LIMITS ON THE UNITARY EXECUTIVE: THE SPECIAL CASE OF THE ADJUDICATIVE FUNCTION

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INTRODUCTION

Federal agencies rely extensively on Administrative Law Judges (ALJs) for resolving disputes between regulated parties and themselves.[1] As a group,[2] ALJs dispose of five times as many cases as are filed in federal district court annually.[3] Given the conflict of interest that hovers over any scheme of administrative adjudication, in which private parties are engaged in a dispute with the very agency that is adjudicating the dispute, confidence in the integrity of ALJ

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[1] The National Labor Relations Board (NLRB), Federal Labor Relations Authority (FLRA), and United States Merit Systems Protection Board (MSPB), in contrast. resolve disputes between, in the first context, employees and private employers, and in the other two, between government employees and agencies for whom they work.

[2] There are roughly 2000 ALJs covered by the APA, working in over 25 agencies, with the majority working for the Social Security Administration (SSA). *Federal Administrative Law Judges by agency and level*, OPM https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=ALJs-by-Agency (Mar. 2017).

[3] *See, e.g.*, Gellhorn & Byse's Administrative Law 26 (12th ed. 2018); Richard J. Pierce, *Political Control Versus Impermissible Bias in Agency Decisionmaking: Lessons from Chevron and Mistretta*, 57 U. CHI. L. REV. 481, 501 (1990).

proceedings is critical. Although courts have rejected the plausible premise that the Due Process Clause itself guarantees ALJ independence,[4] courts to date have upheld congressional efforts, most notably in the Administrative Procedure Act (APA),[5] to insulate ALJs from improper agency influence.

That may be about to end. As others have noted, a combination of the Supreme Court's decisions in *Free Enterprise Fund v. Public Company Accounting Oversight Board*,[6] holding that inferior officers in independent agencies must be removable at will, and *Lucia v. SEC*,[7] which held that ALJs are inferior officers, threatens the continued independence of ALJs. The logic of the two decisions strongly suggests that ALJs, at least in independent agencies, must be subject to at-will dismissal, despite the signal protections in the APA.[8]

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[4] *See, e.g.*, Schweiker v. McClure, 456 U.S. 188, 198 (1982) (upholding adjudication of Medicare Part B claims by private contractors of an agency); Kalaris v. Donovan, 697 F.2d 376, 400–01 (D.C. Cir. 1983) (holding that Due Process did not foreclose removing at-will members of the Benefits Review Board). Indeed, most administrative hearing officers in the federal government are not protected from at-will discharge. *See, e.g.*, Kent Barnett, *Against Administrative Judges*, 49 U. C. DAVIS L. REV. 1643, 1692 (2016). And similarly, many agency heads themselves are not protected despite exercising the power to resolve a dispute between a private party and the agency. Under the APA, agency heads have the power to rehear any administrative dispute even when not insulated from at-will discharge. 5 U.S.C. § 557(b) (2018). For an argument that Due Process should protect adjudicator independence from plenary removal, *see* Richard Pierce, *Should the Court Change the Scope of the Removal Authority?*, 26 GEO. MASON L. REV. 657, 672–75 (2019).

[5] 5 U.S.C. §§ 551–559.

[6] Free Enter. Fund v. PCAOB, 561 U.S. 477, 492 (2010).

[7] Lucia v. SEC, 138 S. Ct. 2044, 2044, 2050–51 (2018).

[8] As an alternative, the Solicitor General (SG) argued that the *for cause* protections from dismissal should be construed broadly to permit agencies wide latitude in removing ALJs, including for policy disagreements. *See* Memorandum from the Solicitor General, U.S. Dep't of Justice, to Agency Gen. Counsels, Guidance on Administrative Law Judges After *Luica v. SEC* (S. Ct.) (July 2018); *see also Recent Guidance: Administrative Law — Appointments Clause — Solicitor General Issues Guidance on Administrative Judges. — Guidance on Administrative Law Judges After Lucia v. SEC (S. Ct.), July 2018*, 132 HARV. L. REV. 1120, 1125–27 (2019). The SG's guidance apparently finds little support in history. *See* Jane Manners & Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 COLUM. L. REV. 1, 17–18 (2021). In any event, the Court did not pursue that tack in construing the restrictions on removal for the head

Others have decried the Supreme Court's decisions imperiling the independence of ALJs.[9] To that end, some have criticized the Court's formalistic decisions, particularly in *Free Enterprise Fund*,[10] and some have advocated for restructuring the ALJ corps.[11] The purpose of this Article is more limited. I argue that Supreme Court precedent does not necessarily spell doom for ALJ independence. Even with the Court's increasing embrace of the unitary executive theory,[12] there are compelling arguments to uphold the APA protections. Indeed, the functional arguments underlying *Seila Law*, in particular, strongly suggest that the President's Article II interest in superintending policymaking can readily be accommodated with independent factfinding in both executive and independent agencies.[13] Unless the unitary executive structure embraced by the Court extends formulaically to all officers in the executive branch, respecting the limited independence of ALJs under the APA readily can be reconciled with the executive's needed control under Article II.

Accordingly, in Part I, I briefly trace the history leading to the APA's enactment and note that protections for factfinders are as important today as they were 75 years ago. In Part II, I summarize the leading Supreme Court decisions addressing the President's removal authority.[14] In Part III, I argue that the functional underpinnings of the required presidential accountability under Article II should leave Congress's protections for ALJs untouched. Congress can choose whether to shield officers from the President's at-will removal

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of the Consumer Financial Protection Bureau. Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2206 (2020); *see* text accompanying *infra* notes 69–79.

[9] *See, e.g.*, Richard E. Levy & Robert L. Glicksman, *Restoring ALJ Independence*, 105 MINN. L. REV. 39, 67–69 (2020); Pierce, *supra* note 4, at 663–65.

[10] *See, e.g.*, Pierce, *supra* note 4, at 663–65.

[11] Levy & Glicksman, *supra* note 9, at 92–98.

[12] *Seila Law*, 140 S.Ct. at 2197–98; *see also* Collins v. Yellen, No. 19-422 (U.S. June 23, 2021) (holding that the President must exercise plenary removal authority over the single head of the Federal Housing Finance Agency). Under the reasoning of *Seila Law* and *Collins*, the independence of ALJs in agencies headed by a single director protected from at-will dismissal may also be imperiled.

[13] *See* text accompanying *infra* notes 69–72.

[14] *See* text accompanying *infra* notes 48–82. For a helpful summary of different approaches to the unitary executive ideal, *see* Ilan Wurman, *The Removal Power: A Critical Guide*, CATO SUP. CT. REV. 157, 158 (2020).

authority if the officers' delegated functions do not include the economic, social, and political policymaking that Article II leaves to the President to manage. That distinction not only is normatively plausible but is historically grounded. I end by canvassing two related areas, the Federal Tort Claims Act (FTCA)[15] and the Federal Service Labor-Management Relations Statute,[16] to show how courts and the executive branch itself long have distinguished between professional and political judgment in assessing needed executive branch control under Article II.

I. CREATION OF THE APA

In enacting the APA 75 years ago, Congress in part responded to complaints by regulated entities that agency adjudicators, then termed hearing examiners, were biased.[17] With the increase in the scope of administrative machinery in the late-nineteenth and early twentieth centuries, hearing examiners within agencies played an increasingly prominent role. Agencies were responsible for both hiring and disciplining such examiners.[18] The examiners, perhaps not surprisingly, favored the agencies in which they worked in resolving private parties' disputes with the government, and studies confirmed the bias.[19] As an ABA report summarized in the mid-1930s, "It is not easy to maintain judicial independence or high standards of judicial conduct when a political sword of Damocles continually threatens the judge's source of livelihood."[20] Attorney General Robert Jackson's influential Committee on Administrative Procedure warned of a "progressive decline" in the quality of decisions where hearing officers lacked independence.[21] Accordingly, the Attorney General's Report urged tenure protections for agency adjudicators: "Removal of a hearing commissioner during his term should be for cause only and by

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[15] 28 U.S.C. §§ 2671–2680.
[16] 5 U.S.C. §§ 7101–7135.
[17] *See* Ramspeck v. Fed. Trial Exam'r Conf., 345 U.S. 128, 131 (1953).
[18] *Id.*
[19] *Id.*
[20] Report of the Special Comm. on Admin. L., 57 Annual Rep. A.B.A. 539, 546 (1934).
[21] ATT'Y GEN. REP. ON ADMIN. PROC. 1, 46 (1941).

a trial board independent of the agency."[22]

Congress reacted in part by making ALJs quasi-independent. Most importantly, the APA provides that an ALJ can only be removed from office or disciplined for "cause,"[23] and then only if an independent agency, the MPSB, agrees.[24] Judicial review thereafter is permitted.[25] Moreover, agencies cannot subject ALJs to performance evaluations, unlike with other agency subordinate officials.[26] Further, Congress provided that, in conducting a hearing, an ALJ cannot be subject to the direction of an employee or agency official who performs investigative or prosecutorial functions.[27] When the case is *sub judice*, an ALJ cannot engage in conversations with the parties or agency officials concerning the case without disclosing such contacts.[28]

The Court in *Wong Yang Sung v. McGrath*[29] summarized soon thereafter that "[t]he Act thus represents a long period of study and strife; it settles long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest."[30] Indeed, "[c]oncern over administrative impartiality and response to growing discontent was reflected in Congress as early as 1929 . . . . Fears and dissatisfactions increased as tribunals grew in number and jurisdiction . . . ."[31] The APA, in other words, reflected Congress's effort to meet "currently prevailing standards of impartiality."[32] Most adjudicators in the federal government today are not protected by the APA. Although their fact-finding duties are often beyond reproach, the potential for political influence is present.[33]

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[22] *Id.* at 49.
[23] 5 U.S.C. § 7521.
[24] *Id. See also infra* text accompanying note 87 (addressing the role of MSPB under the APA in reviewing discipline meted to ALJs).
[25] The APA also barred agencies from assigning ALJs any tasks inconsistent with their adjudicative responsibilities. 5 U.S.C. § 3105.
[26] *See* Lloyd Musolf, *Performance Evaluation of Federal Administration Judges and Challenges for Public Administration*, 28 AM. REV. PUB. ADMIN. 390, 396 (1998).
[27] 5 U.S.C. § 554(d)(2).
[28] *Id.* § 554(d)(1).
[29] Wong Yang Sung v. McGrath, 339 U.S. 33, 33 (1950).
[30] *Id.* at 40, 43–56
[31] *Id.* at 37–38.
[32] *Id.* at 50.
[33] *See generally* Barnett, *supra* note 4, at 1647 (noting Administrative Judges

Ongoing political pressure on immigration judges provides a case in point. The Trump Administration moved to decertify the union of immigration judges on the ground that the Immigration Judges (IJs) exercise too much discretion to be considered employees and therefore should not be eligible to organize under the Federal Service Labor Management Relations Statute.[34] The Administration also ordered the judges not to speak in public about the functioning of immigration courts.[35] The Attorney General, in other words, can fire immigration judges for addressing the public about the court system. Indeed, former Attorney General Jeff Sessions removed cases from a judge for being too lenient, and that removal likely impacted the decision-making of other immigration judges.[36]

Political pressure on immigration judges is far from new. In a notorious case during the Bush II Administration, a Department of Justice (DOJ) official called the Chief Immigration Judge and convinced him to direct an immigration judge handling a controversial case to change his decision.[37] The APA may confer only partial security on ALJs, but significantly more than that enjoyed by most Administrative Judges who can be removed at will.[38] The question

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outnumber ALJs by approximately a five-to-one margin and are most prevalent in the Department of Commerce and Internal Revenue Service (IRS)).

[34] *See infra* text accompanying notes 143–56.

[35] *See, e.g.*, Laila L. Hlass et al., *Let Immigration Judges Speak*, SLATE (Oct. 24, 2019), https://slate.com/news-and-politics/2019/10/immigration-judges-gag-rule.html; *see also* Stephanie Krent, *Revised Justice Department Policy Still Silences Immigration Judges*, JUST SECURITY (Mar. 5, 2020), https://www.justsecurity.org/69048/revised-justice-department-policy-still-silences-immigration-judges/.

[36] Jeff Gammage, *In Philly Immigration Court, a Judge is Replaced After Delaying a Man's Deportation*, PHILA. INQUIRER (Aug, 8, 2018), https://www.inquirer.com/philly/news/immigration-judges-association-grievance-philadelphia-steven-morley-removal-deportation-case-20180808.html.

[37] *See* Stephen Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 373 (2006).

[38] The political pressure issue recently arose in Florida, when the chief ALJ suspended Judge John Van Laningham of the Florida Division of Administrative Hearings for including a footnote in his opinion questioning whether pressure from the chief judge to alter his opinion before publication constituted an ex parte communication banned by Florida law. Debra Cassens Weiss, *Administrative Law Judge is accused of insubordination and suspended for footnotes*, ABA J., April 7,

presented, therefore, is whether Congress's longstanding decision to protect certain judicial officials in the executive branch from at-will removal violates Article II.

II. THE SUPREME COURT'S REMOVAL JURISPRUDENCE

The fate of ALJ independence rests in large part on the nature of the Supreme Court's future adherence to the unitary executive theory. In cases such as *Free Enterprise Fund* and *Seila Law*, the Court has affirmed the importance of a robust Chief Executive, who must under Article II be able to superintend the authority delegated by Congress to the executive branch.[39] Given that the President cannot alone discharge all such responsibilities, the powers to appoint and remove officials are central to preserving presidential control. In turn, the electorate can then hold the Chief Executive responsible for the administration's execution of the law come election day.

Although often left unstated, there is no *one* theory of a unitary executive. Adherents agree that the Vesting and the Take Care Clauses in Article II[40] dictate that the President wield some type of supervisory power over tasks delegated from Congress to officials within the executive branch. Adherents also agree that the President's appointment and removal authorities under Article II are critical to effectuating a unitary executive. But, such agreements have not extended to delineating the required *extent* of presidential supervision over officers of the United States,[41] whether comparable authority

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2020. Whether Judge Van Laningham construed Florida's ban on ex parte communications correctly or not, the imbroglio brings to the fore the simmering question whether a superior can direct the ALJ to change his or her opinion without jeopardizing the ALJ's decisional independence.

[39] *See* Free Enter. Fund v. PCAOB, 561 U.S. 477, 483 (2010); Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2197 (2020).

[40] U.S. CONST. art. II, §§ 1, 3. *See also* Wurman, *supra* note 14, at 159.

[41] *Compare* Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701, 716–17 (2003) (arguing that the President must have the power to directly exercise all delegated power), *with* Peter L. Strauss, *Overseer or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 728–30 (2007) [hereinafter Strauss, *Overseer*] (arguing that the President cannot displace the judgment of the officer to whom Congress has delegated authority).

should extend to delegations outside the executive branch,[42] and whether the President must comply with congressional judgments about which officers should be responsible for which tasks delegated by Congress.[43]

A. History

The Supreme Court's decisions in the area have been well canvassed, but a short recap is appropriate to depict the Supreme Court's oscillation between more or less formal means to determine how much presidential supervision Article II requires. The Court deploys more formal approaches to draw clear lines and to prevent chipping away at constitutionally grounded authority.[44] For example, a decision holding that Congress can take *no* part in the removal of executive branch officials[45] reflects a clear rule to preserve executive branch control. On the other hand, a decision holding that Congress can vest appointment of executive branch inferior officers in judges as long as the decision is not "incongruous"[46] represents a functional balancing of interests of all three branches: the executive branch in controlling authority delegated from Congress; Congress in deciding how best the authority should be exercised; and judges in determining the identity of the officer who is to interact with the judiciary. Functional approaches recognize interdependence among the three branches and stress the importance of preserving the balance of powers among the branches, while formal approaches create walls around

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[42] *See, e.g.*, Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations Outside the Executive Branch*, 85 NW. U. L. REV. 62, 76–80 (1992) ("Delegating authority outside the federal government may permit Congress to exercise both a de facto appointment and removal authority.").

[43] *See, e.g.*, Peter Shane, *Prosecutors at the Periphery*, 94 CHI-KENT L. REV. 241, 246–51 (2019) (noting "that duties assigned to 'the Heads of Departments' are not to be performed by the President, but rather by those officers explicitly tasked to perform them.").

[44] *See generally* Peter L. Strauss, *Formal and Functional Approaches to Separation of Powers Clashes: A Foolish Inconsistency*, 72 CORNELL L. REV. 488, 512 (1987) (comparing and contrasting functional and formal approaches to separation of powers issues).

[45] Bowsher v. Synar, 478 U.S. 714, 733–34 (1987).

[46] Morrison v. Olson, 487 U.S. 654, 656 (1988).

separate powers to ensure that the original design is not diluted.

As a matter of history, Congress at times has left the President with little control over tasks it has delegated.[47] In the last hundred years, however, courts have been more wary about such congressional determinations, bolstering the President's authority both to appoint and remove officers within the executive branch. Given that there is little in the Constitution describing how the President is to supervise subordinates, it is perhaps not surprising that the Court has struggled to ascertain just how much presidential oversight Article II requires.

The Supreme Court's first lengthy foray concerning the President's removal authority, as is well known, came in *Myers v. United States* [48] The Court held that a congressional effort to restrict the President's removal of a first-class postmaster by requiring Senate approval for all such discharges violated Article II.[49] And, largely in dicta, the Court stated that Article II not only prevented the Senate from having a direct role in removing an executive branch official, but that the President himself *must* be able to remove at will all officers he appointed in the executive branch. The importance of protecting postmasters from presidential interference was not evaluated; rather, the opinion was sweeping in that its reasoning seemingly covered all officers in the executive branch.[50] Yet what is not as well remembered is that the Court specifically flagged the question whether Congress must also allow the President to remove those officers whom Congress

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[47] Indeed, at the Founding, Congress delegated substantial financial authority to individuals insulated from presidential supervision. *See* Christine K. Chabot, *Is the Federal Reserve Constitutional? An Originalist Argument for Independent Agencies*, 76 NOTRE DAME L. REV. 1, 27–43 (2019) (focusing on delegation to the Sinking Fund Commission in the early years of the nation). Moreover, for a historical discussion of the limited understanding of the reasons for which a President could remove an officer for cause, *see* Manners & Menand, supra note 8, at 28–32.

[48] Myers v. United States, 272 U.S. 52 (1926).

[49] *Id.* at 83–84 (holding that Congress can take no part in the removal process). The Court has not wavered from that position since. Bowsher v. Synar, 478 U.S. 714, 733–34 (1986).

[50] *See Myers*, 272 U.S. at 204–05. The historical analysis in *Myers* recently has come under attack, undermining much of the originalist basis for the unitary executive. *See generally* Jed Shugerman, *The Indecisions of 1789: Strategic Ambiguity and the Imaginary Unitary Executive (Part I)* (drft. Dec. 13, 2021) [hereinafter Shugerman, *Indecisions*].

had empowered to adjudicate disputes in the executive branch,[51] leaving open the possibility that presidential control might "not apply to the judges, over whose judicial duties he could not properly exercise any supervision or control after their appointment."[52] *Myers* reflects formal reasoning in that it did not factor in Congress's interest in protecting the officer from the President's removal authority. The Court's carve-out of adjudicative responsibilities suggested that the Court, in a future case, might introduce some balancing into the equation, particularly when considering restraints on adjudicative officers.

The Court's return to the removal issue nine years later in *Humphrey's Executor v. United States*[53] reflected a modest turn towards balancing congressional and executive authority in the removal context. There, in considering the propriety of President Franklin Delano Roosevelt's discharge of a Federal Trade Commission (FTC) Commissioner, the Court held that Congress could choose to limit the President's removal authority over *quasi-legislative* and *quasi-judicial* bodies such as the FTC. The Court noted that if the Constitution mandated plenary removal authority for FTC Commissioners, then such authority also would exist over "judges of the legislative Court of Claims, exercising judicial power."[54] For purely executive officers, the *Myers* approach held sway, but the Court engaged in a more functional approach for superior officers whom Congress had tasked with legislative-type or judicial-type duties. In those contexts, the Court was willing to consider the importance of Congress's determination to shield the officer from the President's at-will removal authority.[55] At the same time, the decision embraced formal distinctions among *executive*, *quasi-legislative*, and *quasi-judicial* powers.

The Court left unexplored the question whether Congress also could shield removal of officers who discharged a mixture of executive and either quasi-judicial or quasi-legislative authority as most agencies

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[51] *Myers*, 272 U.S. at 156.
[52] *Id.* at 156–57.
[53] Humphrey's Ex'r v. United States, 295 U.S. 602, 629 (1935).
[54] *Id.*
[55] *Id.* at 630.

currently do. In other words, Congress could have circumvented *Myers* if it grafted judicial or legislative duties onto a purely executive office. In that eventuality, a functional balancing test might have been inevitable, weighing the importance of Congress's judgment to shield an officer exercising such a mixture of powers from plenary removal against the intrusion into the Chief Executive's Article II authority.

The Court continued to follow *Humphrey's Executor* a generation later in *Wiener v. United States*, holding that the President could not remove a member of the War Claims Tribunal other than for cause.[56] From the nature of the Tribunal's duties, the Court presumed that Congress would not have wanted the President to interfere with the member's adjudicative duties.[57] According to the Court, the Tribunal's power "to adjudicate according to law" resembled that of Article III courts or the Court of Claims, and, as a consequence, the President should not interfere with the judgment exercised by a member of the Tribunal.[58] More than in *Humphrey's Executor*, the Court focused on Congress's interest in insulating the tasks it delegated from presidential interference.[59] The Court did not signal that any other aspect of *Humphrey's Executor* would be altered.

The Court jettisoned the formal approach in *Morrison v. Olson.*[60] There, the Court deployed a functional balancing approach to gauge whether Congress could limit the President's removal over a purely executive official, albeit an inferior officer—the independent counsel.[61] The Court assessed the scope of the independent counsel's authority and balanced it against Congress's interest in assuring independent investigation of wrongdoing within the executive branch.[62] In particular, the Court stressed that the independent counsel exercised virtually no policymaking authority.[63] The Court concluded that Congress's limitation on the removal authority prevailed because it did not "interfere impermissibly with his constitutional obligation to

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[56] Wiener v. United States, 357 U.S. 349, 356 (1958).
[57] *See id.* at 355–56.
[58] *Id.* at 355.
[59] *Compare id.* at 356, *with Humphrey's Ex'r*, 295 U.S. at 625–26.
[60] 487 U.S. 654 (1988).
[61] *Id.* at 711.
[62] *Id.* at 685–97.
[63] *Id.* at 671.

ensure the faithful execution of the laws."[64] The Court did not specify whether this test was to be used for both superior and inferior officers, but it seemingly covered both categories.

The Supreme Court's functional approach did not last long. In *Free Enterprise Fund v. Public Company Accounting Oversight Board*,[65] the Court held that two layers of insulation from the President's at-will removal power violated Article II. The Court stated that "[b]y granting the Board executive power without the Executive's oversight, [the] Act subverts the President's ability to ensure that the laws are faithfully executed—as well as the public's ability to pass judgment on his efforts."[66]

In *Free Enterprise Fund*, the question concerned the status of an inferior officer as in *Morrison v. Olson.* The Court asked whether "the President [could] be restricted in his ability to remove a principal officer, who is in turn restricted in his ability to remove an inferior officer, even though that inferior officer determines the policy and enforces the laws of the United States?"[67] The Court did not balance the importance of the duties exercised by the Public Company Accounting Oversight Board (PCAOB) against Congress's interest in shielding the Board from presidential interference.

Despite the formalism of the Court's ruling against two layers of insulation, the Court specifically stated that its holding did not "address that subset of independent agency employees who serve as administrative law judges . . . . [U]nlike members of the Board, many administrative law judges of course perform adjudicative rather than enforcement . . . functions," and the Court focused on the "policy and enforcement" actions of the PCAOB.[68] Although the formal approach in *Free Enterprise Fund* starkly raises the possibility that ALJs in independent agencies should be removable at will, the opinion also suggested that functional considerations of the adjudicative role of ALJs might come into play in a future case.

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[64] *Id.* at 693.
[65] *See generally* Free Enter. Fund v. PCAOB, 561 U.S. 477, 478 (2010).
[66] *Id.* at 498.
[67] *Id.* at 483–84.
[68] *Id.* at 507 n.10.

B. The Present

The Supreme Court's recent case addressing the unitary executive, *Seila Law LLC v. Consumer Financial Protection Bureau*,[69] stressed functional considerations in holding that Congress could not insulate the head of the Bureau from the President's at-will removal authority. The Bureau, much like the FTC in *Humphrey's Executor,* exercises a mixture of executive, legislative, and adjudicative functions. Per Chief Justice Roberts, the Court reiterated "that, 'as a general matter,' the Constitution gives the President 'the authority to remove those who assist him in carrying out his duties,' . . . . 'Without such power, the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else.'"[70] The Court reinterpreted its prior holdings to permit only two exceptions: the *Humphrey's Executor* exception allowing Congress to "create expert agencies led by a *group* of principal officers removable by the President only for good cause," and the *Morrison v. Olson* exception for "certain *inferior* officers with narrowly defined duties" who lacked "policymaking or significant administrative authority."[71]

In subsequently concluding that Congress could not, consistent with Article II, insulate the Bureau's head from the President's plenary removal authority, the Court used functional arguments. The Court noted that with "the sole exception of the Presidency, [the constitutional] structure scrupulously avoids concentrating power in the hands of any single individual."[72] The problem with the Consumer Financial Protection Bureau (CFPB), in other words, unlike the FTC, Securities and Exchange Commission (SEC), NLRB, and other independent regulatory commissions, is that a single director need not obtain the agreement of others before approving an enforcement

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[69] Seila Law LLC v. CFPB, 140 S.Ct. 2183, 2192 (2020).
[70] *Id.* at 2191 (citations omitted) (quoting Free Enterprise Fund v. PCAOB, 561 U.S. 477, 513–14 (2010)).
[71] *Id.* at 2192–99. The Court more recently in Collins v. Yellen altered the focus from the "significant" executive authority in *Seila Law* to simply "executive" authority, reasoning that "the nature and breadth of an agency's authority is not dispositive in determining whether Congress may limit the President's power to remove its head." *Collins*, No. 19-422, slip op. at 27 (U.S. June 23, 2021).
[72] *Seila Law*, 140 S. Ct. at 2202.

action, proposing a rule, or resolving a case. And unlike members of Congress, the single director is not checked by the need to persuade fellow members of his or her chamber, let alone the other chamber.

In addition to such functional arguments, the Court relied on historical practice, which can be persuasive in adopting both formal and functional assessments. The Court stressed that the single-member structure of the CFPB was "novel" and that Congress instead had crafted almost every other independent agency as a multi-member commission.[73] The historical record supported the impropriety of Congress's attempt to infuse the CFPB with greater independence.

The Court continued that, due to the President's unique role under the Constitution, he had to be responsible for such exercises of authority—"the Framers made the President the most democratic and politically accountable official in Government. Only the President . . . is elected by the entire Nation."[74] To that end, the Constitution "render[s] the President directly accountable to the people through regular elections."[75] Indeed, because the director serves a five-year term, some Presidents may be stuck with their predecessor's choice and may *never* be able to appoint a director.[76] The Court continued that, not only was the single-member structure of the Bureau problematic, but so was the fact that the Bureau received funds outside the appropriations process and thus was more independent financially than other agencies.[77]

In short, while embracing a version of the unitary executive, the Court deployed functional justifications. The Court declined to reconsider *Humphrey's Executor*,[78] focusing instead on the greater independence exercised by the CFPB Director given the single-member structure, his or her five-year term in office, and the agency's comparative financial autonomy. And the Court defended its view by focusing on historical precedents, suggesting that the CFPB's structure

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[73] *Id.* at 2201, 2240 ("'Perhaps the most telling indication of [a] severe constitutional problem' with an executive entity 'is [a] lack of historical precedent' to support it.") (citation omitted) (quoting *Free Enter. Fund*, 561 U.S. at 505 (2010)).
[74] *Id.* at 2203.
[75] *Id.*
[76] *Id.* at 2204.
[77] *Id.*
[78] *Id.* at 2206.

was "novel" in vesting such wide authority in a single individual outside the President's at-will removal authority.[79] The issue raised is whether comparable functional and historical considerations will inform future resolution of whether ALJs can be protected from at-will removal—at least in independent agencies—without jeopardizing the President's control over Article II.

Indeed, in subsequently striking down the single-member head of the Federal Housing Finance Agency, the Court in *Collins v. Yellen*[80] similarly relied on the importance of presidential control "to ensure that these subordinates serve the people effectively and in accordance with the policies that the people presumably elected the President to promote."[81] Yet, in doing so, the Court distinguished the *Wiener* precedent by noting that "the War Claims Commission was an adjudicatory body, and as such, it had a unique need for 'absolute freedom from Executive interference.'"[82]

The D.C. Circuit more recently ducked that very question, dismissing a challenge to an ALJ's status in the Department of Agriculture on the ground that the plaintiff had failed to exhaust available administrative remedies.[83] Judge Rao in dissent, however, would have held the APA protections for ALJs to be unconstitutional. Her opinion relied extensively on *Free Enterprise Fund*[84] and *Seila Law* in concluding that the "'dual for-cause limitations on the removal'

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[79] *Id.* at 2192.
[80] *Collins*, No. 19-422, slip op. at 26.
[81] *Id.* at 27.
[82] *Id.* at 25 n.18 (citation omitted). The Office of Legal Counsel has read *Seila Law* and *Collins* similarly. *See* Constitutionality of the Commissioner of Social Security's Tenure Protections, 45 Op. O.L.C., slip op. at 10 (July 8, 2021) ("We emphasize that both of these recent decisions leave open the possibility that certain agencies, including (and perhaps especially) some that conduct adjudications, may constitutionally be led by officials protected from at-will removal by the President.").
[83] *See* Axon Enter. v. FTC, 986 F. 3d 1173, 1177 (9th Cir. 2021) (dismissing a similar constitutional challenge because of plaintiff's failure to raise the claim before the agency).
[84] *See* Fleming v. U.S. Dept. of Agric., 987 F.3d 1093, 1114 (D.C. Cir. 2021) (arguing that presidents now wield more influence over ALJs than previously because Congress post-*Lucia* must vest the appointment authority in the President or a head of a department).

of ALJs 'contravene the Constitution's separation of powers.'"[85] Yet the logic of her opinion extends well beyond the reasoning in those two Supreme Court decisions because the Department of Agriculture is not an independent agency.[86]

Rather, Judge Rao reasoned that a second layer of insulation from the President's removal authority existed because ALJs could appeal any discipline or removal for cause to the independent MSPB, whose members are also insulated from the President's plenary removal authority.[87] But if review of a *for cause* removal of an inferior officer, such as an ALJ, by an independent agency is unconstitutional, then *judicial* review of the President's *for cause* determination—as in *Humphrey's Executor*, *Wiener*, and *Morrison*—presumably would be unconstitutional as well. It is hard to imagine why the President's need for control can be harmonized with judicial review of a *for cause* dismissal but not for agency review of that same determination. In short, Judge Rao must have concluded that *one* layer of *for cause* protection itself is unconstitutional if it can be reviewed either by judges or agency heads outside the President's direct control. Thus, she apparently would extend *Seila Law* to prohibit the independence of all ALJs. Other challenges to ALJ status are forthcoming.

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[85] *Id.* at 1115 (Rao, J., dissenting) (citations omitted).

[86] Ironically, as an academic, Judge Rao defended the constitutionality of for cause restrictions on the removal of adjudicators in the executive branch, in part because of historical practice, and in part based on Due Process concerns. Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 ALA. L. REV. 1205, 1247–48 (2014).

[87] *See* Linda D. Jellum, *"You're Fired!" Why the ALJ Multi-Track Dual Removal Provisions Violate the Constitution and Possible Fixes*, 26 GEO. MASON L. REV. 705, 743 (2019). See also United States v. Arthrex, No. 19-1434, slip op. at 12–15 (U.S. June 21, 2021) (casting doubt on the constitutionality of the MSPB by stressing the close presidential control needed over those making final decisions, including adjudications in the executive branch). On the other hand, if the Supreme Court rules that Article II cannot be reconciled with independent agencies, then presumably Congress could protect *all* ALJs from at will removal because their employing agency heads (and the MSPB members) would be subject to plenary removal.

III. THE SCOPE OF PRESIDENTIAL SUPERINTENDENCE UNDER ARTICLE II

The test the Supreme Court devised to preserve a robust Chief Executive currently reflects a mix of formal and functionalist considerations. Justices at times have relied on views at the Founding; the historical practice thereafter; the constitutional structure creating a single executive atop the administration; and functional considerations for why presidential control is so important. All these factors, therefore, may contribute to determining whether the APA's restrictions on removal comport with the constitutional structure. Of course, some members of the Supreme Court and many commentators believe the very notion of a unitary executive to be misguided.[88]

With respect to presidential control over adjudicative duties delegated by Congress, the record at the Founding does not support a requirement of close presidential supervision. To be sure, Congress often delegated adjudicative authority to the executive branch without limiting presidential control. For example, with respect to veterans' claims, the First Congress provided compensation to disabled veterans, without including a claims resolution or adjudicative mechanism.[89] Congress directed that pensions were to be paid "under such regulations as the President of the United States may direct."[90] The implication was that the Executive should proceed as he deemed appropriate. Similarly, Congress in 1794 appropriated money for those who fled a Saint Domingo insurrection "in such manner, and by the hands of such persons, as shall, in the opinion of the President, appear most conducive to the humane purpose of this act."[91] Full control rested with the President.

But there were several striking exceptions at the outset. First, Congress delegated to the courts the responsibility to grant citizenship

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[88] *See, e.g.*, Seila Law LLC v. CFPB, 140 S.Ct. 2183, 2224–38 (2020) (Kagan, J., dissenting); Shugerman, *Indecisions*, supra note 50, at 81–83; Shane, *Prosecutors at the* Periphery, *supra* note 43, at 242–45; Strauss, *Overseer*, *supra* note 41, at 705–15.

[89] Act for the Payment of the Invalid Pensioners of the United States, Pub. L. No. 1–25, 1 Stat. 95 (1789).

[90] *Id.*

[91] Act Providing for the Relief of the Inhabitants of Saint Domingo, 6 Stat. 13 (1794).

if individuals had lived within the jurisdiction for at least a year and then made "proof to the satisfaction of such court that, he is a person of good character."[92] Such administrative decisions rested outside the President's control, albeit within the judicial branch.

Second, when Congress passed the Invalid Pension Act in 1792, it delegated the authority to Article III judges to determine eligibility for pensions, subject only to limited review by the Secretary of War.[93] The Supreme Court later invalidated the statute on the ground that Congress could not permit the executive branch to revise determinations of Article III judges,[94] but no one objected to the congressional measure on the ground that the President needed to be able to remove all officials recommending resolution of claims against the United States.[95] In light of the controversy, Congress subsequently limited the courts' involvement to receiving evidence that the executive branch would then use in determining eligibility.[96] Congress had no qualms about vesting adjudicative responsibilities outside the President's control even when the final decision was the President's to make.

Third, Congress in the 1793 Patent Act provided that in case of competing applications for patents, the patentability decision would no longer be made, as under the prior Act,[97] by the Secretary of State, Secretary of War, and Attorney General but rather by a Board of three

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[92] Act of March 26, 1790, 1 Stat. 103. As James Madison wrote, an official who "partakes strongly of the judicial character . . . should not hold . . . office at the pleasure of the Executive branch of the Government." JAMES MADISON, THE WRITINGS OF JAMES MADISON 413 (Gaillard Hunt, Hunt ed. 1904).

[93] Invalid Pension Act of 1792, ch. 11, Pub. L. 2–11, 1 Stat. 243.

[94] Hayburn's Case, 2 U.S. 409, 409–10 (1792).

[95] Moreover, Congress delegated executive authority to the Sinking Fund Commission and to Assayers of the Mint, and each group of delegees included the Chief Justice. *See* Chabot, supra note 47, at 32–34, 37–40, 43, 46–48, 50–51; Act establishing a Mint, and regulating the Coins of the United States, ch. 16, 1 Stat. 246, 250. Such delegations reveal that, in Congress's eyes, presidential control over executive functions need not be absolute, although the Chief Justice presumably could not exercise such responsibilities on his own.

[96] Act of Feb. 28, 1793, ch. 17, 1 Stat. 324–325 (explaining how courts were to assess evidence).

[97] Patent Act of 1790, ch. 7, Pub. L. 1-7, 1 Stat. 109–112 (1790).

arbitrators, two of whom were selected by the parties themselves.[98] Resolution of adjudication within the executive branch, in other words, rested in the hands of non-executive branch actors. At the time of the Founding, therefore, there was clearly no consensus that the President through appointment and removal had to control all adjudicative responsibilities delegated by Congress.[99]

Moreover, the Court in *Free Enterprise Fund* and *Seila Law* emphasized not only the history at the Founding but also the historical practice since. Congress enacted the APA 75 years ago and restrictions on removal of ALJs have been commonplace ever since. In contrast to the congressional structures that were deemed "novel" in *Free Enterprise Fund* and *Seila Law,* historical practice weighs in favor of congressional discretion to insulate ALJs from at-will removal.

The historical practice—both at the Founding and more recently—constitutes just one lens with which one can assess the needed presidential control over adjudicative functions delegated by Congress. Other considerations, whether the overall structure of the Constitution or particular language in Article II, may lead some to stress the importance of a robust executive removal authority despite the lack of historical support.

In considering possible formulations, one approach might focus on the stature of the individual carrying out the tasks. Under this approach, *all* officers in the executive branch, whether a superior or inferior officer, would be subject to at-will dismissal to maintain an effective connection to the President's supervision. This approach—much as described by the Court in *Myers*—would in effect preclude any protection for heads of independent agencies or for inferior officers such as the independent counsel or ALJs. Under this view, any official "exercising significant authority pursuant to the laws of the United States"[100] must be removable at will to preserve a sufficiently

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[98] Patent Act of 1793, ch. 11, Pub. L. 2-11, 1 Stat. 318 (1793); *see also* U.S. v. Arthrex, No. 19-1434, slip op. at 12–13 (U.S. June 21, 2021) (Thomas, J., dissenting) (noting that Congress long has delegated the power to make binding patent decisions to individuals who were not superior officers of the United States).

[99] *See* Manners & Menand, *supra* note 8, at 6 n.23 (noting that Congress apparently also protected justices of peace, who were appointed by the President, from the President's at-will removal authority).

[100] Buckley v. Valeo, 424 U.S. 1, 126 (1974).

close tie between the President and officer. Those in the civil service could be exempted, but any governmental official whose duties exceeded the "significant authority" threshold would be subject to at-will dismissal.[101] Given that the Supreme Court has held that the "power of removal is incident to the power of appointment,"[102] it might follow that all officers must be removable at will by the appointing authority. A number of Justices on the Court may be leaning in this direction.

One could take this approach further and argue that *all* federal employees must be subject to at-will discharge. Some have recently so argued, reasoning that the unitary executive demands close supervision of even clerks, janitors, and grounds crew.[103] Despite the fact that civil service protections have existed for over a century,[104] an expansive view of the unitary executive could conclude that the President must be able to discharge all employees in the executive branch.

A different formalist focus on the stature of the individual is also possible, which would make more of the distinction in the Constitution between superior and inferior officers. The President's need to remove an inferior officer arguably is not as critical to maintaining the unitary executive. Given the two categories of officers in the Constitution, plenary removal would only extend to the most important level of officer. The criteria for determining the characteristics of the officer would be congruent with the set of functions for which the President must be directly accountable to the public. The Court earlier in *United States v. Perkins*[105] seemed to adopt that position, explaining that "[w]e have no doubt that when Congress, by law, vests the appointment of inferior officers in the heads of

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[101] *Id. See* Jennifer L. Mascott, *Who Are Officers of the United States?*, 70 STAN. L. REV. 443, 454 (2018) (noting that the category of which governmental officials should be considered *officers* might expand as well).

[102] Myers v. U.S. 272 U.S. 52, 122; Free Enter. Fund v. PCAOB, 561 U.S. 483, 504 (2010). Of course, the Senate must consent to those appointments, a fact frequently overlooked by adherents of the unitary executive.

[103] Philip K. Howard, *Restoring Accountability to the Executive Branch*, CTR. FOR THE STUDY OF THE ADMIN. STATE 21–22 (2020) (explaining how *Free Enterprise Fund* left open the President's constitutional authority over non-officers).

[104] Lloyd-LaFollette Act of 1912, ch. 389, Pub. L. 62-336, 37 Stat. 539, 555. *See* discussion in Arnett v. Kennedy, 416 U.S. 134, 140 (1974).

[105] United States v. Perkins, 116 U.S. 483, 483 (1886).

department it may limit and restrict the power of removal."[106] As long as their superiors are subject to close presidential control, then direct presidential supervision over inferior officers is not critical to preserve the unitary executive. Presidents can still demand the loyalty of those officers' superiors and be judged by voters for exercise of the policy formulated. To be sure, the efforts of inferior officers are important, as are those of career public servants. But the public is not as likely to hold the President responsible for the slowness or negligence of efforts from personnel lower on the totem pole, as least as much as they are for policy formulated by heads of departments and other superior officers of the United States.

Although logical, the Court has swerved from such an approach, finding it overinclusive in that removal at will is not required (at least to date) for a variety of officers of the United States if Congress has a good reason for insulating their removal and if their power is checked by other factors, such as being part of a multi-member commission. The Court has also found the above approach underinclusive in part by holding that inferior officers must be subject to at-will removal if their superiors are subject only to removal for cause, as for members of the PCAOB, as well as when presidential oversight is required to assure that the President can perform his or her constitutionally assigned functions.[107]

A number of functional approaches to Article II authority are also possible, some of which might themselves leave particular executive branch judicial officials unprotected depending upon the type of balancing test selected. For instance, the approach in *Humphrey's Executor* focuses on separating delegated authority from Congress into categories of purely executive, quasi-judicial, and quasi-legislative. Those characterizations are highly contestable. As Justice Stevens noted when concurring in *Bowsher*, "One reason that the exercise of legislative, executive, and judicial powers cannot be categorically distributed among three mutually exclusive branches of Government is that governmental power cannot always be readily characterized within only one of those three labels."[108] Moreover, even

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[106] *Id.* at 485.
[107] Morrison v. Olson, 487 U.S. at 693.
[108] Bowsher v. Synar, 478 U.S. 714, 749 (1986) (Stevens, J., concurring). The Court

if there is something to be said about the separate categories, Congress has delegated a mix of such responsibilities to virtually all agencies. Distinguishing among categories of executive, quasi-legislative, and quasi-judicial authority, therefore, has become less defensible.

For another functional perspective, the Supreme Court might decide that the President's interest in supervision is paramount when Congress has delegated to an officer in the executive branch the power to bind those outside the branch.[109] Arguably, the executive branch cannot bind any individual or firm unless the President can be sufficiently tied to that decision. Under this view, the President should be able to remove all such officers at will, no matter the duties exercised.

A more promising functional test would consider, consistent with the unitary executive theory, the types of conduct for which the President must be accountable to the public. Both *Free Enterprise Fund* and *Seila Law* make it critical for the public to be able to tie administrative action to the President.[110] Under this version of the unitary executive, the question would be how to ascertain which governmental acts must be tied in the public eye to the President and thus subject to close presidential supervision. Almost every task accomplished by governmental employees is important in some sense—otherwise, presumably, taxpayer dollars would not be devoted to the effort. Whether the issue is research by a governmental scientist, construction of a bridge by the Army Corps of Engineers, or brief writing by an agency attorney, such efforts reflect the government at

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in *Arthrex* similarly stressed that all such duties have to be considered executive if carried out by officers in the executive branch. United States v. Arthrex, No. 94-1434, slip op. at 12–13 (U.S. June 21, 2021).

[109] *Bowsher* suggests such a test. *See Bowsher*, 478 U.S. at 733 ("The executive nature of the Comptroller General's functions under the Act is revealed in § 252(a)(3), which gives the Comptroller General the ultimate authority to determine the budget cuts to be made. Indeed, the Comptroller General commands the President himself to carry out, without the slightest variation (with exceptions not relevant to the constitutional issues presented), the directive of the Comptroller General as to the budget reductions."); *see also Arthrex*, No. 94-1434 (holding that administrative patent judges could not render final decisions with respect to the validity of patents unless their decisions became more clearly linked to the President).

[110] *See* Free Enter. Fund v. PCAOB, 561 U.S. 477, 498 (2010); Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2191 (2020).

work but are not actions that we conventionally ascribe to the President. Indeed, the entire Civil Service system reminds us that there exist wide swathes of governmental work that need not be tied closely to the President. In other words, the Constitution requires that the President expect "here and now subservience"[111] only for officials who exercise certain types of policymaking authority.

The decision in *Morrison v. Olson*[112] reflects that analysis. The Court, in upholding the *for cause* limitation on the independent counsel, acknowledged that the independent counsel "exercises no small amount of discretionary judgment in deciding how to carry out his or her duties under the Act."[113] Yet the Court clarified that what was critical for presidential control was not discretion by itself but rather policymaking—"this grant of authority does not include any authority to formulate policy for the Government or the Executive Branch . . . [and the independent counsel] is to comply to the extent possible with the policies of the Department."[114] Under a functionalist approach, it is critical to tie policymaking to the President but not necessarily all exercise of discretion by subordinates.

To be sure, *officer* status is a convenient proxy for that work which, under the unitary executive theory, must be connected to the Chief Executive. But many officers' tasks do not reflect such significant policymaking, as the decision in *Morrison v. Olson* attests, and much activity outside of the immediate control of officers can affect the country greatly.[115] To provide two simple examples—government scientists in the Food and Drug Administration (FDA) have great influence over which medicines the public will be able to buy and for how much, even if they do not wield final authority.[116]

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[111] *See Bowsher*, 478 U.S. at 727 n.5 (quoting Synar v. United States, 626 F. Supp. 1374, 1392 (D.D.C. 1986)).
[112] Morrison v. Olson, 487 U.S. 654, 655 (1988).
[113] *Id.* at 691–92.
[114] *Id.* at 671–72. The Court in *Seila Law* cited this reasoning in *Morrison v. Olson* with approval. *Seila Law*, 140 S. Ct. at 2199.
[115] *Morrison*, 487 U.S. at 671–72 (asserting the President under Article II has the power to appoint officers in the judicial branch, which suggests that officer status by itself is not talismanic).
[116] *FDA Mission: About FDA*, FEDERAL DRUG ADMINISTRATION, (Mar. 28, 2018), https://www.fda.gov/about-fda/what-we-do; *see also* Claire Felter, *What is the FDA's Role in Public Health?*, COUNCIL ON FOREIGN RELS. (Sept. 10, 2021),

Similarly, lawyers in the Department of Justice wield considerable influence over which arguments the government will make in court and in that way shape the power of the government for the future.[117]

Under such a functional approach, the question therefore would be how to determine which governmental functions must be attributed to the President, both to permit the President the requisite control and to allow the public to tie such actions to the President to ensure electoral accountability. In contexts other than appointment and removal, courts and the executive branch itself have differentiated among the executive branch's many functions to ascertain when close presidential control is needed. They have concluded—parallel to the reasoning in *Morrison v. Olson*—that presidential supervision is most critical for determinations that reflect economic, social, and political policy. Such analyses provide a plausible framework for understanding how to apply the unitary executive formulation.

A. Federal Tort Claims Act

Although the question of which tort claims can be litigated against the federal government may seem far afield from the scope of the President's removal authority, in both contexts the resolution turns on determining which governmental functions must be subject solely to presidential control. Congress waived much of the federal government's tort immunity in the FTCA.[118] Courts must scrutinize agency actions to determine if agency actors were negligent (based on the law of the state in which the injury arose)[119] in constructing dams, conducting blasting operations, or even in regulating banks. Congress determined, however, that the prospect of damages actions might lead

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https://www.cfr.org/backgrounder/what-fdas-role-public-health (noting the FDA's authority and role in relation to other federal agencies, despite its lack of final authority).

[117] *See* Stephen G. Calabresi & Christopher S. Yoo, *The Unitary Executive: Presidential Power from Washington to Bush*, 53–54 (Yale 2008) (explaining that the independence of the Bank of the United States may reflect the view that monetary policy was distinct from political and social policy).

[118] 28 U.S.C. §§ 2671–2680.

[119] *Id.* § 2674 ("The United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances.").

agencies to curb their activities for fear of incurring liability. The potential for damages actions might deter a risk-averse agency from novel policies that benefit the public. Agencies might conform their conduct to what they believe reviewing judges would deem *reasonable*, as opposed to what they believe to be most in the public interest. In light of the potential intrusion into agency operations, Congress included one catchall exception to preclude recovery of "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."[120]

To determine what constitutes a *discretionary function* of government under the FTCA, courts historically first looked to whether the agency action stemmed from a decision at the *planning* as opposed to the *operational* level. In *Dalehite v. United States*,[121] those injured in a tragic accident in Texas caused by explosion of fertilizer stored for export at a government facility sued the government, alleging negligence in how the fertilizer was stored. The Court opined that the discretion protected in the Act referred to "the discretion of the executive or the administrator to act according to one's judgment of the best course," and held that the exception protected any act made "at a planning rather than operational level."[122] The Court dismissed the action, finding that the storage decisions had been made at a high enough level.[123]

The key was not solely whether a high-level official made the decision, although that factor was relevant. After all, the Attorney General's decision to drive a car at 95 MPH may be authoritative but insufficiently reflect *planning* to qualify for the exception. Rather, the Court required a semblance of a plan and fidelity in execution of that plan.[124]

Courts also construed the discretionary function consistent with dicta in *Dalehite* that "it was not contemplated that the

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[120] *Id.* § 2680(a).
[121] Dalehite v. United States, 346 U.S. 15, 15 (1953).
[122] *Id.* at 34, 42.
[123] *Id.* at 42.
[124] *Id.* at 40.

Government should be subject to liability arising from acts of a governmental nature or function."[125] The Supreme Court subsequently, however, rejected the distinction between governmental and proprietary acts in *Indian Towing Co. v. United States* as "inherently unsound"[126] but did not come up with any new formulation.

The Court in the intervening decades has modified the planning versus operational level distinction to focus more narrowly on the type of decision reached in determining when the discretionary function exception applies. In *Berkovitz v. United States*, the negligence claim arose when an infant contracted polio after ingesting an oral polio vaccine that the FDA had approved for release to the public.[127] Plaintiffs alleged that the FDA was negligent in inspecting and approving a particular batch of polio vaccines.[128]

The Supreme Court determined that federal courts should apply a two-prong test when analyzing whether the discretionary function exception applies:

> [A] court must first consider whether the action is a matter of choice for the acting employee. This inquiry is mandated by the language of the exception; conduct cannot be discretionary unless it involves an element of judgment or choice. . . . [The] exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow.[129]

If the challenged conduct is a matter of choice, "a court must [then] determine whether that judgment is of the kind that the discretionary function exception was designed to shield[:] . . . governmental actions and decisions based on considerations of public policy."[130] The Court explained that when existing regulations "allow room for

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[125] *Id.* at 28.
[126] Indian Towing Co. v. United States, 350 U.S. 61, 65 (1955).
[127] Berkovitz v. United States, 486 U.S. 531, 531 (1988).
[128] *Id.* at 540.
[129] *Id.* at 536.
[130] *Id.* at 536–37.

implementing officials to make independent policy judgments, the discretionary function exception protects the acts taken by those officials in the exercise of this discretion."[131] The Court concluded that insufficient information existed in the record to determine whether the agency's decision to approve the vaccine lot stemmed from considerations of public policy.[132] Some cases are more clear-cut: auto accidents fall outside the discretionary function exception[133] as does most medical malpractice.[134] But any action stemming from broader notions of the public welfare likely is protected.

The Supreme Court in *United States v. Gaubert*[135] soon after amplified that the choice protected had to be "grounded in the policy of the regulatory regime" and be "susceptible to policy analysis."[136] In reviewing a negligence claim based on the bank regulatory agency's failure to advise and help administer the savings and loan competently, the Court concluded that even those recommendations by the agency in the day-to-day management of a savings and loan were susceptible to policy analysis and therefore shielded by the exception.[137]

Courts in applying the discretionary function exception have stressed that discretion by itself is not sufficient to warrant immunity. Rather, the government's act, no matter how discretionary, must flow from political, economic, or social concerns. For instance, in *Cope v. Scott*, the D.C. Circuit stated that, although the decision whether to warn about dangerous road conditions was discretionary, the decision on how to implement the warning did not involve the type of discretion

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[131] *Id.* at 546. *See also* United States v. S.A. Empresa de Viacao Aerea Grandense (Varig Airlines), 467 U.S. 797, 798 (1984) ("Congress wished to prevent 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.").

[132] On the other hand, if the officials knowingly released unsafe lots, no discretion existed, and the exception would not come into play. *S.A. Empresa de Viacao Aerea Grandense (Varig Airlines)*, 467 U.S. at 798.

[133] *See* Dolan v. United States Postal Service, 546 U.S. 481, 487–88 (2006) (stating that crashes quintessentially are not protected under the exception).

[134] *See, e.g.*, Wheat v. United States, 860 F.2d 1256, 1258 (5th Cir. 1988) (reaffirming that most malpractice claims are not protected by the discretionary function exception).

[135] United States v. Gaubert, 499 U.S. 315, 315 (1991).

[136] *Id.* at 325.

[137] *Id.* at 328–29, 331–33.

protected by the exception because the implementation decision stemmed from "engineering and aesthetic" concerns as opposed to public policy.[138] In *Andrulonis v. United States* the court rejected application of the discretionary function exception because the claims against a government immunologist "involved 'the kind of judgment that requires the knowledge and professional expertise of [the] government employees who implement government policies'" but not a balancing of public policy concerns.[139] Similarly, in *Walen v. United States*,[140] the court rejected application of the exception because the government's allegedly faulty maintenance causing an injury in a public park arose from "professional and scientific assessments" rather than a balancing of competing preservation and safety interests.[141] The government engineers' actions undoubtedly are important, and indeed the negligent performance of such actions can lead to significant governmental liability and even expose the President to some political embarrassment. Nonetheless, that professional judgment is not the type that courts have deemed critical to safeguard from judicial probing.

B. Federal Service Labor Management Relations Statute

Analysis of executive branch prerogatives under the Federal Service Labor Management Relations Statute ("Statute") is remarkably similar. Congress enacted the Statute in 1978[142] to establish a structure in which federal employees can collectively bargain with management over a wide range of issues, such as safety and grievance procedures. Striking is not permitted, but continuing disputes must be resolved by an independent impasse panel.[143] The Statute permits employees to organize, but that right does not extend

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[138] Cope v. Scott, 45 F.3d 445, 451–52 (D.C. Cir. 1995); *see also* Marlys Bear Medicine v. United States, 241 F.3d 1208, 1214 (9th Cir. 2001) ("[A]ctions based on technical or scientific standards are not the kind of judgment protected from liability.").
[139] Andrulonis v. U.S., 724 F. Supp. 1421, 1498 (N.D.N.Y. 1989) (quoting Aslakson v. United States, 790 F.2d 688, 693 (8th Cir. 1986)).
[140] Walen v. United States, 246 F. Supp. 3d 449, 462 (D.D.C. 2017).
[141] *Id.* at 464–66.
[142] 5 U.S.C. § 7101(a)(1).
[143] *Id.* § 7101(a)(2).

to a *managerial official*, defined as "an individual employed by an agency in a position the duties and responsibilities of which require or authorize the individual to formulate, determine, or influence the policies of the agency."[144] Analogous to the FTCA context, the Statute recognizes that congressional interference with certain governmental functions would undermine the Article II interest in management of the executive branch. The FLRA has explained that managerial officials are those who "(1) create, establish or prescribe general principles, plans or courses of action for an agency; (2) decide upon or settle upon general principles, plans or course of action for an agency; or (3) bring about or obtain a result as to the adoption of general principles, plans or course of action for an agency."[145] Such officials do not enjoy congressional protections.

In accordance with that statutory definition, the FLRA has held, for example, that computer specialists and procurement contract negotiators may organize.[146] Both positions are important, and officeholders use discretion in the first instance by developing the technical specifications required by agencies and the benchmarks for evaluating computer hardware and, in the second, by negotiating contracts that bind the government. Nonetheless, because the employees did not "formulate, determine, or influence . . . the policies of the agency, [they] cannot be deemed management officials within the meaning of [the Statute]."[147] The employees are "valuable experts or professionals whose actions assist in implementing, as opposed to shaping, the policies in connection with each procurement."[148] Under the Statute, policy formation—not professional status,—is key.

Congress borrowed the *managerial official* exclusion from judicial elaboration of the National Labor Relations Act, which was adopted over 40 years previously to govern labor-management relations in the private sector.[149] Under the Act, the NLRB assesses

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[144] *Id.* § 7103(a)(11).
[145] Department of Navy, Automatic Data Processing Selection Office, 7 F.L.R.A. 172, 177 (1981).
[146] *Id*. at 181.
[147] *Id.*
[148] *Id.*
[149] See NLRB v. Bell Aerospace, 416 U.S. 267, 289 (1974) (construing 29 U.S.C. § 151–152).

which employees are too closely allied with management to warrant the protections in the Act.

In *General Dynamics*,[150] the NLRB recognized that private businesses frequently relied on the technical and professional expertise of employees, such that nonmanagerial employees contribute to managerial decisions by virtue of their expertise. The NLRB noted that "[w]ork which is based on professional competence necessarily involves a consistent exercise of discretion and judgment . . . . Nevertheless, professional employees plainly are not the same as managerial employees."[151] The NLRB continued that "[l]ikewise technical expertise in administrative functions which may involve the exercise of judgment and discretion does not confer executive-type status upon the performer. A lawyer or certified public accountant . . . may well cause a change in company direction, or even policy, based on the professional advice alone, which, by itself, would not make him managerial."[152] Accordingly, the NLRB held that systems engineers who exercised wide technical discretion could organize:

> The fact that the employees involved may handle the entire project assigned to them undoubtedly is a tribute to their organizational skills and abilities, but has little, if any, bearing on managerial authority. Their discretion and decisions are predicated solely on a technical base, and culminate in technical reports or recommendations to managerial superiors who, in turn, determine, establish, and carry out management direction, i.e., "policy," by approving or disapproving the recommendations.[153]

Under that definition, the NLRB has held that port captains overseeing international transport are not managerial even though they exercise

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[150] General Dynamics, Corp., 213 N.L.R.B. 851, 857 (1974).
[151] *Id.*
[152] *Id.* at 857–58.
[153] *Id.*; s*ee* Bulletin Co., 226 N.L.R.B. 345, 358 (1976) (holding that editorial writers are not managerial employees, despite the wide discretion exercised).

discretion over a ship's stowage plans, largely because they are to abide by superiors' policy choices.[154] And professors at universities merit the protections of the Act *if* "the discretion exercised by core faculty members, both individually and collectively, regarding such matters as student recruitment and admissions, completion of degree requirements, and curriculum, clearly is indicative of professional rather than managerial status."[155] NLRB decisions thus mirror those of the FLRA in holding that the discretion exercised by professionals by itself does not make individuals managers within the labor-management statutes.

As with the FTCA discretionary function exception, the labor-management relations cases recognize that the President must superintend closely only those subordinate officials who fashion social, economic, or political policy. Management relies on professional judgments and facts to mold policy but need not, and arguably should not, control those facts.

C. ALJs and Discretion

A key lesson emerges from the discretionary function exception and labor-management cases. In protecting the executive branch in those two very different contexts, the focus has been on whether the executive branch officer's tasks, no matter how important, reflect the social, political, and economic analysis that is the hallmark of executive authority. Although an ALJ's factfinding is far from mechanical, it involves little of the economic or social forecasting that is the staple of the administrative state. Historical assessment of what happened, when, and to whom simply does not implicate the social, political, or economic analysis that should be tied to the President. Most statutes and regulations leave ALJs with *no* discretion but to follow previously established rules.[156] Factfinding, of course, demands

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[154] Evergreen Am. Corp. v. NLRB, 362 F.3d 828, 837–40 (D.C. Cir. 2004).

[155] Goddard College, 234 N.L.R.B. 1111, 1113 (1978); Elmira College, 309 N.L.R.B. 842, 848 (1992); *see also* NLRB v. Yeshiva University, 444 U.S. 672, 686–90 (1980) (holding that professors in that particular university exercised a governing hand in university affairs and therefore should be considered managerial).

[156] *See* Hearings, Appeals, and Litigation Law (HALLEX) I-1-0-3 (noting that the agency has directed ALJs to adhere to a comprehensive manual on all matters of

judgment but not policy formation. Viewed another way, ALJs in assessing facts can determine whether a pitch was a ball or strike[157] but lack discretion to determine a new category.[158]

Moreover, the ALJ factfinding is not binding. Under the APA, affected parties can appeal any adverse judgment to the agency, and the agency may affirm or reverse. Indeed, the agency can rehear any contentious dispute anew. For example, the Social Security Administration (SSA) has the power to review ALJ decisions *sua sponte* to ensure that prior agency policy is pursued faithfully.[159] Agencies defer widely to ALJ factfinding, which elevates its importance. But the power of agencies to overrule ALJs limits any ALJ inclination to engage in adventurous factfinding. And no ALJ determination is final until the agency has an opportunity to review the case. The Supreme Court in *Lucia* held that the lack of finality did not rob ALJs of officer status,[160] but that is not to ignore that the agency's power to change an ALJ's findings suggests that it is the agency head who arguably should be accountable to the President, not that the agency heads should be able to remove ALJs at will. The agency's power to deny any authority to ALJ findings itself represents a critical control function.

The fact that the executive branch has engaged in decades-long collective bargaining with ALJs reinforces that presidents or their proxies need not be able to remove ALJs at will.[161] The Association of Administrative Law Judges, for example, has been a union for over

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statutory interpretation, regulatory interpretation, and even with respect to how to assess facts).

[157] *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005).

[158] *See* SSA, Preface to Social Security and Acquiescence Rulings, https://www.ssa.gov/OP_Home/rulings/rulings-pref.html (last visited Dec. 21, 2021) (noting that the SSA has directed ALJs to follow administratively set policy even when not reached through notice and comment rulemaking because "Social Security Rulings . . . are binding on all components of the SSA").

[159] *See* 20 C.F.R. §§ 404.969(a)–(b), (1977) (empowering the agency to select a sampling of cases to review pre-effectuation).

[160] *See* Lucia v. SEC, 138 S. Ct. 2044, 2055 (2018).

[161] *See* Ass'n of Admin. Judges v. Colvin, 777 F.3d 402, 403 (7th Cir. 2015) (relating the importance of collective bargaining to ALJs).

20 years, representing over 1,000 ALJs, principally in the SSA.[162] The union engages in collective bargaining on behalf of its members, representing them in unfair labor practice proceedings, in grievances, and in court. The union is affiliated with the International Federation of Professional and Technical Engineers of the American Federation of Labor and Congress of Industrial Organizations.[163] Such history, as the Court in *Seila Law* pointed out,[164] strongly militates in favor of limiting presidential control over ALJ functions. Bargaining over employment conditions reflects the reality that the ALJs' judgment is not linked to the critical economic, social, and political policy that solely the President under Article II must superintend. As the Supreme Court explained in *Collins*, the President's removal authority "works to ensure that . . . subordinates serve the people effectively and in accordance with the policies that the people presumably elected the President to promote."[165]

To be sure, a divided FLRA recently reversed course and held that IJs should be considered *managerial officials* under the Statute.[166] The FLRA earlier had determined that IJs were not managerial because "in arriving at their decisions, Immigration Judges are required to apply immigration laws and regulations, . . . their decisions are not published and do not constitute precedent. . . . [and] the decisions are binding only on the parties to the case, are 'routinely' appealed, and are subject to *de novo* review."[167] Moreover, the FLRA in its most recent decision agreed that the Supreme Court's decision in *Lucia* by

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[162] *Social Security Relents and Agrees to Return to Bargaining Table With Judges' Unio*n, AALJ (June 16, 2021), https://d2fwhheo3hasol.cloudfront.net/wp-content/uploads/bsk-pdf-manager/2021/07/Press_Release_Social_Security_Relents_and_Agrees_to_Return_to_Bargaining_Table_6_16_21.pdf (noting that the AALJ represents "approximately 1,200 judges across 160 offices who preside in Social Security disability hearings across the country").

[163] *Association of Administrative Law Judges*, BALLOTPEDIA, https://ballotpedia.org/Association_of_Administrative_Law_Judges (last visited Dec. 8, 2021).

[164] Seila Law LLC v. CFPB, 140 S.Ct. 2183, 2236 (2020).

[165] Collins v. Yellen, No. 19-422, slip op. at 27 (June 23, 2021).

[166] U.S. Dep't of Just. Exec. Off. for Immigr. Rev., 71 F.L.R.A. 1046, 1049 (Nov. 2, 2020).

[167] U.S. Dep't of Just. Exec. Off. for Immigr. Rev., 56 F.L.R.A. 616, 618, 622 (2000).

itself did not call for reversal, because "whether IJs are 'officers' under the Constitution is not relevant in determining if they are or are not management officials."[168] Rather, what is critical is an assessment of "the duties and responsibilities of the individual to determine if he or she is a management official under the Statute."[169]

Nonetheless, the FLRA reversed its prior conclusion and the decision below by its Regional Director[170] because it had "failed to recognize the significance of IJ decisions and how those decisions influence Agency policy. . . . [namely] by interpreting immigration laws when they apply the law and existing precedent to the unique facts of each case."[171] The FLRA did not purport to alter its approach to determine managerial official status, nor did it reconsider its prior determinations distinguishing between managerial and professional officials. To the FLRA, the facts that IJs do not make law and do not render final decisions were not dispositive. Rather, the FLRA relied on the analogy between district and appellate courts, quipping that "arguing that district court decisions do not shape the law while appellate court decisions do . . . is nonsensical."[172] The dissent, puzzled by the reversal in policy, stated that "IJs do not make policy, but instead, only assist in the implementation of agency policy,"[173] and thus should not be considered managerial officials under the Statute. To the dissent, the majority's conclusion "is the antithesis of reasoned decision making."[174] The Biden Administration has withdrawn

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[168] U.S. Dep't of Just. Exec. Off. for Immigr. Rev., 71 F.L.R.A. at 1047–48.
[169] *Id.* at 1047.
[170] The Regional Director acknowledged that "IJs have the ability to exercise discretion in their decision making, bound by the facts of their cases and the law, regulation, and BIA decisions that they are required to follow." *Id.* at 1055. In the Regional Director's view, however, that limited discretion did not convert the judges into managers. The Director explained that "having recommendations generally accepted by superiors does not, on its own rise to the level of 'influential' within the meaning of the Statute." *Id.* at 1063. In short, because immigration judges "do not create policy and their decisions are not precedential," they cannot be considered management. *Id.* at 1064.
[171] *Id.* at 1048.
[172] *Id.* at 1049.
[173] *Id.* at 1051 (DuBester, dissenting).
[174] *Id.* at 1052.

opposition to reconsidering of the decision.[175]

Despite the recent FLRA reversal, the parallels between the Article II removal issue and managerial official status are clear. Factfinding should not make an administrative judge a management official because the judge plays no direct role in future agency policy formulation. If the ALJs have no common law authority, they must strictly apply the rules and regulations set forth by agency leadership.[176] The FLRA correctly noted that IJs can influence the agency's ultimate policy, but many professional employees influence agency policy through their expertise.

Indeed, historical application of the managerial official characterization recognized that influence by itself—as with ALJs—does not determine which officials can organize under the Statute. Rather, only those employees fashioning economic, political, or social policy are precluded from organizing—the same type of discretion that cannot be second-guessed under the FTCA. Under the unitary executive theory, the President should closely superintend those who make policy, not those who apply such policy to the facts at hand.[177] The FTCA and labor-management parallels thus converge in strongly suggesting that ALJ functions, however important, are not those that Article II requires to be under the President's thumb.

The distinction between policymaking and professional

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[175] David Wiessner, *Biden Admin Won't Oppose Bid to Revive Immigration Judges Union*, REUTERS (June 28, 2021), https://www.reuters.com/legal/litigation/biden-admin-wont-oppose-bid-revive-immigration-judges-union-2021-06-28/.

[176] ALJs in several agencies, as in the FTC, exercise greater responsibility in applying open-ended provisions such as when determining—at least as an initial matter—whether the conduct reviewed constitutes an unfair trade practice under 15 U.S.C. § 45 (2018).

[177] In comparison, in U.S. Dep't of Just. Exec. Off. for Immigr. Appeals, 47 F.L.R.A. 505, 506–11 (1993), the FLRA held that members of the Board of Immigration Appeals were managerial officials. Members of the Board can issue final decisions, their decisions create precedent, and the decisions are published. The FLRA reasoned that "the Board has broad discretionary authority to administer the immigration laws through the issuance of precedential and non-precedential final decisions." *Id.* at 509. The FLRA continued that the Board "effectively creates and establishes general agency principles which guide the outcome of future immigration decisions and establish Agency policy." *Id.* The contrast between the policymaking of Board members and IJs is clear.

expertise perhaps explains Congress's decisions soon after ratification of the Constitution to delegate adjudicative duties outside presidential supervision.[178] Moreover, that distinction sheds light on why the Supreme Court in *Myers*, *Humphrey's Executor*, and even *Free Enterprise Fund* carved out adjudicative duties from other executive branch functions that the President must closely superintend through the plenary removal authority. Viewed another way, the Court in *Humphrey's Executor* may have been half right. Although factfinding is backward-looking and involves only modest policymaking, the President should closely superintend officials who instead assess economic, social, and political factors in fashioning policy that binds the nation. Congress's interest in insulating ALJs from at-will removal can readily be reconciled with Article II.

From a functional perspective, for the public to hold the President accountable for factfinding within the government would be perverse. The public should care whether the factfinders are competent, courteous, and more, but they need not tie the factfinding itself to the President. No one assesses the President on Election Day based on whether the President was personally involved in factfinding. Indeed, private parties would not want the President to be involved in finding facts in their disputes with the government. The test in *Morrison v. Olson* as applied here is whether the independent factfinding leaves the President with "*sufficient* control . . . to ensure that [he or she] is able to perform his [or her] constitutionally assigned duties."[179] Given the ALJs' lack of "any authority to formulate policy for the Government,"[180] Congress can choose to insulate them from at-will removal. Thus, from the perspective of almost any functionally based unitary executive theory, the President does not and should not stand accountable for ALJ factfinding.[181]

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[178] *See supra* text accompanying notes 89–99.

[179] Morrison v. Olson, 487 U.S. 654, 696 (1988).

[180] *Id.* at 671.

[181] Consider, as well, that some defenders of the unitary executive argue that the President has the right to take over and nullify all tasks delegated by Congress to subordinate officials within the executive branch. *See, e.g.*, Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L. J. 541, 596 (1994). The executive may be unitary without having the power to decide facts in disputes against itself.

On the other hand, for those judicial officials who make decisions binding the government, a link to presidential control is more critical, at least under some variants of unitary executive theory.[182] For example, the patent administrative judges assessed in *Arthrex* made binding decisions on patentability on *inter partes* review.[183] And agency heads such as SEC Commissioners and NLRB members (though not their ALJs) set government-wide policy through the policies they promulgate, as well as through their interpretation of statutes and regulations.[184] Thus, from a functional approach to the unitary executive, the constitutional case for congressional protection for subordinate judicial officials' tenure is compelling,[185] and the historical record points in the same direction.

CONCLUSION

There is no agreed-upon formulation for the unitary executive. Functional, formal, and historical considerations inform different approaches both on and off the Court. Nonetheless, ALJ independence can readily be reconciled with most versions of the unitary executive because factfinding does not involve the economic, political, and social policymaking which, under the unitary executive, must be tied to the Chief Executive. Congress need not protect such administrative officials from at-will dismissal. But a legislative decision to protect

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[182] *See, e.g.*, United States v. Arthrex, No. 94-1434, slip op. 12–15 (U.S. June 21, 2021) (focusing on importance of strengthening the link between the President and those officers with the power to bind the executive branch).

[183] Of course, the private arbitrators under the Patent Act of 1793 did as well. 35 U.S.C. § 6(c) (2018).

[184] *See, e.g.*, SEC v. Chenery Corp., 332 U.S. 80, 92–93 (1947); *see also* Joan Flynn, *The Costs and Benefits of "Hiding the Ball": NLRB Policymaking and the Failure of Judicial Review*, 75 B.U. L. REV. 387, 387 (2005).

[185] Indeed, after concluding in *Arthrex* that the power of administrative patent judges to issue final decisions was incompatible with inferior officer status, the Court as a remedy ensured that the Director of the Patent and Trademark Office, a superior officer, could review the judges' decisions rather than strike the judges' protection from at will removal as the lower court had resolved. United States v. Arthrex, No. 19-1434, slip op. at 20–22 (U.S. June 21, 2021). *Arthrex* thus implicitly recognized the importance of Congress's decision to insulate subordinate judicial officials from the President's at-will removal authority.

professional or technical efforts of governmental officials should be upheld because, while any competent government leader must rely on professional and technical determinations, the policy call remains for him or her to make.