Elizabeth Oyer v. Department of Justice

Docket # DC-0752-25-2372-I-1

Response to Agency's 08 15 2025 Response to Agencys 07 15 2025 Response to 5 22 2025 Order and Summary of Status Conference

Summary Page

Case Title : Elizabeth Oyer v. Department of Justice

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Online Interview

1. Party whose pleading you are responding to.

Agency

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2. Date of the Party's pleading.

08/15/2025

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3. Title(or Brief Description) of party's pleading.

Response to Agencys 07 15 2025 Response to 5 22 2025 Order and Summary of Status Conference

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4. Does your pleading assert facts that you know from your personal knowledge?

Yes

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5. Do you declare, under penalty of perjury, that the facts stated in this pleading are true and correct?

Yes

U.S. MERIT SYSTEMS PROTECTION BOARD
DALLAS REGIONAL OFFICE

ELIZABETH G. OYER,	)	
	)	
Appellant,	)	
	)	
v.	)	**Docket No. DC-0752-25-2372-I-1**
	)	
U.S. DEPARTMENT OF JUSTICE,	)	**CAJ: Joel T. Alexander**
	)	
Agency,	)	
	)	
and	)	
	)	
DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT,	)	
	)	
Intervenor.	)	
	)	

APPELLANT'S REPLY TO AGENCY'S JURISDICTIONAL BRIEF

On May 22, 2025, the Chief Administrative Judge issued an order requiring the parties to brief three issues pertaining to the jurisdiction of the U.S. Merit Systems Protection Board ("MSPB" or "Board"). Tab 12. On July 15, 2025, Appellant Elizabeth G. Oyer and the Department of Justice ("Agency") filed responses to the order. Tabs 19, 20. Appellant submits the instant reply to the Agency's response.

INTRODUCTION

The Agency advances an untenable, extreme view of the Executive Branch's Article II removal power that would eviscerate the Civil Service Reform Act's (CSRA's) core protections for career civil servants. Under the Agency's theory, agencies can, by simply invoking "Article II," ignore the CSRA and fire career civil servants for arbitrary reasons, retaliate against whistleblowers, discriminate against employees perceived to be Democrats or Republicans, and there would be nothing that Congress or the Merit Systems Protection Board (MSPB or Board) could do about it. This is nothing less than a wholesale assault on the merit system principles. In

this case, for example, Appellant has alleged that she was fired in violation of 5 U.S.C. § 7543, which protects career Senior Executive Service members from removal except for specified reasons and requires the Agency to provide advance notice and an opportunity to respond. Appellant also alleges that she was removed in retaliation for engaging protected whistleblower activity—including raising public safety concerns about allowing a person previously convicted in a domestic violence case to access firearms again—and based on her perceived political affiliation with the Biden Administration. Tab 1 at 15-16.[1] Citing Article II, the Agency has flatly refused to respond to discovery requests seeking information relevant to Appellant's claims and is now seeking to cut off this proceeding (its brief is even styled a "closing brief") before Appellant has the chance to prove her case at a hearing. *See* Tab 20 at 4.

The Agency's Article II argument should be summarily rejected because the Board was created to implement the employee protections in the CSRA and has no power to invalidate them. Even if the Board could reach the issue, the Agency's position is wrong on the merits. The Agency claims that the Pardon Attorney is an inferior officer and therefore must be removable at will, but the Pardon Attorney is an employee, not an inferior officer. Even if the Pardon Attorney is an inferior officer, under longstanding Supreme Court precedent, Congress can provide removal protections to inferior officers who are adequately supervised by others within the Executive Branch and who have limited duties and no policymaking or significant administrative authority. The Pardon Attorney would fall squarely within that category. Further, the CSRA poses no separation of powers problem because, as the Supreme Court has recognized, under the CSRA, agencies can review and reassign Senior Executive Service (SES) members like the Appellant, thus ensuring adequate supervision even if career SES members cannot be removed from the SES or the civil service altogether except for cause.

In its brief, the Agency concedes that the Board has jurisdiction over this appeal. Since the Board has jurisdiction, the Board should proceed with discovery and a hearing in the normal

[1] Pincites to Tabs use the pagination in the footer automatically generated by the e-filing system, where it exists.

course. The Article II issue should be reserved for a federal court, should the Agency continue to want to pursue it.

ISSUE A: The Board has jurisdiction over this appeal.

Regarding Issue A, the parties agree that the Board has jurisdiction over this appeal because Appellant was a career member of the SES who, at the time of her summary termination, had successfully completed her one-year probationary period and therefore had accrued statutory removal protections and appeal rights under the CSRA. *See* Tab 20 at 5-6, 9; *see also* 5 U.S.C. § 7541(1)(A) (explaining that a career SES appointee who has completed probation is an "employee" entitled to the procedural and substantive protections of 5 U.S.C. § 7543). Because the Board has jurisdiction over this appeal and because it cannot entertain the Agency's novel and unsupported Article II argument, the Board should process this appeal as usual to include completion of discovery and a hearing on the merits and Appellant's affirmative defenses.

ISSUE B: The Board has authority to adjudicate Appellant's CSRA and related due process claims; the Agency's Article II argument must be left to the federal courts.

As explained in Appellant's prior brief, although the Board has jurisdiction over this appeal, it lacks authority to consider the Agency's sweeping constitutional challenge to the career SES removal protections in the CSRA. The appropriate course is to apply the CSRA and leave the Article II issue to the federal courts.

The CSRA lays out a comprehensive, detailed framework under which a career SES member may be removed from federal employment only for specified reasons and, depending on the reason for removal, different procedures must be used. *See* Tab 19 at 7-8, n.2. The Agency nonetheless claims that, "[b]ecause Senior Executive Service officials exercise significant executive power, they are generally removable without cause under Article II." Tab 20 at 12. If accepted, the Agency's theory of Article II would nullify the protections of the CSRA, which provide property interests to career SES employees, as it would allow agencies to disregard the CSRA's provisions and summarily fire career SES members for any reason (even retaliatory or

discriminatory reasons) at any time without following any procedural requirements, just by invoking Article II.[2]

The Board, however, was created by the CSRA to implement the SES and other employee protections in the CSRA, *see* 5 U.S.C. § 1204(a), not to "invalidate the statute from which it derives its existence . . . ." *Jones Bros., Inc. v. Sec'y of Lab.*, 898 F.3d 669, 673 (6th Cir. 2018). Of the three branches of government, "only the Judiciary enjoys the power to invalidate statutes inconsistent with the Constitution." *Id.* at 674. The Agency's arguments to the contrary fail for multiple reasons.

First, the Agency's claim that "Supreme Court precedent" requires the Board to "resolve constitutional questions that arise within the context of reviewing personnel actions," Tab 20 at 7, is incorrect. The Agency misreads *Elgin v. Dep't of Treasury*, 567 U.S. 1 (2012), which imposes no such requirement on the Board. *Elgin* held that the CSRA precluded a district court from exercising jurisdiction over federal employment disputes covered by the statute. Thus, Mr. Elgin's claim that a statute disqualifying men who had not registered for the Selective Service from federal employment was unconstitutional had to be channeled through the MSPB and the Federal Circuit and could not be brought in district court. *See Elgin*, 567 U.S. at 7-8. *Elgin* recognized that "the MSPB has repeatedly refused to pass upon the constitutionality of legislation," but declined to "decide whether the MSPB's view of its power is correct" because the Court held that, even if the MSPB could not decide the constitutionality of the statute, the claim still needed to be channeled through the MSPB and could be resolved at the Federal Circuit. *Id.* at 16-17. *Elgin* simply does not address whether the MSPB can or must rule on the CSRA's constitutionality.[3]

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[2] In this case, for example, Appellant has alleged that she was removed in retaliation for protected whistleblower activity and because of her perceived political affiliation. Tab 1 at 15-16. The Agency has refused to engage in discovery, citing Article II. *See* Tab 22 at 5. The Agency is now citing Article II in a bid to cut off this proceeding without a hearing. *See* Tab 20 at 4.

[3] Similarly, in footnote 5, the Court concluded that CSRA channeling applied to constitutional claims relating to covered personnel practices, whether they were claims that the agency "acted in an unconstitutional manner" or facial or as-applied challenges to a federal statute, rejecting the petitioners' argument that the latter should not be channeled. *Elgin*, 567 U.S. at 16 n.5. Contrary

Second, the Agency's reliance on cases where the MSPB considered employee-specific procedural due process or equal protection challenges to agency actions is misplaced. Tab 20 at 7-8. Those cases involved individualized actions, not the broad challenge to the MSPB's authority that the government brings now.[4] The Agency's position that it can ignore the CSRA by invoking Article II goes "to the structure or very existence of" the MSPB, *Axon Enter., Inc. v. FTC*, 598 U.S. 175, 189 (2023), as it would require the Board "to question its own statutory authority" and "to disregard . . . instructions Congress has given it," *Riggin v. Off. of Senate Fair Emp. Pracs.*, 61 F.3d 1563, 1569-70 (Fed. Cir. 1995). *See also id.* at 1569 ("A finding that the agency lacks jurisdiction to decide constitutional questions is especially likely when the constitutional claim asks the agency to act contrary to its statutory charter.").

Third, the Agency's attempt to label its constitutional challenge as merely an "as-applied" challenge or as merely a constitutional avoidance statutory interpretation argument is unconvincing. Tab 20 at 6, 9; Tab 23 at 4. The Agency cannot hide the sweeping nature of its constitutional argument. Much of the Agency's Article II argument, for instance, relies on general claims about the role and powers of the SES rather than facts specific to Appellant. *See* Tab 20 at 11-12. And the notion that the Agency's contentions are case-specific cannot be reconciled with

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to the Agency's suggestion, Tab 20 at 7-8, footnote 5 did not hold that the MSPB was required to address those challenges. Just because an issue must be channeled through an administrative process does not mean that the administrative adjudicator must, or has the authority to, rule on it. *See Elgin*, 567 U.S. at 16-17; *Axon Enter., Inc. v. FTC*, 598 U.S. 175 (2023) ("Although the MSPB might not be able to hold the draft law unconstitutional, we stated [in *Elgin*], the Court of Appeals could—and that was sufficient to ensure 'meaningful review' of Elgin's claim.").

[4] *See, e.g.*, *Special Counsel v. Jackson*, 119 M.S.P.R. 175, 179 (2013) (selective enforcement of the Hatch Act against appellant); *May v. OPM*, 38 M.S.P.R. 534, 538 (1988) (termination of appellant's annuity before he was provided notice). Many of the other cited cases do not address the MSPB's authority to rule on constitutional issues at all. *See* Tab 19 at 7-8; *Spithaler v. OPM*, 1 M.S.P.R. 587, 588 (1980) (three-sentence initial decision was not a reasoned decision under MSPB regulation); *Hayes v. Dep't of Army*, 111 M.S.P.R. 41 (2009) (equitable tolling of complaint filing deadline); *Smart v. Dep't of Army*, 105 M.S.P.R. 475, 481 (2007) (AJ failed to adjudicate pro se litigant's allegations of race discrimination and retaliation); *Burton v. Veterans Affairs*, 35 M.S.P.R. 52, 54 (1987) (AJ addressed some of the agency's conduct-based grounds for firing an employee but failed to address others).

its response to Appellant's motion to compel discovery, in which the Agency asserted that "[t]he propriety of the Agency's termination of Appellant is a purely legal question that hinges on the constitutional framework governing the Attorney General's authority under Article II of the Constitution, not any factual disputes." Tab 22 at 4-5. The Agency further contends (prematurely, *see infra* at 21-22) that the Attorney General should not be "compell[ed] . . . to retain the services of an inferior officer whom she no longer believes should be entrusted with the exercise of executive power" and that "any remedy afforded to Appellant should be limited to financial compensation, consistent with the historical remedy for improper removal of executive officers." Tab 20 at 17. But the Agency offers no limiting principle to its arguments. Carried to its logical conclusion, this understanding of Article II would prevent the Board from providing complete relief to any career SES employee or any executive officer, not just to Appellant, even when the Board has jurisdiction over the appeal under the CSRA. A claim that the Constitution prevents the Board from performing its statutory function of reviewing SES members' claims of wrongful removal and providing relief is simply not one the Board can or should adjudicate.

For all these reasons, the Board should apply the CSRA's statutory framework to this appeal and leave the government's Article II challenge to the federal courts.

ISSUE C: Appellant as a career SES employee is not removable at will. The Agency was required to provide due process and comply with the CSRA.

Even if the Board were to entertain the Article II issue (it need not and cannot), it should reject the Agency's argument on the merits. The Agency contends that the Pardon Attorney is an inferior officer and therefore can be removed at will under Article II, without regard to the CSRA provisions that allow career SES to be removed only for cause and that prohibit personnel practices like whistleblower retaliation and discrimination based on political affiliation. The Agency's argument is flawed for several reasons. First, the Pardon Attorney is an employee, not an inferior officer. Second, even if the Pardon Attorney is an inferior officer, the Pardon Attorney is still not removable at will. The Supreme Court has long held that Congress may, without offending Article II, provide removal protections for inferior officers like the Pardon Attorney, who are supervised

by others within the Executive Branch and who have limited duties and no policymaking or significant administrative authority. Even assuming that the Pardon Attorney is an inferior officer, she fits within this category and thus may constitutionally be afforded removal protections.[5] Third, even if the Pardon Attorney is removable at will under Article II, her removal was invalid. Because the Attorney General appoints the Pardon Attorney, only the Attorney General can remove the Pardon Attorney, but here she was removed by the Deputy Attorney General. In sum, the Agency's Article II argument cannot stand.

I. Removal of positions like the Pardon Attorney is regulated by the CSRA.

The Pardon Attorney role originated in an 1865 statute that allowed the Attorney General to employ a "fourth-class" "pardon clerk." Act of March 3, 1865, 13 Stat. 516. The Pardon Attorney's current role is described in DOJ regulations and the Justice Manual, a Department policy manual. 28 C.F.R. §§ 0.35, 0.36, 1.1-1.11; DOJ, Justice Manual Ch. 9-140.000 – Pardon Attorney, https://perma.cc/8ARG-WMJA. The Pardon Attorney's job is to process applications for clemency and make recommendations "[u]nder the general supervision of the Attorney General and the direction of the Deputy Attorney General." 28 C.F.R. §§ 0.35, 1.6. DOJ policy, established by the Attorney General and the Deputy Attorney General, sets forth the criteria to be considered in processing clemency applications. DOJ, Justice Manual Ch. 9-140.112 - *Standards for Considering Pardon Petitions*, https://perma.cc/J56T-8XU9, Ch. 9-140.113 - *Standards for Considering Commutation Petitions*; *see also id.* Ch. 1-1.200, *Authority*, https://perma.cc/7HHP-MWS6 ("The Justice Manual is prepared under the supervision of the Attorney General and direction of the Deputy Attorney General."). All recommendations are sent to the Deputy Attorney General, who "exercise[s] such discretion and authority as is appropriate and necessary for the

[5] The Board is not authorized to entertain the Agency's Article II arguments and, even if it does, the Agency's argument fails as a matter of law based on the regulations and Departmental policy manual that govern the Pardon Attorney's role. However, to the extent that the Board is inclined to entertain the Agency's Article II arguments, and the Agency disputes the scope of the Pardon Attorney's duties and authority, the proper path would be to allow the parties to engage in discovery and present evidence at a hearing.

handling and transmittal of such recommendations to the President." 28 C.F.R. § 0.36. The Deputy Attorney General is not bound by the Pardon Attorney's recommendations. The President, who makes the final decision on whether to grant clemency, is not either. Indeed, the President is free to consider petitions and grant or deny them without any DOJ involvement at all. *See id.* § 1.11 (regulations are "advisory only" and do not "restrict the authority granted to the President under Article II, section 2 of the Constitution"). And Presidents have done so.[6]

The Pardon Attorney position does not have statutory removal protections specific to it,[7] but the Pardon Attorney has statutory and regulatory protections on the same basis as other federal SES employees. In appointing Appellant, the Agency chose to make a career SES appointment to the Pardon Attorney position. *See* Tab 17 at 11 (Appellant's SF-50 shows "SES CAREER APPT" in Box 5-B). Thus, the CSRA's protections for career SES apply to Appellant.

Under the CSRA, career appointees to the SES "may not be removed" from the SES or from the civil service altogether "except in accordance with the applicable provisions of" five specified statutes. 5 U.S.C. § 3393(g). The parties agree that the fifth statute, 5 U.S.C. § 7543, is the one that applies to Appellant's case. *See* Tab 20 at 5, 12. Section 7543 applies to career SES appointees who, like Appellant, have completed a one-year probationary period. *See* 5 U.S.C. § 7541(1)(A). Under § 7543, career SES appointees who have completed their probationary period can be removed from the civil service "only for misconduct, neglect of duty, malfeasance, or failure to accept a directed reassignment or to accompany a position in a transfer of function." They have the right to receive 30 days' advance written notice of their removal, to have at least 7 days to

[6] For example, under the current Administration and others, many high-profile and high-volume clemency grants have not been routed through the Pardon Attorney's office. *See, e.g.*, Beth Reinhard & Anne Gearan, *Most Trump clemency grants bypass Justice Dept. and go to well-connected offenders*, Wash. Post (Feb. 3, 2020), https://archive.ph/CFSFy; Kyle Cheney & Betsy Woodruff Swan, *The Hunter Biden pardon gives Donald Trump powerful new political cover*, Politico (Dec. 3, 2024), https://perma.cc/B8QJ-PNA4 (reporting that the Office of the Pardon Attorney "was taken by surprise").

[7] In contrast, some positions, such as administrative law judges, do have statutory protections specific to them. *See* 5 U.S.C. § 7521(a).

respond, and to appeal their removal to the Board pursuant to 5 U.S.C. § 7701. *Id.* § 7543(b), (d). They are also protected from prohibited personnel practices, such as whistleblower retaliation or discrimination based on political affiliation. *See id.* §§ 2302(a)(2)(B), (b)(1)(E), (8), (9)(D), (10); *see also id.* § 7701(c)(2) (agency's adverse action decision cannot be sustained if it was "based on any prohibited personnel practice described in section 2302(b)"). If a member of the career SES prevails in their appeal, the Board may order relief, including reinstatement. *See id.* § 7701(b)(2)(A); *see Harris v. Air Force*, 96 MSPR 193, 195-196 (2004).

Here, it is undisputed that the Agency removed Appellant without asserting any § 7543-authorized ground and without providing the notice, opportunity to respond, or procedural protections that statute requires. In the Agency's view, none of that matters because Article II gives it authority to ignore § 7543's substantive and procedural protections. However, even if the Board could decide this question (it cannot), the Agency's argument fails for the reasons below.

II. The Pardon Attorney is an employee, not an inferior officer.

First, the Agency claims that the Pardon Attorney is an inferior officer and therefore removable at will, but the Pardon Attorney is an employee, not an inferior officer. For Appointments Clause purposes, federal workers fall into three buckets: principal officers, inferior officers, and employees. *See Lucia v. SEC*, 585 U.S. 237, 244 & n.3 (2018). Principal and inferior officers "exercise[] significant authority pursuant to the laws of the United States"; employees do not. *Kennedy v. Braidwood Mgmt., Inc.*, 145 S. Ct. 2427, 2442 (2025) (citation omitted). Principal officers include heads of departments who report directly to the President. *Id.* at 2442-43. Generally, "[i]nferior officers are those 'whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.'" *Id.* at 2443 (quoting *Edmond v. United States*, 520 U.S. 651, 663 (1997)). While the scope of the Executive Branch's power to remove principal and inferior officers—and of Congress's power to regulate those removals—has been litigated, it has long been understood that Congress can regulate the removal of employees. *See Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 507 (2010) ("Nothing in our opinion . . . should be read to cast doubt on the use of what is

colloquially known as the civil service system within independent agencies."); *cf. Lucia*, 585 U.S. at 245 ("[T]he Appointments Clause cares not a whit" how "non-officer employees—part of the broad swath of 'lesser functionaries' in the Government's workforce"—are appointed.).

The Pardon Attorney is an employee, not an inferior officer, position. In considering whether an individual wields "significant authority" sufficient to render them an officer, courts consider "(1) the significance of the matters resolved by the official[], (2) the discretion they exercise in reaching their decisions, and (3) the finality of those decisions." *Tucker v. C.I.R.*, 676 F.3d 1129, 1133 (D.C. Cir. 2012); *see also Carr v. Saul*, 593 U.S. 83, 86 (2021) (whether the individual "exercised significant discretion when carrying out important functions" and whether they "often had the last word") (cleaned up). The Pardon Attorney exercises limited authority and discretion and does not make final decisions. As discussed, in processing clemency applications, the Pardon Attorney follows standards set by DOJ policy. The Pardon Attorney makes non-binding recommendations, and all such recommendations are subject to review by the Deputy Attorney General before transmittal to the White House. The President makes final clemency decisions and can bypass the Pardon Attorney altogether if he wishes.

Further, unlike special trial judges in the Tax Court or administrative law judges, who have been found to be inferior officers, the Pardon Attorney does not "take testimony, conduct trials, rules on the admissibility of evidence, [or] have the power to enforce compliance with discovery orders." *Lucia*, 585 U.S. at 238 (quoting *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 881-82 (1991)). The Pardon Attorney can only request information from other DOJ components. DOJ, Justice Manual Ch. 9-140.111 – Pardon Attorney, https://perma.cc/Y2SA-JHXE. The Pardon Attorney is more similar to the members of the U.S. Preventive Services Task Force before 2010, whom the Supreme Court considered to be "mere employees" because at the time they "made only non-binding recommendations" on clinical preventive services after reviewing scientific evidence. *Braidwood*, 145 S. Ct. at 2443, 2455.

For these reasons, the Pardon Attorney is not an inferior officer.

III. Even if the Pardon Attorney is an inferior officer, the Constitution permits removal protections for inferior officers.

Second, even if Appellant is an inferior officer, inferior officers are not categorically removable at will. Under the Constitution, Congress regulates both the appointment and the removal of inferior officers. Article II assigns Congress the power to "vest the appointment of . . . Inferior Officers, as they think proper, in the President alone, in the Courts of Law or in the Heads of Departments." U.S. Const., art. II, § 2, cl. 2. And just as the "power to remove" is considered "an incident of the power to appoint," "the power of Congress to regulate removals [is] incidental to the exercise of its constitutional power to vest appointments." *Myers v. United States*, 272 U.S. 52, 161 (1926). "Congress, in committing the appointment of . . . inferior officers to the heads of departments, may prescribe incidental regulations controlling and restricting the latter in the exercise of the power of removal." *Id.* (citing *United States v. Perkins*, 116 U.S. 483, 485 (1886)); *Walmart, Inc. v. Chief Admin. Law Judge of Off. of the Chief Admin. Hr'g Officer*, No. 24-11733, 2025 WL 1949488 (11th Cir. July 16, 2025) (the vesting role "granted to Congress implies at least some authority in Congress to regulate the removal of inferior officers so appointed by that department head").

And, of course, there is more to the Constitution than just Article II. For instance, political discrimination in government employment can violate the First Amendment. *See Rutan v. Republican Party of Illinois*, 497 U.S. 62, 78 (1990) (Under the Supreme Court's "sustained precedent, conditioning hiring decisions on political belief and association plainly constitutes an unconstitutional condition, unless the government has a vital interest in doing so."). Congress may enact laws to protect the constitutional rights of federal employees, without violating the separation of powers. *See Elrod v. Burns*, 427 U.S. 347, 352 (1976) (plurality op.) ("[T]here can be no impairment of executive power, whether on the state or federal level, where actions pursuant to that power are impermissible under the Constitution."). The Agency has cited no authority for the notion that Article II allows the President to violate employees' constitutional rights.

Since at least 1886, the Supreme Court has repeatedly recognized Congress's authority to control and restrict the removal of inferior officers under what is today known as the *Morrison* exception. In *Perkins*, the Court upheld statutes that restricted the Secretary of the Navy's ability to dismiss a naval officer. 116 U.S. at 484-85. In *Morrison v. Olson*, the Court upheld a restriction on the Attorney General's power to remove an independent counsel who could prosecute cases "in the name of the United States," but who had "limited jurisdiction and tenure and lack[ed] policymaking or significant administrative authority." 487 U.S. 654, 662, 691 (1988) (quoting 28 U.S.C. § 594(a)(9)). Indeed, even Justice Scalia's *Morrison* dissent—widely recognized as a canonical defense of the President's removal power—readily dismisses the notion that "every officer of the United States exercising any part of [the executive] power must serve at the pleasure of the President and be removable by him at will," explaining "that has never been the law." *Id.* at 724 n.4 (Scalia, J., dissenting) (alteration in original).

In *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, the Supreme Court held unconstitutional the "highly unusual" and "sharply circumscribed" removal protections of the members of the Public Company Accounting Oversight Board (PCAOB). 561 U.S. 477, 505 (2010). However, in the course of doing so, the Court distinguished the PCAOB members from members of the SES. The Court noted that SES employees do not "enjoy the same significant and unusual protections from Presidential oversight as the [PCAOB]," as they "may be reassigned or reviewed by agency heads" and "entire agencies may be excluded from the Service by the President." *Id.* at 506-07 (citing 5 U.S.C. §§ 3132(c), 3395(a), 4312(d), 4314(b)(3), (c)(3) and § 2302(a)(2)(B)(ii)).

More recently, the Supreme Court reaffirmed that one of the exceptions to the President's general removal power—the *Morrison* exception—is for "inferior officers with limited duties and no policymaking or administrative authority." *Seila Law LLC v. CFPB*, 591 U.S. 197, 218 (2020). And just this past Term, the Court recognized in *Braidwood* that inferior officers whose decisions are reviewable by a superior can have for-cause removal protections. *See* 145 S. Ct. at 2445 ("If

an adjudicative officer's decisions are reviewable by a superior, then the officer may be considered inferior even if not removable at will.").[8]

In addition, all but one of the courts of appeals to have considered the question have also upheld removal protections for administrative law judges (ALJs) because, while ALJs exercise significant authority and are considered inferior officers, they do not exercise policymaking or significant administrative authority. Furthermore, in many cases their decisions are reviewable by a higher executive official. *Walmart*, 2025 WL 1949488, at *23-24, 26 (DOJ Office of the Chief Administrative Hearing Officer ALJs); *Leachco, Inc. v. Consumer Prod. Safety Comm'n*, 103 F.4th 748, 764 (10th Cir. 2024) (Consumer Product Safety Commission ALJs), *cert. denied,* 145 S. Ct. 1047 (2025); *Rabadi v. DEA*, 122 F.4th 371, 375 (9th Cir. 2024) (Drug Enforcement Administration ALJs); *Calcutt v. FDIC*, 37 F.4th 293, 319 (6th Cir. 2022) (FDIC ALJs), *rev'd on other grounds,* 598 U.S. 623 (2023); *Decker Coal Co. v. Pehringer*, 8 F.4th 1123, 1133 (9th Cir. 2021) (Department of Labor ALJs).[9]

Under the logic of those cases, the Pardon Attorney's career SES protections are fully consistent with Article II and should also be upheld.

IV. The Pardon Attorney's career SES protections are constitutional.

The key inquiry to determining whether a removal restriction for an inferior officer is constitutional is whether Congress has imposed removal protections that "interfere with the

[8] The Agency cites *Braidwood* for the proposition that "[b]ecause Senior Executive Service officials exercise significant executive power, they are generally removable without cause under Article II." Tab 20 at 12. But that is not what *Braidwood* said. *Braidwood* held that, "[w]hen a statute empowers a department head to appoint an officer, *the default presumption* is that the officer holds his position 'at the will and discretion of the head of the department.'" 145 S. Ct. at 2444 (emphasis added) (citation omitted). That default presumption went unrebutted in *Braidwood* because the officers at issue, members of the Preventive Services Task Force, were unpaid volunteers and no statute addressed their removal. *Id.* at 2439, 2444, 2448-49; 42 U.S.C. § 299b-4. Here, in contrast, SES members have protections under the CSRA.

[9] The outlier is the Fifth Circuit. *Jarkesy v. SEC*, 34 F.4th 446, 465 (5th Cir. 2022), *aff'd and remanded on other grounds,* 603 U.S. 109 (2024). The Supreme Court granted certiorari on the ALJ removal question in *Jarkesy*, but in the end, the Court did not reach the ALJ removal question. 603 U.S. at 120, 140-41.

President's exercise of the 'executive power' and his constitutionally appointed duty to 'take care that the laws be faithfully executed' under Article II." *Morrison*, 487 U.S. at 690 (citation omitted). The inferior officer must be accountable to the President, such that the President can be held accountable by the people, but at-will removal is not the only way to ensure accountability. Other factors to be considered include the nature and extent of the inferior officer's duties and how their work is supervised. *See id.* at 692; *Braidwood*, 145 S. Ct. at 2445 (noting that "[a]t-will removal is one means of ensuring supervision and direction," but recognizing that "[i]f an adjudicative officer's decisions are reviewable by a superior, then the officer may be considered inferior even if not removable at will").

Here, career SES protections for Pardon Attorneys do not interfere with the President's exercise of executive power. Career SES remain subject to reassignment without cause, even though they cannot be removed from the SES or the civil service altogether without cause. Their work is also subject to review, ensuring political accountability. Here, in particular, the Pardon Attorney makes recommendations subject to review by the Deputy Attorney General and Attorney General, who ultimately decide what DOJ's recommendations will be. Any DOJ recommendation certainly is not binding on the President. Further, the Pardon Attorney does not exercise policymaking or significant administrative authority.

Supervision. The Pardon Attorney need not be removable at will for the President to perform his executive duties and to be accountable to the people. The President is not bound at all by the Pardon Attorney's recommendations. As discussed, the President is free to grant or deny pardons as he wishes. Presidents can and do consider pardon requests and grant pardons outside of the Pardon Attorney process.

Even when the President seeks a recommendation from DOJ, the Pardon Attorney's removal protections do not interfere with the President's executive powers because the Pardon Attorney's work is supervised by higher officers within DOJ who are removable at will by the President. The Pardon Attorney's role is to review petitions for clemency submitted to her office and recommend whether the President should grant or deny the petition. 28 C.F.R. §§ 0.35, 1.6(c).

The Pardon Attorney works "[u]nder the general supervision of the Attorney General and the direction of the Deputy Attorney General." *Id.* § 0.35. The Pardon Attorney's recommendations go to the Deputy Attorney General, who is not bound by the Pardon Attorney's recommendation and can make a different recommendation if he wishes. *See id.* § 0.36. The Pardon Attorney applies criteria set by DOJ policy.

And career SES members are subject to annual performance reviews and cannot appeal their appraisal and rating outside of the agency. *See* 5 U.S.C. §§ 4312(d), 4314(b)(3), (c)(3). Further, although the Agency cannot remove a career SES member from the SES or from the civil service except for specified causes, the Agency can reassign an SES employee to another SES position without cause. *Compare* 5 U.S.C. § 3393(g), *with id.* § 3395(a)(1)(A). Thus, the SES are subject to control even if there are limitations on their removal from the SES or the civil service.

Removal protections for inferior officers whose work is otherwise adequately supervised by higher executive officers do not offend Article II. As noted above, *Free Enterprise Fund* distinguished the SES from the PCAOB, whose removal protections were unconstitutional, in part on the ground that SES members "may be reassigned or reviewed by agency heads." *Id.* at 506 (citing 5 U.S.C. §§ 3395(a), 4312(d), 4314(b)(3), (c)(3)). Also, in *United States v. Arthrex*, *Inc.*, 594 U.S. 1 (2021), the Supreme Court determined that administrative patent judges (APJs) were not adequately supervised by higher officials within the Executive Branch where a statute prevented the Director of the Patent and Trademark Office (PTO) from reviewing their decisions. To remedy the situation, the Court severed the offending statutory provision and allowed the Director to conduct discretionary review of APJs' decisions. In doing so, the Court declined the government's alternative suggestion to get rid of the APJs' civil service protections instead because, in the Court's view, allowing Director review better reflected the structure of supervision within the PTO and the nature of the APJs' duties. *Id.* at 25-26. The Pardon Attorney is similarly situated to the APJs in *Arthrex*, after the Court had fixed the constitutional flaw. Like the APJs, the Pardon Attorney's recommendations are reviewable by a higher authority within the Executive Branch, the Deputy Attorney General and Attorney General. Thus, there is no need here to disturb

the Pardon Attorney's civil service protections. *See Walmart*, 2025 WL 1949488, at *24 (finding ALJ removal protections constitutional where the ALJs "have essentially no power to render a final decision on behalf of the United States unless permitted to do so by the Attorney General").

No policymaking or significant administrative authority. Removal protections are also permissible for inferior officers who have limited duties and do not have policymaking or significant administrative authority. The Pardon Attorney fits that description.

The Pardon Attorney's powers and duties are limited. As described above, the President has no obligation to even consider the Pardon Attorney's recommendation, much less to follow them. The Agency claims that "all requests for executive clemency for federal offenses are directed to the Pardon Attorney for investigation and review," Tab 20 at 13, but that assertion is contradicted by past practice and by the regulations, which are "advisory only" and recognize that the President can operate outside of the Pardon Attorney process if he wishes. *See supra* note 6; 28 C.F.R. § 1.11.

The Pardon Attorney does not have policymaking authority. Under the regulations and Justice Manual, the Pardon Attorney's role is to process applications in accordance with Department policy and make non-binding recommendations on a case-by-case basis. *See* 28 C.F.R. §§ 0.35-0.36, 1.1-1.11. The regulations do not give the Pardon Attorney policymaking authority. *See id.* The Justice Manual establishes standards for considering pardon petitions but the Pardon Attorney has no apparent role in writing the Justice Manual. *See* DOJ, Justice Manual Ch. 1-1.200, *Authority*, https://perma.cc/DC48-NDJW ("The Justice Manual is prepared under the supervision of the Attorney General and direction of the Deputy Attorney General."); *id.* 1-1.300 (listing components involved in revising the Justice Manual; none of them are the Office of the Pardon Attorney). The Pardon Attorney is thus similar to the independent counsel in *Morrison*, whose "grant of authority" did "not include any authority to formulate policy for the Government or the Executive Branch." *Morrison*, 487 U.S. at 671. The Pardon Attorney is also similar to officers whose removal protections were upheld in part because they adjudicated individual cases subject to agency policy and did not make across-the-board policies. *See Walmart*, 2025 WL 1949488, at *4, *27 (upholding DOJ ALJ removal protections where "[t]he sole function of the Department's

ALJs is to adjudicate individual cases, not to exercise policymaking powers" and "ALJs' exercise of those duties is subject to agency policy"); *see also Free Enter. Fund*, 561 U.S. at 507 n.10 (distinguishing ALJs from PCAOB members in part because ALJs "perform adjudicative rather than enforcement or policymaking functions . . . or possess purely recommendatory powers"). The Agency contends that the Pardon Attorney has "significant responsibility/influence in pardon policy," Tab 20 at 13, but cites no persuasive authority.[10]

The Pardon Attorney also does not have "administrative duties outside of those necessary to operate her office," similar to the independent counsel in *Morrison*. 487 U.S. at 671-72. The Agency does not contend otherwise.

* * * *

In sum, the Pardon Attorney's career SES removal protections are squarely consistent with the Constitution. Congress has long had authority to provide removal restrictions for inferior officers with limited duties, no policymaking or significant administrative authority, and whose work is supervised by officials removable at will by the President. The Pardon Attorney meets all those criteria. Moreover, any separation-of-powers concerns are eliminated by the fact that the Agency remains free to reassign SES members to other SES positions. Having made that choice, the Agency must honor the CSRA's requirements.

V. There is no "clemency" exception to the *Morrison* exception.

The Agency's remaining arguments are unpersuasive. The Agency contends that "[c]lemency is a core executive power." Tab 20 at 13. But the Pardon Attorney does not actually exercise the clemency power; she only makes non-binding recommendations. Furthermore,

[10] Contrary to the Agency's suggestion, Tab 20 at 14, the mere fact that the Pardon Attorney was classified as an SES position does not automatically mean that the Pardon Attorney has policymaking or significant administrative authority for Appointments Clause purposes. To be classified as an SES position, a position can meet any one criterion in a disjunctive list of criteria. Although one criterion involves "exercis[ing] important policy-making, policy-determining, or other executive functions," others are more prosaic, such as "supervis[ing] the work of employees other than personal assistants." *See* 5 U.S.C. § 3132(a)(2).

prosecution is also a core executive power and the Supreme Court nevertheless upheld removal restrictions for an independent counsel with "full power and independent authority to exercise all investigative and prosecutorial functions and powers" of the Department of Justice. *Morrison*, 487 U.S. at 696-97. Similarly, command over the military is also arguably a core executive power, but the Court has upheld removal protections for a naval officer. *Perkins*, 116 U.S. at 484-85. If Article II did not bar removal protections for those officers, there is no reason to think that the pardon power is so special that no removal protections are permitted.

The Agency also argues that Appellant exercises a "'conclusive and preclusive' power on behalf of the President." Tab 20 at 14 (citing *Trump v. United States*, 603 U.S. 593, 608 (2024)). Again, though, not only does the Pardon Attorney not make final decisions on clemency (the President does), the Pardon Attorney does not even make final recommendations (the Deputy Attorney General or Attorney General does). Further, even if the President's ultimate decision to grant clemency is "conclusive and preclusive," that does not speak to whether Congress can regulate the removal of the Pardon Attorney. In *Trump* itself, cited by the Agency, the Supreme Court suggested "the President's 'exclusive power of removal in executive agencies' as an example of 'conclusive and preclusive' constitutional authority," but it continued to recognize that there were "exceptions to the President's unrestricted removal power." *Trump*, 603 U.S. at 609 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 638 n.4 (1952) (Jackson, J., concurring), and *Seila Law*, 591 U.S. at 215). One of those is the *Morrison* exception, which, for the reasons above, applies to this case.

VI. Under Article II, the Deputy Attorney General cannot remove the Pardon Attorney.

Finally, even if the Agency were correct (it is not) that Article II allows it to remove inferior officers regardless of the CSRA and that the Pardon Attorney is an inferior officer, Appellant's removal was still invalid. Under Article II, only the Attorney General has authority to remove inferior officers. But according to the file produced by the Agency, Appellant was removed by Deputy Attorney General Todd Blanche. Tab 17 at 10.

Officers must be appointed in particular ways. Principal officers must be nominated by the President and confirmed by the Senate. This is also the default method for inferior officers, but alternatively, Congress "may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const., art. II, § 2, cl. 2; *Edmond*, 520 U.S. at 660. Removals must be carried out in particular ways as well. As a textual matter, the Constitution is silent as to removal of officers, but the power to remove is understood to be incidental to the power to appoint. *Myers*, 272 U.S. at 161. Just as the power to appoint cannot be delegated, the power to remove cannot either. *See Braidwood*, 145 S. Ct. at 2456 ("where the Constitution requires that the Secretary personally perform a particular function, like appointing the Task Force members, delegation is not an option"); *Free Enter. Fund*, 561 U.S. at 493 (if Congress vests the appointment of inferior officers in heads of departments, "it is ordinarily the department head, rather than the President, who enjoys the power of removal"); *Appointment & Removal of Fed. Rsrv. Bank Members of the Fed. Open Mkt. Comm.*, 43 Op. O.L.C. 263, 283 (Oct. 23, 2019) ("We have conceived of both the power to appoint and the power to remove such officers as being among the nondelegable authorities 'prescribed by the Constitution.'").

Here, Congress vested in the Attorney General the authority to appoint the Pardon Attorney. *See* 5 U.S.C. §§ 509, 510, 533(4). If the Pardon Attorney is an inferior officer, only the Attorney General has the authority to remove the Pardon Attorney. But the Agency's file shows that Deputy Attorney General Todd Blanche removed Appellant, not Attorney General Pamela Bondi. Thus, under the Agency's own Article II theory, Appellant's removal was unlawful.

VII. Appellant has constitutional due process rights and statutory rights under 5 U.S.C. §§ 7543 and 7701, including protection from whistleblower retaliation and political affiliation discrimination.

Contrary to the Agency's argument, Appellant has a property right in her career SES status because the CSRA "sets a baseline expectation that a 'career appointee may not be removed from the Senior Executive Service or civil service except in accordance with' five specified provisions."

Esparraguera v. Dep't of the Army, 101 F.4th 28, 34 (D.C. Cir. 2024) (quoting 5 U.S.C. § 3393(g)). Appellant relied upon this expectation in deciding to take the job of Pardon Attorney, just as millions of other career civil servants plan their careers and their lives based on the expectation that they will "remain employed *unless* they do something warranting their termination." *Id.* at 33 (quoting *Hall v. Ford*, 856 F.2d 255, 265 (D.C. Cir. 1988)). The Due Process Clause "protect[s] those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined." *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972). Here, due process entitles Appellant "to at least notice and an opportunity to respond before her removal, and she received neither" from the Agency. *Esparraguera*, 101 F.4th at 40.

Appellant is also entitled to the statutory protections of the CSRA, including not just notice and an opportunity to respond, 5 U.S.C. § 7543(b), but also the right to challenge her removal by showing that it was a prohibited personnel practice, *id.* §§ 7543(d), 7701(c)(2). Here, Appellant was fired because of her whistleblower activity and perceived political affiliation. Tab 1 at 15-16. She is entitled to discovery and a hearing so that she can prove her case.

The Agency attempts to erase the Appellant's constitutional and statutory rights by claiming that she is removable at will, Tab 20 at 15, but as explained above, Appellant is not removable at will. She is a career SES appointee who is entitled to procedural and substantive protections under the CSRA and the Due Process Clause. There is no conflict between Article II and the CSRA that would negate her statutory rights, for the reasons discussed above. Nor, as a constitutional matter, can her property interest in her employment now be taken away without due process. *Loudermill*, 470 U.S. at 541. Further, the Agency has not cited any authority supporting the notion that Article II can be wielded in a retaliatory or discriminatory way.

The Agency argues that "the President and his immediate subordinates" must be able to make "inherently discretionary judgment calls" to fire "individuals who exercise executive power on his behalf," without having to "wait[] for some notice period to pass or hearing to transpire." Tab 20 at 15-16. But this novel proposition is contrary to the plain text of the CSRA and would

eviscerate the CSRA and the due process rights of employees under the statute and the Constitution, as countless employees exercise executive power in some fashion.

Nor do the cases the Agency cites support its position. *See id. Trump v. Wilcox*, 145 S. Ct. 1415 (2025), concerned a principal officer, not inferior officers or employees. *Dep't of Navy v. Egan*, 484 U.S. 518 (1988), is inapt. While *Egan* held that the MSPB does not have authority to review the merits of the government's decision to deny a security clearance, it nevertheless recognized that "[a]n employee who is removed for 'cause' under § 7513, when his required clearance is denied, is entitled to the several procedural protections specified in that statute. The Board then may determine whether such cause existed, whether in fact clearance was denied, and whether transfer to a nonsensitive position was feasible." *Id.* at 530. Nothing in *Egan* suggests that the government has unlimited discretion to fire employees and opt out of following the CSRA altogether whenever it wishes, as the Agency would have it.

Appellant has a protected property interest in her continued employment and was entitled to the procedural safeguards set forth in the CSRA.

PREMATURE ISSUE: Relief

Finally, the Agency asks for a preemptive ruling that Appellant should not be reinstated but only given financial compensation. Tab 20 at 16-17. This issue is not only outside the bounds of the Chief Administrative Judge's briefing order but the Agency's request also appears to be an inappropriate request for summary judgment. As the Federal Circuit has held, "the Board does not have the power to grant summary judgment." *Crispin v. Dep't of Com.*, 732 F.2d 919, 924 (Fed. Cir. 1984); *see id.* at 922 (interpreting 5 U.S.C. § 7701(a)(1) as not allowing summary judgment). Indeed, an appellant has a right to a hearing even if there is no dispute of material facts. *Carew v. OPM*, 34 M.S.P.R. 527, 528-29 (1987). Rulings regarding the appropriate scope or nature of relief in this case must await the development of the record at a hearing.

CONCLUSION

The Board has jurisdiction over Appellant's claims (a point the Agency does not contest). Thus, under the CSRA, Appellant is entitled to a hearing so that she can prove she was fired without

good cause and based on retaliatory and discriminatory reasons. The Board does not have authority to adjudicate the Agency's sweeping Article II challenge to the CSRA. Even if it could reach that issue, the Agency's interpretation of Article II should be rejected as meritless. Even assuming the Pardon Attorney is an inferior officer, the Constitution allows Congress to provide removal protections for inferior officers without offending Article II. The Agency's contrary, absolutist version of Article II would allow agencies to retaliate against whistleblowers and discriminate against employees based on political affiliation and other protected bases and leave employees with no recourse. It should be rejected, and Appellant should be afforded the hearing and relief to which she is entitled under law.

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Certificate of Service

e-Appeal has handled service of the assembled pleading to MSPB and the following Parties.

Name & Address	Documents	Method of Service
MSPB: Dallas Regional Office	Response to Agencys 07 15 2025 Response to 5 22 2025 Order and Summary of Status Conference	e-Appeal
Carstens, Zachary	Response to Agencys 07 15 2025 Response to 5 22 2025 Order and Summary of Status Conference	e-Appeal
Daniels, Eric	Response to Agencys 07 15 2025 Response to 5 22 2025 Order and Summary of Status Conference	e-Appeal
Dornacker, Alex	Response to Agencys 07 15 2025 Response to 5 22 2025 Order and Summary of Status Conference	e-Appeal
Ehler, Patrick	Response to Agencys 07 15 2025 Response to 5 22 2025 Order and Summary of Status Conference	e-Appeal
Eisenmann, James	Response to Agencys 07 15 2025 Response to 5 22 2025 Order and Summary of Status Conference	e-Appeal
Ferguson Queen, Julie	Response to Agencys 07 15 2025 Response to 5 22 2025 Order and Summary of Status Conference	e-Appeal
Goldstein, Elena	Response to Agencys 07 15 2025 Response to 5 22 2025 Order and Summary of Status Conference	e-Appeal
Goodwin, Joanna	Response to Agencys 07 15 2025 Response to 5 22 2025 Order and Summary of Status Conference	e-Appeal
Jones, Melanie	Response to Agencys 07 15 2025 Response to 5 22 2025 Order and Summary of Status Conference	e-Appeal
Martinez, Michael	Response to Agencys 07 15 2025 Response to 5 22 2025 Order and Summary of Status Conference	e-Appeal
Oyer, Elizabeth	Response to Agencys 07 15 2025 Response to 5 22 2025 Order and Summary of Status Conference	e-Appeal
Perkins, Jordan	Response to Agencys 07 15 2025 Response to 5 22 2025 Order and Summary of Status Conference	e-Appeal