THE COURT SHOULD CHANGE THE SCOPE OF THE REMOVAL POWER BY ADOPTING A PURELY FUNCTIONAL APPROACH

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INTRODUCTION

Over the past century, the U.S. Supreme Court has issued a handful of opinions addressing the constitutional validity of statutory limits on the power of the President, or those directly responsible to the President, to remove officers of the United States. Over the last decade, some scholars have urged the Court to increase the scope of the President's removal power notwithstanding statutory limits on that power. Proponents of such broadening argue that it is needed to allow the President to exercise effectively the powers vested in him by Article II of the Constitution.

Over the last two years, the President and the Solicitor General have joined the campaign to expand the scope of the President's removal power.[1] There are reasons to believe that a majority of the Justices are prepared to act in ways that will increase the scope of the President's power to remove officers at will.[2] If it engages in that process, the Court will need to reconcile its changes with the many relevant precedents. In the 1950s, the Court issued several well-reasoned opinions strongly suggesting that the power to remove

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[1] President Trump has published hundreds of tweets in which he has expressed his desire to remove Robert Mueller from his position as special counsel, but only Associate Attorney General Rod Rosenstein has that power. *See* NOAH BOOKBINDER, NORMAN EISEN & CAROLINE FREDRICKSON, WHY TRUMP CAN'T (EASILY) REMOVE MUELLER—AND WHAT HAPPENS IF HE TRIES 3–4 (2017); *e.g.*, Donald J. Trump (@realDonaldTrump), TWITTER (July 29, 2018, 3:35 PM), https://twitter.com/realdonaldtrump/status/1023653191974625280; Donald J. Trump (@realDonaldTrump), TWITTER (July 29, 2018, 4:12 PM), https://twitter.com/realdonaldtrump/status/1023662510371741696; Donald J. Trump (@realDonaldTrump), TWITTER (Aug. 1, 2018, 9:24 AM), https://twitter.com/realdonaldtrump/status/1024646945640525826. President Trump's Solicitor General submitted a brief to the Supreme Court in which he argued that the President must have the power to remove even administrative law judges without stating a cause for removal. Brief for Respondent Supporting Petitioners at 39–56, Lucia v. SEC, 138 S. Ct. 2044 (2018) (No. 17-130).

[2] The Court expanded the scope of the President's removal power in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477, 483–84 (2010). The most recent addition to the Court, Justice Kavanaugh, wrote an opinion as a member of the D.C. Circuit in which he urged further expansions of the removal power. PHH Corp. v. CFPB, 839 F.3d 1, 13, 21, 26, 39 (D.C. Cir. 2016), *rev'd en banc*, 881 F.3d 75 (D.C. Cir. 2018).

some officers is limited by due process even absent any statutory limit.[3] As it considers potential changes in the scope of the removal power, the Court should consider both the reasons to increase the scope and the reasons to decrease the scope.

This Article suggests ways the Court should respond to efforts to broaden the scope of the removal power. The suggestions take into account the potential conflict between the high value the Constitution places on the President's power as chief executive and the high value the Constitution places on ensuring private parties' access to unbiased tribunals that adjudicate disputes between private parties and the federal government.

Part I describes the Court's opinions with respect to the permissible scope of the removal power when Congress attempts to limit the removal power by statute. Part II examines the recent efforts of scholars, litigants, and the government to increase the scope of the removal power by reducing the circumstances in which Congress can insulate officers from plenary control by the President. Part III describes the opinions of the Court in the 1950s that announced judicially mandated limits on the removal power based on due process. Part IV urges the Court to use a functional approach in determining the constitutionally appropriate scope of limits on the removal power. Specifically, the Court should restrict the removal power when due process so requires and reject congressional limits on the removal power when it interferes with the President's responsibility for decisions concerning government policy.

I. THE BIG FIVE PRECEDENTS

Part I describes the five cases in which the Court has decided whether a limit on the removal power is permissible. Before embarking on that task, however, it is useful to note some general characteristics of those decisions.

First, the Court's task is rendered difficult by the nonexistence of an explicit removal power provision in the Constitution. Because of this absence, the Court must draw inferences. Those inferences are based on the significance the Court attaches to provisions that have a functional relationship with the removal power—most notably the provisions of Article II that vest "the executive power" in the President and the Due Process Clause of the Fifth Amendment, which guarantees to litigants access to an impartial forum against the government.

Second, the Court has never upheld a complete prohibition on exercise of the removal power with respect to any officer.[4] The cases have involved

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[3] *See, e.g.*, Wiener v. United States, 357 U.S. 349, 355–56 (1958); Wong Yang Sung v. McGrath, 339 U.S. 33, 49–51 (1950).

[4] Congress has never attempted to impose such a prohibition, so the Court has never had occasion to decide whether it can do so. Given the results and reasoning in the Court's opinions on the removal

only the question whether a statutory limit on the removal power—in the form of a requirement that the President or his immediate subordinate specify a cause for removal—is constitutionally permissible.

Third, the Court has never had occasion to decide what "cause" would satisfy such a requirement where such a limit is permissible or what, if any, evidence the President must offer to support a decision to remove an officer for cause.

In its 1926 opinion in *Myers v. United States*,[5] the Court held that a statute "by which the unrestricted power of removal of first class postmasters is denied the President, is in violation of the Constitution, and invalid."[6] The opinion is often cited for the broad proposition that Congress cannot limit in any way the power of the President to remove any executive officer.

The apparent breadth of the holding in *Myers* should be qualified, however, by its context. The statute the Court held unconstitutional required the President to obtain the consent of the Senate before removing any officer.[7] The statute was enacted in 1867 as part of the attempt by Congress to make it impossible for President Johnson to use the executive power to implement his ideas about how best to reconstruct the nation after the Civil War.[8] It was the sole basis for the successful effort of the House to impeach President Johnson that came within one vote of his removal from office by the Senate.[9] The *Myers* Court devoted much of its seventy-one pages to unflattering descriptions of Congress's attempt to render President Johnson totally ineffective in his efforts to exercise the powers Article II vested in him by transferring all executive power to Congress.[10]

Thus, *Myers* can be interpreted much more narrowly to prohibit Congress from attempting to aggrandize itself by transferring executive powers to itself. As so interpreted, *Myers* fits well with modern opinions such as *INS v. Chadha*,[11] holding unconstitutional a statute that purported to empower Congress to veto an action taken by an agency, and *Bowsher v. Synar*,[12] holding unconstitutional a statute that purported to confer executive power on an officer who could be removed only by Congress.[13] The *Myers* Court also made it clear that it was not deciding whether the President must have the

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power, it seems highly unlikely that the Court would uphold a complete prohibition on the power of the President to remove any officer.

5 272 U.S. 52 (1926).

6 *Id.* at 176.

7 *Id.* at 107–08.

8 *See id.* at 175–76.

9 *See id.* at 166.

10 *See, e.g.*, *id.* at 164–65 (characterizing Congress's actions as a "reversal [that] grew out of the serious political difference between the two Houses of Congress and President Johnson" because Congress "resented what it feared" President Johnson might do).

11 462 U.S. 919 (1983).

12 478 U.S. 714 (1986).

13 *See id.* at 720–21; *Chadha*, 462 U.S. at 952.

power to remove without cause officers who have adjudicatory responsibilities.[14]

In its 1935 opinion in *Humphrey's Executor v. United States*,[15] the Court held that Congress can limit the power of the President to remove some officers by requiring that the President specify a cause for removal.[16] The Court distinguished *Myers* by interpreting it to apply only to "purely executive officers" and not to officers that head an agency that Congress intended to be independent of the executive.[17] The opinion is often cited to support the proposition that Congress can create an agency with broad powers that is "independent" of the Executive Branch.

Like the opinion in *Myers*, however, the opinion in *Humphrey's Executor* should be interpreted narrowly based on the context in which it was decided. The officer whose removal was at issue in *Humphrey's Executor* was one of the five Commissioners of the Federal Trade Commission ("FTC").[18] The Court characterized the FTC as a "quasi-legislative and quasi-judicial" body and analogized it to the Court of Claims.[19]

At the time, the FTC had no power to issue rules or to make policy decisions on behalf of the government.[20] It had only the power to adjudicate disputes through use of formal evidentiary hearings and the power to advise Congress with respect to the need for legislation.[21] That quasi-legislative role was particularly important at the time. Congress lacked the staff required to determine whether legislation was needed to address a perceived problem and, if so, the form that any such legislation should take.[22] Congress necessarily relied on the FTC to advise it on the need to enact critically important

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14 *Myers*, 272 U.S. at 157–58.

15 295 U.S. 602 (1935).

16 *Id.* at 631–32.

17 *Id.* at 627–28.

18 *Id.* at 618.

19 *Id.* at 629.

20 In its 1973 opinion in *National Petroleum Refiners Association v. FTC*, 482 F.2d 672 (D.C. Cir. 1973), the D.C. Circuit surprised most observers by holding that the FTC has the power to issue rules, even though the agency had denied that it had that power for decades. *Id.* at 698. The court supported its holding by explaining why the power to make substantive rules was essential to allow an agency to make regulatory policy. *Id.* at 681. Congress ratified the D.C. Circuit's holding in 1974 by enacting a statute that expressly conferred rulemaking power on the FTC. Magnuson-Moss Warranty—Federal Trade Commission Act, Pub. L. No. 93-637, 88 Stat. 2183 (1975).

21 *See, e.g.*, Glen O. Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485, 490 (1970).

22 *See generally* Susan Webb Hammond, *Life and Work on the Hill: Careers, Norms, Staff, and Informal Caucuses*, *in* CONGRESS RESPONDS TO THE TWENTIETH CENTURY 73, 82 (Sunil Ahuja & Robert Dewhirst eds., 2003) (showing the great increase in the numbers of congressional staff from the early to late twentieth century).

legislation such as the Federal Power Act and the Natural Gas Act.[23] Moreover, even in the case of such a "quasi-judicial" and "quasi-legislative" body, the Court upheld only the power of Congress to require the President to state a cause for removing one of the five members of the tribunal that oversaw the performance of those functions.[24]

In its 1958 opinion in *Wiener v. United States*,[25] the Court held that the President could not remove a member of the three-member War Claims Tribunal without giving a cause for removal other than a desire to replace the Commissioner with someone of the President's choosing.[26] *Wiener* can be interpreted to support a proposition broader than the proposition supported by *Humphrey's Executor*. The statute itself did not limit the President's power to remove members of the War Claims Tribunal. Rather, the Court drew the inference that Congress intended such a limit. This inference was based, in part, on Congress's failure to include in the statute that created the Tribunal any provision that authorized the President to remove a member of the Tribunal and also, in part, on the purely adjudicative function the agency performed.[27]

Like *Myers* and *Humphrey's Executor*, *Wiener* should be interpreted narrowly based on its context. The Court emphasized that the sole function of the Tribunal was "to adjudicate according to law" three classes of claims that arose from U.S. activities in World War II.[28] The Court noted that Congress could use, and had used, a variety of means to adjudicate war claims.[29] It could act on such claims itself; it could entrust the executive with discretion to act on the claims; or it could assign the adjudication of the claims to the district courts or to the Court of Claims.[30]

The Court concluded that Congress also had the option that it chose in this case: Congress could create a specialized tribunal tasked only with '"adjudicating according to law', that is, on the merits of each claim, supported by evidence and governing legal considerations."[31] The Court reasoned that Congress intended the members of the specialized adjudicative tribunal to have the same kind of freedom from potential outside influences that the

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23 Ewin L. Davis, *Influence of the Federal Trade Commission's Investigations on Federal Regulation of Interstate Electric and Gas Utilities*, 14 GEO. WASH. L. REV. 21, 21, 28 (1945). Both statutes were based on detailed FTC studies of the natural gas and electricity markets. *Id.* at 22.

24 Humphrey's Executor v. United States, 295 U.S. 602, 632 (1935).

25 357 U.S. 349 (1958).

26 *Id.* at 356.

27 *Id.* at 352–55.

28 *Id.* at 353–56.

29 *Id.* at 355–56.

30 *Id.*

31 *Wiener*, 357 U.S. at 355 (quoting *Humphrey's Executor*, 295 U.S. at 629).

district courts or the Court of Claims had.[32] It followed that the President could not remove a member of the Tribunal without stating a cause for removal.[33]

In its 1988 opinion in *Morrison v. Olson*,[34] a seven-Justice majority upheld the provisions of the Ethics in Government Act that authorized the appointment of an independent counsel when the Attorney General determined that probable cause existed to believe that a high-ranking member of the Executive Branch had committed a crime.[35] Once appointed, the independent counsel had complete control over the investigation and potentially the prosecution of such a high-ranking official.[36] The independent counsel could be removed only by the Attorney General for cause.[37]

The majority acknowledged that the Court was departing from its prior functional approach to removal cases.[38] It recognized that the functions of investigation and prosecution are executive functions rather than quasi-legislative or quasi-judicial functions.[39] Nevertheless, the Court concluded that it was permissible for Congress to provide the independent counsel with a degree of insulation from presidential control because the executive functions the independent counsel performed were limited in scope and time.[40] The majority also emphasized that the independent counsel had no power to make policy decisions.[41] The independent counsel was required to act in accordance with the policies of the Department of Justice.[42]

The most recent Supreme Court decision on the removal power was the 2010 opinion of a five-Justice majority in *Free Enterprise Fund v. Public Company Accounting Oversight Board*.[43] The majority held that the for-cause limit on the power of the Securities and Exchange Commission ("SEC") to remove a member of the Public Company Accounting Oversight Board ("PCAOB") unconstitutionally limited the power of the President to perform the functions vested in him by Article II.[44]

The *Free Enterprise Fund* majority reasoned that two or more layers of limits on the President's removal power left the President with inadequate means to exercise the powers of the chief executive.[45] (The majority accepted

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32 *Id.* at 355–56.
33 *Id.* at 356.
34 487 U.S. 654 (1988).
35 *Id.* at 659–61.
36 *Id.* at 662–63.
37 *Id.* at 663.
38 *Id.* at 689–91.
39 *Id.* at 691.
40 *Morrison*, 487 U.S. at 671–72.
41 *Id.*
42 *Id.* at 672.
43 561 U.S. 477 (2010).
44 *Id.* at 484.
45 *Id.* at 498.

the assumption of the parties that the President could remove an SEC Commissioner only for cause even though there is no statutory limit on the President's power to remove an SEC Commissioner.[46]) The majority repeatedly emphasized that PCAOB had the power to make policy decisions on behalf of the government.[47] In a footnote, the majority stated that the holding "does not address that subset of independent agency employees who serve as administrative law judges. Whether administrative law judges are necessarily 'Officers of the United States' is disputed. And unlike members of the Board, many administrative law judges of course perform adjudicative rather than enforcement . . . functions."[48]

In summary, every opinion in which the Court addressed a removal issue, except the opinion in *Morrison*, relied primarily on an officer's function in deciding whether Congress could require the President or his immediate subordinate to state a cause for removing an officer. If the officer performs a quasi-judicial function, Congress can condition the President's power to remove the officer by requiring the President or his agent to state a cause for removal. If the officer has the power to perform executive functions, Congress cannot impose such a limit on the President's removal power. Even in *Morrison*, the officer had no power to make policy decisions. The Court has never upheld a for-cause limit on the President's power to remove an officer who has the power to make policy decisions.

II. THE RECENT EFFORTS TO REDUCE THE SCOPE OF PERMISSIBLE LIMITS ON THE REMOVAL POWER

Over the last three decades, some scholars have urged the Court to broaden the scope of the President's removal power.[49] The opinion of a five-Justice majority in *Free Enterprise Fund* was the first success the proponents have enjoyed at the Supreme Court in this effort. The Court broadened the scope of the President's removal power by prohibiting Congress from imposing two or more layers of for-cause protection from removal for officers that perform executive functions, such as policymaking.[50]

Proponents of expanding the scope of the President's unlimited removal power are pressing their arguments in many other contexts, with some success in lower courts and in the Solicitor General's office. Three cases illustrate this ongoing effort.

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46 *Id.* at 487.

47 *Id.* at 485–86.

48 *Id.* at 507 n.10 (citations omitted).

49 *See, e.g.*, Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 595 (1994).

50 Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 514 (2010).

In its 2016 decision in *PHH Corporation v. Consumer Financial Protection Board*,[51] a two-judge majority of a D.C. Circuit panel held that the for-cause limit on the President's power to remove the Director of the Consumer Financial Protection Bureau was unconstitutional.[52] The majority noted that the Director had extraordinary executive power because he "unilaterally [implemented and] enforce[d] 19 federal consumer protection statutes, covering everything from home finance to student loans to credit cards to banking practices."[53] The majority distinguished *Humphrey's Executor* on the basis that the FTC, like almost all other "independent agencies," was headed by a multimember body that had to include at least some members who were not members of the President's political party.[54] The panel reasoned that a single agency head has so much greater power than a member of a multimember agency that the agency head must be removable at will by the President to ensure that the President is politically accountable for the actions of the agency.[55]

The en banc D.C. Circuit overruled the panel in 2018.[56] The en banc majority rejected the distinction the panel drew between agencies headed by a single director and agencies headed by a multimember body.[57] The majority held that the case was governed by the holding in *Humphrey's Executor*.[58] Two concurring opinions issued on behalf of three of the judges who joined the majority demonstrate, however, that the judges who joined the majority differed with respect to some of the underlying reasoning.

In one of the concurring opinions, two judges emphasized that their agreement with the majority was based on the "significant adjudicatory . . . functions" that the agency performs.[59] Those judges expressed the belief that the Framers of the Constitution and the Justices who wrote the opinion in *Humphrey's Executor* "recognized that adjudication poses a special circumstance."[60] Officers who adjudicate disputes between the government and individuals should not be subject to complete control by the executive.

Another judge concurred only because he interpreted the requirement that the President state a cause for removing the Director to allow the President to remove the Director over some policy disagreements.[61] Because of that easy-to-satisfy interpretation of *for cause*, the judge reasoned that the

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51 839 F.3d 1 (D.C. Cir. 2016), *rev'd en banc*, 881 F.3d 75 (D.C. Cir. 2018).

52 *Id.* at 8.

53 *Id.* at 7.

54 *Id.* at 8–9, 14–16.

55 *Id.* at 12.

56 PHH Corp. v. CFPB, 881 F.3d 75, 77 (D.C. Cir. 2018).

57 *Id.* at 96.

58 *Id.* at 78–80.

59 *Id.* at 114 (Wilkins, J., concurring, joined by Rogers, J.).

60 *Id.* at 115.

61 *Id.* at 124 (Griffith, J., concurring).

for-cause limit left the President with enough authority to ensure that the laws are faithfully executed.[62]

In its 2018 opinion in *Collins v. Mnuchin*,[63] a two-judge majority of a Fifth Circuit panel used reasoning similar to the D.C. Circuit's in *PHH Corp.* as the basis for holding that the statute that required the President to state a cause for removing the Director of the Federal Housing Finance Agency ("FHFA") was unconstitutional.[64]

Finally, the effort to increase the scope of the President's removal power has enjoyed success in the office of the Solicitor General. In his 2018 brief in *Lucia v. Securities & Exchange Commission*,[65] the Solicitor General argued that the provision of the Administrative Procedure Act of 1946 ("APA") that limits an agency's power to remove an administrative law judge ("ALJ")[66] was unconstitutional unless it could be interpreted to allow removal for virtually any reason.[67]

III. THE COURT'S DECISIONS THAT LIMIT THE PERMISSIBLE SCOPE OF THE REMOVAL POWER BASED ON DUE PROCESS

Four of the five Supreme Court precedents discussed in Part I—and all the recent proposed reductions in scope of the permissible limits on the removal power discussed in Part II—involved only one issue. The sole question in each was whether Congress can limit the power of the President or his immediate subordinates to remove an officer by stating a cause for removal without unconstitutionally interfering with the President's exercise of the executive powers vested in him by Article II of the Constitution.

One of the precedents discussed in Part I involved a limit imposed by the Court itself, however. In *Wiener*, the Court held that the President could not remove a member of the War Claims Tribunal without stating a cause even though Congress did not impose any statutory limit on the President's power to remove a member of the Tribunal.[68] The Court did not make the basis for its holding explicit, but the context in which the issue arose and the Court's discussion of the need for such a limit strongly suggests that the basis was due process. The Court analogized the function of the Tribunal to that of a district court and referred to the need for an adjudicatory body that is

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62 *Id.* at 125–26.

63 896 F.3d 640 (5th Cir. 2018) (per curiam).

64 *Id.* at 674–75.

65 138 S. Ct. 2044 (2018).

66 5 U.S.C. § 7521(a) (2012).

67 Brief for Respondent Supporting Petitioners at 67–68, Lucia v. SEC, 138 S. Ct. 2044 (2018) (No. 17-130).

68 Wiener v. United States, 357 U.S. 349, 356 (1958).

"entirely free from the control or coercive influence [of the President], direct or indirect."[69]

During the 1950s, the Supreme Court issued three other opinions in which it reduced the scope of the President's removal power based on due process reasoning.[70] In each case, Congress had not limited the President's removal power, but the *Court* imposed such a limit. The Court did not explicitly state the basis for each limit, but the context in which each case was decided and the Court's reasoning suggest strongly that the basis was due process.

Each of the three cases involved the question whether an agency was required to apply the restrictions on removal of ALJs that Congress had included in the APA. In each case, the Court held that an agency was required to apply the restrictions on removal even though the APA did not apply to the agency. A brief description of the relevant APA provisions will aid in understanding the holdings.

Congress enacted the APA to respond to numerous claims by regulated firms that agency ALJs (then called "hearing examiners") conducted hearings in ways that reflected the ALJs' bias in favor of agencies and against regulated firms.[71] Studies supported the claims of systemic bias.[72] Congress responded to the ALJ bias claims by including in the APA several provisions designed to reduce the risk that ALJs would conduct hearings in ways that reflected pro-agency/anti-regulated firm bias.[73] The most important of those provisions prohibit an agency from assigning an ALJ any function that is inconsistent with the ALJ's adjudicative responsibilities[74] and limit an agency's power to remove or otherwise punish an ALJ.[75] If an agency is subject to the APA, an ALJ who works for the agency can be removed only if a separate agency, the Merit Systems Protection Board ("MSPB"), finds that there is cause to remove the ALJ.[76]

The sections of the APA that ensure the independence of ALJs do not apply to all agencies, however. Congress makes the decision whether to apply the relevant sections of the APA on an agency-by-agency basis. Thus, when Congress does not apply the APA provision that limits the power of an agency to remove an ALJ to a particular agency, the Court has to decide whether such a limit applies to the agency independent of the scope of the APA.

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69 *Id.* at 355 (quoting Humphrey's Executor v. United States, 295 U.S. 602, 629 (1935)).

70 Cates v. Haderlein, 342 U.S. 804 (1952); Riss & Co. v. United States, 341 U.S. 907 (1951); Wong Yang Sung v. McGrath, 339 U.S. 33 (1950).

71 *E.g.*, Ramspeck v. Fed. Trial Exam'rs Conference, 345 U.S. 128, 131–32 (1953).

72 *E.g.*, *id.*

73 *E.g.*, *id.* at 131–33.

74 *See* 5 U.S.C. § 3105 (2012).

75 *See* 5 U.S.C. § 7521.

76 *Id.*

In *Wong Yang Sung v. McGrath*,[77] one question answered was whether the APA provisions that limit an agency's power to remove ALJs applies to the administrative judges ("AJs") who preside in deportation proceedings.[78] The Court held that they do, even though no statute made them applicable to such proceedings.[79]

The Court began by describing the widespread complaints of bias that led to the APA's enactment and to its treatment of hearing examiners as independent of the agencies at which they preside.[80] It then referred to the many studies that had substantiated those complaints and that had urged statutory changes to reduce the pro-agency bias.[81] It also described the years of study and deliberation that led to the APA's enactment by unanimous votes in both houses of Congress.[82] The Court summarized the process through which the APA was enacted: "The 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."[83]

The Court then identified the primary purposes of the APA's adjudication provisions:

> Of the several administrative evils sought to be cured or minimized, only two are particularly relevant to issues before us today. One purpose was to introduce greater uniformity of procedure and standardization of administrative practice among the diverse agencies whose customs had departed widely from each other. . . .
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> More fundamental, however, was the purpose to curtail and change the practice of embodying in one person or agency the duties of prosecutor and judge.[84]

Next, the Court compared the unfair and biased hearing that the government had provided the immigrant in the case before the Court with the hearing before an impartial hearing examiner that the APA requires.[85] The Court suggested that the Constitution compels an agency to use the APA hearing procedures: "The constitutional requirement of procedural due process of law derives from the same source as Congress' power to legislate and, where

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77 339 U.S. 33 (1950).

78 *Id.* The term "administrative judge" refers to agency personnel who are not ALJs and who preside in adjudicatory hearings conducted by agencies. *See id.* at 35 n.1. On its website, the Administrative Conference of the United States lists ten reports describing in detail the functions of AJs and recommended best practices with respect to agency uses of AJs. Administrative Conference of the United States, *Reports*, https://www.acus.gov/publication/reports (last visited Nov. 11, 2018).

79 *Wong Yang Sung*, 339 U.S. at 52–53.

80 *Id.* at 36–38.

81 *Id.* at 38–45.

82 *Id.*

83 *Id.* at 40.

84 *Id*. at 41.

85 *Wong Yang Sung*, 339 U.S. at 45–46.

applicable, permeates every valid enactment of that body."[86] The Court also reasoned as follows:

> We would hardly attribute to Congress a purpose to be less scrupulous about the fairness of a hearing necessitated by the Constitution than one granted by it as a matter of expediency.
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> Indeed, to so construe the Immigration Act might again bring it into constitutional jeopardy. When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality.[87]

The Court concluded that the APA represented an effort by Congress to set forth the "currently prevailing standards of impartiality" and thereby to codify the minimum requirements of due process.[88] Based on that conclusion, the Court held that the provisions of the APA that insulate ALJs from potential sources of bias apply to deportation proceedings.[89] In later cases, the Court relied on the reasoning in *Wong Yang Sung* as the basis to hold that the APA applies to hearings under the Interstate Commerce Act in *Riss & Co. v. United States*[90] and to U.S. Postal Service fraud hearings in *Cates v. Haderlein*.[91]

Congress disagreed with the Court in the case of immigration judges. In 1952, Congress amended the Immigration Act of 1917 by making it explicit that the restriction on removal of ALJs in the APA does not apply to immigration judges.[92] Faced with a direct conflict between its own views and those of Congress, the Court backed down. In *Marcello v. Bonds*,[93] the Court retreated from its holding in *Wong Yang Sung* and upheld the congressional decision to not apply the APA to deportation proceedings; thus, by implication, the immigration agency had the power to remove immigration judges without stating a cause for removal.[94]

IV. THE COURT SHOULD USE A FUNCTIONAL APPROACH IN DETERMINING THE SCOPE OF THE REMOVAL POWER

The Supreme Court's 2010 opinion in *Free Enterprise Fund* and the elevation to the Supreme Court of the author of the D.C. Circuit's 2016 *PHH*

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86 *Id.* at 49.
87 *Id.* at 50.
88 *Id.*
89 *Id.* at 51.
90 341 U.S. 907 (1951).
91 342 U.S. 804 (1951).
92 Marcello v. Bonds, 349 U.S. 302, 306–10 (1955).
93 349 U.S. 302 (1955).
94 *Id.* at 314.

Corp. opinion[95] foreshadow changes in the scope of the removal power in the near future. As the Court makes decisions about the scope of the removal power, it should attempt to minimize the adverse effects of each decision on two important and potentially conflicting constitutional imperatives: (1) the ability of the President to perform effectively the powers vested in him by Article II; and (2) the need to protect the due process rights of parties who litigate against the government in cases resolved by agencies. The Court's opinions support a purely functional approach to the scope question.

In *Myers*, the Court described persuasively and in detail why the Justices agreed with James Madison and the other Framers and with the First Congress that the executive power vested in the President must include the power to remove any executive officer:

> The debates in the Constitutional Convention indicated an intention to create a strong Executive, and after a controversial discussion the executive power of the Government was vested in one person and many of his important functions were specified so as to avoid the humiliating weakness of the Congress during the Revolution and under the Articles of Confederation.
>
> Mr. Madison and his associates in the discussion in the House dwelt at length upon the necessity there was for construing Article II to give the President the sole power of removal in his responsibility for the conduct of the executive branch, and enforced this by emphasizing his duty expressly declared in the third section of the Article to "take care that the laws be faithfully executed."
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> The vesting of the executive power in the President was essentially a grant of the power to execute the laws. But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates. This view has since been repeatedly affirmed by this Court. As he is charged specifically to take care that they be faithfully executed, the reasonable implication, even in the absence of express words, was that as part of his executive power he should select those who were to act for him under his direction in the execution of the laws. The further implication must be, in the absence of any express limitation respecting removals that as his selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he [cannot] continue to be responsible. It was urged that the natural meaning of the term "executive power" granted the President included the appointment and removal of executive subordinates. If such appointments and removals were not an exercise of the executive power, what were they? They certainly were not the exercise of legislative or judicial power in government as usually understood.[96]

The *Free Enterprise Fund* majority repeated much of the discussion in *Myers* and tied the removal power to political accountability:

> The diffusion of power [among officers of the United States] carries with it a diffusion of accountability. The people do not vote for the "Officers of the United States." They instead look to the President to guide the "assistants or deputies . . . subject to his superintendence." Without a clear and effective chain of command, the public cannot "determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really

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95 Then–Judge Kavanaugh wrote the panel opinion in *PHH Corp. v. CFPB*, 839 F.3d 1 (D.C. Cir. 2016). He was confirmed as an Associate Justice of the Supreme Court on October 6, 2018. Sheryl Gay Stolberg, *Kavanaugh Is Sworn In After Close Confirmation Vote in Senate*, N.Y. TIMES (Oct. 6, 2018), https://www.nytimes.com/2018/10/06/us/politics/brett-kavanaugh-supreme-court.html.

96 Myers v. United States, 272 U.S. 52, 116–18 (1926) (citations omitted).

> to fall." That is why the Framers sought to ensure that "those who are employed in the execution of the law will be in their proper situation, and the chain of dependence be preserved; the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community."[97]

The Court has always distinguished adjudicative functions from executive functions, however. Thus, in *Myers*, the Court discussed at some length the conflicting opinions of judges and Justices with respect to the power of the President to remove a non–Article III judge. It referred with apparent approval to the opinion of Justice McLean:

> He pointed out that the argument upon which the decision rested was based on the necessity for presidential removals in the discharge by the President of his executive duties and his taking care that the laws be faithfully executed, and that such an argument could not apply to the judges, over whose judicial duties he could not properly exercise any supervision or control after their appointment and confirmation.[98]

The Court then disavowed any intent to apply its reasoning or holding in *Myers* to non–Article III judges: "The question[] . . . whether Congress may provide for his removal in some other way, present[s] considerations different from those which apply in the removal of executive officers, and therefore we do not decide them."[99] The Court followed the *Myers* dicta by clearly holding in *Humphrey's Executor* that Congress could require the President to state a cause for removing an officer who performed no executive functions and whose responsibilities were "quasi-judicial."[100] In *Wiener*, the Court took the additional step of holding that the President must state a cause for removing an officer whose duties are judicial in nature, whether or not Congress has so limited the President's removal power.[101]

The Court issued its most detailed and most persuasive opinion on this point in *Wong Yang Sung*. The opinion begins with a description of the APA and the evils it addressed:

> Multiplication of federal administrative agencies and expansion of their functions to include adjudications which have serious impact on private rights has been one of the dramatic legal developments of the past half-century. . . . The conviction developed, particularly within the legal profession, that this power was not sufficiently safeguarded and sometimes was put to arbitrary and biased use.

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97 Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 497–98 (2010) (citations omitted) (first quoting U.S. CONST. art. II,§ 2, cl. 2; then quoting THE FEDERALIST NO. 72 (Alexander Hamilton); then quoting *id.*; then quoting 1 ANNALS OF CONG. 518 (Joseph Gales, ed. 1789) (James Madison)).

98 *Myers*, 272 U.S. at 156–57.

99 *Id.* at 157–58.

100 Humphrey's Executor v. United States, 295 U.S. 602, 629 (1935).

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

> Concern over administrative impartiality and response to growing discontent was reflected in Congress as early as 1929, when Senator Norris introduced a bill to create a separate administrative court. Fears and dissatisfactions increased as tribunals grew in number and jurisdiction, and a succession of bills offering various remedies appeared in Congress. Inquiries into the practices of state agencies, which tended to parallel or follow the federal pattern, were instituted in several states, and some studies noteworthy for thoroughness, impartiality and vision resulted.[102]

The Court then summarized the seventeen years in which Congress and numerous other institutions had studied the evils that Congress and the Court both recognized.[103] The Court characterized the provisions of the APA that were designed to provide a right to a fair and impartial hearing before an unbiased adjudicative officer as the most important safeguards that Congress provided in the APA.[104] The most important of those provisions forbid an agency from assigning an adjudicative officer any task other than presiding over adjudicative hearings[105] and limit the power of an agency to remove an ALJ. The provision that limits the removal power is now codified at 5 U.S.C. § 7521. It limits the power to remove an ALJ by specifying that an ALJ can be removed or otherwise disciplined only as a result of a finding of cause made by the MSPB after a formal hearing.[106]

The Court then turned to the question before it. Is the Immigration Service required to provide a hearing before an adjudicative officer who is subject to the APA safeguards of impartiality? The Court described the obviously biased hearing the Immigration Service had provided and found "the administrative hearing a perfect exemplification of the practices so unanimously condemned."[107]

The Court admitted that the relevant provisions of the APA did not apply to immigration hearings based solely on a literal parsing of the language of the statute.[108] It used constitutional reasoning to support its holding that "deportation proceedings must conform to the requirements of the [APA] if resulting orders are to have [legal] validity."[109] The Court questioned whether the Immigration Act would be constitutional if it were not interpreted to require hearings that comply with the APA safeguards designed to ensure that presiding officers were unbiased:

> Indeed, to so construe the Immigration Act might again bring it into constitutional jeopardy. When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality. A deportation hearing involves

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102 Wong Yang Sung v. McGrath, 339 U.S. 33, 36–38 (1950) (citations omitted).
103 *See id*. at 37–41.
104 *Id.* at 41–42.
105 5 U.S.C. § 3105 (2012).
106 *Id.* § 7521.
107 *Wong Yang Sung*, 339 U.S. at 45.
108 *Id.* at 48–49.
109 *Id.* at 53.

> issues basic to human liberty and happiness and, in the present upheavals in lands to which aliens may be returned, perhaps to life itself. It might be difficult to justify as measuring up to constitutional standards of impartiality a hearing tribunal for deportation proceedings the like of which has been condemned by Congress as unfair even where less vital matters of property rights are at stake.[110]

Shortly after the Court issued its opinion in *Wong Yang Sung*, Congress amended the Immigration Act in ways that reflected Congress's rejection of the Court's strong suggestion that due process requires immigration judges to be insulated from potential removal in the same way that the APA insulates ALJs from potential removal, which is by allowing removal only for cause determined by the MSPB after a hearing.[111] Congress pointedly refused to limit the immigration agency's power to remove an immigrant in any way. The Court then backed down from its due process requirement and upheld the amended Immigration Act in its 1955 decision in *Marcello v. Bonds*.[112]

As it reconsiders the scope of the removal power, the Court should establish and implement a clear, bright-line rule that is based on the functional distinctions that the Court has always recognized. The President or his immediate subordinate must have the power to remove any officer empowered to make binding policy decisions on behalf of the government. That is the context in which political accountability is most important. It follows that the President must have the power to remove any policymaking officer to execute the functions vested in him by Article II, including the duty to take care that the laws be faithfully executed.

By contrast, no one, including the President, should have the power to remove without cause any officer whose sole responsibility is to adjudicate disputes between individuals and the government. That is the context in which due process requires a decisionmaker who is not subject to potential removal by the President or his agent. As the Court has repeatedly emphasized, conferring the power to remove an officer on any individual or institution creates a "here-and-now subservience."[113] It is intolerable for an agent of the executive to have the power to remove an officer with responsibility to adjudicate disputes between individuals and the government. That is fundamentally unfair to private parties.

That bright-line rule would render unconstitutional the for-cause limits on the power to remove members of PCAOB or the FHFA—the issues that the D.C. Circuit and the Fifth Circuit recently addressed. Both agencies have significant policymaking power.

By contrast, the for-cause limit on the power to remove ALJs would survive scrutiny under Article II because ALJs have no power to make policy decisions that bind the government. They have only the power to preside in

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110 *Id.* at 50–51.

111 Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952).

112 Marcello v. Bonds, 349 U.S. 302, 310 (1955).

113 Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, 501 U.S. 252, 265 n.13 (1991); *accord* Bowsher v. Synar, 478 U.S. 714, 720, 727 n.5 (1986).

adjudicatory hearings to resolve disputes between private parties and the government. Indeed, due process requires such a limit on the removal power even when Congress has not imposed a limit by statute, as the Court implicitly recognized in *Wiener* and strongly suggested in *Wong Yang Sung*.

That constitutionally compelled limit on the removal power should apply to any officer whose sole responsibility is to adjudicate disputes between private individuals and the government, including immigration judges. The Court should overrule its holding in *Marcello* based on the powerful reasoning in its *Wong Yang Sung* opinion. Deportation often has devastating effects on immigrants, including a high probability that the deported immigrant will be killed upon his forced return to his country of origin.[114] There is no context in which it is more important to ensure that officers with adjudicative responsibilities are able to perform their duties without fear that they will be removed if they do not act in accordance with any biases that the President or his subordinates might have with respect to members of any ethnic or religious group or to asylum applicants in general.

As Professor Catherine Kim has documented, President Trump and his Attorney General have applied intense pressure on immigration judges to deny applications for asylum.[115] That pressure is likely to be effective since the Attorney General has the power to evaluate the performance of immigration judges and the power to remove them or to punish them in other ways without stating any reason for taking such an action. The Supreme Court needs to apply the Due Process Clause to bring that blatantly unconstitutional practice to a halt.

Application of the three-part test in *Mathews v. Eldridge*[116] compels holding that the present method of adjudicating asylum cases violates due

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114 Many asylum applicants make well-supported claims that they will be the victims of either domestic violence or gang violence if they are forced to return to their countries of origin. In 2018, the Attorney General certified an asylum case to himself in which he noted, "Generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum," and thus "few such claims would satisfy the legal standard to determine whether an alien has a credible fear of persecution." In re A-B-, 27 I. & N. Dec. 316, 320 n.1 (A.G. 2018). The USCIS subsequently issued guidance that instructed immigration officers conducting credible fear interviews to deny aliens the opportunity to apply for asylum if the officer knows the alien will not be able to establish the necessary elements—without ever having a hearing on the merits of the asylum claim. USCIS Policy Memorandum PM-602-0162, *Guidance for Processing Reasonable Fear, Credible Fear, Asylum, and Refugee Claims in Accordance with* Matter of A-B-, 8–9 (July 11, 2018). A federal district court stayed the removal of multiple asylum applicants who failed their credible fear interviews under the new USCIS guidance, Grace v. Sessions, No. 18-cv-1853, 2018 WL 3812445, at *1 (D.D.C. Aug. 9, 2018), and then decided that a permanent injunction was warranted on the ground that the USCIS memorandum was arbitrary and capricious, Grace v. Whitaker, 344 F. Supp. 3d 96, 127, 146 (D.D.C. 2018) (abrogating the proposition from *In re A-B-* that victims of domestic violence or gang violence are unlikely to qualify for asylum), *appeal docketed*, No. 19-5013 (D.C. Cir. Jan. 30, 2019).

115 *See* Catherine Y. Kim, *The President's Immigration Courts*, 68 EMORY L. REV. 1, 3–6 (2018).

116 424 U.S. 319 (1976). *Mathews* is discussed in detail in I KRISTIN HICKMAN & RICHARD PIERCE, ADMINISTRATIVE LAW TREATISE § 7.5 (6th ed. 2019).

process and that due process requires asylum cases be adjudicated by immigration judges who are insulated from any pressure the President or the Attorney General might apply to coerce immigration judges to deny asylum. The private interest at stake in an asylum case is life itself—many applicants for asylum face a high risk of being the victim of a violent death if they are required to return to their country of origin.[117] The risk of an erroneous deprivation of that interest is extraordinarily high in the present situation. Immigration judges—who can be removed from office or punished in other ways without any explanation by an Attorney General who has made it clear that he wants to minimize the number of cases in which asylum is granted—are highly likely to deny asylum in many cases in which the evidence strongly supports the applicant.[118] The cost to the government of reducing that risk is trivial. The government can reduce the risk dramatically by extending to immigration judges the same safeguards of decisional independence that all ALJs have enjoyed since 1946.

The power to enforce the law, like the power to make policy decisions on behalf of the government, is a core executive function. It follows that the President or his immediate subordinates must have the power to remove the vast majority of officers with the power to enforce federal law. That leaves only the issue that the Court addressed in *Morrison v. Olson*. Should Congress have the discretion to insulate from the President's removal power an investigator/prosecutor whose sole responsibility is to investigate and to potentially prosecute the President or those senior members of his administration who are identified with the President?

That is a difficult question. It is possible to defend such congressionally mandated insulation based on a due process principle that has been a feature of the Anglo–American legal system for many centuries—no one should be a judge in his own case.[119] On the other hand, experience to date suggests that the political limits on removal in this context may well be sufficient alone to ensure that the President does not abuse the removal power in this context. President Nixon abused the removal power by removing a special counsel who was about to make public powerful evidence that the President committed a crime.[120] Nixon's decision to remove the special counsel precipitated a

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117 Judge Calabresi once wrote, "We should not forget, after all, what is at stake. For each time we wrongly deny a meritorious asylum application, concluding that an immigrant's story is fabricated when, in fact, it is real, we risk condemning an individual to persecution." Ming Shi Xue v. BIA, 439 F.3d 11, 113–14 (2d Cir. 2006).

118 *See generally Judge-by-Judge Asylum Decisions in Immigration Courts FY 2013–2018*, TRACIMMIGRATION, https://trac.syr.edu/immigration/reports/judge2018/denialrates.html (last visited Feb. 19, 2019) (immigration judges grant/denial rates of asylum).

119 Dr. Bonham's Case (1610), 77 Eng. Rep. 638 (C.P.) 652 (Coke, C.J. opinion) ("*[A]liquis non debet esse Judex in propria causa* . . . ."). For discussion of the derivation and history of this principle, see Piotr J. Malysz, Nemo iudex in causa sua *as the Basis of Law, Justice, and Justification in Luther's Thought*, 100 HARV. THEOL. REV. 363 (2007).

120 *See generally* United States v. Nixon, 418 U.S. 683 (1974).

crisis that forced him to resign in disgrace. By contrast, President Clinton did not attempt to remove the special counsel who made public his criminal conduct.[121] Unlike President Nixon, President Clinton survived the attempt to remove him from office. The lesson of those contrasting experiences seems clear. A President who removes a special counsel who is investigating the President will pay a high political price for abusing the removal power.

CONCLUSION

This Article argued that the Court should use a strict functional approach in its ongoing process of changing the scope of the President's power to remove officers. The Court can reconcile the potentially conflicting commands of Article II and due process by holding that the President must have unlimited power to remove any officer who can make policy decisions on behalf of the government but that due process limits the President's power to remove an officer whose sole responsibility is to adjudicate disputes between private parties and the government.

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121 *See generally* NEIL A. LEWIS, *FINAL REPORT BY PROSECUTOR ON CLINTONS IS RELEASED*, N.Y. TIMES, (Mar. 21, 2002), https://www.nytimes.com/2002/03/21/us/final-report-by-prosecutor-on-clintons-is-released.html (discussing the special prosecutor's report on the Whitewater investigation).