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Should the Court Change the Scope of the Removal Power?

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In this essay Professor Pierce argues that the Court should use a strict functional approach in its ongoing process of changing the scope of the power of the president to remove officers. He maintains that the Court can reconcile the potentially conflicting commands of Article II and due process by holding that the president must have unlimited power to remove any officer who can make policy decisions on behalf of the government, but that due process limits the power of the president to remove an officer whose sole responsibility is to adjudicate disputes between private parties and the government.

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

Over the last two years, the president and the Solicitor General have joined the campaign to expand the scope of the president's removal power, and there are reasons to believe that a majority of Justices are prepared to act in ways that will increase the scope of the president's power to remove officers at will. In the 1950s, however, the Court issued several well-reasoned opinions in which it strongly suggested that the power to remove some officers is limited by due process even in the absence of any statutory limit on the power to remove an officer. Any change in the scope of the removal power must consider both the reasons to increase the scope of the removal power and the reasons to decrease the scope of the power.

This essay will suggest ways in which the Court should respond to efforts to change the scope of the removal power, given the potential conflict between the high value the constitution places on the president's power to perform the functions of the chief executive and the high value the constitution places on the availability of means through which private parties can be assured of access to unbiased tribunals to adjudicate disputes between private parties and the federal government.

In section one, I describe the Court's opinions with respect to the permissible scope of the removal power and its limits. In section two, I describe the recent efforts of scholars, litigants, and the government to reduce the circumstances in which Congress can insulate officers from plenary control by the president, and the attempts by the Court in the 1950s to create judicially-mandated limits on the removal power. In section three, I urge the Court to use a functional approach in determining the constitutionally appropriate scope of limits on the removal power.

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The Court should restrict the removal power when restrictions are required by due process and reject them when they interfere with the president's responsibility for decisions with respect to government policy.

I. The Precedents

In this section I will describe the five cases in which the Court has decided whether a limit on the removal power is permissible. Before I embark on that task, however, it is useful to note some general characteristics of the decisions in the cases. First, the Court's task is rendered difficult by the lack of any provision of the Constitution that specifically addresses the removal power. In the absence of such a provision, the Court must draw inferences with respect to the removal power based on the significance it attaches to provisions that have a functional relationship with the removal power—most notably the provisions of Article II that confer executive power on the president and the due process clause of the Fifth Amendment that assures litigants against the government of access to an impartial forum.

Second, the Court has never upheld a prohibition on exercise of the removal power with respect to any officer. The cases involved only the question whether a statutory limit on the removal power in the form of a requirement that the president or his immediate subordinate must specify a cause for removal is constitutionally permissible. Third, the Court has never had occasion to decide what "cause" would satisfy the requirement that the president state a cause for removal where such a limit is permissible or what, if any, evidence the president must offer to support a decision to remove an officer for cause.

In its 1926 opinion in *Myers v. U.S.*[2], the Court held that a statute "by which the unrestricted power of removal of first class postmasters is denied the president is in violation of the Constitution and invalid." The opinion is often cited for the broad proposition that Congress cannot limit in any way the power of the president to remove any executive officer.

The apparent breadth of the holding in *Myers* should be qualified, however, by its context. The statute the Court held unconstitutional required the president to obtain the consent of the Senate before removing any officer.[3] The statute was enacted in 1867 as part of the nasty debate between President Johnson and Congress about how to treat the former states of the Confederacy after the Civil War. It was the sole basis for the successful effort of the House to impeach President Johnson that came within one vote of his removal from office by the Senate. The *Myers* Court devotes much of its 71 pages to unflattering descriptions of that congressional attempt to render President Johnson totally ineffective in his efforts to exercise the powers the constitution vests in the president in Article II and to transfer all executive power to the Congress.

Thus, *Myers* can be interpreted much more narrowly to prohibit Congress from attempting to aggrandize itself by transferring executive powers to itself. As so interpreted, *Myers* fits well with

[2] 272 U.S. 52,176 (1926).
[3] Id. at 107.

modern opinions like *INS v. Chadha*,[4] holding unconstitutional a statute that purported to empower Congress to veto an action taken by an agency, and *Bowsher v. Synar*,[5] holding unconstitutional a statute that purported to confer executive power on an officer who could only be removed by Congress. The *Myers* Court also made it clear that it was not deciding whether the president must have the power to remove without cause officers who have adjudicatory responsibilities. [6]

In its 1935 opinion in *Humphrey's Executor v. U.S.*,[7] the Court held that Congress can limit the power of the president to remove some officers by requiring that the president specify a cause for removal. The Court distinguished *Myers* by interpreting it to apply only to "purely executive officers" and not to officers that head an agency that Congress intended to be independent of the executive.[8] The opinion is often cited to support the proposition that Congress can create an agency with broad powers that is "independent" of the executive branch.

Like the opinion in *Myers*, however, the opinion in *Humphrey's* should be interpreted narrowly based on the context in which it was decided. The officer whose removal was at issue in *Humphrey's* was one of the five Commissioners of the Federal Trade Commission (FTC). The Court characterized the FTC as a "quasi legislative and quasi judicial" body and analogized it to the Court of Claims.[9]

At the time, FTC had no power to issue rules or to make policy decisions on behalf of the government.[10] It had only the power to adjudicate disputes through use of formal evidentiary hearings and the power to advise Congress with respect to the need for legislation. That quasi legislative role was particularly important at the time. Congress lacked the staff required to determine whether legislation was needed to address a perceived problem and, if so, the form that any such legislation should take. Congress necessarily relied on the FTC to advise it with respect to the need to enact critically important legislation like the Federal Power Act and the Natural Gas Act.[11] Moreover, even in the case of such a "quasi judicial" and "quasi legislative" body, the Court upheld only the power of Congress to require the President to state a cause for removing one of the five members of the tribunal that oversaw the performance of those functions.

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[4] 462 U.S. 919 (1983).
[5] 478 U.S. 714 (1986).
[6] 272 U.S. at 157-58.
[7] 295 U.S. 602 (1935).
[8] Id. at 627-28.
[9] Id. at 629.
[10] In its 1973 opinion in National Petroleum Refiners Ass'n v. FTC, 482 F. 3d 672 (1973), the D.C. Circuit surprised most observers by holding that FTC has the power to issue rules even though the agency had denied that it had that power for decades. The court supported its holding by explaining why the power to make substantive rules was essential to allow an agency to make regulatory policy. Congress ratified the D.C. Circuit's holding in 1974, by enacting a statute that expressly conferred rulemaking power on FTC. Magnuson Moss Warranty—Federal Trade Commission Act, Pub. L. No. 93-637, 88 Stat. 2183 (1974).
[11] Both statutes were based on detailed FTC studies of the natural gas and electricity markets.

In its 1958 opinion in *Wiener v. U.S.*,[12] the Court held that the President could not remove a member of the three member War Claims Tribunal without giving a cause for removal other than a desire to replace the Commissioner with someone of the president's choosing. The *Wiener* opinion can be interpreted to support a proposition broader than the proposition supported by the *Humphrey's* opinion. Congress did not purport to limit the president's power to remove members of the War Claims Tribunal. The Court drew the inference that Congress intended such a limit based on its failure to include in the statute that created the Tribunal any provision that authorized the president to remove a member of the Tribunal.[13]

Like the opinion in *Myers* and *Humphrey's*, however, the opinion in *Wiener* should be interpreted narrowly based on its context. The Court emphasized that the sole function of the Tribunal was "to adjudicate according to law" three classes of claims that arose from U.S. activities in World War II.[14] The Court noted that Congress could, and had, used a variety of means to adjudicate war claims. It could act on such claims itself; it could entrust the executive with discretion to act on the claims; or, it could assign the adjudication of the claims to the District Courts or to the Court of Claims.[15]

The Court concluded that Congress also had the option that it chose in this case. It could create a specialized tribunal tasked only with "adjudicating according to law, that is, on the merits of each claim, supported by evidence and governing legal considerations."[16] The Court concluded that Congress intended the members of the specialized adjudicative tribunal to have the same kind of freedom from potential outside influences that the District Courts or the Court of Claims would have. It followed that the President could not remove a member of the Tribunal without stating a cause for removal.[17]

In its 1988 opinion in *Morrison v. Olson*,[18] a seven-Justice majority upheld the provisions of the Ethics in Government Act that authorized a court to appoint an independent counsel in response to a determination by the Attorney General that there is probable cause to believe that a high ranking member of the executive branch had committed a crime. Once appointed, the independent counsel had complete control over the investigation and potentially the prosecution of such a high ranking official. The independent counsel could only be removed by the Attorney General for cause.

The majority acknowledged that the Court was departing from its prior functional approach to removal cases.[19] It recognized that the functions of investigation and prosecution are executive

[12] 357 U.S. 349 (1958).
[13] Id. at 352-53.
[14] Id. at 353-55.
[15] Id. at 355-56.
[16] Id. at 355.
[17] Id. at 355-56.
[18] 487 U.S. 654 (1988).
[19] Id. at 689-90.

functions rather than quasi-legislative or quasi-judicial functions.[20] It concluded that it was permissible for Congress to provide the independent counsel with a degree of insulation from control by the president because the executive functions performed by the independent counsel were limited in scope and time.[21] The majority also emphasized that the independent counsel had no power to make policy decisions.[22] The independent counsel was required to act in accordance with the policies of the Department of Justice.[23]

The most recent of the Supreme Court decisions on the removal power was the 2010 opinion of a five-Justice majority in *Free Enterprise Fund v. Public Company Accounting Oversight Board.*[24] The majority held that the for cause limit on the power of the Securities and Exchange Commission (SEC) to remove a member of the Public Company Accounting Oversight Board (PCAOB) unconstitutionally limits the power of the president to perform the functions vested in him by Article II.

The *Free Enterprise Fund* majority reasoned that two or more layers of limits on the president's removal power left the president with inadequate means to exercise the powers of the chief executive.[25] (The majority accepted the assumption of the parties that the president can only remove an SEC Commissioner for cause even though there is no statutory limit on the president's power to remove an SEC Commissioner.)[26] The majority emphasized repeatedly that PCAOB has the power to make policy decisions on behalf of the government.[27] In a footnote the majority stated that the holding "does not address that subset of independent agency employees who serve as administrative law judges. Whether administrative law judges are necessarily 'officers of the United States' is disputed. And unlike members of the Board, many administrative law judges of course perform adjudicative rather than enforcement functions . . . ."[28]

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

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[20] Id. at 691.
[21] Id. at 672.
[22] Id. at 671-672.
[23] Id. at 672.
[24] 561 U.S. 477 (2010).
[25] Id. at 498-506.
[26] Id. at 487.
[27] Id. at 485-86.
[28] Id. at 507 n.10.

II. The Recent Efforts to Reduce the Scope of Permissible Limits on the Removal Power

Over the last three decades, some scholars have urged the Court to reduce the scope of the permissible limits on the president's removal power in various ways.[29] The opinion for a five-Justice majority in *Free Enterprise Fund* was the first success the proponents have enjoyed at the Supreme Court in this effort. The limit announced in that opinion took the form of a prohibition on congressional imposition of two or more layers of for cause protection from removal for officers that perform executive functions, including policy making.

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

In its 2016 decision in *PHH Corporation v. Consumer Financial Protection Board*,[30] a two-judge majority of a panel of the D.C. Circuit held that the for cause limit on the president's power to remove the Director of the Consumer Financial Protection Bureau is unconstitutional. The majority reasoned that the Director has extraordinary executive power because he "unilaterally implements and enforces 19 federal consumer protection statutes, covering everything from home finance to student loans to credit cards to banking practices."[31] The majority distinguished *Humphrey's Executor* on the basis that the FTC, like almost all other "independent agencies," is headed by a multi-member body that must include at least some members who are not members of the president's political party.[32] The panel argued that a single agency head has so much greater power than a member of a multi-member agency that the agency head must be removable at will by the president to ensure that the president is politically accountable for the actions of the agency.[33]

The en banc D.C. Circuit overruled the panel in 2018.[34] The en banc majority rejected the distinction the panel drew between agencies headed by a single director and agencies headed by a multi-member body. The majority held that the case was governed by the holding in *Humphrey's Executor.* Two concurring opinions issued on behalf of three of the judges who joined the majority demonstrate, however, that the judges who joined the majority differed with respect to some of the underlying reasoning.

[29] E.g., Steven Calabresi & Saikrishna Prakash, The President's Power to Execute the Laws, 104 Yale L. J. 541, 593-99 (1994).
[30] 839 F. 3d 1 (D.C. Cir. 2016).
[31] Id. at 7.
[32] Id. at 8-9, 15-16.
[33] Id. at 36.
[34] PHH Corp. v. CFPB, 881 F. 3d 75 (2018).

In one of the concurring opinions, two judges emphasized that their agreement with the majority was based on the "significant adjudicatory functions" that the agency performs. [35]Those judges expressed the belief that the Framers of the constitution and the Justices who wrote the opinion in *Humphrey's Executor* "recognized that adjudication poses a special circumstance."[36] Officers who adjudicate disputes between the government and individuals should not be subject to complete control by the executive.

Another judge concurred only because he interpreted the requirement that the president state a cause for removing the Director to allow the president to remove the Director because the president disagreed with a policy adopted by the Director.[37] Because of that easy-to-satisfy interpretation of for cause, the judge reasoned that the for cause limit left the president with enough authority to ensure that the laws are faithfully executed.

In its 2018 opinion in *Collins v. Mnuchin*,[38] a two-judge majority of a panel of the Fifth Circuit used reasoning similar to the reasoning of the D.C. Circuit panel in PHH as the basis for its holding that the statute that requires the president to state a cause for removing the Director of the Federal Housing Finance Agency is unconstitutional.

Finally, the effort to increase the scope of the president's removal power has enjoyed success in the office of the Solicitor General (SG). In his 2018 brief in *Lucia v. Securities & Exchange Commission*, the SG argued that the provision of the Administrative Procedure Act that limits an agency's power to remove an Administrative Law Judge (ALJ) is unconstitutional unless it can be interpreted to allow removal for virtually any reason. [39]

III. The Court's Efforts to Expand the Scope of Permissible Limits on the Removal Power

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

One of the precedents discussed in section I involved a limit imposed by the Court itself, however. In *Wiener*, the Court held that the president could not remove a member of the War Claims Tribunal without stating a cause even though Congress did not impose any statutory limit on the

[35] Id. at 113-16.
[36] Id. at 115-16.
[37] Id. at 124-37.
[38] ____F. 3d ____(5th Cir. 2018).
[39] Brief for Respondent Supporting Petitioners, in Lucia v. SEC, U.S. Sup. Ct. No. 17-130, pp. 39-56 (Feb. 2018).

president's power to remove a member of the Tribunal.[40] The Court did not make the basis for its holding explicit but the context in which the issue arose and the Court's discussion of the need for such a limit strongly suggests that the basis was due process. The Court analogized the function of the Tribunal to that of a District Court and referred to the need for an adjudicatory body that is "entirely free from the control, or coercive influence [of the president], direct or indirect."[41]

Another of the precedents discussed in section II included recognition of a limit on the president's removal power that was not imposed by Congress. In *Free Enterprise Fund*,[42] the Court held that the statutory limit on the power of the SEC to remove a member of the PCAOB was unconstitutional because it would create two layers of for cause insulation between the president and members of the PCAOB. The Court reasoned that two or more layers of insulation impermissibly interferes with the president's power to perform the functions that Article II vest in him.[43]

Of course, the holding in *Free Enterprise Fund* follows from the Court's reasoning only if there is a for cause limit on the president's power to remove a member of the SEC. There is no such statutory limit. The Court provided no explanation for its apparent belief that the president can only remove SEC Commissioners for cause. It stated only that the parties agreed with respect to that critical issue and that the Court "decide[d] the case with that understanding."[44]

During the 1950s, the Supreme Court issued three opinions in which it expanded the scope of limits on the president's removal power. In each case Congress had not limited the president's removal power, but the Court imposed such a limit. The Court did not explicitly state the basis for each limit, but the context in which each case was decided suggests strongly that the basis was due process.

Each of the three cases involved the question whether an agency was required to apply the restrictions on removal of Administrative Law Judges (ALJs) that Congress had included in the Administrative Procedure Act of 1946 (APA).[45] In each case, the Court held that an agency was required to apply the restrictions on removal even though the APA did not apply to the agency. A brief description of the relevant provisions of the APA will aid in understanding the holdings.

Congress enacted the APA to respond to numerous claims by regulated firms that agency ALJs (then called hearing examiners) conducted hearings in ways that reflected the ALJs' bias in favor of agencies and against regulated firms.[46] Studies supported the claims of systemic bias.[47]

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[40] 357 U.S. at 355-56.
[41] Id. at 355.
[42] 561 U.S. 477.
[43] Id. at 498-506.
[44] Id. at 487.
[45] Pub. L. No. 79-404, 60 Stat. 237 (1946).
[46] Ramspeck v. Federal Trial Examiners Conference, 345 U.S. 128, 131 (1953).
[47] Id. at 131.

Congress responded to the claims of ALJ bias by including in the APA several provisions that were designed to reduce the risk that ALJs would conduct hearings in ways that reflected pro-agency/anti-regulated firm bias.[48] The most important of those provisions prohibit an agency from assigning an ALJ any function that is inconsistent with the ALJ's adjudicative responsibilities[49] and a provision that limits an agency's power to remove or otherwise punish an ALJ.[50] If an agency is subject to the APA, an ALJ who works for the agency can only be removed if a separate agency, the Merit Systems Protection Board, finds that there is cause to remove the ALJ.

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

In *Wong Yong Sun v. McGrath*,[51] the question was whether the APA provisions that limit an agency's power to remove ALJs applies to the administrative judges (AJs) who preside in deportation proceedings. The Court held that they do even though no statute made them applicable to such proceedings.

The Court began by describing the widespread complaints of bias that led to the enactment of the APA and to its treatment of hearing examiners as independent of the agencies at which they preside.[52] It also referred to the many studies that had substantiated those complaints and that had urged statutory changes to reduce the pro-agency bias.[53] It then described the years of study and deliberation that led to enactment of the APA by unanimous votes in both Houses of Congress. The Court summarized the process through which the APA was enacted: "The Act thus represents a long period of study and strife; it settles long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest."[54]

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

> Of the several administrative evils sought to be cured or minimized, only two are particularly relevant to issues before us today. One purpose was to introduce greater uniformity of procedure and standardization of administrative practice among the diverse agencies whose customs had departed widely from each other. . . .

[48] Id. at 131-32.
[49] 5 U.S.C. §3105.
[50] 5 U.S.C. §7521.
[51] 339 U.S. 33 (1950).
[52] Id. at 36-38.
[53] Id. at 38-45.
[54] Id. at 40.

> More fundamental, however, was the purpose to curtail and change the practice of embodying in one person or agency the duties of prosecutor and judge.[55]

The Court then compared the unfair and biased hearing that the government had provided the immigrant in the case before the Court with the hearing before an impartial hearing examiner that the APA requires.[56] The Court suggested that the Constitution compels an agency to use the APA hearing procedures:

> The constitutional requirement of procedural due process of law derives from the same source as Congress' power to legislate and, where applicable, permeates every valid enactment of that body.[57]

The Court also reasoned as follows:

> We would hardly attribute to Congress a purpose to be less scrupulous about the fairness of a hearing necessitated by the Constitution than one granted by it as a matter of expediency.
>
> Indeed, to so construe the Immigration Act might again bring it into constitutional jeopardy. When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality.[58]

The Court concluded that the APA represented an effort by Congress to set forth the "currently prevailing standards of impartiality" and thereby to codify the minimum requirements of due process.[59] Based on that conclusion, the Court held that the provisions of the APA that insulate ALJs from potential sources of bias apply to deportation proceedings.[60] In later cases, the Court relied on the reasoning in *Wong Yang Sung* as the basis to hold that the APA applies to hearings under the Interstate Commerce Act, *Riss & Co. v. U.S.*[61], and to Post Office fraud hearings, *Cates v. Haderlein*.[62]

Congress disagreed with the Court in the case of immigration judges. Congress amended the Immigration Act by making it explicit that the restriction on removal of ALJs in the APA do not apply to immigration judges. Faced with a direct conflict between its views and those of Congress the Court backed down. In *Marcello v. Bonds*, the Court retreated from its holding in *Wong Yong*

[55] Id. at 41.
[56] Id. at 45-53.
[57] Id. at 49.
[58] Id. at 50.
[59] Id. at 50.
[60] Id. at 51.
[61] 341 U.S. 907 (1951).
[62] 342 U.S. 804 (1952).

Sun and upheld the congressional decision to allow the immigration agency to remove immigration judges without stating a cause for removal.[63]

III. The Court Should Use a Functional Approach in Determining the Scope of the Power to Remove

The Supreme Court's 2010 opinion in *Free Enterprise Fund*[64] and the elevation of the author of the D.C. Circuit panel's 2016 opinion in *PHH* to the Supreme Court[65] foreshadow changes in the scope of the removal power in the near future. As the Court makes decisions about the scope of the removal power it should attempt to minimize the adverse effects of each decision on two important and potentially conflicting constitutional imperatives—the ability of the president to perform effectively the powers vested in him by Article II and the need to protect the due process rights of parties who litigate against the government in cases that are resolved by agencies. The Court's opinions support a purely functional approach to the scope question.

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

> The debates in the Constitutional Convention indicated an intention to create a strong executive, and after a controversial discussion the executive power of the government was vested in one person and many of his important functions were specified so as to avoid the humiliating weakness of the Congress during the Revolution and under the Articles of Confederation.
>
> Mr. Madison and his associates in the discussion in the House dwelt at length upon the necessity there was for construing article 2 to give the President the sole power of removal in his responsibility for the conduct of the executive branch, and enforced this by emphasizing his duty expressly declared in the third section of the article to 'take care that the laws be faithfully executed.' The vesting of the executive power in the President was essentially a grant of the power to execute the laws. But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates. This view has since been repeatedly affirmed by this court. As he is charged specifically to take care that they be faithfully executed, the reasonable implication, even in the absence of express words, was that as part of his executive power he should select those who were to act for him under his direction in the execution of the laws. The further implication must be, in the absence of any express limitation respecting removals that as his selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he cannot continue to be responsible. It was urged that the natural meaning of the term 'executive power' granted the President included the appointment and removal of executive subordinates. If such appointments and removals were not an exercise of the executive power, what were they? They certainly were not the exercise of legislative or judicial power in government as usually understood.[66]

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

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[63] 349 U.S. 302 (1955).

[64] 561 U.S. 477.

[65] Judge Kavanaugh wrote the panel opinion in PHH v. CFPB, 839 F. 3d 1. He was confirmed as an Associate Justice of the Supreme Court on _____.

[66] 272 U.S. 52, 116-17 (references omitted).

> The diffusion of power [among officers of the United States] carries with it a diffusion of accountability. The people do not vote for the "Officers of the United States." They instead look to the President to guide the "assistants or deputies ... subject to his superintendence." Without a clear and effective chain of command, the public cannot "determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall." That is why the Framers sought to ensure that "those who are employed in the execution of the law will be in their proper situation, and the chain of dependence be preserved; the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community."[67]

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

> He pointed out that the argument upon which the decision rested was based on the necessity for presidential removals in the discharge by the President of his executive duties and his taking care that the laws be faithfully executed, and that such an argument could not apply to the judges, over whose judicial duties he could not properly exercise any supervision or control after their appointment and confirmation.[68]

The Court then disavowed any intent to apply its reasoning or holding in *Myers* to non-Article III judges:

> The question * * * whether Congress may provide for his removal in some other way present considerations different from those which apply in the removal of executive officers, and therefore we do not decide them.[69]

The Court followed its dicta in *Myers* with its clear holding in *Humphrey's* that Congress can require the president to state a cause for removing an officer who has no executive functions and whose responsibilities are "quasi-judicial."[70] In *Wiener* the Court took the further step of holding that the president must state a cause for removing an officer whose duties are judicial in nature whether or not Congress has so limited the president's removal power.[71]

The Court issued its most detailed and most persuasive opinion on this point in *Wong Yong Sun* v. *McGrath*. The opinion begins with a description of the Administrative Procedure Act of 1946 and the evils it addressed:

> Multiplication of federal administrative agencies and expansion of their functions to include adjudications which have serious impact on private rights has been one of the dramatic legal developments of the past half-century. * * * The conviction developed, particularly within the legal profession, that this power was not sufficiently safeguarded and sometimes was put to arbitrary and biased use.
>
> Concern over administrative impartiality and response to growing discontent was reflected in Congress as early as 1929, when Senator Norris introduced a bill to create a separate administrative court. Fears and dissatisfactions increased as tribunals grew in number and

[67] 561 U.S. 477, 497-98 (references omitted).
[68] 272 U.S. at156-57.
[69] Id. at 158.
[70] 295 U.S. 602, 629.
[71] 357 U.S. 349, 354-56.

> jurisdiction, and a succession of bills offering various remedies appeared in Congress. Inquiries into the practices of state agencies, which tended to parallel or follow the federal pattern, were instituted in several states, and some studies noteworthy for thoroughness, impartiality and vision resulted.[72]

The Court then summarized the seventeen years in which Congress and numerous other institutions had studied the evils that Congress and the Court recognized.[73] The Court characterized the provisions of the APA that were designed to provide a right to a fair and impartial hearing before an unbiased adjudicative officer as the most important safeguards that Congress provided in the APA.[74] The most important of those provisions forbid an agency from assigning an adjudicative officer any task other than presiding in adjudicative hearings[75] and limit the power of an agency to remove an ALJ. The provision that limits the removal power is now codified at 5 U.S.C. §7521. It limits the power to remove an ALJ by specifying that an ALJ can be removed or otherwise disciplined only as a result of a finding of cause made by the Merit Systems Protection Board after a formal hearing.

The Court then turned to the question before it. Is the immigration Service required to provide a hearing before an adjudicative officer who is subject to the APA safeguards of impartiality? The Court described the obviously biased hearing the Immigration Service had provided and found "the administrative hearing a perfect exemplification of the practices so unanimously condemned."[76]

The Court admitted that the relevant provisions of the APA did not apply to immigration hearings based solely on a literal parsing of the language of the statute.[77] It used constitutional reasoning to support its holding that "deportation proceedings must conform to the requirements of the Administrative Procedure Act if resulting orders are to have legal validity."[78] The Court questioned whether the Immigration Act would be constitutional if it was not interpreted to require hearings that comply with the APA safeguards that are designed to ensure that president officers are unbiased:

> Indeed, to so construe the Immigration Act might again bring it into constitutional jeopardy. When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality. A deportation hearing involves issues basic to human liberty and happiness and, in the present upheavals in lands to which aliens may be returned, perhaps to life itself. It might be difficult to justify as measuring up to constitutional standards of impartiality a hearing tribunal for deportation proceedings the like of which has been condemned by Congress as unfair even where less vital matters of property rights are at stake.[79]

Shortly after the Court issued its opinion in *Wong Yong Sun*, Congress enacted a new immigration

[72] 339 U.S. 33, 37-38 (references omitted).
[73] Id. at 38-41.
[74] Id. at 41.
[75] 5 U.S.C. §3105.
[76] Id. at 45.
[77] Id. at 48-49.
[78] Id. at 53.
[79] Id. at 50-51.

statute in which Congress rejected the Court's strong suggestion that due process requires immigration judges to be insulated from potential removal in the same way that the APA insulates ALJs from potential removal—by allowing removal only for cause determined by the Merit Systems Protection Board after a hearing. Congress pointedly refused to limit the immigration agency's power to remove an immigration in any way. The Court then backed down and upheld the new immigration statute in its 1955 decision in *Marcello v. Bonds*.[80]

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

By contrast, no one, including the president, should have the power to remove without cause any officer whose sole responsibility is to adjudicate disputes between individuals and the government. That is the context in which due process requires a decision maker who is not subject to potential removal by the president or his agent. As the Court has repeatedly emphasized, conferring the power to remove an officer on any individual or institution creates a "here and now subservience."[81] It is intolerable for an agent of the executive to have the power to remove an officer with responsibility to adjudicate disputes between individuals and the government. That is fundamentally unfair to private parties.

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

By contrast, the for cause limit on the power to remove ALJs would survive scrutiny under Article II because ALJs have no power to make policy decisions that bind the government. They have only the power to preside in adjudicatory hearings to resolve disputes between private parties and the government. Indeed, due process requires such a limit on the removal power even when Congress has not imposed a limit by statute, as the Court implicitly recognized in *Wiener* and *Free Enterprise Fund* and strongly suggested in *Wong Yong Sun*.

That constitutionally-compelled limit on the removal power should apply to any officer whose sole responsibility is to adjudicate disputes between private individuals and the government, including immigration judges. The Court should overrule its holding in *Marcello v. Bonds* based on the powerful reasoning in its opinion in *Wong Yong Sun*. Deportation often has devastating effects on immigrants, including a high probability that the deported immigrant will be killed upon his forced return to his country of origin. There is no context in which it is more important to insure that officers with adjudicative responsibilities are able to perform their duties without

[80] 349 U.S. 302.

[81] Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, 501 U.S. 252, 265n.13 (1991); Bowsher v. Synar, 478 U.S. 714, 720, 727n. 5 (1986).

fear that they will be removed if they do not act in accordance with any biases that the president or his subordinates might have with respect to members of any ethnic or religious group.

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

That is a difficult question. It is possible to defend such a congressional decision based on a due process based principle that has been a feature of the Anglo-American legal system for many centuries—no one should be a judge in his own case.[82] On the other hand, experience to date suggests that the political limits on removal in this context may well be sufficient alone to insure that the president does not abuse the removal power in this context. President Nixon abused the removal power by removing a special counsel who was about to make public powerful evidence that the president committed a crime and was forced to resign in disgrace. By contrast, President Clinton did not attempt to remove the special prosecutor who made public his criminal conduct and survived the attempt to remove him from office.

[82] Bonham's Case, 8 Coke 114a, 118a, 77 Eng. Rep. 646, 652 (1610). For discussion of the derivation and history of this principle, see Piotr Malysz, Nemo Index in causa sua as the Basis and of Law, Justice, and Justification in Luther's Thought, 100 Harv. Theological Rev. 363 (2007).