qualified immunity, because they were executive department employees.[129] With no dissent, the Court held that their quasi-judicial functions entitled them to the same absolute immunity enjoyed by Article III judges.[130] Also invoking *Wong Yang Sung*, the Court relied on the APA's assurance that a hearing examiner "exercises his independent judgment on the evidence before him, free from pressures by the parties or other officials within the agency."[131] Their independent judgment was protected by the fact that "[t]hey may be removed only for good cause established and determined by the Civil Service Commission after a hearing on the record."[132] (Today, the MSPB would perform this role.[133]) These facts were essential to the Court's holding: "In light of these safeguards, we think that the risk of an unconstitutional act by one presiding at an agency hearing is clearly outweighed by the importance of preserving the independent judgment of these men and women."[134]

In subsequent floor debates as well as committee hearings, members of Congress from both sides of the aisle have relied on the entrenched norm of ALJ independence as essential to the impartial

124 *Id.* at 112 (statement of A.L.J. Russell S. Barone).

125 *Id.* at 153 (statement of Jeffrey Tureck, Sec'y, Fed. A.L.J. Conf.).

126 Bono, *supra* note 118, at 240–41.

127 *See Hearing Before H. Comm.*, 101st Cong., *supra* note 123, at 153 (statement of Jeffrey Tureck, Sec'y, Fed. A.L.J. Conf.).

128 Butz v. Economou, 438 U.S. 478, 511–14 (1978).

129 *Id.* at 511.

130 *Id.* at 511–14 (majority opinion); *id.* at 517–18 (Rehnquist, J., concurring in part and dissenting in part).

131 *Id.* at 513, 513–14 (majority opinion).

132 *Id.* at 514.

133 5 U.S.C. § 7521 (2018).

134 *Butz*, 438 U.S. at 514.

hearings they provide for the due process state. In a 2002 floor debate, Representative George Gekas (R-PA) grounded his remarks on the constitutional as well as statutory policy requiring ALJ independence: "The SSA ALJ hearing system protects a constitutional right of our citizens and provides a constitutionally protected due process hearing to members of the American public."[135] As Representative Elijah Cummings (D-MD) put it in House Ways and Means Committee hearings in 2014, protecting the decisional independence of ALJs "is fundamental to ensuring the integrity of the program and the rights of American citizens. We are talking about due process and equal protection under the law."[136]

The central role played by ALJs in the due process state is not limited to the SSA. During the 1980s, Congress worked to expand the protections of the Fair Housing Act (FHA) of 1968.[137] There was concern that the ALJs who would administer the fair hearings in the Department of Housing and Urban Development (HUD) would not be sufficiently independent of the agency. Representative Robert McClory (R-IL) expressed concerns supporting the APA-required impartiality of ALJs in explicitly "due process and equal protection" terms.[138] Representative Mike Synar (D-OK) proposed additional safeguards, which Representative Robert Railsback (R-IL) praised.[139]

> [I]t is further my understanding that under the gentleman's amendment now an administrative law judge can only be fired for cause and after a hearing before the Merit System Protection Board, which would again further insulate that ALJ from any pressures brought by HUD or by anyone else for that matter; is that correct?[140]

Representative Synar agreed, as "that was one of the benefits we sought in isolating them."[141] The FHA Amendments were not enacted for another eight years. In the Fair Housing Amendments Act of 1988, Congress provided administrative relief through hearings administered by

135 148 CONG. REC. 10458 (2002) (statement of Rep. George Gekas) (discussing the proposed Administrative Law Process Enhancement Act, H.R. 4932, 107th Cong. (2002)).

136 *Social Security Administration Oversight: Examining the Integrity of the Disability Determination Appeals Process, Part II: Hearing Before the H. Comm. on Oversight and Gov't Reform*, 113th Cong. 4 (2014) (statement of Rep. Elijah E. Cummings); see also *Hiring of Administrative Law Judges at the Social Security Administration: Hearing Before Subcomm. on Soc. Sec. of the H. Comm. on Ways and Means*, 110th Cong. 34 (2007) (statement of Ass'n of Admin. L. Judges).'

137 *See* Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619.

138 126 CONG. REC. 13955, 13957 (1980) (statement of Rep. Robert McClory).

139 *Id.* at 14004–05.

140 *Id.* at 14004 (statement of Rep. Robert Railsback).

141 *Id.* at 14005 (statement of Rep. Mike Synar).

ALJs appointed under 5 U.S.C. § 3105 (with its accompanying for-cause and MSPB hearing protections under 5 U.S.C. § 7513).[142]

C. Civil Service Reform Act

Most relevant to the *Harris* case is that Congress relied on the constitutional principles entrenched in the APA, *Wiener*, and *Wong Yang Sung* when it revised the federal civil service job protections in the Civil Service Reform Act of 1978.[143] "[I]n order to provide the people of the United States with a competent, honest, and productive Federal work force reflective of the Nation's diversity, and to improve the quality of public service, Federal personnel management should be implemented consistent with merit system principles and free from prohibited personnel practices."[144] To effectuate that purpose, the CSRA assures federal employees that they will be evaluated based only on merit (i.e., their ability and diligence in doing their jobs)[145] and, specifically, not for "partisan" reasons or as retaliation for lawful whistleblowing.[146]

As required by *Mathews* and *Loudermill*, these guarantees are constitutionally useless unless federal employees enjoy due process protections against arbitrary, partisan, or retaliatory discharges. The statutory text explicitly acknowledges that norm: "Federal employees should receive appropriate protection through increasing the authority and powers of the [MSPB] in processing hearings and appeals affecting Federal employees."[147] The MSPB was empowered to conduct adjudicatory hearings where employees could present their cases against discharge or other adverse employment actions and receive an impartial decision based on the record and reasoning from the statute and other legal authority.[148] The CSRA reaffirmed and extended the APA's special protections for ALJs: "An action may be taken against an administrative law judge appointed under [5 U.S.C. § 3105] by the agency in which the administrative law judge is employed only for good cause established and determined by the [MSPB] on the record after opportunity for hearing before the Board."[149]

As is apparent from the statutory text and scheme, Congress established the MSPB as a "quasi-judicial body" that is "independent of

142 Fair Housing Amendments Act of 1988, § 8, 42 U.S.C. § 3612(b) (2018); *see also* 5 U.S.C. § 3105 (2018); 5 U.S.C. § 7513 (2018).

143 Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (codified as amended in scattered sections of 5 U.S.C.).

144 *Id.* § 3(1).

145 *Id.* § 101(a) (codified as amended at 5 U.S.C. § 2301(b)(1)–(2), (6) (2018)).

146 *Id.* (codified as amended at 5 U.S.C. § 2301(b)(8)–(9) (2018)).

147 *Id.* § 3(3).

148 *See id.* § 202(a) (codified as amended at 5 U.S.C. § 1204(a) (2018)).

149 *Id.* § 204(a) (codified as amended at 5 U.S.C. § 7521(a) (2018)).

the President."[150] The MSPB's adjudicatory role required that its members serve long terms (seven years) and could only be removed for "inefficiency, neglect of duty, or malfeasance in office."[151] The executive branch fully recognized this principle undergirding the statutory removal protections. When the President submitted the draft CSRA to Congress, he defended the MSPB's for-cause removal provision as necessary to "guarantee independent and impartial protection to employees."[152] In congressional hearings, the Chair of the Civil Service Commission argued that the MSPB as a "quasi-judicial" body needed to be insulated from presidential influence.[153] Associate Director Lazarus of the White House Domestic Policy Staff endorsed the constitutional principle that quasi-judicial officials could be insulated from White House control with for-cause removal protections.[154] Reformers testifying before Congress agreed that the MSPB "must be completely independent of political control to be able to impartially decide cases in which the employee is claiming that the adverse action suffered was a result of improper political pressure."[155] Signing the CSRA into law, the President praised the Act because it provided "better protection for employees against arbitrary actions and abuses and contains safeguards against political intrusion."[156]

Indeed, due process principles were the central reason the President proposed and Congress enthusiastically adopted a restructuring of our nation's civil service protections. Before the 1978 Act, the Civil Service Commission combined quasi-judicial functions (protecting employees against arbitrary treatment) and executive and quasi-legislative functions of personnel management. Under *Wong Yang Sung*, the intermingling of functions posed due process concerns,[157] and for that reason the Commission proposed to abolish itself, to be replaced by the Office of Personnel Management to handle the executive and

150 S. REP. NO. 95-969, at 24 (1978); *accord* S. REP. NO. 95-1272, at 133 (1978) (Conf. Rep.); H.R. REP. NO. 95-1403, at 100 (1978) (presidential civil service reform proposal, describing the MSPB as "the adjudicatory arm of the new personnel system").

151 Civil Service Reform Act § 202(a) (codified as amended at 5 U.S.C. § 1202(a), (d) (2018)).

152 H.R. REP. NO. 95-1403, at 100 (1978).

153 *Civil Service Reform: Hearings Before the H. Comm. on Post Off. and Civ. Serv.*, 95th Cong. 828 (1978) (statement of Alan K. Campbell, Chairman, Civ. Serv. Comm'n).

154 *Civil Service Reform Act of 1978 and Reorganization Plan No. 2 of 1978: Hearings on S. 2640, S. 2707, and S. 2830 Before the S. Comm. on Governmental Affs.*, 95th Cong. 251–52 (1978) [hereinafter *Hearings Before S. Comm.*, 95th Cong.] (statement of Simon Lazarus III, Assoc. Dir., White House Domestic Pol'y Staff).

155 *Id.* at 432 (statement of Ralph Nader).

156 Statement on Signing S. 2640 into Law, 2 PUB. PAPERS 1765 (Oct. 13, 1978).

157 *See* Wong Yang Sung v. McGrath, 339 U.S. 33, 41–45, 50–51 (1950), *superseded by statute on other grounds*, Immigration and Nationality Act, ch. 477, § 242(b), 66 Stat. 163, 209 (1952), *as recognized in*, Marcello v. Bonds, 349 U.S. 302 (1955).

quasi-legislative work and by "the MSPB, guaranteed independence by the fact that it would be bipartisan with three members, appointed for seven-year terms and removable only for cause," to handle the quasi-judicial work.[158]

Senator Abraham Ribicoff (D-CT, the Senate floor manager) explained that the proposed CSRA Title II

> [c]reates a new 3-member Board, bipartisan in make-up, whose sole responsibility will be to enforce the merit system principle and the civil service laws generally. It will be free of any inconsistent responsibility to develop or manage personnel policies favored by the President and other political officials in the government. The responsibilities of the current Civil Service Commission for both the management of the civil service system, and adjudication of complaints against the way the system is implemented, create an irreconcilable conflict.[159]

From the other side of the aisle, Senator Charles Percy (R-IL) agreed that the proposed system was a "significant improvement[] over the present system under which the Civil Service Commission plays the roles of both administrator and watchdog. The inherent institutional conflicts of interests have detracted from both roles."[160]

The Supreme Court has repeatedly interpreted the CSRA, and in some of its decisions it has relied on its constitutional (due process-oriented) structure to create a legal architecture of rights and responsibilities that should not be untangled. Consider a few examples. In *Bush v. Lucas*, the Court held that a federal employee allegedly discharged for exercising his First Amendment rights did not have a *Bivens* claim, because Congress's regulatory regime already provided due process for his constitutional grievance.[161] Noting post-CSRA updates, the Court described the notice, opportunity for a hearing, and the assurance of impartiality that the pre-CSRA regime afforded employees such as Bush.[162] Based upon the "elaborate remedial system that has been constructed step by step," the Court rejected "the creation of a new judicial remedy for the constitutional violation at issue."[163]

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158 *Hearings Before S. Comm.*, 95th Cong., *supra* note 154, at 782–83 (statement of Alan K. Campbell, Chair, Civ. Serv. Comm'n); *accord id.* at 32 (earlier Campbell statement).

159 124 CONG. REC. 27536 (1978) (statement of Sen. Abraham Ribicoff).

160 *Id.* at 27538 (statement of Sen. Charles Percy).

161 Bush v. Lucas, 462 U.S. 367, 368, 388 (1983).

162 *Id.* at 386–88; *cf. id.* at 386 n.29 (relying on the empirical record of internal agency review).

163 *Id.* at 388. The regime in place when Bush was fired was similar to the CSRA regime. *See id.* at 387–90, 386 nn.30–31, 387 nn.32–35.

In *Elgin v. Department of Treasury*, the Court held that an aggrieved federal employee asserting both statutory and constitutional challenges could not jump the MSPB and bring suit directly in federal district court.[164] Justice Thomas's opinion for the Court assumed that Elgin was correct that the MSPB could not or would not decide his ultimate constitutional question but concluded that Congress relied on the MSPB as the sole institution for adjudicating employee claims, with review for constitutional as well as statutory issues in the Federal Circuit.[165] Analogizing the MSPB to federal magistrate judges, Justice Thomas observed that the CSRA gives the MSPB judicial authority to "administer oaths, examine witnesses, take depositions, issue interrogatories, subpoena testimony and documents, and otherwise receive evidence when a covered employee appeals a covered adverse employment action," and hence create a record for constitutional as well as statutory review.[166] The Court implicitly relied on the MSPB's impartiality and independence.

III. CONSISTENCY WITH SUPREME COURT'S ARTICLE II JURISPRUDENCE

The Supreme Court's Article II jurisprudence consistently has distinguished: (1) adjudicative officers from purely executive officers and (2) principal officers from inferior officers. With respect to the first distinction, for the reasons explained above, fair and faithful execution of the law requires a carefully balanced legal regime that enables adjudicative officers to decide individual cases on the law and the record, free from political and employment pressures that may emanate from outside the record. With respect to the second distinction, the Court has recognized broader congressional authority to regulate the removal of inferior officers whose decisions are subject to agency head control. The Court's recent Article II jurisprudence has reaffirmed these principles and has approved of Congress's reliance upon them in developing the standard model for agency adjudication that is reflected in the APA.

A. Two Categories of Distinguishable Officers

The Court has long and properly recognized that Article II demands different treatment for adjudicative officers than for purely executive officers. Even *Myers v. United States*, a case generally known for its full-throated defense of the President's power to remove executive

164 Elgin v. Dep't of Treasury, 567 U.S. 1, 23 (2012).

165 *Id.* at 19–21.

166 *Id.* at 19 (citing 5 U.S.C. § 1204(b)(1)–(2) (2018)).

officers, recognized that the nature of an officer's duties may require some insulation from political control.[167] In an opinion authored by Chief Justice Taft, a former President, the *Myers* Court held that the President must be able to remove "purely executive officers" without congressional interference.[168] But the Court distinguished adjudicative officers, i.e., those charged with "quasi-judicial" duties, and explained that it would be improper for the President to "influence or control" the disposition of individual cases by "executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals."[169] With respect to such officers, the President's "constitutional duty of seeing that the laws be faithfully executed" is discharged by his responsibility to evaluate the officer's course of performance and his power to remove the officer, in appropriate circumstances, "on the ground that the discretion regularly entrusted to that officer by statute has not been on the whole intelligently or wisely exercised."[170] The Court recognized that questions about the removability of judges appointed to the Article I courts, who likewise exercise quasi-judicial duties, "present considerations different from those which apply in the removal of executive officers, and therefore [it] d[id] not decide them."[171] In *Wiener*, as explained above, the Court reaffirmed and enforced the principle articulated in *Myers* that the quasi-judicial character of an officer's duty circumscribes the President's power to remove that officer.[172]

The Court has also long recognized that Congress enjoys broader authority to regulate the removal of inferior officers when it has exercised its constitutional power to "by Law vest the Appointment of such inferior Officers, as [it] think[s] proper, . . . in the Heads of Departments."[173] The Supreme Court embraced this principle in *United States v. Perkins*, which held that, with respect to inferior officers, Congress "may limit and restrict the power of removal as it deems best for the public interest."[174] This was reaffirmed in *Myers*, when the Court explained that its holding regarding "[t]he independent power of removal by the President alone . . . works no practical interference with the merit system" because "[t]he evil of the spoils system aimed at in the civil service law and its amendments is in respect of inferior offices"

167 Myers v. United States, 272 U.S. 52, 135 (1926).

168 *Id.*

169 *Id.*

170 *Id.*

171 *Id.* at 158.

172 *See supra* notes 63–65 and accompanying text.

173 U.S. CONST. art. II, § 2, cl. 2.

174 United States v. Perkins, 116 U.S. 483, 485 (1886) (quoting Perkins v. United States, 20 Ct. Cl. 438, 444 (1885)).

and does not extend "to appointments confirmed by the Senate," i.e., principal officers.[175] More recently, in *Morrison v. Olson*, the Court again relied on the distinction between inferior and principal officers.[176] The distinction makes sense legally, because of the clear text of the Appointments Clause, and practically, because inferior officers and employees are subject to agency head control in the discharge of their statutory duties. The CSRA is grounded upon *Myers*'s sound affirmation that "[t]he extension of the merit system rests with Congress."[177]

B. Recent Reaffirmations of These Distinctions

In its recent Article II cases, the Supreme Court has continued to observe these foundational principles, implicitly leaving its due process jurisprudence intact. In *Free Enterprise Fund*, the Court held that two layers of for-cause removal protection for the Public Company Accounting Oversight Board "contravene[d] the Constitution's separation of powers."[178] But the Court distinguished ALJs because they "perform adjudicative rather than enforcement or policymaking functions" and often "possess purely recommendatory powers."[179] And it distinguished "members of the Senior Executive Service" because they "may be reassigned or reviewed by agency heads."[180] The Court cautioned that "[n]othing in our opinion . . . should be read to cast doubt on the use of what is colloquially known as the civil service system within independent agencies."[181] Recall that the MSPB and its members (who have for-cause removal protections) guarantee the independence of civil servants through due process review.

In *Seila Law*, the Supreme Court invalidated statutory for-cause removal protection for the single Director of the Consumer Financial Protection Bureau (CFPB), while again distinguishing adjudicative and inferior officers.[182] It reasoned that available precedent offered two exceptions to the general rule of presidential power to remove officers at will.[183] First, *Humprey's Executor* recognized an exception for multi-member commissions charged with quasi-legislative and quasi-judicial duties.[184] Second, under *Perkins* and *Morrison*, Congress may provide tenure protections to "inferior officers with limited duties and

175 *Myers*, 272 U.S. at 173.
176 Morrison v. Olson, 487 U.S. 654, 670–72 (1988).
177 *Myers*, 272 U.S. at 174.
178 Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 492 (2010).
179 *Id.* at 507 n.10.
180 *Id.* at 506.
181 *Id.* at 507.
182 See Seila L. LLC v. CFPB, 140 S. Ct. 2183, 2197–98, 2211 (2020).
183 *Id.* at 2192.
184 *Id.* at 2198–99.

no policymaking or administrative authority."[185] The Court determined that neither of these exceptions applied to the non-adjudicative CFPB, and it declined the invitation to extend them.[186]

The Court stayed the course in *Collins v. Yellen*, in which it invalidated for-cause protection for the single Director of the Federal Housing Finance Agency (FHFA).[187] *Wiener* was distinguishable, the Court explained, because "the War Claims Commission was an adjudicatory body, and as such, it had a unique need for 'absolute freedom from Executive interference.'"[188]

Even when the Court has critiqued *Humphrey's Executor* in the foregoing cases, it has cast no doubt upon the due process principles justifying *Wiener* and *Wong Yang Sung*. For example, in *Morrison v. Olson*, the Court stated that "it is hard to dispute that the powers of the FTC at the time of *Humphrey's Executor* would *at the present time* be considered 'executive,' at least to some degree."[189] And *Seila Law* observed that "[t]he Court's conclusion [in *Humphrey's Executor*] that the FTC did not exercise executive power has not withstood the test of time."[190] This suggests the possibility that the Court could affirm the President's power to remove Rebecca Slaughter for no cause without completely overruling *Humphrey's Executor*. And even if *Humphrey's Executor* were overruled, it would be a radical move for the Court to jettison *Wiener* and *Wong Yang Sung* or otherwise cast doubt on the myriad precedents that have affirmed the propositions that adjudicative officers and inferior officers are different. Overruling *Wiener* or *Wong Yang Sung* would create turmoil in carefully developed statutory schemes and would trigger years of litigation over fresh due process problems with administrative adjudications.

C. Approval for the Standard Model of Agency Adjudication

Most recently, in *United States v. Arthrex*, the Supreme Court ratified Congress's use of these principles to construct a statutory scheme for patent adjudication.[191] In the America Invents Act of 2011, Congress created the Patent Trial and Appeal Board (PTAB), authorizing it to adjudicate *inter partes* claims challenging the validity of previously issued patents.[192] The statute provided that the Administrative Patent

185 *Id.* at 2200, 2199–200.

186 *See id.* at 2192, 2200–01.

187 Collins v. Yellen, 141 S. Ct. 1761, 1770 (2021).

188 *Id.* at 1783 n.18 (quoting Wiener v. United States, 357 U.S. 349, 353 (1958)).

189 Morrison v. Olson, 487 U.S. 654, 690 n.28 (1988) (emphasis added).

190 *Seila L.*, 140 S. Ct. at 2198 n.2.

191 United States v. Arthrex, Inc., 141 S. Ct. 1970 (2021).

192 *See* Leahy-Smith America Invents Act, Pub. L. No. 112-29, § 7, 125 Stat. 284, 313 (2011).

Judges (APJs) who served on the PTAB would be appointed by the Secretary of Commerce as inferior officers and afforded for-cause removal protection.[193] The statute did not, however, give the head of the agency (in this case, the Director of the Patent and Trademark Office (PTO)) authority to review the APJ decisions.[194] To gain some measure of control on PTAB decisions, the PTO Director resorted to a practice of "panel stacking," which involved manipulating the composition of panels in individual cases on rehearing in the hopes of influencing the outcome in the Director's preferred direction.[195]

In *Arthrex*, the Supreme Court determined that the APJ's for-cause removal protection, combined with their authority to issue final, unreviewable decisions for the PTO, made them principal officers and rendered their method of appointment unconstitutional.[196] The Supreme Court might have remedied this defect as the Federal Circuit below did, by severing the APJ's for-cause protection.[197] Instead, it held that "[d]ecisions by APJs must be subject to review by the Director."[198] It thus gave effect to Congress's classification of the APJs as inferior, purely adjudicative officers. In so doing, it brought the PTAB and its APJs into alignment with "the almost-universal model of adjudication in the Executive Branch,"[199] which is reflected in the APA and "is the standard way to maintain political accountability and effective oversight for adjudication that takes place outside" of the APA.[200]

Arthrex is a powerful recognition that the demands of Article II and due process simultaneously can be satisfied by protecting the tenure of inferior adjudicative officers whose decisions may be reviewed and controlled on the record by the head of the adjudicating agency. This approach empowers the President to fulfill his obligation to see that the law is fairly and faithfully executed by recognizing Congress's authority to equip the President with competent, impartial adjudicative officers.[201] Combined with agency head control of adjudicative decisions, this approach provides political accountability and responsibility up through the chain of command within the Executive Branch.

193 *See Arthrex*, 141 S. Ct. at 1979–80.
194 *See id.* at 1976–77, 1980–81.
195 *See id.* at 1981.
196 *See id.* at 1985.
197 *See id.* at 1978.
198 *Id.* at 1986.
199 *Id.* at 1987.
200 *Id.* at 1984.
201 *See* Bremer, *supra* note 29, at 1781–1801.

CONCLUSION

The due process state and the unitary executive can coexist, and indeed the latter depends on the former for its legitimacy and proper functioning. If the Supreme Court in *Slaughter* overrules or narrows *Humphrey's Executor*, Article II does not require, and the Due Process Clause stands in the way of, rewriting *Myers* and overruling *Wiener*, *Wong Yang Sung*, and other cases that have recognized the unique need to insulate adjudicatory officers from political interference. In due course, the Court should either allow the lower courts to enforce that foundational principle or take the opportunity to reaffirm and elaborate its centrality to a functioning unitary executive.