UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Office of Commissioner
Andrew N. Ferguson

Statement of Commissioner Andrew N. Ferguson
Dissenting in Part and Concurring in the Denial of the Motion
In the Matter of H&R Block, Inc., et al.
Docket Number 9427

October 18, 2024

This motion asks whether the Commission may remove its Administrative Law Judges ("ALJs") only for cause. That question at first blush appears to be humdrum bureaucratic minutia. But, really, the question is about self-government—whether the American people govern themselves through their elections, or whether they are ruled by an independent administrative state.

The administrative state is gargantuan and increasingly removed from the American people. When President Washington retired to his farm in 1797, the federal government employed several thousand people.[1] Today, it employs three million.[2] Its most powerful officers are ensconced inside the Beltway, hundreds or thousands of miles from the people they govern. The cultural distance is greater still.

The people do not vote for these millions of officials. But they do vote for the President. The election of the President is thus the key to constitutional self-government for the executive branch. If the President supervises and directs subordinate officers, then the people control them because the President answers directly to the people. But if the President does not control subordinate officers, then neither do the people. The administrative state would rule the roost, governing in favor of its own interests without regard to the people's needs.

The President cannot control subordinate officers without the power to appoint and remove them. The power to appoint is critical to setting the governing agenda. The power to remove, and the obedience that the fear of removal instills, ensures the agenda's execution. The removal power is also the key to reforming the administrative state. The President could hardly reform the government if he were stuck with the officers responsible for the problems he was trying to fix.

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[1] See Thomas Jefferson: Domestic Affairs, U. Va. Miller Center (Mar. 25, 2021), https://millercenter.org/president/jefferson/domestic-affairs (noting that when President Jefferson took office in 1801, the federal government had "316 employees subject to presidential appointment[,] … 700 clerks and 3,000 postal workers," excluding the Army and Navy); The Early Federal Workforce, Brookings Inst. (May 2018), https://www.brookings.edu/wp-content/uploads/2018/05/the-early-federal-workforce-by-p-kastor.pdf ("In 1802 ... the federal government employed 3,905 people"); The rise of the fourth branch of government, Wash. Post (May 24, 2013), https://www.washingtonpost.com/opinions/the-rise-of-the-fourth-branch-of-government/2013/05/ 24/c7faaad0-c2ed-11e2-9fe2-6ee52d0eb7c1_story.html ("In 1790, [the federal government] had just 1,000 nonmilitary workers.").

[2] U.S. Bureau of Labor Statistics, All Employees, Federal [CES9091000001] (retrieved from FRED, Federal Reserve Bank of St. Louis on Oct. 15, 2024), https://fred.stlouisfed.org/series/CES9091000001 (showing 2,999,000 federal employees).

And the removal power must extend beyond merely officers who openly disobey his orders. Subtle forms of disagreement and bureaucratic mischief can strangle policy reforms in their cradle. The President therefore must have the power to remove not just disobedient officers, but also those whom he concludes do not support his governing agenda.

Dual-layer tenure protections for FTC ALJs insulate subordinate officers from the President's control. They undermine self-government and empower the administrative state to the people's detriment. I therefore would hold that those protections violate the Vesting and Take Care Clauses of Article II of the U.S. Constitution.[3] I nevertheless concur in the denial of the disqualification motion because the provision conferring for-cause removal protections to FTC ALJs is severable from the remainder of the statutory scheme.

I

A

When the Commission has reason to believe that someone has violated Section 5 of the Federal Trade Commission Act ("FTC Act"),[4] it may "address [that] violation[ ] either by bringing civil suits in federal district court or by instituting [its] own administrative proceedings."[5] When the Commission chooses the latter, we almost always "delegate[ ] the initial adjudication to an ALJ."[6] Commission ALJs operate "much like a regular trial judge."[7] They "are officials to whom the Commission, in accordance with law, delegates the initial performance of statutory fact-finding functions and initial rulings on conclusions of law."[8] They have "all powers necessary to" "conduct fair and impartial hearings, to take all necessary action to avoid delay in the disposition of proceedings, and to maintain order."[9] These include the power to control discovery, to issue procedural and substantive orders, to admit and exclude evidence, to punish contemnors, and to preside over oral arguments and evidential hearings.[10] At the conclusion of proceedings, the ALJ must issue a "recommended decision ... based on consideration of the whole record relevant to the issues decided," "supported by reliable and probative evidence."[11] The recommended decision must contain "recommended findings of fact," "recommended conclusions of law," and "the reasons or basis therefore, upon all material issues of fact, law, or discretion presented on the record."[12] It must also include "an appropriate proposed rule or order."[13]

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[3] U.S. Const. art. II, § 1, cl. 1; *id.* art. II, § 3, cl. 3.
[4] 15 U.S.C. § 45(a).
[5] *Axon Enter., Inc. v. FTC*, 598 U.S. 175, 180–81 (2023); see also 15 U.S.C. § 45(b), (m).
[6] *Axon Enter., Inc.*, 598 U.S. at 181.
[7] *Ibid.*; see also *In re Axon Enter., Inc.*, Docket No. 9389, 2020 WL 5406806, at *3 (FTC Sept. 3, 2020) (An ALJ "presides over adjudicative proceedings in whatever cases may come before him after initiation by the Commission, and he applies the law to the facts. His position is 'functionally comparable to that of a judge.'" (quoting *Butz v. Economou*, 438 U.S. 478, 513 (1978))).
[8] 16 C.F.R. § 0.14.
[9] *Id.* § 3.42(c).
[10] *Ibid.*; see also *id.* § 3.43 (governing offer, admission, and exclusion of evidence in Commission proceedings).
[11] *Id.* §§ 3.51(a), (c)(1).
[12] *Id.* § 3.51(c)(1).
[13] *Ibid.*

Once the ALJ issues a recommended decision, the Commission reviews it.[14] The Commission may "adopt, modify, or set aside the recommended findings, recommended conclusions, and proposed rule or order contained in the recommended decision," and must "include in the decision a statement of the reasons or basis of its action and any concurring or dissenting opinions."[15] The Commission's decision is final agency action, subject to review by a U.S. court of appeals "within any circuit where the" unlawful conduct "was used" or where the respondent resides or carries on its business.[16]

Congress has through the Administrative Procedure Act ("APA")[17] and Civil Service Reform Act ("CSRA")[18] made ALJs "semi-independent"[19] from the agencies they serve to "safeguard the[ir] decisional independence."[20] The Commission appoints ALJs[21] but cannot remove them from office except "for good cause established and determined by the Merit Systems Protection Board [MSPB]."[22] The President appoints both Commissioners and MSPB members,[23] but may remove them "only for inefficiency, neglect of duty, or malfeasance in office."[24]

B

On February 3, 2024, the Commission filed an administrative complaint against Respondents, alleging that they violated Section 5 of the FTC Act[25] in the marketing, sale, and distribution of their tax-preparation products and services.[26] That complaint was ultimately assigned to FTC ALJ Jay L. Himes.[27] Respondents moved to disqualify Judge Himes on the ground that the multilevel tenure protections for FTC ALJs violated Article II, and Judge Himes therefore lacked authority to adjudicate the administrative complaint.[28] Judge Himes certified that motion to the Commission for a decision.[29]

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[14] 16 C.F.R. § 3.53.
[15] *Id.* § 3.54(a).
[16] 15 U.S.C. § 45(c).
[17] 5 U.S.C. §§ 551–559.
[18] Pub. L. No. 95–454, 92 Stat. 1111 (codified as amended in scattered sections of 5 U.S.C.).
[19] *Ramspeck v. Fed. Trial Exam'rs Conf.*, 345 U.S. 128, 132 (1953) (quotation marks omitted).
[20] *Mahoney v. Donovan*, 721 F.3d 633, 635 (D.C. Cir. 2013).
[21] 5 U.S.C. § 3105 ("Each agency shall appoint as many administrative law judges as are necessary for proceedings required to be conducted in accordance with sections 556 and 557 of this title."); 16 C.F.R. § 0.14 ("Administrative law judges are officials to whom the Commission, in accordance with law, delegates the initial performance of statutory fact-finding functions and initial rulings on conclusions of law …").
[22] 5 U.S.C. § 7521(a).
[23] 15 U.S.C. § 41 ("Federal Trade Commission … shall be composed of five Commissioners, who shall be appointed by the President …"); 5 U.S.C. § 1201 ("The Merit Systems Protection Board is composed of 3 members appointed by the President …").
[24] 15 U.S.C. § 41 (Commission); 5 U.S.C. § 1202(d) (MSPB).
[25] 15 U.S.C. § 45(a).
[26] Compl., *In the Matter of H&R Block Inc., et al.*, FTC Docket No. 9427, at 15–16 (Feb. 23, 2024).
[27] Order Reassigning Admin. Law Judge, *In the Matter of H&R Block Inc., et al.*, FTC Docket No. 9427 (Mar. 12, 2024).
[28] Resp'ts' Mot. to Disqualify the Admin. Law Judge, *In the Matter of H&R Block Inc., et al.*, FTC Docket No. 9427, at 1 (Mar. 26, 2024) (hereinafter "Resp'ts' Mot. to Disqualify ALJ").
[29] Order Certifying Mot. to Disqualify Admin. Law Judge, *In the Matter of H&R Block Inc., et al.*, FTC Docket No. 9427 (Apr. 4, 2024); see also 16 C.F.R. § 3.42(g)(2) (authorizing certification of disqualification motions).

Around the same time, Respondents sued Judge Himes and the Commission in the U.S. District Court for the Western District of Missouri.[30] They sought to enjoin preliminarily the Commission's administrative proceedings on the same ground they sought to disqualify Judge Himes.[31] On August 1, 2024, the district court denied the preliminary injunction,[32] and Respondents appealed to the Eighth Circuit.[33]

II

A

Article II vests "the executive Power"[34] exclusively in the President and charges him to "take Care that the Laws be faithfully executed."[35] "[B]ecause it would be 'impossib[le]' for 'one man' to 'perform all the great business of the State,' the Constitution assumes that lesser executive officers 'will assist the supreme Magistrate in discharging the duties of his trust.'"[36] Although these lesser executive officers wield "executive power on [the President's] behalf," the executive power and the duty to execute the laws belong exclusively to the President.[37] Because they act on his behalf, the Constitution gives the President authority to control and supervise those officers.[38]

That authority is critical to constitutional self-government. "A dependence on the people is no doubt the primary controul [sic] on the government."[39] But we do not vote for any of the many "thousands of officers [who] wield executive power on behalf of the President."[40] They do not depend on the people directly. The President, however, is "directly accountable to the people through regular elections."[41] The Constitution therefore establishes a "chain of dependence" running from the least of the President's subordinates directly back to the people—"the supreme body"—through the elected President.[42] This "chain of dependence" is how the people control their government.

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[30] Compl., *H&R Block, Inc. v. Himes*, No. 4:24-cv-198 (W.D. Mo. Mar. 20, 2024).
[31] Mot. for Prelim. Inj., *H&R Block, Inc. v. Himes*, No. 4:24-cv-198 (W.D. Mo. Mar. 20, 2024).
[32] Order 4, *H&R Block, Inc. v. Himes*, No. 4:24-cv-198 (W.D. Mo. Aug. 1, 2024).
[33] Not. of Appeal, *H&R Block, Inc. v. Himes*, No. 4:24-cv-198 (W.D. Mo. Aug. 8, 2024).
[34] U.S. Const. art. II, § 1, cl. 1.
[35] *Id.* art. II, § 3, cl. 3.
[36] *Seila Law LLC v. CFPB*, 591 U.S. 197, 213 (2020) (quoting 30 Writings of George Washington 334 (J. Fitzpatrick ed. 1939)); see also *Myers v. United States*, 272 U.S. 52, 117 (1926) ("But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates.").
[37] *Seila Law LLC*, 591 U.S. at 203–04.
[38] See *Myers*, 272 U.S. at 117–18, 163–64.
[39] The Federalist No. 51, at 349 (J. Cooke ed. 1961) (J. Madison).
[40] *United States v. Arthrex*, 594 U.S. 1, 11 (2021); *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 497–98 (2010).
[41] *Seila Law LLC*, 591 U.S. at 224.
[42] 1 Annals of Cong. 499 (1789) (Statement of Rep. Madison) ("If the President should possess alone the power of removal from office, those who are employed in the execution of the law will be in their proper situation, and the chain of dependence preserved; the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community. The chain of dependence therefore terminates in the supreme body, namely, in the people …").

B

The Constitution gives the President two powerful tools to supervise and direct his subordinates: appointment and removal.[43] "Just as the President's '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.'"[44] Only the removal power is at issue here. The Constitution's text is less explicit about the President's removal power than his appointment power, but the removal power "has long been confirmed by history and precedent."[45] The First Congress debated extensively which branch had the power to remove subordinate officers, and the prevailing view of the Constitution's text and structure was that "the executive power included a power to oversee executive officers through removal."[46] The President's authority to supervise and direct his subordinates therefore necessarily includes "the general administrative control of those executing the laws, including the power of … removal of executive officers."[47]

"[U]nrestricted removal power" is the "general rule" of Article II.[48] "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 intelligent or wise, 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."[49]

This plenary removal power is subject only to two limited exceptions.[50] The first was articulated in *Humphrey's Executor v. United States*[51] and permits Congress to "give for-cause removal protections to a multimember body of experts, balanced along partisan lines, that performed legislative and judicial functions and was said not to exercise any executive power."[52] Although this exception insulates removal protections for Commissioners from constitutional attack (for now, anyway),[53] it does not apply to ALJs.

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[43] *Seila Law LLC*, 591 U.S. at 213 ("As Madison explained, '[I]f any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws.'" (quoting 1 Annals of Cong. 463 (1789))).
[44] *Id.* at 214 (quoting *Myers*, 272 U.S. at 117).
[45] *Ibid*.
[46] *Free Enter. Fund*, 561 U.S. at 492; see also *Bowsher v. Synar*, 478 U.S. 714, 723–24 (1986) ("This 'Decision of 1789' provides 'contemporaneous and weighty evidence' of the Constitution's meaning since many of the Members of the First Congress 'had taken part in framing that instrument.'" (quoting *Marsh v. Chambers*, 463 U.S. 783, 790 (1983))); *Myers*, 272 U.S. at 109–31 (discussing the Decision of 1789). For a comprehensive historical defense of the Decision of 1789, see Aditya Bamzai & Saikrishna Bangalore Prakash, The Executive Power of Removal, 136 Harv. L. Rev. 1756 (2023); Aditya Bamzai & Saikrishna Bangalore Prakash, How to Think About the Removal Power, 110 Va. L. Rev. Online 159 (2024).
[47] *Myers*, 272 U.S. at 164.
[48] *Seila Law LLC*, 591 U.S. at 215.
[49] *Collins v. Yellen*, 594 U.S. 220, 256 (2021) (cleaned up).
[50] *Seila Law LLC*, 591 U.S. at 215.
[51] 295 U.S. 602 (1935).
[52] *Seila Law LLC*, 591 U.S. at 216; but see *id.* at 216 n.2 (noting that "[t]he Court's conclusion [in *Humphrey's Executor*] that the [Commission] did not exercise executive power has not withstood the test of time," and that under modern doctrine, administrative agencies plainly wield exclusively executive power).
[53] *Id.* at 239 (Thomas, J., concurring in part and dissenting in part) ("[T]he Court has repudiated almost every aspect of *Humphrey's Executor*.").

The second is for "inferior officers with limited duties and no policymaking or administrative authority."[54] The Court has invoked this exception twice. In *United States v. Perkins*, the Court upheld a statute which forbade the Secretary of the Navy from removing a naval cadet except for misconduct or the judgment of a court-martial.[55] And in *Morrison v. Olsen*, the Court upheld a statute forbidding the Attorney General from removing an independent counsel—a special prosecutor within the executive branch appointed by an Article III court—except for good cause.[56]

This second exception, however, is subject to an important qualification. Congress may not grant inferior officers *two layers* of for-cause tenure protections, no matter their duties. In *Free Enterprise Fund v. Public Company Accounting Oversight Board*, the Court held unconstitutional for-cause removal protections for members of the Public Company Accounting Oversight Board (PCAOB).[57] The PCAOB is an agency within the Securities Exchange Commission (SEC) that regulates the accounting industry.[58] The SEC appoints PCAOB members, but may remove them only for cause.[59] The President appoints SEC commissioners, but similarly may remove them only for cause.[60]

The *Free Enterprise Fund* Court acknowledged that in *Perkins* and *Morrison* it "upheld limited restrictions on the President's removal power" for inferior officers.[61] Multilevel tenure protection, however, was a "new situation not yet encountered by the Court."[62] In both *Perkins* and *Morrison*, "the President—or a subordinate he could remove at will— … decided whether the officer's conduct merited removal under the good-cause standard."[63] The Court "declined to extend" *Perkins* and *Morrison* to "an official insulated by *two* layers of for-cause removal protection."[64] Multilevel tenure protection, the Court held, "changes the nature of the President's" ability to control PCAOB members.[65] The "novel structure" of dual-layer protections "does not merely add to the … independence" of the officers who enjoy the protections, "but transforms it."[66] "[T]he President cannot remove an officer who enjoys more than one level of good-cause protection, even if the President determines that the officer is neglecting his duties or discharging them improperly."[67] The PCAOB's multilevel protection from removal therefore violated Article

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[54] *Id.* at 218. An "inferior officer" is an officer who is supervised by someone in the chain of command below the President. See *Edmond v. United States*, 520 U.S. 651, 663 (1997); see also *NLRB v. SW Gen., Inc.*, 580 U.S. 288, 311, 315 (2017) (Thomas, J., concurring).
[55] 116 U.S. 483, 485 (1886).
[56] 487 U.S. 654, 663 (1986).
[57] 561 U.S. at 484.
[58] *Id.* at 485.
[59] *Id.* at 485–86.
[60] *Id.* at 487.
[61] *Id.* at 495; see also *id.* at 494–95 (discussing *Perkins* and *Morrison*).
[62] *Id.* at 483.
[63] *Id.* at 495.
[64] *Seila Law LLC*, 591 U.S. at 215 (citing *Free Enter. Fund*, 561 U.S. at 483).
[65] *Free Enter. Fund*, 561 U.S. at 496.
[66] *Ibid.*
[67] *Id.* at 484.

II because the President "can neither ensure that the laws are faithfully executed, nor be held responsible for the" conduct of PCAOB members.[68]

C

Free Enterprise Fund and its progeny resolve the constitutional question before us. FTC ALJs indisputably are officers of the United States.[69] They are therefore subject to the President's "unrestricted removal power" unless one of the two exceptions applies.[70] Neither does. The *Humphrey's Executor* exception is limited to a small class of principal officers and therefore does not apply to FTC ALJs, who are inferior officers.[71] The *Morrison* exception also does not apply to Commission ALJs because *Free Enterprise Fund* "declined to extend" it to inferior officers who enjoy more than one layer of for-cause removal protection.[72] Section 7521 confers on ALJs more than one layer of for-cause removal protection. It is therefore an unconstitutional "multilevel protection from removal."[73]

Several courts have reached similar conclusions. In *Jarkesy v. SEC*, the Fifth Circuit concluded that dual-layer removal protections for SEC ALJs violate Article II on a straightforward reading of *Free Enterprise Fund*.[74] It reasoned that "[i]f principal officers"—in that case, SEC Commissioners—"cannot intervene in their inferior officers' actions except in rare cases, the President lacks the control necessary to ensure that the laws are faithfully executed."[75] Similarly in *Walmart Inc. v. King*, a district court enjoined Department of Justice immigration ALJs from adjudicating disputes because they enjoyed two layers of removal protection.[76] There, ALJs were subject to the same removal standard as Commission ALJs,[77] but the Attorney General is removable at will.[78] Still, the Court concluded that the ALJs were doubly insulated, because the

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[68] *Id.* at 484, 496.

[69] *Lucia v. SEC*, 585 U.S. 237, 249 (2018) (holding that SEC ALJs are inferior officers); *In re Axon Enter., Inc.*, 2020 WL 5406806, at *3 n.7 (FTC Sept. 3, 2020); see also Order Denying Resp'ts' Mot. to Disqualify the Admin. Law Judge, *In the Matter of H&R Block Inc., et al.*, FTC Docket No. 9427, at 9 (Oct. 18, 2024) (hereinafter "Maj. Op.") (acknowledging that "*Lucia*'s holding that SEC ALJs are 'inferior officers,' [is] a proposition grounded in Supreme Court law."). The Supreme Court has generally defined an "officer of the United States" for purposes of the appointment and removal power as an official who wields "significant authority." See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 125–26 (1976) (per curiam); see also *Freytag v. Comm'r*, 501 U.S. 868, 881–82 (1991) (considering the "significance of the duties and discretion" of officials in determining whether that official is an "officer of the United States" for Article II purposes). There is substantial evidence, however, that this test is underinclusive, and that a much broader arrange of government employees are "officers of the United States." See *SW Gen., Inc.*, 580 U.S. at 314 (Thomas, J., concurring) (citing Jennifer L. Mascott, Who Are "Officers of the United States"? 70 Stan. L. Rev. 443, 564 (2018); Officers of the United States Within the Meaning of the Appointments Clause, 31 Op. OLC 73, 77 (2007)); *Lucia*, 585 U.S. at 254 (Thomas, J., concurring). ALJs are "officers of the United States" under either interpretation of the phrase. *Lucia*, 585 at 247–49; *id*. at 255 (Thomas, J., concurring).

[70] *Seila Law LLC*, 591 U.S. at 228 ("[T]ext, first principles, the First Congress's decision in 1789, *Myers*, and *Free Enterprise Fund* all establish that the President's removal power is the rule, not the exception.").

[71] *Id.* at 215–16.

[72] *Id.* at 215.

[73] *Free Enter. Fund*, 561 U.S. at 484.

[74] 34 F.4th 446, 463–65 (5th Cir. 2022), *aff'd on other grounds by* 144 S. Ct. 2117 (2024).

[75] *Id.* at 464.

[76] No. cv 623-040, 2024 WL 1258223 (S.D. Ga. Mar. 25, 2024).

[77] *Id*. at *3.

[78] See generally *Myers*, 272 U.S. at 176 (holding that the President has power to remove those executive branch officials of the United States whom he has appointed by and with the advice and consent of the Senate).

MSPB articulates the for-cause standard for the removal of ALJs and its members enjoy for-cause protection as well.[79]

D

The majority raises several arguments in defense of multilevel tenure protections for FTC ALJs.

1

Least convincingly, the majority concludes that the *Morrison* exception for inferior officers applies because FTC ALJs are "officers with 'limited duties and no policymaking or administrative authority.'"[80] Granting Commission ALJs removal protections is consistent with the President's duty to supervise subordinate officers under *Morrison*, the majority reasons, because Commission ALJs perform solely adjudicative functions subject to the Commission's review,[81] and the removal protections are modest and flexible.[82]

This rationale cannot be squared with *Free Enterprise Fund*. The Court acknowledged the *Morrison* exception for certain inferior officers, but expressly held that it did not apply to officers with dual-layer protections. Neither *Perkins* nor *Morrison* involved two layers of protections.[83] Such a "novel structure" was "quite different"[84] and required a new rule.[85] The Court did not conduct the *Morrison* inquiry at all. Instead, the Supreme Court "declined to extend" *Morrison* to officers protected "by *two* layers of for-cause removal protection."[86] *Morrison* therefore does not apply to multilevel tenure protections.

2

The majority next argues that *Free Enterprise Fund* does not control this case for two reasons. First, Commission ALJs are distinguishable from PCAOB members because the former perform only adjudicatory functions whereas the latter have policymaking power.[87] Second, it argues that the Court in *Free Enterprise Fund* excepted ALJs from the prohibition on dual-layer protections.[88] The Ninth Circuit reached a similar conclusion on the constitutionality of ALJs

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[79] *Walmart*, 2024 WL 1258223 at *3–*4.
[80] Maj. Op. at 5 (quoting *Seila Law LLC*, 591 U.S. at 217–18 (cleaned up)).
[81] *Id.* at 6–7.
[82] *Id.* at 7.
[83] *Free Enter. Fund*, 561 U.S. at 495.
[84] *Id.* at 495, 496.
[85] *Id.* at 483.
[86] *Seila Law LLC*, 591 U.S. at 215 (citing *Free Enter. Fund*, 561 U.S. at 483).
[87] Maj. Op. at 8.
[88] *Id.* at 8–9.

employed by the Department of Labor,[89] as did the district court in the litigation collateral to this proceeding.[90] Neither argument holds water.[91]

First, turning *Free Enterprise Fund*'s application on the officer's similarity to a PCAOB member gets the constitutional rule exactly backwards.[92] The President's removal power is plenary outside of the two limited exceptions recognized for principal officers in *Humphrey's Executor* and inferior officers in *Morrison*.[93] "These exceptions 'represent what up to now have been the outermost constitutional limits of permissible congressional restrictions on the President's removal power.'"[94] *Free Enterprise Fund* did not create a third exception authorizing dual-layer removal protections for inferior officers other than PCAOB members. It refused to extend the existing exceptions into the dual-layer protection context at all.[95] Reading *Free Enterprise Fund* as limited only to the PCAOB is not a fair reading of what the Court said there, or since.

Second, *Free Enterprise Fund* did not create for ALJs a freestanding exception from the prohibition against multilevel tenure protections. The Court there noted that it was unclear whether ALJs were "Officers of the United States" for purposes of the appointment and removal power, and that ALJs perform different functions than PCAOB members.[96] Since *Free Enterprise Fund*, however, any lingering doubt over the constitutional status of ALJs has dissipated. The Court held in *Lucia v. SEC* that ALJs are officers of the United States wielding the executive power on the President's behalf.[97] "These lesser officers must remain accountable to the President, whose authority they wield."[98] The power to oversee lesser officers like ALJs "generally includes the

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[89] *Decker Coal Co. v. Pehringer*, 8 F.4th 1123, 1129–36 (9th Cir. 2021).
[90] Order Denying Mot. for Prelim. Inj., *H&R Block v. Himes*, No. 24-cv-198, at 7–8 (W.D. Mo. Aug. 1, 2024).
[91] The majority also invokes the Sixth Circuit's decision in *Calcutt v. FDIC*, 37 F.4th 293 (6th Cir. 2022), as suggesting that ALJs are excluded from the reach of *Free Enterprise Fund*. Maj. Op. at 8–9. Although *Calcutt* expressed "doubt" about whether the FDIC ALJs' removal protections violated the Constitution, it did not decide the question. *Calcutt*, 37 F.4th at 319, 320.
[92] *Free Enter. Fund*, 561 U.S. at 497.
[93] See *Seila Law LLC*, 591 U.S. at 215 (holding that "the President's unrestricted removal power" is the "general rule").
[94] *Fleming v. U.S. Dep't of Agric.*, 987 F.3d 1093, 1114 (D.C. Cir. 2021) (Rao, J., concurring in part and dissenting in part) (quoting *Seila Law LLC*, 591 U.S. at 218).
[95] *Seila Law LLC*, 591 U.S. at 215 ("Although we had previously sustained congressional limits on that power in certain circumstances, we declined to extend those limits to 'a new situation not yet encountered by the Court'—an official insulated by *two* layers of for-cause removal protection." (quoting *Free Enter. Fund*, 561 U.S. at 483)); see also *Fleming*, 987 F.3d at 1117 (Rao, J., concurring in part and dissenting in part) ("While the Court has recognized that an inferior officer may be insulated from removal in some circumstances, that narrow exception to the President's removal power does not extend to two layers of for-cause tenure protection. A second layer of for-cause protection contravenes the Constitution's separation of powers, because it results in officers who are not accountable to the President, and a President who is not responsible for his officers." (cleaned up)).
[96] 561 U.S. at 507 n.10.
[97] 585 U.S. at 245–49; see also *Free Enter. Fund*, 561 U.S. at 491–92; *Myers*, 272 U.S. at 117; *Fleming*, 987 F.3d at 1115 (Rao, J., concurring in part and dissenting in part) ("[A]s 'Officers of the United States,' ALJs exercise the Article II executive power on behalf of the President."); cf. *Lucia*, 585 U.S. at 261 (Breyer, J., concurring in the judgment in part and dissenting in part) (noting that if *Free Enterprise Fund* applies to ALJs, then treating ALJs as officers of the United States imperils their for-cause removal protections).
[98] *Seila Law LLC*, 591 U.S. at 213.

ability to remove executive officials, for it is 'only the authority that can remove' such officials that they 'must fear and, in the performance of [their] functions, obey.'"[99]

Finally, the differences between FTC ALJs and PCAOB members do not affect the constitutional analysis. PCAOB members wield policymaking power, whereas ALJs adjudicate disputes.[100] The law-execution functions are different,[101] but the power they wield is the same.[102] "Agencies make rules … and conduct adjudications … and have done so since the beginning of the Republic. These activities take 'legislative' and 'judicial' forms, but they are exercises of—indeed, under our constitutional structure they *must be* exercises of—the 'executive Power.'"[103] Officers of the United States with adjudicative authority therefore wield "the executive Power" on the President's behalf no less so than officers of the United States with policymaking authority. Both "exercise significant discretion" in the "carrying out of … important functions" on the President's behalf.[104] Adjudicative executive-branch officers therefore must be subject to the President's supervision and direction no less so than policymaking officers.[105]

And FTC ALJs wield "extensive" executive power.[106] They have "authority … much like a regular trial judge to resolve motions, hold a hearing, and then issue a decision."[107] They control the creation of the administrative record—a function no less important to an administrative adjudication than the creation of a trial record in court. That power includes most of the same powers enjoyed by a trial judge—the power to set the schedule, to control discovery, to admit or exclude evidence, to punish contemnors, and to issue every order necessary to direct the adjudication.[108] The President must have authority under Article II to supervise the wielding of this power, and the FTC ALJ's dual-layer tenure protections prevent him from doing so.

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[99] *Id.* at 213–14 (quoting *Bowsher*, 478 U.S. at 726).
[100] *Free Enter. Fund*, 561 U.S. at 485.
[101] See Elena Kagan, Presidential Administration, 114 Harv. L. Rev. 2245, 2362 (2001).
[102] *Fleming*, 987 F.3d at 1115 (Rao, J., concurring in part and dissenting in part) ("[W]hatever methods or functions are employed, however, officers of the Executive Branch cannot exercise anything but the executive power.").
[103] *City of Arlington v. FCC*, 569 U.S. 290, 304 n.4 (2013) (Scalia, J.); see also Harold J. Krent, 65 Case. W. Res. L. Rev. 1083, 1089, 1091 (2015) ("[F]or the first 150 years of our history," "Congress delegated adjudicative authority to the executive branch without limiting Presidential control to any extent. As a result, the policy emerging from the delegated authority reflected that of the President … Presidents have long exercised substantial control in shaping the claims resolution processes set into motion by Congress. Presidents directed clerks and others to resolve claims, and affected individuals had no recourse to the courts. In the absence of any congressional specification, Presidents enjoyed authority under Article II to oversee the adjudication.").
[104] *Lucia*, 585 U.S. at 247 (cleaned up).
[105] *Seila Law LLC*, 591 U.S. at 218 (*Morrison* exception does not apply for inferior officers with "policymaking or administrative authority"); *Fleming*, 987 F.3d at 1116 (Rao, J., concurring in part and dissenting in part) ("As officers exercising the executive power, … ALJs must be accountable to the President. To secure the requisite constitutional accountability, officers must be in the chain of command to the President, with control generally provided by removal at will.").
[106] See *Lucia*, 585 U.S. at 241 (describing as "extensive" powers wielded by SEC ALJs, which are also wielded by FTC ALJs).
[107] *Axon*, 598 U.S. at 181; *In re Axon Enter., Inc.*, 2020 WL 5406806, at *3.
[108] See *supra* I.A & n. 10.

Finally, the majority dismisses the Fifth Circuit's decision in *Jarkesy* forbidding dual-layer tenure protections for SEC ALJs on multiple grounds.[109] All miss the mark.

The Commission argues that *Jarkesy* does not apply because FTC ALJs are distinguishable from SEC ALJs. But SEC and FTC ALJs are far more similar than they are different. *Jarkesy* held that SEC ALJs are "sufficiently important to executing the laws" that they must be subject to the President's control because they "exercise considerable power over administrative case records by controlling the presentation and admission of evidence; they may punish contemptuous conduct; and often their decisions are final and binding."[110] FTC ALJs similarly exercise extensive control over our case records. They have the power to control discovery; to admit and exclude evidence; to punish contemnors; and to rule on "all procedural and other motions" "as justice may require."[111]

These similarities do not matter, the majority argues, because of one "essential distinction" between the two species of ALJ: "[FTC] ALJs' FTC Act decisions are recommendatory only, while … SEC ALJs' decisions are 'often … final and binding.'"[112] But this distinction is not tied to the law-execution functions that the ALJs perform. FTC and SEC ALJs do the same things in their respective hearing rooms. They exercise the same on-the-ground executive authority over litigants.

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[109] The majority disagrees with *Jarkesy* on the merits, but also argues that it is "particularly unsuitable" to rely on *Jarkesy* because the Supreme Court affirmed the Fifth Circuit on a different ground. *SEC v. Jarkesy*, 144 S. Ct. 2117, 2139 (2024) ("We do not reach the remaining constitutional issues and affirm the ruling of the Fifth Circuit on the Seventh Amendment ground alone."). I do not understand this argument. The Fifth Circuit's removal holding remains good law. *In re Bonvillian Marine Serv., Inc.*, 19 F.4th 787, 792 (5th Cir. 2021) (holding that a court of appeals decision remains binding unless unequivocally overruled by the Supreme Court); see also *Energy Transfer, LP v. NLRB*, No. 3:24-cv-198, 2024 WL 3571494, at *2 n. 2 (S.D. Tex. July 29, 2024) (*Jarkesy*'s removal holding remains good law); *Space Exploration Technologies Corp. v. NLRB*, No 6:24-cv-203, 2024 WL 3512082, at *2 n.1 (W.D. Tex. July 23, 2024) (same). And a huge proportion of Commission actions are reviewed by the Fifth Circuit. Indeed, a suit raising this precise question is pending in a U.S. District Court in Texas right now. Compl., *Tempur Sealy Int'l, Inc. v. FTC*, No. 4:24-cv-0376 (S.D. Tex. Oct. 4, 2024). Ignoring Fifth Circuit precedent, as the Commission suggests we should, seems like a poor strategy.

[110] *Jarkesy*, 34 F.4th at 464.

[111] See, e.g., 16 C.F.R. §§ 3.42(c), (d), (h); *id.* §§ 3.43(b), (c), (d); *id.* § 3.44.

[112] Maj. Op. at 10 (quoting *Jarkesy*, 34 F.4th at 464). The majority cites *Lucia* for the proposition that "last-word capacity" is "critical[ ]" to "assessing the level of authority that an official wields." Maj. Op. at 10, n.19. This argument seriously misapprehends *Lucia*. The question in *Lucia* was not whether Congress may impose more onerous removal protections on some officers than on others. It was whether ALJs are officers of the United States at all. FTC ALJs undoubtedly are officers of the United States, and the majority does not dispute that. The absence of last-word authority is a key distinction between inferior and principal officers. See *Edmond*, 520 U.S. at 665 (holding that absence of authority to render a final decision is one feature distinguishing inferior from principal officers); see also *Lucia*, 585 U.S. at 246–49 (holding that an official qualifies as an inferior officer even without the power to render final, binding decisions); *Freytag*, 501 U.S. at 881–82 (similar). The holding in *Lucia* was merely that because an official without "last-word capacity" still qualifies as an inferior officer, an ALJ's "last word-capacity makes" an ALJ's status as an inferior officer "an *a fortiori* case." *Lucia*, 585 U.S. at 249. Nothing in *Lucia*, any other case, Article II's ratification history, nor the Decision of 1789 supports the majority's view that the President's power to supervise and direct subordinate officers—of which the removal power is a component—does not apply to non-final decision makers. Indeed, the opposite is true. *Seila Law LLC*, 591 U.S. at 228 ("[T]ext, first principles, the First Congress's decision in 1789, *Myers*, and *Free Enterprise Fund* all establish that the President's removal power is the rule, not the exception.").

They adjudicate disputes, write findings of fact and conclusions of law, and issue an order.[113] They have the power to control discovery, admit and exclude evidence, punish contemnors, preside over hearings and trials, and rule on substantive and procedural motions.[114] Their law-execution functions are effectively identical. And although the majority makes much of the fact that FTC ALJ "[d]iscovery and evidentiary rulings may be brought to the Commission for interlocutory review,"[115] the same is true for SEC ALJs.[116]

The majority's distinction instead turns on how the Commission and the SEC review the decisions of their respective ALJs. When the SEC adjudicates a matter, the ALJ issues an "initial decision" that "must set out findings and conclusions about all material issues of fact and law" and include "the appropriate order, sanction, relief, or denial thereof."[117] The SEC then reviews the decision either upon the request of the losing party or *sua sponte*.[118] If it declines to review the decision, then the ALJ's initial decision "is deemed the action of the" SEC and treated as final.[119] Our adjudicative process is very similar. The Commission ALJ adjudicates the dispute and issues a "recommended decision" containing the same material as the SEC ALJ's decision, which the Commission may either "adopt, modify, or set aside" on review.[120]

The distinction between "initial" and "recommended" decisions is not meaningful. We called FTC ALJ decisions "initial" up until last year.[121] Before the Commission changed the lingo, the Commission and SEC conducted their adjudications almost identically. FTC ALJ decisions could become final if the Commission decided not to review them.[122] But any time the Commission reviewed an ALJ initial decision, which we frequently did, that decision was no less recommendatory than now. We reviewed initial decisions *de novo* just as we now do recommended decisions.[123] Treating the change from "initial decision" to "recommended decision" as constitutionally dispositive, without changing anything else, is empty formalism.

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[113] See *Axon*, 598 U.S. at 181 (discussing similarity of functions of FTC and SEC ALJs).
[114] See *supra* I.A (describing FTC ALJ powers); *Lucia*, 585 U.S. at 241–42 (describing SEC ALJ powers); compare, e.g., 16 C.F.R. § 3.42 (powers of FTC ALJs), with 17 C.F.R. § 201.111 (power of SEC ALJs).
[115] Maj. Op. at 6.
[116] 16 C.F.R. § 3.23 (interlocutory appeals at FTC); 17 C.F.R. § 201.321 (objections and offers of proof at SEC); *id*. § 201.400 (interlocutory review at SEC).
[117] *Lucia*, 585 U.S. at 242 (quotation marks omitted).
[118] *Ibid*.
[119] *Ibid.* (quotation marks omitted).
[120] 16 C.F.R. §§ 3.51(a)(1), 3.54(a).
[121] In July 2023, the Commission amended its procedural rules to change the name of the ALJ's decision from "initial decision" to "recommended decision," and to require the Commission to review every ALJ decision rather than declining review and treating ALJ decisions as Commission decisions in the absence of review. 88 Fed. Reg. 42872, 42873–74, 42876–77 (July 5, 2023).
[122] 74 Fed. Reg. 1804, 1834 (Jan. 13, 2009).
[123] See e.g., Commission Order Returning the Matter to Adjudication, Vacating the Initial Decision, and Dismissing the Complaint, *In the Matter of Altria Group, Inc. and JUUL Labs, Inc.*, at 2 n.4 (June 30, 2023) ("When the Commission does rule on the merits of an appeal, it reviews the ALJ's findings of fact and conclusions of law *de novo*, considering 'such parts of the record as are cited or as may be necessary to resolve the issues presented. On appeal from an initial decision, the Commission exercises all the powers which it could have exercised if it had made the initial decision." (cleaned up) (citing 16 C.F.R. § 3.54(a))).

The majority's argument ultimately is not about the ALJs' power. It is about the Commission's mode of review. The mode of review does not change the power of the ALJ in the hearing room. Nor are the modes of review at the Commission and SEC meaningfully different today. When we exercise our authority to "adopt" a recommendation because we agree with it, we are performing substantially the same act as the SEC when it refuses to review an ALJ decision with which it agrees, knowing that the refusal ratifies the underlying ALJ decision. The fact that we must announce that we are adopting an ALJ's decision, whereas the SEC may adopt an ALJ's decision through declination, does not alter the extent of the ALJs' executive authority in the first instance.

Multilevel tenure protections for FTC ALJs unconstitutionally deprive the President of his Article II authority to supervise and direct those officers. I therefore dissent from the Commission's order holding that Section 7521 is consistent with the Constitution.

III

Section 7521's unconstitutionality does not end the matter. We must further decide what to do about it. Respondents argue that the only remedy is to disqualify Commission ALJs from adjudicating cases.[124] I disagree. Instead, we should apply the "'normal rule'" of "severing" the unconstitutional provision of the challenged statute "'while leaving the remainder intact.'"[125] I therefore concur in the Commission's order denying Respondents' motion to disqualify Judge Himes.

A

"A statute bad in part is not necessarily void in its entirety."[126] When courts and adjudicative agencies determine that a statute is inconsistent with the Constitution, they "should refrain from invalidating more of the statute than is necessary" to address the constitutional flaw.[127] Thus, "[w]henever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional," courts and agencies must "maintain the act in so far as it is valid."[128]

The severability doctrine is an inquiry into congressional intent, albeit an unusual one. We ask what the legislature would have intended had it known it could not enact the unconstitutional provision. "Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as law."[129] If the rest of the statute "is incapable of functioning independently" of the unconstitutional provision, then that provision cannot be severed.[130] "In conducting [the legislative intent] inquiry, we ask whether the law remains fully operative without

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[124] Resp'ts' Mot. to Disqualify ALJ, *supra* note 28, at 7–9; see also Suggestions in Supp. of Mot. for Prelim. Inj., *H&R Block Inc. v. Himes*, 4:24-cv-198, at 12 (W.D. Mo. March 20, 2024).
[125] *Free Enter. Fund*, 561 U.S. at 508 (quoting *Champlin Refining Co. v. Corp. Comm'n of Okla.*, 286 U.S. 210, 234 (1932), and *Ayotte v. Planned Parenthood of Northern New Eng.*, 546 U.S. 320, 328–29 (2006)).
[126] *Dorchy v. Kansas*, 264 U.S. 286, 289 (1924).
[127] *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1987) (plurality op.).
[128] *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987) (cleaned up).
[129] *Ibid*.
[130] *Ibid.*

the invalid provisions, but we cannot rewrite a statute and give an effect altogether different from that sought by the measure viewed as a whole."[131]

Where Congress expressly addresses severability in the statute, this "inquiry is straightforward."[132] No "imaginative[] reconstruct[ion of] a prior Congress's hypothetical intent" is necessary.[133] Where Congress is silent on severability, the matter is more difficult. "[E]xperience shows that" the exercise of imaginative reconstruction in the absence of express statutory direction "often leads to an analytical dead end."[134] The Supreme Court has therefore developed "a strong presumption of severability" that applies in all but the "fairly unusual" cases in which a law could not operate at all without the unconstitutional provisions.[135]

This "normal rule" of "partial, rather than facial, invalidation" applies with particular force in removal challenges.[136] Given that "the traditional default rule" in our constitutional system is that "removal is incident to the power of appointment," severing provisions that prevent the appointing officer from removing the appointed officer simply restores the ordinary constitutional rule; the remainder of the statute can operate perfectly well under that ordinary rule.[137] The Supreme Court has applied this rule to sever unconstitutional removal provisions in each case where it confronted the question.[138] That is presumptively the correct approach here.

B

Respondents resist the "normal rule" by arguing that Congress would have scrapped ALJs entirely had it known that the removal provisions were unconstitutional. ALJ independence from their agency heads, Respondents reason, was the key feature of the APA and CSRA reforms to the administrative-adjudication system.[139] Congress therefore would have preferred that the agencies not employ ALJs at all and adjudicate every case directly rather than employ ALJs who are little more than "agency foot-soldiers" entirely "subservient to the agency heads."[140]

This argument does not cohere. First, if the indispensable feature of the APA and CSRA reforms were ensuring that agency adjudications are conducted semi-independently of the agency heads, one would not expect Congress to permit agency heads to control those adjudications directly. After all, if Congress was trying to solve the problem of agency heads influencing adjudications, giving agency heads the power to adjudicate directly would make the problem orders of magnitude worse. Yet, Congress did precisely that. The Commission may preside directly over every single administrative proceeding if it sees fit.[141] That Congress gave agency heads the

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[131] *N.J. Thoroughbred Horsemen's Ass'n v. Nat'l Collegiate Athletic Ass'n*, 584 U.S. 453, 481–62 (2018) (cleaned up).
[132] *Barr v. Am. Ass'n of Political Consultants, Inc.*, 591 U.S. 610, 624 (2020) (plurality op.).
[133] *Id.* at 625.
[134] *Ibid.*
[135] *Id.* at 625, 628.
[136] *Free Enter. Fund*, 561 U.S. at 508 (quotation marks omitted).
[137] *Id.* at 509.
[138] *Ibid.*; *Seila Law LLC*, 591 U.S. at 234–35.
[139] Resp'ts' Mot. to Disqualify ALJ, *supra* note 28, at 7–8.
[140] *Id.* at 8 (quotation marks omitted).
[141] See 5 U.S.C. §§ 556(b)(1), 557(b).

authority to wield the ALJs' powers directly strongly suggests that semi-independence was not the *sine qua non* of the ALJ system. It was doubtlessly a key feature of it,[142] but not indispensable.

Second, Respondents do not tell the whole story about why Congress wanted the ALJs to enjoy semi-independence. There was widespread concern that federal agencies enjoyed the power to investigate violations of the laws, prosecute violators, and adjudicate those prosecutions—and often used the same people to perform all three functions.[143] Congress sought in the APA to "curtail and change" the "administrative evil[ ] … of embodying in one person or agency the duties of prosecutor and judge."[144] It did so by requiring agencies to separate the ALJs from officers with investigative and prosecutorial functions.[145] Respondents' proposal would undermine this key feature of Congress's reform. If Commissioners had to adjudicate every single matter directly, as Respondents contend, then we would necessarily be commingling the Commission's investigative, prosecutorial, and adjudicative functions in every case.[146] That commingling is precisely the evil Congress sought to restrain in the APA and CSRA. Severing the removal restrictions and leaving the rest of the statutes intact preserves the structural separation that was so important to Congress.

Finally, Respondents' argument that Congress was "reforming the old system" of administrative adjudication rather than "creating a new system" cuts in favor of severability, not against it.[147] Administrative agencies have conducted adjudications since the founding of the Republic,[148] and the predecessor "position of hearing examiner[]" was "a creature of congressional

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[142] See *Lucia*, 585 U.S. at 259–60 (Breyer, J., concurring in the judgment in part and dissenting in part).

[143] See, e.g., *Wong Yang Sung v. McGrath*, 339 U.S. 33, at 41–42 (1950) (discussing widespread concern on comingling of prosecution and adjudication within executive-branch agencies), judgment modified on other grounds by 339 U.S. 908 (1950); Final Report of the Attorney General's Committee on Administrative Procedure 55–58 (1941) (discussing problems inherent in commingling prosecutorial and adjudicative functions); Emily S. Bremer, Presidential Adjudication, 110 Va. L. Rev. ___ (forthcoming 2024), draft at 13–15 (C. Boyden Gray Center for the Study of the Administrative State Research Paper No. 24-04, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id= 4726519; Jeremy Rabkin, The Origins of the APA: Misremembered and Forgotten Views, 28 Geo. Mason L. Rev. 547, 554 (2021).

[144] *Wong Yang Sung*, 339 U.S. at 41.

[145] See 5 U.S.C. § 554(d) (enumerating structural requirements).

[146] Congress left open the possibility that the Commission or individual Commissioners may act as adjudicators in individual cases. See 5 U.S.C. § 556(b). But we have invoked this option only rarely. See, e.g., Order Designating Presiding Official, *In the Matter of Equitable Resources, Inc., Dominion Resources, Inc., Consolidated Natural Gas Company, and The Peoples Natural Gas Company*, FTC Docket No. 9322 (Apr. 13, 2007), https://www.ftc.gov/sites/default/files/documents/cases/2007/04/070416equitableresorderdesignatingpresidingfffl.pdf; Order Designating Administrative Law Judge, *In the Matter of Inova Health Systems Foundation and Prince William Health System, Inc.*, FTC Docket No. 9326 (May 9, 2008), https://www.ftc.gov/sites/default/files/documents/cases/2008/05/080509order.pdf; Order Rescinding Stay of Administrative Proceeding, Setting Scheduling Conference, and Designating Presiding Official, *In the Matter of Whole Foods Market, Inc., and Wild Oats Markets, Inc.*, FTC Docket No. 9324 (Aug. 8, 2008), https://www.ftc.gov/sites/default/files/documents/cases/2008/08/080808wholefoodsorder.pdf. Respondents' argument would make this the only option and require commingling of functions in every case.

[147] Resp'ts' Mot. to Disqualify ALJ, *supra* note 28, at 8.

[148] See, e.g., *City of Arlington*, 569 U.S. at 304 n.4 ("Agencies … conduct adjudications … and have done so since the beginning of the Republic."); Jerry L. Mashaw, Recovering American Administrative Law: Federalist Foundations, 1787-1801, 115 Yale L.J. 1256, 1298 (2006) (explaining that in 1794, Congress created two relief funds, one for victims of the Saint Domingo rebellion and another for victims of the Whiskey Rebellion, to be disbursed by the President according to broad, discretionary criteria, an early example of administrative adjudication).

enactment" long before the APA.[149] Pre-APA statutes governed hearing examiners' tenure, status, compensation, and promotion.[150] Respondents nevertheless argue that the Congress which adopted the APA would have eliminated the longstanding hearing-officer system entirely rather than adopt all of the APA reforms other than the removal protections. This argument beggars belief. Respondents give no plausible explanation for why Congress would have preferred to destroy entirely the hearing-officer system rather than retain it with most of the APA's and CSRA's reforms.

Admittedly, imaginatively reconstructing congressional intent is a difficult undertaking.[151] After all, "[a]scertainment of the intention of Congress in this situation is impossible. It is to indulge in a fiction to say that it had a specific intention on a point which never occurred to it."[152] Resting the outcome of cases on this fictive thought exercise has been justly and roundly criticized.[153] Nevertheless, the doctrine requires that we do the best we can.[154] Excluding ALJs entirely from administrative adjudication would exacerbate all of the evils Congress sought to address in the APA and CSRA. Severing only the removal provisions is the "normal rule" and vindicates at least some of the objectives that animated the passage of those acts. I therefore conclude Congress likely would have "enacted those provisions which are within its power, independently of that which is not."[155] Section 7521 is therefore severable.

IV

Finally, the Chair separately objects to my argument. Most of her statement regurgitates the majority's position. But at the close, she catalogues a series of my previous statements and

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[149] *Ramspeck*, 345 U.S. at 133; see also *Fleming*, 987 F.3d at 1116 (Rao, J., concurring in part and dissenting in part).
[150] *Ramspeck*, 345 U.S. at 130.
[151] *Barr*, 591 U.S. at 625 (plurality op.) ("[C]ourts are not well equipped to imaginatively reconstruct a prior Congress's hypothetical intent.").
[152] *Western Union Tele. Co. v. Lenroot*, 323 U.S. 490, 508 (1945) (Jackson, J.).
[153] See *Barr*, 591 U.S. at 652–53 & n.* (Gorsuch, J., concurring in the judgment in part and dissenting in part) (discussing criticisms); *N.J. Thoroughbred Horsemen's Ass'n*, 584 U.S. at 488–91 (Thomas, J., concurring) ("[T]he severability doctrine does not follow basic principles of statutory interpretation. Instead of requiring courts to determine what a statute means, the severability doctrine requires courts to make 'a nebulous inquiry into hypothetical congressional intent.'" (quoting *United States v. Booker*, 543 U.S. 220, 320 n.7 (2005) (Thomas, J., dissenting in part)).
[154] Modern severability doctrine rests on shaky foundations. See *N.J. Thoroughbred Horsemen's Ass'n*, 584 U.S. at 488–91 (Thomas, J., concurring). Courts do not have the power to strike down statutes as "invalid" and treat them as "erase[d] … from the statute books." Jonathan Mitchell, The Writ-of-Erasure Fallacy, 104 Va. L. Rev. 933, 936 (2018). Courts have the power to decide the cognizable legal rights of parties in justiciable cases, and "to give parties remedies to prevent or alleviate legally cognizable harms." John Harrison, Severability, Remedies, and Constitutional Adjudication, 83 Geo. Wash. L. Rev. 56, 82 (2014). Where a party in a justiciable controversy demonstrated that enforcing a statute against him would violate his constitutional rights, the traditional approach was for a court to treat the offending statute as having been displaced by the superior law of the Constitution, to grant a remedy sufficient to prevent the law from having an effect in the particular case, and to say nothing about other provisions of the statute that were not claimed to be unconstitutional. See Kevin C. Walsh, Partial Unconstitutionality, 85 N.Y.U. L. Rev. 738, 769 (2010). Indeed, addressing unchallenged provisions of the statute may create constitutional problems of its own because the party maintaining the suit may lack standing to attack other parts of the statute. *N.J. Thoroughbred Horsemen's Ass'n*, 584 U.S. at 490–91 (Thomas, J., concurring). The parties agree, however, that severability doctrine provides the answer to the question whether the ALJ ought to be disqualified. See Resp'ts' Mot. to Disqualify ALJ, *supra* note 28, at 7–9; Compl. Counsel's Resp. to Resp'ts' Mot. to Disqualify the Admin. Law Judge, *In the Matter of H&R Block Inc., et al.*, FTC Docket No. 9427, at 5 (Apr. 5, 2024).
[155] *Alaska Airlines*, 480 U.S. at 684 (quotation marks omitted).

contends that I am insufficiently solicitous of the Commission's power, i.e., the administrative state.[156] He principal example is my dissent from the majority's failed Noncompete Rule, which multiple courts have since declared unlawful.[157]

I reject the Chair's insistence on supine deference to her policy preferences and legal theories. I swore the same oath as "all executive … Officers … of the United States … to support th[e] Constitution."[158] I am bound by that oath to follow and obey "the supreme Law of the Land" wherever it may lead.[159] When a federal statute conflicts with the Constitution, the executive branch must obey the superior law of the Constitution.[160]

My allegiance is to the Constitution, not to the administrative state. The "direction" in which I wish to "steer" the Commission is towards the Constitution, rather than away from it.[161] When the majority proposes sound policy consistent with the law, I will vote for it and defend it.[162] When the majority violates the commands of Congress or of the Constitution, I will dissent and explain why.[163] Dissenting in those circumstances is what my oath requires.

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[156] Statement of Chair Lina M. Khan, Joined by Comm'r Alvaro Bedoya, Concurring in the Denial of the Motion, *In the Matter of H&R Block, Inc., et al.*, FTC Docket No. 9427, at 3 (Oct. 18, 2024) (hereinafter "Chair's Statement") ("Strikingly, these positions all point in the direction of undermining the FTC and its authorities.").

[157] The Chair suggests that the U.S. District Court for the Middle District of Florida "reject[ed]" my statutory arguments against the Noncompete Rule. *Id*. at 3 n.20. But in preliminarily enjoining the Noncompete Rule, the district court expressly adopted one of my statutory arguments—that the majority's interpretation of the FTC Act violated the major-questions doctrine—and invoked my dissent in its ruling. See Excerpt of Proceedings, No. 5:24-cv-316, 2024 WL 3870380, at *6 (M.D. Fla. Aug. 15, 2024); Dissenting Statement of Comm'r Andrew N. Ferguson, Joined by Comm'r Melissa Holyoak, In the Matter of the Non-Compete Clause Rule, Matter No. P201200, at 11–14 (June 28, 2024) (hereinafter "Ferguson Non-Compete Rule Statement"), https://www.ftc.gov/system/files/ftc_gov/pdf/ferguson-noncompete-dissent.pdf.

[158] U.S. Const. art. VI, cl. 3; see also 5 U.S.C. § 3331 (text of the oath).

[159] See, e.g., Saikrishna Prakash, The Executive's Duty to Disregard Unconstitutional Laws, 96 Geo. L.J. 1613, 1616–17 (2008) ("[T]he Constitution actually requires the President to disregard unconstitutional statutes. … [H]e violates his constitutional oath when he enforces a law he regards as unconstitutional. Because the Constitution effectively obliges [him] to do no constitutional harm, he cannot execute unconstitutional laws."); see also *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803) ("It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the constitution, have that rank. Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument.").

[160] See The Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation, 4A Op. O.L.C. 55, 56 n.1 (1980) ("If an Act of Congress directs or authorizes the Executive to take action which is 'transparently invalid' when viewed in light of established constitutional law, I believe it is the Executive's constitutional duty to decline to execute that power."); Presidential Authority to Decline to Execute Unconstitutional Statutes, 18 Op. O.L.C. 199, 200 (Nov. 2, 1994) (the executive "is required to act in accordance with the laws—including the Constitution, which takes precedence over other forms of law. This obligation is reflected … in the … oath of office.").

[161] Chair's Statement at 3.

[162] See Concurring Statement of Comm'r Andrew N. Ferguson, In the Matter of Amendments to the Premerger Notification and Report Form and Instructions, and the Hart-Scott-Rodino Rule 16 C.F.R. Parts 801 and 803, Matter No. P239300 (Oct. 10, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/ferguson-final-hsr-rule-statement.pdf.

[163] See Ferguson Non-Compete Rule Statement.

If the Chair believes that my dissents improve the odds of litigants challenging her legal theories in court, she should reconsider her legal theories.

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Self-government requires, at a minimum, that the President control the executive branch. The power to control necessarily includes the power to remove. Multilevel tenure protections for FTC ALJs unconstitutionally interfere with that power. Because those protections are severable, however, I concur in the denial of the motion to disqualify Judges Himes.