

No. 25-1110

In the Supreme Court of the United States

CATHY A. HARRIS,

Petitioner,

v.

SCOTT BESSENT, SECRETARY OF THE
TREASURY, ET AL.,

Respondents.

**On Petition for Writ of Certiorari to the
United States Court of Appeals for the District
of Columbia Circuit**

**BRIEF OF *AMICI CURIAE* PROFESSORS NICK
BEDNAR, VICTORIA NOURSE, AND LAWYERS
DEFENDING AMERICAN DEMOCRACY
SUPPORTING PETITIONER**

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QUESTIONS PRESENTED

(1) Whether Congress may provide by statute that members of the Merit Systems Protection Board—an adjudicatory body—“may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office.” 5 U.S.C. § 1202(d).

(2) Whether, to the extent the Merit Systems Protection Board possesses some minimal non-adjudicatory powers, the appropriate remedy is to sever that authority rather than invalidate the for-cause removal provision.

PARTIES TO THE PROCEEDING

Petitioner in this Court is Cathy A. Harris.

Respondents are Scott Bessent, Trent Morse, Sergio Gor, Henry Kerner, Donald J. Trump, and Russell T. Vought.

STATEMENT OF RELATED PROCEEDINGS

The case was before the U.S. Court of Appeals for the District of Columbia Circuit as *Harris v. Bessent*, No. 25-5055, and before the U.S. District Court for the District of Columbia as *Harris v. Bessent*, No. 1:25-cv-00412-RC.

The case was previously before this Court in *Trump v. Wilcox*, No. 24A966, and *Harris v. Bessent*, No. 25-312.

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INTEREST OF *AMICI CURIAE*¹

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Lawyers Defending American Democracy (LDAD) is a non-profit, non-partisan organization devoted to encouraging lawyers to help preserve and sustain the Constitution and the values on which our democracy depends, consistent with our distinctive professional responsibilities as members of the legal profession. LDAD's Board of Directors includes, among others, a retired state supreme court justice, a former state attorney general, retired partners and managing partners of major law firms, a corporate vice-president, a past general counsel of a major corporation, past

¹ No counsel for a party authored the brief in whole or in part and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

² Professor Nourse also sits, part time, as Vice Chair of the United States Commission on Civil Rights, but nothing in this brief is written in her official capacity.

presidents of two state bar associations, business entrepreneurs, and legal academics.

I. Multi-Member Adjudicatory Bodies Were First Created at the Founding

Congress has the power under Article I to create governmental entities both “necessary” and “proper” to implement congressional powers. Jed H. Shugerman & Gary Lawson, *Presidential Removal as Article I, not Article II* (forthcoming 121 NW. L. REV. (2026)) (presenting the originalist argument that Congress may limit presidential removals, limited by the “necessary and proper” clause). In the nation’s earliest days, Congress created multi-member commissions assigned with adjudicatory tasks. This history and tradition supports the Court’s holdings on the need to maintain impartiality in adjudications. In *Wong Yang Sung v. McGrath*, the Court recognized that adjudicative officers ensure fair hearings before impartial officers. 339 U.S. 33, 50–51 (1950). In *Wiener v. United States*, the Court endorsed the constitutionality of limits on the presidential removal of members of an adjudicatory commission. 357 U.S. 349, 355–56 (1958). As Professors Emily Bremer and William Eskridge have written: The due process clause requires fair hearings before impartial adjudicators and, if that is true, Congress must be able “to design adjudicatory offices and institutions,” to satisfy those requirements. Emily Bremer & William Eskridge, *The*

Unitary Executive and the Due Process State, 101 Notre Dame Reflection 1, 6 (2026), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5846925.

**A. Congress deployed impartial
adjudicatory commissions to settle
the Revolutionary War Debt**

Multi-member adjudicatory boards are older than the Constitution itself. Under the Articles of Confederation, from 1782 until 1787, Congress created multi-member commissions to adjudicate between the states the amounts of their revolutionary war debt. Act of Feb. 20, 1782, 22 Journals of the Continental Cong. 83-86 (Gaillard Hunt, ed., 1914); Act of Oct. 13, 1786, 31 Journals of the Continental Cong. 779-781 (John C. Fitzpatrick, ed. 1934); Act of May 7, 1787, 32 Journals of the Continental Cong. 262 (Roscoe Hill, ed. 1936). Different states, using different methods of valuation, could not “produce that equal *justice* so desirable in this important object.” Act of Feb. 20, 1782, 22 Journals of the Continental Cong. 83 (Gaillard Hunt, ed., 1914). In 1782, Congress authorized commissions to call witnesses and take testimony on the state’s debts, giving the commissioners tenure protections: each was replaceable only “upon [his] death, refusal, or inability to act.” *Id.* at 84. Act of Oct. 13, 1786, 31 Journals of the Continental Cong. 779-781 (Roscoe Hill, ed. 1936). In 1786, the commission’s authority was expanded to

receive depositions and nontestimonial evidence. *Id.* at 780.

In 1787, a third commission was created to address a looming debt-crisis. Act of May 7, 1787, 32 Journals of the Continental Cong. 262 (Roscoe Hill, ed. 1936). Commissioners were required to take oaths swearing “faithfully and impartially to perform the duties of the Office” and apply “principles of general equity.” *Id.* at 265-66. They held their office for a term of a year and a half. *Id.* The First Congress, under the newly ratified Constitution of 1789, met in August and ratified the 1787 Commission, inviting the President to appoint two new members to the existing commission. See Act of Aug. 5, 1789, ch. 6, 1 Stat. 49. Congress complied with the Appointments Clause. Act of Aug. 5, 1790, ch. 38, § 1, 1 Stat. 178, 49. See Nat’l Archives: Founders Online, Editorial Note to Letter from Robert Barnwell to George Washington (Apr. 27, 1789), <https://founders.archives.gov/documents/Washington/05-02-02-0114> [<https://perma.cc/N6QH-QPZA>].

In 1789, Congress debated a new commission statute, providing that the commissioners had a “duty” to receive and examine all *claims* which shall be exhibited to them * * * and to determine those claims, “according to the principles of *general equity*.” A commission “majority” could determine such claims, which “shall be *final and conclusive*.” Act of Aug. 5, 1790, ch. 38, § 1, 1 Stat. 178, 178 (emphasis added). The commissioners were bound by a judicial-type oath: to

“faithfully and *impartially* execute the duties of their office.” *Id.* § 2, at 179. Commissioners had a limited term of office, and the Presidential commission documents appointing the commissioners reflected that limited term. *Id.* § 9, at 179 (“[T]he powers of the said commissioners shall continue until the first day of July, [1792], unless the business shall sooner be accomplished.”). For the commission documents, see Christine Chabot, *The Interstitial Executive: A View from the Founding* (Oct. 29, 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5673491 [<https://perma.cc/KB5S-ATDM>].

Secretary of the Treasury, Alexander Hamilton, who had proposed such a commission as part of his economic plan, wrote that the commission was composed “of distinct and Independant [sic] Officers, charged with a special and delicate Trust.” Letter from Alexander Hamilton to Benjamin Hawkins (Mar. 12, 1794), reprinted by Nat’l Archives: Founders Online, <https://founders.archives.gov/documents/Hamilton/01-16-02-0114> [<https://perma.cc/9T7F-XH39>] (emphasis added). The Governor of Virginia in a letter to James Madison called the commissioners “judges.” See, e.g., Letter from Beverley Randolph to James Madison (June 4, 1790), reprinted by Nat’l Archives: Founders Online, <https://founders.archives.gov/documents/Madison/01-13-02-0167> [<https://perma.cc/T9JL-CYPK>]. But this was not an Article III court; it was created alongside

Article III courts, and outside the Treasury Department. See Victoria Nourse, *The History of Multi-Member Commissions at the Founding: New Evidence on Independent Agencies*, *Duke L. Rev.* (forthcoming 2026), available on SSRN, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5628110.

**B. Congress and President Adams
turned to impartial adjudicatory
commissions to implement the
Nation’s first direct tax**

Fearing war with France, in July 1798, Congress enacted and the President approved a direct tax. The statute required all persons “owning or possessing any dwelling-houses, lands or slaves, . . . to deliver separate written lists, specifying in one list, the dwelling-houses; in another, the lands; and in a third, the slaves.” See Act of July 9, 1798, ch. 70, § 9, 1 Stat. 580, 586. When the law said, “every person,” that included John Jay, former Chief Justice, who provided a lengthy list of property and Thomas Jefferson dutifully filed his list. There was nothing small or insignificant about the commissions the law created to implement the tax: As Professor Nicholas Parrillo wrote, the law proved to be the largest “administrative endeavor of the federal government near in time to the adoption of the Constitution and outside the military.” Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case*

Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s, 130 Yale L.J. 1288, 1306 (2021).

Congress charged these commissions in a language familiar to adjudication at the time. Commissioners within each state named assessors who did initial property valuations, which were then sent to the commissioners to adjudicate differences in those valuations. Act of July 9, 1798, ch. 70, § 4, 1 Stat. 580, 584. Commissioners were given broad discretion to raise or lower valuations “as shall appear just and equitable.” Act of July 9, 1798, ch. 70 § 22, 1 Stat. 580, 589. In return, Congress required trust: before the commissioners were to “enter on the discharge of the duties,” they were to “take and subscribe . . . an oath or affirmation, truly, faithfully and *impartially* to discharge *their trust . . .*” *Id.* § 2, at 583 (emphasis added). Befitting their adjudicatory duties, and independence, the Secretary of the Treasury had no statutory right to control the commissioner’s decisions. The Secretary of the Treasury, Oliver Wolcott, affirmed this understanding of his limited authority in a letter: “I do not consider myself authorized to control the decisions of the Commissioners.” Letter from Oliver Wolcott Jr. to Isaac Alexander (Oct. 7, 1799), Box 20, Folder 13, (Oliver Wolcott Jr. Papers, Connecticut Historical Society). And for good reason: What citizen would consider a tax “just and equitable,” if assessed by political whim? Act of July 9, 1798, ch. 70 § 22, 1

Stat. 580, 589.

**C. Several Congresses and Presidents
turned to impartial adjudicatory
commissions to settle title disputes**

The Louisiana Purchase nearly doubled the United States landmass, transforming the nation and promising to generate significant tax revenue from land sales. Before lands could be sold, however, title had to be resolved, as many citizens held property under French and Spanish grants. In 1803, Congress enacted a statutory template for how land commissions would adjudicate land titles, all across the Louisiana Territory. *See* Act of Mar. 3, 1803, ch. 27, 2 Stat. 229. For similar acts, *see, e.g.*, Act of Mar. 3, 1807, ch. 47, § 2, 2 Stat. 446, 447 (Illinois); Act of Apr. 25, 1808, ch. 67, 2 Stat. 502-04 (Michigan); Act of June 13, 1812, ch. 99, 2 Stat. 748-52 (Missouri).

Typically, the President was to name the register of the land office and “two other persons,” to form a commission in designated areas. *See* Act of Mar. 3, 1803, ch. 27, § 6, 2 Stat. 229, 230. These “commissioners,” were to “ascertain[] the *rights of persons claiming*” title under the Act. *Id.* (emphasis added).

Congress described the commission’s responsibilities in the language of adjudicatory impartiality. Upon appointment, commissioners

repeated the legislatively required oath that they would “*impartially* exercise and discharge the duties imposed on me” *Id.* § 6, at 230-31. Commissioners were to decide claims in a “summary manner,” with the power to “administer oaths and examine witnesses.” *Id.* § 6, at 231. Commissioners were vested with discretion to do “justice and equity” in resolving titles, and the commissions’ determinations, “shall be final.” *Id.*

Albert Gallatin, Jefferson’s Secretary of the Treasury, “described the commissioners as ‘the sole judge[s] of what should be considered’ and as ‘court[s] without appeal for the purpose of which they were initiated.’” Jerry L. Mashaw, *Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801-1829*, 116 *Yale L. J.* 1636, 1719 (2007) (quoting Letter from Albert Gallatin to Parke Alton (Aug. 9, 1810)). In 1807, Secretary of Treasury Albert Gallatin and President Jefferson conferred about whether Jefferson should “send instructions” to the Commissioners. Gallatin wrote of the “judicial character” of these bodies and that the finality of their decisions “invests them with a judicial character. Letter from Albert Gallatin to Thomas Jefferson (Mar. 14, 1807), *reprinted by Nat’l Archives: Founders Online*, <https://founders.archives.gov/documents/Jefferson/99-01-02-5280> [<https://perma.cc/39GM-LH8H>].

President Jefferson adopted Gallatin’s

description of these commissioners as a “judiciary tribunal,” and therefore to be left “to the law itself as their instructions, on the meaning of which they are competent to decide.” Letter from Thomas Jefferson to Albert Gallatin (Mar. 29, 1807), *reprinted by Nat’l Archives: Founders Online*, <https://founders.archives.gov/documents/Jefferson/99-01-02-5382> [<https://perma.cc/2PGX-SB7F>].

D. The History and Tradition of Early Multi-Member Adjudicatory Bodies

The Founders understood the concept of adjudication and associated it strongly with impartiality, leaving multi-member commissioners, as Jefferson explained, to “the law itself,” rather than partisan interference. This supports the importance of limiting partisan dismissals of adjudicators, as this Court has held for almost seventy years. *Wiener v. United States*, 357 U.S. 349, 355–56 (1958).

II. The Merit Systems Protection Board Exercises Purely Adjudicatory Power

The U.S. Court of Appeals for the D.C. Circuit erred in concluding that the Merit Systems Protection Board (MSPB) performs executive functions. The MSPB exercises purely adjudicatory power and, therefore, Congress possesses authority to insulate its members from removal as necessary to secure adjudicatory independence and protect the constitutional Due Process rights of federal employees.

In *Wiener v. United States*, 357 U.S. 349 (1958), the Supreme Court held that the President lacks authority to “remove a member of an adjudicatory body . . . merely because he wanted his own appointees on such a Commission.” *Id.* at 356. *Wiener* stands for a principle that both predates and survives *Humphrey’s Executor*.

The relevant inquiry for whether removal restrictions are constitutional is the “nature of the function that Congress vested” in it. *Id.* at 353. Congress has long limited the removal of officers in purely adjudicatory bodies. *See, e.g.*, 10 U.S.C. § 942(c) (U.S. Court of Appeals for the Armed Forces); 26 U.S.C. § 7443(f) (Tax Court); 38 U.S.C. § 7251 (U.S. Court of Appeals for Veterans Claims). This principle is fully consistent with *Seila Law’s* recognition that Congress may restrict the President’s removal authority over “multimember expert agencies that do not wield substantial executive power.” 591 U.S. 207, 218. (2020). An institution that exercises purely adjudicatory power does not, by definition, wield substantial executive power—it resolves disputes according to law.

The U.S. Court of Appeals for the D.C. Circuit erred as a matter of law by concluding that the MSPB exercises executive—rather than adjudicatory—power. *See Harris v. Bessent*, 160 F.4th 1235, 1254 (D.C. Cir. 2025).

A. The MSPB Decides Cases and Controversies

Fundamentally, adjudicatory power describes the authority to decide cases and controversies. *See* U.S. Const. art. III, § 2. The Constitution envisions that adjudication will occur within various institutions, including the federal courts, Article I tribunals, and agencies created as “necessary and proper for carrying into Execution” the laws of the United States. *See id.* art. I, § 8; art. III.

Congress created the MSPB to “*hear, adjudicate, or provide for the hearing or adjudication* of all matters within the jurisdiction of the Board. . .” 5 U.S.C. § 1204(a)(1) (emphasis added). The MSPB’s jurisdiction is limited to disputes between the federal government and its employees. *See* 5 U.S.C. § 7501(a). MSPB decides these disputes by developing an evidentiary record, making findings of fact, and applying governing law to those facts. The MSPB draws the controlling legal standards from statutes enacted by Congress, regulations promulgated by Office of Personnel Management (OPM), and binding precedent from the federal courts and the MSPB.

In creating the MSPB under the Civil Service Reform Act of 1978 (CSRA), Congress itself understood that it was creating a body that was independent of any executive functions:

[F]or the first time there will be a body that is genuinely independent, not having the multiple personalities that the current Civil Service Commission has, by, on the one hand, attempting to

carry out the positive personnel policies needed to maximize the return from the Federal work force, while turning around and in a quasi-judicial capacity, simultaneously having to pass on specific kinds of actions which indeed may be closely related to those earlier policies that it advocated in its policy role.

Civil Service Reform Act of 1978 and Reorganization Plan No. 2 of 1978: Hearings on S. 2640, S. 2707, and S. 2830 Before the S. Comm. on Governmental Affairs, 95th Cong. 32-33 (1978) (statement of Alan K. Campbell). The rights-protecting and adjudicatory nature of the MSPB would be “guaranteed, [Congress] believe[d], by the provisions of the 7-year term, ineligibility for reappointment, and removal only for cause.” *Id.* at 33. Congress viewed the “heart of the proposal” as to establish the MSPB as “an independent body” *Id.* at 39.

Like other adjudicatory bodies, the MSPB has limited jurisdiction over employment disputes between the federal government and its employees. Even within the domain of civil service law, the CSRA withholds from the MSPB authority to review many categories of personnel actions. Probationary employees, for example, have no statutory right to appeal adverse actions to the MSPB. *See* 5 U.S.C. § 7511(a)(1)(A)(i) (defining “employee” to exclude probationary

employees); 5 U.S.C. § 7513(a) (providing appellate rights to employees).

The President and OPM retain significant control over the cases that MSPB hears and the standards it applies. The CSRA, for example, denies the MSPB jurisdiction over adverse actions taken pursuant to a reduction-in-force (RIF). *See* 5 U.S.C. § 7512(A). OPM regulations—not the CSRA—permit employees to appeal personnel actions taken pursuant to a RIF. *See* 5 C.F.R. § 351.901. The Trump administration has recently proposed regulations to strip the MSPB of authority to hear claims related to RIFs. *See* Off. Personnel Mgmt., *Reduction in Force Appeals*, 91 Fed. Reg. 5861 (Feb. 10, 2026). The Board’s jurisdiction is at its broadest when a case is brought by the Office of Special Counsel (OSC), 5 U.S.C. § 1214(b)(2), but the Special Counsel is a presidential appointee who is removable at will. Consequently, the President influences which cases are brought to the MSPB through his selection of the Special Counsel.

The MSPB’s fundamental function is to hear and decide disputes within its limited jurisdiction. That jurisdiction encompasses a limited number of disputes between federal employees and their employing agencies. The functions of the MSPB fit comfortably within traditional understandings of adjudicatory power.

**B. The MSPB’s Remedial Authority Is
Part-and-Parcel of its Adjudicatory
Power**

Like other adjudicatory bodies, the MSPB has authority to order reinstatement, back pay and related benefits, attorneys' fees, "medical costs incurred, travel expenses, any other reasonable and foreseeable consequential damages, and compensatory damages (including interest, reasonable expert witness fees, and costs)" *See* 5 U.S.C. § 1214(g). The remedies exercised by the MSPB are the sort traced to the history of the courts of law and courts of equity. These remedies are routinely awarded by federal courts in private employment disputes. Title VII of the Civil Rights Act of 1964, for example, authorizes courts to award reinstatement, backpay, attorneys' fees, declaratory relief, injunctive relief, "or any other equitable relief as the court deems appropriate." *See* 42 U.S.C. § 2000e-5(g).

Nevertheless, the D.C. Circuit disagreed with the MSPB's classification as an adjudicatory body, in part, based on the "breadth" of its remedial authority. *Harris*, 160 F.4th at 1256. These remedies, however, cannot be distinguished from those awarded by the War Claims Commission—the adjudicatory body whose removal protections were inferred in *Wiener*. The War Claims Act of 1948 authorized the Commission to award compensatory damages; wages; disability benefits; death benefits; and expenses for food, shelter, clothing, hospitalization, medicines, and medical services. War Claims Act of 1948 §§ 5-7, Pub. L. 895, 62 Stat. 1240, 1241-45. The D.C. Circuit has offered no compelling argument for why the breadth of remedies transforms these adjudicatory functions into exercises of executive power.

Finally, the D.C. Circuit also takes issue with the authority of the MSPB to order interim relief when requested by the Special Counsel. *See* 5 U.S.C. § 1214(b)(1)(A). The power to grant interim relief is a quintessentially adjudicatory function. Federal courts routinely issue temporary restraining orders and preliminary injunctions to preserve the status quo while a dispute is resolved on the merits. The MSPB's authority to stay a personnel action pending resolution of a complaint mirrors this familiar judicial practice.

That a single Board member may issue such a stay, *see* 5 U.S.C. § 1214(b)(1)(A), is no different in kind from a single federal judge's authority to enter a temporary restraining order. The D.C. Circuit's reliance on a particular exercise of this stay authority—Chair Harris's order reinstating nearly 6,000 probationary employees—conflates the scale of a remedy with its character. The magnitude of interim relief does not alter its adjudicatory nature any more than a class wide preliminary injunction transforms a district court into an executive agency.

C. The Finality of the MSPB's Decision Is Part-and-Parcel of its Adjudicatory Power.

Like other adjudicatory bodies, the MSPB has authority to issue final decisions. *See* 5 U.S.C. § 7701(e). But the MSPB's decisions are final only in the administrative sense because they remain subject to judicial review in the federal courts. *See* 5 U.S.C. § 7703. Both the employee and OPM may challenge the MSPB's final order. *See* 5 U.S.C. § 7703(d). The MSPB's finality is thus functionally equivalent to that of a

federal district court: its decisions stand unless a reviewing court sets them aside. Other adjudicatory bodies' decisions are similarly final and binding unless reversed on appeal. *See, e.g.*, 26 U.S.C. § 7481 (Tax Court); 38 U.S.C. § 7266 (Board of Veterans' Appeals).

Yet the D.C. Circuit concluded that the power to “unilaterally issue final decisions” is executive power rather than adjudicatory power. *Harris*, 160 F.4th 1235, 1254 (quoting *Seila Law*, 591 U.S. 197, 219 (2020)). But *Seila Law* used the word “unilaterally” to describe a single agency director acting alone. The MSPB, by contrast, is a multi-member body that issues decisions only after adversarial proceedings conducted under established procedural rules.

Moreover, the finality of a decision does not transform the character of the power wielded by the decisionmaker. Once again, the War Claims Commission proves this fact. Under the War Claims Act, “The action of the Commission in allowing or denying any claim under this Act shall be *final and conclusive* on all questions of law and fact and *not subject to review by any other official of the United States or by any court by mandamus or otherwise.*” War Claims Act of 1948 § 11, Pub. L. 895, 62 Stat. 1240, 1246. The War Claims Commission's decisions were entirely unreviewable. If such absolute finality was consistent with adjudicatory power in *Wiener*, then the MSPB's more limited finality, which is subject to full judicial review, cannot reasonably be characterized as executive.

D. The MSPB's Rulemaking Authority is Consistent with the Adjudicatory Power

The D.C. Circuit also pointed to the MSPB's rulemaking authority as evidence of substantial executive power. *Harris*, 160 F.4th at 1254. The D.C. Circuit conceives of two ways in which the MSPB engages in policymaking—a task it considers a hallmark of executive power. Neither transforms the MSPB from a pure adjudicatory body into an executive agency.

First, the D.C. Circuit describes the MSPB's development of precedent through common-law reasoning as something other than a “mere legal or factual inquiry.” *Harris*, 160 F.4th at 1255. As an example, the D.C. Circuit emphasized the *Douglas* factors, which the MSPB uses to evaluate whether an employing agency has imposed punishment proportional to the offense. *See, e.g., Douglas v. Veterans Admin.*, 5 M.S.P.B. 313, 325 (1981). Contrary to the D.C. Circuit's assertion, the *Douglas* factors reinforce that the MSPB exercises adjudicatory power. Confronted with broad statutory mandates, all adjudicators, including federal courts, must develop workable standards to evaluate whether parties have complied with applicable law. The *Douglas* factors—and similar standards developed by the MSPB—stem from precisely the type of common-law reasoning that adjudicatory bodies have always employed to apply the laws enacted by Congress.

The nature of the MSPB's common-law reasoning becomes even clearer when viewed in concert with the powers of OPM. The President and OPM retain authority to develop the substantive standards applied by the MSPB. Since the Act of 1871, the President has had authority to “prescribe regulations

for the conduct of employees in the executive branch.” *See* 5 U.S.C. § 7301. Likewise, OPM has authority to prepare rules that “promote an efficient civil service and a systematic application of the merit system principles, including recommending policies relating to the selection, promotion, transfer, performance, pay, conditions of service, tenure, and separation of employees.” *See* 5 U.S.C. § 1103(a)(7). The President and OPM are thus the source of personnel policy within the executive branch; the MSPB merely determines whether employing agencies have properly complied with that policy. This division of labor mirrors the familiar separation between lawmaking and adjudication. One body sets the rules, another applies them to particular disputes. Far from exercising executive power, the MSPB measures conduct against standards established by others—a quintessential adjudicatory function.

Silence from the President and OPM occasionally requires the MSPB to develop standards through common-law reasoning. Yet the President is not without recourse when these situations arise. The CSRA requires the MSPB to “promptly notify the [OPM] Director whenever the interpretation of any civil service law, rule, or regulation under the jurisdiction of [OPM] is at issue in any proceeding under this section.” 5 U.S.C. § 7701(d)(2). In such cases, the OPM Director has a right to intervene in the case. *Id.* § 7701(d)(1). Thus, even when the MSPB must develop standards in the first instance, the President—through OPM—retains the ability to shape the outcome, further confirming that the MSPB’s role remains adjudicatory rather than policymaking.

Second, the D.C. Circuit points to two separate statutory provisions conferring rulemaking authority upon the MSPB as evidence of executive power. *See Harris*, 160 F.4th at 1254. But the MSPB’s rulemaking authority is narrow and functionally indistinguishable from the procedural rulemaking that courts and other adjudicatory bodies themselves routinely exercise. *See, e.g.*, 26 U.S.C. § 7453; 38 U.S.C. § 7264(a). The CSRA empowers the MSPB to promulgate “such regulations as may be necessary for the performance of its functions.” 5 U.S.C. § 1204(h). This grant of authority enables the MSPB to establish the procedural rules governing its own adjudicatory proceedings, much as federal courts promulgate rules of procedure under the Rules Enabling Act. 28 U.S.C. § 2072. Like the MSPB, the War Claims Commission had authority to “prescribe such rules and regulations as may be necessary to enable it to carry out its functions” *See War Claims Act of 1948 § 2(c)*, Pub. L. No. 895, 62 Stat. 1240, 1241.

The D.C. Circuit’s sole example of substantive rulemaking derives from 5 U.S.C. § 1305. Section 1305 provides that the MSPB may prescribe regulations “for purpose of section 7521.” Section 7521 provides that “[a]n action may be taken against an administrative law judge . . . only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board.” 5 U.S.C. § 7521.

Congress assigned the MSPB—rather than OPM or any other executive agency—the authority to define the contours of this standard for a reason. Administrative law judges (ALJ) serve as impartial

adjudicators across the executive branch, and their decisional independence depends on removal protections. Congress's decision to vest this authority in the MSPB thus reflects not a grant of executive power, but a structural judgment that the standard governing removal of adjudicators should itself be developed by an adjudicatory body insulated from political pressure.

An analogy to the federal judiciary is instructive. Congress has vested authority to prescribe standards of judicial conduct and to administer judicial discipline in the Judicial Conference and the federal courts themselves, rather than in the Department of Justice. See 28 U.S.C. §§ 351–364. The reason is self-evident: if the executive branch could define the standards for disciplining judges, judicial independence would be compromised. Congress made the same structural choice in Section 1305. It assigned the MSPB, rather than an executive agency, the power to define the standards governing ALJ removal because the integrity of administrative adjudication depends on adjudicatory independence and freedom from political control. Far from undermining the MSPB's adjudicatory character, its rulemaking authority under Section 1305 reinforces it.

E. The MSPB's Litigation Authority is Consistent with the Adjudicatory Power

The D.C. Circuit also pointed to the MSPB's litigating authority as evidence of executive power, noting that the Board's attorneys “may appear for the Board, and represent the Board, in any civil action brought in connection with any function carried out by

the Board,” 5 U.S.C. § 1204(i), and that the MSPB is sometimes the proper respondent when its orders are challenged on judicial review. *Harris*, 160 F.4th at 1256. In general, however, the agency is respondent when “the employee or applicant for employment seeks review of a final order or decision on the merits on the underlying personnel action or on a request for attorney fees.” 5 U.S.C. § 7703(a)(2).

The scope of the MSPB’s litigating role confirms rather than undermines its adjudicatory character. As the Federal Circuit explained in *Spruill v. MSPB*, the identity of the proper respondent on appeal turns on a simple distinction: “if only MSPB procedure or jurisdiction is involved, it is the Board; when the underlying merits are involved, it is the employing agency; when both are involved, it is the employing agency.” 978 F.2d 679, 684 (Fed. Cir. 1992); *see also Costello v. Merit Sys. Prot. Bd.*, 182 F.3d 1372, 1378 (Fed. Cir. 1999). In other words, the MSPB appears as a party only when the challenge concerns its own adjudicatory process—not when the dispute concerns the substance of the underlying personnel action. The employing agency, an executive actor answerable to the President, defends the merits. This division maps precisely onto the distinction between adjudicatory and executive power. The MSPB defends its own internal procedures; the executive branch defends the personnel actions it takes.

The MSPB’s litigation authority departs from the authority typically at issue in these sorts of cases. Unlike the Consumer Financial Protection Bureau, the MSPB does not seek damages, civil fines, or injunctive relief in federal court. *Seila Law*, 591 U.S. at 219. It

does not prosecute individuals accused of violating the civil service laws. *See Morrison v. Olson*, 487 U.S. 654, 706 (1988) (Scalia, J., dissenting). It appears only when someone challenges the legality of its own adjudicatory proceedings.

* * *

In sum, each of the powers that the D.C. Circuit identified as evidence of “substantial executive power” is, upon examination, a characteristic feature of adjudicatory bodies.

The D.C. Circuit’s contrary conclusion rests on a fundamental category error: it treats the routine incidents of adjudication as hallmarks of executive power. If the MSPB’s powers are executive, then so too are the powers of every federal court, every Article I tribunal, and the War Claims Commission itself. *Wiener* forecloses that result. The MSPB is precisely the sort of adjudicatory body whose independence Congress may constitutionally protect.

III. The MSPB Provides Impartial Hearings Mandated by the Constitution

Congress understood the importance of affording federal employees a hearing before an independent adjudicator. Such a hearing is constitutionally required. Consequently, presidential removal of agency adjudicators violates the Due Process Clause of the Fifth Amendment by depriving federal employees of their right to a hearing before an impartial adjudicator. U.S. Const. amend. V.

Tenure protections, such as those found in 5 U.S.C. § 7513(a), afford public employees a constitutionally protected property right in continued employment. See *Board of Regents v. Roth*, 408 U.S. 564, 576–78 (1972). Consequently, the federal government must provide “some kind of hearing’ prior to the discharge of an employee who has a constitutionally protected property interest in his employment.” *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985). Congress created the MSPB to provide such hearings.

Permitting the President to remove members of the MSPB at-will infringes upon the constitutional rights of federal employees. An “impartial decision maker is essential” to ensuring that a hearing satisfies the requirements of procedural due process. See *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970). Yet in every case before the MSPB, a federal agency—an entity answerable to the President—is a party. If the President could remove Board members at will, the adjudicator would serve at the pleasure of one side of the dispute. Congress enacted for-cause removal protections to prevent precisely this structural bias.

The for-cause removal standard provides the President with sufficient authority to remove Board members who fail to fulfill their duties. Under 5 U.S.C. § 1202(d), the President may remove any MSPB member for “inefficiency, neglect of duty, or malfeasance in office.” Such grounds for removal ensure that the President can fulfill his obligation to “take Care that the Laws be faithfully executed.” U.S. Const. art. II, § 3.

The President may not remove a Board member simply because he disagrees with her decisions in a particular case. The for-cause standard draws the same line that due process demands. It permits the President to ensure competence and integrity while prohibiting him from dictating outcomes in adjudications where federal agencies under his leadership are parties. Indeed, for-cause removal mirrors the “good cause” standard that governs the removal of ALJs under 5 U.S.C. § 7521 and the “good behavior” standard that protects Article III judges under the Constitution itself. The government has identified no instance in which the existing for-cause standard has prevented the President from removing a Board member who was genuinely derelict in her duties.

Granting the President at-will removal power over MSPB members may also violate the Fifth Amendment by causing delays in the ability of federal employees to receive a hearing. 470 U.S. 532, 547. The MSPB cannot decide appeals without a quorum, which requires two of its three members. Presidential removals are a leading cause of quorum losses at multi-member commissions. See Nicholas R. Bednar & Todd Phillips, *Commission Quorums*, __ STAN. L. REV. __ (forthcoming 2026) (manuscript at 12–17), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5347384.

The MSPB lost its quorum for five years between 2017 and 2022, producing a backlog of 3,800 cases. *Id.* at 12–13. The Board lost its quorum again in March 2025, this time as a direct consequence of the President’s removal of Chair Harris—a removal that

coincided with the administration's effort to terminate thousands of federal employees. *Id.* at 12. During these periods, federal employees cannot appeal their cases to the federal court because they lack a final decision from the MSPB. Expansion of the removal power would make quorum losses a permanent feature of adjudicatory agencies and allow Presidents to prevent federal employees from vindicating their constitutional rights.

CONCLUSION

The Fifth Amendment's guarantee of due process is a constitutional command that constrains how the political branches may structure the adjudication of individual rights. Congress designed the MSPB to satisfy that command. It created an independent, multi-member adjudicatory body insulated from political pressure so that federal employees facing removal would receive the impartial hearing the Constitution requires. The for-cause removal standard is the linchpin of that design: it ensures competence and integrity without permitting the President to control adjudicatory outcomes in cases where his own executive branch is a party. Eliminating that protection would compromise the impartiality of the tribunal, expose the Board to quorum-destroying removals that leave employees without any forum for vindication of their rights, and transform the President's removal power from a tool of faithful execution into an instrument for evading constitutional obligations.

The government asks this Court to expand presidential power. But the Fifth Amendment asks something of the President as well: that when the government seeks to deprive its own employees of their property interests, it do so before an adjudicator who answers to the law — not to the party on the other side of the case. The MSPB’s for-cause removal protections are what make that promise credible. This Court should preserve them.

Respectfully Submitted.

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