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Congress's Anti-Removal Power

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Agency Independence After Seila and Collins

CONGRESS'S ANTI-REMOVAL POWER

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Statutory restrictions on presidential removal of agency leadership enable agencies to act independently from the White House. Yet since 2020, the U.S. Supreme Court has held two times that such restrictions are unconstitutional precisely because they prevent the president from controlling policymaking within the executive branch. Recognizing that a supermajority of the justices now appear to reject the principle from Humphrey's Executor that Congress may prevent the president from removing agency officials based on policy disagreement, scholars increasingly predict that the Court will soon jettison agency independence altogether.

This Article challenges that conventional wisdom. True, the Court is skeptical of statutory restrictions on the president's removal power. But statutory removal restrictions are not the only tool to achieve agency independence. Instead, the Constitution provides Congress with what we dub the anti-removal power—i.e., the power to discourage the White House from using its removal power. For example, because the Senate has plenary authority under the Appointments Clause to withhold its consent for executive branch nominees there is no guarantee that the Senate will confirm a replacement if the president removes the incumbent for a poor reason. As Alexander Hamilton explained, the “silent operation” of that uncertainty often allows Congress to prevent removal in the first place. Similarly, James Madison acknowledged during the Decision of 1789 that although the Constitution (in his view) forbids statutory removal restrictions, Congress has means to make removal costly for the president, which prospect should “excite serious reflections beforehand in the mind of any man who may fill the presidential chair.”

Importantly, moreover, Congress can strengthen its anti-removal power by, among other things, enacting reason-giving requirements, raising cloture thresholds, and preventing presidential evasion of the Appointments Clause. Using history, real-world examples, and game theory, we demonstrate how Congress can create a level of agency independence without the use of statutory removal restrictions. We also

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explain why Congress’s anti-removal power has advantages over statutory removal restrictions, including a surer constitutional footing and enhanced accountability: both the president and Congress face political consequences for how they exercise their removal and anti-removal powers. Finally, we offer Congress a path forward to restore some agency independence, strengthen perceived decisional independence in agency adjudication, and limit judicial challenges to agency structures.

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INTRODUCTION

The Supreme Court’s decision in *Humphrey’s Executor*¹—and with it the idea that Congress can impose statutory restrictions on the president’s power to fire agency policymakers²—may be living on borrowed time. Justices Clarence Thomas and Neil Gorsuch have identified *Humphrey’s Executor* as a “serious, ongoing threat” that “subverts political accountability and threatens individual liberty,”³ while Justice Brett Kavanaugh has stated

¹ *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935).

² See, e.g., Ganesh Sitaraman, *The Political Economy of the Removal Power*, 134 HARV. L. REV. 352, 381, 404 (2020) (explaining *Humphrey’s Executor* and the relationship between removal and agency independence); Aziz Z. Huq, *Removal as a Political Question*, 65 STAN. L. REV. 1, 6 (2013) (agreeing that although their effect should not be overstated, removal restrictions create some independence).

³ See, e.g., *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2219 (2020) (Thomas, J., concurring in part; joined by Gorsuch, J).

that *Humphrey's Executor* finds no support in “the text of Article II” and can be “discarded as [a] relic[] of an overly activist anti-New Deal Supreme Court.”⁴ Justice Samuel Alito authored the Court’s opinion in *Collins v. Yellen* that held that *any* restriction on presidential removal is unconstitutional for a single-headed agency.⁵ All the while, Chief Justice John Roberts has repeatedly refused to extend *Humphrey's Executor*, including most recently in *Seila Law v. CFPB* and *United States v. Arthrex*.⁶ And for her part, Justice Amy Coney Barrett openly espouses the methodology of her late boss, Justice Antonin Scalia.⁷ Scalia, of course, attacked *Humphrey's Executor* in his most famous dissent.⁸

Reading these tea leaves (if they aren’t not neon signs), observers across the ideological spectrum predict that the Court is preparing to overrule *Humphrey's Executor* outright, or at least limit it to its facts.⁹ For example,

⁴In re Aiken Cty., 645 F.3d 428, 441–42 (D.C. Cir. 2011) (Kavanaugh, J., concurring); see also Jess Bravin & Brent Kendall, *The Case That Shaped Brett Kavanaugh's Thinking on Presidential Power*, WALL ST. J. (Aug. 31, 2018) (“Judge Brett Kavanaugh . . . has signaled he would like to overturn . . . *Humphrey's Executor v. U.S.* The case has come up repeatedly in Judge Kavanaugh’s writings as a misguided dilution of the president’s power over the executive branch.”). Cf. Christopher J. Walker, *Judge Kavanaugh on Administrative Law and Separation of Powers*, SCOTUSBLOG (July 26, 2018) (“To be sure, Kavanaugh’s separation-of-powers opinions do not directly address these issues—though some have strained to read ‘wolves’ into Kavanaugh’s footnotes to cast doubt on the future of independent agencies writ large.”).

⁵141 S. Ct. 1761, 1783–87 (2021) (holding that the president must be able to remove agency heads, regardless of how much authority they wield); see also John Harrison, *The Unitary Executive and the Scope of Executive Power*, 126 YALE L.J. F. 374, 374 (2016) (explaining that Justice Alito has described himself as a “strong proponent” of the view that “the President has the power and the duty to supervise the way in which subordinate Executive Branch officials exercise the President’s power” (quotation omitted)).

⁶See *Seila Law*, 140 S. Ct. at 2206 (“While we do not revisit *Humphrey's Executor* . . . we decline to elevate it into a freestanding invitation for Congress to impose additional restrictions on the President’s removal authority.”); *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010) (refusing to extend *Humphrey's Executor* to “a new situation”); *U.S. v. Arthrex, Inc.*, 141 S. Ct. 1970, 1983 (2021) (reiterating *Seila Law* and *Free Enterprise Fund* over the dissent’s invocation of *Humphrey's Executor*); see also Gillian E. Metzger, *The Supreme Court, 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 18 (2017) (explaining how the Chief Justice’s chary view of agency independence reflects the rise of anti-administrativism).

⁷See, e.g., *Remarks by President Trump Announcing His Nominee For Associate Justice of The Supreme Court of The United States*, 2020 WL 5759946, at *3 (Sept. 26, 2020) (quoting Barrett as stating that Scalia’s “judicial philosophy is mine, too”).

⁸See, e.g., *Morrison v. Olson*, 487 U.S. 654, 726 (1988) (Scalia, J., dissenting) (criticizing *Humphrey's Executor* as “devoid of textual or historical precedent”).

⁹See, e.g., Cass R. Sunstein & Adrian Vermeule, *The Unitary Executive: Past, Present, Future*, 2021 SUP. CT. REV. (forthcoming 2021) (explaining that the Court has already begun to “gut[] *Humphrey's Executor*” and does “not have a favorable word to say about” it); Justin Walker, *The Kavanaugh Court and the Schechter-to-Chevron Spectrum: How the New Supreme Court Will Make the Administrative State More Democratically Accountable*, 95 IND. L.J. 923 (2020) (arguing that “we can

Richard Murphy has argued that because the “language and logic” of the Court’s recent cases “flatly contradicts” the reasoning from *Humphrey’s Executor* and *Morrison*, those “two precedents, and the agency decisional independence they protect, are skating on melting ice.”¹⁰

This conventional wisdom has much truth to it: statutory restrictions on presidential removal may not be long for this world. In *Collins*, for example, six justices declined to defend the Federal Reserve, the Social Security Administration (SSA), and even the Civil Service—despite our contentions as court-appointed amicus to the contrary.¹¹ But the idea that this development, although important, portends the end of agency independence is false. Although commentators have overlooked the point in the familiar back-and-forth over statutory removal restrictions, in reality the Constitution itself gives Congress an anti-removal power that is separate from Congress’s disputed ability to enact statutory removal restrictions. Thus, even if the Court were to toss out *Humphrey’s Executor* altogether, Congress’s anti-removal power would allow some agency independence.

This anti-removal power is found in Congress’s ability to discourage the White House from exercising its removal power. The most obvious source of Congress’s anti-removal power is the Appointments Clause and, in particular, the Senate’s plenary, unreviewable authority to reject a presidential nominee. This power to withhold consent has a dynamic effect: because the president knows that the Senate may reject a replacement nominee, the president often must rationally hesitate before firing the incumbent in the first place. This dynamic effect was known to the framers; indeed, Alexander Hamilton identified it in the *Federalist* as one of the Appointments Clause’s great—albeit “silent”—benefits.¹² And the current Supreme Court has also recognized this effect, twice accepting that Congress can require the president to give notice and provide reasons when firing

expect the Court to further undermine *Humphrey’s Executor*” and perhaps even “overturn[]” it outright, which would be a “jurisprudential earthquake”).

¹⁰Richard W. Murphy, *The DIY Unitary Executive*, 63 ARIZ. L. REV. 439, 446, 468–69 (2021); see also Jonathan H. Adler, *Conservative Minimalism and the Consumer Financial Protection Bureau*, 2020 U. CHI. L. REV. ONLINE 28, 35 (comparing Chief Justice Roberts’s minimalist approach with Justice Thomas’s more sweeping one); Patricia A. McCoy, *Constitutionalizing Financial Instability*, 2020 U. CHI. L. REV. ONLINE 66, 74–75 (lamenting the Court’s direction and warning that “it is hard to read [Justice Thomas’s analysis] as anything other than a call for abolition of independent federal agencies across the board”).

¹¹*Collins v. Yellen*, 141 S. Ct. 1761, 1787 n.21 (2021) (“Amicus warns that if the Court holds that the Recovery Act’s removal restriction violates the Constitution, the decision will ‘call into question many other aspects of the Federal Government.’ Amicus points to the Social Security Administration, the Office of Special Counsel, the Comptroller [of the Currency], ‘multi-member agencies for which the chair is nominated by the President and confirmed by the Senate to a fixed term,’ and the Civil Service. None of these agencies is before us, and we do not comment on the constitutionality of any removal restriction that applies to their officers.”); see also *id.* at 1802 (Kagan, J., concurring in part) (predicting based on the majority’s analysis that the SSA will be “next on the chopping block”).

¹²FEDERALIST NO. 76, p. 457 (C. Rossiter ed. 1961).

officers, even though the real-world effect of such a requirement may be discourage the White Houses from exercising its removal authority.¹³

The Appointments Clause, however, is only one part of Congress's anti-removal power. The Constitution also gives Congress other tools to discourage removal. Even James Madison—no doubt history's most formidable opponent of statutory restrictions on removal—conceded during the debates over what has come to be known as the Decision of 1789 that the Constitution empowers Congress with means to make removal so costly that no rational president would “wantonly dismiss a meritorious and virtuous officer.”¹⁴ Beyond echoing Hamilton's view that the Appointments Clause's dynamic effect often should prevent removal,¹⁵ Madison identified other tools—including even impeachment—available to Congress.¹⁶ Madison thus recognized that the anti-removal power belongs to Congress as a whole. Although the Senate confirms presidential nominees by means of its own cameral rules,¹⁷ Congress decides which offices are subject to the Senate's confirmation process and can make credible political threats.¹⁸

Congress's anti-removal power, moreover, is not just theoretical. For over 150 years, no president has *ever* removed a Comptroller of the Currency, even in the face of policy disagreement.¹⁹ For the Comptroller, there is no statutory removal restriction, only a reason-giving requirement. Congress

¹³ See, e.g., *Collins*, 141 S. Ct. at 1785 n.19 (agreeing that Congress may require reasons as part of removal); *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2201 n.5 (2020) (same); *id.* at 2232 (Kagan, J., dissenting) (explaining that such a requirement may “make [the president] sleep on the subject” rather than “firing” the official).

¹⁴ I ANNALS OF CONG. 517 (Joseph Gales ed., 1834) (quoting remarks of James Madison, June 17, 1789).

¹⁵ See *id.* (“[W]hat can be [the president's] motives for displacing a worthy man? It must be that he may fill the place with an unworthy creature of his own. Can he accomplish this end? No; he can place no man in the vacancy whom the senate shall not approve.”).

¹⁶ See *id.* at 517-18 (“The danger then consists merely in this: the president can displace from office a man whose merits require that he should be continued in it. What will be the motives which the president can feel for such abuse of his power, and the restraints that operate to prevent it? In the first place, he will be impeachable by this house, before the senate, for such an act of maladministration; for I contend that the wanton removal of meritorious officers would subject him to impeachment and removal from his own high trust. . . . [Beyond that,] the community will take side with [the removed official] against the president; it will facilitate those combinations, and give success to those exertions which will be pursued to prevent his re-election.”); *id.* at 518 (explaining that there are “other modes in which [the removed official] could make the situation of the president very inconvenient”).

¹⁷ See U.S. CONST. art. II, § 5 (“Each House may determine the Rules of its Proceedings . . .”). We explore these congressional tools in Part III *infra*.

¹⁸ See U.S. CONST. art. II, § 2 cl. 2 (“Congress may . . . vest the Appointment of such inferior Officers . . . in the President alone, in the Courts of Law, or in the Heads of Departments” (emphasis added)); *id.* art I, § 2 cl. 5 (“The House of Representatives . . . shall have the sole Power of Impeachment.”); *id.*, art I, § 3 cl. 6 (“The Senate shall have the sole Power to try all Impeachments.”).

¹⁹ See, e.g., Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (And Executive Agencies)*, 98 CORNELL L. REV. 769, 788 (2013) (offering an example of a policy disagreement involving the Comptroller of the Currency that did not result in removal). This example is discussed in detail in Part II.B *infra*.

included that requirement to signal that the White House should think twice before exercising its removal power absent a very strong justification.²⁰ Likewise, inspectors general have no statutory removal protections, but the president must provide reasons for removal. Although presidents occasionally remove inspectors general despite having to provide reasons, it is remarkable how often presidents do *not* remove inspectors general, even after a presidential transition.²¹ Once more, this sustained cross-administration stability reflects the “silent” effect of Congress’s anti-removal power. In fact, when President Reagan tried to remove every confirmed inspector general following his election in 1980, the Senate pushed back through political opposition and refusal to confirm any replacements until “five of the former inspectors general had been renominated and the Administration had made other commitments to support the inspector general system.”²² After observing that sharp pushback to Reagan’s attempt to clean house, no president has tried again. To the contrary, even though a president can nominally remove an inspector general for any reason, presidents have only removed a confirmed inspector general on three occasions (once by President Obama and twice by President Trump) over for the last forty years.²³

Importantly, once Congress’s anti-removal power is identified, one also sees that this power can be strengthened. Most obvious, if Congress wants to limit removal, it can enact reason-giving requirements for more offices and communicate—either formally or informally—that it prefers stability. But that is only the beginning. The Senate, for example, has the power to raise the number of votes necessary to invoke cloture for the executive calendar (i.e., the calendar the Senate uses as part of its confirmation process). By raising the number of votes from a simple majority to, say, three-fifths, Congress’s anti-removal power would become stronger because a president would know *ex ante* that it is less likely that the Senate would confirm a replacement. The number of votes necessary to invoke cloture could change, moreover, depending on *why* a vacancy exists. All the while, Congress could enact other procedural changes to disincentive removal. For example, the Congressional Review Act makes it quite difficult for a Senate committee to sit on legislation to disapprove a regulation.²⁴ Congress could do the same thing, but in reverse, adding more steps to the process to confirm a

²⁰ See, e.g., Aditya Bamzai, *Tenure of Office and the Treasury: The Constitution and Control over National Financial Policy, 1787 to 1867*, 87 GEO. WASH. L. REV. 1299, 1378–79 (2019) (offering contemporaneous evidence why Congress imposed a reason-giving requirement on the president for the Comptroller, namely, that “if the Senate did not approve of the reasons given by the President, they could refuse to confirm the successor” (quoting CONG. GLOBE, 38th Cong., 1st Sess. 1865 (1864))).

²¹ See, e.g., *Removal of Inspectors General: Rules, Practice, and Considerations for Congress*. Cong. Research Ser. at 1–2 (May 26, 2020) (identifying just a handful of removals of inspectors general).

²² *Id.* at 1.

²³ *Id.* at 2.

²⁴ See, e.g., Note, *The Mysteries of the Congressional Review Act*, 122 HARV. L. REV. 2162, 2168 (2009) (explaining that “CRA disapproval resolutions short-circuit the congressional committee process” and “prohibits filibusters”).

replacement for a removed official, which prospect in turn would further discourage the president from removing the incumbent. To be sure, the Senate potentially could discard such procedural rules—as it has sometimes used the “nuclear option” to do in related contexts.²⁵ But such rules generally have long shelf lives precisely because they serve the Senate’s own institutional interests.²⁶ In law and logic, Congress can use such unreviewable procedural rules to strengthen its anti-removal power. Congress can also strategically precommit to procedures that raise the White House’s political costs, such as by ensuring (by rule or perhaps even statute) that removed officials will receive a public opportunity to defend themselves in Congress and criticize the president’s “maladministration.”²⁷

Similarly, Congress as a whole can “cut off” presidential escape hatches from the Appointments Clause, which would also discourage removal. Presidents looking to avoid the Senate’s advice-and-consent process—in other words, to circumvent Congress’s anti-removal power—may attempt to use recess appointments or acting officials to carry out policy.²⁸ Yet at the same time that the Court has been narrowing Congress’s ability to impose statutory restrictions on removal, it has been reinforcing Congress’s ability to prevent presidential evasion of the Senate’s advice-and-consent process.²⁹ Indeed, the justices who most fervently oppose *Humphrey’s Executor* have also most aggressively argued that the president should not be able to duck the Appointments Clause.³⁰ The upshot of making evasion more difficult is that presidents also have less real-world ability to remove officeholders.

Although there are counterarguments to resting agency independence on Congress’s anti-removal power, including—admittedly—that it may not always work, doing so also has important advantages. First, and most important, this path to agency independence is constitutional—as confirmed by Article II’s text, structure, and history. Scholars disagree about whether

²⁵ See, e.g., Rebecca M. Kysar, *Interpreting by the Rules*, 99 TEX. L. REV. 1115, 1157 (2021) (describing use of “nuclear option” to change rules by majority vote).

²⁶ See, e.g., Jonathan S. Gould, *Law Within Congress*, 129 YALE L.J. 1946, 1955–56 & n.25 (2020) (collecting literature on “incentives facing legislators with respect to Congress’s rules and precedents”); Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 224 (1997) (explaining dynamics of filibuster).

²⁷ I ANNALS OF CONG. 517 (Joseph Gales ed., 1834) (quoting remarks of James Madison, June 17, 1789); see also *id.* (“The injured man will be supported by the popular opinion; the community will take side with him against the president.”).

²⁸ See generally Nina Mendelson, *The Permissibility of Acting Officials: May the President Work Around Senate Confirmation?*, 72 ADMIN. L. REV. 533 (2020); Anne Joseph O’Connell, *Actings*, 120 COLUM. L. REV. 613 (2020).

²⁹ See, e.g., *NLRB v. Noel Canning*, 573 U.S. 513 (2014) (rejecting recess appointments during pro forma sessions); *NLRB v. SW General, Inc.*, 137 S. Ct. 929 (2017) (restricting the president’s ability to use certain individuals as acting officials if the president wishes to nominate that person for the full-time position).

³⁰ See, e.g., *Noel Canning*, 573 U.S. at 569 (Scalia, J., concurring in the judgment, and joined by Roberts, C.J., and Thomas and Alito, JJ.) (arguing that recess appointments should be limited to “intermission between two formal legislative sessions” and that vacancies “may be used to fill only those vacancies that ‘happen during the Recess,’ that is, offices that become vacant during that intermission”); *Southwest General*, 137 S. Ct. 929 (Thomas, J., concurring) (concluding the Appointments Clause itself prohibits some uses of acting officials).

the Court’s holdings in *Arthrex*, *Collins*, and *Seila Law* are correct, but there is no dispute that a supermajority of the Court has decisively turned against statutory restrictions on removal. Thus, if Congress wants to preserve *any* agency independence, it needs another option that will not trigger constitutional invalidation. The anti-removal power is such an option.

Second, although Congress’s anti-removal power does not always prevent presidential removal, it often should. Although other factors obviously may also be at play, no president has ever fired a Comptroller of the Currency, and that position is protected by only a weak dose of Congress’s anti-removal power. Presumably a stronger dose—including enhanced cloture rules—would result in greater independence. Accordingly, although presidents would invariably still exercise their removal authority if Congress tried to protect officials like the Attorney General, Secretary of Defense, or Secretary of State, presidents almost certainly would stand down for many lesser offices absent a reason for removal that the Senate would respect, such as corruption or incompetence.

Third, the anti-removal power is flexible. Relying on *Humphrey’s Executor*, the Court has upheld statutory restrictions for multi-headed agencies but rejected them for single-headed agencies.³¹ Likewise, the Court has cast doubt on statutory removal restrictions for inferior officers who exercise policymaking discretion.³² Going forward, it is unclear whether *Humphrey’s Executor* and *Morrison* will remain good law. But whatever happens, Congress may decide that it wants to structure an agency differently than the few examples the Court has not rejected. Unlike statutory removal restrictions, Congress can use its anti-removal power for whatever type of agency structure it wants, and it can modulate its use of the power in each context with various hard and soft tools. This flexibility is particularly important for agency adjudication. As Justice Stephen Breyer has warned, if the president can remove all officers within the executive branch, then how can the government ensure that agency adjudicators can decide cases without fear of political influence?³³ Even strong proponents of the unitary executive acknowledge the importance of impartiality for agency

³¹ See, e.g., *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2206 (2020).

³² See, e.g., *id.* at 2200 (explaining that precedent recognizes an “exception” from the rule of at-will removal “for inferior officers with limited duties and no policymaking or administrative authority”).

³³ See, e.g., *Lucia v. SEC*, 138 S. Ct. 2044, 2060 (2018) (warning that the Court’s analysis “risk[s] transforming administrative law judges from independent adjudicators into *dependent* decisionmakers”) (Breyer, J., dissenting in part); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010) (warning that the Court’s analysis threatens administrative law judges “in over 25 agencies” who “adjudicate Social Security benefits, employment disputes, and other matters highly important to individuals.”) (Breyer, J., dissenting); Kent Barnett, *Regulating Impartiality in Agency Adjudication*, 69 DUKE L.J. 1695, 1698 (2020) (“Direct at-will removal of ALJs . . . likely undermines ALJs’ objective appearance of impartiality because department heads can hold the subtle threat of discipline or removal over ALJs to encourage them to favor agency positions.”).

adjudication.³⁴ But how to safeguard that impartiality without restrictions on removal? Congress's anti-removal power is the answer.

And fourth, grounding independence in Congress's anti-removal power would further political accountability—the same principle that motivates the president's removal power. Indeed, both the president and Congress would face political consequences for how they chose to exercise their respective powers. Because the president would need a good justification for removal to persuade the Senate to confirm a replacement, the White House would have strong incentive to make a case that the incumbent officeholder is doing a bad job. At the same time, Congress would have to justify its refusal to confirm a replacement or to use other anti-removal tools. The result would be greater political accountability for both branches. Congress's anti-removal power thus provides a political solution to a political problem.

Finally, now is the time for Congress to begin exploring its options under its anti-removal power. Since 2020, the Supreme Court has already rejected the structure of three agencies and the White House, in reliance on that precedent, has fired the head of the Social Security Administration. All the while, litigants across the country are challenging agency adjudication—often presided over by administrative law judges—on the ground that those adjudicators are insulated by two layers of statutory removal protection. Indeed, the justices have recently begun clearing the way for such litigation.³⁵ If Congress wishes to preserve agency decisional independence going forward, especially for adjudication, it would do well to promptly begin stronger and more targeted use of its anti-removal power.

This Article proceeds as follows. Part I sets the stage by surveying the longstanding constitutional debate over whether Congress can impose restrictions on the president's removal authority and the recent moves by the Supreme Court to cut back on *Humphrey's Executor*. It shows why Congress must now look beyond statutory removal protections to create agency independence. Part II introduces Congress's anti-removal power and explains—both doctrinally and using game theory—why this power challenges the conventional wisdom that agency independence requires statutory restrictions on removal. Part III offers a menu of tools that Congress can use to strengthen its anti-removal power. Part IV explains the benefits of grounding agency independence in Congress's anti-removal power and responds to counterarguments. Part V offers guidance to help Congress prudently use its anti-removal power, with particular focus on the benefits of protecting the decisional independence of agency adjudicators.

³⁴ See, e.g., Exec. Order No. 13,843, 83 Fed. Reg. 32,755 (July 13, 2018) (agreeing that agency adjudicators must be “impartial and committed to the rule of law”).

³⁵ See *Carr v. Saul*, 141 S. Ct. 1352, 1362 (2021) (rejecting issue-exhaustion requirement for constitutional challenges to administrative law judges based on officer status, which would apply equally to removal challenge); cf. *Fleming v. USDA*, 987 F.3d 1093, 1097 (D.C. Cir. 2021) (declining to reach constitutional challenge to agency adjudication based on the presence of “dual for-cause” removal protections for agency adjudicators because of failure to exhaust the issue before the agency).

I. THE BASICS OF AGENCY INDEPENDENCE

Agency independence and presidential removal are, at least in the eyes of the law, two sides of the same coin.³⁶ Some agencies like the Federal Trade Commission or the Federal Reserve are “independent” because the president cannot remove their leadership based on policy disagreement, while other agencies, like the Department of Treasury or Drug Enforcement Agency, are not independent because their leaders serve at the pleasure of the president.³⁷ The ability to disagree with the president without being removed for it allows some agencies to pursue policy that the White House dislikes.³⁸ As the Court explained in *Humphrey’s Executor*, “it is quite evident that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter’s will.”³⁹

Yet that “attitude of independence,” the Court has since explained, is constitutionally problematic precisely because it comes at the expense of “oversight by an elected President,” who is chosen by “the entire Nation [to] oversee the execution of the laws.”⁴⁰ Can Congress prevent the president from controlling the executive branch, thus potentially creating a “headless

³⁶ See, e.g., ACUS, SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES 42–43 (2d ed. 2018) (explaining that for legal scholars, “independence” is tied to “structural features, particularly fixed terms with for-cause removal protections,” whereas for non-legal scholars, “any agency established outside the [Executive Office of the President] or executive departments is an ‘independent agency’”).

³⁷ See *id.*; see also, e.g., *id.* at 44 (explaining that “[t]here are at least 30 agencies and subunits with administrators or directors who serve for a fixed term and are protected from removal by for-cause provisions”).

³⁸ See, e.g., *Humphrey’s Executor v. United States*, 295 U.S. 602, 619 (1935) (concluding that the president could not lawfully remove an FTC commissioner merely because the president did “not feel that [the commissioner’s] mind and [the president’s] mind [went] along together on either the policies or the administering of” the agency).

³⁹ *Id.* at 629; see also *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 531 (2010) (Breyer, J., dissenting) (explaining that restrictions on removal allows agencies to better exercise “technical expertise” free from “political influence”). To be sure, protection from removal is not the only source of independence. See, e.g., *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2237 (2020) (Kagan, J., dissenting) (“A given agency’s independence (or lack of it) depends on a wealth of features, relating not just to removal standards, but also to appointments practices, procedural rules, internal organization, oversight regimes, historical traditions, cultural norms, and (inevitably) personal relationships.”). But it is hard to deny that such protection provides *some* independence. See *id.* at 2237; see also Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 600–01 (2010) (identifying “mechanisms that make independent agencies increasingly responsive to presidential preferences” but agreeing that they do not create the same level of control as for “executive-branch agencies”); Datla & Revesz, *supra* note 19 at 826 (identifying multiple features that create decisional independence, including removals on restriction); David E. Lewis & Jennifer L. Selin, *Political Control and the Forms of Agency Independence*, 83 GEO. WASH. L. REV. 1487, 1490 (2015) (explaining that removal restrictions are one of many tools).

⁴⁰ *Free Enter. Fund*, 295 U.S. at 499.

fourth branch of government”⁴¹ This important and longstanding debate has been recounted many times before. Here, however, we present the relevant highlights, to underscore why statutory removal protections are likely on their way out and why Congress must look elsewhere if it wishes to encourage independence in the administrative state.

A. The Constitution's Text

The Constitution does not explicitly grant the president a removal power.⁴² Article II, however, does include at least three provisions from which the removal power may spring. The first is the Vesting Clause, which provides that “[t]he executive power shall be vested in a President of the United States.”⁴³ The second is the Take Care Clause, which commands the president to “take care that the laws be faithfully executed.”⁴⁴ The third is the Appointments Clause, which allows the president to appoint executive branch officers (sometimes subject to the Senate’s confirmation process),⁴⁵ and so—according to the principle that the power to appoint carries with it the power to unappoint—may implicitly allow removal.⁴⁶

The scope of each of these provisions is contested. Take the Vesting Clause. By some accounts, the term “executive power” encompasses subsidiary powers, including removal.⁴⁷ Others, however, contend that the term should be understood narrowly such that the president can only implement the law on the books, subject to any limitations Congress

⁴¹ See, e.g., *City of Arlington v. FCC*, 569 U.S. 290, 314 (2013) (Roberts, C.J., dissenting) (“The collection of agencies housed outside the traditional executive departments, including the Federal Communications Commission, is routinely described as the ‘headless fourth branch of government,’ reflecting not only the scope of their authority but their practical independence.”).

⁴² See, e.g., MICHAEL W. MCCONNELL, *THE PRESIDENT WHO WOULD NOT BE KING: EXECUTIVE POWER UNDER THE CONSTITUTION* 161 (2020) (“Although Article II contains an elaborate scheme for the appointment of officers, it does not explicitly address how and by whom executive officers may be removed from office, other than by impeachment.”).

⁴³ U.S. CONST. art. II, § 1, cl. 1.

⁴⁴ *Id.* at § 3.

⁴⁵ *Id.* § 2 cl. 2 (“[H]e shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all . . . Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law but the Congress may . . . vest the Appointment of such inferior Officers . . . in the President alone, in the Courts of Law, or in the Heads of Departments”).

⁴⁶ See, e.g., *Ex parte Hennen*, 38 U.S. 230, 13 Pet. 230, 259 (1839) (explaining that the “power of removal” may be “an incident of the power of appointment”).

⁴⁷ See, e.g., Ilan Wurman, *In Search of Prerogative*, 70 DUKE L.J. 93, 106 (2020) (categorizing different theories of what “the executive power” means, including theories that would allow “removal”); Ilan Wurman, *The Removal Power: A Critical Guide*, 2020 CATO SUP. CT. REV. 157, 158 (2019-2020) (similar); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 597-98 (1994) (“We . . . reject the idea that the President lacks a textually explicit power of removal, adopting instead the argument that the President may remove executive officers using his Vesting Clause grant of ‘executive Power’ that allows him to superintend the execution of federal law.”).

imposes.⁴⁸ Scholars also debate what it means to “vest” a power and whether such vesting supports unitary presidential control of the executive branch.⁴⁹

The Take Care Clause’s meaning is likewise disputed.⁵⁰ On its face, this clause imposes a duty rather than granting a power—a point that critics of presidential removal are quick to point out.⁵¹ Yet the imposition of a duty may carry with it power to enforce the duty (ought, after all, often implies can).⁵² Likewise, as a structural matter, the mere fact that the duty exists may suggest that some other provision (such as the Vesting Clause) grants the power. By contrast, others argue that the Take Care Clause just means that the president must enforce the law, including whatever removal restrictions that Congress has enacted.⁵³

⁴⁸ See, e.g., Wurman, *supra* note 47, at 106 (listing other theories that would preclude removal in the face of a statutory restriction); Daniel D. Birk, *Interrogating the Historical Basis for A Unitary Executive*, 73 STAN. L. REV. 175, 183 (2021) (arguing that the concept of “executive power” in pre-1789 England did not include removal); Julian Davis Mortenson, *The Executive Power Clause*, 168 U. PA. L. REV. 1269, 1273 (2020) (“[The Vesting Clause’s] fundamentally derivative characteristic meant that executive power was incapable of serving as even a defeasible source of independent substantive authority, let alone one that would be immune to legislative revision.”); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 47–48 (1994) (arguing that the Vesting Clause “says who has the executive power; not what that power is”).

⁴⁹ Compare Jed Shugerman, *Vesting: Text, Context, and Separation-of-Powers Problems*, 74 STAN. L. REV. (forthcoming 2021) (arguing that the Vesting Clause does not extend “powers beyond the reach of legislative conditions”), with Steven G. Calabresi, *The Vesting Clauses as Power Grants*, 88 NW. U. L. REV. 1377, 1387 (1994) (suggesting that the “Vesting Clause is a grant of power to the President to control and direct subordinate officials”), with Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 804 (1999) (arguing that vesting clauses should be read in light of other clauses to generate a more nuanced view of the issue).

⁵⁰ Compare Andrew Kent, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2189–90 (2019) (arguing that the president’s duty of faithful execution “may also restrict the President’s power to dismiss officials for primarily self-protective purposes against the public interest, especially given that removal power is not explicitly mentioned in the text, while the requirement of faithful execution is”) with McConnell, *supra* note 42, at 336 (arguing that the removal power flows from “the Vesting Clause and the Take Care Clause”), with Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1835, 1858 (2016) (noting that “[i]f [the clauses] requires the President to assure that subordinates engage in honest, scrupulous, and good faith administration, the President must have fairly broad removal powers that go beyond assuring that his or her subordinates have acted lawfully,” but concluding that the clause needs more scholarly examination).

⁵¹ See, e.g., *Seila Law*, 140 S. Ct. at 2228 (arguing that the clause does not support removal because it “speaks of a duty, not power”) (Kagan, J., dissenting).

⁵² See, e.g., *id.* (“To be sure, the imposition of a duty may imply a grant of power sufficient to carry it out.”); Goldsmith & Manning, *supra* note 50, at 1854 (“Although legal academics have often stressed that constitutionmakers framed the clause as a duty rather than a grant of power, a well-known—and commonsensical—canon of textual interpretation instructs that the imposition of a duty necessarily implies a grant of power sufficient to see the duty fulfilled.”).

⁵³ See, e.g., *Seila Law*, 140 S. Ct. at 2228 (Kagan, J., dissenting) (“[T]he Take Care Clause requires only enough authority to make sure ‘the laws [are] faithfully

The Appointments Clause is complicated as well. It allows the president to appoint officers of the United States, which may imply the power to remove the person so appointed. But the Senate also plays a role in appointment of principal officers and, unless Congress changes the default, of inferior officers, too. Thus, even if the power to appoint sometimes carries with it the power to remove,⁵⁴ it is debatable whether the Appointments Clause even fits that pattern given the role that Congress plays in the appointment of officers. Indeed, the fact that Congress must “establish[] by Law” the offices themselves arguably suggests that Congress has a role in removal on the theory that the greater power includes the lesser.⁵⁵

All the while, other provisions of Article II may cut against inherent presidential removal. For example, the Constitution does contain an express removal provision—impeachment.⁵⁶ So might not that be the correct way to remove an officer? Furthermore, the Opinions Clause allows the president to “require the Opinion, in writing, of the principal Officer in each of the executive Departments upon any Subject relating to the Duties of their respective Offices.”⁵⁷ If the president can remove an agency head for whatever reason, including failure to provide an opinion if asked, then what purposes does the Opinions Clause serve?⁵⁸ Of course, it is possible that the Opinions Clause is “redundant”—Alexander Hamilton thought so.⁵⁹ But the clause does complicate the argument. And outside of Article II, “Congress has the power ‘[t]o make all Laws which shall be necessary and proper for carrying into Execution’ not just its own enumerated powers but also ‘all

executed’—meaning with fidelity to the law itself, not to every presidential policy preference”).

⁵⁴ See, e.g., *Cafeteria & Rest. Workers Union, Local 473, AFL-CIO v. McElroy*, 367 U.S. 886, 896 (1961) (explaining the “settled principle” that absent some contrary indication, removal is “at the will of the appointing officer”)

⁵⁵ See, e.g., *Seila Law*, 140 S. Ct. at 2228 (Kagan, J., dissenting) (quoting U.S. CONST. art. II, § 2, cl. 2); cf. *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850) (holding that because Congress does not have to create inferior courts at all, it has the lesser power of restricting the jurisdiction of the courts it does create)

⁵⁶ U.S. CONST. art. I, § 3, cl. 5–7 (describing impeachment); *id.* Art. II, § 4 (“[A]ll civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”).

⁵⁷ *Id.* art. II, § 2, cl. 1.

⁵⁸ See, e.g., *Seila Law*, 140 S. Ct. at 2227 n.3 (Kagan, J., dissenting) (arguing that the Opinions Clause is “inexplicable” if the president has a removal power).

⁵⁹ See FEDERALIST NO. 74, at 446 (Alexander Hamilton) (Clinton Rossiter ed., Signet 2003) (commenting on Article II, Section 2’s Opinions Clause: “This I consider as a mere redundancy in the plan, as the right for which it provides would result of itself from the office.”); see also Saikrishna Bangalore Prakash, *Hail to the Chief Administrator: The Framers and the President’s Administrative Powers*, 102 YALE L.J. 991, 1004, 1007 (1993) (noting view that “even without the clause, the President has the power to ask for opinions of his department heads” and arguing that “[t]he President would not be demanding reports on how the departments would independently administer federal law” but instead “would be demanding opinions on how he ought to control the administration”).

other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”⁶⁰

Unfortunately, the question of removal was not debated during the constitutional convention.⁶¹ Nor does the Federalist definitively answer the question, though snippets suggest that Hamilton and perhaps even James Madison may have rejected an inherent removal power⁶²—another point of contention.⁶³ Accordingly, although one can draw structural inferences, the Constitution’s text does not unambiguously answer the question.

B. Early Debates

Much of the debate about presidential removal turns on what to make of early debates in Congress on the subject—most notably, the Decision of 1789.⁶⁴ The debate concerned whether the president could remove the head of the Department of Foreign Affairs.⁶⁵ Madison contended that the president had a such power based on his reading of Article II’s Vesting and Take Care Clauses.⁶⁶ Other members of Congress disagreed.⁶⁷ Further complicating the situation, some believed that Congress *could* impose removal restrictions, but the president, as a policy matter, should be able to remove the head of this particular agency.⁶⁸ After lengthy debate, Congress allowed presidential removal, but one cannot say for certain that this episode demonstrates that “a majority of the House subscribed to the Madisonian view of presidential

⁶⁰ *Seila Law*, 140 S. Ct. at 2228 (Kagan, J., dissenting) (quoting U.S. CONST. art. I, § 3, cl. 5).

⁶¹ *Compare Seila Law*, 140 S. Ct. at 2212 (Thomas, J., concurring in part) (agreeing that the “subject [of removal] was not discussed in the Constitutional Convention” and instead focusing on the First Congress), *with id.* at 2239 (Kagan, J., dissenting) (explaining that “[d]elegates to the Constitutional Convention never discussed whether or to what extent the President would have power to remove” and “the Framers advocating ratification had no single view of the matter”), and Heidi Kitrosser, *Interpretive Modesty*, 104 GEO. L.J. 459, 509 (2016) (urging hesitance given “[t]he lack of a founding consensus on removal”).

⁶² *Compare Seila Law*, 140 S. Ct. at 2229 (Kagan, J., dissenting) (arguing that “Hamilton presumed that under the new Constitution ‘[t]he consent of [the Senate] would be necessary to displace as well as to appoint’ officers of the United States,” and “Madison thought the Constitution allowed Congress to decide how any executive official could be removed” by stating that “[t]he tenure of the ministerial offices generally will be a subject of legal regulation” (quoting FEDERALIST NOS. 39 & 77)), *with id.* at 2205 & n.10 (maj.) (rejecting relevance of these quotations).

⁶³ *See Wurman*, *supra* note 44, at 197–98 (“It is not clear that either statement suggests the president does not have a removal power. . .”).

⁶⁴ *See, e.g.*, Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021, 1072 (2006).

⁶⁵ *See, e.g.*, Bamzai, *supra* note 20, at 1324–25.

⁶⁶ *See, e.g.*, John Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1971 (2011) (discussing *Myers v. United States*, 272 U.S. 52, 111–15, 117 (1926)).

⁶⁷ *See id.*

⁶⁸ *See* DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS* 40–41 (1997) (“[I]t was the considered judgment of the majority in both Houses that the President could remove the Secretary of Foreign Affairs, but there was no consensus as to whether he got that authority from Congress or from the Constitution itself.”).

power.”⁶⁹ And if things weren’t complicated enough, the Senate deadlocked on the question, requiring the vice president to cast the deciding vote.⁷⁰

At the same time, other early events suggest the president did not have power to control all acts of law execution. In 1790, for example, Congress enacted the Sinking Fund Commission to purchase war debt.⁷¹ The Commission had a peculiar structure: it was staffed by “the President of the Senate [i.e., the vice president], the Chief Justice, the Secretary of State, the Secretary of the Treasury, and the Attorney General.”⁷² This unusual structure may be relevant because the Commission could only act if three commissioners agreed *and* the president approved.⁷³ Yet because the president could not remove the chief justice or the vice president (at the time, a political rival), the Commission might refuse to act despite the president’s wishes whenever one of the three department heads was not confirmed or not present—which was certainly possibly, especially in an age when travel was difficult.⁷⁴ Likewise, as late as 1818, the Attorney General “believed that Congress could restrict the President’s authority to remove such officials, at least so long as it ‘express[ed] that intention clearly.’”⁷⁵

Nonetheless, despite the difficulty of drawing certain conclusions from this history, the Court stated in 1839 that “it was very early adopted, as the practical construction of the Constitution, that this power [to remove officers] was vested in the President alone,”⁷⁶ a point reiterated by the Attorney General in 1842 and by commentators who recognized that it was “difficult, and perhaps impracticable” to reverse course and allow restrictions on removal because the issue was “firmly and definitively settled.”⁷⁷

⁶⁹ Manning, *supra* note 66, at 2031.

⁷⁰ *Id.*

⁷¹ See Christine Kexel Chabot, *Is the Federal Reserve Constitutional? An Originalist Argument for Independent Agencies*, 96 NOTRE DAME L. REV. 1 (2020).

⁷² *Id.* at 4 (quoting Act of Aug. 12, 1790, ch. 47, § 2, 1 Stat. 186).

⁷³ *Id.* at 39.

⁷⁴ *Cf. id.* at 41 (explaining that Chief Justice Jay’s absence “prevented the Commission from acting immediately during a crucial episode in the financial crisis of 1792” when other members of the Commission were deadlocked). In *Collins*, the Court’s majority rejected the relevance of the Sinking Fund Commission because “three of those Commissioners were part of the President’s Cabinet and therefore removable at will.” 141 S. Ct. at 1785 n.19; see also Bamzai, *supra* note 20, at 1324 (similar). The Court’s observation is correct but it does not address that *sometimes* the president—predictably—could not control the Commission’s operations.

⁷⁵ *Seila Law*, 140 S. Ct. at 2231 n.5 (Kagan, J., dissenting) (quoting 1 Op. Atty. Gen. 212, 213 (1818)). This opinion concerned a recorder of wills, who arguably served an adjudicative function. As discussed below, how to reconcile presidential removal with adjudicative independence is a difficult question. See Part V.B *infra*.

⁷⁶ *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 259 (1839); see also *Shurtleff v. United States*, 189 U.S. 311, 318 (1903).

⁷⁷ John F. Manning, *The Independent Counsel Statute: Reading “Good Cause” in Light of Article II*, 83 MINN. L. REV. 1285, 1335 (1999) (quoting 4 Op. Atty. Gen. 1, 1 (1842); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION §§ 799–800, at 572–73 (Ronald D. Rotunda & John E. Nowak eds., 1987); 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 310–11 (John M. Gould ed., 1896)).

C. The Inconsistent Middle Years

As the 19th century moved forward, Congress decided that the issue was not “definitively settled” and began limiting removal by statute.⁷⁸ During the Civil War, for example, Congress for a one-year period limited the president’s ability to remove the Comptroller of the Currency without “the advice and consent of the Senate.”⁷⁹ Soon afterwards, Congress rescinded that removal restriction, but replaced it with a requirement that the president must convey “reasons” for removal.⁸⁰ This reason-giving requirement, which has been in place now for nearly 160 years, is discussed in Part II.B.

More significantly, Congress—over the president’s veto—enacted the Tenure of Office Act in 1867, which “provid[ed] that all officers appointed by and with the consent of the Senate should hold their offices until their successors should have in like manner been appointed and qualified.”⁸¹ Although the Tenure of Office Act’s constitutionality did not come before the Court, the justices did address removal restrictions for inferior officers, holding in *United States v. Perkins* that Congress’s “constitutional authority” to vest the appointment of such officers in department heads (rather than the president) “implies authority to limit, restrict, and regulate the removal by such laws as Congress may enact in relation to the officers so appointed.”⁸² The Court, however, was also reluctant to infer removal restrictions from ambiguous statutory language, concluding in *Shurtleff v. United States* that Congress must clearly express its intention before a court should “hold[] the power of the President to have been taken away by an act of Congress.”⁸³

Then came *Myers*, where Chief Justice Taft—on behalf the Court’s majority—addressed a provision akin to the Tenure of Office Act. Taft concluded that Congress could not require the president to obtain the Senate’s consent before removing a postmaster.⁸⁴ The Court could have simply concluded that the Senate could not interject itself into the removal process, without addressing bigger questions about the scope of presidential removal. Taft, however, wrote broadly, explaining that because Article II vests “the executive power of the Government” in the president alone, who has the duty to “take Care that the Laws be faithfully executed,” it follows that an “unrestricted” “power to remove officers appointed by the President and the Senate [is] vested in the President alone.”⁸⁵ Although Taft was unwilling to say that the president has an unlimited removal power, his analysis suggested deep skepticism of removal restrictions.⁸⁶

⁷⁸ See *Myers v. United States*, 272 U.S. 52, 163 (1926) (explaining that “from 1789 until 1863, a period of 74 years, there was no act of Congress, no executive act, and no decision of this Court at variance [with the Decision of 1789]”).

⁷⁹ National Bank Act of 1863, ch. 58, § 1, 12 Stat. 665, 665–66 (repealed 1864).

⁸⁰ See 12 U.S.C. § 2; see also Bamzai, *supra* note 20, at 1320, 1371–79.

⁸¹ See *Myers*, 272 U.S. at 166.

⁸² *United States v. Perkins*, 116 U. S. 483, 485 (1886).

⁸³ See *Shurtleff v. United States*, 189 U.S. 311, 315 (1903).

⁸⁴ See *Myers*, 272 U.S. at 166.

⁸⁵ See *id.* at 114–15.

⁸⁶ See *id.* at 127 (concluding in light of *Perkins* that Congress could restrict the removal of inferior officers whose appointment is vested in department heads).

Nine years later, however, the Court reversed course in *Humphrey's Executor*.⁸⁷ President Franklin Roosevelt concluded that he wished to remove William Humphreys, an FTC commissioner whose views did not jibe with the Administration's "aims and purposes."⁸⁸ Congress, however, had declared that the president could only remove FTC commissioners for "inefficiency, neglect of duty, or malfeasance in office."⁸⁹ Humphrey refused to resign, and the matter ended up before the justices. Given *Myers*, Stanley Reed, Roosevelt's Solicitor General, told the president that the case "couldn't be lost."⁹⁰ Yet the president did lose—unanimously. The Court distinguished *Myers* on the ground that a postmaster exercises pure executive power, but "[t]o the extent that [the FTC] exercises any executive function—as distinguished from executive power in the constitutional sense—it does so in the discharge and effectuation of its quasi-legislative or quasi-judicial powers, or as an agency of the legislative or judicial departments of the government."⁹¹ The Court also dismissed many of the broad statements in *Myers* as "dicta."⁹² Following *Humphrey's Executor*, the Court's general philosophy regarding removal restrictions flipped, with the Court going so far as to infer removal protections even when Congress did not expressly provide for them.⁹³

This already narrow understanding of the president's removal power was further narrowed in *Morrison v. Olson*.⁹⁴ There, the question was whether Congress could provide the independent counsel (an inferior officer⁹⁵) with protection from removal without "good cause." There was no question that the independent counsel—a prosecutor assigned the "full power and independent authority to exercise all investigative and prosecutorial

⁸⁷ *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

⁸⁸ See *id.* at 618; see also Daniel Crane, *Debunking Humphrey's Executor*, 83 GEO. WASH. L. REV. 1836, 1841–42 (2015) (describing policy differences, including William Humphrey's "vow[] not to approve any Commission action that did not have as its goal to 'help business help itself'").

⁸⁹ 15 U.S.C. § 41.

⁹⁰ JEFF SHESOL, *SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT* 144 (2010). Indeed, *Humphrey's Executor* made Roosevelt "madder at the Court than any other decision." *Id.* at 143 (quoting Robert Jackson).

⁹¹ *Humphrey's Executor*, 295 U.S. at 628.

⁹² *Id.* at 627.

⁹³ Indeed, in *Wiener v. United States*, the Court explained that "Humphrey's case was a cause celebre—and not least in the halls of Congress," and that it was fair to assume that Congress legislated with an understanding that certain "tasks require absolute freedom from Executive interference." 357 U.S. 349, 353 (1958).

⁹⁴ 487 U.S. 654 (1988).

⁹⁵ The *Morrison* Court determined that the independent counsel was an inferior officer; whether that analysis still applies, however, is debatable. In dissent, Justice Scalia argued that she was a principal officer because she could act without supervision. See *id.* at 720 (Scalia, J., dissenting). Subsequently, the Court appears to have adopted Scalia's test. See, e.g., *Seila Law*, 140 S. Ct. at 2199 n.3 ("More recently, we have focused on whether the officer's work is 'directed and supervised' by a principal officer." (quoting *Edmond v. United States*, 520 U.S. 651, 663 (1997))). In *Arthrex*, the Court relied on this language from *Edmond* to conclude that administrative patent judges would be principal officers if the director of the PTO could not revise their decisions.

functions and powers of the Department of Justice”⁹⁶—exercised executive power rather than quasi-legislative or quasi-judicial power.⁹⁷ Nonetheless, the Court upheld the removal restriction, explaining that rather than focus on whether a power is “purely executive” or quasi-anything, the proper inquiry is “whether the removal restrictions are of such a nature that they impede the President’s ability to perform his constitutional duty.”⁹⁸

Thus, following *Morrison*, the general view was that Congress could impose removal restrictions even for purely executive officers. Indeed, that was the take-away of Justice Scalia—hence his memorable image of a wolf coming as a wolf.⁹⁹

D. The Modern Trend

That general view no longer holds. The Court in recent years has repeatedly sided in favor of presidential removal using principles that if taken to their logical conclusion call into question *Humphrey’s Executor* itself.¹⁰⁰ The trend began with 2010’s *Free Enterprise Fund v. Public Company Accounting Oversight Board*, which concerned a board of accounting specialists within the Securities and Exchange Commission (SEC)—itself *arguably* an independent agency—who could not be removed at will.¹⁰¹ Then-Judge Kavanaugh dissented from the D.C. Circuit’s decision blessing this arrangement, arguing that *Humphrey’s Executor* did not apply to this new configuration. Surprising many, the Supreme Court granted

⁹⁶ *Morrison*, 487 U.S. at 716 (Scalia, J., dissenting) (quoting 28 U.S.C. § 594(a) (1982 ed., Supp. V)).

⁹⁷ *See id.* at 690 n.29 (concluding that the FTC exercised “executive” power); *Seila Law*, 140 S. Ct. at n.2 (“The Court’s conclusion that the FTC did not exercise executive power has not withstood the test of time . . . [because] even though the activities of administrative agencies ‘take “legislative” and “judicial” forms,’ they are exercises of—indeed, under our constitutional structure they *must* be exercises of—the “executive Power.””) (quoting *City of Arlington v. FCC*, 569 U.S. 290, 305 n.4 (2013))).

⁹⁸ *See Morrison*, 487 U.S. at 691.

⁹⁹ *Id.* at 699 (Scalia, J., dissenting).

¹⁰⁰ Notably, the importance of agency independence may be decreasing even apart from these doctrinal developments. *See, e.g.*, Adrian Vermeule, *Contra Nemo Iudex in Sua Causa: The Limits of Impartiality*, 122 YALE L.J. 384, 398 (2012) (“Although such structures theoretically insulate the independent agencies from presidential control, evidence suggests that by the end of their first term, presidents typically control policymaking at ‘independent’ agencies, in part by appointing members whose political preferences are predictable.” (citing Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459 (2008))).

¹⁰¹ 561 U.S. 477 (2010). Whether the SEC actually is an independent agency is unclear. *See id.* at 546–47 (Breyer, J., dissenting) (explaining that the SEC commissioners do not have statutory removal restrictions and that the statute was enacted after *Myers* but before *Humphrey’s Executor*). Following *Collins*, which states that “[w]hen a statute does not limit the President’s power to remove an agency head, we generally presume that the officer serves at the President’s pleasure,” 141 S. Ct. at 1782, the argument against SEC independence is even stronger.

certiorari and held that “such multilevel protection from removal is contrary to Article II’s vesting of the executive power in the President.”¹⁰²

The Court’s conclusion that *Humphrey’s Executor* can be distinguished because the FTC and the president are only separated by one level of removal, whereas the Board and the president were separated by two levels of removal, is not especially satisfying on its own terms; either way, the president cannot control the use of executive power. Indeed, much of *Free Enterprise Fund’s* analysis would apply with equal force to a single-level removal restriction.¹⁰³ Alarmed, Justice Breyer wrote a lengthy dissent, warning of the consequences posed by the majority’s reasoning.¹⁰⁴ Among the potential legal challenges, he suggested that any losing party before the more than 1500 federal administrative law judges (ALJs) would arguably have grounds to challenge the agency adjudicators’ constitutionality under *Free Enterprise Fund*.¹⁰⁵ Breyer thus highlighted a key risk: If political officials can remove adjudicators at will, how to ensure decisional independence? Several years later, in *Lucia v. SEC*, which concerned whether ALJs are officers of the United States for purposes of the Appointments Clause, Breyer returned to this theme, warning that if principles of at will removal “appl[y] equally to the administrative law judges,” then ALJs may cease being “independent adjudicators” and become “dependent decisionmakers,” contrary to a key premise of the Administrative Procedure Act (APA).¹⁰⁶

The prospect that *Free Enterprise Fund’s* attack on *Humphrey’s Executor* would be limited to situations involving two levels of removal was firmly put to rest in the Court’s 2020 *Seila Law* decision. *Seila Law* concerned the Consumer Financial Protection Bureau (CFPB), a powerful regulator tasked with “the sole responsibility to administer 19 separate consumer-protection statutes that cover everything from credit cards and car payments to mortgages and student loans.”¹⁰⁷ The CFPB was created following the 2007 to 2008 financial crisis and prompted years of litigation, which culminated in *Seila Law*. There, again drawing on then-Judge Kavanaugh’s analysis from the D.C. Circuit, Chief Justice Roberts—writing for a 5–4 majority—held that the CFPB’s structure was unconstitutional because the president could not remove the agency’s head at will, yet the CFPB “wield[ed] significant executive power.”¹⁰⁸ Justice Thomas (joined by Justice Gorsuch) wrote separately to urge the Court to overrule *Humphrey’s Executor*, which

¹⁰² *Id.* at 484; *see also id.* at 488 (explaining Kavanaugh’s views).

¹⁰³ *See, e.g.,* Neomi Rao, *A Modest Proposal: Abolishing Agency Independence in Free Enterprise Fund v. PCAOB*, 79 *FORDHAM L. REV.* 2541, 2559 (2011); Huq, *supra* note 2, at 3; *see also* Kent Barnett, *Avoiding Independent Agency Armageddon*, 87 *NOTRE DAME L. REV.* 1349, 1356 (2012) (speculating that the Court had changed its views on the unitary executive by the time *Free Enterprise Fund* was decided).

¹⁰⁴ *See Free Enterprise*, 561 U.S. at 545 (Breyer, J., dissenting) (“To interpret the Court’s decision as applicable only in a few circumstances will make the rule less harmful but arbitrary. To interpret the rule more broadly will make the rule more rational, but destructive.”).

¹⁰⁵ *Id.* at 542–43.

¹⁰⁶ *Lucia v. SEC*, 138 S. Ct. 2044, 2060 (2018) (Breyer, J., dissenting in part).

¹⁰⁷ 140 S. Ct. at 2200.

¹⁰⁸ *Id.* at 2192–93; *see also id.* at 2200 (reiterating Kavanaugh’s analysis).

he called “a direct threat . . . the liberty of the American people.”¹⁰⁹ By his account, the majority opinion in *Seila Law* “has repudiated almost every aspect of *Humphrey’s Executor*.”¹¹⁰

Justice Kagan dissented—vigorously. She argued that Congress may “organize all the institutions of American governance, provided only that those arrangements allow the President to perform his own constitutionally assigned duties.”¹¹¹ Of particular relevance, Kagan explained that the majority opinion’s treatment of *Humphrey’s Executor* was illogical on its own terms; all else being equal, the president has more ability to control a single-headed agency with removal restrictions than a multi-member agency with them.¹¹² As Paul Clement—the court-appointed amicus—explained: “If it is unconstitutional to impose for-cause removal restrictions on one officer exercising executive power, imposing those restrictions on five officers exercising executive power would seem five times worse.”¹¹³

In 2021, the Court’s rejection of statutory removal restrictions continued. First, the Court held in *United States v. Arthrex* that the use of administrative patent judges (APJs) at the U.S. Patent and Trademark Office (PTO) violates the Appointments Clause because they could issue decisions not subject to plenary review by the PTO director.¹¹⁴ Again writing for the Court, Chief Justice Roberts explained that the president—or the president’s agents within the PTO—could not control APJs because of their “for cause” removal protection, meaning that “[i]n all the ways that matter to the parties who appear before the PTAB, the buck stops with the APJs, not with the Secretary or Director.”¹¹⁵ Justice Gorsuch wrote separately to stress that all executive officials must “depend, as they ought, on the President,” whose authority in turn depends on “the people.”¹¹⁶ In dissent, Justice Breyer argued that *Arthrex* is “part of a larger shift in our separation-of-powers jurisprudence” that began with *Free Enterprise Fund* and that rejects a “functional approach” to resolving “separation-of-power disputes.”¹¹⁷

Then came *Collins v. Yellen*, which significantly expanded *Seila Law*.¹¹⁸ In *Collins*, a group of investors challenged the Federal Housing Finance Agency’s decision to place the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) into conservatorships. Most of the investors’ arguments were statutory in character. But they also raised a constitutional challenge to the agency’s structure. The FHFA director serves a five-year term and can only be

¹⁰⁹ *Id.* at 2211 (Thomas, J., concurring in part).

¹¹⁰ *Id.* at 2212.

¹¹¹ *Id.* at 2225 (Kagan, J., dissenting in part).

¹¹² *Id.* at 2242–43.

¹¹³ Brief for Court-Appointed Amicus Curiae in Support of Judgment Below, *Seila Law LLC v. CFPB*, 2020 WL 353477 (U.S.), at 40–41 (2020).

¹¹⁴ *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1985 (2021).

¹¹⁵ *Id.* at 1982.

¹¹⁶ *Id.* at 1989 (Gorsuch, J., concurring in part and dissenting in part) (internal quotation marks omitted).

¹¹⁷ *Id.* at 1996 (Breyer, J., concurring in the judgment in part and dissenting in part).

¹¹⁸ 141 S. Ct. 1761 (2021).

removed by the president “for cause.”¹¹⁹ Anticipating the Supreme Court’s decision in *Seila Law*, the en banc Fifth Circuit held that this feature of the FHFA rendered the agency’s structure unconstitutional.¹²⁰ The Supreme Court then granted certiorari to determine whether to extend *Seila Law*’s holding applies to this different agency, despite the fact that the FHFA, unlike the CFPB, “regulates primarily Government-sponsored enterprises, not purely private actors,” and does “not involve regulatory or enforcement authority remotely comparable to that exercised by the CFPB.”¹²¹

Over the dissent of Justices Sotomayor and Breyer¹²² and Justice Kagan’s sharp criticism,¹²³ the *Collins* majority concluded that an agency need not exercise “significant executive power” in order for the president to have removal authority. Further, the majority held that although the term “for cause” provides less protection than the removal statutes at issue in *Seila Law*, *Free Enterprise Fund*, and *Humphrey’s Executor*, even that limited restriction was unconstitutional because it prevented the president from having “confidence” in the FHFA’s administration.¹²⁴ The majority also declined to offer a limiting principle that would prevent the Court’s holding from having far-reaching effects.¹²⁵ Although concurring in the judgment on because of the stare decisis effect of *Seila Law*, Kagan agreed that the Court’s analysis was far-reaching and predicted that the Commissioner of the Social Security Administration—another single-headed agency with a statutory removal restriction—may be “next on the chopping block.”¹²⁶

The Biden Administration quickly seized on the Court’s analysis, firing the FHFA director the day *Collins* was decided and the SSA commissioner

¹¹⁹ 12 U.S.C. § 4512(b)(2).

¹²⁰ *Collins v. Mnuchin*, 938 F.3d 553, 569–85 (5th Cir. 2019) (en banc).

¹²¹ *Seila Law*, 140 S. Ct. at 2202.

¹²² *Collins*, 141 S. Ct. at 1804 (“Never before, however, has the Court forbidden simple for-cause tenure protection for an Executive Branch officer who neither exercises significant executive power nor regulates the affairs of private parties. Because the FHFA Director fits that description, this Court’s precedent, separation-of-powers principles, and proper respect for Congress all support leaving in place Congress’ limits on the grounds upon which the President may remove the Director.”) (Sotomayor, J., dissenting).

¹²³ *Id.* at 1801 (“Without even mentioning *Seila Law*’s ‘significant executive power’ framing, the majority announces that, actually, ‘the constitutionality of removal restrictions’ does not ‘hinge[]’ on ‘the nature and breadth of an agency’s authority.’”) (Kagan, J., concurring in the judgment).

¹²⁴ *Id.* at 1786–87. Notably, the Court has never directly addressed the meaning of the various formulations of statutory removal restrictions, but *Collins* explains that a naked “for cause” provision “appears to give the President more removal authority than other removal provisions reviewed by this Court.” *Id.* at 1786 (collecting varying articulations). Cass Sunstein and Adrian Vermeule argue that under perhaps the most common removal standard—“inefficiency, neglect, or malfeasance”—the president still has some policy control. See Cass R. Sunstein & Adrian Vermeule, *Presidential Review: The President’s Statutory Authority Over Independent Agencies*, 109 GEO. L.J. 637 (2021). Thus, even “independent” agencies do not have unlimited discretion, although the precise limits are unclear.

¹²⁵ See *id.* at 1787 n.21 (declining to address other agencies that may be vulnerable under the Court’s analysis).

¹²⁶ *Id.* at 1802 (Kagan, J., concurring in the judgment).

less month a month later; both of these agency heads had been nominated by President Trump and confirmed by a Republican-controlled Senate.¹²⁷

E. The Future?

Reading these signals, many commentators believe that *Humphrey's Executor* may be on its last legs. And even scholars who contend that the Court is unlikely to overrule *Humphrey's Executor* outright agree that the Court will not extend it an inch further. To be sure, the Court's trajectory is not popular in all circles; many scholars agree with Justices Breyer, Sotomayor, and Kagan that the Court's return to *Myers* is a mistake. But the aggressive analysis in *Collins*—which rejected the “significant executive power” limitation identified just one year earlier in *Seila Law*—suggests that the Court views statutory restrictions on removal as constitutionally problematic and should only be tolerated (if at all) because of *stare decisis*.

Indeed, the distinctions the Court drew in *Free Enterprise Fund* and *Seila Law* between those cases and *Humphrey's Executor* demonstrate that *Humphrey's Executor* itself is the Court's target. As a practical matter, for example, if the president cannot freely remove the head of an agency, it is hard to see how much less control the president has over the agency when that agency head herself cannot freely remove an inferior officer within that agency. The first-level restriction is the most important.¹²⁸ Likewise, it is more difficult for the president to control multi-headed agencies, yet the Court has only rejected removal restrictions for single-headed agencies. All of this suggests that the Court's majority believes that *Humphrey's Executor* is simply wrong and is not a sound premise from which to reason. Indeed, it is not clear that *Humphrey's Executor*—as construed by the Court in *Seila Law*—even protects today's FTC, let alone other agencies.¹²⁹

II. CONGRESS'S ANTI-REMOVAL POWER

The trend in recent years is clear: the Court has turned on the principle from *Humphrey's Executor* that Congress can impose restrictions on presidential removal. As the Chief Justice has repeatedly explained, the “buck” must stop with the president.¹³⁰ Thus, because conventional

¹²⁷ See Rachel Siegel, Tyler Pager & Robert Barnes, *White House Replaces Regulator Overseeing U.S. Mortgage Giants Following Supreme Court Ruling*, WASH. POST (June 23, 2021), <https://www.washingtonpost.com/us-policy/2021/06/23/biden-fannie-freddie-fhfa-supreme-court/>; Lisa Rein, *Biden Fires Head of Social Security Administration, a Trump Holdover Who Drew the Ire of Democrats*, WASH. POST (July 11, 2021), https://www.washingtonpost.com/politics/andrew-saul-firing-social-security-2021/07/09/c18a34fa-df99-11eb-a501-0e69b5d012e5_story.html.

¹²⁸ *Free Enterprise Fund*, 561 U.S. at 525 (Breyer, J., dissenting) (“[S]o long as the President is legitimately foreclosed from removing the Commissioners except for cause (as the majority assumes), nullifying the Commission's power to remove Board members only for cause will not resolve the problem the Court has identified: The President will still be ‘powerless to intervene’ by removing the Board members if the Commission reasonably decides not to do so.”).

¹²⁹ See, e.g., Aaron L. Nielson, *Is The FTC on a Collision Course With the Unitary Executive?*, YALE J. REG.: NOTICE & COMMENT (July 2, 2021).

¹³⁰ *Seila Law*, 140 S. Ct. at 2191 (quoting *Free Enterprise Fund*, 561 U.S. at 514).

administrative law treats protection from removal as the springboard for agency independence, or at least a central part of it, the conventional wisdom is that the Court is preparing to destroy “decisional independence”¹³¹ and maybe even toss out “independent agencies altogether.”¹³²

Yet that conclusion does not follow. Agency independence is possible even without statutory restrictions on removal. Such independence requires, however, Congress to exercise its *anti-removal power*, an overlooked feature of the Constitution that Congress can use to create stability across presidential administrations by discouraging the president’s use of his removal power. Congress, for example, can dissuade removal in the first place—even where the president and an executive-branch official disagree on policy matters—by credibly signaling that the Senate will not confirm a replacement. Often, the result is that the president will conclude that removal is just not worth it, especially for positions that are technocratic or otherwise not salient. Congress also has other tools to increase the political costs of “wanton” removal; indeed, Madison went so far as to suggest that Congress could threaten impeachment. Importantly, at the same time that the Court has been rejecting statutory restrictions on presidential removal, it has been strengthening Congress’s anti-removal power, both by affirming that Congress can impose reason-giving requirements on removal and by cutting off presidential attempts to evade the Appointments Clause.

The existing literature recognizes that the Senate can use the Appointments Clause in a retaliatory fashion, including to push back against presidential involvement with agency activity.¹³³ But the literature has not recognized the dynamic effect of that reality on removal in the first place and in particular how it enables agency independence. Nor has the literature identified how the Appointments Clause fits in Congress’s broader suite of tools that can be strategically employed to discourage removal. Here, we introduce Congress’s anti-removal power, explain its history, and then use game theory to illustrate why and under what circumstances it works.

¹³¹ Murphy, *supra* note 10, at 468–69.

¹³² Barnett, *supra* note 33, at 1718; *see also* Jane Manners & Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 COLUM. L. REV. 1, 71 (2021) (explaining that diluting statutory restrictions on removal undermines “agencies designed to be independent of the President”).

¹³³ *See, e.g.*, Timothy G. Duncheon & Richard L. Revesz, *Seila Law as an Ex Post, Static Conception of Separation of Powers*, 2020 U. CHI. L. REV. ONLINE 97 (explaining how the Senate may respond to *Seila Law* by “scrutiniz[ing] director nominees more extensively and even refuse to approve some of them”); Michael A. Livermore & Daniel Richardson, *Administrative Law in an Era of Partisan Volatility*, 69 EMORY L.J. 1, 33 (2019) (explaining that Congress can “resist” White House efforts to control agencies in numerous ways, including “the refusal to confirm nominees to key White House oversight positions”); *cf.* Thomas O. McGarity, *Administrative Law As Blood Sport: Policy Erosion in A Highly Partisan Age*, 61 DUKE L.J. 1671, 1714–15 (2012) (explaining how “drawn-out confirmation battles” can dampen “aggressive” policymaking).

A. The Basis of Congress’s Anti-Removal Power

Article II grants the president expansive powers. The president, for example, has always played a prominent role in foreign affairs.¹³⁴ And as the domestic federal government has become larger, the scope of the president’s domestic powers—such as the power to control criminal prosecution, administer benefits, and increasingly create nationwide policies—has also increased.¹³⁵ “Because no single person could fulfill that responsibility alone,” however, “the Framers expected that the President would rely on subordinate officers for assistance.”¹³⁶ But although giving “the President unilateral power to fill vacancies in high offices might contribute to more efficient Government,”¹³⁷ the framers rejected the idea that the president can appoint anyone he wishes to such offices.¹³⁸ Instead, for many officials—potentially a great many¹³⁹—Congress plays a role in appointment.

In particular, the Appointments Clause provides that the president:

shall nominate, and by and with the Advice and Consent of the *Senate*, shall appoint . . . all . . . Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the *Congress may by Law* vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.¹⁴⁰

The constitutional default thus is that the appointment of “Offices of the United States” must be approved by a majority of the Senate,¹⁴¹ but that Congress—if it wishes—may depart from that default for “inferior Officers.” Even then Congress need not directly empower the president, but can instead vest appointment in “Courts of Law,” and so outside of the executive

¹³⁴ See, e.g., *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319–320, (1936). To be sure, the president’s powers are not unlimited. See, e.g., Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 235 (2001) (explaining powers and limits). Yet the president regularly prevails. See, e.g., Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1258 (1988).

¹³⁵ See generally Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1240 (1994).

¹³⁶ *Seila Law*, 140 S. Ct. at 2191.

¹³⁷ *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 948 (2017) (Thomas, J., concurring).

¹³⁸ See, e.g., FEDERALIST NO. 76, *supra* note 12 (explaining that “[t]he person ultimately appointed must be the object of [the president’s] preference, though perhaps not in the first degree”).

¹³⁹ See, e.g., *Lucia v. SEC*, 138 S. Ct. 2044 (2018) (holding that SEC ALJs are officers); see also Jennifer L. Mascott, *Who Are “Officers of the United States”?*, 70 STAN. L. REV. 443, 443 (2018) (arguing that the original “meaning of ‘officer’” would likely extend to thousands of officials not currently appointed as Article II officers, such as tax collectors, disaster relief officials, customs officials, and administrative judges”).

¹⁴⁰ U.S. CONST. art. II, § 2, cl. 2 (emphasis added).

¹⁴¹ See, e.g., 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 80 (M. Farrand rev. ed. 1966) (defeating proposal that it would take “two-thirds of the Senate” to reject a nomination).

branch altogether.¹⁴² Thus, Congress can mitigate “the serious risk for abuse and corruption posed by permitting one person to fill every office in the Government.”¹⁴³ In this way, the Appointments Clause acts as a “check [on] a spirit of favoritism in the President” and minimizes the risk of “the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity.”¹⁴⁴

Yet preventing the appointment of “unfit characters” is not the Appointments Clause’s only effect. As Alexander Hamilton explained in Federalist No. 76, the Appointments Clause would also “have a powerful, though, in general, silent operation” that would both serve as “an excellent check upon a spirit of favoritism in the President” and, “[i]n addition to this,” serve as “an efficacious source of stability in the administration.”¹⁴⁵

In Federalist No. 77, Hamilton expounded on this theme:

IT HAS been mentioned as one of the advantages to be expected from the co-operation of the Senate, in the business of appointments, that it would contribute to the stability of the administration. The consent of that body would be necessary to displace as well as to appoint. A change of the Chief Magistrate, therefore, would not occasion so violent or so general a revolution in the officers of the government as might be expected, if he were the sole disposer of offices. Where a man in any station had given satisfactory evidence of his fitness for it, a new President would be restrained from attempting a change in favor of a person more agreeable to him, by the apprehension that a discountenance of the Senate might frustrate the attempt, and bring some degree of discredit upon himself. Those who can best estimate the value of a steady administration, will be most disposed to prize a provision which connects the official existence of public men with the approbation or disapprobation of that body which, from the greater permanency of its own composition, will in all probability be less subject to inconstancy than any other member of the government.¹⁴⁶

Some scholars—including Justice Kagan—read this language to mean that the Senate would have a formal role in removal, i.e., that the president

¹⁴²In *Morrison v. Olson*, the Court upheld such “interbranch appointments,” but explained—somewhat cryptically—that the power is not “unlimited,” and cannot be used to “impair the constitutional functions assigned to one of the other branches” or if “there [is] some ‘incongruity’ between the functions normally performed by the courts and the performance of their duty to appoint.” 487 U.S. at 675-76. For further discussion of interbranch appointments, compare Kent Barnett, *Resolving the ALJ Quandary*, 66 VAND. L. REV. 797, 832-60 (2013) (defending), with Amar, *supra* note 49, at 808 (casting doubt).

¹⁴³*Southwest General*, 137 S. Ct at 948 (Thomas, J., concurring).

¹⁴⁴FEDERALIST NO. 76, *supra* note 12; see also 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1524, p. 376 (1833) (explaining that “the appointments to office are too important to the public welfare” for the president alone to control, as “[t]he power may be abused; and, assuredly, it will be abused, except in the hands of an executive of great firmness, independence, integrity, and public spirit”).

¹⁴⁵See FEDERALIST NO. 76, *supra* note 12 (emphasis added).

¹⁴⁶FEDERALIST NO. 77, p. 463 (C. Rossiter ed. 1961).

would need the Senate’s permission to remove an official.¹⁴⁷ By contrast, Ian Wurman has recently argued that Hamilton just meant that the Senate would play a role if the president wished to “replace the officer with a new one,” but not that the Senate would need to approve the initial removal.¹⁴⁸ Seth Barrett Tillman offers a similar take, arguing that reading “displace” as “replace” rather than “remove” makes more sense in context.¹⁴⁹

Regardless of which side has the better of the argument, the broader point remains that Hamilton recognized what is inherent in the requirement that officeholders be approved by the Senate: The Appointments Clause is a tool of stability. Obviously, if the president could not remove an official without the Senate’s permission, the amount of stability would be much greater. But even under the “replacement” theory, greater stability should result to the extent that the president is “apprehensi[ve] that a discountenance of the Senate might frustrate the attempt to” appoint “a person more agreeable” to the president’s views.¹⁵⁰ Because the president cannot know whether the Senate—an “independent and co-ordinate” branch with plenary authority to reject appointments¹⁵¹—will confirm a replacement official, the White House must tread carefully before removing an officeholder, thereby dynamically discouraging removal and preventing the sort of “revolution in the officers of the government as might be expected, if [the president] were the sole disposer of offices.”¹⁵² This dynamic mechanism is a key part of Congress’s anti-removal power.

¹⁴⁷ See *Seila Law*, 140 S. Ct. at 2239 (Kagan, J., dissenting); see also Jeremy D. Bailey, *The Traditional View of Hamilton’s Federalist No. 77 and an Unexpected Challenge: A Response to Seth Barrett Tillman*, 33 HARV. J.L. & PUB. POL’Y 169, 171 (2010) (defending the “traditional view” that Hamilton endorsed a restriction on removal (citing Jeremy D. Bailey, *The New Unitary Executive and Democratic Theory: The Problem of Alexander Hamilton*, 102 AM. POL. SCI. REV. 453 (2008))).

¹⁴⁸ Wurman, *supra* note 47, at 197.

¹⁴⁹ Seth Barrett Tillman, *The Puzzle of Hamilton’s Federalist No. 77*, 33 HARV. J.L. & PUB. POL’Y 149, 165 (2010).

¹⁵⁰ FEDERALIST NO. 77, *supra* note 146.

¹⁵¹ 8 THE WRITINGS OF JAMES MADISON 250-51 (Gaillard Hunter ed., 1900-1910) (explaining that the “Executive & Senate . . . are . . . independent and co-ordinate with each other” and that if the Senate disagrees about appointments, “they fail”).

¹⁵² FEDERALIST NO. 77, *supra* note 146. To be sure, Hamilton may not have predicted widely divergent policies between administrations. See, e.g., David M. Driesen, *The Unitary Executive Theory In Comparative Context*, 72 HASTINGS L.J. 1, 21 (2020) (explaining the “view that all objective, reasonable officials would agree upon the proper course of action”). But his analysis recognized that the Senate could slow even modest changes—and so necessarily less modest ones. See, e.g., Marc Landy, *Incrementalism V. Disjuncture: The President And American Political Development*, 50 TULSA L. REV. 635, 639 (2015) (“Hamilton could see that the election of new presidents, especially if they were significantly at odds with their predecessor would create inexorable pressure to interrupt steady administration The Senate would serve as a very useful obstacle to such turnover Any official worth his salt could cultivate enough support among senators so that he could most likely thwart the effort of a hostile president to oust him. With the aid of Senatorial involvement Hamilton foresaw the development of a body of administrators whose lengthy tenure and relative immunity from political pressure would enable them to acquire the

Importantly, moreover, even while arguing that statutory restrictions on the president's removal power are unconstitutional, Madison also recognized Congress's anti-removal power and vividly demonstrated that it goes beyond just the Appointment Clause's dynamic effect. During the debate over the Decision of 1789, Madison reasoned that there was no need to fear presidential removal because Congress has ample means to prevent the power from being abused. Like Hamilton, Madison explained that the president would not likely remove an incumbent for a poor reason because the president "can place no man in the vacancy whom the senate shall not approve."¹⁵³ Madison, however, did not stop there. Instead, he asked the House of Representatives to "consider the restraints [the president] will feel" on exercising such a power, explaining that if the president should attempt to "displace from office a man whose merits require that he should be continued in it," the president "will be impeachable by this house, before the senate, for such an act of maladministration; for I contend that the wanton removal of meritorious officers would subject him to impeachment and removal from his own high trust."¹⁵⁴ And even beyond impeachment, the president would face political "consequences" for an imprudent removal:

The injured man will be supported by the popular opinion; the community will take side with him against the president; it will facilitate those combinations, and give success to those exertions which will be pursued to prevent his re-election. . . . If this should not produce his impeachment before the senate, it will amount to an impeachment before the community, who will have the power of punishment by refusing to re-elect him.¹⁵⁵

Madison further recognized that Congress could sharpen those costs. For example, apart from joining with others—no doubt including members of Congress—in targeted "combinations" designed to undercut the president's re-election prospects, the removed official "could make the situation of the president very inconvenient" by "obtain[ing] an appointment in one or other branch of the legislature; and being a man of weight, talents and influence in either case, he may prove to the president troublesome indeed."¹⁵⁶ Presumably by that remark Madison meant that the removed official could seek legislative office, but Madison's logic—that political checks discourage "wanton" removal—extends to other forms of legislative involvement, such as serving as a fact witness against the president before Congress. Given these many downsides, Madison observed that a rational president would hesitate before exercising the removal power, for "[t]o displace a man of high merit, and who from his station may be supposed a man of extensive influence, are considerations which will excite serious reflections beforehand in the mind of any man who may fill the presidential chair."¹⁵⁷

experience and expertise needed to make sound decisions and bring complex enterprises to fruition.").

¹⁵³ I ANNALS OF CONG. 517 (Joseph Gales ed., 1834) (quoting remarks of James Madison, June 17, 1789).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 517-18.

¹⁵⁶ *Id.* at 518.

¹⁵⁷ *Id.*

B. The History of Congress's Anti-Removal Power

Congress's anti-removal power is not just theoretical. History confirms that Congress sometimes deliberately employs its anti-removal power to create agency independence.

The best example is from the 1860s and the conflict over the Comptroller of the Currency. As explained in Part I.A, following the Decision of 1789, Congress did not enact a statutory restriction on removal for over 70 years. That changed in 1863, when Congress enacted the National Bank Act, which created the Office of the Comptroller of the Currency and tasked it with “organizing and administering a system of nationally chartered banks and a uniform national currency.”¹⁵⁸ Although serving “under the general direction of the Secretary of the Treasury,” the Comptroller would be “appointed by the President, on the nomination of the Secretary of the Treasury, by and with the advice and consent of the Senate” and “hold his office for the term of five years unless sooner removed by the President, by and with the advice and consent of the Senate.”¹⁵⁹ This removal restriction appears to have been included by members of Congress who feared too much presidential control over the banking system.¹⁶⁰

In 1864, Congress returned to the issue and deleted the 1863 Act's restriction on presidential removal. As Aditya Bamzai has recounted in his exploration of presidential control of financial agencies during the 18th and 19th centuries, Representative James Brooks complained that the 1863 Act deprived the president of “his constitutional power” to control the Comptroller's operations and Congress should not “take[] from the President of the United States the control of the public treasury.”¹⁶¹ The Senate debated the issue at length. Senator William Fessenden explained that the 1863 Act included the statutory removal restriction “because it was thought advisable that [the Comptroller] should be in a very particular degree independent of political changes and political considerations” with “a degree of permanency,” yet, under Article II, “[i]t is questionable whether the President has not the power of appointing this officer and removing him, even if this provision should remain in the bill.”¹⁶² Senator Jacob Howard was more blunt, stating that it was “well-settled law that under the

¹⁵⁸ Founding of the OCC & the National Banking System, <https://www.occ.treas.gov/about/who-we-are/history/founding-occ-national-bank-system/index-founding-occ-national-banking-system.html>

¹⁵⁹ National Bank Act of 1863, ch. 58, § 1, 12 Stat. 665, 665–66 (repealed 1864).

¹⁶⁰ See Bamzai, *supra* note 20, at 1372–75 (explaining fears expressed by some of a “political agency” but also noting others who objected to such a restriction).

¹⁶¹ CONG. GLOBE, 38th Cong., 1st Sess. 1256 (1864) (statement of Rep. Brooks); see also *id.* (“It is the President of the United States who is, has been through our whole history, and who should be, responsible.”). This statement prompted pushback, including apparently the notion that the mere vesting of the power of appointment in a department head creates independence from the president. See *id.* (statement of Rep. Stevens) (“I have no doubt of our power upon this subject. We could vest the appointment entirely in the Secretary of Treasury if we chose But I do not think it is worth quarreling about; and since there is now such a unanimous confidence in the President I propose that the words be stricken out.”).

¹⁶² *Id.* at 1865.

Constitution of the United States the President has the absolute power of appointment and the equally absolute power of removal” and that the Senate must not “annex any conditions or limitations to the President’s power of removal from office” but instead should “leave the responsibility of removal to the President himself.”¹⁶³

Yet the desire to provide the Comptroller with some protection remained. Senator Charles Buckalew offered a middle ground, “suggest[ing] that the Senate authorize the President to remove the Comptroller of the Currency ‘upon reasons to be reported by him to the Senate.’”¹⁶⁴ Senator Samuel Clarke Pomeroy supported that idea, explaining that “that the ‘effect’ of Buckalew’s proposal ‘would be that if the Senate did not approve of the reasons given by the President, they could refuse to confirm the successor.’”¹⁶⁵ Fessenden, however, thought this middle ground was incoherent because the president was free to remove the Comptroller for any reason whatsoever; thus, requiring him to give reasons “forms no sort of restraint” and “nothing will be accomplished.”¹⁶⁶ But Buckalew disagreed, explaining that although the president retained a removal power, a reason-giving requirement would inherently “limit” how the president used that authority “by ensuring that he would ‘not exercise this power unless he has good reasons for it,’” which would be “a very prudent and proper check” on the president.¹⁶⁷ Buckalew explained that such a requirement signaled that “[i]t is the policy of the Government that the President shall not have combined in him all power over the purse of the country and the money affairs of the country further than it is absolutely necessary.”¹⁶⁸ Although Fessenden continued to believe that a reason-giving requirement was “mere form [that] amounts to nothing,” Congress ultimately adopted Buckalew’s language.¹⁶⁹ Thus, until this day, the President cannot dismiss the Comptroller of the Currency unless he “communicate[s] his ‘reasons’ . . . to the Senate.”¹⁷⁰

Both sides of this debate were prescient. The Fessenden/Howard coalition correctly predicted the long-run course of constitutional law and the emergence of cases like *Myers* and *Collins*. But the Buckalew/Pomeroy coalition had a better nose for politics and human nature. In over 160 years, no president has ever removed a Comptroller.¹⁷¹ The reason why is surely not

¹⁶³ *Id.*

¹⁶⁴ Bamzai, *supra* note 20, at 1378 (quoting CONG. GLOBE, 38th Cong., 1st Sess. 1865 (1864)).

¹⁶⁵ *Id.* (quoting CONG. GLOBE, 38th Cong., 1st Sess. 1865 (1864)).

¹⁶⁶ CONG. GLOBE, 38th Cong., 1st Sess. 2122 (1864).

¹⁶⁷ *Id.* at 212. *See also id.* (statement of Sen. Johnson) (“I think it is some restraint upon the President.”).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ 140 S. Ct. at 2201 n.5 (quoting 12 U.S.C §2).

¹⁷¹ *See, e.g.*, Previous Comptrollers of the Currency, Office of the Comptroller of the Currency (listing comptrollers and why they left the office), <https://www.occ.treas.gov/about/who-we-are/history/previous-comptrollers/index-previous-comptrollers.html>; *see also PHH Corp. v. CFPB*, 881 F.3d 75, 92 (D.C. Cir. 2018) (en banc) (“Whatever the type of reason it requires, the statute without question constrains the presidential removal power.”). <add findings from current

because it is hard for the president to come up with some reason to fire the incumbent officeholder, but instead (at least in part) because of the Appointments Clause’s dynamic effect; the president knows that unless the White House’s reason is a good one, the Senate may “refuse to confirm the successor.”¹⁷²

Importantly, following Congress’s decision, presidents have opted to not use their removal authority for Comptrollers even in the face of serious policy disagreement. As Kirti Datla and Richard Revesz have demonstrated, “the existence of [this reason-giving] requirement contributed in part to the successful decision of the Comptroller of the Currency . . . to ignore a presidential directive.”¹⁷³ In particular, William Cary, former chair of the SEC, recounted an incident in which James Saxon, the Comptroller, opposed legislation to impose new disclosure standards on banks.¹⁷⁴ By Cary’s account, Saxon did all he could to torpedo the legislation, including attacking it publicly and before Congress.¹⁷⁵ The White House invited Cary and Saxon to a meeting to hear their positions. Following that meeting, the White House decided to support the legislation.¹⁷⁶ Nonetheless, Saxon continued to attack it. In response, the White House formally informed Congress that Saxon’s views were his “own” and “were in fact contrary to the administration position.”¹⁷⁷ And even then, Saxon still “ma[de] every effort to kill the bill until the day it was signed by the President.”¹⁷⁸ Reflecting on this event—in which an agency that is “technically part of the Executive Department” defied the position of the White House—Cary asked how it was possible that a “one-man regulatory agency could . . . exercise such broad independence?”¹⁷⁹ His conclusion echoed Buckalew’s prediction: Saxon could openly and repeatedly defy the White House because he had developed his own network of support in Congress, “plus the fact that the Comptroller of the Currency has a term appointment and can only be removed by the President ‘upon reasons communicated by him to the Senate.’”¹⁸⁰

The Comptroller is not the only officeholder protected by a reason-giving requirement; Congress has done the same for inspectors general. Congress enacted the Inspector General Act in 1978 to hold federal agencies accountable through audits, investigations, and whistleblowing.¹⁸¹

research on which presidents have asked a Comptroller to resign and additional details>

¹⁷² CONG. GLOBE, 38th Cong., 1st Sess. 1865 (1864) (statement of Sen. Clarke).

¹⁷³ Datla & Revesz, *supra* note 19 at 789 (citing WILLIAM L. CARY, POLITICS AND THE REGULATORY AGENCIES 101-03 (1967)).

¹⁷⁴ Cary, *supra* note 173, at 100.

¹⁷⁵ *See id.* at 101.

¹⁷⁶ *See id.*

¹⁷⁷ *See id.* at 102 (quoting 88 Cong., 1st Sess. on H.R. 6789, H.R. 6793, S. 1642, April 3, 1963, p. 1372)).

¹⁷⁸ *Id.* at 102–03.

¹⁷⁹ *Id.* at 103.

¹⁸⁰ *Id.* Here, we only show the efficacy of Congress’s anti-removal power. We do not defend Saxon’s choices or behavior. We discuss the policy implications of Congress’s anti-removal power in Part V *supra*.

¹⁸¹ Statutory Inspectors General in the Federal Government: A Primer, Cong. Res. Serv. (Jan. 3, 2019).

Inspectors general “are ‘independent and objective units’ charged with improving executive branch efficiency and accountability through oversight,” but are removable by the president.¹⁸² Congress, moreover, has not limited the causes for which removal is permissible; instead, the president can remove an inspector general for any reason, but if the White House does so, “the President shall communicate in writing the reasons for any such removal or transfer to both Houses of Congress, not later than 30 days before the removal or transfer.”¹⁸³ Inspectors general, moreover, can (and often do) serve for decades.¹⁸⁴ And although inspectors general are supposed to be selected based on merit rather than political affiliation, sometimes they may be selected at least in part due to partisan considerations.¹⁸⁵

Nevertheless, with some exceptions, presidents have been reluctant to remove inspectors general. That Congress has signaled to the president that it does not want these officials removed seems to play an important constraining role. And the few contrary examples seem to prove the rule. Despite desiring to remove inspectors general broadly, President Reagan retreated from that position in the face of congressional opposition.¹⁸⁶ When President Obama removed one—and only one—inspector general, his administration felt obliged to defend itself repeatedly and in some detail to

¹⁸² Congress’s Authority to Limit the Removal of Inspectors General, Cong. Res. Serv. (Apr. 16, 2021) (quoting 5a U.S.C. § 2), <https://crsreports.congress.gov/product/pdf/R/R46762>; see also Anne Joseph O’Connell, *Bureaucracy at the Boundary*, 162 U. PA. L. REV. 841, 927 n.135 (2014) (“IGs typically operate independently of agency leaders, though some agency heads can block investigations if national security is threatened. In some sense, IGs move classic executive agencies slightly closer to the legislative-executive border.”).

¹⁸³ 5a U.S.C. § 3(b). One may reasonably be concerned that the 30-day notice requirement, which was added in 2008 and allows for interbranch dialogue, could substantively (and unconstitutionally) limit the president’s removal power. But, in practice at least, “both President Obama and President Trump have removed IGs due to a ‘lack of confidence’ and placed IGs on administrative leave during the 30-day waiting period.” Cong. Res. Serv., *Presidential Removal of IGs Under the Inspector General Act 3* (May 22, 2020). The D.C. Circuit has upheld this presidential practice because IG “placement on administrative leave . . . did not constitute removal from office.” *Walpin v. Corp. for Nat. & Cmty. Servs.*, 630 F.3d 184, 187 (D.C. Cir. 2011). Because a pre-firing notice requirement strikes us as raising constitutional questions and is easily side-stepped by the president through paid administrative leave, we do not include it in Congress’s anti-removal power toolkit outlined in Part III *infra*. Congress could, of course, alternatively enact legislation that provides that if the president does not provide notice a certain number of days in advance of the firing, that failure would trigger a heightened cloture vote threshold for the president’s replacement nomination. See Part III.B *infra* (discussing cameral rule and statutory approaches to heightened cloture votes on appointments).

¹⁸⁴ *Statutory Inspectors General in the Federal Government: A Primer*, *supra* note 181, at 13.

¹⁸⁵ See, e.g., *id.* at 15 & n.115 (noting that presidential appointment may politicize the positions and noting allegations of the same); cf. Thomas O. McGarity & Wendy E. Wagner, *Deregulation Using Stealth “Science” Strategies*, 68 DUKE L.J. 1719, 1775 (2019) (explaining that inspectors general “can sometimes be compromised . . . by politics” (citing Holly Doremus, *Scientific and Political Integrity in Environmental Policy*, 86 TEX. L. REV. 1601, 1634 (2008))).

¹⁸⁶ See *Removal of Inspectors General*, *supra* note 21, at 2.

Congress.¹⁸⁷ Indeed, even President Trump, who removed two permanent inspectors general and three acting inspectors general, left in place many inspectors general appointed by President Obama.¹⁸⁸ He also attempted to avoid scrutiny by firing four of them on a Friday evening—a classic “news dump”—and still faced considerable political scrutiny for his decision.¹⁸⁹ To be sure, in the wake of President Trump’s actions, some members of Congress have pushed to provide inspectors general with stronger statutory removal restrictions.¹⁹⁰ But the key point is that a reason-giving requirement seems to have provided at least some measure of independence for decades.

To be sure, we do not mean to suggest, much less prove, that the statutory reason-giving requirement is the *sole* reason that the Comptroller and inspectors general generally do not face presidential removals. As Madison predicted in 1789, political considerations no doubt play a role—as they do for heads of independent agencies and other government officials who presidents generally do not seek to remove. But such a reason-giving requirement seems to do some work as we further detail in Part II.C, and in Part III we explore how Congress can strengthen this anti-removal power.

Finally, it bears noting that the Supreme Court has twice suggested that reason-giving requirements do not pose constitutional concerns. In both *Collins* and *Seila Law*, the Court concluded that the Comptroller was distinguishable from the FHFA and CFPB directors, respectively, because

¹⁸⁷ See *id.* President Obama’s letter to Congress did not give a detailed explanation for his decision to remove Gerald Walpin, the Inspector General of the Corporation for National and Community Service but stated that “[i]t is vital that I have the fullest confidence in the appointees serving as inspectors general” and that that was “no longer the case with regard to this inspector general.” Letter from B. Obama to N. Pelosi, June 11, 2009. In response to congressional criticism, the White House Counsel offered his assurance “that the president’s decision was carefully considered.” Letter from G. Craig to C. Grassley, June 11, 2009. When that proved unsatisfactory, the White House prepared a more detailed statement of reasons, including, among others, that the “bi-partisan Board of the Corporation” had “unanimously requested” a review of his conduct, that he had been “confused, disoriented, unable to answer questions and exhibited other behavior that led the Board to question his capacity to serve,” and that “a career prosecutor” whom President Bush had appointed as acting U.S. Attorney “had filed a complaint about Mr. Walpin’s conduct with the oversight body for Inspectors General, including for failing to disclose exculpatory evidence.” Letter from N. Eisen to J. Lieberman and S. Collins, June 12, 2009. The fact that the White House felt obligated to offer such reasons—many of which were framed as appeals to bipartisanship—illustrates the force of a reason-giving requirement.

¹⁸⁸ See, e.g., *Removal of Inspectors General*, *supra* note 21, at 2

¹⁸⁹ See, e.g., Jon Allsop, *Trump’s Pointless Friday-Night News Dumps*, COLUM. J. REV. (July 13, 2020), https://www.cjr.org/the_media_today/trump-friday-night-news-dump.php.

¹⁹⁰ See *Congress’s Authority to Limit the Removal of Inspectors General*, *supra* note 182, at 1; accord Robert L. Glicksman, *Shuttered Government*, 62 ARIZ. L. REV. 573, 634–35 (2020). Earlier this year, the Congressional Research Service concluded that Congress could likely lawfully impose statutory removal restrictions for inspectors general because, inter alia, they do not “exercise substantial amounts of executive power.” *Id.* at 21, 28. Whether that analysis still applies after *Collins*’s intervening rejection of a significant-power test is doubtful. See Part I.D *supra*.

the president can remove the Comptroller “for any reason.”¹⁹¹ Yet the Court did not deny that a reason-giving requirement creates a political obstacle to removal.¹⁹² The Court simply concluded that even if a reason-giving requirement may discourage removal in the real world, it nonetheless is different in kind from a statutory removal restriction.¹⁹³ We return to its constitutionality in Part IV.A.

C. How Congress’s Anti-Removal Power Creates Independence

The reason why Congress’s anti-removal power dissuades removal is intuitive; because the president needs the Senate’s approval of a replacement official, any signal from the Senate that it may withhold that approval must be considered prior to removal in the first instance. Likewise, because rational presidents are mindful of the political costs of removal, Congress’s ability to increase those costs should cause the president—in Madison’s words—to engage in “serious reflections beforehand.”¹⁹⁴ This intuitive effect, however, is further supported by straightforward game theory.¹⁹⁵ Indeed, modeling a president’s decision whether to remove an incumbent official demonstrates how Congress’s anti-removal power can create agency independence. In particular, Congress can decrease the benefits of removal, increase the costs of removal, and encourage the appointment of officers who will be difficult to remove.

¹⁹¹ See *Collins*, 141 S. Ct. at 1785 n.19 (following *Seila Law*, 140 S. Ct. at 2201 n.5).

¹⁹² See, e.g., *Seila Law*, 140 S. Ct. at 2232 (Kagan, J., dissenting) (explaining that a reason-giving requirement acts a “constraint on the removal power”); Datla & Revesz, *supra* note 19, at 788 (noting that such a requirement “increas[es] the political risks involved”).

¹⁹³ It is worth noting that in 1977, the Office of Legal Counsel opined, with no additional analysis, that the removal notice provision in the inspectors general legislation “constitutes an improper restriction on the President’s exclusive power to remove Presidentially appointed executive Officers.” Op. Att’y Gen. No. 77–8, at 18 (Feb. 21, 1977). The Congressional Research Service strongly disagreed in an opinion letter to the House Government Operations Committee:

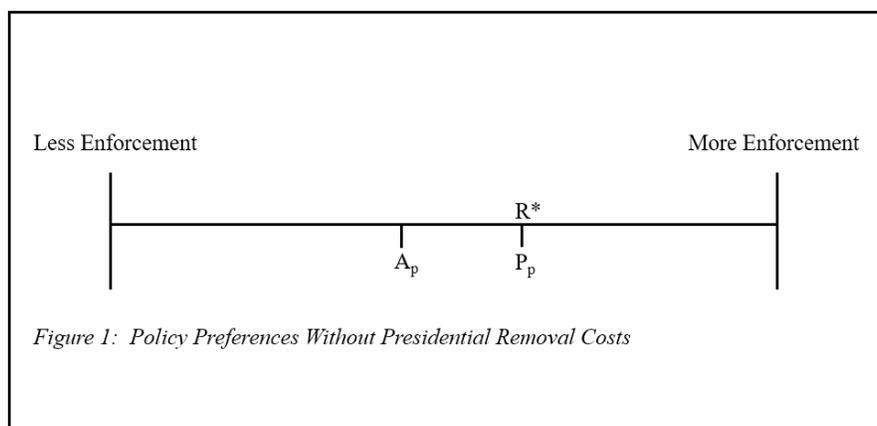
Section 2(e) of the Bill requires that the President communicate his reasons for the removal of an Inspector General to Congress. This section does not require that the removal is in any way contingent upon this communication. Therefore, we feel that this requirement cannot reasonably be viewed as any restriction on the President’s power of removal.

Memo. from CRS American Law Division to House Gov’t Affairs Comm., Regarding Review of Department of Justice Memorandum on the Constitutional Issues Presented by H.R. 2819 (Aug. 31, 1977). *Collins* and *Seila Law* suggest that the Court may disagree with OLC’s.

¹⁹⁴ I ANNALS OF CONG. 517 (Joseph Gales ed., 1834) (quoting remarks of James Madison, June 17, 1789).

¹⁹⁵ For a discussion of how entities can strategically increase another entity’s costs of change in order to preserve the status quo, see Aaron L. Nielson & Paul Stancil, *Gaming Certiorari*, 170 PENN. L. REV. (forthcoming) (using game theory to demonstrate how lower courts can increase the Supreme Court’s costs and thus “cert-proof” decisions that the justices, all else being equal, would reverse).

The president’s authority over other executive branch officials can be modeled as a “game” between the president, the official, and the Senate. The first step in the analysis is to map the president and the official’s respective policy preferences along a single axis.¹⁹⁶ We begin in a world without presidential “removal costs,” i.e., a world in which the president can remove an incumbent officeholder and at no cost promptly replace that person with someone the president prefers more.¹⁹⁷ For purposes of the game, imagine a president who prefers more aggressive use of regulatory authority to prevent financial companies from using arbitration agreements. Imagine further an agency head who, as a policy matter, does not want to use regulatory authority for that purpose. In such a world, we can map the president’s preference (P_p) and the agency head’s preference (A_p) in a spatial model as follows:

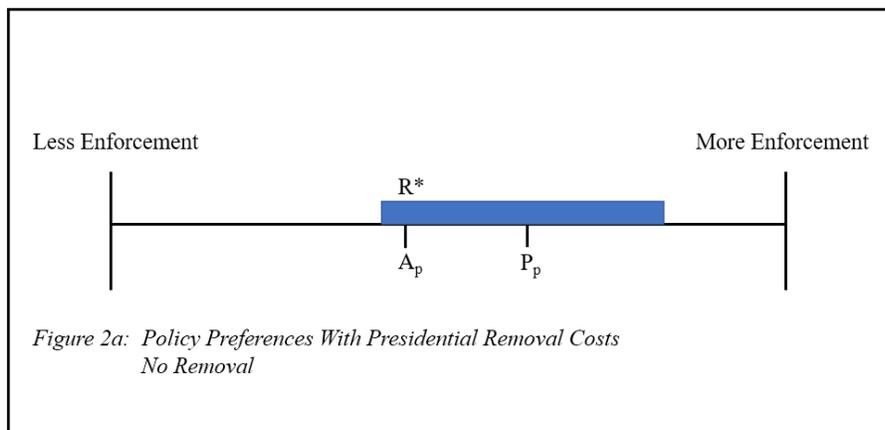


In a world without removal costs, the president will remove an agency head who does not act as the president wishes (at least in a single iteration game when this is the only relevant issue before the agency). Thus, the game will produce a result (R^*) that is precisely at the president’s preference. If the agency head refuses to acquiesce to the president’s preference, the president will simply replace the official with someone whose view either is identical to the president’s or who is willing to do exactly as the president wishes.

¹⁹⁶ See, e.g., Paul Stancil, *Close Enough for Government Work: The Committee Rulemaking Game*, 96 VA. L. REV. 69 (2010) (using a single axis to model how the Supreme Court can prevent Congress from overriding outcomes); William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523 (1992) (using a similar single-axis model to predict statutory outcomes).

¹⁹⁷ To avoid definitional baggage, we use the term “removal costs” instead of “transaction costs.” To be sure, transaction costs have been broadly defined as “any impediments” to “negotiating.” Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1094–95 (1972). That definition, however, does not precisely mirror the concept we are offering here, as it’s not a “negotiation”—it is the president’s efforts to obtain his or her policy preference. Conceptually, though, the idea that there are costs associated with using a president’s removal power is analytically similar to the costs a party incurs to negotiate. See, e.g., Stancil, *supra* note 196, at 75 (explaining how “transaction costs” prevent congressional overrides).

In reality, however, the president confronts removal costs, both direct and indirect. Even if the president can remove an agency head *at will*, it often does not follow that the president will do so, even when the agency head will not do what the president prefers. The president, for example, must consider opportunity costs; it takes time and effort to get someone confirmed, which resources could be used for other things. Thus, if the agency head is “good enough” from the president’s perspective, the president is unlikely to expend the effort to replace that agency head.¹⁹⁸ Likewise, if an agency head is popular (either with the public or, perhaps more importantly, with the Senate), a president may not wish to burn political capital by replacing the person, which could damper the president’s reelection prospects or make it more difficult to obtain other goals (such as recruiting the most talented political appointees into the administration).¹⁹⁹ Absent such removal costs, the president would remove anyone whenever a replacement official would be better overall, even if slightly. But because removal is not costless, the president sometimes accepts the status quo.²⁰⁰ This reality can also be modeled spatially:



In Figure 2a, we offer a situation where the president’s range of “indifference”²⁰¹—i.e., policy outcomes for which the president believes the

¹⁹⁸ See, e.g., Mark Seidenfeld, *A Big Picture Approach to Presidential Influence on Agency Policy-Making*, 80 IOWA L. REV. 1, 50 n.169 (1994) (“There are significant costs involved in replacing an agency head,” including that “[t]he President may not be able to get Senate approval for a replacement who will do his bidding”).

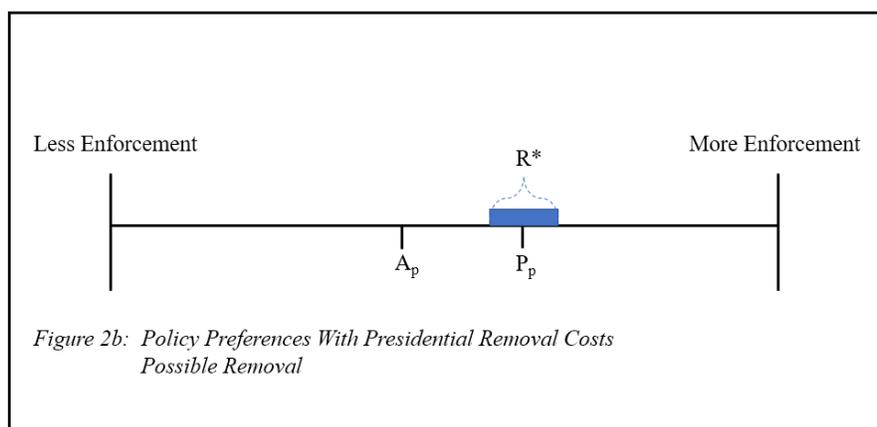
¹⁹⁹ See, e.g., *id.* (explaining that “removal of an agency head is a high-profile event that may cost the President significant popular support”).

²⁰⁰ See, e.g., FEDERALIST NO. 77, *supra* note 146 (explaining why the president may retain someone in office rather than seeking someone “more agreeable to him”).

²⁰¹ See, e.g., Eskridge & Ferejohn, *supra* note 196, at 531 (identifying the point where a legislator is “indifferent to the choice between the status quo . . . and the proposed policy” to model behavior); Paul Stancil, *Congressional Silence and the Statutory Interpretation Game*, 54 WM. & MARY L. REV. 1251, 1269 (2013) (explaining the concept of an “indifference zone” where a policymaker is “indifferent” between its preferred policies and other policies given the “transaction costs” necessary to achieve the preferred policy); cf. Ian Ayres & Robert Gertner, *Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules*, 101 YALE L.J. 729, 739 (1992) (using “indifference curves” to model decision-making).

agency head is “good enough” to not justify the resources necessary to remove and replace, which we designate by the blue box—encompasses the agency head’s preferred policy. In this situation, we should expect the agency to pursue the agency head’s preferred policy, even though that policy is quite far from the president’s preferred policy. In other words, even without any special removal costs created by Congress through use of its anti-removal power, the agency head is de facto independent; she can implement her preferred policy with confidence that the president will not remove her.

There is a limit, however, to this de facto independence. If the president’s range of indifference is small (either because the benefits to the president of removing the agency head are large or because it has a relatively low cost to remove the agency head and replace her with someone else), then the agency head’s preferred policy may fall outside of what the president will tolerate. In other words, the agency head will not be “good enough” from the president’s perspective. We model this scenario in Figure 2b:

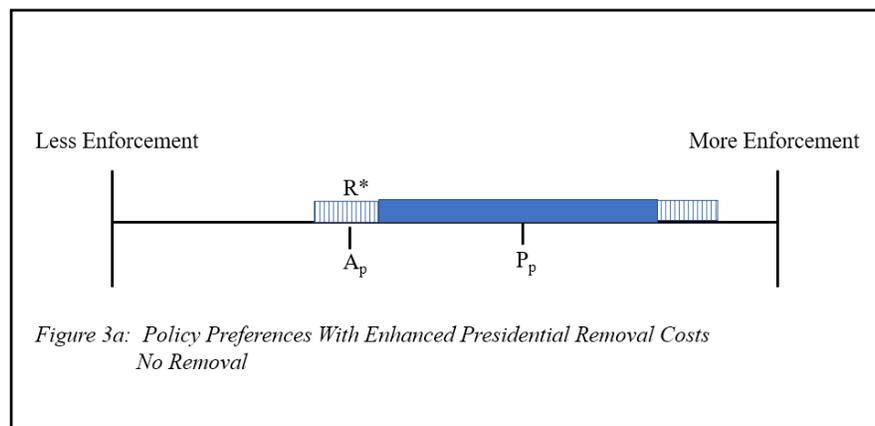


In this case, it is impossible to say what policy will result, only that it will be somewhere within the president’s indifference range. If the agency head is sufficiently flexible, she may choose the policy that is exactly at the margin of the president’s indifference range that is closest to the agency head’s preference. The agency head would not be happy with that result, all else equal, but that result would be better from her perspective than letting the president pick a replacement. The agency head, however, may make her decision based on other considerations, including her reputation and career prospects—some policies may be just too much for her to stomach. If so, the president will remove the agency head and nominate someone else to the position. Either way, we can conclude that the easier it is for the president to remove an officeholder or the more the president cares about the policy, the closer the agency’s policy will ultimately be to the president’s preference.

It is easy to see this dynamic in the real world. Presidents are more willing to fire cabinet secretaries mired in scandal than those who are popular; at the same time, they are less willing to fire them when the Senate is in control of the other political party because getting a replacement confirmed will take more effort. Presidents are also more willing to pull the trigger when the opportunity costs are lower, such as when there are no other policies on which the president places a higher priority. Because there is only

so much floor-time in the Senate,²⁰² a president deciding whether to remove someone must decide whether the game is worth the candle.

With this framework in place, we can see the effect of Congress's anti-removal power. Simply put, Congress has the power to *increase* the president's removal costs. We should expect a president to remove an officeholder if and only if the benefits of removal exceed the costs of removal. This means, at the margins, as either the pros decrease or the cons increase, we should expect the president to conclude that the incumbent officeholder is "good enough" more often. By making removal less valuable to the president, Congress can expand the range of presidential indifference. In Figure 3a, we offer an example of this effect with the expanded presidential indifference range signified by the boxes with blue stripes:



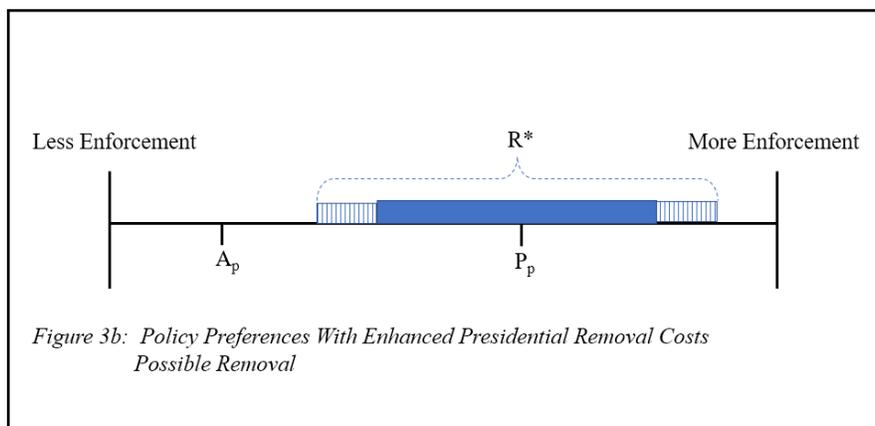
Relevant here, Congress may use its anti-removal power to expand the president's indifference zone both by making removal less beneficial and by making it more politically costly. Consider the benefits first. Because the president cannot know whether his preferred replacement will be confirmed, he must account for the possibility of rejection; thus, one of the benefits of removal is less than it would be if the president was, in Hamilton's words, "the sole disposer of offices."²⁰³ Rather than comparing the incumbent agency head against a preferred replacement, a president must compare the incumbent against the preferred replacement *discounted by the possibility* of Senate rejection. Hence, by credibly signaling that the Senate prefers stability for an office—such as through a statute requiring reason-giving—Congress can add to the president's uncertainty whether a replacement will be confirmed, thereby decreasing one of the key benefits of removal. By itself, at the margins, this effect should prevent some removals. Thus, in Figure 3a, Congress was able to expand the president's indifference range to prevent removal and ensure that the agency head's preferred policy will be the ultimate result.

²⁰² See, e.g., Jennifer Shutt, *Appropriations vs. Judges: Battle for Senate Floor Time Nears*, ROLL CALL (May 18, 2018) (explaining the need to prioritize how to use floor time because "[t]he Senate can't walk and chew gum at the same time").

²⁰³ FEDERALIST NO. 77, *supra* note 146.

With similar effect, Congress can make removal more painful for the president. For example, as presidents have learned when dealing with inspectors general, a reason-giving requirement elevates the issue in the public's consciousness, thus creating more drama than otherwise would exist. This is particularly true after such a statute has created a norm against presidential removal; presidents do not like to be asked why they are breaking norms, especially where the reason for doing so can be spun as nefarious.²⁰⁴ Presidents also know that removing an officeholder whom the Senate has approved may have spillover effects by irritating senators the president needs to deal with on other issues; alternatively, the president may need to trade with a senator to get that senator's support, and every chit called in for one issue or nominee cannot be used for something else. This reality also prevents some removals at the margins.

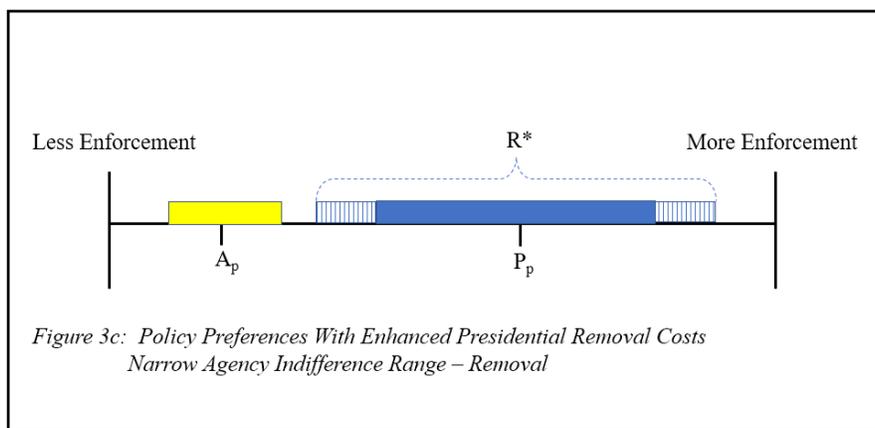
To be sure, there are limits to Congress's anti-removal power. Even when confronted with enhanced removal costs, the president sometimes will still decide that an agency head falls outside of the president's indifference range. We explore this scenario in Figure 3b:



Here, we again do not know what policy will ultimately result, but it will fall within the president's indifference range. As with Figure 2b, the agency head—whose preference is outside of the president's indifference range—will have to decide if she can tolerate being the instrument for implementing a policy at the edge of the president's indifference range. If she cannot, she will be removed and replaced. But if she can, the distance from the president's preference can be quite substantial. The key point, though, is that even without a statutory restriction on removal, Congress can create more space for policy independence than would otherwise exist.

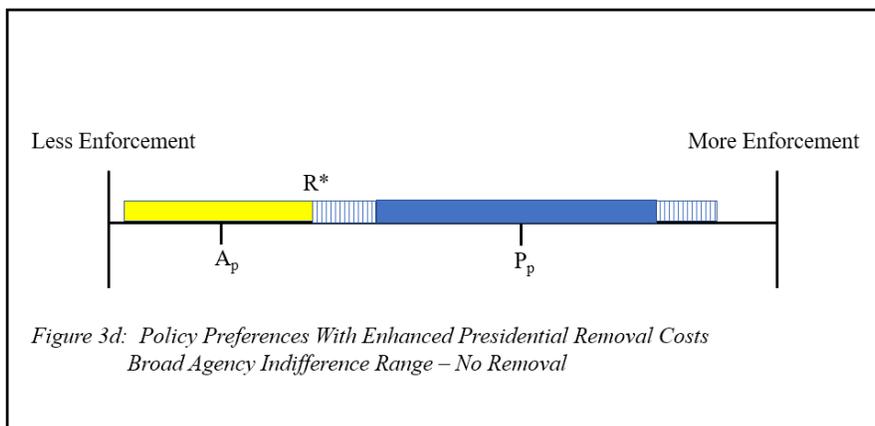
²⁰⁴ Notably, this effect of norms can work even without a statutory removal restriction. Presidents, for example, can fire FBI directors at will. *See, e.g.,* Vivian S. Chu & Henry B. Hogue, *FBI Director: Appointment and Tenure* at 15, Cong. Res. Serv. (Feb. 19, 2014). Yet doing so inevitably creates drama. Thus, FBI Director Louis Freeh was able to stay in office even though President Clinton wished him gone. *See, e.g.,* Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187, 2212 (2018) (explaining that “the investigatory-independence norm appears to have constrained Clinton, at least for fear of political blowback if he fired Freeh”).

Thus far, we have only been focusing on the president's indifference range. But we can also consider the agency head's indifference range. In Figures 2b and 3b, we could not say whether removal would occur or what the ultimate policy result would be. If we incorporate the agency head's indifference range, however, it is possible to answer those questions, too. In Figure 3c, we offer an example of an agency head with a fairly narrow indifference range, which we mark with a yellow box:



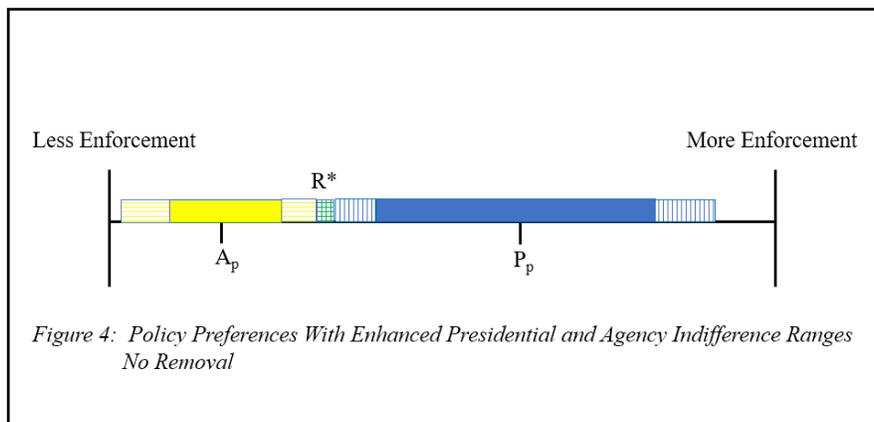
The agency head's indifference range may be narrow for numerous reasons, including conviction (or stubbornness, depending on one's perspective), peer-group pressure, or concern about future employment. Whatever reason, if the agency head's indifference range is narrow, removal should occur, and the ultimate policy result will be somewhere within the president's indifference range after a replacement is confirmed.

By contrast, as shown in Figure 3d, if an agency head is more flexible—in other words, has a wider indifference range—then a different result will occur:



Here, because the agency head's indifference range intersects with the president's indifference range, the agency will pursue a policy precisely at the point of intersection, and the president will not remove her. This point leads to another one, which we explore in Figure 4. In Figure 4, we return to

the agency head from Figure 3c, but with a twist: Congress has expanded the agency head's indifference range:



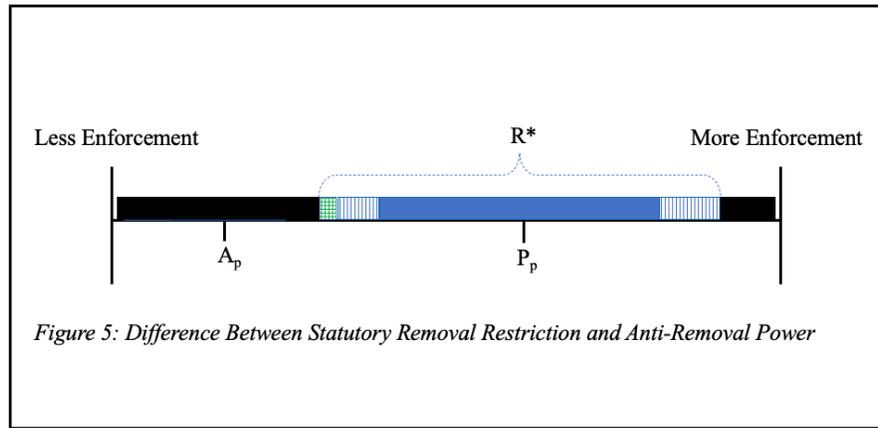
Here, we signify the agency head's expanded indifference range with yellow striped boxes and the overlap between the expanded presidential indifference range and the agency head's expanded indifference range with a green striped box. The result here is exactly the same as in Figure 3d: there will be no removal and the agency will pursue a policy precisely at the point of intersection between the president's indifference range and the agency head's indifference range.²⁰⁵

This prompts a question: How can Congress expand the agency head's indifference range? Perhaps informally by peer pressure; if the agency head stays in place, the result will be quite far from the president's preference, which may not be the case if the president removes the agency head and replaces her with someone else. Or Congress could use, or threaten to use, its toolbox for constraining the agency, including its appropriating power of the purse, oversight capabilities, or even contempt powers.²⁰⁶ Likewise, and of particular importance to this Article's analysis, if the Senate prefers policy stability for its own sake, it can dynamically use its veto authority under the Appointments Clause to put a thumb on the scale in favor of agency heads with unusually wide indifference ranges. Over the long run, the effect of such prioritization may be an outcome like Figure 4. In other words, if it wishes to do so, Congress can also use its anti-removal power to influence the indifference range of the agency head.

²⁰⁵ This analysis may be too quick. For simplicity's sake, our model assumes perfect knowledge; in other words, that the president knows the agency head's indifference range and vice versa. Yet perfect knowledge is not necessary for the model. In a world without perfect knowledge, the president may try to send false signals about his indifference range to try to induce the agency head to move closer to the president's preference. Because the agency head would not go beyond her own indifference range, the scope of negotiation would be within green box.

²⁰⁶ See, e.g., Christopher J. Walker, *Restoring Congress's Role in the Modern Administrative State*, 116 MICH. L. REV. 1101, 1107 tbl.1 (2018) (summarizing this toolbox as exhaustively chronicled in JOSH CHAFETZ, *CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND SEPARATION OF POWERS* (2017)).

Finally, we can compare the differences between agency independence created by a statutory removal restriction and agency independence created by Congress's use of its anti-removal power, which we do in Figure 5:



In Figure 5, we mark in black the policies that the agency head could pursue if policy-based removal was barred but that she could not pursue if her independence is only protected by Congress's anti-removal power. These are policies outside of the president's indifference range. Accordingly, if Congress wants an agency head to be able to pursue policies within the president's indifference range, as expanded by Congress through anti-removal power, Congress can achieve that amount of independence without a statutory removal restriction. But if Congress wants an agency head to be able to pursue policies outside of the president's indifference range—which is not infinitely large; at some point, the president will say “enough”—then Congress would need a statutory restriction on removal. Congress's anti-removal power therefore is not the same as a statutory restriction on removal, but for policies within the president's indifference range, either sort of independence should be effectively the same.

This is especially true because, as noted above, statutory removal restrictions do not truly restrict removal. Presidents can still remove officials when there is sufficient cause to do so, a concept that has never been definitively articulated. It is also debatable whether a court can even order reinstatement of an unlawfully removed official.²⁰⁷ Instead, it is possible that the remedy is merely a damages suit for wrongfully withheld pay, which gives the fired official an opportunity to clear her name and a court the opportunity to rule that the president violated the law.²⁰⁸ This means that even with a statutory removal restriction, it is far from clear that an independent agency has complete discretion.

Thus, the upshot from game theory: If Congress has a strong enough preference for independence, it often can obtain a good measure of it without a statutory removal restriction. For some positions, like the Secretary of

²⁰⁷ Huq, *supra* note 2, at 74 n.358 (“[I]njunctive relief against an executive branch official in the form of a reinstatement order would raise substantial constitutional issues.”).

²⁰⁸ See, e.g., *Myers v. United States*, 272 U.S. 52, 106 (1926).

State, a president will almost always conclude that benefits of removal exceed its costs if there is even a slight difference between their preferences. After all, the issues confronted by the State Department are so important to every president that the president's indifference range should be quite small, indeed. But for other types of positions, including those that are lower profile and that, relatively, do not have as much policy discretion, Congress can use its anti-removal power to induce the president to accept the incumbent even if, all else being equal, the president would prefer someone else.

III. CONGRESS'S TOOLKIT TO STRENGTHEN ITS ANTI-REMOVAL POWER

Not only is Congress's anti-removal power real, but Congress can strengthen it. By changing the values in the above formula (for example, by increasing the president's discount rate on the benefits of removal, or increasing the political costs), Congress can discourage the president from removing an officeholder. Congress can do this in several ways. On the benefits side, Congress can make it more difficult for the president to act without a confirmed officeholder, for example by preventing the president from using an acting official or temporarily installing an officer through a recess appointment. And on the costs side, Congress can make a president think twice about pulling the trigger, for example, by pre-committing in House and Senate rules or by statute to giving a removed officeholder in certain positions a platform from which to publicly explain why he or she was removed.

Importantly, moreover, at the same time the Court has been limiting Congress's ability to impose statutory restrictions on removal, it has been enhancing Congress's ability to strengthen its anti-removal power. In other words, although recent cases like *Collins* cast significant doubt on *Humphrey's Executor*-style statutory restrictions on removal, the Court itself has opened up an alternative path to agency independence. In this Part, we start with the soft tools that are merely words or dialogue (Part III.A) and then we discuss the hard tools that make it harder for the president's replacement nominee to get confirmed (Part III.B), concluding with ways in which Congress can prevent the president's evasion of the Appointments Clause (Part III.C).

A. Soft Tools to Strengthen Congress's Power

The most obvious way for Congress to strengthen the effect of its anti-removal power is to do more of what it has already been doing. The prospect that Congress will not confirm a replacement always has some anti-removal effect, even without any signal from Congress. Congress has already shown that it can strengthen that effect through "soft" means that signal to the president that stability for a certain office is particularly important.

We've already discussed a reason-giving requirement. But there are other such mechanisms. Congress, for example, can simply label an agency "independent," even if that office does not have any removal protections. Not every head of nominally "independent" agencies is protected by a statutory

removal restriction.²⁰⁹ Yet the mere fact that Congress has labeled an agency independent may *itself* discourage removal. To be sure, this does not always work. For example, the Peace Corps is an “independent” agency by statute, yet presidents place their own people in control. But it often works, as with the Comptroller and inspectors general—both of which are labeled “independent” by statute, in addition to their reason-giving requirements.²¹⁰

Likewise, history confirms that certain agencies Congress has treated and designated as “independent” are regarded as such, even though Congress has not imposed a statutory restriction on presidential removal. In *Free Enterprise Fund*, for example, the Court treated the SEC *as if* the president could not remove the agency’s commissioners at will, even though nothing expressly bars at-will removal and Congress could not have acted against a background principle of removal when it created the SEC because Congress created the agency during the nine-year period between *Myers* and *Humphrey’s Executor*.²¹¹ Yet Congress has long treated the SEC as independent and has described it as such in statutory law.²¹² Likewise, in *Collins*, the Court observed that Congress has described the Commodity Futures Trading Commission as “independent” even though it “has not expressly provided that the removal of the agency head is subject to any restrictions.”²¹³

Along similar lines, Congress’s decision to attach a term of years to an office can dissuade removal, even without a statutory restriction on removal. As Datla and Revesz explain, “a specified term imposes at least some costs on a President” by “inhibit[ing] a President from ‘arbitrarily dismissing an [officer] for political reasons’” because the president would have to “explain his departure from the default term of office to the Senate when he

²⁰⁹ See, e.g., ACUS, SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES 44 (2d ed. 2018) (explaining that not all agencies listed as “independent” have “for-cause protections”); *Collins*, 141 S. Ct. at 1782-83 (collecting examples).

²¹⁰ See, e.g., 5a U.S.C. § 2 (creating offices of inspector general as “independent and objective units”); 44 U.S.C. § 3502 (defining, *inter alia*, the Office of the Comptroller of the Currency as an “independent regulatory agency”). The Comptroller is labeled as independent in the Paperwork Reduction Act’s list of “independent regulatory agenc[ies].” In its organic statute, the Comptroller is listed as a “bureau” within the Department of Treasury,” but Congress declared that the Treasury Secretary “may not delay or prevent . . . the promulgation of any regulation by the Comptroller of the Currency, and may not intervene in any matter or proceeding before the Comptroller of the Currency (including agency enforcement actions), unless otherwise specifically provided by law.” 12 U.S.C. § 1(a), (b)(1).

²¹¹ See, e.g., *Free Enterprise Fund*, 561 U.S. at 487 (relying on the parties’ agreement that SEC “Commissioners cannot themselves be removed by the President except under the *Humphrey’s Executor* standard”); *id.* at 546–47 (Breyer, J., dissenting) (“It is certainly not obvious that the SEC Commissioners enjoy ‘for cause’ protection. Unlike the statutes establishing the 48 federal agencies listed in [in an appendix], the statute that established the Commission says nothing about removal. . . . Nor is the absence of a ‘for cause’ provision . . . likely to have been inadvertent . . . [because] under this Court’s precedents [at the time], it would have been *unconstitutional* to make the Commissioners removable only for cause.”).

²¹² See 44 U.S.C. § 3502.

²¹³ *Collins*, 141 S. Ct. at 1783.

nominated a successor.”²¹⁴ Similarly, Congress can enact legislative findings and purposes to declare the importance of and reasons for the agency’s independence and the independence-driven qualities and qualifications Congress envisions in the head of that agency.²¹⁵

Finally, Congress could enact a trigger (either by statute or rule) that requires a congressional hearing whenever the head of an independent agency (or other agency official Congress so designates) is fired.²¹⁶ This provision could be triggered by any such firing, or perhaps only when the president fails to provide a statutorily required reason. At this hearing, the fired official would testify, along with other witnesses the relevant committee chose to call. By engaging in this public inter-branch dialogue, such a hearing requirement would raise the political stakes and salience in a manner consistent with Madison’s observations in 1789.

These suggestions are “soft” tools under Congress’s anti-removal power, because they are merely words and inter-branch dialogue reinforcing norms and expectations, as opposed to statutory constraints on the president’s appointment and removal powers.²¹⁷ For a great many positions in the federal government, such soft means of signaling that Congress prefers stability should be sufficient to prevent removal regardless of what happens to *Humphrey’s Executor*. This is particularly true for those categories of positions around which political norms of independence exist, including perhaps most prominently agency adjudicators.

B. Hard Tools to Strengthen Congress’s Power

Congress, however, is not limited to soft tools. The Appointments Clause, combined with each chamber’s authority over its own cameral rules, allows Congress to discourage removal more forcefully even without imposing a statutory restriction on removal.²¹⁸ In particular, the Senate can change its

²¹⁴ Datla & Revesz, *supra* note 19, at 791 (quoting 122 CONG. REC. 23,809 (1976) (statement of Sen. Robert C. Byrd)); *see also id.* at 791 n.116 (similar sentiments regarding FBI Director); *cf.* Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 29 (2010) (“Giving agency officials tenure for a term of years can also foster expertise, as agency heads gain wisdom from their experience on the job. The terms must be sufficiently long to allow agency heads to gain the relevant experience.”).

²¹⁵ *See generally* Jarrod Shobe, *Enacted Legislative Findings and Purposes*, 86 U. CHI. L. REV. 669 (2019) (explain the value of enacted findings).

²¹⁶ Congressional pre-commitment of this sort is important even beyond the context of removal. *See, e.g.*, Jonathan H. Adler & Christopher J. Walker, *Delegation and Time*, 105 IOWA L. REV. 1931, 1980 (2020) (explaining that Congress can require “by statute, that the authorizing committees conduct some sort of oversight over the federal agency or program before Congress can pass appropriations legislation to renew funding for that agency or program”).

²¹⁷ *Cf.* Christopher J. Walker & James Saywell, *Remand and Dialogue in Administrative Law*, 89 GEO. WASH. L. REV. (forthcoming 2021) (exploring similar “soft” tools courts can use to enhance inter-branch dialogue with federal agencies on remand).

²¹⁸ In our court-appointed amicus brief in *Collins v. Yellen*, 141 S. Ct. 1761 (2021), we briefed another hard tool short of the conventional “at will” removal restriction: a more modest “good cause” statutory removal protection that would “allow removal

rules for considering executive branch nominees, including raising the vote count. Ex ante, a president confronted with a 60-vote cloture requirement will behave differently than a president confronted with a 50-vote requirement.

The Senate has the power to increase the number of votes necessary. Currently, it only takes a bare majority of the Senate to invoke cloture for many executive branch offices. Yet it has not always been so. Indeed, the text of the Senate Rules currently still says senators are allowed to speak for as long as they want—to filibuster—on any matter unless “three-fifths of the Senators duly chosen and sworn” vote “that the debate should be brought to a close.”²¹⁹ In 2013, however, then-Senate Majority Leader Harry Reid invoked the “nuclear option” and had the Senate vote to change the cloture rule to lower the cloture vote threshold to a simple majority for most presidential nominations.²²⁰ When Republicans took control of the Senate in 2013, they kept the Reid precedent in place. Indeed, in 2017, then-Senate Majority Leader Mitch McConnell invoked that same “nuclear option” to eliminate the 60-vote filibuster for Supreme Court nominees.²²¹ As modified by the Reid and McConnell precedents, the 60-vote cloture rule now applies only to legislation—and Democrats are currently considering whether to go nuclear on the legislative filibuster as well.²²²

based on policy disagreement with the President.” Brief of Court-Appointed Amicus Curiae, *Collins v. Yellen*, 2020 WL 6264506, at 2 (filed Oct. 16, 2020) [hereinafter “Nielson Amicus Br.”]; see also *id.* at 44–47 (detailing argument). The *Collins* Court rejected that tool in this context, holding that “the Constitution prohibits even ‘modest restrictions’ on the President’s power to remove the head of an agency with a single top officer.” *Collins*, 141 S. Ct. at 1787 (quoting *Seila Law*, 140 S. Ct., at 2205); see *id.* (“The President must be able to remove not just officers who disobey his commands but also those he finds ‘negligent and inefficient,’ those who exercise their discretion in a way that is not ‘intelligen[t] or wis[e],’ those who have ‘different views of policy,’ those who come ‘from a competing political party who is dead set against [the President’s] agenda,’ and those in whom he has simply lost confidence.” (citations omitted)). In other words, the *Collins* Court held, at will removal is constitutionally required (at least for the head of a single-headed agency like the FHFA). *Id.* Perhaps that tool could be further developed and implemented for officers who are not the heads of single-headed agencies, but we leave that potential hard tool for others to explore.

²¹⁹ SENATE RULE XXII, ¶ 2.

²²⁰ 159 CONG. REC. S8418 (daily ed. Nov. 21, 2013) (statement of President Pro Tempore) (“Under the precedent set by the Senate today, November 21, 2013, the threshold for cloture on nominations, not including those to the Supreme Court of the United States, is now a majority.”); see also William G. Dauster, *The Senate in Transition or How I Learned to Stop Worrying and Love the Nuclear Option*, 19 N.Y.U. J. LEGIS. & PUB. POL’Y 631, 645–49 (2016) (chronicling the “Reid precedent” to modify the cloture vote rule for presidential nominations).

²²¹ See, e.g., Ed O’Keefe & Sean Sullivan, *Senate Republicans Go “Nuclear,” Pave the Way for Gorsuch Confirmation to Supreme Court*, WASH. POST (Apr. 6, 2017), <https://www.washingtonpost.com/powerpost/senate-poised-for-historic-clash-over-supreme-court-nominee-neil-gorsuch/2017/04/06/40295376-1aba-11e7-855e-4824bbb>.

²²² See, e.g., Annie Linskey, Sean Sullivan & Maria Sacchetti, *Pressure Grows on Biden To End the Filibuster*, WASH. POST (Mar. 5, 2021),

The Senate could, of course, amend its rules to restore the 60-vote threshold for all presidential appointments to the executive branch.²²³ We doubt that will happen anytime soon. But what about just focusing on the heads of so-called independent agencies and any other agency officials Congress wants to have some decisional independence from the president? The Senate could justify such reform as a response to the Supreme Court decisions striking down statutory removal protections. That option seems more likely than a blanket filibuster restoration, but perhaps still a political reach. Another, narrower approach would be to enact statutory reason-giving requirements for firing the heads of independence agencies, such as those currently required for removal of the Comptroller and inspectors generals, and then couple those statutory requirements with filibuster reform. In other words, if the president fails to provide the statutorily required reason for firing—or a good-cause reason for firing, if required—the Senate would raise the cloture vote threshold for the president’s nominee to replace that official. The Senate could modulate the cloture vote requirement based on its perception of the importance of independence, perhaps three-fifths for some and two-thirds for others. This modulated approach to cloture is similar to the different types of removal restrictions Congress enacts into statutes, some of which are much easier for presidents to satisfy.²²⁴

To be sure, such a proposal would be subject to the whims of the current majority of the Senate, which could always invoke the nuclear option to amend the rules back to a simple majority. But there are still political costs for the Senate to do so.²²⁵ Those costs arguably kept the prior 60-vote filibuster in place for years even when there was a Senate majority wanting to confirm the president’s nominees. And the president would have to decide whether to fire the head of an independent agency before knowing for sure whether the Senate would lower the president’s costs to nominate a preferred replacement for that position. If these reforms were coupled with a statutory requirement for a hearing before a House oversight committee (one of the soft tools mentioned in Part III.A), the political costs to the Senate and the president would arguably be even greater. That way, both chambers of Congress, the president, and the agency would be publicly involved in the

https://www.washingtonpost.com/politics/biden-kill-the-filibuster/2021/03/05/09c0d774-7857-11eb-8115-9ad5e9c02117_story.html.

²²³ See generally Michael J. Gerhardt, *Norm Theory and the Future of the Federal Appointments Process*, 50 DUKE L.J. 1687 (2001) (reviewing literature and surveying various norms and procedural options for structuring the federal appointments process); David S. Law & Lawrence B. Solum, *Judicial Selection, Appointments Gridlock, and the Nuclear Option*, 15 J. CONTEMP. LEGAL ISSUES 51 (2006) (surveying political science literature on the filibuster and developing a theory for understanding “appointments gridlock” in the judicial appointments context).

²²⁴ See, e.g., *Collins*, 141 S. Ct. at 1786–87 (explaining differences).

²²⁵ See, e.g., Michael J. Gerhardt, *The Constitutionality of the Filibuster*, 21 CONST. COMMENT. 445, 448 (2004) (“In the filibuster debate, the most effective of these turned out to be the Senate’s rules, which condition some changes in the rules on supermajority approval. This requirement forces the side seeking change to make arguments that can appeal across party lines. This burden facilitates stability and order within the institution.”).

aftermath of such firing, further increasing the costs for the president when deciding whether to remove. Indeed, to facilitate inter-branch dialogue (and increase the president's political costs), Congress could even request that the president provide notice a certain number of days prior to removal, with the failure to do so triggering a heightened cloture vote threshold.²²⁶

Even apart from cloture rules, the Senate can also change other internal rules to discourage removal, including slowing the Senate confirmation process down. Under the Congressional Review Act (CRA), agencies must provide notice to both houses of Congress and the Comptroller General when rules are promulgated, and Congress has the power to reject the rule by enacting a "joint resolution of disapproval" through the bicameralism-and-presentment process. Relevant here, however, the CRA establishes special procedures for proposed joint resolutions of disapproval. If the relevant Senate committee does not act within "20 calendar days" from the applicable date, "such committee may be discharged from further consideration of such joint resolution upon a petition supported in writing by 30 Members of the Senate, and such joint resolution shall be placed on the calendar."²²⁷ The effect of this mechanism is to streamline the review process by preventing a committee from acting as a bottleneck.

The inverse, however, may also be possible. For instance, Congress could determine that when the Senate has already confirmed an individual to a term of years, confirming a replacement for that individual in the event of removal is less important than other business or should require a longer period of deliberation and debate. Congress could similarly slow things down when the president fails to give the statutorily required reasons for removal. The Senate could do this unilaterally through amending its standing rules, or Congress could do this jointly through legislative action—the latter of which would make that rule stickier and arguably subject to bicameralism and presentment to override. The effect of such a requirement would be to discourage removal.

It would be a mistake to view these soft and hard tools as solely the Senate's anti-removal power. This is Congress's power. Congress collectively can play a role. The House (and the president) would be involved in enacting any statutory reason-giving requirements as well as any oversight or other requirements enacted by statute. Indeed, Congress's ultimate hard tool to strengthen its anti-removal power is impeachment of the president, which the House has the sole power to initiate.²²⁸ Congress, through its soft tool of enacted findings, could include in legislation requiring presidential reason-giving for removal that removal for an inadequate reason could be grounds for impeachment. As Madison himself remarked, "the wanton removal of meritorious officers would subject [the president] to impeachment and

²²⁶ See note 183 *supra* (discussing the constitutionality of the statutory 30-day pre-firing notice requirement for inspectors general and how Congress could instead tailor this as a cloture-raising trigger).

²²⁷ 5 U.S.C. § 802(c).

²²⁸ U.S. CONST. art. I, § 4 ("The House of Representatives . . . shall have the sole Power of Impeachment.")

removal from his own high trust.”²²⁹ And impeachment—or at least the threat of impeachment—is arguably Congress’s strongest tool to constrain presidential overreach.

Congress could explore other creative legislative actions to raise the removal costs, such as limiting the agency’s authority under an acting head, reducing or constraining funding through the appropriations process, eliminating the voting power of a commissioner of the president’s party, or lowering the quorum threshold to allow the multi-member commission to continue to make final decisions—just to name a few. In this Article, we do not endeavor to detail, much less endorse, any of these approaches. But one such legislative tool is worth extended discussion: a *statutized* heightened cloture vote. The heightened filibuster rules outlined above would be stickier if they were enacted by statute, as opposed to just adopted in the Senate rules. Congress has enacted statutes that bypass the Senate filibuster for various reasons. The CRA, mentioned above, is one obvious example.²³⁰ Budget reconciliation, created by Congressional Budget Act of 1974,²³¹ is another example that has been used in recent years in aggressive ways.²³² Congress has enacted various statutes to fast-track authority for the president to negotiate international trade agreements.²³³ And under the National Emergencies Act and the War Powers Act, Congress has bypassed the Senate filibuster to terminate presidential declarations of emergency and to authorize or terminate use of force overseas, respectively.²³⁴

²²⁹ I ANNALS OF CONG. 517 (Joseph Gales ed., 1834) (quoting remarks of James Madison, June 17, 1789).

²³⁰ See *id.* § 802(d) (detailing streamlined provision for CRA resolution considerations in the Senate, including the elimination of a cloture vote and debate limited to ten hours).

²³¹ 2 U.S.C. § 641(e) (setting forth Senate floor procedures for budget reconciliation, including the limitation of debate to twenty hours). For more on the origins and procedures of the budget reconciliation process, see Rebecca M. Kysar, *Reconciling Congress to Tax Reform*, 88 NOTRE DAME L. REV. 2121, 2126–39 (2013).

²³² See, e.g., G. William Hoagland, *Reconciliation, Corrupted by Congress: May it R.I.P.*, ROLL CALL (Feb. 25, 2021) (arguing that the budget reconciliation process has been “[a]bused in recent years by both Senate Republicans and Democrats for its filibuster immunity” and citing as reconciliation abuse Republicans’ unsuccessful attempt to repeal Obamacare and successful passing of the \$1.5 trillion tax reform package and Democrats’ current attempts to pass a \$3.5 trillion spending package and (subsequently successful) passing of the \$1.9 trillion COVID-19 relief package), <https://www.rollcall.com/2021/02/25/budget-reconciliation-corrupted-by-congress-may-it-r-i-p/>.

²³³ See generally Michael A. Carrier, *All Aboard the Congressional Fast Track: From Trade to Beyond*, 29 GEO. WASH. J. INT’L L. & ECON. 687 (1996); Hal Shapiro & Lael Brainard, *Trade Promotion Authority Formerly Known as Fast Track: Building Common Ground on Trade Demands More than a Name Change*, 35 GEO. WASH. INT’L L. REV. 1 (2003).

²³⁴ See 50 U.S.C. § 1622(c)(2) (proving that a joint motion to terminate a national emergency “shall be voted on within three calendar days after the day on which such resolution is reported, unless such House shall otherwise determine by yeas and nays”); *id.* §§ 1545(b), 1546(b) (same for joint resolution or bill under the War Powers Act); *id.* § 1547 (“If such a joint resolution or bill [under the War Powers Act] should

It is not clear why Congress could not do the inverse by requiring by statute a super-majority Senate cloture vote for consideration of certain presidential nominees (like those to head independent agencies), which may be blanket requirements or only triggered if the president fails to provide statutorily required reasons for the predecessors' removal. To be sure, there are constitutional arguments that some hard tools may be impermissible. One Congress, for example, cannot generally limit the power of a future Congress.²³⁵ Thus, efforts to place some of these changes—such as heightened cloture requirements or a delayed committee and floor process—in statutory law may be impermissible.²³⁶

Or perhaps not. After all, the current Congress is not technically entrenching these statutory provisions with some repeal prohibition or super-majority vote requirement to repeal. A future Congress, at least under our proposal outlined above, could repeal those statutory requirements through the ordinary bicameralism and presentment process. Such repeal could be blanket, or it could carve out that particular nominee or office. The president would presumably support such repeal, such that a super-majority would not be required to overcome a veto. And the Senate could, if it wanted, nuke the filibuster for that particular type of legislation, just as it has done for all presidential nominations. In that sense, as Aaron-Andrew Bruhl has explained, such “statutes could have only political, but not legal, meaning”; indeed, “Congress typically (though not unfailingly) includes disclaimers in statutized rules that recognize that either chamber may unilaterally abrogate the statutory procedures.”²³⁷

But maybe there is something constitutionally special about the Senate's advice and consent power under the Appointments Clause. After all, at least when it comes to principal officers, the Constitution vests the advice and consent power in the Senate alone.²³⁸ Perhaps the House (and the president and a prior Senate) cannot constitutionally require more than a simple-majority vote in the Senate in a way that would limit a future Senate's discretion to structure its advice and consent role.²³⁹ This argument seems to

be vetoed by the President, the time for debate in consideration of the veto message on such measure shall be limited to twenty hours in the Senate and in the House shall be determined in accordance with the Rules of the House.”).

²³⁵ See, e.g., *United States v. Winstar Corp.*, 518 U.S. 839, 872 (1996) (“[O]ne legislature may not bind the legislative authority of its successors.” (citing 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *90 (1765))). But see Eric Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665 (2002) (identifying some counterexamples).

²³⁶ See, e.g., Aaron-Andrew P. Bruhl, *Using Statutes to Set Legislative Rules: Entrenchment, Separation of Powers, and the Rules of Proceedings Clause*, 19 J.L. & POL. 345, 349 (2003) (“The consensus view, shared by Congress and commentators, is that statutized rules are troubling because they implicate a constitutionally rooted anti-entrenchment norm that forbids one legislature from binding its successors—in this case, binding successors to follow particular rules of debate.”).

²³⁷ *Id.* at 349.

²³⁸ U.S. CONST. art. II, § 2 cl. 2.

²³⁹ Cf. Bruhl, *supra* note 236, at 349–50 (arguing that the problem with statutized rules is one of separation of powers, and they “give[] the president a say in a sphere of activity where, constitutionally speaking, he should have no voice”).

lose some force, though, when it comes to inferior officers, as the Constitution vests the collective Congress with the power to appoint “such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.”²⁴⁰ Moreover, it is also not at all clear such decisions would be judicially reviewable. The Court has strongly suggested that Congress, as a rule, has unreviewable authority over its own internal processes.²⁴¹ This principle that political questions belong in the political branches may well prevent judicial second guessing of how Congress chooses to conduct its business under the Appointments Clause.²⁴² We do not offer any firm opinion on this constitutional issue, but do flag the issue.

Here, however, is the key point: even if the statutory approach were unconstitutional (or could be overridden by the Senate unilaterally), each chamber of Congress certainly can make such changes in its own rules with the effect of reducing removal. And even though Congress has the power to change its rules by a majority vote, history teaches that such rules can be sticky because of the institutional values they serve. Changing the rules—especially changing the rules without supermajority support—is a significant act that the Senate does not take lightly.²⁴³

C. Efforts to Prevent Evasion

Congress can also take steps to ensure that the president cannot evade the Appointments Clause’s ordinary strictures. If the president can replace an incumbent officeholder easily with someone the president prefers more, it is more likely that the president will pull trigger on removal, all else being equal. Our model illustrates why this is so. As demonstrated in Figure 2b, the easier it is to replace someone, the smaller the president’s indifference range becomes, making removal more likely. Hence, by parity of reason, from Congress’s perspective, the question is how to make it harder to replace an incumbent officeholder with someone the president prefers more.

²⁴⁰ *Id.*

²⁴¹ See, e.g., *Rucho v. Common Cause*, 139 S. Ct. 2484, 2490 (2019) (refusing to answer a politically important question in the absence of “judicially manageable standards for deciding such claims”); see also, e.g., Gerhardt, *supra* note 225, at 449 (arguing that “the filibuster is best understood as a classic example of a nonreviewable, legislative constitutional judgment”); John C. Roberts, *Majority Voting in Congress: Further Notes on the Constitutionality of the Senate Cloture Rule*, 20 J.L. & POL. 505, 507 (2004) (“[W]hile the debate is interesting and useful, the argument over the validity of the filibuster or the Cloture Rule is ultimately not constitutional or even legal. Rather it is a policy debate about the functioning of the Senate as an institution, with all its peculiar traditions and rich history.”).

²⁴² The political question doctrine is a “very confusing” constitutional thicket. John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 1014 (2002); see also Tara Leigh Grove, *The Lost History of the Political Question Doctrine*, 90 N.Y.U. L. REV. 1908, 1911 (2015) (challenging current doctrine as ahistorical). We do not weigh into that debate here. Our point is simply that to the extent the doctrine applies, Congress has even more protection for its decisionmaking.

²⁴³ See, e.g., Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. CHI. L. REV. 361, 433 (2004) (explaining how the cloture rules are “formally entrenched” in cameral rules and what that means practically).

One way to do that is to prevent the president from evading the Appointments Clause. In deciding whether to remove an agency head, presidents no doubt consider not just whether the Senate will confirm a replacement, but also whether it is possible to place someone in the vacant point through other means, such as through recess appointments, via the use of acting officials, or by delegation of the official's duties to someone else within the agency. Accordingly, Congress can discourage removal by making it more difficult for the president to use those means.

The most straightforward way for a president to evade the Appointments Clause's advice-and-consent requirement is through a recess appointment. Under the Recess Appointments Clause, "[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."²⁴⁴ Thus, a president looking to evade the confirmation process may wait until the Senate is in recess, and then appoint someone. Such a prospect may push the president to more readily remove because the discount factor on replacement would be less than if Senate confirmation is required.²⁴⁵

Similarly, presidents can evade Senate advice and consent through the use of acting officials.²⁴⁶ The Federal Vacancies Reform Act (Vacancies Act) broadly empowers the president to select temporary replacements for agency heads "without Senate confirmation" when a confirmed official is not present to perform the functions of the office.²⁴⁷ There is good reason for the Vacancies Act; important public functions could go undone without someone to direct an office.²⁴⁸ At the same time, however, the president can put people in place that the Senate would not confirm,²⁴⁹ thereby achieving policies closer to the president's preference.²⁵⁰ In the parlance of our model, if the president can costlessly replace an agency head whose views differ from the president's, the ultimate policy result should always be precisely what the president prefers. Using acting officials may essentially create that scenario.²⁵¹

²⁴⁴ U.S. CONST. art. II, § 2, cl. 3.

²⁴⁵ See Part II.C *supra*.

²⁴⁶ O'Connell, *supra* note 28, at 691.

²⁴⁷ See *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 934 (2017).

²⁴⁸ See *id.* at 935 ("The constitutional process of Presidential appointment and Senate confirmation, however, can take time: The President may not promptly settle on a nominee to fill an office; the Senate may be unable, or unwilling, to speedily confirm the nominee once submitted. Yet neither may desire to see the duties of the vacant office go unperformed in the interim.").

²⁴⁹ See O'Connell, *supra* note 28, at 698-99 ("Presidents of both parties have placed officials in acting roles whom the Senate would not confirm.").

²⁵⁰ See, e.g., Mendelson, *supra* note 28, 535 (quoting President Trump as saying "I sort of like acting. It gives me more flexibility.").

²⁵¹ Of course, it would not be exactly the same as a world without removal costs; the president would still face political consequences for using acting officials in this way. See O'Connell, *supra* note 28, at 623 (noting how use of acting officials can be "controversial").

Less obvious, the president can evade the Appointments Clause by delegating an office's duties to someone else.²⁵² Unless constrained by statutory law, many duties—those that are not “non-delegable”—that are typically performed by a confirmed official can be reallocated to someone else within the agency who either has already been confirmed or does not need confirmation.²⁵³ The president thus can remove officeholders with less fear of the Senate by ordering agencies to delegate the office's duties to someone the president can control. Anne Joseph O'Connell has identified situations where temporary officials who could not serve as acting officials under the Vacancies Act continued to perform the exact same role in the administration through delegation of duties. For example, she observes that President Trump used delegation to continue to control the Social Security Administration past the Vacancies Act deadline before formally nominating a new Commissioner, and that President Obama—fearing a “nasty confirmation hearing”—“strategically chose not to nominate someone” to run the Bureau of Alcohol, Tobacco, Firearms and Explosives but instead simply delegated the office's functions to someone who did not require confirmation.²⁵⁴

Congress does not have to allow this. Congress can take steps to prevent recess appointments and curb the Vacancies Act. It could similarly create more non-delegable duties or even narrow or modify the authority that an acting leader has—either generally, or (perhaps) only when the president removes the Senate-confirmed leader without giving proper reasons or otherwise complying with the soft and hard tools detailed above.²⁵⁵ It can also add quorum requirements to make it more difficult for the president to remove some officials whose views differ from his.²⁵⁶

Notably, the Supreme Court is likely to be quite receptive to arguments based on anti-evasion. Consider *Noel Canning*. There, the Court confronted

²⁵² See *id.* at 633 (“For all the detail given to permissible types of acting officials, . . . the Vacancies Act now appears to provide an easy workaround in many cases: delegate the tasks of the vacant office.”). See generally Jennifer Nou, *Subdelegating Powers*, 116 COLUM. L. REV. 473 (2017).

²⁵³ See O'Connell, *supra* note 28, at 633–34 (explaining difference between delegable and non-delegable duties).

²⁵⁴ See *id.* at 634–35 (quoting Sarah Wheaton, *White House to Demote ATF Chief—To Keep Him on the Job*, POLITICO (Oct. 8, 2015)).

²⁵⁵ Exploring how to structure such substantive restrictions on the authority of acting officials exceeds the ambitions of this Article, but it would likely involve setting a sunset default that is not politically attractive to either the regulated or the regulatory beneficiaries. Cf. Adler & Walker, *supra* note 216, at 1977–79 (exploring in the reauthorization context how “to set the [sunset] default to avoid catastrophic outcomes while still imposing significant costs on politically diverse groups so as to increase political pressure and swift congressional action”).

²⁵⁶ See, e.g., Brian Naylor, *As FEC Nears Shutdown, Priorities Such As Stopping Election Interference On Hold*, NPR (Aug. 30, 2019) (“The FEC is not the only government agency unable to act because of a lack of a quorum. The Merit Systems Protection Board, which investigates allegations of violations of federal personnel practices, including the Hatch Act, hasn't had one for over two years.”), <https://www.npr.org/2019/08/30/755523088/as-fec-nears-shutdown-priorities-such-as-stopping-election-interference-on-hold>.

President Obama's recess appointments to the National Labor Relations Board (NLRB). Recall that under the Recess Appointments Clause, "the President alone [has] the power 'to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.'"²⁵⁷ Rather than take a recess—which potentially would allow the president to put someone in office the Senate does not want—the Senate increasingly uses "pro forma" sessions where no business is conducted.²⁵⁸ Irritated with that practice, President Obama aggressively used the Recess Appointments Clause, arguing that although the Senate was conducting pro forma sessions, the Senate really was in recess, and thus the president could put his people on the NLRB. A party sanctioned by the NLRB challenged the lawfulness of the sanction.

The Court unanimously held that President Obama's appointments were unlawful, in a majority decision written by Justice Breyer. Breyer—joined by Justices Kennedy, Ginsburg, Sotomayor, and Kagan—based that decision on three propositions. First, he concluded that the Recess Appointments Clause's reference to "recess of the Senate" applies to both an "inter-session recess (i.e., a break between formal sessions of Congress)" and "an intra-session recess, such as a summer recess in the midst of a session." Second, he concluded that the phrase "vacancies that may happen during the Recess of the Senate" refers both to "vacancies that first come into existence during a recess" and to "vacancies that arise prior to a recess but continue to exist during the recess." And third, fatal to the President Obama's effort, he also determined that a "recess" presumptively must be longer than a few days and the pro forma sessions at issue prevented a recess from occurring.²⁵⁹

By itself, *Noel Canning's* holding makes it harder for the president to evade the Senate's advice-and-consent process. Yet Justice Scalia—joined by Chief Justice Roberts and Justices Thomas and Alito—would have gone much further. According to Scalia, "recess of the Senate" only covers inter-session recesses, and "vacancies that may happen during the Recess of the Senate" *only* covers vacancies that occur during the recess, and not vacancies that occur before the recess but are not filled while the Senate sits. This view—shared, notably, by much of the *Arthrex*, *Collins*, and *Seila Law* majorities—would significantly limit the president's ability to make recess appointments. Should the president attempt to make a recess appointment that runs afoul of Scalia's proposed test, moreover, it is quite likely that someone will challenge that appointment in court, arguing that Breyer's analysis was dicta (as it was not necessary to the Court's judgment), or, alternatively, that it should be overruled. That litigation risk *by itself* may,

²⁵⁷ *Noel Canning*, 134 S. Ct. at 2556 (quoting U.S. CONST. art. II, § 2, cl. 3).

²⁵⁸ See, e.g., Ronald J. Krotoszynski, Jr., *Transcending Formalism and Functionalism in Separation-of-Powers Analysis: Reframing the Appointments Power After Noel Canning*, 64 DUKE L.J. 1513 (2015).

²⁵⁹ See *Noel Canning*, 134 S. Ct. at 2567 ("We . . . conclude . . . that a recess of more than 3 days but less than 10 days is presumptively too short to fall within the Clause. We add the word 'presumptively' to leave open the possibility that some very unusual circumstance—a national catastrophe, for instance, that renders the Senate unavailable but calls for an urgent response—could demand the exercise of the recess-appointment power during a shorter break.").

at the margins, discourage some possible recess appointments.²⁶⁰ *Noel Canning* thus strengthens Congress’s anti-removal power.²⁶¹ By making it harder to replace an officeholder, the president should be more reluctant to remove that officeholder. And in the real world, Scalia’s view of recess appointments would create even more agency independence.

The Court has also addressed acting officials. In *Southwest General*, the Court addressed a technical question with significant consequences for the president’s ability to use acting officials. The Vacancies Act’s default rule is that if a vacancy arises in an office requiring presidential appointment and Senate confirmation, then “the first assistant to the office of such officer shall perform the functions and duties of the office temporarily in an acting capacity.”²⁶² The president, however, can override that default and pick someone else, including a senior agency official.²⁶³ Yet there are limits on this power. In *Southwest General*, the Court held in a lopsided 6–2 vote—with only Justices Ginsburg and Sotomayor in dissent—that a person who has been nominated to serve in an office requiring Senate confirmation cannot serve in the office in an acting capacity pending confirmation.

This holding demonstrates that Congress can limit the president’s powers under the Vacancies Act. Notably, however, Justice Thomas—the justice most openly opposed to *Humphrey’s Executor*—would have gone further and held that Congress lacks the *constitutional* authority to allow many such appointments.²⁶⁴ Under Thomas’s view, Congress has the power to vest the appointment of inferior officers—who can act as acting officials—in the president alone, but Congress cannot vest the appointment of principal officers in the president alone.²⁶⁵ Further, Thomas agreed that his view of the Appointments Clause may hobble the executive branch, yet he observed that a key virtue of the Appointments Clause is that it mitigates “the serious risk for abuse and corruption posed by permitting one person to fill every

²⁶⁰ See, e.g., Kristin E. Hickman & Aaron L. Nielson, *The Future of Chevron Deference*, 70 DUKE L.J. 1015 (2021) (explaining that litigation risk may determine what happens in the real world even without formal changes to law (citing Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 457 (1897))).

²⁶¹ See, e.g., Noel Francisco & James Burnham, *Noel Canning v. NLRB: Enforcing Basic Constitutional Limits on Presidential Power*, 99 VA. L. REV. IN BRIEF 17, 28 (2013) (“Senate confirmation thus provides ‘an efficacious source of stability in the administration.’ The boundless construction of the Recess Appointments Clause urged by the executive branch in [*Noel Canning*]—pursuant to which the recess-appointment exception would swallow the advice-and-consent rule—would turn these structural benefits on their head.”).

²⁶² 5 U.S.C. § 3345(a)(1).

²⁶³ *Id.* §§ 3345(a)(2), (a)(3).

²⁶⁴ See, e.g., *Southwest General*, 137 S. Ct. at 946 (Thomas, J., concurring) (“The FVRA does not, however, require the President to seek the advice and consent of the Senate before directing the official to perform the functions of the vacant office.”).

²⁶⁵ See, e.g., *id.* (“When the President ‘direct[s]’ someone to serve as an officer pursuant to the FVRA, he is ‘appoint[ing]’ that person as an ‘officer of the United States’ within the meaning of the Appointments Clause.”); *id.* (“Appointing principal officers under the FVRA . . . raises grave constitutional concerns because the Appointments Clause forbids the President to appoint principal officers without the advice and consent of the Senate.”).

office in the Government,” which structural principle counseled against watering down “the Appointments Clause’s important check on executive power for the sake of administrative convenience or efficiency.”²⁶⁶ Thomas’s view of the Appointments Clause—which the majority had no occasion to reach—would greatly enhance real-world agency independence.

That point is even more potent if the president lacks the power to designate an acting director following removal. This is an issue that courts have not yet resolved, though one court has suggested that a “vacancy” does not arise for Vacancies Act purposes if the president caused the vacancy.²⁶⁷ The Vacancies Act’s text is far from pellucid, stating that the statute applies when the officeholder “dies, resigns, or is otherwise unable to perform the functions and duties of the office.”²⁶⁸ Does the phrase “unable to perform the functions and duties of the office” include being fired? The Office of Legal Counsel has concluded that it does.²⁶⁹ Others disagree.²⁷⁰ Congress, however, could amend the statute to say that it does not apply when the president removes an agency head.²⁷¹ Similarly, Congress can specify that more duties are nondelegable, which would further force the president to seek Senate confirmation, and with it trigger the Appointments Clause’s dynamic effect.

* * *

In sum, Congress’s anti-removal power encompasses a set of soft and hard tools that raise the costs to the president in the Senate confirmation process to replace a fired officer as well as a set of legislative tools to raise the president’s costs of evading the Senate confirmation process. These tools

²⁶⁶ *Id.* at 948. Justice Thomas also observed that it is irrelevant under his view that Congress itself limited the force of the Senate’s advice-and-consent function by enacting the Vacancies Act. Because the Appointments Clause is a structural component of the separation of powers intended to protect liberty, the Senate does not have the power to relinquish its role. *See id.* at 949.

²⁶⁷ *See* O’Connell, *supra* note 28, at 673 (“In a challenge to [Matthew] Whitaker’s service as acting Attorney General, one district court, in dicta and without any analysis, stated that [h]ad [Jeff] Sessions chosen to refuse to resign the President could have exercised his authority to fire him, which would make the [Vacancies Act] inapplicable.” (quoting *United States v. Valencia*, No. 5:17-CR-882-DAE(1)(2), 2018 WL 6182755, at *4 (W.D. Tex. Nov. 27, 2018), appeal dismissed, 940 F.3d 181 (5th Cir. 2019))).

²⁶⁸ 5 U.S.C. § 3345(a).

²⁶⁹ *See* O’Connell, *supra* note 28, at 672 (Ben Miller-Gootnick, Note, *Boundaries of the Federal Vacancies Reform Act*, 56 HARV. J. ON LEGIS. 459 (2019); Justin C. Van Orsdol, Note, *Reforming Federal Vacancies*, 54 GA. L. REV. 297 (2019)). O’Connell notes that the Vacancies Act’s legislative history indicates that the statute applies after the president has removed an incumbent officeholder. *See* O’Connell, *supra* note 28, at 673 (citing 144 CONG. REC. 27,496 (1998)). Legislative history, needless to say, may not be the persuasive evidence for the current Supreme Court.

²⁷⁰ 5 U.S.C. § 3345(a).

²⁷¹ *See generally* Ronald J. Krotoszynski, Jr. & Atticus DeProspero, *Squaring A Circle: Advice and Consent, Faithful Execution, and the Vacancies Reform Act*, 55 GA. L. REV. 731, 812 (2021) (urging the Vacancies Act’s scope be narrowed so that acting officials could only act as “caretaker[s]” rather than as true leaders); Nina A. Mendelson, *supra* note 28, at 601 (urging that the Vacancies Act be reformed to prevent overly long periods of acting officials).

are summarized in the following table. It is important to underscore that a mix of these tools can be used in combination, with some tools only triggered if the president fails to provide adequate reasons for removal. The key point is that use of this toolkit would increase an agency's range of policymaking discretion.

Congress's Toolkit for Strengthening Its Anti-Removal Power		
	Tool	Description
Soft Tools	Enact Removal Reason-Giving Requirement	This requires the president to report a reason (any reason or a specific good-cause reason) to Congress for the firing
	Enact Statutory Signals of Agency Independence	These include labeling the agency as "independent," setting a term of years for the office, and enacting legislative findings that reinforce independence
	Require Congressional Hearings on Removal	A hearing with the fired official and other witnesses could be required whenever removed or for failure to comply with reason-giving requirements.
Hard Tools	Heighten Senate Cloture Vote Threshold on Replacement Nominee	Senate cloture vote could be increased above a simple majority for removal, or more narrowly when the president does not provide adequate reasons.
	Slow Down Senate Confirmation Process on Replacement Nominee	Procedures for hearing, debate, and consideration of subsequent nominee could be drawn out if removal was not for good reasons.
	Impeach the President (or Threaten Impeachment)	Congress could signal in enacted legislative findings that presidential impeachment is on the table for improper removal, with impeachment being the ultimate hard tool.
Anti-Evasion Tools	Limit Recess Appointments	The Senate can ensure it is never in a recess long enough to allow the president to make a recess appointment replacement.
	Reform the Vacancies Act	Congress could reform the Federal Vacancies Reform Act to increase removal costs by limiting the president's options for acting or temporary leaders.
	Limit Subdelegations and Acting Officials Authority	Congress can narrow the authority of an agency under an acting leader or otherwise prohibit the subdelegation of agency authority within the agency.

IV. THE BENEFITS OF CONGRESS'S ANTI-REMOVAL POWER

In this Part, we explain why Congress's anti-removal power should be the primary (if not exclusive) basis for agency independence going forward. Indeed, shifting away from statutory restrictions in favor of Congress's anti-removal power has many important advantages and even the arguable disadvantages have silver linings.

A. It's Constitutional.

The most important advantage of grounding agency independence on Congress's anti-removal power is that it is almost certainly constitutional. Now that a supermajority of justices has turned against statutory restrictions on removal, Congress needs a different tool if it wishes to preserve independence. This is where Congress's anti-removal power really shines. In *Seila Law*, Chief Justice Roberts faulted the CFPB's structure for

running afoul of constitutional text, structure, and history.²⁷² All three of those factors, however, cuts in favor of Congress's anti-removal power.

First, text. On its face, Article II gives the Senate broad authority over confirmation. Indeed, the words "advice" or "consent" do not suggest any limit on what the Senate can consider in deciding whether to approve a nominee. Scholars disagree about whether the original understanding of these terms—particularly "advice"—indicate that the president should coordinate with the Senate before making a nomination (or presenting a treaty),²⁷³ but the words do not impose substantive limits on what the Senate can consider in providing consent. Granted, some scholars argue that the Senate has a duty to give an up-and-down vote to every nominee,²⁷⁴ and that it violates the Senate's constitutional obligation to use heightened cloture requirements to block confirmation.²⁷⁵ Others disagree, arguing that the Senate can reject a nominee for any reason²⁷⁶ and adopt cloture requirements that may precluding a final vote on a nominee.²⁷⁷ The Senate itself certainly appears to hold that view, and it almost unthinkable that any court would disagree. Accordingly, it is hard to see anything in the Constitution's language that bars Congress from using the anti-removal power to create a measure of independence, nor—with perhaps some exceptions at the margins, particularly for statutory enactments—from increasing the anti-removal power's effectiveness along the lines set forth in this Article.

Second, structure. The *Seila Law* majority relies heavily on the principle that, read as a whole, the Constitution's structural provisions cut in favor of presidential control over the operations of the executive branch, which indicates that the president must be able to remove officers who do not use the executive power as the president wants it used. "Without such power, the

²⁷² See, e.g., *Seila Law*, 140 S. Ct. at 2197 (concluding that the term "executive power" contains "a power to oversee executive officers through removal"); *id.* at 2202 ("In addition to being a historical anomaly, the CFPB's single-Director configuration is incompatible with our constitutional structure. Aside from the sole exception of the Presidency, that structure scrupulously avoids concentrating power in the hands of any single individual.").

²⁷³ See, e.g., David A. Strauss Cass, *The Senate, the Constitution, and the Confirmation Process*, 101 YALE L.J. 1491, 1493 (1992) (arguing that the Senate can use its "advice and consent" power to influence who is nominated); Grant H. Frazier & John N. Thorpe, *A Case for Circumscribed Judicial Evaluation in the Supreme Court Confirmation Process*, 33 GEO. J. LEG. ETHICS 229, 234 (2020) (noting the two "plausible meanings" of the role of "advice" in "advice and consent").

²⁷⁴ See, e.g., Daniel S. Cohen, *Do Your Duty (!)(?) the Distribution of Power in the Appointments Clause*, 103 VA. L. REV. 673, 679 (2017) (arguing that "the Senate must exercise its advice and consent authority for every nomination").

²⁷⁵ See, e.g., Dan T. Coenen, *The Filibuster and the Framing: Why the Cloture Rule Is Unconstitutional and What To Do About It*, 55 B.C. L. REV. 39 (2014); Josh Chafetz, *The Unconstitutionality of the Filibuster*, 43 CONN. L. REV. 1003 (2011).

²⁷⁶ See, e.g., Henry Paul Monaghan, *The Confirmation Process: Law or Politics?*, 101 HARV. L. REV. 1202, 1203 (1988) ("[N]o significant affirmative constitutional compulsion exists to confirm any presidential nominee. So viewed, the Senate can serve as an important political check on the President's power to appoint.").

²⁷⁷ See, e.g., Adam J. White, *Toward the Framers' Understanding of "Advice and Consent": A Historical and Textual Inquiry*, 29 HARV. J.L. & PUB. POL'Y 103, 106 (2005).

President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else.”²⁷⁸ Yet constitutional structure also cuts in favor of an anti-removal power. The fact that the Constitution contains no mechanism to prevent the Senate from using its advice-and-consent role to discourage removal—while also precluding judicial second-guessing of how the Senate uses its power—at least suggests that the Constitution does not preclude such a use. Similarly, the power to prevent rapid policy change itself has liberty implications; indeed, the Court has suggested that Article I slows legislation for that reason.²⁷⁹ Why not the same for Article II?²⁸⁰ The Senate’s ability to withhold consent when it believes that an incumbent has done a fine job allows the Senate—if it is willing to bear the political heat—to prevent rapid policy change.²⁸¹

Finally, history. Statutory restrictions on presidential removal are rare for agency heads and were never enacted until the Civil War.²⁸² In her *Seila Law* dissent, Justice Kagan was able to identify a few historical examples of statutory restrictions that may or may not be apt, but she could not deny that the CFPB was, if not unprecedented, certainly an outlier. Yet the idea behind the anti-removal power—that the Senate can create “stability of the administration” through the Appointments Clause—goes back to Hamilton and Madison.²⁸³ Indeed, Madison articulated this vision of political checks on removal in the very Decision of 1789 debates that undergird the Court’s recent removal holdings.²⁸⁴ And the idea that Congress can strengthen its anti-removal power’s real-world effects is hardly new. The fact that Congress can and does limit removal by imposing a reason-giving requirement on the White House has been reality for more than 150 years and has twice been, if not blessed, at least tolerated by the Supreme Court in recent years.²⁸⁵

As noted in Part III.B, there are perhaps some anti-entrenchment arguments that the Constitution does not allow Congress *by statute* to

²⁷⁸ *Seila Law*, 140 S. Ct. at 2191 (quoting *Free Enterprise Fund*).

²⁷⁹ *See, e.g.*, *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 575 U.S. 43, 61 (2015) (Alito, J., concurring) (“The Constitution’s deliberative process was viewed by the Framers as a valuable feature, not something to be lamented and evaded.” (citing John F. Manning, *Lawmaking Made Easy*, 10 GREEN BAG 2d 191, 202 (2007))). “[T]he framers went to great lengths to make lawmaking difficult,” for “[a]n ‘excess of law-making’ was, in their words, one of ‘the diseases to which our governments are most liable.’” *Gundy*, 139 S. Ct. at 2134 (Gorsuch, J., dissenting) (quoting FEDERALIST NO. 62 (James Madison)).

²⁸⁰ Notably, the founding generation recognized the importance of stability of administration, which theme runs through *The Federalist* and was identified by Madison as part of his remarks during the Decision of 1789. *See, e.g.*, J. DAVID ALVIS, JEREMY D. BAILEY & F. FLAGG TAYLOR IV, *THE CONTESTED REMOVAL POWER, 1789–2010* (2013) (explaining the Federalist’s emphasis on stability).

²⁸¹ *Cf.* Jonathan Turley, *Recess Appointments in the Age of Regulation*, 93 B.U. L. REV. 1523, 1603 (2013) (“Much of the Madisonian system is directed and funneling factional and political pressures in ways to achieve compromise and defuse the aggregation of power.”).

²⁸² *See* Part I.C *supra*.

²⁸³ *See* Part II.A *supra*.

²⁸⁴ *See, e.g.*, *Seila Law*, 140 S. Ct. at 2203 (quoting from the same speech in which Madison stated that impeachment for “wanton” removal is warranted).

²⁸⁵ *See* Part II.B *supra*.

require a heightened cloture vote for Senate confirmations. Such questions could prompt litigation. But those constitutional arguments strike us as having zero force if the Senate adopts those same provisions by cameral rule. To be sure, the Senate can more easily change its own rules—to nuke the anti-removal filibuster—with a simple majority vote, unlike the same rule by statute that would require bicameralism and presentment. But even when the Senate can change its rules by majority vote, history teaches that such rules can be quite durable even as political control shifts.

Likewise, some argue that because the president has the constitutional power to remove officials at will, Congress cannot “burden the President’s constitutionally protected removal power.”²⁸⁶ But surely the Appointments Clause lets Congress make removal less attractive; indeed, the Senate’s power to do so is on the face of Article II. And Congress does not need to allow acting officials or delegable duties at all. Furthermore, it is doubtful that the freedom to put anyone the president wants in office is a “benefit” for purposes of the rule that “the government may not deny a benefit to a person because he exercises a constitutional right.”²⁸⁷ This is especially true given the liberty concerns that motivate the Appointments Clause in the first place.

B. It Can Be Effective.

Congress’s anti-removal power can also be quite effective—especially if Congress strengthens it. As our model demonstrates, the range of independence possible through Congress’s anti-removal power can be broad. Accordingly, we predict that the anti-removal power would often produce outcomes similar to what is possible under a statutory removal restriction.

To be sure, for some offices, even aggressive efforts to strengthen Congress’s anti-removal power may not prevent removal; a president would not tolerate a restriction on removing the Secretary of State. At some point, even accounting for enhanced indifference ranges and removal costs, the president will conclude that the costs of removal are worth it. In the real world, this means that the president likely will not try to remove more technocratic, less politically charged positions, but will do so for the weightier positions. Yet this may be a virtue. It is hard to deny the force of accountability. If the president does not want an official and is willing to face the political consequences inherent in removing that person, it is hard to defend a system that allows such an official to remain in office. Congress’s anti-removal power creates greater stability in the executive branch, but it does not fuel a headless fourth branch of government. The president still can say “enough.” Thus, unlike a statutory restriction on removal, Congress’s anti-removal power merely discourages removal, thereby allowing the president to decide whether the fight is worth it.

No doubt, one counterargument is that Congress’s anti-removal power does not work in an era of political polarization; when the same party controls both the White House and the Senate, it is easier for the president

²⁸⁶ Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. REV. 1487, 1514–17 (2005).

²⁸⁷ *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013) (quotation marks omitted).

to remove and replace.²⁸⁸ For purposes of our model, that means that the president's indifference range is much smaller when his party controls the Senate than otherwise, thus reducing the amount of independence.

We do not disagree. This counterargument, however, should not be overstated for at least two reasons. First, history teaches that senatorial commitment to stability often cuts across party lines, especially for lower-profile positions, like inspectors general and more technocratic regulators. Second, but no less important, many of the ways to strengthen Congress's anti-removal power—such as increasing the number of votes necessary to invoke cloture—do not depend on shared political control. Because it is quite rare in modern times, for example, for 60 or more senators to be from the same political party, a 60-vote cloture requirement generally would do the trick, especially when one recalls that such rules tend to be resilient.

Likewise, some may argue against grounding independence in Congress's anti-removal power by observing that the attractiveness of regulatory power is asymmetric; some presidents are much more willing to disempower an agency than the others, so the threat that the Senate will refuse to confirm a replacement nominee is, if not empty, at least as meaningful as it would be to a president that places a higher value on the agency.²⁸⁹ This point, however, should also not be overstated. Presidents usually want to do more than just stop the agency from acting; if nothing else, they want to undo what prior administrations have done and lock in favorable policies going forward.²⁹⁰ An agency that cannot act cannot do those things.

C. It's Flexible.

Congress's anti-removal power is also quite flexible. Congress can use it for any type of agency structure and can modulate the anti-removal power by using a combination of some hard and soft tools and evasion tactics. Through these tools, moreover, Congress can impose greater or lesser removal costs depending on the level of independence Congress desires for a particular agency or official. *Seila Law* appears to allow (for now) removal restrictions for multi-headed agencies and inferior officers that do not

²⁸⁸ See, e.g., McGarity, *supra* note 133, at 1681 (explaining the effects of divided government on congressional behavior); cf. Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2363 (2006) (explaining the incentives created by divided government).

²⁸⁹ See, e.g., Jody Freeman & Sharon Jacobs, *Structural Deregulation*, HARV. L. REV. (forthcoming) (arguing that some administrations want to harm the agency rather than use the agency for ordinary regulatory purposes).

²⁹⁰ See, e.g., Aaron L. Nielson, *Sticky Regulations*, 85 U. CHI. L. REV. 85, 90 (2018) (explaining that precisely because the rulemaking process is difficult, it allows administrations to lock in policies more effectively against future change); cf. Antonin Scalia, *The Two Faces of Federalism*, 6 HARV. J.L. & PUB. POLICY 19, 20 (1982) (“I understand that in some of the offices of the current administration there are signs on the wall that read, ‘Don’t just stand there; undo something.’”).

exercise much policymaking discretion.²⁹¹ Whether those “exceptions”²⁹² from the general rule that the president must be able to remove executive branch officials will survive future cases is unknown. But even if they do, the fact that different types of agency structures trigger different removal rules limits Congress’s ability to structure agencies.

Congress’s anti-removal power, however, is not limited by agency structure. The Appointments Clause *allows*, but does not *require*, Congress to vest the appointment of inferior officers—generally those “work is directed and supervised by [a principal] officer”²⁹³—in “the President alone,” “the Courts of Law,” or “the Heads of Departments.”²⁹⁴ Congress often decides it is worthwhile to exercise that option. Mindful of the potential for a large “number of inferior officers,” the framers recognized that “it would be too burdensome to require each of them to run the gauntlet of Senate confirmation.”²⁹⁵ But it is a *discretionary* call for Congress to make or unmake. And, indeed, a large number of seemingly inferior officers must be confirmed through the Senate, including every U.S. Attorney and many agency general counsels. Accordingly, if Congress wishes, it can use its anti-removal power to discourage removal regardless of an agency’s structure. As we explain below, this flexibility has particular significance for agency adjudication, which going forward may be the battleground for the most controversial and consequential questions of presidential removal. This flexibility is also relevant for the chairs of agencies—such as the Federal Reserve—with their own statutory powers. The *Collins* majority refused to say whether the Federal Reserve Chair is constitutional,²⁹⁶ yet whatever the judiciary says, Congress can preserve the Federal Reserve independence.

²⁹¹ See *Seila Law*, 140 S. Ct. at 2192 (“Our precedents have recognized only two exceptions to the President’s unrestricted removal power. In *Humphrey’s Executor* . . . we held that Congress could create expert agencies led by a group of principal officers removable by the President only for good cause. And in . . . *Morrison* . . . we held that Congress could provide tenure protections to certain inferior officers with narrowly defined duties. . . . We are now asked to extend these precedents to a new configuration: an independent agency that wields significant executive power and is run by a single individual who cannot be removed by the President unless certain statutory criteria are met. We decline to take that step.”).

²⁹² *Id.*

²⁹³ *Arthrex*, 141 S. Ct. at 1976. Being deliberately provocative, Matthew Stephenson argues that sometimes the president can appoint even a principal officer without a Senate vote where the Senate does not act “within a reasonable time.” Matthew C. Stephenson, *Can the President Appoint Principal Executive Officers Without a Senate Confirmation Vote?*, 122 YALE L.J. 940, 946 (2013). We think this argument is unpersuasive for reasons Stephenson identifies, *see id.* (admitting it is a “radical” argument), and are confident that the Court would reject it.

²⁹⁴ U.S. CONST. art. II, § 2, cl. 2.

²⁹⁵ *Lucia v. SEC*, 138 S. Ct. 2044, 2056 (2018) (Thomas, J., concurring).

²⁹⁶ See *Collins*, 141 S. Ct. at 1787 n.21 (declining to address “multi-member agencies for which the chair is nominated by the President and confirmed by the Senate to a fixed term”); *see also* 12 U.S.C. §§ 242, 248 (setting forth unique term length and powers of Federal Reserve Chair).

D. It Reinforces Accountability.

Congress's anti-removal power reinforces, rather than undermines, political accountability. It is true that this power sometimes may give Congress "the means of thwarting" the president "by fastening upon him, as subordinate executive officers, men who by their inefficient service under him, by their lack of loyalty to the service, or by their different views of policy might make his taking care that the laws be faithfully executed most difficult or impossible."²⁹⁷ Yet, Congress's anti-removal power does not prevent the president from firing someone if the president is willing to face the political heat. The president can remove officials for any reason. All the anti-removal power does is discourage the president from using that power. Whether the president ultimately removes someone depends on politics, and the president can be judged by the public for the prudence of his decisions. Moreover, as in other contexts, requiring the president to give reasons for exercising removal discretion may encourage the president to act in a less arbitrary, more transparent manner and thus enhance the public legitimacy of that action.²⁹⁸

At the same time, there are political checks on Congress's ability to use its anti-removal power. In theory, Congress could refuse to confirm *anyone* to *anything*, just as Congress can "shut down" the government by failing to appropriate funds. Yet the political response would be sharp. The idea that Congress would forever refuse to confirm a high-level official within the executive branch because the president has replaced the incumbent seems like a stretch; it is certainly ahistorical. At some point, compromise would result. Because compromise is a political process, however, the president and the Senate—and possibly even the House—must defend their actions to the voters. Unlike a statutory removal restriction, moreover, which cannot readily be changed during a political skirmish, how Congress uses its anti-removal power is subject to more direct political accountability.

But what of the concern that greater use of Congress's anti-removal power would "reduce the Chief Magistrate to a cajoler-in-chief"?²⁹⁹ Our model shows that the president sometimes must negotiate with agency heads who, to a point, can leverage the president's removal costs to do things that the president does not want.³⁰⁰ But this already happens—indeed, it is inherent in the fact that the Senate has a role in the appointments process. The framers decided the dangers of direct presidential control over appointment outweigh its efficiency; the real-world consequence is that incumbent officeholders have some leverage over the president because of removal costs. There are limits, however, to that leverage. Even if an officeholder may not always do precisely what the president wants, the official still must act

²⁹⁷ *Myers*, 272 U.S. at 131.

²⁹⁸ See, e.g., Melissa J. Durkee, *International Lobbying Law*, 127 YALE L.J. 1742, 1778 (2018) (noting the view that "safeguards like transparency, participation, review, and reason-giving can enhance the legitimacy of [a] process"); but see David E. Pozen, *Transparency's Ideological Drift*, 128 YALE L.J. 100, 133 (2018) (suggesting that transparency, if taken too far, can undermine rather than legitimate).

²⁹⁹ *Free Enterprise Fund*, 561 U.S. at 502.

³⁰⁰ See Part II.C *supra*.

within the president's indifference range, the size of which is directly related to the president's political priorities.

Finally, there is one more accountability advantage to grounding independence in the Congress's anti-removal power: it provides a way to determine how important Congress thinks independence really is. There is an empirical debate about how often removal restrictions affect agency behavior.³⁰¹ Using the anti-removal power is not costless. If Congress concludes that the benefits of independence are not worth the costs, that is an important signal about the value of agency independence itself.

V. THE NEXT STEPS FOR CONGRESS'S ANTI-REMOVAL POWER

For the reasons set forth in Parts II–IV, Congress has an anti-removal power that it can use to create at least a measure of agency independence. This final Part explores the next steps for Congress to use this power in response to the Supreme Court's recent rulings in *Arthrex*, *Collins*, and *Seila Law*. After fleshing out some immediate first steps (Part V.A), we focus especially on agency adjudication (Part V.B), where Congress's anti-removal power may be particularly appropriate and politically feasible. Note, however, that we avoid normative arguments; individuals can disagree about when Congress's use of its anti-removal power is wise. Indeed, some may conclude that plenary presidential control over the executive branch is always best as a policy matter. Our point here is simply to lay out the options available to Congress as it responds to a changing landscape.

A. Potential Immediate Responses

The obvious first targets for congressional attention are the CFPB and FHFA, the agencies at issue in *Seila Law* and *Collins* where the statutory removal protections were struck down as unconstitutional.³⁰² Both agencies for months have been led by acting agency heads. At President Biden's request, President Trump's Senate-confirmed CFPB Director Kathy Kraninger resigned on inauguration day.³⁰³ President Biden promptly nominated Rohit Chopra to head the CFPB, but in March, the Senate Banking Committee failed to report his nomination favorably.³⁰⁴ Immediately after the Court issued its *Collins* decision in June 2021, Biden

³⁰¹ Compare, e.g., Huq, *supra* note 2, at 6 (contending that removal is a limited tool of control), and *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2242–43 (Kagan, J., concurring in part) (2020) (explaining that presidential control is a “complex stew” that involves many factors), with *Seila Law*, 140 S. Ct. at 2191 (reasoning that removal is an effective way to control “those who wield executive power”).

³⁰² *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2192 (2020); *Collins v. Yellen*, 141 S. Ct. 1761, 1770 (2021).

³⁰³ Evan Weinberger, *CFPB Director Kraninger Resigns at Biden's Request*, BLOOMBERG LAW (Jan. 20, 2021), <https://news.bloomberglaw.com/banking-law/kraninger-resigns-from-cfpb-allowing-bidens-team-to-take-over>; see also *id.* (noting that “Biden was expected to fire Kraninger if she did not leave of her own accord”).

³⁰⁴ See PN116, Rohit Chopra, Bureau of Consumer Financial Protection, 117th Cong. (2021–22), <https://www.congress.gov/nomination/117th-congress/116>.

fired the FHFA Director Mark Calabria, who had been appointed by Trump and confirmed by the then-Republican-controlled Senate. Biden designated Sandra Thompson as Acting Director.³⁰⁵

If members of Congress value independence at either agency, now is the time to act—to introduce legislation or cameral rule amendments to exercise Congress’s anti-removal power. This is particularly true politically, as President Biden seeks to appoint new agency heads and would have incentives to ensure they are not easily removed by his successor. These measures could include requiring the president to offer reasons for removing the agency heads, coupled with heightened cloture thresholds and public oversight hearings if the president fails to provide reasons (or even good reasons). Congress could also explore how to prevent presidential evasion of the Appointments Clause by reining in the use of acting or temporary agency heads and by limiting the power of acting or other agency leaders have in the absence of a Senate-confirmed agency head.

But those are just the first steps for Congress, if it decides to act. Recent developments suggest Congress might consider more sweeping action. In our court-appointed amicus brief, we outlined the potential far-reaching effects of extending the *Seila Law* precedent to include even the FHFA in *Collins*.³⁰⁶ Justice Alito, writing for the Court in *Collins*, responded that “[n]one of these agencies is before us, and we do not comment on the constitutionality of any removal restriction that applies to their officers.”³⁰⁷ The Biden Administration, however, took quick notice. On July 8, 2021, just two weeks after the Court handed down its *Collins* decision, the Justice Department’s Office of Legal Counsel issued a seventeen-page opinion concluding that “the best reading of *Collins* and *Seila Law* leads to the conclusion that, notwithstanding the statutory limitation on removal, the President can remove the SSA Commissioner at will.”³⁰⁸ The very next day President Biden fired SSA Commissioner Andrew Saul, whose term of service was not to end until January 2025.³⁰⁹ The president named an acting commissioner, and Congress waits on the president to nominate a successor. The time is now for

³⁰⁵ See Siegel, *supra* note 127.

³⁰⁶ Nielson Amicus Br., *supra* note 218, at 48–49 (“Most obviously, if Private Petitioners’ view of removal prevails, copycat suits presumably would next target the SSA, the [Office of Special Counsel (OSC)], and the Comptroller. Other plaintiffs might also challenge multimember agencies for which the chair is nominated by the President and confirmed by the Senate to a fixed term. . . . The Civil Service would also be a fertile ground for litigation. Many civil servants have leadership roles, including the Director of the Secret Service, Director of the National Hurricane Center, and Director of the Office of Highway Safety. . . . To date, courts have seldom been asked to define the line between employees and officers. But if at-will removal were required for any officer involved in policymaking, then those unhappy with agency action would have strong incentives to identify some civil servant who may have participated and could even arguably be an officer.” (citations omitted)).

³⁰⁷ *Collins*, 141 S. Ct. at 1787 n.21.

³⁰⁸ OLC Slip Op. Re: Constitutionality of the Commissioner of Social Security’s Tenure Protection, at 1 (July 8, 2021).

³⁰⁹ See Rein, *supra* note 127.

members of Congress to assess whether they value the independence of the SSA and, if so, to use Congress's anti-removal power to protect it.

As we foreshadowed in *Collins*, moreover, it is only a matter of time until litigants—or the president himself—force Congress to assess the value of agency independence for the Office of the Special Counsel, the more-traditional multi-member-headed independent agencies (and their chairs), and perhaps even certain high-ranking career civil servants who exercise significant policymaking authority. Consider, for instance, how Congress's anti-removal power could be used to provide an added measure of protection to the civil service. Although the Court has never decided the question, it is hard to see how subjecting individuals who may or may not be an officer to the confirmation process exceeds Congress's power under the Necessary and Proper Clause. Because the line between officers and employees is fuzzy,³¹⁰ it may be prudent to prophylactically submit members of the civil service who may be officers to the confirmation process. Congress may provide such individuals long tenure, as with inspectors general.³¹¹ Doing so would almost always prevent presidential micromanagement of the civil service. To be sure, as a policy matter, this approach is costly; there is value in presidential control of administration. Our point is simply that Congress has the power. Within its anti-removal power, Congress also can require by statute that the president or the agency head provide reasons for civil service firings and to require a congressional hearing where the fired individual and other witnesses testify.

In sum, Congress does not have to wait until courts—or the president—eliminate agency independence in those contexts. If members of Congress value such independence, they can call on the Senate or the collective Congress to exercise its anti-removal power. Of course, current congressional gridlock may temper enthusiasm about Congress successfully implementing some of these anti-removal approaches now, especially if they are not part of more comprehensive legislative proposal. Many of these reforms might require the right political moment, and when that time arrives, our anti-removal toolkit awaits. The key point, however, is that Congress's anti-removal power is inherent in the Constitution itself, so even if Congress does not choose to exercise its authority in the near term, the power will still be there. And if Congress *never* chooses to expand its exercises of this power beyond what it has already done thus far, that inaction would be instructive about the value of independence itself.

³¹⁰The Supreme Court has defined the line between “officers,” who are subject to the Appointments Clause, and “employees,” who are not, as whether the individual “exercis[es] significant authority pursuant to the laws of the United States.” *Buckley v. Valeo*, 424 U.S. 1, 126 (1976). That is not an easy line to police. *See, e.g., Lucia v. SEC*, 138 S. Ct. 2044, 2051 (2018) (“The standard is no doubt framed in general terms, tempting advocates to add whatever glosses best suit their arguments.”).

³¹¹Congress may also want to focus its anti-removal efforts on certain intra-agency officials and offices that protect the public from administrative overreach, such as agency ombuds, privacy offices, and other “offices of goodness.” *See* Margo Schlanger, *Offices of Goodness: Influence Without Authority in Federal Agencies*, 36 *CARDOZO L. REV.* 53, 65 (2014).

B. The Safeguarding of Agency Adjudication.

We conclude with one particularly important context for the exercise of Congress’s anti-removal power—and one in which substantial bipartisan support in the current Congress is more likely: the decisional independence of agency adjudicators. Indeed, for reasons well-articulated by Justice Breyer in *Free Enterprise Fund* and *Lucia*, agency adjudication may be where independence is most important. Before discussing how to apply Congress’s anti-removal power in this context, it is helpful to provide some background on agency adjudication and the constitutional tensions it creates.

Administrative adjudication plays a central role in our federal system today. To illustrate its breadth and importance to everyday life, consider that there are only some 860 statutorily authorized judgeships under Article III of the U.S. Constitution. Yet, there are more than 12,000 federal adjudicators appointed outside of Article III, including Article I judges, administrative law judges, and other agency adjudicators to go by a variety of titles who hold evidentiary hearings.³¹² In light of the predominance of agency adjudication in the federal judiciary today, it should perhaps come as no surprise that the constitutionality of this federal administrative judiciary has been called into question in recent years.

In 2018, the Supreme Court decided two cases that illustrate the growing constitutional tensions in agency adjudication.³¹³ In *Lucia v. SEC*, the Court held that administrative law judges (ALJs) at the SEC violate the Appointments Clause because they are, at minimum, inferior “officers of the United States” yet were not appointed by the president, the head of a department, or a federal court.³¹⁴ In *Oil States Energy Services v. Greene’s Energy Group*, the Court rejected constitutional challenges to certain agency adjudications at the U.S. Patent and Trademark Office (PTO), which were based on the argument that such adjudications unconstitutionally strip parties of property rights in issued patents.³¹⁵ The separate opinions in both cases nicely illustrate the emerging constitutional tensions. In his concurring opinion in *Lucia*, Justice Thomas underscored the accountability value of the president’s appointment power: “the Appointments Clause maintains clear lines of accountability—encouraging good appointments and giving the public someone to blame for bad ones.”³¹⁶ Conversely, Justice Gorsuch, in his *Oil States* dissent, expressed concern about too much political pressure affecting the agency adjudicator decisional independence (at least in the context of private rights): “Powerful interests are capable of amassing armies

³¹² See Christopher J. Walker, *Charting the New Landscape of Administrative Adjudication*, 69 DUKE L.J. 1687, 1687–88 (2020) (citing numbers and comparing federal judges and agency adjudicators).

³¹³ See generally Christopher J. Walker, *Constitutional Tensions in Agency Adjudication*, 104 IOWA L. REV. 2679 (2019) (exploring these constitutional tensions in greater detail).

³¹⁴ *Lucia v. SEC*, 138 S. Ct. 2044, 2049 (2018) (citing U.S. CONST. art. II, § 2, cl. 2).

³¹⁵ *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 138 S. Ct. 1365, 1375 (2018).

³¹⁶ *Lucia*, 138 S. Ct. at 2056 (Thomas, J., concurring).

of lobbyists and lawyers to influence (and even capture) politically accountable bureaucracies.”³¹⁷

Part of Justice Gorsuch’s concerns sounds like the reasons why Congress seeks to establish independent agencies more generally. But in the agency adjudication context in particular the concern for independence is further heightened in two related respects. First, there is the concern that an agency’s functions of enforcement and adjudication intermingle—the concerns for the separation of functions within any agency.³¹⁸ Second, there is the concern that politics are injected into adjudication decisionmaking—the concern about agency adjudicator decisional independence.³¹⁹ Insulating agency adjudicators from undue political influence thus becomes a central policy objective. Indeed, Congress addressed both features of adjudicator independence in the APA by requiring a firefall between agency enforcers and adjudicators and by insulating ALJs from political pressures through tenure protections.³²⁰

Lucia encroached on that independence somewhat by classifying ALJs as officers of the United States and thus requiring the head of the agency (or the president) to appoint them—as opposed to some other agency official who is more insulated from political pressures. Congress itself has also eroded such adjudicator independence by creating agency adjudication systems that operate outside of the formal hearing requirements of the APA, such that those adjudicators (labeled administrative judges, immigration judges, hearing officers, examiners, and so forth) potentially face greater political pressures and control. Michael Asimow, Kent Barnett, Emily Bremer, and others have chronicled this new world of agency adjudication outside the

³¹⁷ Oil States, 138 S. Ct. at 1381 (Gorsuch, J., dissenting)

³¹⁸ See, e.g., Michael Asimow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies*, 81 COLUM. L. REV. 759, 761–88 (1981) (surveying statutory and constitutional law on separation of functions); M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1194 (2000) (surveying separation-of-powers literature and arguing that “we operate in a regime that permits the combination of functions within a single institution, but requires separation of functions within the institution itself”).

³¹⁹ See, e.g., Richard E. Levy & Robert L. Glicksman, *Restoring ALJ Independence*, 105 MINN. L. REV. 39, 45 (2020) (“Although other recent threats to the rule of law may deservedly garner the headlines, we should not lose sight of the critical role that impartial agency adjudication plays. Taking reasonable steps toward securing independent and impartial adjudication by agencies is a nonpartisan issue that Congress can and should address.”); Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032, 1075 (2011) (“The bottom line is that senior agency officials can ‘manage’ adjudication only to the extent that that supervision does not relate to the resolution of particular cases.”); see also Jennifer Nou, *Dismissing Decisional Independence Suits*, 86 U. CHI. L. REV. 1187, 1189 (2019) (surveying “the reasons why federal courts are not well-placed to adjudicate decisional independence claims, which are at their root managerial questions requiring political tradeoffs”).

³²⁰ See generally Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CALIF. L. REV. 141 (2019) (detailing the lost world of APA formal adjudication and comparing it to the new world of formal agency adjudication that take places outside of the APA).

APA,³²¹ including the fact that there are five-fold the number of agency adjudicators outside the APA than there are ALJs governed by the APA.³²²

Indeed, last Term in *United States v. Arthrex*, the Supreme Court confronted the constitutionality of one set of these non-APA adjudicators: administrative patent judges (APJs) at the PTO.³²³ The constitutional wrinkle with APJs is that the Patent Act does not give the head of the agency final decisionmaking for their decisions. The Federal Circuit held that because of the lack of agency-head review, APJs are principal officers for the purposes of the Appointments Clause.³²⁴ To remedy this constitutional infirmity, the Federal Circuit severed APJs' statutory removal protections, such that the agency head could remove APJs at will.³²⁵ This remedy, as a policy matter, would take the fears Justice Gorsuch expressed in his *Oil States* dissent to a far more frightening level.

The Supreme Court agreed with the Federal Circuit that the structure of these PTO adjudications violates the separate of powers, holding that “[o]nly an officer properly appointed to a principal office may issue a final decision binding the Executive Branch in the proceeding before us.”³²⁶ But the Court opted for a different remedy. Instead of making APJs removable at will by the agency head, the Court struck down the Patent Act's prohibition on agency-head review of APJ decisions.³²⁷ In other words, by giving the agency head the final say, the Court opted to preserve the decisional independence of the agency adjudicators in exchange for more political accountability over the agency adjudication system. In so doing, the Court emphasized that agency-head final decisionmaking authority “is the standard way to maintain political accountability and effective oversight for adjudication that takes place outside the confines of” the APA's agency-head review provision.³²⁸

Although the Court in *Arthrex* rejected the at-will removal remedy with respect to APJs at the PTO, it is only a matter of time before courts will weigh in again about whether agency adjudicators must be more easily removable than current statutory law provides. In fact, the Court's recent decision in *Carr v. Saul* should expedite the issue.³²⁹ In *Carr*, the Court held that, at least where there is no statute or regulation that requires administrative exhaustion, litigants do not need to administratively exhaust constitutional

³²¹ See, e.g., MICHAEL ASIMOW, FEDERAL ADMINISTRATIVE ADJUDICATION OUTSIDE OF THE ADMINISTRATIVE PROCEDURE ACT (Admin. Conf. U.S. ed., 2019); Kent Barnett, *Against Administrative Judges*, 49 U.C. DAVIS L. REV. 1643 (2016); Kent Barnett & Russell Wheeler, *Non-ALJ Adjudicators in Federal Agencies: Status, Selection, Oversight, and Removal*, 53 GA. L. REV. 1 (2019); Emily S. Bremer, *Reckoning with Adjudication's Exceptionalism Norm*, 69 DUKE L.J. 1749 (2020).

³²² See, e.g., Barnett & Weaver, *supra* note 322, at 5.

³²³ *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1976 (2021).

³²⁴ *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320, 1329 (Fed. Cir. 2019), vacated and remanded sub nom., 141 S. Ct. 1970 (2021)

³²⁵ *Id.* at 1338 (labeling this the “narrowest remedy”).

³²⁶ *Arthrex*, 141 S. Ct. at 1985.

³²⁷ *Id.* at 1986–87.

³²⁸ *Id.* at 1984 (citing Walker & Wasserman, *supra* note 320, at 157).

³²⁹ 141 S. Ct. 1352 (2021).

challenges to how ALJs are appointed during the adjudication process.³³⁰ The result should be more judicial decisions involving constitutional challenges to agency adjudicators—including, likely, challenges to statutory limits on adjudicator removal.

Notably, earlier this year the D.C. Circuit dodged the issue in a case decided shortly before *Carr*. In *Fleming v. Department of Agriculture*, a panel of the D.C. Circuit held that the petitioners had waived the constitutional challenge by not first raising it before the agency.³³¹ Judge Neomi Rao dissented from this part of the panel's opinion, arguing that administrative exhaustion is not required in this context.³³² On the merits, she explained: "Congress insulated ALJs with two layers of for-cause removal protection: an agency may remove an ALJ 'only for good cause established and determined by the [Merit Protection Services Board (MSPB)],' and members of the MSPB 'may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office.'"³³³ Accordingly, Judge Rao concluded that this dual-for-cause removal limitation violates the separation of powers under the Supreme Court's *Free Enterprise Fund* decision.³³⁴ The appropriate remedy, she argued, would be for the agency head to "be responsible for determining whether there is good cause to remove an ALJ."³³⁵

Although the D.C. Circuit did not reach the merits, the clock is ticking. And it is quite likely that at least one court will agree with Judge Rao's conclusion. This constitutional interpretation leads to greater political accountability of agency adjudication, but it potentially risks undermining the decisional independence of agency adjudicators. That is because the adjudicators may feel increased political pressure to decide cases for reasons other than faithfully applying law to facts. Even Chief Justice Taft in *Myers*, while embracing the unitary executive, recognized this risk.³³⁶

Because this is constitutional law, Congress is limited in what it can do by statute.³³⁷ Congress may not be able to simply enact stronger restrictions

³³⁰ *Id.* at 1360.

³³¹ 987 F.3d 1093, 1097 (D.C. Cir. 2021).

³³² *Id.* at 1106 (Rao, J., concurring in part and dissenting in part).

³³³ *Id.* at 1116 (quoting 5 U.S.C. §§ 7521(a), 1202(d)).

³³⁴ *Id.* at 1115 (citing *Free Enterprise Fund*, 561 U.S. at 492). *Cf.* Kevin M. Stack, *Agency Independence After PCAOB*, 32 CARDOZO L. REV. 2391, 2392 (2011) ("But the dual layer of removal protection was not what decided the case. If it were, the PCAOB decision would have swept aside the constitutional foundation for good-cause protections for the many adjudicators operating in independent agencies who also have two layers of good-cause protection, a conclusion the *PCAOB* Court resists.").

³³⁵ *Fleming*, 987 F.3d at 1124 (Rao, J., concurring in part and dissenting in part).

³³⁶ *See Myers v. United States*, 272 U.S. 52, 135 (1926) (noting that "there may be duties of a quasi judicial character imposed on executive officers . . . whose decisions after hearing affect interests of individuals, the discharge of which the President cannot in a particular case properly influence or control," but that the president could remove such adjudicators afterwards "on the ground that the discretion regularly entrusted to that officer by statute has not been on the whole intelligently or wisely exercised").

³³⁷ Elsewhere one of us sketches out other potential reforms outside of Congress's anti-removal power, including removing adjudications to Article III courts, making agency adjudicators "pure adjuncts" of Article III courts, moving agency adjudicators

on removal. But Congress has its anti-removal power. It could require presidential appointment and Senate confirmation for agency adjudicators—or at least for some agency adjudicators that are adjudicating matters for which Congress values even greater decisional independence. Congress could couple that move with the soft and hard tools discussed in Parts III.A–B, such a reason-giving requirement for removal and a congressional hearing for the fired adjudicator to tell her story. Perhaps Congress would even decide to raise the cloture vote threshold in some of these adjudication contexts for the president’s replacement nominees.

Short of designating agency adjudicator appointments for Senate confirmation, Congress could also use its anti-removal soft tools to raise the stakes for agency heads in deciding whether to fire an agency adjudicator. For instance, it could require the agency head to notify Congress of any termination and to provide the “good cause” reason for the firing. The penalty for failing to comply could be a congressional oversight hearing where the agency head must testify and answer questions about her removal decisions—a requirement that could pressure the agency head to take decisional independence more seriously.³³⁸ Congress could also hold a hearing where the fired adjudicators and other witnesses appear.

To be sure, there are costs and benefits to these various anti-removal approaches. It is ultimately up to the members of Congress to determine whether these judicial developments will affect decisional independence; how much they value a certain level of perceived or real decisional independence in a particular agency adjudication system; and, if so, which anti-removal tools would be most appropriate. But this example in the agency adjudication context helps illustrate how Congress can use its anti-removal power even with respect to government officials who are currently not presidentially appointed and Senate confirmed. If Congress does not act, it may soon find in the wake of judicial decisions that agency adjudication no longer provides a fair venue for resolving disputes because of potential political influence in the decisionmaking process. Given that agency adjudicators decide millions of issues each year, this prospect merits close consideration.³³⁹ Congress can help prevent that outcome if it wishes through its anti-removal power.

to Article I courts or to a new Article II federal administrative judiciary, and using internal administrative law to create impartiality regulations. *See* Christopher J. Walker, *A Reform Agenda for Administrative Adjudication*, 44(1) REGULATION 30, 31–32 (2021).

³³⁸ *Cf.* CHRISTOPHER J. WALKER, FEDERAL AGENCIES IN THE LEGISLATIVE PROCESS: TECHNICAL ASSISTANCE IN STATUTORY DRAFTING 17 (Final Rep. to Admin. Conf. U.S. 2015) (reporting that one agency official observed that, in explaining why federal agencies assist Congress in legislative drafting, “his agency feels particularly pressed to complete all technical drafting assistance requests before a senior agency official is scheduled to appear at a congressional hearing.”); *see also id.* (quoting another agency official who said that “oversight is always in the back of our minds” when the agency is providing technical drafting assistance).

³³⁹ *See* Walker & Wasserman, *supra* note 320, at 154–55.

CONCLUSION

After *Arthrex*, *Collins*, and *Seila Law*, it is now plain that the Supreme Court has turned against statutory restrictions on presidential removal. Whether the president has such a power is debatable. Yet seven justices have now held that Congress cannot impose statutory restrictions on removal for single-headed agencies, and the logic of the Court's recent decisions suggests that restrictions for multi-headed agencies are likely to only survive—if at all—because of the *stare decisis* effect of *Humphrey's Executor*. Simply put, a supermajority of the justices has embraced the unitary executive. It does not follow, however, that agency independence must disappear. Whether or not the president has a plenary removal power, Article II undoubtedly gives Congress an anti-removal power. The future of independent agencies and decisional independence for agency adjudicators will in large part depend on how Congress uses this power.