[NOT YET SCHEDULED FOR ORAL ARGUMENT]

No. 25-5165

In the United States Court of Appeals for the District of Columbia Circuit

SUSAN TSUI GRUNDMANN,

Plaintiff-Appellee,

v.

DONALD J. TRUMP, in his official capacity as President of the United States, et al.,

Defendants-Appellants.

On Appeal from the United States District Court for the District of Columbia

Brief of *Amicus Curiae* Professor Jane Manners in Support of Plaintiff-Appellee

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel for *amicus curiae* certifies as follows:

A. Parties and Amici

Except for the amicus submitting this brief and any other amici who had not yet entered an appearance in this case as of the filing of this brief, all parties, intervenors, and amici appearing before the district court and this Court are listed in appellants' brief and/or appellee's brief.

B. Rulings Under Review

References to the ruling at issue appear in appellants' brief and/or appellee's brief.

C. Related Cases

Any related cases are listed in appellants' brief and/or appellee's brief.

Dated: October 10, 2025

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* states that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

STATEMENT REGARDING CONSENT TO FILE AND SEPARATE BRIEFING

Pursuant to D.C. Circuit Rule 29(a), *amicus curiae* represents that counsel for all parties have consented to the filing of this brief.

Pursuant to D.C. Circuit Rule 29(d), *amicus curiae* certifies that a separate brief is necessary due to the expertise and interests of amicus, as set forth below in the section titled, "INTEREST OF *AMICUS CURIAE*."

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Jane Manners is an Associate Professor of Law at Fordham University School of Law. Professor Manners teaches and writes extensively on early American understandings of presidential power, including the evolution of laws governing officer removal. She holds a J.D. and B.A. from Harvard University and a Ph.D. in American history from Princeton University.

Professor Manners submits this brief to inform the Court of the history of presidential removal authority and "inefficiency, neglect of duty, or malfeasance in office" removal language Congress has used when creating independent agencies. Professor Manners has no personal interest in the outcome of this case.[1]

SUMMARY OF ARGUMENT

No constitutional concern was raised when Congress created the first independent agency in 1887. Despite extensive debate, no one questioned Congress's ability to create offices whose holders could be

[1] No party or counsel for any party authored this brief in whole or in part, and no person other than Amicus and undersigned counsel made a monetary contribution intended to fund the preparation or submission of this brief. This brief does not purport to convey the position of New York University School of Law.

removed only for "inefficiency, neglect of duty, or malfeasance in office." In the years since, Congress has created, the President has signed into law, and the Supreme Court has generally upheld, more than thirty federal agencies with similar removal standards.

The history of inefficiency, neglect, and malfeasance removal provisions – so familiar to Congress in 1887 – has faded, so much so that the Supreme Court wrote in *Seila Law* that no "workable standard" derived from the terms had been identified. *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 229-30 (2020). This brief presents the history of the terms, supplies the missing standard, and demonstrates why the structure of the Federal Labor Relations Authority is constitutional.

Appellants' argument that the President must have unfettered power to remove federal officers would have been entirely foreign to the Framers. The Framers were versed in the British legal tradition in which offices granted for a term of years were not removable, even by the King. This concept of inviolable terms of office persisted in early state constitutions and Founding Era jurisprudence. The Constitution's text, Framers' writings, and early legislative debate

all reflect the understanding that Congress has the power to create offices with fixed tenures and to set the terms under which the President may remove such officers.

The Federal Service Labor-Management Relations Statute's references to removal "for inefficiency, neglect of duty, or malfeasance in office," 5 U.S.C § 7104(b), are therefore properly understood not as *restrictions* on an inherent presidential removal power, but rather as legislated *permissions* that allow presidential removal in discrete circumstances. The constitutional question is whether those permissions adequately accommodate the President's duty to ensure that the laws are faithfully executed.

The historical record demonstrates that the removal standards of neglect of duty, and malfeasance in office articulate the meaning of faithful execution. They draw on a rich body of common law that gives them content and meaning. Neglect and malfeasance, together with the broader term inefficiency, do not allow the President to terminate an officer for mere disputes over policy. But they do allow the President to faithfully execute the law by removing an officer who, in failing to do his duty, causes specific harm (neglect), acts unlawfully

in the performance of his duties (malfeasance), or engages in wasteful mismanagement (inefficiency). These removal permissions express what it means to faithfully execute the law, and thus accommodate the President's duty of faithful execution.

Congress has not been on a 150-year unconstitutional legislating spree. A long history establishes that the structure of the Federal Service Labor-Management Relations Statute and dozens of similar statutes strikes an appropriate balance between agency independence and the President's constitutional duty.

ARGUMENT

The Constitution should be interpreted "in light of its text, purposes, and our whole experience as a Nation," and informed by "the actual practice of Government." *NLRB v. Noel Canning*, 573 U.S. 513, 557 (2014) (cleaned up). Accordingly, the Supreme Court "*put[s] significant weight upon historical practice*" when considering "the allocation of power between two elected branches of Government." *Id.* at 524. This principle "is neither new nor controversial," *id.* at 525, and enables this Court to draw on historical practice to illuminate the Constitution's values and guide application of its principles,

particularly on "doubtful question[s] . . . on which human reason may pause." *Id.* at 524 (quoting *McCulloch v. Maryland*, 17 U.S. 316, 401 (1819)).

I.

HISTORICAL EVIDENCE OF CONGRESS'S POWER TO SET REMOVAL CONDITIONS

The Constitution does not enumerate a power to remove officers, short of impeachment. Appellants assume that near absolute removal power is a necessary attribute of the executive power that is vested in the President. (Appellants' Opening Br. 10-11.) But that assumption cannot be reconciled with the Constitution's text, pre-constitutional history, the Framers' expressed intentions, or the actions of the early Congress, all of which show that Congress has the power to determine office tenures and conditions of removal.

A. The Constitution Does Not Imply an Indefeasible Presidential Removal Power

While the Framers enumerated specific presidential powers, including several that might seem obviously within the realm of the

executive, such as the powers to command the armed forces and to receive dignitaries,[2] they did not include a removal power.

The Framers' inclusion of the Opinions Clause indicates that they did not understand the President to have an absolute removal power.[3] Central among the three exclusive powers listed in the first paragraph of Article II, Section 2 is the President's power to "require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Office."[4] That power is decidedly less expansive than removal. If the President had full removal power, he would not need to ask for officers' opinions in writing. The President could simply demand an opinion (or anything else) and dismiss anyone who did not comply, and thus there would be no need for the Opinions Clause.

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[2] U.S. Const. art. II, §§ 2-3.

[3] *See* Zachary J. Murray, *The Forgotten Unitary Executive Power: The Textualist, Originalist and Functionalist Opinions Clause*, 39 Pace L. Rev. 229, 253-54 (2018); Jed H. Shugerman, *Venality: A Strangely Practical History of Unremovable Offices and Limited Executive Power*, 100 Notre Dame L. Rev. 213, 220, 279-85 (2024) [hereinafter *Venality*] (pointing out that in early state constitutions, opinions clauses were part of provisions creating department independence from the Governor).

[4] U.S. Const. art. II, § 2, cl. 2.

In addition, the Framers gave the President only a limited power over appointments. The Constitution places the President's appointment power not within the unilateral powers of the first paragraph of Section 2, but within the qualified, shared powers of the second paragraph. The President's appointment power is constrained by the legislature and may be exercised only in consultation with the Senate or at the behest of a statute.[5] An *unlimited* removal power cannot logically be inferred as the incident to a *limited* appointment power. If an asymmetric removal power that differed so markedly from the appointment power existed, one would expect to see it in writing.[6]

B. The British Model Does Not Imply an Executive Removal Power

The Constitution's silence on removal must be read in light of the prevailing late eighteenth-century Anglo-American

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[5] U.S. Const. art. II, § 2, cl. 2.

[6] Such asymmetry would violate the Founding Era legal principle that an unqualified power of appointment contained a symmetrical power to remove, since the appointer could simply remove, or "supercede," the incumbent by appointing a successor. Andrea Scoseria Katz, Noah A. Rosenblum & Jane Manners, *Disagreement and Historical Argument or How Not to Think About Removal*, 58 U. Mich. J. L. Reform 555, 562-63 (2025). Alexander Hamilton's expectation that "[t]he consent of [the Senate] would be necessary to displace as well as to appoint" reflected this approach. THE FEDERALIST NO. 77 (Alexander Hamilton).

understanding that an executive's power to remove officers was often limited and sometimes non-existent. In early modern England, offices were frequently granted for a period of years and considered property. A term of years was its holder's property and could be sold or inherited.[7] The King had no general right to dispossess the holder of his office, and the officeholder could not be removed absent impeachment or other extraordinary measure.[8] Even high-level executive officers, including regulators of trade, commerce, and infrastructure, could be removed by the King only for cause, if at all.[9] Parliament even established independent commissions to investigate abuses of office or compensate

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[7] Jane Manners & Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 Colum. L. Rev. 1, 18-20 (2021); *see* 3 MATTHEW BACON, A NEW ABRIDGEMENT OF THE LAW 732 (1740) (explaining that term of years is so secure it should be granted only to ministerial rather than judicial offices, since the holder could not be removed for misconduct, and if the officeholder died during their term, the office could be vacant during probate). *See also* Daniel D. Birk, *Interrogating the Historical Basis for a Unitary Executive*, 73 Stan. L. Rev. 175, 204-14 (2021); Shugerman, *Venality*, *supra* note 3, at 220, 270-74.

[8] Manners & Menand, *supra* note 7, at 18-19.

[9] Birk, *supra* note 7, at 204-214; *see also* Shugerman, *Venality*, *supra* note 3, at 259-68 (identifying high-level "department heads" that were unremovable by the King).

citizens, with commissioners appointed by Parliament and unremovable by the King.[10]

Removal power, in short, was not an inherent attribute of monarchical executive power. William Blackstone, the renowned English jurist – who described the King as the "supreme Executive Magistrate" and vested with the whole of the executive power[11] – included in his list of royal prerogatives appointment but not removal.[12] The Framers were well aware of British law protecting office holders,[13] and not one of their reference books suggested that the executive had,

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[10] Birk, *supra* note 7, at 182-83, 225-28.

[11] 1 WILLIAM BLACKSTONE, COMMENTARIES *242-43, *322, *338.

[12] *Id.* at *272; *see* Birk, *supra* note 7, at 182, 197-202. *See also* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849, 859-60 (1989) (making the originalist case for defining executive power by reference to Blackstone's list of royal prerogatives).

[13] British statute books served as references in the library at the Constitutional Convention and were discussed during ratification and in the Federalist Papers. *See* James E. Pfander & Daniel D. Birk, *Article III and the Scottish Judiciary*, 124 Harv. L. Rev. 1613, 1660-61 (2011). Montesquieu – described by Madison as "[t]he oracle who is always consulted and cited" on the subject of separation of powers, THE FEDERALIST NO. 47 (James Madison), and one of the Founders' greatest influences – defended indefeasible offices and considered removal at will "despotic." 1 BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 100 (London, J. Nourse & P. Vaillant 1750) (1748); *see generally* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 244-87 (1997).

or should have, an exclusive or indefeasible power of removal.[14] To the extent the Framers based the presidency on the British monarchy, that model did not include an indefeasible removal power, and the Framers would not have expected it for the President.[15]

C. The Framers Understood that Office Tenures and Removals Would Be Set by Legislation

In Revolutionary America, the concept of an inviolable term of years office persisted, as seen in early state constitutions and the writing of Founding Era jurists.[16] The Framers believed that the government's power derived from the people and that its offices were regulable by the legislature. As described by James Madison:

> [W]e may define a republic to be . . . a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices

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[14] Shugerman, *Venality*, *supra* note 3, at 212-14 (surveying the "Founders' Bookshelf").

[15] As Professor Shugerman asks: "If the Framers relied on the English king as a model, why would they have reduced and divided up so many of the explicit powers derived from Blackstone's list of the king's prerogatives (like war, treaty, and appointment)" but then given the President *more* power than the King with respect to removal, "not listed by Blackstone at all?" Jed H. Shugerman, *Removal of Context: Blackstone, Limited Monarchy, and the Limits of Unitary Originalism*, 33 Yale J. of L. & the Humanities 126, 131 (2022).

[16] Manners & Menand, *supra* note 7, at 20-21.

> during pleasure, for a limited period, or during good behavior . . . . *The tenure of the ministerial offices generally, will be a subject of legal regulation*, conformably to the reason of the case and the example of the State Constitutions.[17]

Madison articulates the common understanding that the legislature would set the terms of an office according to the nature of the office. In the First Congress, Madison proposed that the Comptroller of the Treasury "should hold his office during ----- years, unless sooner removed by the President:"[18] a term of years, in other words, conditioned by removal permission. Madison's proposal reflects the presumption that a fixed-term office would not allow removal unless permitted by statute.[19]

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[17] THE FEDERALIST NO. 39 (James Madison) (emphasis added). Madison used "ministerial" as opposed to "judicial." Jed H. Shugerman, *The* Marbury *Problem and the Madison Solutions*, 89 Fordham L. Rev. 2085, 2095 (2021); *see also Marbury v. Madison*, 5 U.S. 137, 139, 150 (1803) (referring to the Secretary of State as a "ministerial officer").

[18] 1 Annals of Cong. 611 (1790) (Gales ed., 1834).

[19] Madison's passive-voice formulation echoes the compromise reached ten days earlier in the House of Representatives debate over the President's power to remove the Secretary of Foreign Affairs. This so-called "Decision of 1789" has been viewed as support for presidential removal power. *See Myers v. United States*, 272 U.S. 52, 144 (1926). But Professor Shugerman has shown that most members of the First Congress rejected the argument that Article II contains an implied presidential removal power. Rather, Madison, recognizing that

While Congress did not adopt Madison's specific formulation, it did employ his approach of combining a term of years with statutory removal permission. The First Congress created fixed-term offices.[20] When it intended fixed-term officers to be removable at-will, it said so explicitly. In the Judiciary Act of 1789, for example, Congress established that "a marshal shall be appointed in and for each district for the term of four years, but shall be removable from office at pleasure[.]" The second clause and its use of the word "but" underscores

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majorities of the House and Senate would reject any explicit declaration of presidential removal power, deleted a clause he had won in committee that explicitly provided for presidential removal. Madison instead proposed, and the House adopted, a deliberately ambiguous compromise that would permit his allies in the Senate – where hostility to the Senate's exclusion from removal decisions understandably ran high – to plausibly deny that the clause gave the President exclusive removal authority. *See* Jed. H. Shugerman, *The Indecisions of 1789: Inconsistent Originalism and Strategic Ambiguity*, 171 U. Pa. L. Rev. 753, 784-96 (2023). The common reading of the debate outcome – that the Constitution gives the President the power to remove officers at pleasure – is therefore mistaken because of faulty historical analysis. *See id.*; *see also* Jonathan Gienapp, *Making Constitutional Meaning: The Removal Debate and the Birth of Constitutional Essentialism*, 35 J. Early Republic 375, 379-82 (2015) (emphasizing the multiple, confused, and uncertain approaches to constitutional interpretation debate participants used).

[20] *See* CARL RUSSELL FISH, THE CIVIL SERVICE AND THE PATRONAGE 82-86 (1905).

the need to spell out the removal permission, which was not implied.[21] Congress used the same formulation in the Four Years' Law of 1820, which created dozens of jointly appointed officers, including district attorneys and customs collectors, who were "appointed for the term of four years, but shall be removable from office at pleasure."[22] Again, the inclusion of the second clause and the word "but" was required to clarify that the terms would not be inviolable, as might otherwise be assumed. Instead, Congress was granting permission to remove.

The understanding that the President cannot terminate a fixed-year term of office is seen in *Marbury v. Madison*. Marbury was appointed by President Adams to a five-year term as justice of the peace, but President Jefferson refused to deliver his commission, essentially seeking to remove him from office. Chief Justice Marshall explained that Marbury had a right to his office that the President could not terminate:

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[21] Judiciary Act of 1789, ch. 20, § 27 1 Stat. 73, 87. "An Act passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, . . . is contemporaneous and weighty evidence of its true meaning." *Marsh v. Chambers*, 463 U.S. 783, 790 (1983) (quotations omitted).

[22] Four Years' Law of 1820, ch. 102, § 1, 3 Stat. 582, 582.

> Where an officer is removable at the will of the Executive . . . the act is at any time revocable; and the commission may be arrested if still in the office. But when the officer is not removable at the will of the Executive, the appointment is not revocable, and cannot be annulled. It has conferred legal rights which cannot be resumed.
>
> The discretion of the Executive is to be exercised until the appointment has been made. But having once made the appointment, his power over the office is terminated in all cases, where, by law, the officer is not removable by him. . . . *[A]s the law creating the office, gave the officer a right to hold for five years, independent of the Executive, the appointment was not revocable*; but vested in the officer legal rights, which are protected by the laws of his country.

5 U.S. at 162 (emphasis added). Marbury, therefore, had "a vested legal right, of which the executive cannot deprive him." *Id.* at 172.[23]

Chief Justice Marshall's understanding of an inviolable fixed-term office was uncontroversial and widely accepted. It is

[23] *See* Shugerman, *supra* note 17, at 2086 (2021).

reflected in subsequent case law[24] and treatises.[25] Amicus has found no nineteenth-century case disavowing this understanding.

* * *

In sum, ample evidence shows the Framers understood and drew upon a legal tradition of fixed-term offices not removable by the executive. No evidence suggests otherwise. Removal was not discussed at the Constitutional Convention. Nor was it referenced in the

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[24] *See, e.g.*, *Townsend v. Kurtz*, 34 A. 1123, 1123-24 (Md. 1896) (fixed-term office was removable by language providing "unless sooner removed by the governor, treasurer, and comptroller"); *Speed v. Common Council of Detroit*, 57 N.W. 406, 408 (Mich. 1894) (fixed-term office without qualification is not removeable, even for cause); *Stadler v. City of Detroit*, 13 Mich. 346, 347 (1865) (Cooley, J.) (appointment of new marshal halfway through incumbent's two-year term did not remove incumbent, as "the term of the office being for two years, the council had no power to limit it to one").

[25] 2 JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS 791 (1911) ("the general rule is that where the power of appointment is conferred in general terms and without restriction, the power of removal, in the discretion and at the will of the appointing power . . . , is implied and always exists, unless restrained [by another law,] or by appointment for a fixed term") (emphases omitted); JAMES HART, TENURE OF OFFICE UNDER THE CONSTITUTION: A STUDY IN LAW AND PUBLIC POLICY 64-65 (1930) (recognizing "different degrees of independence of tenure" including "relative independence when the officer is chosen for a fixed term of years, and liable only to impeachment" and a "lower order . . . where the officer is subject to removal, but only for specified causes, after notice and public hearing").

ratification debates – a notable silence considering the Antifederalists' concerns about other Article II powers and concentration of power in the executive.[26]

The relevant question – addressed in Point II – is not whether Congress may limit the power of the President to remove executive branch officers. It is whether the removal permissions created by Congress are sufficient to accommodate the President's duty to see that the laws are faithfully executed. *See Morrison v. Olsen*, 487 U.S. 654, 691 (1988) ("[T]he real question is whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty, and the functions of the officials in question must be analyzed in that light."); *see also Seila Law*, 591 U.S. at 263 (Kagan, J., concurring in part) ("If a removal provision violates the separation of powers, it is because the measure so deprives the President of control over an official as to impede his own constitutional functions.").

[26] *See* Jonathan Gienapp, *Removal and the Changing Debate over Executive Power at the Founding*, 63 Am. J. Legal Hist. 229, 233-35 (2023); Shugerman, *Venality*, *supra* note 3, at 278-79.

II.

HISTORICAL EVIDENCE THAT THE INEFFICIENCY, NEGLECT, AND MALFEASANCE REMOVAL STANDARD IS IN HARMONY WITH ARTICLE II

Over thirty federal agencies' organic statutes feature some combination of inefficiency, neglect of duty, and malfeasance in their removal standards.[27] The Supreme Court in *Seila Law* considered whether this removal language unconstitutionally encroached on the President's duty to see that the laws are faithfully executed. The Court noted that neither the parties nor the amici had "advanced any workable standard derived from the statutory language." *Seila Law*, 591 U.S. at 229-30.

The workable standard is found in evidence that the terms have been used for hundreds of years by courts and legislatures to articulate what it means for officers to fail to "faithfully execute" their duties. The removal provisions are thus in harmony with the President's obligations. They strike a balance, allowing officers necessary independence from political meddling while allowing the

[27] Manners & Menand, *supra* note 7, at 9-10 & App'x B.

President to terminate an officer who fails to faithfully execute the law.[28]

A. Common Law and State Law Roots of the Three Removal Permissions

The terms "neglect of duty" and "malfeasance in office" were used in early modern English common law to define conduct that breached the terms of an office. "Neglect of duty" evolved from cases involving municipal corporations, where the courts recognized a municipal corporation's power to remove an officer whose neglect threatened the municipality's wellbeing. The term came to mean failing to perform one's duties in a way that caused specific harm to the entity to which the duties were owed.[29] "Malfeasance," meanwhile, connoted the commission of an unlawful act in the performance of one's official duties.[30]

Removal decisions made clear that statutory constraints on removal would be strictly enforced.[31] *Harcourt v. Fox*, a 1689 decision

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[28] Manners & Menand, *supra* note 7, at 18.

[29] *Id.* at 27-33.

[30] *Id.* at 28-29, 33-34.

[31] *Id.* at 33-37.

widely cited in America and England, established that where the legislature provided an office holder with tenure protection, whether to also permit removal and on what grounds was the legislature's choice.[32] In this way, the common law sought to ensure "faithful execution" by protecting officers from political influence while establishing grounds to remove misbehaving officers.

Following the Revolution, state statutes reflected the states' various efforts to hold officers accountable. A typical approach was to require officers to swear an oath and post a bond conditioned on the "faithful execution" or "faithful performance" of their duties.[33] As courts adjudicated suits filed on these bonds, they turned to the well-defined concepts "neglect of duty" and "malfeasance in office" to liquidate the meaning of faithful execution.[34]

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[32] *Id.* (citing *Harcourt v. Fox* (1693), 89 Eng. Rep. 720, 732 (K.B.) (*Harcourt II*)).

[33] *Id.* at 37-39 (citing, e.g., Act of Mar. 12, 1784, ch. 44, § 1, reprinted in 1 The General Laws of Massachusetts 129, 129 (Theron Metcalf ed., Bos., Wells & Lilly and Cummings & Hilliard 1823)).

[34] *Id.* at 39-42 (collecting cases); *see, e.g.*, *Harris v. Hanson*, 11 Me. 241, 245-46 (1834) (holding the defendant's act constituted malfeasance in office and thus breached condition of his bond).

States also adopted the terms as statutory grounds for removing officers otherwise tenured for a term of years.[35] States began to commission officers to oversee increasingly complex infrastructure projects like schools, prisons, railroads, and canals, and often made the officers subject to removal for neglect of duty and malfeasance in office. The body of law interpreting these terms developed further in cases concerning removals under these statutory schemes.[36] By the time Congress incorporated removal permissions in a statute in 1887, the concept of conditioning an officer's removal on neglect of duty or malfeasance in office was well established. Nothing was novel about the idea that a violation of either standard meant unfaithful execution of the law and potential removal.

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[35] Manners & Menand, *supra* note 7, at 43-44.

[36] *See, e.g.*, *Page v. Hardin*, 47 Ky. 648, 672-77 (1848) (finding that secretary of state serving term of office "during good behavior" "is not removeable either at the pleasure of the Governor, or on his judgment for a mis-demeanor . . . in office"); *Commonwealth ex rel. Bowman v. Slifer*, 25 Pa. 23, 28 (1855) (concluding that "omission to give bond" was "not a neglect of official duty for which the governor is authorized to remove an incumbent duly commissioned for a term of years"). *See also* Miriam Seifter, *Understanding State Agency Independence*, 117 Mich. L. Rev. 1537, 1544 (2019).

The third permission, inefficiency, was incorporated in mid-nineteenth century statutes as state governments sought to tackle ineffective, wasteful spending and the corrupt "spoils system." "Inefficiency" was understood to address minimization of the waste of government resources, especially where that waste resulted from ineptitude and self-dealing.[37] To be found inefficient, it was not enough that an officer was believed to be less "efficient" than another. Rather, an inefficient officer was one whose actions demonstrated that he could not be relied on to do the job he was hired to do.[38] The addition of inefficiency to the removal lexicon broadened the permission structure beyond the baseline permissions of neglect of duty or malfeasance in office to include incompetence as grounds for removal.

B. Congressional Use of the Permission Structure

In 1887, Congress created the first federal independent agency, the Interstate Commerce Commission, to regulate railroad rates.[39] Congress modeled the agency on state commissions, which for

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[37] Manners & Menand, *supra* note 7, at 46-52 (describing adoption of the term by the states).

[38] *Id.*

[39] Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887).

years had tried to end rate wars and address predatory business practices. Early drafts of the Interstate Commerce Act ("ICA") sought to insulate commissioners from political interference through unremovable, five-year terms of office. After months of debate, Congress added that commissioners could be "removed by the President for inefficiency, neglect of duty, or malfeasance in office."[40] Neglect of duty and malfeasance formed the necessary baseline for ensuring faithful execution of the law, and inefficiency provided an additional degree of presidential oversight. Congress thus struck a balance: it gave the commissioners a measure of independence from political interference while empowering the President to remove a commissioner who failed to competently and faithfully execute his duties.[41]

Despite the obvious significance of this first federal independent agency, no member of Congress raised concerns about

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[40] Manners & Menand, *supra* note 7, at 57 (citing A Bill to Regulate Commerce, S. 1093, 49th Cong. § 5 (1886)).

[41] *Id.* at 58; *see also* CHARLES FRANCIS ADAMS, JR., RAILROADS: THEIR ORIGIN AND PROBLEMS, 133-34 (1878); Edward S. Corwin, *Tenure of Office and the Removal Power under the Constitution*, 27 Colum. L. Rev. 353, 356 (1927).

limits on presidential power.[42] This was not for lack of attention. The ICA was intensely studied and debated. Members knew it gave the President only limited authority to remove commissioners, and that this limitation secured the commissioners' autonomy from presidential control. Yet not one legislator suggested that the removal limits of the ICA might be unconstitutional. This silence cannot plausibly be read as evidence that members assumed the inefficiency, neglect of duty, and malfeasance removal permissions gave the President broad power to remove without cause. Such an interpretation would have been contrary to every earlier model for the permission structure.[43]

Nor does Congress's silence mean its members were simply unaware of or unfocused on removal questions during this period. While Congress was putting the finishing touches on the ICA, the Senate debated whether to repeal the Tenure of Office Act, which

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[42] Manners & Menand, *supra* note 7, at 58; *see also* Aditya Bamzai, *Taft, Frankfurter, and the First Presidential For-Cause Removal*, 52 U. Rich. L. Rev. 691, 714 (2018) (observing the same absence of concern over the Board of General Appraisers, created by Congress in 1890 to oversee tariff disputes, a similar structure but without fixed-year terms).

[43] Manners & Menand, *supra* note 7, at 59.

required the President to obtain Senate approval before removing any executive branch officer appointed with the Senate's advice and consent. Throughout the debate, senators were alert to encroachments on presidential power.[44] Repeal of the Tenure of Office Act was necessary, Senator George Hoar argued, because that Act unconstitutionally abridged the President's duty to ensure faithful execution of the law.[45] Senator William Evarts argued that there was a difference between the Tenure of Office Act, which expressly and unconstitutionally required Senate approval to remove any jointly-appointed officer, and Congress's constitutional "right to impress upon *an office* an indelible durability according to the will of the lawmaking power."[46] If the public interest required an office of fixed years with limited or no presidential removal, Evarts reasoned, this would not raise constitutional concerns because such provisions lay "in the very bed of law-making authority."[47] No

[44] *Id.* at 59-61. Likewise, in a debate concerning a District of Columbia board of education just one month before the ICA's passage, Congress gave considerable attention to the issue of removal power. *Id.*

[45] 18 Cong. Rec. 141 (1886).

[46] *Id.* at 216 (emphasis added).

[47] *Id.*

senator spoke against Evarts's constitutional argument, which was fully consistent with the history of American removal law.[48]

Congress used the same structure – appointments to fixed terms subject to removal for inefficiency, neglect, or malfeasance – to create the Board of General Appraisers in 1890,[49] and in the early twentieth century to create the Federal Trade Commission and the Tariff Commission, among other agencies.[50] Throughout the twentieth century, Congress continued to draw on the ICA's permission structure, creating over a dozen agencies with fixed terms and some combination of the three removal permissions.[51] And Congress employed the same structure for fixed-term offices within executive departments.[52] By the late twentieth century, use of fixed terms with the three well-developed removal permissions was a familiar and well-accepted method of

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[48] Manners & Menand, *supra* note 7, at 61.

[49] Customs Administrative Act of 1890, ch. 407, § 12, 26 Stat. 131, 136. *See also Shurtleff v. United States*, 189 U.S. 311, 313-15 (1903) (considering President's authority to remove an appraiser).

[50] Federal Trade Commission Act, ch. 311, § 1, 38 Stat. 717, 717-18 (1914) (codified as amended at 15 U.S.C. § 41); Revenue Act, ch. 463, § 700, 39 Stat. 756, 795 (1916).

[51] *See* Manners & Menand, *supra* note 7, at 63-64 (listing agencies).

[52] *Id.* at 64.

balancing agency independence with the President's duty of faithful execution.[53]

The Federal Labor Relations Authority conforms to this long line of independent agencies, all established with fixed terms and removal permissions, and all enacted by Congress and signed into law by the President without constitutional concern.

C. This History Demonstrates a Workable Removal Standard in Conformity with Article II

Returning to the Supreme Court's request for a "workable standard," the three removal permissions here, supported by a now-unearthed body of caselaw and congressional debate, allow removal of an officer who in failing to do his duty engages in wasteful mismanagement (inefficiency), causes specific harm (neglect), or acts unlawfully in the performance of his duties (malfeasance). The standards are substantive and require judicial determination. They were not designed and have not been used to permit removal of an officer who fails to follow a President's policy directive or political agenda.

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[53] *Id.* at 64-66.

This is consistent with the President's Article II duties, despite what Appellants argue (Appellants' Opening Br. 10). "The duty of the President to see that the laws be executed," as Justice Holmes stated, "is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power." *Myers*, 272 U.S. at 295 (Holmes, J., dissenting). The President's duty to take care that the laws are faithfully executed can be squared with independent agencies by recognizing that Congress granted the President removal permissions keyed to terms that courts and legislatures have for centuries used to determine the scope of unfaithful execution: neglect of duty and malfeasance in office.

This view accommodates the Supreme Court's removal decisions. In *Humphrey's Executor*, Congress was well within its rights to create fixed terms for FTC commissioners and limit removal.[54] *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935). *Free Enterprise*

[54] The problem in *Myers*, on this view, was not tenured agency officers *per se*, but the fact that Congress gave itself a role in removing them, the cabined reading that *Humphrey's Executor* made explicit nine years later. *See Humphrey's Ex'r*, 295 U.S. at 630-31. Essentially, the Court read out that portion of the law, which left the President with power to remove the postmaster at his pleasure.

Fund was correctly decided because the statute did not permit the President to remove Public Company Accounting Oversight Board officials for a failure to faithfully execute the law. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477 (2010). And this reconciliation suggests why the *Seila Law* majority seemed reluctant to rely on the Take Care Clause to strike down removal provisions. The majority relied primarily on "separation of powers" rather than constitutional text. *Seila Law*, 591 U.S. at 213-18. A concurrence in part implied precisely the point made here, that removal permissions for neglect and malfeasance embody "a failure to faithfully execute the law." *Id.* at 285 (Kagan, J., concurring in part) (cleaned up). As Justice Kagan explained, such removal standards "give[] the President 'ample authority to assure that [the official] is competently performing his or her statutory responsibilities in a manner that comports with' all legal obligations." *Id.* at 288 (quoting *Morrison*, 487 U.S. at 692). This removal power gives the President the meaningful control that the Constitution requires, *id.*, and the addition of inefficiency gives the President even greater control.

What cannot be reconciled is the suggestion that the President has an unqualified and unqualifiable constitutional right to remove without cause any executive branch officer, regardless of the terms set by Congress. Such a ruling would undo more than a century of Supreme Court precedent, contradict centuries of common law and legislative history, and upset the balance struck by Congress in dozens of statutes between agency independence and presidential oversight. It would be contrary to what we understand about the Framers' intentions, and it would effect an unprecedented rebalancing of power from the legislative to the executive branch.

CONCLUSION

The district court's judgment should be affirmed.

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Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 5,875 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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Dated: October 10, 2025

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CERTIFICATE OF SERVICE

I, Katherine L. Pringle, counsel for *amicus curiae* Professor Jane Manners and a member of the Bar of this Court, certify that on October 10, 2025, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

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