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Legal Sidebar

Supreme Court Grants Emergency Motion on President's Removal Power

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On May 22, 2025, the Supreme Court granted the executive branch's motion to stay lower court orders reinstating officials at the National Labor Relations Board (NLRB) and Merit Systems Protection Board (MSPB) who enjoy statutory removal protections. Over the opening months of his second Administration, President Donald Trump has actively dismissed 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 NLRB, 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 unconstitutionally infringe on the President's authority to remove executive officials. The Administration asserts, therefore, that the President may remove these officials 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 initially obtained 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. A little more than a week later, all eleven 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.

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On May 22, 2025, the Supreme Court granted the executive branch's motion, staying the reinstatement of the NLRB and MSPB officials. In an unsigned order, the Court cast doubt on the constitutionality of statutory removal protections of the kind limiting removal of the NLRB and MSPB members. The Court also suggested that the "for cause" removal protections for the Federal Reserve Board of Governors was not implicated by the Court's order because the Federal Reserve "is a uniquely structured, quasi-private entity" with a "distinct historical tradition."

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.

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." The Court, however, did not address statutory removal provisions that limit the causes for which a President may remove a subordinate.

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 supervised only 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 be removed only 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 distinguished *Myers* on the ground that the decision was limited to "the narrow point actually decided . . . that the President had power to remove a postmaster of the first class, without the advice and consent of the Senate." The *Humphrey's* Court further 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." In invalidating the removal, the Court began by affirming that *Myers* never suggested that the President retained inherent power to removal all executive officials "no matter what the relation of the executive to the discharge of their duties and no matter what restrictions Congress may have imposed regarding the nature of their tenure."

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. Yellen*, 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 the Court 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 *Collins* 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" (emphasis added).

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 Act directed the FTC to prevent "unfair methods of competition in commerce" through investigations and by issuing "cease and desist" orders enforceable in federal court. The FTC 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 Executor* 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.

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 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.

A little 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. 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 on May 22, 2025, the Court granted the executive branch's motion, staying the lower courts' orders reinstating the NLRB and MSPB officials.

In an unsigned six-to-three order, the Court explained that the executive branch was likely to "show that both the NLRB and MSPB exercise considerable executive power." The Court explained that, according to Article II's vesting clause, the President may remove without cause and subject only to narrow exceptions any executive official who exercises executive power. Although the Court assumed the executive branch was likely to prevail on its argument that the two agencies wield considerable executive power, the Court did not decide whether the NLRB or MSPB fit into any recognized exception.

In an epilogue, the Court appeared to create a safe harbor for the Federal Reserve Board of Governors (the Board) from the ambit of the order. The Court's statement was in response to the respondent's argument that all for-cause removal provisions stand or fall together, including those for the members of the Board. The Board was created by statute in 1913, and, since 1935, all of the members of the Board enjoy "for cause" removal protections. The Federal Reserve's primary tasks are the regulation of banks

and the regulation of the nation's money supply through capital reserve requirements, liquidity regulations, and interest rate regulations.

The Court's order, the Court explained, does not "implicate the constitutionality" of the for-cause removal provisions of the Board because the Federal Reserve "is a uniquely structured, quasi-private entity that follows in the distinct historical tradition of the First and Second Banks of the United States." The Court did not elaborate in what way the Federal Reserve is similar to the First and Second Banks of the United States. At least one financial regulation scholar has criticized the Court's decision equating the Board with the Banks of the United States. Other legal scholars believe the Court's comparison is "plausible."

Justice Kagan filed a dissenting opinion joined by Justices Sotomayor and Jackson. Justice Kagan argued that the majority's decision effectively overrules *Humphrey's*, without saying as much, and in an emergency posture without the benefit of full briefing and oral argument. Justice Kagan highlighted that the majority did not cite to *Humphrey's* in its order, even though in her view *Humphrey's* is controlling precedent that the Court in prior decisions explicitly preserved.

Justice Kagan also took the position that the majority's opinion is "unusual" in at least two ways. First, although the majority determined that it was likely that the NLRB and MSPB exercise significant executive power, the majority declined to say whether the agencies fit within the *Humphrey's* exception. For the executive branch to prevail in a stay pending appeal, the Court must find, among other things, that the executive branch is likely to prevail on the merits. The only way to do that, Justice Kagan explained, is to find that the agencies both exercise significant executive power *and* do not fit within any recognized exception. Justice Kagan wrote that the majority opinion addressed only half the question, making it seemingly impossible to find that the executive branch is likely to prevail on the merits. She surmised that the majority perhaps believes that the agencies' exercise of "considerable executive power" causes them to fall outside of the *Humphrey's* exception.

Second, Justice Kagan argued, the majority's discussion of the Federal Reserve came from "out of the blue." There is, she stressed, no way to distinguish the removal protections enjoyed by the Federal Reserve from those of the NLRB and MSPB—they rest on the same "constitutional and analytical foundations" as every other independent board or commission. If the MSPB and NLRB removal protections are unconstitutional, she argued, then so are the Federal Reserve's.

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