

Supreme Court Considers Emergency Motion on President's Removal Power

April 24, 2025

Over the first month of his second Administration, President Donald Trump has actively used his constitutionally based removal power to dismiss agency leaders across the federal government. Some of these removals have raised significant controversy, most notably the dismissal of executive branch officials with statutory removal protections who were in the midst of an unfinished fixed term on an independent regulatory commission. President Trump recently dismissed members of the [National Labor Relations Board \(NLRB\)](#), [Merit Systems Protection Board \(MSPB\)](#), [Federal Labor Relations Authority \(FLRA\)](#), and [Federal Trade Commission \(FTC\)](#), multimember entities where federal law provides that they can be removed by the President only for cause.

In dismissing these officials, the President did not assert that the statutory criteria for removal had been met. Instead, the Administration has largely taken the position that statutory for-cause restrictions that limit the President's authority to remove agency leaders are [unconstitutional](#) and therefore void. The result, the Administration argues, is that these officials may be removed by the President at will.

All of the affected officials from these four independent regulatory commissions have [challenged](#) their removal in court. Members of the [NLRB](#), [MSPB](#), and [FLRA](#) were initially able to obtain preliminary relief from federal district courts reinstating them to their respective agencies. The federal government appealed the lower courts' decisions regarding the NLRB and MSPB. On March 28, 2025, a divided three-judge panel of the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit) [granted](#) the government's emergency motion to *stay*—or postpone—the reinstatement of members of the MSPB and NLRB pending resolution of the government's appeal. In doing so, two of the three judges expressed their view that the NLRB and MSPB removal protections were likely unconstitutional. Just over a week later, all 11 D.C. Circuit judges reconsidered the earlier stay pending appeal and, by a vote of seven to four, [vacated](#) the stay of the district court's order reinstating the members of the NLRB and MSPB. Shortly thereafter, upon request by the government, Chief Justice Roberts [issued](#) an administrative stay of the reinstatement orders to give the Supreme Court time to evaluate whether to issue a stay pending the resolution of the government's appeal. This case and other pending lawsuits involving the FLRA and FTC remain in early stages, but they present constitutional issues that could fundamentally alter Congress's long-standing authority to use its legislative powers to ensure that certain functions are carried out by officials with some independence or autonomy from presidential and partisan influences.

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LSB11292

This Sidebar describes the governing constitutional principles and summarizes the D.C. Circuit’s decision in the NLRB and MSPB removal case.

Competing Executive and Legislative Powers over Executive Offices

The Supreme Court has [interpreted](#) Article II of the U.S. Constitution to provide the President with “general administrative control” of the executive branch. This principle, which has implicit textual roots, is founded in the proposition that the Constitution—by vesting “the executive Power” solely in the President and making it his personal responsibility to “take Care that the Laws be faithfully executed”—affords the President both the power and the duty to supervise and control those who exercise executive power. As a practical matter, the President exerts his influence in many ways, but ultimately, his control over subordinates is enforced by either removing, or threatening to remove, executive officials who may not act “[in accordance with the policies that the people presumably elected the President to promote.](#)”

The doctrine of presidential control can sometimes collide with Congress’s power over federal offices—a [power](#) that arises mainly from the [Appointments Clause](#) and the [Necessary and Proper Clause](#). It is Congress, by enacting statutes, that creates executive branch offices; empowers those offices through the delegation of authority; sets (subject to the constraints of the Appointments Clause) the method by which an office is filled and the required qualifications of an officeholder; and when necessary, designs an office in a way that encourages operational independence from the political influence of the executive branch. One of Congress’s chief “[independence-promoting](#)” tools is its ability to enact statutory provisions that directly constrain the President’s authority to remove—and therefore control—an official.

These two overlapping authorities—the President’s power to exert control through removal and Congress’s power to grant some degree of autonomy from presidential influence through law—can be viewed as part of a broader tension over control of the federal bureaucracy and a reflection of the [friction](#) that can be a characteristic of the American separation of powers.

The President’s Removal Power

Although there is no removal clause in the Constitution, historical practice and Supreme Court precedent have [established](#) a “general rule that the President possesses ‘the authority to remove those who assist him in carrying out his duties.’” Presidentially appointed agency leaders are therefore [typically](#) “presum[ed]” to “serve[] at the President’s pleasure,” meaning they can be fired at will for any reason or no reason at all. The [reasoning](#) behind this implied power, according to the Court, is that, although the President is vested with “the executive power” under Article II, it would be impossible for “one man” to execute the considerable responsibilities of that office. “[Lesser executive officers](#)” are therefore necessary to implement the President’s powers, but those officers “must remain accountable to the President, whose authority they wield.” That accountability, the Court has [reasoned](#), can be assured only if the President retains the ability to freely remove his subordinates, since “it is ‘only the authority that can remove’ such officials that they ‘must fear and, in the performance of [their] functions, obey.’”

The removal power, according to the Court’s explanation, not only ensures that subordinate officials remain accountable to the President but also that the President remains accountable to the American people. By making the President responsible for the actions of his officials, the removal power [prevents](#) the President from “escap[ing] responsibility for his choices by pretending they are not his own.”

The Supreme Court’s most extensive examination of that power came in the 1926 decision of [Myers v. United States](#). There, the Court invalidated a statutory provision that prohibited the President from removing an appointed executive official—a postmaster—without first obtaining the advice and consent of the Senate. *Myers* [recognized](#) that “the executive power” vested in the President by Article II includes “the power of appointment and removal of executive officers.” The Court tied that implied power to historical practice and the President’s explicit power of appointment and his responsibilities under the

Take Care Clause. “[A]s his selection of administrative officers is essential to the execution of the laws by him,” the Court [reasoned](#), “so must be his power of removing those for whom he cannot continue to be responsible.” To hold otherwise, and permit the Senate to effectively control the removal of an executive branch official, the Court [concluded](#), would violate the separation of powers and “make it impossible for the President . . . to take care that the laws be faithfully executed.”

Congress’s Power to Restrict the Removal Power Through Statute

The Court has endorsed Congress’s [power to protect](#) certain executive branch positions from removal (short of preserving a direct role for itself in that removal) to encourage that officeholder to “act . . . independently of executive control.” Many multimember commissions, for example, serve functions that Congress has determined should be undertaken free of the “[coercive influence](#)” of the President. These independent boards and regulatory commissions are generally led by a group of principal officers (individuals exercising significant authority who are only supervised by the President). They are chosen for their expertise in the relevant field and appointed—typically subject to partisan balance requirements—by the President with the advice and consent of the Senate to a fixed term during which the officeholder may only be removed for cause. The precise phrasing of the applicable for-cause or protected-tenure provisions may differ, but generally they permit an official to be [removed](#) only for some variation of “inefficiency, neglect of duty, or malfeasance in office.”

Congress has consistently applied for-cause restrictions to multimember commissions from 1887 to the modern day. Despite the historical pedigree of these types of provisions, the Court has never clarified what types of conduct would subject an official with these protections to removal. At the very least, these provisions appear to prevent the President from removing officials for no cause at all or based merely on political disagreements.

In the 1935 case *Humphrey’s Executor v. United States* the Supreme Court expressed its most fulsome approval of for-cause protections. There, the Court held that the President’s removal power was not “[illimitable](#)” and that Congress acted within its authority in restricting the removal of members of the FTC. In doing so, the Court gave its explicit consent to the use of for-cause tenure protections, at least as applied to a multimember commission like the FTC whose “predominantly quasi-judicial and quasi-legislative” [functions](#) Congress had identified as needing some degree of political independence. The Court therefore [distinguished](#) the “purely executive” office of postmaster that had been at issue in *Myers* from the FTC, which the Court described as exercising “no part of the executive power vested by the Constitution in the President.”

Many of the central principles of *Humphrey’s* were later reaffirmed in the 1958 decision of *Wiener v. United States*, which dealt with the removal of a member of the War Claims Commission (WCC)—a multimember commission established to adjudicate certain personal injury and property damage claims arising from World War II. In that case, the Court held that even though Congress did not explicitly provide members of the WCC with for-cause removal protections, the law nevertheless made it clear that the WCC was to operate independently of “[coercive influence](#)” from either the President or Congress. As a result, the Court [held](#) that the President lacked the power to “remove a member of an adjudicatory body like the [WCC] merely because he wanted his own appointees on such a Commission.”

A series of recent Supreme Court decisions, however, have cast Congress’s authority to enact for-cause removal protections for multimember independent agencies into a state of some uncertainty. A full discussion of the historical evolution of Congress’s power in this area is beyond the scope of this Sidebar, but in cases like *Seila Law LLC v. CFPB* and *Collins v. Yellin*, the Court appears to have displayed a growing skepticism of congressional attempts to limit the President’s removal power—a power the Court has [described](#) as “unrestricted” and (most recently) “exclusive” and “preclusive.”

Seila Law and *Collins* both invalidated statutory for-cause removal protections for agency leaders who led powerful executive branch agencies on their own. The laws in question therefore did not fall squarely into the multimember, apolitical structure approved in *Humphrey's*. As a result, the decisions did not “revisit” *Humphrey's*. The Court in both cases reiterated Congress’s authority to enact removal protections in specific circumstances but ultimately held that it would not “extend” those cases to cover the “novel” use of tenure protections for agency heads that wield “significant” or “important” executive power on their own, rather than as part of a multimember body.

Seila Law and *Yellen* cabined *Humphrey's* to some extent by characterizing the case as a narrow exception to the President’s otherwise “unrestricted removal power.” In *Seila Law*, the Court interpreted *Humphrey's* to permit statutory removal protections for a “multimember body of experts, balanced along partisan lines, that perform[s] legislative and judicial functions and was said not to exercise any executive power.” The Court did not consistently employ this formulation, however. At times, the Court characterized *Humphrey's* as extending to “multimember expert agencies that do not wield *substantial* executive power.”

There is some uncertainty as to what it means to be an agency that is “said not to exercise any [or substantial] executive power.” At the time of *Humphrey's*, the FTC was directed to prevent “unfair methods of competition in commerce” through investigations and by issuing “cease and desist” orders enforceable in federal court. It could also issue rules, though the agency rarely did so. Despite *Humphrey's* characterization of these FTC functions as constituting “no part of the executive power,” the Court’s modern cases suggest that today, these functions would likely be considered executive. In *Seila Law*, for example, the Court stated in dicta that *Humphrey's* “conclusion that the FTC did not exercise executive power has not withstood the test of time” and reiterated that “it is hard to dispute that the powers of the FTC at the time of *Humphrey's* would at the present time be considered ‘executive,’ at least to some degree.” These comments seem to undercut the rationale for the *Humphrey's* decision. Still, while the Court has criticized the logical reasoning that undergirds *Humphrey's*, it has repeatedly stated that the holding of *Humphrey's*—that Congress can provide certain multimember boards with removal protections—remains in effect.

Harris v. Bessent, Wilcox v. Trump, and Grundmann v. Trump

During the first months of the second Trump Administration, President Trump removed members of the NLRB, MSPB, FLRA, and FTC. Removed board members have all challenged their removals in federal court. Federal district courts in the District of Columbia rendered decisions reinstating members of the NLRB, MSPB, and FLRA. The United States appealed the reinstatement of members of the NLRB and MSPB; in quick succession, a three-judge panel of the D.C. Circuit stayed the reinstatement order and the entire eleven-member court vacated the stay, effectively reinstating the NLRB and MSPB members. The United States did not appeal the district court’s decision in the FLRA case, and the case pertaining to the fired commissioners of the FTC is still in its early stages.

Turning first to the district court decisions, all three courts held that (1) the removal protections for each position fit within the *Humphrey's* exception and were not unconstitutional infringements on the President’s removal power and (2) the removals violated each statute’s removal limitations. Although each statute differs slightly, the three decisions have a number of common themes. The decisions stressed that *Seila Law* explicitly preserved the *Humphrey's* exception for “multimember expert agencies that do not wield substantial executive power.” The decisions also stressed that, in both *Seila Law* and *Collins*, the Court contrasted traditional multimember agencies protected by removal restrictions ruled constitutional by *Humphrey's* with the novel structure of agencies led by a single director with similar protections.

All three decisions also held that the [affected agencies](#) did not wield substantial executive power. Although there are some differences in each agency's statutory authorities, each is predominately adjudicatory—or in terms of the *Humphrey's* exception, “quasi-judicial”—in that the agency's function [requires](#) “the trained judgment of a body of experts informed by experience.” That some of these agencies can issue self-executing binding legal orders resolving disputes did not itself push them out of the scope of the *Humphrey's* exception, as that exception was understood both in *Humphrey's* itself and in *Wiener*. The district courts in the [NLRB](#), [MSPB](#), and [FLRA](#) cases all held that the *Wiener* decision foreclosed the government's arguments that issuing binding decisions pushed the agencies outside the *Humphrey's* exception.

On March 28, 2025, in the two-to-one opinion of *Harris v. Bessent*, the D.C. Circuit [granted](#) the government's emergency motion for a stay pending appeal in the NLRB and MSPB cases. Judges Walker and Henderson both voted in favor of staying the district courts' orders, and their opinions share a [common thread](#) that the NLRB and MSPB exercise substantial executive authority, placing them outside the *Humphrey's* exception.

Judge Walker's opinion focused heavily on the limited scope of the *Humphrey's* exception and the nature of the power wielded by both agencies. Judge Walker [explained](#) that, “[t]o the extent that *Humphrey's* created a showdown between the *Myers* rule and the *Humphrey's* exception, the Court's recent decisions [*Seila Law & Collins*] have been unequivocal: *Humphrey's* has few, if any, applications today.” He went on to compare *Humphrey's* to “a benched quarterback, watching *Myers* (and the original meaning of the Constitution) from the sidelines.” *Humphrey's*, Judge Walker stressed, only [controls](#) “if the agency in question is the identical twin of the 1935 FTC (as *Humphrey's* understood the 1935 FTC).”

From there, Judge Walker would find that neither the [NLRB](#) nor the [MSPB](#) are “identical twin[s]” of the 1935 FTC as *Humphrey's* understood it. Rather, unlike the 1935 FTC, both agencies exercise substantial executive authority. Unlike the FTC, the NLRB is not subject to a partisan balance requirement (although in practice it has been treated as if it were) and can seek preliminary injunctions and monetary damages against private parties in federal court. Judge Walker's analysis of the MSPB took a similar path. According to Judge Walker, although the MSPB primarily functions as an adjudicator, its adjudications resolve disputes *within* the executive branch—not between the government and private parties. This “intra-branch dispute resolution,” Judge Walker said, is an exercise of executive—not “quasi-judicial”—power. Judge Walker went on to explain that the MSPB can override an agency's disciplinary actions, issue binding orders, enforce compliance with those orders, and represent itself in federal court—which he characterizes as quintessentially executive powers. The MSPB, Judge Walker reasoned, is a permanent agency with the power to “force the President to work with thousands of employees he doesn't want to work with, an unquestionable exercise of ‘substantial executive power.’”

Judge Henderson's opinion departs marginally from Judge Walker's. She thought the question of whether the removal protections in the relevant statutes are constitutional is “[a slightly closer call](#)” than Judge Walker; nonetheless, she “agree[d] with many of the general principles in Judge Walker's opinion.”

Judge Millett filed a dissenting opinion, arguing that, by granting the stay, the court effectively [overruled](#) two Supreme Court cases, *Humphrey's* and *Wiener*—something a lower court has no power to do. Judge Millett stressed that in both *Seila Law* and *Collins*, the Court declined to revisit *Humphrey's* and held that *Humphrey's* remained in place. Rather than limiting *Humphrey's* to apply only to the identical twin of the 1935 FTC, *Seila Law* and *Collins* declined to extend *Humphrey's* to structurally distinct agencies—ones led by a single administrator. According to Judge Millett, as multimember boards (not single-administrator agencies), the NLRB and MSPB fit neatly within the scope of *Humphrey's* and *Wiener*. Both are “[predominantly adjudicatory](#).” Neither agency has the power to investigate or prosecute the cases before it—that is, they are “passive” and must wait for cases to be brought before them. Their charge is to adjudicate claims according to law. Further, Judge Millett opined, the agencies have limited or no capacity to [enforce](#) their orders and have limited regulatory authority. Additionally, Judge Millett

explained, orders from both agencies are either reviewed or enforced by the federal courts, and both agencies are balanced along [partisan](#) lines, either by law or practice.

Just more than a week later, in a seven-to-four decision, an en banc panel of the D.C. Circuit vacated the three-judge-panel's stay order, largely adopting the reasoning in Judge Millett's dissenting opinion. The majority [held](#) that "[t]he Supreme Court's repeated and recent statements that *Humphrey's Executor* and *Wiener* remain precedential require denying" the government's stay motions. The four dissenters would have approved the stay, because they would hold that either the statutory removal protections were likely unconstitutional or the district court exceeded its authority in ordering the reinstatement of the removed officials.

On April 9, 2025, the government [petitioned](#) the Supreme Court to stay pending appeal the lower court orders reinstating members of the MSPB and NLRB. Later that day, the Supreme Court [issued](#) an administrative stay and ordered a response to the government's request for a stay to be filed by April 15. The administrative stay will remain in place while the Court considers the government's petition to stay.

Orders granting or denying a stay pending appeal do not resolve the merits of the case. These decisions are based on predictions about the merits of the case. For a party to demonstrate that a stay pending appeal is appropriate, they must, among other things, make a "[strong showing](#)" that the court is *likely* to rule in their favor on their legal claims. The en banc panel's decision merely found that the government was [unable](#) to make a strong showing that the removal protections in those statutes violate the Constitution. At this juncture, the Court will consider the government's petition for a stay pending appeal, but in the meantime, the case will proceed before the D.C. Circuit. The case may proceed before a different three-judge panel than the one that considered the emergency stay motion. Briefing for the appeal concluded April 11. The court has yet to schedule oral argument.

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