TESTING THE INDEPENDENCE HYPOTHESIS

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President Trump's second term began with an immediate and unprecedented wave of forced removals across agencies, some in clear violation of statutory removal restrictions imposed on the President by Congress. Although the Supreme Court has long held that these kinds of removal restrictions are generally constitutional, the Court has recently concluded that some such limits contravene Article II of the U.S. Constitution by limiting the President's power to control the Executive Branch. Despite these recent rulings, removal restrictions (and their constitutionality) have persisted at almost all independent agencies. The recent wave of removals and the current political climate are almost certain to compel the Court to revisit the constitutionality of removal restrictions and may result in their elimination writ large.

Critics (and dissenting Justices) argue that judicial elimination of these protections will make it more difficult for agencies to exercise expertise in the face of political pressure. Both those who favor and oppose the Court's current approach to the constitutional question embrace the same hypothesis: removal restrictions change agency behavior. However, very little empirical work has been done to explore whether this fundamental hypothesis at the core of the Court's debate is correct.

This Article is the first to probe the causal relationship embedded in the independence hypothesis. In 2010, the Court held that removal protections for agency leaders at the Public Company Accounting Oversight Board (PCAOB) were unlawful. Using a difference-in-differences analysis, this Article demonstrates there was a delayed effect on early departures at the PCAOB. There is no evidence of a change in early departures at the PCAOB in the first eight years following the judicial elimination of removal restrictions, but the risk of early departure increased by 373 percent from June 2018 through March 2023.

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These conflicting findings suggest removal restrictions have a different influence depending on the partisan status of the independent agency. Removal restrictions at a nonpartisan agency reflect a bipartisan preference to insulate the agency from unstable political preferences. Removal restrictions at a partisan agency reflect a partisan advantage that insulates the agency from opposing party preferences. Our findings suggest (1) removal restrictions when an agency is in a nonpartisan state do not change agency behavior, since those restrictions are redundant with the underlying preferences of both parties, (2) removal restrictions when an agency is in a partisan state do change agency behavior, since those restrictions operate as a meaningful restraint on removal decisions when the preferences of agency leadership and the Executive Branch do not align, and (3) the status of an agency as partisan or nonpartisan is fluid. Thus, our empirical findings suggest that removal restrictions are simultaneously redundant for agencies in a nonpartisan state and a meaningful constraint on removal for agencies in a partisan state, suggesting they are most influential when the restrictions work a partisan advantage. This conclusion suggests that judicial elimination of removal restrictions will likely have real-world effects, particularly in today's polarized political climate.

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INTRODUCTION

The first days of President Trump's second term brought aggressive action and predictable destabilization. Among the most destabilizing actions was President Trump's removal of executive officials.[1] On his first day in office,

1. *See* Jeremy Herb, Hannah Rabinowitz & Evan Perez, *Trump Touts Political Firings and Retribution as He Begins a Government Overhaul in His Image*, CNN, https://www.cnn.com/2025

he reclassified thousands of employees under the Civil Service Reform Act, allowing him to fire those reclassified employees more easily.[2] On his third day, he requested the resignation—at threat of termination—of three board members of the Privacy and Civil Liberties Oversight Board (PCLOB), which has traditionally been considered an independent agency although its members do not have any statutory protection from removal by the President.[3] He later fired two Democratic Commissioners on the Equal Employment Opportunity Commission (EEOC), who similarly have statutory terms but no express removal protections.[4] On his fifth day, President Trump fired more than a dozen "independent . . . inspectors general" effective immediately, even though Congress by statute had required the President to deliver his reasons for termination to Congress thirty days in advance of the firing.[5] He also fired the Democratic Federal Elections Commission Chair, whose term had expired, without appointing a successor.[6]

In an even more aggressive move, President Trump fired a board member on the National Labor Relations Board (NLRB).[7] By statute, NLRB Members "may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause."[8] However, President Trump did not give a notice or hearing, and although there was no official explanation, one White House official pointed to policy differences as

/01/21/politics/trump-touts-political-firings-and-retribution-and-installs-loyalists-at-key-posts/index.html [https://perma.cc/S9EM-9GTG] (Jan. 21, 2025, 5:06 PM).

2. Exec. Order No. 14,171, 90 Fed. Reg. 8,625, 8,625 (Jan. 31, 2025).

3. Charlie Savage, *Trumps Seeks to Paralyze Independent Privacy and Civil Liberties Watchdog*, N.Y. TIMES (Jan. 22, 2025), https://www.nytimes.com/2025/01/22/us/trump-privacy-civil-liberties-oversight-board.html [https://perma.cc/H8ZC-Q54U].

4. Jim Paretti, *Trump Fires EEOC Commissioners, General Counsel, Depriving Agency of Quorum*, LITTLER (Jan. 29, 2025), https://www.littler.com/publication-press/publication/trump-fires-eeoc-commissioners-general-counsel-depriving-agency-quorum [https://perma.cc/T63T-GCCE].

5. Nandita Bose & Ismail Shakil, *Trump's Firing of Independent Watchdog Officials Draws Criticism*, REUTERS (Jan. 25, 2025, 9:14 PM), https://www.reuters.com/world/us/trump-fires-least-12-independent-inspectors-general-washington-post-reports-2025-01-25/ [https://perma.cc/8AEF-CD7Q].

6. Aaron Navarro, *Democratic FEC Chair Ellen Weintraub Says Trump Fired Her. She Says It's Not Legal,* CBS NEWS, https://www.cbsnews.com/news/democratic-fec-chair-ellen-weintraub-trump-fired-her/ [https://perma.cc/H4XP-SJCR] (Feb. 7, 2025, 6:06 PM).

7. Jim Paretti, *White House Terminates National Labor Relations Board General Counsel Jennifer Abruzzo and Member Gwynne Wilcox*, LITTLER (Jan. 28, 2025), https://www.littler.com/publication-press/publication/white-house-terminates-national-labor-relations-board-general-counsel [https://perma.cc/VN8R-EU7C].

8. 29 U.S.C. § 153(a).

the basis for termination.[9] The fired board member challenged her firing in court and sought reinstatement.[10] The district court issued an order reinstating her.[11] A panel of the D.C. Circuit stayed the district court's order pending appeal (re-effectuating the termination),[12] but the *en banc* D.C. Circuit vacated the panel's stay.[13] The Administration sought emergency relief in the Supreme Court, and Chief Justice Roberts issued an administrative stay.[14] At this time, both the emergency motion and the appeal to the D.C. Circuit are pending.[15] Also pending before the same district court is a similar judicial challenge by two Democratic Commissioners of the Federal Trade Commission who were fired by President Trump contrary to statutory removal protections.[16]

Presidents Trump's aggressive removal actions come (perhaps not coincidentally) at a time in which United States Supreme Court precedent reflects a growing scope of the President's constitutional authority to remove executive officials. The Supreme Court has recently called into question the constitutionality of independent agencies—that is to say, agencies with independent "structural features, particularly fixed terms with for-cause removal protections," that limit the circumstances under which agency leaders can be removed from office.[17] For more than eighty-five years, precedent broadly suggested that Congress could limit the circumstances in which executive

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9. Julian Mark, Lauren Kaori Gurley & Lisa Rein, *Trump Moves to Fire Members of EEOC and NLRB, Breaking with Precedent*, WASH. POST, https://www.washingtonpost.com/business/2025/01/28/trump-fire-eeoc-nlrb-board-members/ [https://perma.cc/7RYH-8NK2] (Jan. 28, 2025).

10. Michael Sainato, *Dismissed Labor Official Sues Trump and NLRB Chair Over Firing*, THE GUARDIAN (Feb. 5, 2025, 11:29 AM), http://theguardian.com/us-news/2025/feb/05/gwynne-wilcox-nlrb-lawsuit-trump [https://perma.cc/6XKE-G5GQ].

11. Wilcox v. Trump, 775 F. Supp. 3d 215, 240–41 (D.D.C.), *appeal docketed*, No. 25-5057 (D.C. Cir. Mar. 7, 2025). The District Court also reinstated a fired member of the Merit Systems Protection Board, Cathy Harris, and the appeal from that order has been considered together with Member Wilcox's. *See* Harris v. Bessent, 775 F. Supp. 3d 164, 189 (D.D.C. 2025), *appeal docketed*, No. 25-5055 (D.C. Cir. Mar. 4, 2025).

12. Harris v. Bessent, No. 25-5037, 2025 WL 980278, at *1 (D.C. Cir. Mar. 28, 2025).

13. Harris v. Bessent, No. 25-5037, 2025 WL 1021435, at *2 (D.C. Cir. Apr. 7, 2025) (en banc).

14. Trump v. Wilcox, No. 24A966, 2025 WL 1063917 (U.S. Apr. 9, 2025) (Roberts, C.J., in chambers).

15. We have accounted for events up to and including May 15, 2025. Any developments past that date are not included in this Article.

16. *See* Complaint, Slaughter v. Trump, No. 1:25-cv-00909, 2025 WL 1984396 (D.D.C. July 17, 2025).

17. Jennifer L. Selin & David E. Lewis, ADMIN. CONF. OF THE U.S., SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES 43 (2d ed. 2018).

branch officials could be fired, thus providing agencies with more discretion to set policy and exercise governmental power independently of elected officials.[18] Yet in *Seila Law LLC v. CFPB*[19] (decided in 2020) and *Collins v. Yellen*[20] (decided in 2021), the Court held that limits on the President's ability to remove the heads of single-headed agencies offend Article II of the U.S. Constitution.

As significant as those holdings were, the Court's reasoning was more striking. The Court's analysis not only applies to single-headed agencies, but also casts real doubt on *all* restrictions on removal of executive branch officers[21]—a class of officials that the Court views broadly.[22] In addition, the Court has also taken steps to make it easier for litigants to raise Article II challenges to independent agencies in federal court.[23] In the midst of this wave of litigation, one legal scholar (now circuit court judge) went so far as to predict the Court will broadly hold that independent agencies are unconstitutional within a decade.[24] Lower courts have already addressed several removal challenges, which, together with President Trump's recent firings,

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18. *See, e.g.*, Aditya Bamzai & Saikrishna Bangalore Prakash, *The Executive Power of Removal*, 136 HARV. L. REV. 1756 (2023) (describing evolution of precedent).

19. 591 U.S. 197, 203–05 (2020).

20. 594 U.S. 220, 250 (2021) (following *Seila Law*); *see also* United States v. Arthrex, Inc., 594 U.S. 1, 16–17 (2021) (invoking *Seila Law* in context of appointments rather than simply removals).

21. *See, e.g.*, Aditya Bamzai & Aaron L. Nielson, *Article II and the Federal Reserve*, 109 CORNELL L. REV. 843, 845 n.5 (2024) (observing that this precedent may "throw[] the independence of most of the current independent agencies . . . into grave doubt" (quoting Cass R. Sunstein & Adrian Vermeule, *The Unitary Executive: Past, Present, Future*, 2020 SUP. CT. REV. 83, 85)).

22. *See* Lucia v. SEC, 585 U.S. 237 (2018) (concluding that administrative law judges are officers subject to the Appointments Clause); *see also* Jennifer L. Mascott, *Who Are "Officers of the United States"?*, 70 STAN. L. REV. 443 (2018) (advancing an even broader originalist argument for who is an "officer").

23. *See* Axon Enter., Inc. v. FTC, 598 U.S. 175 (2023) (allowing litigants to immediately bring constitutional challenge to agency structure in federal district court rather than as part of judicial review of agency determination); Carr v. Saul, 593 U.S. 83, 95 (2021) (rejecting an issue-exhaustion requirement for constitutional challenges to agency structural features). To be sure, the Court has simultaneously erected barriers to obtaining relief even after prevailing on the merits of challenges to removal restrictions. *See* Tyler B. Lindley, *Remedial Limits, Constitutional Adjudications, and the Balance of Powers*, 58 WAKE FOREST L. REV. 655, 687–92 (2023).

24. *See* Justin Walker, *The Kavanaugh Court and the* Schechter-*to*-Chevron *Spectrum: How the New Supreme Court Will Make the Administrative State More Democratically Accountable*, 95 IND. L.J. 923, 971 (2020) (predicting that the Court may overrule or at least limit precedent allowing removal restrictions within a decade).

will likely lead to the Court addressing the constitutionality of removal protections for other agencies and agency heads.[25]

The justices leading the charge against agency independence invoke both history and principles of political accountability. As Chief Justice John Roberts explained in *Seila Law*, "an independent agency led by a single Director and vested with significant executive power . . . has no basis in history and no place in our constitutional structure," whose structure—with "the sole exception of the Presidency"—goes out of its way to "avoid[] concentrating power in the hands of any single individual."[26] Justice Samuel Alito, writing for the Court in *Collins*, took that analysis even further, eliminating any requirement that the agency have "significant executive power" before unfettered Article II removal applies.[27] Other Justices disagree. Justice Elena Kagan has lamented that eliminating removal restrictions destroys "a measure of independence from political pressure."[28] And Justice Sonia Sotomayor has detailed the multi-generational understanding that "financial regulators will best perform their duties if separated from the political exigencies and pressures of the present moment."[29] Further, they reason that Congress determined that independence and expertise should be prioritized over control by elected officials.[30]

For both sides of this debate, then, a key premise is that removal restrictions meaningfully change agency behavior. The Justices who believe

25. *See* Jarkesy v. SEC, 34 F.4th 446, 464 (5th Cir. 2022) (holding that administrative law judges are unconstitutionally insulated from removal), *aff'd on other grounds*, 143 S. Ct. 2688 (2023); *see also* Leachco, Inc. v. Consumer Prod. Safety Comm'n, 103 F.4th 748, 750 (10th Cir. 2024) (holding that subjection to proceedings before an agency with officials who are allegedly subject to unconstitutional removal protections is insufficient to establish irreparable harm, by itself), *cert. denied*, 145 S. Ct. 1047 (2025); *see also* VHS Acquisition Subsidiary No. 7 v. NLRB, 759 F. Supp. 3d 88, 100–01 (D.D.C. 2024).

26. Seila Law LLC v. CFPB, 591 U.S. 197, 222–23 (2020).

27. *See* Collins v. Yellen, 594 U.S. 220, 251–52 (2021) ("[T]he nature and breadth of an agency's authority is not dispositive in determining whether Congress may limit the President's power to remove its head. The President's removal power serves vital purposes even when the officer subject to removal is not the head of one of the largest and most powerful agencies."); *see also id.* at 273 (Kagan, J., concurring in part and concurring in the judgment) ("Without even mentioning *Seila Law*'s 'significant executive power' framing, the majority announces that, actually, 'the constitutionality of removal restrictions' does not 'hinge[]' on 'the nature and breadth of an agency's authority.'").

28. *Seila Law*, 591 U.S. at 264 (Kagan, J., concurring in the judgment with respect to severability and dissenting in part).

29. *Collins*, 594 U.S. at 292 (Sotomayor, J., concurring in part and dissenting in part).

30. *See Seila Law*, 591 U.S. at 264 (Kagan, J., concurring in the judgment with respect to severability and dissenting in part).

such restrictions violate Article II and the Justices who disagree share that premise; they just disagree about what the Constitution requires and, potentially, whether insulation or presidential direction is more desirable.[31]

Political theorists, however, are more divided on the independence hypothesis. Some argue that removal restrictions change agency behavior by insulating agency leaders from political influence and, in turn, lead to different policy outcomes.[32] Others counter that executive removal authority is unnecessary and, in any event, ineffective. For example, it is possible that political dynamics prevent most removals even in the absence of legal removal protections.[33] There are also other, more effective means for the White House to exert influence over agency leaders.[34] In addition, agency leaders may share the political or partisan goals of the White House, thus

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31. To be sure, proponents of removal restrictions generally recognize that many other factors may also influence agency behavior, and Justice Kagan has even suggested that Congress's assumptions may be wrong. *See id.* at 2245 ("Congress may have been right [that formal job protection for policymaking would produce regulatory outcomes in greater accord with the long-term public interest]; or it may have been wrong; or maybe it was some of both. No matter—the branches accountable to the people have decided how the people should be governed.").

32. *See, e.g.*, David E. Lewis & Jennifer L. Selin, *Political Control and the Forms of Agency Independence*, 83 GEO. WASH. L. REV. 1487 (2015) (arguing agency responsiveness to elected officials depends on statutory limits on appointment and removal of agency leaders and features insulating agency decisions from political review); *see also* Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15 (2010) (arguing independent institutional design can help prevent political capture); Richard J. Pierce, Jr., *Agency Adjudication: It Is Time to Hit the Reset Button*, 28 GEO. MASON L. REV. 643 (2021) (arguing administrative judges are prone to political capture and that removal restrictions would help prevent political capture); Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53 (2008) (arguing bureaucratic separation from political control reduces variation in policymaking and leads to more stable governing by the bureaucracy).

33. *See, e.g.*, Ganesh Sitaraman, *The Political Economy of the Removal Power*, 134 HARV. L. REV. 352, 395 (2020) (arguing presidential removal may be "unnecessary, ineffectual, or actually backfire and *reduce* political control of the bureaucracy"); *see also* Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1196 (2013) (arguing that "there is a strong unwritten norm protecting the Fed Chair from removal" as Chair).

34. *See, e.g.*, Aziz Z. Huq, *Removal as a Political Question*, 65 STAN. L. REV. 1, 6 (2013) (arguing executive removal is ineffective as a crude and clumsy tool and that executive removal is also unnecessary to achieve political influence in light of other means of agency control available to other supervising agency leaders and elected officials); *see also* Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 DUKE L.J. 963, 1003 (2001) (arguing that even with removal, presidents cannot compel agency leaders to take a particular action on a particular issue).

negating the importance of any nominal independence.[35] Furthermore, individuals protected from removal may choose to resign out of respect for the voters.[36] And Congress's ability to increase the White House's costs of removal—for instance, by requiring written explanations for removal decisions or cutting off the use of acting officials—may effectively deter removal in the first place, especially for lower-profile agencies.[37]

Ultimately, the resolution to this debate is an empirical question: Do executive branch officials behave differently when insulated from presidential removal compared to when they may be removed at will? Against this backdrop of an expanding presidential power of removal, President Trump, in his second term, is already pushing the boundaries of that power, and yet there is little consensus on the practical consequences of an increased presidential removal power and little direct research on the question. To be sure, there is a fairly robust empirical literature on executive appointments and independent agencies.[38] There are even a handful of papers that look at

35. *See, e.g.*, Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459, 462 (2008) ("Party polarization translates into party loyalty, meaning independent-agency heads from the President's party are less likely to disagree with the President.") [hereinafter Devins & Lewis, *Not-So Independent Agencies*]; *see also* Adrian Vermeule, *Contra Nemo Iudex in Sua Causa: The Limits of Impartiality*, 122 YALE L.J. 384, 398 (2012) ("[B]y the end of their first term, presidents typically control policymaking at 'independent' agencies, in part by appointing members whose political preferences are predictable.").

36. *See, e.g.*, PHH Corp. v. CFPB, 881 F.3d 75, 190 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting) ("A tradition has developed by which some commissioners or board members of the opposite party resign from independent agencies when a new President takes office." (citing Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 820–21 (2013))).

37. *See, e.g.*, Aaron L. Nielson & Christopher J. Walker, *Congress's Anti-Removal Power*, 76 VAND. L. REV. 1, 51, 58 (2023) (explaining how Congress can raise the political costs of removal, thus reducing it, even without removal restrictions). Indeed, an "agency's independence (or lack of it) [may] depend[] on a wealth of features, relating not just to removal standards, but also to appointments practices, procedural rules, internal organization, oversight regimes, historical traditions, cultural norms, and (inevitably) personal relationships." Seila Law LLC v. CFPB, 591 U.S. 197, 283 (2020) (Kagan, J., concurring in the judgment with respect to severability and dissenting in part); *see also* Lewis & Selin, *supra* note 32, at 1490–91 (identifying tools to create independence).

38. That literature probes questions that are adjacent to the question we are exploring here (whether removal restrictions change the behavior of agency leaders). For example, other studies have explored the political motivations underpinning the creation of independent agencies. *See, e.g.*, Patrick M. Corrigan & Richard L. Revesz, *The Genesis of Independent Agencies*, 92 N.Y.U. L. REV. 637, 640–43 (2017) (presenting evidence from regression analysis that the approval rating of the President, the size of the Senate majority, and the alignment of the

departure decisions of career employees[39] and political appointees.[40] But there are only two empirical studies that directly probe whether the structure of independent agencies is changing agency behavior.

These two studies on agency behavior present conflicting findings. On the one hand, Neal Devins and David Lewis compare survey responses from leaders at executive agencies and independent agencies and find that, relative

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political party of the Senate majority and the President are the three main, statistically significant factors that influence whether Congress will establish an agency with independent characteristics, like restrictions on the President's removal power); *cf.* Charles T. Goodsell & Ceferina C. Gayo, *Appointive Control of Federal Regulatory Commissions*, 23 ADMIN. L. REV. 291 (1971) (developing a theoretical framework to motivate early departures of agency leaders during periods of political incongruence). Presidents also prioritize the political valence of the candidates appointed to lead independent agencies. *See* Brian D. Feinstein & Daniel J. Hemel, *Partisan Balance with Bite*, 118 COLUM. L. REV. 9 (2018) (presenting evidence that presidents consistently appointed co-party individuals who match their own ideological intensity, while their cross-party appointees have grown more and more ideologically extreme over time). Other studies consider the evolution of the appointment and confirmation timeline for political appointments at independent agencies and the idea of preventing presidents from appointing turn-coat commissioners (i.e., commissioners that publicly align with the opposing party, but actually support the agenda of the appointing President). *See* Devins & Lewis, *Not-So Independent Agencies*, *supra* note 35 (finding that the structure of independent agencies are increasingly impeding the President's ability to quickly appoint a majority of commissioners (by Senate members delaying confirmation hearings)); Daniel E. Ho, Congressional Agency Control: The Impact of Statutory Partisan Requirements on Regulation 1–3 (Feb. 12, 2007) (unpublished manuscript), http://perma.cc/F8MW-6WN8.

39. *See, e.g.*, Kathleen M. Doherty, David E. Lewis & Scott Limbocker, *Executive Control and Turnover in the Senior Executive Service*, 29 J. PUB. ADMIN RES. & THEORY 159 (2019) (combining survey responses with personnel records to demonstrate turnover by career diplomats at federal agencies from March 2015 to July 2017 is driven largely by strategic exit on the part of career diplomats, and by presidential marginalization as part of the transition from the Obama Administration to the Trump Administration).

40. *See* Brian D. Feinstein & David Zaring, *Disappearing Commissioners*, 109 IOWA L. REV. 1041, 1059–62 (2024) (presenting empirical evidence that consolidation of power by commission chairs (to the detriment of associate commissioners) at independent agencies is associated with an increase in associate commissioner resignations over the last several decades, suggesting independent agencies are failing to realize the full benefits of their independent structure); *see also* B. Dan Wood & Miner P. Marchbanks III, *What Determines How Long Political Appointees Serve?*, 18 J. PUB. ADMIN. RES. & THEORY 375, 378–79, 384, 393 (2008) (finding an increase in presidential-congressional conflict is correlated with a decline in appointee tenure); Matthew Dull & Patrick S. Roberts, *Continuity, Competence, and the Succession of Senate-Confirmed Agency Appointees, 1989–2009*, 39 PRESIDENTIAL STUD. Q. 432 (2009) (finding, unsurprisingly, that that appointees in positions with shorter fixed terms tend to remain in those positions for shorter periods of time than appointees in positions with longer fixed terms).

to executive agencies, independent agencies are not particularly expert, influential, or independent.[41] On the other hand, Roberta Romano compares agency decisionmaking across four independent agencies and argues two unique features of the Consumer Financial Protection Bureau's (CFPB's) independence structure[42] are correlated with the CFPB being less transparent and more shielded from public accountability, suggesting the independence hypothesis has some merit.[43] Both of these studies are descriptive and neither are able to answer the primary question posed by the independence hypothesis: whether the structure of independent agencies *causes* a change in agency behavior. In addition, neither paper attempts to isolate the effect of *removal restrictions* on agency behavior, the structural element of independent agencies being challenged at the Court.

In sum, there is an active debate at the Court on the constitutionality of removal restrictions, but the entire Court appears to agree that removal restrictions change agency behavior. Despite the primacy of the question and the amount of sweat and ink spilt by many scholars probing for an answer, no one has yet been able to develop and execute a research design capable of answering the fundamental question of causality.

To answer this causal question, we identify and leverage a natural experiment: the judicial decision in 2010 that removal restrictions protecting members of the Public Company Accounting Oversight Board (PCAOB) from at-will removal was unlawful.

As part of the Sarbanes-Oxley Act of 2002, Congress created the PCAOB as an independent entity within the Securities and Exchange Commission (SEC) and tasked the PCAOB with, among other things, overseeing audits of public companies.[44] The PCAOB is headed by five board members, each of whom serves a (staggered) five-year term and is appointed by the SEC in consultation with the Secretary of the Treasury and the Chair of the Federal Reserve.[45] Congress provided by statute that these board members can be removed only by the SEC and only for "good cause shown" following

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41. Neal Devins & David E. Lewis, *The Independent Agency Myth*, 108 CORNELL L. REV. 1305, 1331–35 (2023) [hereinafter Devins & Lewis, *Independent Agency Myth*].

42. These are (1) the Consumer Financial Protection Bureau (CFPB) is run by a single agency leader, not a multi-member board, and (2) the CFPB is not subject to the ordinary annual appropriations process.

43. Roberta Romano, *Does Agency Structure Affect Agency Decisionmaking? Implications of the CFPB's Design for Administrative Governance*, 36 YALE J. REG. 273 (2019).

44. *See, e.g.*, *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 484–87 (2010) (describing the agency).

45. *See id.* at 484.

specified procedures.[46] In 2010, however, the Court concluded in *Free Enterprise Fund v. PCAOB*,[47] that this structure violates Article II because the President cannot freely remove SEC Commissioners, who in turn cannot freely remove the PCAOB members.[48] According to the Court, this "Matryoshka doll of tenure protections" is unconstitutional.[49] For the remedy, the Court concluded that the board member's "good cause" protection should no longer be enforced, leaving them subject to at-will dismissal by the SEC.[50]

Free Enterprise Fund remains a controversial decision.[51] For our purposes here, however, the upshot is that it presents an opportunity to use a difference-in-differences design to estimate the effect the Court's decision has had on agency behavior.

In studying this question, it is important to recognize that changes in agency behavior can vary in degree. Some changes are incremental, and some incremental changes are more incremental than others. For example, an incremental change may manifest as a different outcome to a particular agency decision. A more substantial incremental change may manifest as a modification to the decisionmaking process itself, or even the substantive decisionmaking criteria. One might describe variations along this spectrum as changes in behavior on the intensive margin (i.e., the decision makers remain the same, but the decisions that are being made are different). A more extreme manifestation of a change in agency behavior is a change on the extensive margin (i.e., a change in the composition of the decisionmakers). These changes can be realized by either voluntary (i.e., early retirement, resignation, etc.) or involuntary (i.e., forced removal) early departures.

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46. *See id.* at 486.

47. 561 U.S. 477.

48. *See id.* at 487. There are no statutory removal protections for SEC commissioners, but one has been implied. *See infra* note 271.

49. *Free Enter. Fund,* 561 U.S. at 497.

50. *Id.* at 508–10 ("[W]e agree with the Government that the unconstitutional tenure provisions are severable from the remainder of the statute.").

51. *See, e.g.*, *id.* at 545 (Breyer, J., dissenting) (harshly criticizing the decision as "arbitrary," "destructive," or both); Patrick Jiang, Free Enterprise Fund v. PCAOB*: In Which a Great Case Makes Bad Law*, 92 B.U. L. REV. 701, 724 (2012) ("Substantial criticism has been leveled at the Supreme Court following the *Free Enterprise Fund* opinion."); Harold J. Krent, *Limits on the Unitary Executive: The Special Case of the Adjudicative Function*, 46 VT. L. REV. 86, 88 (2021) (noting criticism of "the Court's formalistic decisions, particularly in *Free Enterprise Fund*"). *But see* Neomi Rao, *A Modest Proposal: Abolishing Agency Independence in* Free Enterprise Fund v. PCAOB, 79 FORDHAM L. REV. 2541 (2011) (defending Court's analysis and explaining how it logically calls independence generally into question).

For this study we focus on agency behavior on the extensive margin[52] and explore whether judicial elimination of removal restrictions has caused a change in the composition of PCAOB leadership by changing the incidence of early departures of PCAOB members.[53] To answer this question, we first identify a group of other federal agencies (1) with similar removal restrictions that have not been held to be unconstitutional despite the *Free Enterprise Fund* ruling,[54] and (2) that have structural similarities to the PCAOB.[55] We then use early departure rates at these other agencies to project what early departure rates would have been at the PCAOB had its removal restrictions remained in place. Finally, we take the difference of the observed departure rates and the projected departure rates to estimate the causal effect of *Free Enterprise Fund* on early departures of PCAOB members.

Our dataset includes a total of twenty-five completed terms filled by ninety unique PCAOB leaders, and 116 terms filled by ninety unique leaders serving at other agencies. Of these 141 terms, thirty-one (22%) ended in early departure, nine occurring at the PCAOB and the remaining twenty-two occurring at the other agencies. Plotting these early departures over time, the

52. We recognize that changes in agency behavior on the intensive margin are also an important consideration, though they are beyond the scope of this project. We focus on early departure as our measure of change in agency behavior largely because early departure is an objective measure, it is easy to observe and quantify, and it is straightforward to compare early departure rates across agencies. By contrast, intensive, incremental change is a more subjective measure, is harder to observe and quantify, and may be difficult to standardize in a way that allows for cross agency comparisons.

53. *See, e.g.*, Michael Frakes, *The Impact of Medical Liability Standards on Regional Variations in Physician Behavior: Evidence from the Adoption of National-Standard Rules*, 103 AM. ECON. REV. 257 (2013) (using difference-in-differences to estimate the effect of a change in medical liability standards on the performance of c-sections in Mississippi). For an accessible explanation of the difference-in-differences methodology in the context of empirical legal studies, see ADAM CHILTON & KYLE ROZEMA, TRIAL BY NUMBERS 123–52 (2024).

54. Note that the holding in *Free Enterprise Fund* turned, in large part, on the idiosyncratic fact that the PCAOB was protected by two layers of removal restrictions, one for PCAOB leaders from at will removal by the SEC, and one for SEC leaders from at will removal by the President. *See Free Enter. Fund*, 561 U.S. at 497. The seven agencies included in our control group do not have the same layering of removal restrictions. Thus, removal restrictions for these agencies were not directly implicated by the reasoning in *Free Enterprise Fund*. For a discussion of how that difference might affect the generalizability of the results, see *infra* Part III.C.

55. Specifically, our control group includes the Consumer Product Safety Commission (CPSC), the Chemical Safety and Hazard Investigation Board (CSB), the Federal Energy Regulatory Commission (FERC), the Federal Mine Safety and Health Review Commission (FMSHRC), the Foreign Service Labor Relations Board (FSLRB), the National Labor Relations Board (NLRB), and the Surface Transportation Board (STB).

data suggests the judicial elimination of removal restrictions through *Free Enterprise Fund* did not initially have much real-world impact on early departures at the PCAOB. In November 2020, however, the patterns between the PCAOB and the other agencies diverge, with a large increase in the incidence of early departures at the PCAOB relative to early departures at the other independent agencies.

To explore whether these differences are due to random chance, however, and to produce a more precise estimate of this effect, we also conduct a formal statistical analysis that deploys a difference-in-differences estimation using a Cox-Proportional Hazard model.[56] We estimate that the elimination of removal restrictions at the PCAOB did not cause an increase in the risk of an early departure at the PCAOB in the first eight years following *Free Enterprise Fund* but did cause a large—373%—and statistically significant increase in the risk of early departure for PCAOB board members from June 2018 through March 2023.

These conflicting findings suggest that the effect of removal restrictions depends on the partisan status of the agency. If an agency is in a nonpartisan state, the removal restrictions reflect a bipartisan preference to insulate the agency from unstable political preferences. By contrast, if an agency is in a partisan state, the removal restrictions reflect a partisan advantage that insulates the agency from an opposing party's preferences. Our first finding of no initial change suggests that during the time the PCAOB was in a nonpartisan state, and thus the elimination of removal restrictions did not change agency behavior because those restrictions would have then been redundant with the underlying preferences of both parties. Our second finding of a delayed, large, and statistically significant increase in early departures suggests that sometime after June of 2018 the PCAOB's status changed from nonpartisan to partisan. That finding also demonstrates that removal restrictions in an agency in a partisan state do change agency behavior because those restrictions operate as a meaningful restraint on removal decisions when the preferences of agency leadership and the Executive Branch do not align. Collectively our empirical findings and resulting theory suggest that removal restrictions matter only when they are most likely to perpetuate a partisan advantage.

56. *See, e.g.*, John E. Sheridan, *Organizational Culture and Employee Retention*, 35 ACAD. MGMT. J. 1036 (1992) (deploying a Cox Proportional hazard model to study the relationship between organizational culture and employee departure); Cree Jones & Weijia Rao, *(Un)s table BITs*, 47 YALE J. INT'L L. 247 (2022) (using a Cox Proportional hazard model to study the relationship between investment treaty termination events and the evolution of signatory preferences regarding different treaty provisions).

This article proceeds as follows. Part I summarizes the debate over the constitutionality of removal restrictions with particular focus on the independence hypothesis—the idea that removal restrictions have real-world effects on agency behavior. It also describes what various theories about the independence hypothesis might suggest would happen at the PCAOB after *Free Enterprise Fund*. Part II then describes our study and its findings. Part II also details the limits of our analysis and identifies subjects for future empirical research. Part III then explores the implications of our findings, including implications on the stare decisis argument for independence. It also discusses the suggestion from our results that removal restrictions only matter for independent agencies in a partisan state and that nonpartisan agencies may become more partisanly controversial over time.

I. UNDERSTANDING AGENCY INDEPENDENCE

For more than two centuries, jurists have debated whether Congress can limit the circumstances in which executive branch officials can be removed from office. For the better part of the twentieth century, precedent broadly suggested that Congress generally could limit removal to facilitate policy independence. Yet in recent years, the Court has reversed course and has concluded in multiple cases that Article II of the U.S. Constitution allows policy-based removal. Here, we briefly detail this history with particular focus on the hypothesis that removal restrictions affect behavior.

A. *The Early Years*

Whether Article II provides the President with removal authority is a story that has been told many times.[57] Outside of impeachment, the Constitution says nothing explicit about how to remove executive branch officials.[58] Although the relevant history may go back much further,[59] the standard account

57. *See, e.g.*, J. DAVID ALVIS, JEREMY D. BAILEY & F. FLAGG TAYLOR IV, THE CONTESTED REMOVAL POWER, 1789–2010 (2013) (analyzing the development of executive removal power throughout American history).

58. *See, e.g.*, Myers v. United States, 272 U.S. 52, 109 (1926) ("There is no express provision respecting removals in the Constitution, except as Section 4 of Article II, above quoted, provides for removal from office by impeachment.").

59. *See, e.g.*, Daniel D. Birk, *Interrogating the Historical Basis for a Unitary Executive*, 73 STAN. L. REV. 175 (2021) (discussing pre-1789 removal practices); MICHAEL W. MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING: EXECUTIVE POWER UNDER THE CONSTITUTION 26–27 (2020) (focusing on Blackstone); Ilan Wurman, *The Removal Power: A Critical Guide*, 2020 CATO SUP. CT. REV. 157, 162–63 (2019-2020) (similar); *see also* Jane Manners & Lev Menand,

of whether the Constitution implicitly allows removal begins with the Constitutional Convention in 1787, where delegates discussed the appointments process but apparently said nothing about the flipside of appointment: removal.[60]

The issue, however, soon arose when the First Congress in 1789 established the federal government's early departments—in particular, the Department of Foreign Affairs.[61] During the debates about this constitutional question, various members of the First Congress advanced four different theories: (1) that the only permissible way to remove an executive branch official is by impeachment, (2) that removal should follow the same procedures as appointment (complete with Senate involvement), (3) that Congress could freely create removal restrictions under the Necessary and Proper Clause, or (4) that Article II—especially read structurally—empowers the President with unilateral removal authority.[62]

In what has come to be known as the Decision of 1789, Congress decided not to impose restrictions on the President's ability to remove the department head.[63] Some interpret that decision to mean that James Madison—the principal proponent of the view that Article II's Vesting and Take Care Clauses give the President a broad removal power in order to control the executive power—persuaded Congress.[64] Others argue that the decision simply reflects political compromise but that the fact that roughly half (or more) of Congress rejected such a reading of Article II counsels against Madison's

The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence, 121 COLUM. L. REV. 1, 28 (2021) (discussing history of term-of-year provisions); *Myers*, 272 U.S. at 110 (explaining that "during the Revolution and while the Articles [of Confederation] were given effect, Congress exercised the power of removal"); Jed Handelsman Shugerman, *Venality: A Strangely Practical History of Unremoval Offices and Limited Executive Power*, 100 NOTRE DAME L. REV. 213 (2024) (discussing a British history of executive officers shielded from removal by the monarchy); Jed Handelsman Shugerman, *Freehold Offices vs. 'Despotic Displacement': Why Article II 'Executive Power' Did Not Include Removal* (Boston Univ. Sch. of L. Rsch. Paper, Paper No. 4521119, 2023), http://ssrn.com/abstract=4521119 [https://perma.cc/59KX-LT8K].

60. *See, e.g.*, *Myers*, 272 U.S. at 109–10 ("The subject was not discussed in the Constitutional Convention."); Seila Law LLC v. CFPB, 591 U.S. 197, 243 (2020) (Thomas, J., concurring in part) (agreeing that the subject was not discussed).

61. *See, e.g.*, *Myers*, 272 U.S. at 111–12 (describing the history).

62. *See, e.g.*, Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021, 1034 (2006) (outlining the four basic positions, though noting that there were not "four static camps" holding these positions).

63. *See, e.g.*, *Myers*, 272 U.S. at 113–14 (describing history).

64. *See, e.g.*, Bamzai & Prakash, *supra* note 18, at 1798–99, 1802; *Myers*, 272 U.S. at 114; *see also Seila Law*, 591 U.S. at 214–15 (agreeing with *Myers*).

views.[65] However it originally played out, though, the Decision of 1789 soon became widely understood to represent a pro-removal-power moment. By 1839, the Court announced that "it was very early adopted, as the practical construction of the Constitution, that this power was vested in the President alone."[66] And again, regardless of the actual basis for the decision, "[f]ollowing the Decision of 1789, Congress did not impose express statutory limits on the President's removal power until 1863," when Congress did so for the Comptroller of the Currency.[67] Even for the Comptroller, however, Congress eliminated that restriction just one year later, with Members of Congress expressing constitutional concerns.[68]

Although the early years do not present a perfectly clear picture of the source or scope of the President's removal power, the conventional wisdom even by the early nineteenth century was that the Decision of 1789 had "settle[d]" the question or "fix[ed]" the constitutional meaning of the executive vesting clause.[69]

B. The Middle Years

Congress returned to the issue in 1867 when—unhappy with President Andrew Johnson's obstruction of Reconstruction initiatives—it enacted the Tenure of Office Act, "which required the Senate's advice and consent to remove an officer confirmed by the Senate."[70] Congress debated whether it could constitutionally impose such a requirement on cabinet secretaries—

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65. *See, e.g.*, Jed Handelsman Shugerman, *The Indecisions of 1789: Inconstant Originalism and Strategic Ambiguity*, 171 U. PA. L. REV. 753, 761–62 (2023); John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 2031 (2011).

66. *Ex parte* Hennen, 38 U.S. (13 Pet.) 230, 259 (1839).

67. Bamzai & Nielson, *supra* note 21, at 867. Some offer the Second Bank of the United States as a counterexample. *See, e.g.*, *Seila Law*, 591 U.S. at 274–75 (Kagan, J., concurring in the judgment with respect to severability and dissenting in part) (following Lawrence Lessig & Cass Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 30 (1994)). The Second Bank, however, was not historically viewed as part of the government. *See* Bamzai & Nielson, *supra* note 21, at 897–901. So it would not have been subject to the Madisonian Article II objection.

68. *See, e.g.*, Aditya Bamzai, *Tenure of Office and the Treasury: The Constitution and Control over National Financial Policy, 1787 to 1867*, 87 GEO. WASH. L. REV. 1299, 1378–79 (2019); *see also* Nielson & Walker, *supra* note 37, at 34–35.

69. *See* William Baude, *Constitutional Liquidation*, 71 Stan. L. Rev. 1, 9, 15, 53–54 (2019) (discussing James Madison's view that the Decision of 1789 would serve as a "permanent exposition of the constitution" (quoting The Congressional Register, Minutes of the House of Representatives (June 17, 1789), *in* 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, 4 MARCH 1789–2 MARCH 1791, at 904, 921 (Charlene Bangs Bickford et al. eds., 1992)).

70. Bamzai & Nielson, *supra* note 21, at 867.

core principal officers.[71] Some worried that Congress had no power to prevent the President's power to remove these high-level cabinet officials, although all apparently agreed that it could restrict that power as to lower-level officers.[72] However, Congress ultimately enacted a bill that protected "every person holding any civil office to which he has been appointed by and with the advice and consent of the Senate."[73] In other words, the Act "was a generalized version of the 1863 statute that Congress had enacted to protect the Comptroller of the Currency."[74] Congress recognized that presidents should be able to choose certain of their own cabinet officials, so it included in the Act a provision that certain officers were to have their term expire one month after the conclusion of the term of the president who appointed them: "the Secretaries of State, of the Treasury, of War, of the Navy, and of the Interior, the Postmaster-General, and the Attorney-General."[75] After President Johnson vetoed the Act, both houses of Congress voted to override this veto with the requisite supermajorities.[76]

President Johnson nonetheless purported to remove Edward Stanton from his position as Secretary of War.[77] Secretary Stanton refused to leave his office, and President Johnson nominated a replacement.[78] The House then impeached President Johnson for having attempted to remove Secretary Stanton contrary to law.[79] The Senate vote failed by one vote to achieve the necessary two-thirds supermajority to convict and remove President Johnson, although a strong majority voted in favor.[80] Some have suggested that the decisive vote against conviction (by a Republican) was achieved through bribery, and that other Republican votes may have been won through less than upright means.[81] Although President Johnson's counsel argued that the Act was unconstitutional, it appears that a majority of Congress rejected that argument, and that at least some of those who voted against conviction did so on other grounds.[82]

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71. DAVID O. STEWART, IMPEACHED: THE TRIAL OF PRESIDENT ANDREW JOHNSON AND THE FIGHT FOR LINCOLN'S LEGACY 216 (2009).

72. *Id.* at 322.

73. Tenure of Office Act, ch. 154, § 1, 14 Stat. 430, 430 (1867) (repealed 1887).

74. Bamzai & Nielson, *supra* note 21, at 867 (quoting Aditya Bamzai, *supra* note 68, 1380).

75. Tenure of Office Act § 1.

76. EDMUND G. ROSS, HISTORY OF THE IMPEACHMENT OF ANDREW JOHNSON 60–63 (1868).

77. STEWART, *supra* note 71, at 95.

78. *Id.* The Senate never acted on the nomination of Thomas Ewing, Sr., of Ohio. *See* ROSS, *supra* note 76, at 65.

79. STEWART, *supra* note 71, at 101–02.

80. *Id.* at 277.

81. *Id.* at 277–280.

82. *Id.* at 280–83.

Although the controversial Tenure of Office Act was repealed twenty years later,[83] Congress enacted other removal restrictions in the Reconstruction Era.[84] For example, in 1866, Congress provided that "no officer in the military or naval service shall in time of peace, be dismissed from service except upon and in pursuance of the sentence of a court-martial to the effect, or in commutation thereof."[85] The Court addressed the constitutionality of this restriction when a Naval cadet engineer sought recovery of past-due salary.[86] The government argued that the removal restriction was "an infringement upon the constitutional prerogative of the executive."[87] The Court disagreed, reasoning that Congress's constitutional power to "vest[] the appointment of inferior officers in the heads of [D]epartments" entailed a power to "limit and restrict the power of removal [by the head of Department] as it deems best for the public interest."[88] The Court distinguished, though, the situation in which an officer is "appointed by the President by and with advice and consent of the Senate" because the President's appointment power arises "under the authority of the Constitution" rather than by Congress.[89] On the facts of this particular case, the Court did not "need [to] consider[]" that question.[90]

Notably, Congress in 1887 established the Interstate Commerce Commission (ICC) to help regulate shipping rates.[91] The President could appoint five ICC Commissioners to six-year terms with the advice and consent of the Senate.[92] A partisan balance rule further required that no more than three of the Commissioners be members of the same political party.[93] And, of

83. Before its repeal, it was amended in 1869 to allow "remov[al]" through successful appointment of a new officer through presidential nomination and Senate consent. *See* Parsons v. United States, 167 U.S. 324, 341 (1897).

84. *See, e.g.*, Myers v. United States, 272 U.S. 52, 168 (1926) (describing history).

85. Act of July, 13, 1866, ch. 176, § 5, 14 Stat. 90, 92; *see also* United States v. Perkins, 116 U.S. 483, 484 (1886).

86. *Perkins*, 116 U.S. at 483.

87. *Id.* at 484 (quoting Perkins v. United States, 20 Ct. Cl. 438, 444 (1885), *aff'd*, 116 U.S. 483).

88. *Id.* at 484–85 (quoting *Perkins*, 20 Ct. Cl. at 444).

89. *Id.* at 484 (quoting *Perkins*, 20 Ct. Cl. at 444).

90. *Id.* (quoting *Perkins*, 20 Ct. Cl. at 444); *see also* Myers v. United States, 272 U.S. 52, 161–62 (1926) ("Whether the action of Congress in removing the necessity for the advice and consent of the Senate, and putting the power of appointment in the President alone, would make his power of removal in such case any more subject to Congressional legislation than before is a question [not yet decided by] this Court [and not presented or] decid[ed] in the *Perkins* case.").

91. *See, e.g.*, Jed Handelsman Shugerman, *The Dependent Origins of Independent Agencies: The Interstate Commerce Commission, the Tenure of Office Act, and the Rise of Modern Campaign Finance*, 31 J.L. & POL. 139, 144, 165–66 (2015).

92. *See id.* at 144–45.

93. *Id.*

particular importance, the President could remove Commissioners only for "inefficiency, neglect of duty, or malfeasance in office."[94] Congress later adopted this model for other independent agencies, including the Federal Trade Commission and the Federal Communications Commission.[95] Even though these commissioners were undoubtedly principal officers—who, in accordance with the Constitution, were appointed via presidential nomination and with Senate consent—Congress understood itself to have the power to specify the terms on which these officers could be removed.

It thus appeared that the tide might have turned in favor of Congress's power to enact removal restrictions. The Court, however, disagreed in a trio of cases that offered a more robust view of the President's Article II powers: *Parsons v. United States* (decided in 1897),[96] *Shurtleff v. United States* (decided in 1903),[97] and *Myers v. United States* (decided in 1926).[98]

In *Parsons*, the Court addressed "whether the President of the United States ha[d] power to remove a district attorney" before the attorney's four-year term had expired.[99] After a thorough examination of the history of removal, the Court concluded that Congress's enactment of a term-of-years provision did not prevent earlier presidential removal.[100] The statute at issue specified that "all district attorneys . . . shall be appointed for the term of four years, but shall be removable from office at pleasure."[101] The Court reasoned that the specified term of years was "designed . . . to bring the terms of [district attorneys] to an end after the expiration of four years," not "to grant an unconditional term of office for that period."[102] Although the statue made the President's removal power clear, the Court concluded that it was unnecessary: "The provision for a removal from office at pleasure was not necessary for the exercise of that power by the president . . . ."[103] That is, the default, even when Congress specified a term of years, was that the President could remove officers at will.

94. *Id.* at 145 (quoting Interstate Commerce Act of 1887, ch. 104, § 11, 24 Stat. 379, 383).

95. *See, e.g.*, Susan E. Dudley, *Improving Regulatory Accountability: Lessons from the Past and Prospects for the Future*, 65 CASE W. RSRV. L. REV. 1027, 1029 (2015).

96. 167 U.S. 324 (1897).

97. 189 U.S. 311 (1903).

98. 272 U.S. 52 (1926).

99. *Parsons*, 167 U.S. at 327.

100. *See id.* at 343 (concluding that the President may "remove an officer when in his discretion he regards it for the public good, although the term of office may have been limited by the words of the statute creating the office.").

101. *Id.* at 338 (quoting Act of May 15, 1820, ch. 102, 3 Stat. 582, 582).

102. *Id.*

103. *Id.* at 339.

In *Shurtleff*, the Court again assumed that Congress could restrict the President's removal power[104] but held that Congress could only do so with "very clear and explicit language" given the rule that "in the absence of constitutional or statutory provision the President can by virtue of his general power of appointment remove an officer, even though appointed by and with the advice and consent of the Senate."[105] The clear-statement rule articulated by the Court was robust. There, the statute specified that the officers "may be removed from office at any time by the President for inefficiency, neglect of duty, or malfeasance in office."[106] The Court explained that removal for any or all of those enumerated causes required a notice to the officer and a hearing.[107] And then, in explaining that there was no clear statement restricting the President's power to remove for other reasons, the Court rejected the argument that it's interpretation would render the enumerated causes surplusage: "[T]here is some use for the provision for removal for . . . cause[]" because "if a removal is made without [the required] notice, there is a conclusive presumption that the officer was not removed for any of those causes."[108] And that presumption benefitted the officer because the "removal [could not] be regarded as the least imputation on his character for integrity or capacity."[109]

Then came *Myers*, a wide-ranging decision about postmasters in which the Court largely endorsed Madison's view from the Decision of 1789 that Article II's Vesting and Take Care Clauses broadly empower presidential removal.[110] In *Myers*, the estate of a regional postmaster in Portland—one level below the Postmaster General—sought his unpaid salary which was purportedly owed despite being removed by "the Postmaster General, acting by direction of the President."[111] Congress had provided that postmasters like Myers should be appointed and removed only by the President with advice and consent of the Senate.[112] The Court did not focus on the fact that

104. Here, again, the Court distinguished between inferior officers appointed by heads of department and those appointed through presidential nomination and Senate confirmation. *See* Shurtleff v. United States, 189 U.S. 311, 314–15 (1903).

105. *See id.*

106. *Id.* at 313 (quoting Act of June 10, 1890, ch. 407, 26 Stat. 131, 136).

107. *Id.* at 314.

108. *Id.* at 317.

109. *Id.*

110. *See* Myers v. United States, 272 U.S. 52, 176 (1926); *see also id.* at 115–16 (describing Madison's analysis).

111. *Id.* at 106.

112. *See id.* at 107 (citing Act of July 12, 1876, ch. 44-179, § 6, 19 Stat. 78, 80).

Congress had retained a role for itself in the removal of the officers,[113] but rather held more broadly that the President has the constitutional power to remove any executive officer whom he had appointed with the advice and consent of the Senate, principal or inferior.[114] Writing for the Court, Chief Justice (and former President) William Howard Taft first distinguished *Perkins*, reasoning that Congress gained the power to condition the power of removal only when it exercised its constitutionally granted power to vest appointment of inferior officers in heads of departments.[115] He then explained that Congress had satisfied *Shurtleff*'s clear-statement rule,[116] and therefore it was necessary to answer the question *Perkins* refused to answer and *Shurtleff* had assumed.[117] Thus, after *Myers*, precedent appeared to support the proposition that the Constitution granted the President the indefeasible power to remove all executive officials whom he had appointed with advice and consent of the Senate, and perhaps even all executive officials regardless of the method of appointment.

Less than a decade later, however, the Court reversed course in *Humphrey's Executor*.[118] There, the Court upheld the Federal Trade Commission Act's restrictions on removal.[119] The FTC Act was passed by the House of Representatives by a voice vote,[120] was passed by the Senate by a vote of 43–5,[121] and was signed by President Woodrow Wilson.[122] The statute set a term for each commissioner and provided that "[a]ny commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office."[123] However, when President Franklin Roosevelt disagreed with the insufficiently progressive policy decisions of the FTC in the 1930s, he attempted to remove Commissioner Humphrey.[124] In an action by Humphrey's estate for

113. *Myers* did mention that *Perkins*—which, recall, held that Congress could place conditions on the removal of officers for whom it had vested their appointment in heads of departments—could not be extended to allow Congress to place itself in the removal process. *Id.* at 161. But the Court's ultimate holding in *Myers* was broader. *See id.* at 176.

114. *Id.* at 176.

115. *Id.* at 162. *Myers* also strongly implied that *Perkins* allowed restrictions only on removal by heads of department (but not the President), but pretermitted the question. *Id.* at 161–62.

116. *Id.* at 175–76.

117. *See supra* notes 90, 104, 113.

118. 295 U.S. 602 (1935).

119. *Id.* at 632.

120. 51 CONG. REC. 14,943 (1914). The original House version of the bill also passed by a voice vote after a motion to recommit the bill failed 19–151. 51 CONG. REC. 9,910 (1914).

121. 51 CONG. REC. 14,802 (1914).

122. 15 U.S.C. § 41.

123. *Humphrey's Executor*, 295 U.S. at 620; *see also* 15 U.S.C. § 41.

124. *Humphrey's Executor*, 295 U.S. at 618–19.

unpaid salary, the Court reasoned that *Shurtleff*'s clear-statement rule applied only where a removal restriction would lead to the executive officer's life tenure; for FTC Commissioners, the term of years prevented such a result, and so the clear-statement rule did not apply.[125]

The Court then distinguished *Myers* by reasoning that an FTC Commissioner's office "is so essentially unlike" the office of a Postmaster that "the *Myers* case cannot be accepted as controlling."[126] The Court reasoned that FTC Commissioners acted in a "quasi-legislative" and "quasi-judicial" capacity and so ought to be able to operate "entirely free from the control of coercive influence" of the Executive.[127] The Court went so far as to say that FTC Commissioners "occupie[d] no place in the executive department and . . . exercise[d] no part of the executive power vested by the Constitution in the President."[128] In its view, the FTC was "an agency of the legislative or judicial departments of the government," and so did not "exercise any . . . executive power in the constitutional sense."[129] The Court thus concluded that the President's plenary removal power was confined to "purely executive officers," like the officer at issue in *Myers*.[130]

Following the Court's about-face in *Humphrey's Executor*, its philosophy regarding removal changed. Indeed, despite *Shurtleff*'s clear-statement rule, the Court concluded in *Wiener v. United States*[131] that, even absent express statutory removal restrictions, some offices—in *Wiener*, a War Claims Commissioner tasked with adjudicating—have implied removal protection.[132] That

125. *Id.* at 621–23. The Court did not mention *Parsons*, but the statute in *Parsons* did not provide for or imply a for-cause removal requirement. *See* Act of May 15, 1820, ch. 102, 3 Stat. 582, 582.

126. *Humphrey's Executor*, 295 U.S. at 627.

127. *Id.* at 629.

128. *Id.* at 628.

129. *Id.* The Court waved away provisions authorizing the President to use the FTC in "investigati[ng] . . . alleged violations of the anti-trust acts" as "so obviously collateral to the main design" of the FTC Act that it could be ignored for purposes of the removal question. *Id.* at 628 n.1. In later decisions, the Court has squarely rejected *Humphrey's Executor*'s approach to executive power, reasoning that quasi-legislative and quasi-judicial powers *are* executive power in the constitutional sense. *See, e.g.*, INS v. Chadha, 462 U.S. 919, 953 n.16 (1983) ("Executive action under legislatively delegated authority that might resemble 'legislative' action in some respects is . . . Executive action."); City of Arlington v. FCC, 569 U.S. 290, 305 n.4 (2013) ("These [quasi-legislative and quasi-judicial] activities take 'legislative' and 'judicial' forms, but they are exercises of—indeed, under our constitutional structure they *must be* exercises of—the 'executive Power.'").

130. *Humphrey's Executor*, 295 U.S. at 632.

131. 357 U.S. 349 (1958).

132. *See, e.g.*, *id.* at 353–54.

is, some officers are tasked with functions so non-executive—as defined by *Humphrey's Executor*—that Congress must affirmatively grant the President removal power else he is powerless to remove the officer.

More than fifty years after *Humphrey's Executor*, in *Morrison v. Olson*,[133] the Court reaffirmed that Congress could restrict presidential removal, though the Court retreated from the rationale used in *Humphrey's Executor*.[134] *Morrison* concerned the Office of Independent Counsel, an inferior officer appointed by the D.C. Circuit—following a referral from the U.S. Attorney General—with authority to investigate and prosecute various government officials.[135] An independent counsel could only be removed by the Attorney General for "good cause."[136] Over Justice Antonin Scalia's dissent, the Court concluded that this restriction comports with Article II, even though the power to prosecute is a purely executive power.[137] The Court explained that although it had relied on the "terms 'quasi-legislative' and 'quasi-judicial' to distinguish the officials involved in *Humphrey's Executor* and *Wiener* from those in *Myers*," such "rigid categories" are inappropriate in assessing the President's removal power.[138] Instead, "the real question is whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty," which, the Court concluded, the "good cause" restriction at issue did not do.[139] The Court's analysis thus suggested an extremely narrow removal power under Article II. After all, "[i]f the removal of a prosecutor, the virtual embodiment of the power to 'take care that the laws be faithfully executed,' can be restricted, what officer's removal cannot?"[140]

Despite this general trend, not all the Court's decisions expanded Congress's power to control the terms of removal. In *Bowsher v. Synar*,[141] the Court addressed a statutory scheme in which Congress gave itself the sole power to remove the Comptroller General of the United States.[142] The Comptroller had been viewed as a legislative officer for decades, in part because of this

133. 487 U.S. 654 (1988).

134. *Id.* at 688-89.

135. *See id.* at 660–65 (describing independent counsel's authority).

136. *Id.* at 696.

137. *Id.* at 688–90.

138. Morrison v. Olson, 487 U.S. 654, 689 (1988).

139. *Id.* at 691.

140. *Id.* at 726 (Scalia, J., dissenting); *see also id.* at 710 ("[T]he inexorable command of Article II is clear and definite: the executive power must be vested in the President of the United States.").

141. 478 U.S. 714 (1986).

142. *Id.* at 714, 727–28.

power of removal.[143] However, the Court concluded that a recent statute had given the Comptroller executive power in addition to legislative power.[144] Because Congress held the power of removal (and therefore the office was a legislative office), the Court held that "he may not be entrusted with executive powers"[145] on the grounds that "Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment."[146]

C. The Modern Trend

The view that Congress has broad freedom to provide restrictions on the President's ability to remove executive officers began to change under the Roberts Court. In 2010, the Court—with Chief Justice Roberts writing—decided *Free Enterprise Fund*, a closely divided, 5-to-4 case.[147] As described earlier,[148] *Free Enterprise Fund* concerned the PCAOB, an independent board within the SEC created by Congress in 2002 as part of the Sarbanes-Oxley Act to regulate accounting practices following "a series of celebrated accounting debacles."[149] The bill passed with overwhelming support, unanimously in the Senate[150] and with only three votes against in the House.[151]

The statute established a new independent board within the SEC. The five PCAOB members serve staggered five-year terms, and Congress provided that they can only be removed for "good cause" by the SEC following specified procedures.[152] Congress's decision to embed the PCAOB in the SEC prompted a constitutional question. Although Congress has not expressly provided SEC commissioners with protection against removal, the SEC has long been understood to be an independent agency, with implied

143. *Id.* at 731–32.

144. *Id.* at 718, 732–33.

145. *Id.* at 732.

146. *Id.* at 726.

147. 561 U.S. 477 (2010).

148. *See supra* notes 44–50 and accompanying text.

149. 561 U.S. at 484.

150. 148 CONG. REC. 14,458 (2002); *Roll Call Vote 11th Congress – 2nd Session*, U.S. SENATE (July 25, 2002, 04:30 PM), https://www.senate.gov/legislative/LIS/roll_call_votes/vote1072/vote_107_2_00192.htm [https://perma.cc/ZW92-WA3P] (99 Yeas, 0 Nays, 1 Not Voting).

151. 148 CONG. REC. 14,505 (2002); *Roll Call 348 | Bill Number: H.R. 3763*, U.S. HOUSE OF REPRESENTATIVES, OFF. OF THE CLERK (July 25, 2002, 12:09 PM), https://clerk.house.gov/Votes/2002348 [https://perma.cc/Y5MK-BV8Q] (423 Yeas, 3 Nays, 8 Not Voting).

152. *Free Enter. Fund*, 561 U.S. at 486.

limitations on the President's power to remove commissioners.[153] Yet if the President cannot fire SEC commissioners at will, then placing the PCAOB within the SEC meant that there were two layers of removal protection between the President and the PCAOB members. Should that matter?

The controversy that led to *Free Enterprise Fund* arose when the PCAOB released a report criticizing the audit procedures of a Nevada accounting firm, and instituted a formal investigation.[154] The firm sought to prevent that investigation, arguing, among other points, that the PCAOB was unconstitutionally insulated from presidential control.[155] Ultimately, the Court rejected most of the firm's challenges, but it did agree that two-layers of insulation is unconstitutional.[156] Chief Justice Roberts embraced Madison's views from the Decision of 1789 and Chief Justice Taft's views from *Myers*.[157] He acknowledged that the Court had upheld removal restrictions in *Perkins*, *Humphrey's Executor*, and *Morrison*, but stressed that in those cases "only one level of protected tenure separated the President from an officer exercising executive power."[158] According to Roberts, this distinction was critical: Under Sarbanes-Oxley, "[n]either the President, nor anyone directly responsible to him, nor even an officer whose conduct he may review only for good cause, has full control over the Board."[159] As a remedy, the Court declared that the purported limits on the SEC's power to remove PCAOB members were unconstitutional; then it held that "the unconstitutional tenure provisions are severable from the remainder of the statute."[160] Thus, *Free Enterprise Fund* recognized the SEC's power to remove PCAOB members at will.

Justice Breyer—alarmed by the Court's holding and even more by its reasoning[161]—dissented, warning that the Court's "holding threatens to disrupt

153. *See id*. at 487. Even in *Free Enterprise Fund*, this implied protection was questioned by the dissent, or, more accurately, the dissent chided the majority for assuming removal protections to create, rather than avoid, a constitutional problem. *Id.* at 545 (Breyer, J., dissenting) ("How can the Court simply *assume* without deciding that the SEC Commissioners themselves are removable only 'for cause'?"). Whether SEC commissioners enjoy removal protection is even more questionable after *Collins*, which reaffirmed *Shurtleff*'s clear-statement requirement. *See* Collins v. Yellen, 594 U.S. 220, 247–248 (2021).

154. *See Free Enter. Fund*, 561 U.S. at 487.

155. *See id.* at 510–13.

156. *Id.* at 507–08.

157. *Id.* at 492–93.

158. *Id.* at 495.

159. *Id.* at 496.

160. *Free Enter. Fund*, 561 U.S. 447, 508 (2010).

161. *See, e.g.*, *id.* at 514 (Breyer, J., dissenting); *see also* Neomi Rao, *A Modest Proposal: Abolishing Agency Independence in* Free Enterprise Fund v. PCAOB, 79 FORDHAM L. REV. 2541 (2011) (explaining why the Court's analysis swept more broadly than its holding).

severely the fair and efficient administration of the laws."[162] Justice Breyer urged the Court to embrace a functionalist approach. After all, "to free a technical decisionmaker from the fear of removal without cause can . . . help create legitimacy with respect to that official's regulatory actions by helping to insulate his technical decisions from nontechnical political pressure."[163] The PCAOB was a prime example for Justice Stephen Breyer's reasoning. Sarbanes-Oxley was not an attempt by a majority political party to entrench its policy views or gain a partisan advantage.[164] Rather, it was a wildly popular and bipartisan effort to enforce technical accounting standards in a way that would not be subject to political interests.[165] Neither the President nor the SEC had shown any inclination that either wanted to remove PCAOB members. The *Free Enterprise Fund* case arose because a regulated party wanted to stop a PCAOB investigation.

The prospect that the Court's *Free Enterprise Fund* analysis would be limited to situations with two levels of removal restrictions was rejected a decade later in *Seila Law*—another 5-to-4 decision penned by Chief Justice Roberts.[166] *Free Enterprise Fund* concerned a relatively obscure group of inferior officers, but *Seila Law* concerned a prominent position: the Director of the CFPB.[167] Congress created the CFPB in 2010 as part of the Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd–Frank).[168] Following the economic crisis of 2008, Congress broadly tasked the CFPB with regulating the financial industry's interactions with consumers.[169] Dodd–Frank was enacted largely along partisan lines, with Democrats controlling both houses of Congress and the Presidency.[170] The director's removal protections were

162. *Free Enter. Fund*, 561 U.S. at 514 (Breyer, J., dissenting).

163. *Id.* at 522.

164. *Id.* at 523.

165. *Id.* at 530–32 (describing the justifications for granting an accounting board some measure of political independence in the wake of several public accounting scandals). Justice Breyer's dissent appears to have a contradiction because he argues that the removal protections were unlikely to inhibit the President but also that they were necessary to protect PCAOB members from political pressure exerted by the President. That is, he appears to have taken the position that removal restrictions do not affect agency behavior and that removal restrictions do affect agency behavior. *Cf. id.*

166. Seila Law LLC v. CFPB, 591 U.S. 197, 204–205 (2020).

167. *Id.* at 202.

168. *Id.* at 206.

169. *Id.*

170. The House vote included a few crossover votes, none of which made a difference on the outcome of the vote. 111 CONG. REC. 12462–63 (2010); *Roll Call 413 | Bill Number: H. R.* 44173, U.S. HOUSE OF REPRESENTATIVES, OFF. OF THE CLERK (June 30, 2010, 6:54 PM),

designed with the policy purpose to "ensure that 'consumer protection regulations' in the financial sector 'are written fairly and enforced vigorously.'"[171] And although President Barack Obama's original proposal suggested the CFPB be "run by a multimember board with a 'diverse set of viewpoints and experiences,'"[172] Congress established a single-head agency with a director rather than a board, with a five-year term, who could only be removed for "inefficiency, neglect of duty, or malfeasance in office."[173]

Nearly a decade into its existence, the CFPB issued a civil investigative demand to a California law firm, which responded by challenging the agency's structure on Article II grounds.[174] In holding that Congress violated the Constitution, Chief Justice Roberts expanded upon his analysis from *Free Enterprise Fund*, explaining that the proposition that "[t]he President's power to remove . . . those who wield executive power on his behalf follows from the text of Article II, was settled by the First Congress, and was confirmed in the landmark decision *Myers*."[175] The Court then characterized *Humphrey's Executor* and *Morrison* (along with *Perkins*) as mere "exceptions to the President's unrestricted removal power," "one for multimember expert agencies that do not wield substantial executive power, and one for inferior officers with limited duties and no policymaking or administrative authority."[176] Notably, the Court read *Humphrey's Executor* so narrowly that it is hard to see how it applies to any agency, including the FTC itself.[177] As with *Free Enterprise*

https://clerk.house.gov/Votes/2010413 (237 Yeas, 192 Nays, 4 Not Voting). In the Senate, the only crossover vote was one Democrat voting against the legislation. 111 CONG. REC. 13,200 (2010); *Roll Call Vote 111th Congress – 2nd Session*, U.S. SENATE (July 15, 2010, 2:29 PM), https://www.senate.gov/legislative/LIS/roll_call_votes/vote1112/vote_111_2_00208.htm #position (60 Yeas, 39 Nays). Of course, it is not clear how much partisan opposition was founded on the CFPB's mission or structure versus other parts of the Act.

171. *Seila Law*, 591 U.S. at 207 (quoting U.S. DEP'T OF THE TREASURY, FINANCIAL REGULATORY REFORM: A NEW FOUNDATION 55 (2009), https://fraser.stlouisfed.org/title/financial-regulatory-reform-5123 [https://perma.cc/5C9W-3GZY]).

172. *Id.* at 206 (quoting U.S. DEP'T of THE TREASURY, *supra* note 171, at 58).

173. *Id.* at 207.

174. *Id.* at 208.

175. *Id.* at 204.

176. *Id.* at 218.

177. *See* Seila Law LLC v. CFPB, 591 U.S. 197, 216 (2020) ("*Humphrey's Executor* permitted Congress to give for-cause removal protections to a multimember body of experts, balanced along partisan lines, that performed legislative and judicial functions and was said not to exercise any executive power."); *id.* at 216 n.2 ("The Court's conclusion that the FTC did not exercise executive power has not withstood the test of time."); *id.* at 219 n.4 ("[W]hat matters is the set of powers the Court considered [in *Humphrey's Executor*] as the basis for its

Fund, the Court declared the removal restrictions unconstitutional but severable and so did not directly offer the challenger a remedy.[178]

Justice Kagan dissented, echoing themes from Justice Breyer's *Free Enterprise Fund* dissent. She emphasized that Congress may properly "create zones of administrative independence," and that "the distinction doing most of the majority's work—between multimember bodies and single directors—does not respond to the constitutional values at stake."[179] Justice Kagan also observed that even *Free Enterprise Fund*, with its focus on two levels of removal, "left in place a removal provision just like the one here" with respect to the SEC.[180] Justice Kagan further attempted to cast the CFPB's structure as ordinary and nonpartisan. She argued that "[i]nsulation from political pressure . . . . promotes continuity, and prevents short-term electoral interests from distorting policy."[181] "No one had a doubt," Justice Kagan claimed, the CFPB "should be independent,"[182] comparing the CFPB to "financial

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decision, not any latent powers that the agency may have had not alluded to by the Court."); *see also id.* at 239 (Thomas, J., concurring in part and dissenting in part) ("[W]ith today's decision, the Court has repudiated almost every aspect of *Humphrey's Executor*."); *id.* at 277 (Kagan, J., concurring in the judgment with respect to severability and dissenting in part) ("The majority grounds its new approach in *Myers*, ignoring the way this Court has cabined that decision."); *see also* Bamzai & Nielson, *supra* note 21, at 882, 888–893 (explaining the implications of the Court's analysis).

178. *Seila Law*, 591 U.S. at 237–38; *see also* Lindley, *supra* note 23, at 692 n.211 (explaining that the Court's remedial analysis allowed it to "vindicate constitutional separation of powers principles while avoiding the risk of collapsing the entire agency and crippling the agency's ability to act."); Kristin Hickman, *Symbolism and Separation of Powers in Agency Design*, 93 NOTRE DAME L. REV. 1475 (2018) (explaining that the remedies in the Court's separation-of-power cases may make its merits analysis symbolic). *But see* Bamzai & Nielson, *supra* note 21, at 871 & n.192 (explaining how these holdings have effects outside of private litigation). On remand, the Ninth Circuit held that the Director's post-*Seila Law* ratification of all previous and ongoing CFPB actions cured any constitutional problem with the CFPB's investigation. CFPB v. Seila Law LLC, 984 F.3d 715, 717–18 (9th Cir. 2020); *see also* Lindley, *supra* note 23, at 685–86 (discussing how the procedural niceties of the case prevented the challenger from obtaining any remedy).

179. *Seila Law*, 591 U.S. at 261, 263; *see also id.* at 2238 (Kagan, J., concurring in the judgment with respect to severability and dissenting in part) ("Congress has historically given—with this Court's permission—a measure of independence to financial regulators like the Federal Reserve Board and the FTC."); *id.* at 263 ("[W]ith or without a for-cause removal provision, the President has at least as much control over an individual as over a commission—and possibly more.").

180. *Id.* at 281–82.

181. *Id.* at 282–83.

182. *Id.* at 285; *see also id.* at 296 ("Congress and the President came together to create an

regulators like the Federal Reserve Board and the FTC."[183] For Justice Kagan, the CFPB Director was just "one in a long line . . . of financial regulators designed to do their jobs with some independence."[184]

In *Collins*, the Court extended *Seila Law*'s holding to a new agency: the Federal Housing Finance Agency (FHFA). In the midst of the same financial downturn that prompted Dodd–Frank, Congress created the FHFA to regulate a limited number of quasi-governmental housing entities, most notably the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation—better known as Fannie Mae and Freddie Mac.[185] The FHFA shares some features with the CFPB; most notably, both are headed by single directors, not commissions. Yet the FHFA director could be removed merely "for cause," seemingly a less protective standard.[186] And the FHFA lacks "regulatory or enforcement authority remotely comparable to that exercised by the CFPB."[187] Nonetheless, the Court—in an opinion authored by Justice Samuel Alito—concluded that the same constitutional infirmity from *Seila Law* also existed. The Court did not repeat its language from *Seila Law* about "significant executive power," instead concluding that

agency with an important mission . . . . Not only Congress but also the President thought that the new agency, to fulfill its mandate, needed a measure of independence. So the two political branches, acting together, gave the CFPB Director the same job protection that innumerable other agency heads possess. All in all, those branches must have thought, they had done a good day's work. . . . They had protected the public from financial chicanery and crisis.").

183. *Id.* at 285; *see also id.* at 286–87 (comparing the CFPB's power to other independent agencies by tracing the old power transferred from those agencies to the CFPB and comparing the CFPB's new powers to the powers held by other independent agencies).

184. *Id.* at 290 (Kagan, J., concurring in the judgment with respect to severability and dissenting in part).

185. *See* Collins v. Yellen, 594 U.S. 220, 226 (2021). The Housing and Economic Recovery Act of 2008 passed with meaningful, although not broad, bipartisan support in the Senate. 154 CONG. REC. 16569–70 (2008); *Roll Call Vote 110th Congress – 2nd Session*, U.S. SENATE (July 26, 2008, 11:00AM), https://www.senate.gov/legislative/LIS/roll_call_votes/vote1102/vote_110_2_00186.htm [https://perma.cc/7LJ6-2U36] (71 Yeas, 13 Nays, 15 Not Voting), and in the House, 154 CONG. REC. 16,059 (2008); *Roll Call 519 | Bill Number: H.R. 3221*, U.S. HOUSE OF REPRESENTATIVES (July 23, 2008, 5:01 PM), https://clerk.house.gov/Votes/2008519 [https://perma.cc/5KJR-SV98] (272 Yeas, 152 Nays, 11 Not Voting).

186. *Collins*, 594 U.S. at 255 ("We acknowledge that the Recovery Act's 'for cause' restriction appears to give the President more removal authority than other removal provisions reviewed by this Court.").

187. *Id.* at 1803 (Sotomayor, J., concurring in part and dissenting in part); *see also, e.g.*, *Seila Law*, 591 U.S. at 222. *But see Collins*, 594 U.S. at 272 (Kagan, J., concurring in part and concurring in the judgment) ("[The FHFA] wields 'significant executive power,' much as the agency in *Seila Law* did." (quoting *Seila Law*, 591 U.S. at 220)).

the head of any agency "do[ing] important work" must be removable at will by the President.[188] Justice Kagan joined the Court's judgment, explaining that the stare decisis force of *Seila Law* compelled her decision, though she again rejected the Court's "political theory."[189] Justice Sonia Sotomayor dissented, stressing that "[t]he public has long accepted (indeed, expected) that financial regulators will best perform their duties if separated from the political exigencies and pressures of the present moment."[190] Following *Collins*, President Joseph Biden fired the heads of the FHFA and the Social Security Administration (SSA) (another agency headed by a single person that the separate opinions had argued were indistinguishable from the CFPB and FHFA).[191]

Since *Collins*, the Court has not squarely addressed a removal restriction. It has, however, made it easier to raise such challenges. In *Axon Enterprise, Inc. v. FTC*,[192] the Court concluded that a party could raise a challenge to the FTC's structure directly in federal district court rather than as part of a review of a final agency action.[193] And at least two lower courts concluded that the rule from *Free Enterprise Fund* applies to administrative law judges who operate within independent agencies, such as the SEC and NLRB.[194]

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188. *Seila Law*, 591 U.S. at 220; *Collins*, 594 U.S. at 252.

189. *Collins*, 594 U.S. at 272 (Kagan, J., concurring in part and concurring in the judgment).

190. *Id.* at 292 (Sotomayor, J., concurring in part and dissenting in part).

191. Andrew M. Grossman & Sean Sandoloski, *The End of Independent Agencies? Restoring Presidential Control of the Executive Branch*, 22 FEDERALIST SOC. REV. 216 (2021); Constitutionality of the Commissioner of Social Security's Tenure Protection, 45 Op. O.L.C. (July 8, 2021) (Slip Opinion); *see also Seila Law*, 591 U.S. 290–91 (Kagan, J., concurring in the judgment with respect to severability and dissenting in part); *Collins*, 594 U.S. at 274–276 (Kagan, J., concurring in part and concurring in the judgment); *id.* at 290–291 (Sotomayor, J., concurring in part and dissenting in part).

192. 598 U.S. 175 (2023).

193. *See id.* (allowing litigants to immediately bring constitutional challenge to agency structure in federal district court rather than as part of judicial review of an agency determination); *see also* Carr v. Saul, 593 U.S. 83, 95 (2021) (rejecting an issue-exhaustion requirement for constitutional challenges to agency structural features when litigants do wait until judicial review of an agency determination).

194. *See* SEC v. Jarkesy, 34 F.4th 446 (5th Cir. 2022), *aff'd on other grounds*, SEC v. Jarkesy, 603 U.S. 109 (2024); VHS Acquisition Subsidiary No. 7 v. Nat'l Lab. Rels. Bd., 759 F. Supp. 3d 88 (D.D.C. 2024); *see also* Benjamin M. Daniels & Trevor L. Bradley, *Fifth Circuit Decision Threatens to Upend SEC's Use of Administrative Proceedings*, NAT'L L. REV., June 7, 2022, https://natlawreview.com/article/fifth-circuit-decision-threatens-to-upend-sec-s-use-administrative-proceedings [https://perma.cc/X6SP-GDY3] (explaining potential implications).

II. TESTING THE INDEPENDENCE HYPOTHESIS

A key premise of the Court's ongoing debate regarding the constitutionality of removal restrictions is that such restrictions meaningfully change agency behavior. Both the Justices who believe removal restrictions violate Article II and those Justices who disagree embrace that premise. Those who believe removal restrictions violate Article II generally view removal restrictions as allowing unaccountable bureaucrats to subvert the democratically elected President. And those who think that Congress can constitutionally enact removal restrictions believe that such restrictions can be important and useful tools in promoting independent and expert decisionmaking in areas in which political influence is more likely to cause mischief than it is to promote democratic legitimacy.

However, as discussed in the Introduction, despite this consensus within the Court, there are competing narratives promulgated by legal and political theorists and scant evidence from empiricists on whether removal restrictions actually have any real effect on agency behavior.[195] In this Section we lay out and execute a research design to provide an answer to this fundamental question.

In our study we look specifically at whether the official judicial declaration that removal restrictions are unlawful causes a change in the likelihood that an appointed official leaves before the completion of her term (early departure). To answer this question, at a minimum, one must observe both what happens when removal restrictions are in place (or understood to be enforceable) and what happens when removal restrictions are not in place (or understood to be unenforceable).[196] One rudimentary approach may be to simply compare early departure events at agencies with removal restrictions to agencies without removal restrictions. However, this crude calculation will fail to produce a reliable causal estimate because agencies with and without removal restrictions are likely different in important ways that may also affect early departure decisions, thus biasing the causal estimate.[197]

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195. *See supra* notes 31–43 and accompanying text.

196. Throughout this Article, when we discuss agencies in terms of removal restrictions being in place or not being in place—or agencies with or without removal restrictions—we intend to identify two groups of agencies. The first group includes agencies with heads who enjoy statutory removal protections that are understood to be legally enforceable. The second group includes agencies with heads who either have no statutory removal protections or statutory removal protections that the Supreme Court has held to be unlawful.

197. Note this approach is analogous to the ones taken by both Devins & Lewis, *supra* note 35 (comparing expertise, influence, and independence of independent agencies to the same measures for executive agencies), and Romano, *supra* note 43 (comparing transparency

A second, more sophisticated approach would be to identify an agency, or group of agencies, that have existed in both states of the world (with and without removal restrictions) and then compare early departures for agency leaders that enjoyed removal restrictions to agency leaders that did not enjoy those same protections. This approach has the benefit of holding the agency or group of agencies constant in both groups, setting up a more likely apples-to-apples comparison and producing a more credible estimate. Yet the difference in the timing of the creation of the two groups may result in important differences between groups that may, again, bias the estimate.

Finally, a third approach (and the approach taken in this study), is to begin with an agency that experiences a change in the status of its removal restrictions and compare it to a set of independent agencies with a similar organizational structure and comparable removal restrictions *that remain in place*. Under a statistical method known as difference-in-differences, we can use the second group of independent agencies to account for important changes that are happening over time that may also be affecting early departure decisions. This approach produces a causal estimate by (1) using the change in the early departure rate of the agencies whose removal restrictions remain in place, to (2) make a projection of what the early departure rate of the treated agency would have been had the removal restrictions remained in place, and then (3) finding the difference between the modeled projection and the observed outcome to estimate the causal effect of the elimination of the removal restrictions.

As discussed above, there are only three independent agency leadership positions whose removal restrictions have been held unconstitutional by the Court (or been removed by Congress).[198] These include the board members of the PCAOB (*Free Enterprise Fund*, June 2010), the head of the CFPB (*Seila Law*, June 2020), and the director of the FHFA (*Collins*, June 2021).[199] Due to the recency of the latter two decisions, and the limited number of leadership positions affected, it is not yet feasible to estimate the effect of these decisions. By contrast, the PCAOB removal restrictions were held unconstitutional in 2010 and this change in status affected a five-member board, thus providing a setting in which it is possible to estimate the effect of the "elimination" of these removal restrictions on the early departure decisions of PCAOB board members.

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and public accountability of an independent agency with a single agency head and exemption from the appropriations process to three other independent agencies with multi-member boards and no exemption from the appropriations process).

198. *See supra* Part I.C.

199. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477 (2010) (PCAOB); Seila Law LLC v. CFBP, 591 U.S. 197 (2020); Collins v. Yellen, 594 U.S. 220 (2021) (FHFA).

A. Data

Our dataset begins in October 2002 (the appointment of the first board member of the PCAOB) and concludes in March 2023. It includes all agency leaders at the PCAOB (the treatment group) and seven other federal agencies (the control group) with terms scheduled to conclude on or after October 1, 2003 and concluding on or before March 1, 2023.[200] The agencies included in the control group are limited to agencies that (1) have multi-member commissions or boards, (2) have statutory removal restrictions, (3) were established before the PCAOB came into existence, and (4) still exist through the end of the observation period. These agencies are the Surface Transportation Board (STB), the National Labor Relations Board (NLRB), the Federal Energy Regulatory Commission (FERC), the Chemical Safety and Hazard Investigation Board (CSB), the Consumer Product Safety Commission (CPSC), the Mine Safety and Health Review Commission (FMSHRC), and the Foreign Service Labor Relations Board (FSLRB).[201] The similarities between the PCAOB and these seven agencies are documented in Table 1.[202]

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200. The PCAOB appointments begin in October 2002, and the shortest of the initial terms was scheduled to conclude in October 2003. Thus, in order to create a control group of comparable terms, we exclude terms in the control agencies that were scheduled to conclude between October 1, 2002, and September 30, 2003. We have also completed full analyses of the data that (1) includes all terms that were active as of October 1, 2002, and (2) excludes all terms that started prior to October 1, 2002 (thus matching the PCAOB on the start date, rather than the scheduled end date). The results are consistent with those presented and discussed here.

201. The selection of these agencies is based, in part, on the research of Datla and Revesz, who prepared a list of eighty-one federal agencies organized by features of agency independence, such as whether the agency's leadership is organized in a multi-membered structure with statutory removal protection. *See* Datla & Revesz, *supra* note 36, at 793. For each of the multi-membered independent agencies in Datla and Revesz' list, we reviewed the agency's establishing statutes to determine which agencies hold relevant attributes in common with the PCAOB. Specifically, we considered the language of the agency's tenure protection, the number of commissioners or board members, term length, whether the statute provides guidance on how to handle early vacancies, whether the members are subject to term limits, whether the agency is subject to a partisan balance rule, and whether the members undergo presidential nomination and senate confirmation.

202. Although the independent agencies listed in the control group are independent agencies with multi-membered leadership structures, they each have unique characteristics that may limit causal inferences. For example, the statutory tenure protection provided by Congress limits the presidential removal of leadership in most of the control group agencies to reasons of "inefficiency, neglect of duty, or malfeasance." 42 U.S.C. §§ 7171, 7412; 30 U.S.C. § 823; 49 U.S.C. § 1301. (Note, the NLRB's statutory protection is only "neglect of

Table 1: Structure of Agency Leadership

Agency	Year Est.	Tenure Protection Language	# of Board Members/ Commis-sioners	Term (Years)	Term Limits	Partisan Balance Rule	Pres. Nom. & Sen. Conf.	Midterm Appoint. Remainder Only	Quorum Req.
PCAOB	2002	GC	5	5	Yes, 2 terms	No	No**	Yes	Yes
CSB	1998	INM	5	5	No	No	Yes	No	Yes
CPSC	1972	INM	5	7	No	Yes	Yes	Yes	Yes
FERC	1990	INM	5	5	No	Yes	Yes	Yes	Yes
FMSHRC	1977	INM	5	6	No	No	Yes	Yes	Yes
FSLRB	1980	INM	2*	3	No	No	No***	Yes	No
NLRB	1982	NM	5	5	No	No	Yes	Yes	Yes
STB	1996	INM	5	5	Yes, 2 terms	Yes	Yes	Yes	No

* There are 3 Board Members, but the board chair has a separate appointment process.
**Appointed by the SEC
***Appointed by the chair
Note: GC (good cause), INM (inefficiency, neglect of duty, or malfeasance), NM (neglect of duty or malfeasance)

There are a total of 141 completed terms filled by 109 unique agency leaders. The treatment group is comprised of twenty-five terms filled by nineteen agency leaders. The control group is comprised of 116 terms filled by ninety agency leaders.

Note that none of the control agencies match on all dimensions with the PCAOB. For example, agency leaders at the PCAOB are appointed by (and are subject to removal by) the SEC,[203] while agency leaders at six of the seven agencies in the control group are appointed by the President, confirmed by the Senate, and are subject to removal by the President.[204] One may have (at least) two concerns regarding these differences and whether they undermine the credibility of the analysis we present here. First, the differences between the agencies in the control group and the PCAOB may make it

duty or malfeasance." 29 U.S.C. § 153.) The PCAOB's enabling statute provided tenure protection that limited removal except in instances where "good cause" could be shown. 15 U.S.C. § 7211. Neither "good cause" nor "inefficiency, neglect of duty, or malfeasance," however, have been definitively defined by Congress or the Judiciary. *See, e.g.*, Jane Manners & Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 COLUM. L. REV. 1, 4 (2021). As discussed *infra* in Section II.B, moreover, a difference-in-differences model may still be able to produce a causal estimate despite structural differences in the treatment and control group, provided those differences don't change over time with respect to the particular agency.

203. 15 U.S.C. § 7211(e)(4), (6).

204. *Id.* The leaders of the Chemical Safety and Hazard Investigation Board (CSB), Consumer Product Safety Commission (CPSC), Federal Energy Regulatory Commission (FERC), Mine Safety and Health Review Commission (FMSHRC), National Labor Relations Board (NLRB), and Surface Transportation Board (STB) are appointed by the President, confirmed by the Senate, and subject to removal by the President. 42 U.S.C. §§ 7171(b), 7412(r)6; 15 U.S.C. § 2053(a); 30 U.S.C. § 823(a); 29 U.S.C. § 153(a); 49 U.S.C. § 1301(b). Agency leaders in the seventh agency in the control group, the FSLRB, are appointed by the chair of the board at the Foreign Service Labor Relations Board (FSLRB). 22 U.S.C. § 4106(a).

impossible for our methodology to produce a causal estimate of the effect of the elimination of removal restrictions on early departures at the PCAOB (i.e., our study is not internally valid). Second, even if the methodology can produce a causal estimate in the context of the PCAOB, agency differences limit how much the findings can tell us about what removal restrictions are doing (and what their removal may do) at other agencies with different structural features (i.e., our study has limited external validity).

Neither concern is fatal to our analysis. We explore the internal-validity concern below in Subsection II.B and present empirical evidence that suggests our study is credible notwithstanding these agency differences. The external-validity concern is explored in Subsection III.C. To preview that discussion here, we recognize and acknowledge that these agency differences—particularly appointment and removal by the SEC as opposed to appointment by the President, confirmation by the Senate, and removal by the President—limit what our study can tell us about removal restrictions at other agencies. However, this study provides a reference point—and, at this point, the sole empirical reference point—that can help Congress and the Court form predictions and make informed decisions as they consider the future of removal restrictions at other independent agencies.

The outcome variable is an indicator variable equal to one if (1) the agency leader departed their position, and (2) the date of departure was prior to the scheduled end of their term. The outcome variable equals zero if there is not an early departure by that agency leader.[205]

Figure 1 presents the trend line of cumulative early departures for both the PCAOB and the full set of independent agencies in the control group. Across the entire population of the control group and the PCAOB, thirty-one out of the 141 terms (22%) end in an early departure, with nine departing before *Free Enterprise Fund* and twenty-two departing afterwards. Of the twenty-five terms at the PCAOB, nine (36%) ended in an early departure due to early resignation or firing. Two of those departures occurred before *Free Enterprise Fund*, and seven occurred after. In the control group, twenty-two of the 116 terms (19%) ended in an early departure. Seven of these departures occurred before *Free Enterprise Fund*, and fifteen after *Free Enterprise Fund*.

205. For the treatment group, information on the names and terms of the PCAOB board members comes from the PCAOB's website, the SEC website, and various other reliable internet sources. For the control group, information on the names and terms of service of the STB, NLRB, CSB, CPSPC, FERC, FSLRB, and FMSHRC leadership comes from congress.gov, each agency's respective websites, and the like.

Figure 1: Cumulative Early Departures (Count)

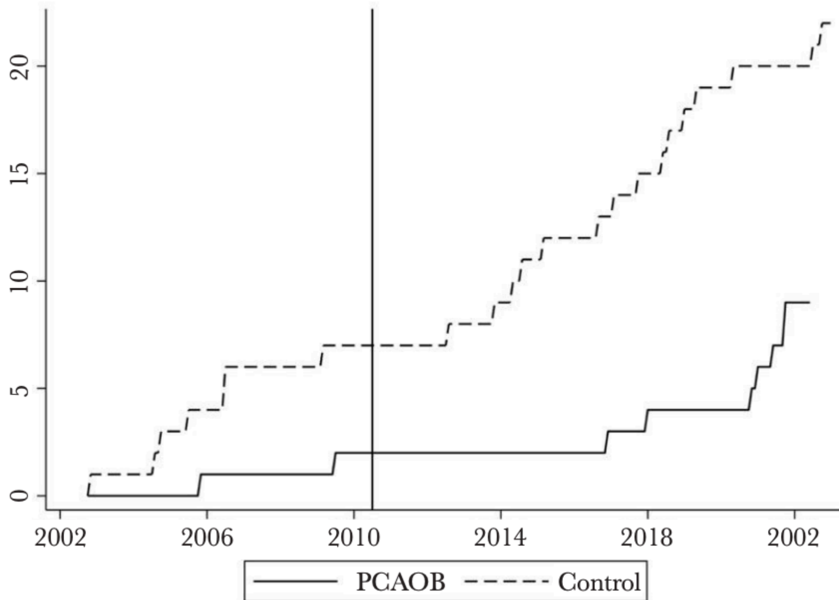

Table 2 breaks down the number of agency leaders, terms, early departures, and early departures relative to *Free Enterprise Fund* for each of the eight agencies in the dataset. Note that early departures as a share of total terms is quite similar for the CPSC, CSB, and FERC compared to the PCAOB (ranging between 22.7% and 31.8%). By contrast, early departures as a share of total terms are quite different for the remaining agencies, with early departure as a share of total terms ranging from 0% to 10%. Despite these differences in the outcome variable, we think it is still appropriate to include each of these agencies in our study due to the similarities in each of their removal restrictions and organizational structure.

Additionally, for twenty-four of the thirty-one agency leaders who departed early, the data set identified the political affiliation of the commissioner and the political affiliation of the President at the time of the leader's early departure. These data are relevant to explore Goodsell and Gayo's theory[206] that agency leaders are more likely to depart early when the President is affiliated with an opposing political party.[207] Surprisingly, of those twenty-four agency leaders, twelve of them (50%) departed early during a same-party presidential administration. Twelve of the departing leaders left

206. Goodsell & Gayo, *supra* note 38.

207. Goodsell & Gayo, *supra* note 38.

their agency while the political affiliation of the Senate majority was the same as their political affiliation.[208]

Table 2: Early Departures by Agency

Agency	Agency Leaders	Terms	Early Departures Pre-2010	Early Departures Post-2010	Early Departures Total	Early Departures Share (Total Terms)
PCAOB	19	25	2	7	9	0.300
CPSC	14	17	3	2	5	0.294
CSB	17	18	1	6	7	0.389
FERC	19	25	3	6	9	0.360
FMSHRC	9	16	0	0	0	0.000
FSLRB	7	11	0	1	1	0.091
NLRB	14	17	0	0	0	0.000
STB	10	12	0	0	0	0.000
Total	109	141	9	22	31	0.220

Moreover, all thirty-one early departures were analyzed to assess whether they occurred during a time of divided government, specifically when the political majority of the Senate did not align with the political affiliation of the President. We hypothesize that, if the government is divided, it will be less appealing for the President to fire agency leaders or pressure them to resign early as it will be more difficult to fill those vacancies under a divided government. In our dataset, twenty-six of the thirty-one early departures occurred during times of divided government, and only five occurred during times when the Senate majority and President were politically aligned. This suggests it is highly unlikely that the President's ability to easily replace an agency leader is driving the departure timing of agency leaders.

What might account for the overwhelming majority of departures occurring in time of divided government? Although speculative, dysfunction of the government during times of political division may explain why many early departures occur during divided government. Agency leadership may find it difficult to work with the President and the Senate when they do not see eye-to-eye. Congress and the President may have a difficult time passing policy and budgets that benefit independent agencies during these times, thereby making the work of the agency leader ever more difficult and tiring, leading to the resignation of exhausted agency leaders. Although an interesting question to analyze, this issue is only tangential to the focus of this paper, and additional research is necessary to understand the causal mechanism behind these patterns and whether these patterns are generalizable or anomalous.

208. Note that none of the early departures at any of these agencies occur between an election (presidential or midterm) and the start of the swearing-in of the new President or Congress.

B. Identifying Assumptions

For a difference-in-differences analysis to estimate the causal effect of a treatment event, three identifying assumptions must be satisfied. The first identifying assumption is that the intervention is exogenous to the treatment observations.[209] This means that the post-*Free Enterprise Fund* behavior of the PCAOB should be caused by the release of the Court's opinion, rather than the release of the Court's opinion being caused by changes in the PCAOB's behavior. The SEC's firing of PCAOB Chair William Duhnke in 2021 supports this assumption. In response to the firing, the Republican members of the SEC specifically cited *Free Enterprise Fund* as the source of the SEC's authority to fire Duhnke.[210] In addition, the data do not show any dramatic difference in PCAOB behavior (measured by the proxy of early departures) leading up to *Free Enterprise Fund*. Rather, the more likely explanation is that *Free Enterprise Fund* was a sudden change—an external shock to the leadership structure of the PCAOB—and therefore an exogenous intervention that supports the first identifying assumption.

The second identifying assumption is that the treatment event does not occur at the same time as other relevant changes to the treatment group.[211] After conducting extensive research to collect data on each appointment, firing, and resignation of all PCAOB board members, no other relevant changes were identified that would suggest that something other than *Free Enterprise Fund* affected the PCAOB's firing and early resignation patterns at the time of the *Free Enterprise Fund* decision.

The third identifying assumption is that the early departure patterns of both the control group and the treatment group would have continued along similar trends if the treatment event had never occurred.[212] In other words, the difference-in-differences analysis assumes that the change in the rate of resignations at the PCAOB from 2010–2023 would have been similar to the change in the rate of resignations experienced by the control group agencies during that same time if *Free Enterprise Fund* had not held the removal

209. ADAM CHILTON & KYLE ROZEMA, TRIAL BY NUMBERS: A LAWYER'S GUIDE TO STATISTICAL EVIDENCE 120–21 (2024).

210. Citing *Free Enterprise Fund* in footnote 1 of their statement, SEC Commissioners Peirce and Roisman stated, "[a]lthough the Commission has the authority to remove PCAOB members from their posts without cause, in all of our actions, we should act with fair process, fully-informed deliberation, and equanimity, none of which characterized the Commission's actions here." Press Release, Hester M. Peirce & Elad L. Roisman, Comm'rs, SEC, Statement on the Commission's Actions Regarding the PCAOB (June 4, 2021), https://www.sec.gov/newsroom/speeches-statements/peirce-roisman-pcaob-2021-06-04.

211. CHILTON & ROZEMA, *supra* note 209, at 121.

212. *Id.* at 121–22.

restrictions for PCAOB leaders unconstitutional. This assumption is often described by empiricists as parallel trends. While many different factors may affect the level and shape of the trends, those factors should affect the treatment and control group equally (in the absence of treatment) so that the slopes of the trends would be similar to each other.[213]

It is not possible to verify whether the trends in the post treatment period would have been parallel absent treatment, since we only observe what happened when the treatment did occur. However, one can probe the credibility of the parallel trends assumption by verifying the trends were at least tracking each other prior to treatment (i.e., check for parallel pre-trends). Parallel pre-trends can be evaluated visually.[214]

Figure 2: Cumulative Early Departures (Share)

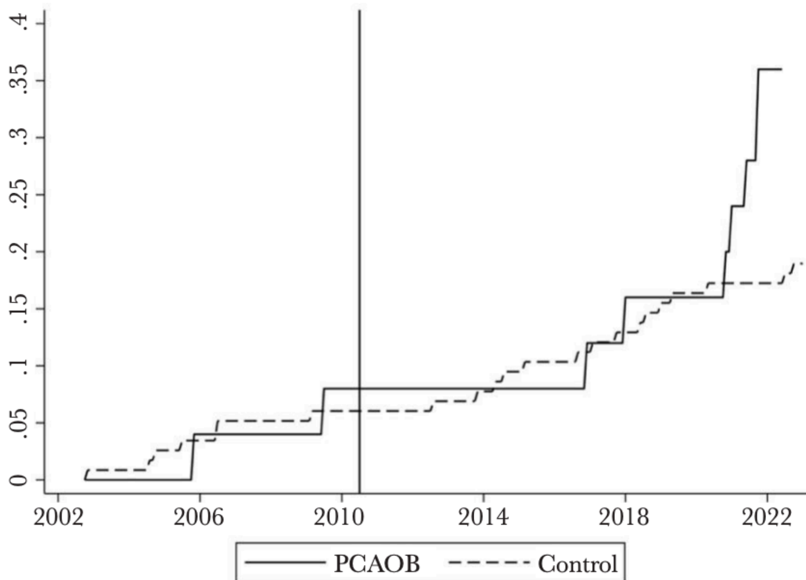

Figure 2 presents the trend in early departures at the PCAOB and the control agencies, normalized by the total number of terms completed by that

213. Anders Fredriksson & Gustavo Maglhães de Oliveira, *Impact Evaluation Using Difference-in-Differences*, 54 RAUSP MGMT. J. 519, 523 (2019).

214. A coefficient event study can also provide a more formal validation of the parallel pre-trends identifying assumption. *Id.* at 524. For ease of exposition, we present and discuss a coefficient event study below, *infra* Section II.D. To preview that discussion here, we find the coefficient event study further corroborates the parallel pre-trends assumption, suggesting our estimates are capturing the true causal effect of the judicial elimination of removal restrictions on early departure events of agency leaders at the PCAOB.

date in each group. Note that the vertical line indicates the publication of the *Free Enterprise Fund* decision in June 2010. The trend lines track each other closely in the pre-period, suggesting the identifying assumption is plausible. Note also that the trends continue to track each other following the decision and do not diverge substantially until November 2020, which was the month of the presidential election in which President Biden defeated sitting President Donald Trump, and the Democrats regained control of the U.S. Senate.[215]

Before presenting our formal model and analysis, we want to highlight that the identifying assumptions in a difference-in-differences analysis do not require the internal structure of the agencies to be identical to each other, nor that the characteristics of the agency leaders be the same across agencies. To the contrary, a difference-in-differences analysis is actually able to account for some differences across groups as long as those differences are constant across time (identifying assumption 2) and do not produce a different trend line in early departures across groups (identifying assumption 3).

C. Regression Model

Our difference-in-differences regression uses a Cox proportional-hazards model to assess whether early resignations of PCAOB board members occur more frequently after *Free Enterprise Fund* than before. The Cox proportional-hazards model is a statistical model commonly used in medical research to understand how certain factors relate to individual survival or infection rates among a group.[216] For example, in a population infected with a virus, individuals contract the virus at different points on a continuous timeline. However, the longer an individual goes without contracting the virus, the individual's likelihood to contract the virus increases, and the regression incorporates that likelihood as a factor in the calculations. The Cox proportional-hazards model is well suited for our analysis here because it considers other underlying factors that contribute to a board member's decision to resign, most notably accounting for the continually increasing likelihood of a board member to resign early as the board member remains at his or her post at the agency.

215. FED. ELECT. COMM'N, OFF. OF COMM'NS, FEDERAL ELECTIONS 2020: ELECTION RESULTS FOR THE U.S. PRESIDENT, THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES 3, 7 (2022), https://www.fec.gov/resources/cms-content/documents/federalelections2020.pdf [https://perma.cc/6U7Q-QGDB].

216. STATISTICAL TOOLS FOR HIGH-THROUGHPUT DATA ANALYSIS, *Cox Proportional-Hazards Model* http://www.sthda.com/english/wiki/cox-proportional-hazards-model [https://perma.cc/8Y7T-SFS3] (last visited June 9, 2025). For more information about the Cox proportional-hazards model, see David R. Cox, *Regression Models and Life-Tables*, 34 J. ROYAL STAT. SOC. 187 (1972).

This model specification is mathematically expressed as:

$$\lambda(t|\boldsymbol{X}_i)=\lambda_0(t)\,exp(\boldsymbol{X}_i\boldsymbol{\beta})$$

where $\lambda(t|\boldsymbol{X_i})$ represents the hazard rate for an agency leader i at time t. That is, $\lambda(t|\boldsymbol{X_i})$ is the probability that an agency leader will experience an early departure within a small time interval provided that the agency leader has not yet experienced an early departure. It can also be understood as the risk that an agency leader will experience an early departure at time t, or the instantaneous rate over a period. The term $\lambda_0(t)$ is the baseline hazard rate, the probability of an early departure when all other covariates equal zero. The product $\boldsymbol{X}_i\boldsymbol{\beta}$ is the mechanism measure (or set of measures) of interest $(\boldsymbol{X}_i)$ multiplied by their corresponding coefficients $(\boldsymbol{\beta})$. For each regression estimated below, the set of mechanism measures include (1) treatment, i.e., an indicator variable equal to one if the observation is part of a leadership term at the PCAOB, or equal to zero if the observation is part of a leadership term at one of the agencies included in the control group; (2) post, i.e., an indicator variable equal to one if the observation occurs after *Free Enterprise Fund*, or equal to zero if the observation occurs before; and (3) an interaction term between treatment and post, which equals one if the observation is part of a leadership term at the PCAOB *and* the date of the observation is after *Free Enterprise Fund*, or is zero otherwise. Note that, in a difference-in-differences model, the coefficient associated with the interaction term is the estimate of the effect of the elimination of the removal restrictions on early departure of agency leaders. In addition to these three terms, a few of the regressions estimated below also include agency fixed effects, year fixed effects, or both agency and year fixed effects.

To implement this analysis, the data is organized on the term-month level. This means that an observation is created for each month in each term during an agency leader's tenure in their leadership position. By creating observations at the term-month level, the data set expands to 7,584 total observations: 1,306 in the treatment group and 6,278 in the control group.

D. Results

Before reporting the results of our analysis, one might reasonably predict three different outcomes. The first, what we might call the "strong-influence hypothesis," would suggest that the PCAOB would see an immediate, even if not dramatic, increase in early departures after *Free Enterprise Fund*. If removal restrictions change behavior certainly and significantly, a Supreme Court decision holding that a removal restriction previously believed to be lawful was actually unconstitutional would result in a certain and noticeable

change in behavior. Even the strong-influence hypothesis, though, would not necessarily predict a dramatic change in early departures because presumably some PCAOB members would have been amenable to the approach of the entity (here, the SEC) with removal power. Perhaps some of the Justices and academics who vigorously debate the scope of the constitutional removal power would adopt this hypothesis, although they need not go so far.[217]

Another prediction might be a "no-influence hypothesis." On this view, removal is too unwieldy for most attempts to influence agency behavior and too costly to actually exercise in many cases. Although removal power might theoretically increase control to some extent, the transaction costs of removal make it an ineffective tool of control and therefore the fight about removal is immaterial to behavior in the real world. This appears to be more-or-less the view of some expressed in the political-theory literature.[218]

And finally, perhaps one would adopt a middle ground that we might call the "circumstance-dependent hypothesis." This hypothesis would suggest that removal restrictions *can* make a difference but that the size of influence depends on many factors unrelated to the removal restrictions: the political capital of the entity with the removal power, the extent to which agency leaders adjust their behavior in incremental ways short of early departure, and the strength and bipartisan nature of the norms counseling against removal for political reasons. Unfortunately, this hypothesis might be difficult to disprove because even data that are broadly consistent with the strong-influence or no-influence hypotheses might also support the circumstance-dependent hypothesis. But the hypothesis would be buttressed by data showing that *Free Enterprise Fund*'s influence was not immediately or consistently significant but rather was sometimes (perhaps initially) zero with pockets of strong effect.

Turning now to our results, we begin by first conducting a baseline difference-in-differences analysis that estimates a single average treatment effect for the entire period following *Free Enterprise Fund*. That analysis shows that *Free Enterprise Fund*, on average, had a positive, though not statistically significant, effect on the rate of early departures among board members of the PCAOB.

Table 3 reports the estimates using four different models, beginning in column 1 with the most basic difference-in-differences model, and then adding in various permutations of agency and year fixed effects in the remaining three columns. The size of the estimates range from a 35.3% increase (second column) to a 77.2% increase (third column) in the likelihood of early

217. *See supra* notes 26–32 and accompanying text.

218. *See supra* notes 33–37 and accompanying text.

departure.[219] However, none of the estimates are statistically significant, meaning that this analysis cannot disprove the no-influence hypothesis that *Free Enterprise Fund* had no effect on early departures among PCAOB members.[220]

Table 3: Baseline Regression Results

	(1) Early Depart	(2) Early Depart	(3) Early Depart	(4) Early Depart
Treat x Post	0.391	0.302	0.572	0.463
	(0.946)	(0.942)	(0.969)	(0.980)
Treat	0.339	1.258	0.164	1.205
	(0.858)	(1.317)	(0.890)	(1.396)
Post	0.523	0.599	0.0872	-0.143
	(0.455)	(0.459)	(1.319)	(1.161)
Agency FE		x		x
Year FE			x	x
Observations	7584	7584	7584	7584

Standard errors in parentheses. Standard errors clustered at the term level. $^{*}p < 0.05$, $^{**}p < 0.01$, $^{***}p < 0.001$

By construction, the model specification used to produce these estimates assumes the effect of *Free Enterprise Fund* on early departures at the PCAOB is constant in the period following the decision. However, the descriptive statistics depicted in Figure 2 suggest that the effect of *Free Enterprise Fund* may have actually occurred in two distinct phases (as the circumstance-dependent hypothesis might suggest). Specifically, a visual review of the data suggests *Free Enterprise Fund* had no effect on early departures during the first several years of the post-period, with early departure trends at the PCAOB continuing to track trends in the control group from June 2010 until October 2020. Beginning in November 2020, the trend in early departures at the PCAOB increased

219. Note that in a proportional hazard model estimation, the percent change can be backed out from the coefficient estimate by simply taking the exponential of the estimate which will return the hazard ratio. The difference between the exponential and the baseline hazard rate (one) yields the percent change, i.e., *exp(0.302)=1.353* and *1.353-1=0.353* or 35.3%. The size and direction of the coefficient estimate is consistent with the descriptive statistics. In both the PCAOB and the control group, early departures of agency leadership increased during the years following *Free Enterprise Fund*, with PCAOB resignations and executive firings more than tripling from two to seven and control group resignations almost doubling (from seven to fifteen).

220. For non-statisticians, note that if an estimate is not statistically significant at the p=0.05 level, it simply means we are not at least 95% (*1-0.05=0.95*) confident that the observed difference is not simply due to random chance.

dramatically, with five early departures (i.e., the entire PCAOB board) occurring between November 2020 and March 2023, compared to only two early departures occurring during the same time interval at the control agencies.

To explore whether the effect of *Free Enterprise Fund* might be evolving over time, and to further probe the credibility of the parallel-trends assumption, we produce a coefficient event study. This event study is produced by (1) dividing the panel dataset into four year increments,[221] (2) estimating the difference in risk of early departures between the PCAOB and the control agencies for each four-year increment across the panel,[222] (3) normalizing the

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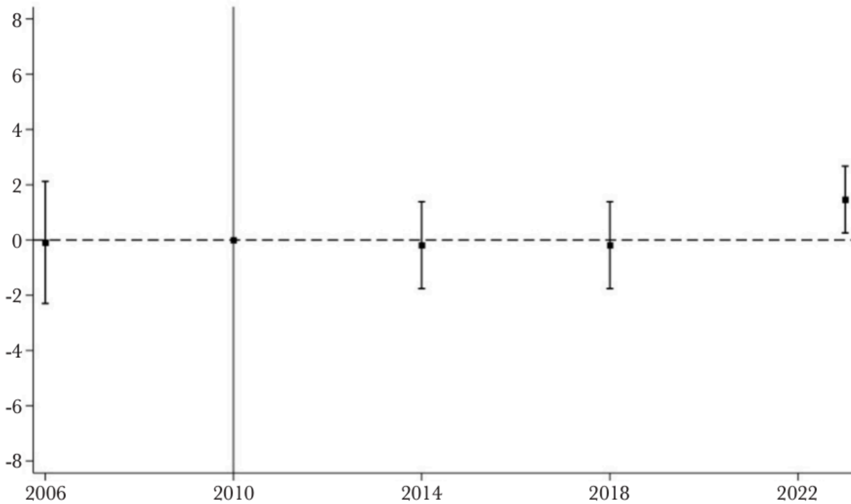
221. Four-year increments were used to produce the coefficient event study for three reasons. First, to calculate standard errors for each of the coefficient estimates, we needed to segment the panel data in a way that included at least one early departure in both the treatment and control group during each segment. If either group has no early departures in a segment, there is no variation in the outcome variable for at least one of the groups and thus we are not able to calculate a standard error for the coefficient estimate produced using that segment. We explored using a smaller segmentation (one year, two years, and three years), but each of these failed to produce standard error calculations across all segments. Second, there are approximately eight years in the pre-period (seven years, nine months) and approximately thirteen years in the post-period (twelve years, nine months) which allow for intuitive segmentation. Third, the four-year segmentation produces two pre-treatment estimates that can be used to probe the credibility of the parallel-trends assumption. This is done by checking to see if the differences between the treatment and control group are the same in both pre-treatment estimates, suggesting that the across group difference is staying the same in the pre-treatment period, thus verifying that the treatment and control group have parallel pre-trends. A more course segmentation (i.e., eight years) would have only produced one pre-treatment estimate and thus would not help probe the credibility of the parallel-trends assumption.

Two items to note. First, not all increments are precisely four years in length. We center the segmentation at the treatment event, June 2010 producing the following segments: segment one (October 2002–May 2006) (forty-four months), segment two (June 2006–May 2010) (forty-eight months), segment three (June 2010–May 2014) (forty-eight months), segment four (June 2014–May 2018) (forty-eight months), and segment five (June 2018–March 2023) (fifty-seven months). Second, the PCAOB did not have any early departures during segment three. To produce standard error calculations, we combined segments three and four to calculate a single coefficient and standard error estimate for these segments. For expositional purposes, this single estimate is plotted twice, once at the conclusion of segment three in 2014, and again at the conclusion of segment four in 2018.

222. These coefficient estimates are obtained using a Cox proportional-hazards model that includes an interaction term between the treatment variable and each time increment, see *supra* note 216, and a dummy variable for each time increment. The coefficient estimate is normalized by omitting the interaction term between the treatment variable and the second time increment (i.e., the time increment right before the treatment event). Coefficient estimates for the interaction terms are displayed as a solid black box. Ninety-five percent

estimates by setting the difference estimate for the period preceding treatment (June 2006–May 2010) equal to zero, and (4) plotting the coefficient estimates and their corresponding 95% confidence intervals over time. The coefficient event study is presented in Figure 3.

Figure 3: Longitudinal Effect of *Free Enterprise Fund*



Three important conclusions can be drawn from this figure.

First, the difference in the risk of early departures between the PCAOB and the control agencies is essentially constant in the two segments in the pre-period. This confirms that trends in early departures at the PCAOB and the control agencies are tracking each other *prior* to *Free Enterprise Fund*, thus suggesting the parallel-trends identifying assumption (*in the post-period*) is credible.

Second, the coefficient estimate for the third and fourth segment is centered very close to zero. This suggests *Free Enterprise Fund* had no effect on early departures at the PCAOB from June 2010 through May 2018.

Finally, the coefficient estimate for the fifth segment is large, positive, and statistically significant.[223] To be precise, the coefficient estimate in the fifth segment is 1.553, which translates into *Free Enterprise Fund* causing an increase

confidence intervals are displayed as whiskers on either side of the relevant solid black box. All standard errors are clustered at the term level.

223. For the non-statistician, note that an estimate being statistically significant at the p=0.05 level simply means we are at least 95% confident the observed difference is not simply due to random chance and is instead a true difference.

of 373% in the likelihood of a term ending in an early departure at the PCAOB during this period.[224]

III. IMPLICATIONS

The preceding empirical analysis has important implications for the longstanding debate over removal restrictions. We sketch out four of these implications here, including offering a theory of when removal restrictions do work—that is, when removal restrictions prevent early departures that would have occurred without them. To be sure, our study's external validity might be limited by the particular structure of the PCAOB. But nonetheless, it represents the first and, so far, only attempt to empirically estimate the causal relationship between removal restrictions and agency behavior. The results serve as a starting point from which to analyze removal restrictions and should be considered by courts and Congress in evaluating both the propriety and constitutionality of removal protections for agency heads, such as those protecting the heads of politically charged agencies such as the FTC, the NLRB, the SEC, and even the Federal Reserve.

A. Analysis

First, the data suggest that the effect of removal restrictions on agency behavior has at least sometimes been overstated; that is, the strong-influence hypothesis is not supported by the data concerning the PCAOB. The Court held the PCAOB members' removal protections unconstitutional in June 2010.[225] However, our findings suggest that this holding had no effect on early departures at the PCAOB for more than eight years. If the strong-influence hypothesis were true and removal restrictions had noticeable and persistent effects on agency behavior, one would expect the PCAOB to have had at least an incremental uptick in early departures soon after *Free Enterprise Fund*.

Second, the data also suggests that the no-influence hypothesis does not obtain for agencies like the PCAOB. Although the data from the first several years following *Free Enterprise Fund* might have appeared supportive of the no-influence hypothesis, the early departure spike at the PCAOB starting in 2020 indicates that the removal power is a potent tool for controlling and altering agency behavior. Whatever the reasons that the SEC did not wield its removal power for more than ten years after *Free Enterprise Fund* (perhaps

224. Note that to interpret the coefficient estimate in this type of model, we simply recover the hazard ratio by taking the exponential of the coefficient: $exp(1.553) = 4.73$. Relative to a baseline hazard rate of 1 (i.e., the hazard ratio is 4.73:1), this is an increase of $4.73 - -1 = 3.73$, or 373%.

225. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 484 (2010).

for many of the reasons offered in the literature[226]), our analysis suggests that elected politicians and political leaders were ultimately willing to compel the removal of agency leaders who do not enjoy removal protections. This finding is consistent with the wave of forced removals of agency leaders by the Biden Administration[227] and the forced removals by the newly installed Trump Administration.[228] However, our analysis demonstrates this trend extends beyond the actions of a single elected official (President Biden firing the heads of the FHFA and the SSA; President Trump firing eighteen independent inspectors general and board members at the PCLOB, the EEOC, and the NLRB) to other elected officials in the U.S. Senate (Senators Elizabeth Warren and Bernie Sanders pressuring the SEC to remove PCAOB members)[229] and agency leaders at the SEC (who in fact removed PCAOB

226. *Supra* notes 33–37 and accompanying text.

227. *See supra* note 191.

228. *See supra* notes 3–7, 9; 29 U.S.C. § 153(a); Brandon Livesay, *Trump Courts Crypto Industry Votes and Campaign Donations*, BBC (July 27, 2024), https://www.bbc.com/news/articles/cne4n2xdylvo [https://perma.cc/N452-JMTD]; Maria Aspan, *SEC Chair Gary Gensler, Who Took Aim at Crypto Industry, to Step Down in January*, NPR (Nov. 21, 2024), https://www.npr.org/2024/11/21/g-s1-35233/sec-gary-gensler-resigns-crypto [https://perma.cc/E5M7-QYAW] (discussing the resignation letter of SEC Chair, Gary Gensler, after statements made by President Trump that he would remove Gensler once in office); *see also* Auzinea Bacon, *Trump Says He Doesn't Plan to Remove Fed Chairman Jerome Powell*, CNN (Dec. 8, 2024, 12:38 PM), https://www.cnn.com/2024/12/08/business/trump-fed-chair-jerome-powell/index.html [https://perma.cc/HHU9-3N72] (reporting that President Trump stated in a December 8, 2024 interview that he would not remove Federal Reserve Chair Jerome Powell, contrasting his previous 2019 remark that Powell is "the enemy" and a March 2020 statement claiming a "right to remove [Powell] as chairman"); Zeke Miller, Eric Tucker & Will Weissert, *Trump Fires More than a Dozen Independent Inspectors General at Government Agencies*, PBS (Jan. 25, 2025, 6:02 PM), https://www.pbs.org/newshour/politics/trump-fires-more-than-a-dozen-independent-inspectors-general-at-government-agencies [https://perma.cc/Y5AF-2P8E](discussing the Trump Administration's firing of seventeen independent inspectors general without providing Congress with 30-day statutory notice).

229. Senators Warren and Sanders sent a public letter to SEC Chair Gary Gensler urging him to remove and replace the PCAOB board members, citing a sixty-three percent reduction in PCAOB enforcement actions under Duhnke, the Board's failure to hold any advisory meetings during 2019 and 2020, and regulatory policies that put more power in the hands of the company being audited. Letter from Elizabeth Warren, Sen., U.S. Senate, and Bernard Sanders, Sen., U.S. Senate, to Gary Gensler, Chair, SEC (May 25, 2021) [hereinafter Warren & Sanders, May 25, 2021 Letter], https://www.warren.senate.gov/imo/media/doc/Letter%20to%20Gensler%20on%20PCAOB.pdf [https://perma.cc/97DH-4PH5] (urging SEC Chair Gary Gensler to remove and replace the PCAOB board members because of a sixty-three percent reduction in PCAOB enforcement actions under Chairman Duhnke, the

members). Indeed, it seems that the entire political environment, at least with respect to the PCAOB and some other agencies, fostered a culture in which forced removals were not politically damaging and were viewed as effective means of control.

Third, our analysis suggests that, at least through the end of our study window (March 2023), statutory removal restrictions that have not been held unconstitutional still provided a meaningful buffer for the agency leaders protected by those provisions. Prior to Trump's second term, this buffer may well have provided a degree of insulation from political influence for these agencies, particularly given the evidence we present here that political pressures are leading to forced removals for an agency without effectual removal protections.

However, the wave of forced removals at independent agencies during the first 100 days of the second Trump Administration (including agency leaders at the NLRB, MSPB, and FTC that are all protected by explicit statutory removal restrictions) demonstrates this buffer is quickly eroding and may be on the brink of evisceration. Despite the technical fact that recent decisions by the Court do not affect other agencies like those in the control group here (such as the FTC and NLRB), there is substantial speculation that the Court is on its way to eliminating all removal protections for leaders of executive agencies "do[ing] important work," and perhaps all principal officers.[230] There are even assertions by others that recent precedent has rendered removal protections at some agencies inoperative, thus opening the door to the recent wave of forced removals and their seemingly inevitable constitutional challenges.[231]

Fourth and finally, our analysis affirmatively supports the circumstance-dependent hypothesis. From 2010–2019, the PCAOB saw no more early departures than what we project would have happened had its removal restrictions remained in place. However, when certain circumstances were present—united Democratic government antagonistic to the political direction of the PCAOB and an SEC amenable to the policies of the Democratic party[232]—forced removals served as an effective tool in changing the agency's behavior

Board's failure to hold any advisory meetings during 2019 and 2020, and regulatory policies that put more power in the hands of the company being audited).

230. Collins v. Yellen, 594 U.S. 220, 252 (2021); Grossman & Sandoloski, *supra* note 191, at 223–24.

231. *See, e.g.*, Peirce & Roisman *supra* note 210.

232. At the time the SEC voted to remove Duhnke as Chair of the PCAOB and announced its intention to replace the remaining commissioners, it consisted of a Democrat majority (Gary Gensler (Chair), Allison H. Lee, and Carlina A. Crenshaw) and a Republican minority (Hester M. Peirce and Elad L. Roisman). *SEC Historical Summary of Chairmen and Commissioners*, SEC, https://www.sec.gov/about/sec-commissioners/sec-historical-summary-chairmen-commissioners [https://perma.cc/N4QB-6L7N] (Jan. 25, 2025).

from one perceived to be friendly to big business and regulated parties to one perceived to be more aggressive in regulating public accounting firms.

B. Theoretical Contribution

More interesting than an "it depends" answer to agency independence, however, is what this particular fact pattern tells us about the impact of removal restrictions on independent agencies. One could conceive of two reasons why Congress (and the President) would seek agency independence.[233] The first is to create a political or partisan advantage by protecting an agency's mission or particular agency heads who are favorable to the party in control. The second is to protect independence on the belief that independence is better for both sides, in the long run, than political meddling. In addition to accounting for the intent of the enacting Congress, these two categories can also be repurposed to describe the *effect* of the removal restrictions over time. In the first, there is partisan disagreement about political involvement in the agency's decisionmaking, and one side benefits from the agency's independence.[234] In the latter, however, there is continued agreement (or at least sufficiently strong norms) to protect independence.[235]

For a possible example of the first scenario, consider the creation of the CFPB, which was on partisan lines. The Democratic Party controlled the Presidency, the Senate, and the House of Representatives. The bill passed the Senate with no Republican support, and just a few Republicans in the House of Representatives voted in favor of the bill.[236] The CFPB was given a partisan[237] mission that relied on a certain policy view on the desirability of

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233. *See, e.g.*, Corrigan and Revesz, *supra* note 38, at 639–40, 696–97 (testing the "Divided Government Hypothesis," i.e., the hypothesis that Congress is more likely to establish independent agencies during a time of divided government to prevent establishing the agency with a partisan advantage).

234. Even in a world in which the agency's actions do not clearly benefit the pro-independence party, the anti-independence party would seek political involvement to further its preferred policies. So, the pro-independence party would still benefit from the agency's continued independence and the anti-independence party would benefit from ending its independence.

235. When we describe norms as sufficiently or insufficiently strong, we mean to say that the penalties for violating the norms are sufficiently severe to dissuade those who would seek to influence behavior for political reasons from doing so. For example, in the case of the PCAOB, because the penalties for SEC commissioners who sought to remove PCAOB members for political reasons (such as impeachment proceedings, removal, hearings, or other strong political blowback) were not strong enough to prevent those commissioners from replacing the entire PCAOB, the "norms" against removal were not sufficiently strong.

236. *Supra* note 170.

237. The term partisan used here is not meant to disparage the CFPB's mission. It

vigorously enforcing certain consumer-protection statutes and increasing regulation. Although Justice Kagan attempted to analogize the CFPB to other financial regulators,[238] the CFPB's mission did not share bipartisan support. And there is no evidence of bipartisan agreement that the CFPB director's independence was so valuable as to make presidential involvement undesirable. This kind of advantage lock-in is generally not seen as a legitimate or desirable goal for agency independence, even if it might be constitutionally permissible. Mere partisan interest should not justify shielding agency decisionmaking from the President or other democratically accountable officials.[239]

The PCAOB, on the other hand, was created in an extremely bipartisan fashion: through nearly unanimous votes by a Democratic-controlled Senate and a Republican-controlled House of Representatives and signed by a Republican President.[240] In the wake of the Enron and other major corporate scandals, both parties sought to better regulate public accounting firms—those that audited public companies. Although each party might have had preferences about how that regulatory authority would be wielded by the new agency, both parties agreed that political meddling from either side would be worse than any quibbles with the PCAOB's decisions. Between the opportunity and temptation for gaining partisan advantage and the desire to create a public air of independence, preventing political meddling by enacting removal restrictions were seen as more desirable than allowing unfettered presidential control. Justice Kagan's and Justice Sotomayor's dissents in *Seila Law* and *Collins*, respectively (and Justice Kagan's concurrence in the judgment in *Collins* to a lesser extent), called on this principle in arguing that the Court should defer to Congress's judgment whether such independence is desirable.

That *Free Enterprise Fund* appears to have had a limited effect for years after the decision was issued suggests that this bipartisan agreement persisted. *Free*

merely refers to the fact that elected officials' views of the desirability of the mission split along partisan lines.

238. Seila Law LLC v. CFPB, 591 U.S. 197, 285 (2020) (Kagan, J., concurring in the judgment with respect to severability and dissenting in part) (asserting that "[n]o one had a doubt that the [CFPB] should be independent" in part because many of its responsibilities were transferred to the CFPB from other independent agencies).

239. One might object to the partisan advantage theory on the ground that any party who gains the Presidency and majorities in both houses of Congress can simply amend the statute to allow for at-will removal. That objection, however, runs into multiple legal and practical hurdles. It is unclear whether such a retroactive law would be constitutionally problematic under current doctrine, at least without financial compensation for the affected agency heads. And the current filibuster rules would prevent such legislation without the votes of 60 Senators. To be sure, maybe neither of these hurdles should affect the constitutional question, but as a practical matter, agency independence can work a significant partisan advantage.

240. *Supra* note 150–151.

Enterprise Fund arose out of a challenge by a regulated entity—neither President Obama nor his SEC had expressed disapproval with the PCAOB's independence.[241] It is likely, although speculative, that post-*Free Enterprise Fund*, President Obama's and President Trump's SECs disagreed with at least some PCAOB actions. Yet, our analysis offers no evidence that the SEC, on its own initiative or in response to pressure from elected officials, resorted to forced removal in an attempt to change the agency's behavior. One possible explanation is that the norms against removing PCAOB members—whether or not President Obama, President Trump, or their SECs agreed with those norms—were strong enough to prevent removal. Another is that President Obama and President Trump or their SECs affirmatively agreed that the value of independence outweighed the value of political involvement in the PCAOB's decisionmaking. In either event, the statutory removal restrictions were likely not doing the work of protecting the PCAOB's independence—it enjoyed independence both when the restrictions were in place and after they were held unconstitutional. Instead, the PCAOB's independence came from the norms or political agreement that independence was desirable; the statutory protections were redundant.

However, our data show that at some point after *Free Enterprise Fund* the norms or agreement broke down, leading to a dramatic increase in early departures that promoted alignment with President Biden's and his SEC's political aims. To be sure, some elected officials or agency leaders might still have believed that political involvement was not desirable. Yet, that agreement was not widespread enough—and the norms against political involvement not strong enough—to prevent President Biden's SEC from replacing the entire PCAOB.

An objector might point out that the SEC was only able to replace PCAOB members because *Free Enterprise Fund* had held that any restrictions on removal of PCAOB members were unconstitutional. That much is true. However, consider a world in which President Biden's SEC is prevented from replacing PCAOB members: The norms and agreement concerning PCAOB's independence had broken down. The only thing standing in the SEC's way would be the PCAOB's statutory protection. In this counterfactual world, the PCAOB would no longer be on the "consensus on independence," or nonpartisan, side of the line. Instead, the PCAOB's continued independence protects one party's interests (here, Republicans) at the expense of the other's (here, Democrats).

In other words, the agencies for which there is agreement concerning their independence is not a stable group. Even if an agency's independence is

241. In fact, the Solicitor General defended the constitutionality of the PCAOB's independence. *See* Free Enter. Fund v. PCAOB, 561 U.S. 477, 482, 495–97 (2010).

bipartisan at its inception, its independence might become subject to partisan disagreement at a later time. While the initial agreement persists, the removal restrictions are at best redundant, as our data on the PCAOB for the first 10 years after *Free Enterprise Fund* suggest. When that agreement breaks down, removal restrictions do work, but by entrenching partisan advantage.[242]

If one thinks agency independence is impermissible (or at least less desirable) when there is no agreement on agency independence but rather a partisan tug-of-war, then removal restrictions are normatively undesirable. When there is agreement, they are unnecessary; when there is no agreement, they protect partisan aims.

What might this dynamic—particularly the change we observed in the PCAOB—tell us about other agencies? Consider the Federal Reserve. The Federal Reserve as we know it was created in 1935.[243] Although the initial House bill was controversial,[244] the Senate Committee on Banking and Currency reworked the bill,[245] which passed on unrecorded votes in both the House[246] and the Senate.[247] Even this less controversial bill protected

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242. *See* Peter L. Strauss, *Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 756 (2007) (in the context of whose views receive *Chevron* deference, describing the view that removal is "an understandable and ultimately persuasive political response to the situation in which President Ronald Reagan and his Republican successors found themselves in relation to the career civil service—notoriously Democratic still, even after a quarter century of largely Republican presidencies"). Professor Strauss ultimately rejects that such a scenario justifies a constitutional removal authority. *Id.* at 756–57. But notably, he does so by rebuffing that the President has any right to involve politics in responsibilities delegated specifically to the agency, not that there is no partisan advantage.

243. The modern version of the Federal Reserve was created in 1913. Bamzai & Nielson, *supra* note 21, at 879. It was passed largely along partisan lines by the strong Democrat majorities in the House and the Senate and signed by Democrat President Woodrow Wilson. *The Senate Passes the Federal Reserve Act*, U.S. SENATE (Dec. 23, 1913), https://www.senate.gov/artandhistory/history/minute/Senate_Passes_the_Federal_Reserve_Act.htm [https://perma.cc/VZ7W-UU53] (discussing the enactment as "nearly straight party-line voting" in the Senate). That Act made members of the Federal Reserve Board removable by the President only "for cause." Federal Reserve Act of 1913, Pub. L. No. 63-43, § 10, 38 Stat. 251, 260. When Congress reformed the banking system in 1933, it omitted that removal protection. Banking Act of 1933 (Glass-Steagall), Pub. L. 73-66, § 6, 48 Stat. 162, 166; *see also* Bamzai & Nielson, *supra* note 21, at 885. As discussed below, however, Congress reinserted the removal protection in 1935. *See infra* note 248.

244. 79 CONG. REC. 7,270–71 (1935) (reporting a vote falling mostly along party lines).

245. *Id.* at 10,588.

246. *Id.* at 13,711.

247. *Id.* at 11,935 (the Senate's initial vote); *id.* at 13,655 (the Senate's final vote); *see also* Harold James Kress, *The Banking Act of 1935*, 34 MICH. L. REV. 155, 157–58 (1935).

members of the Federal Reserve Board from removal.[248] The primary drafter of the Senate version of the bill believed in separation between the President and the Federal Reserve.[249] Thus, despite disputes about the particulars of the Act,[250] there was broad agreement that the Federal Reserve Board members should have a degree of protection from the influence of the President. Indeed, that agreement has persisted over time as both parties have agreed that the costs of allowing the President to control the Federal Reserve outweigh the benefits.[251]

But recall that this category is not stable. There is evidence that even now the agreement at the Federal Reserve is starting to breakdown.[252] If and when it does break down and the norms protecting independence are no longer strong enough, the removal protections for board members will work a partisan advantage. And until then, they will be redundant given the norms against presidential involvement.[253]

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248. Banking Act of 1935, Pub. L. No. 74-305, § 202, 49 Stat. 684, 704.

249. *See* Bamzai & Nielson, *supra* note 21, at 884 n.279, 885 n.280 (discussing Senator Carter Glass's desire that the President not dominate the Federal Reserve Board); Kress, *supra* note 247, at 157 ("As a result of Senator's Glass's leadership, Title II of the bill [the part dealing with the Federal Reserve] was substantially rewritten."); *see also* S. REP. No. 74-1007, at 11 (1935).

250. 79 CONG. REC. 13,711 ("Rep. Gifford (R-MA): 'The gentleman [Rep. Goldsborough (D-MD)] made the statement that it was the conception of the Senate that bankers should control the people's money, and it was the conception of the House that the representatives of the people should control it?' Rep. Goldsborough: 'That is what the vote showed.'").

251. *See* Vermeule, *supra* note 33, at 1196 (describing the strength of these norms as of 2013).

252. *See* Bacon, *supra* note 228 (discussing some of Trump's campaign statements regarding removing the Chair of the Federal Reserve); Christopher Rugaber, *Top Federal Reserve Bank Regulator, Under Fire from GOP, to Step Down Next Month*, AP NEWS (Jan. 6, 2025), https://apnews.com/article/banks-federal-reserve-trump-regulation-barr-83ea8abf5ca65449a0eb1d5fe198cfbf [https://perma.cc/M3A7-69T4] (the Vice Chair for Supervision of the Federal Reserve announcing his resignation in light of criticism from then-President-elect Trump and Republican Senators). However, during the early part of President Trump's Administration, President Trump appeared to have threatened to fire Jerome Powell as Chair, but quickly stated that he had no intention of doing so amid increasing concern about the stability of the financial markets. Colby Smith, *Trump Says He Won't Fire Powell. His Fed Battle May Not Be Over Yet*, N.Y. TIMES (Apr. 23, 2025), https://www.nytimes.com/2025/04/23/us/politics/trump-jerome-powell-fed.html [https://perma.cc/Q6SY-BA6F]. Perhaps this sequence of events demonstrates that the Federal Reserve's independence is still supported by strong norms.

253. Professors Aditya Bamzai and Aaron Nielson have argued that the Court's recent jurisprudence likely spells doom for the Federal Reserve as currently constituted. Bamzai & Nielson, *supra* note 21, at 892–93. They propose splitting the responsibilities of the Federal Reserve between its regulatory or governmental responsibilities (for which presidential

The FTC presents both a historical and current example. The FTC was enacted along broad bipartisan lines.[254] In fact, the FTC was born of multiple parties' platforms.[255] Yet two decades later President Roosevelt was locked in a game of political warfare with FTC Commissioners who held divergent policy views. The Supreme Court prioritized the FTC's independence over the President's policy views, but there was no mistaking that the Court's decision entrenched partisan preferences contrary to the President's. The FTC has recently been at the center of another political firestorm.[256] And President Trump recently fired the two Democratic FTC Commissioners based on policy disagreement, despite *Humphrey's Executor*.[257] This history suggests that agencies can, over time, oscillate between the two categories.

Another agency in a similar position might be the SEC. As described above,[258] the SEC was enacted during a time in which Supreme Court precedent was broadly understood to prohibit all removal protections for executive officials. The Securities and Exchange Act of 1934 consequently "lacks an express removal provision."[259] But the norms supporting the SEC's independence have been sufficiently strong that all political actors have acted as though the SEC was an independent agency with commissioners protected from presidential removal.[260] Even after Justice Breyer questioned whether

removal might be constitutionally required) and its market-based responsibilities (which might allow removal protections). *Id.* at 908–09. In any event, the former responsibilities would still be subject to the phenomenon described above.

254. *Supra* notes 120–121.

255. 51 CONG. REC. 14942 (1914) (explaining that the Act was consistent with the Republican Party platform and the Progressive Party (Bull Moose) platform and was advanced by the Democrat President and celebrating the nonpartisan nature of the Act).

256. *See* Non-Compete Clause Rule, 89 Fed. Reg. 38,342 (May 7, 2024) (to be codified at 16 C.F.R. pts. 910, 912) (promulgating a rule broadly prohibiting non-compete clauses and drawing a spirited dissent); Press Release, Fed. Trade Comm'n, Statement on FTC Victory Securing Halt to Kroger, Albertsons Grocery Merger (Dec. 10, 2024) https://www.ftc.gov/news-events/news/press-releases/2024/12/statement-ftc-victory-securing-halt-kroger-albertsons-grocery-merger [https://perma.cc/TLM3-998N] (celebrating a successful yet controversial intervention blocking a merger in part on grounds that workers would be harmed).

257. Will Weissert & Christopher Rugaber, *Trump Fires 2 Democrats on the Federal Trade Commission, Seeking More Control over Regulators*, AP NEWS (Mar. 18, 2025) https://apnews.com/article/trump-ftc-firings-bedoya-slaughter-488bfe5419e48d5acbd95d3f9401404b [https://perma.cc/JM95-6SFY].

258. *Supra* Part I.B.

259. Bamzai & Nielson, *supra* note 21, at 885 n.281 (citing Note, *The SEC Is Not an Independent Agency*, 126 HARV. L. REV. 781, 782 (2013)).

260. *See* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 487 (2010).

SEC commissioners enjoy removal protections,[261] those norms persisted. So, the SEC did not need statutory removal restrictions to remain independent. But those norms might change, and if they do, one might expect to see a similarly dramatic increase in early departures like the PCAOB did starting in November of 2020.[262]

Finally, consider the NLRB. Enacted in 1935, the National Labor Relations Act passed the Senate[263] and the House[264] with fairly robust bipartisan support. However, it was at least somewhat controversial, and President Roosevelt did not whip up votes for the bill or even publicly announce his support until passage was imminent.[265] Whatever its early status, though, the NLRB has been a subject of partisan contestation for decades.[266] Despite this contestation, we saw no early departures for our entire observation period,[267] suggesting either that the norms were strong enough to protect the agency's independence (despite political disagreement) or that the statutory removal restrictions were preventing removal.[268] President Trump's

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261. *Id.* at 546–47 (Breyer, J., dissenting); *see also The SEC Is Not an Independent Agency*, *supra* note 259.

262. There is perhaps already some breakdown. *See* Aspan, *supra* note 228 (discussing the resignation letter of SEC Chair, Gary Gensler, after statements by President Trump that he would remove Gensler once in office).

263. 79 CONG. REC. 7,681 (1935) (initial vote of 63–12 with Republicans splitting 13–8 in favor, Democrats 49–4, and the one Progressive in favor); *id.* at 10259 (voice vote on the final version).

264. *Id.* at 9,731 (voice vote on Senate bill with amendments); *id.* at 10,300 (voice vote on the final version).

265. J. Warren Madden, *Origin and Early Years of the National Labor Relations Act*, 18 HASTINGS L.J. 571, 572–73 (1967).

266. *See generally* William B. Gould IV, *Politics and the Effect on the National Labor Relations Board's Adjudicative and Rulemaking Processes*, 64 EMORY L.J. 1501 (2015). *See also id.* at 1504 ("This eightieth anniversary of the passage of the National Labor Relations Act of 1935 [(NLRA)] is more politically challenging than the previous NLRA anniversaries of say, for instance, middle age of forty, fifty, or even sixty that were celebrated earlier."); Hosp. Menonita de Guayama, Inc. v. NLRB, 94 F.4th 1, 5–7 (D.C. Cir. 2024) (Edwards, J.), *vacated and remanded*, 145 S. Ct. 982 (2024) (describing the NLRB's nearly 40-year back and forth on a certain interpretation of the NLRA based largely on the change in the President's party and eventual nominations of members to the NLRB).

267. *See supra* Table **2**.

268. Interestingly, Senate Democrats tried to confirm President Biden's nominee for an open NLRB seat during the lame-duck period before President Trump's inauguration, which would have locked in a partisan advantage until 2026, but relatively moderate Senators Joe Manchin and Kristen Sinema voted against confirmation, leaving only 49 Democratic votes in favor. Alexander Bolton, *Senate Democrats Livid with Exiting Sinema, Manchin: "Pathetic*,*"* THE

aggressive and unprecedented removal of an NLRB member suggests that the latter was more likely, and the Court will likely have the opportunity to decide whether the President can remove independent-agency heads unsympathetic to their policies.

It is important to recognize that removal protections might stop two very different kinds of presidential involvement. The first arises when the President's electoral mandate conflicts with a previously enacted statute—that is, when the democratic choice is to disrupt the work of an independent agency. In this situation, a previous democratic majority enacted a statute providing tenure protections, but a later democratic majority opposes them. In normal situations, only constitutional provisions can have such a counter-majoritarian anchoring effect. To be sure, the problems of legislation (think the filibuster and the time-lag caused by staggered Senate elections) are not unique to the removal power context. But to the extent one views removal as a question of executive power, the ability of the Legislature to put handcuffs on the Executive's ability to carry out the democratic will of the populace rests uneasy. The second, and perhaps more pressing, scenario is that removal restrictions might block the temptations of presidents to meddle with independent agencies in a way that is not democratically supported. For example, the President might be tempted to merely reward his friends with nominations, to control an agency to promote his personal financial gain, or act according to his personal political preferences when he is no longer subject to continuing elections. Putting aside the constitutional question for a moment, the President's claim to pursue these ends carries less force, and Congress's justifications for protecting certain agencies is at its apex. Our findings do not separate between the two possible motivations for political involvement, but it is important to keep both possibilities in mind when analyzing whether the President should be able to control independent agencies.

Our analysis thus offers something for each side of the constitutional (and political) debate over independent agencies. For those who favor removal protections, this analysis demonstrates that removal restrictions play a critical role in preserving agency independence only (and precisely) when political polarization has eroded the institutional norms of agency independence.

By contrast, for those who oppose removal protections, this analysis confirms that these protections are at best redundant and at worst may perpetuate a partisan advantage that consequently (and perhaps unconstitutionally) prevent the only elected official in the Executive Branch from carrying out the will of the people and fulfilling his constitutional role.

HILL (Dec. 13, 2024, 6:00AM), https://thehill.com/homenews/senate/5038382-senate-democrats-furious-over-sinema-manchin-vote [https://perma.cc/FK8F-Y2JH].

C. Limitations

Now to the limitations of our data and analysis. The PCAOB is unlike the agency leaders at issue in decisions like *Myers*, *Humphrey's Executor*, *Seila Law*, and *Collins*, who are appointed by presidential nomination and Senate consent and removable by the President.[269] The organizational structure of the PCAOB is quite unique compared to those other independent agencies. PCAOB board members are appointed and removed by the SEC.[270] Despite these differences, we believe that these findings nonetheless provide important insights into what may happen at other independent agencies if their removal protections are also eliminated.

Some features of the PCAOB's structure might affect how the results here apply to other agencies. First, since PCAOB leaders are appointed and removed by the SEC, they enjoy a degree of separation from political influence. This degree of separation is reinforced by the fact that SEC leaders are not elected and may themselves be protected from at-will removal by the President.[271] To the extent that there is increased separation, there is additional noise that makes direct political influence more difficult (for example, Senators had to put pressure on independent agency leaders at the SEC), which might be confused with political agreement. However, recent events suggest this degree of separation may be thin (the pressure from Senators appears to have worked), so perhaps this structural difference is not as consequential as it might first appear.[272]

Second, a more meaningful difference is the fact that it is much easier to fill vacancies at the PCAOB relative to filling leadership vacancies at other

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269. *See supra* notes 203–204 and accompanying text.

270. 15 U.S.C. § 7211.

271. Note that removal protections for SEC leaders are not explicitly found in any statute, *see* 15 U.S.C. § 78d, but implicit removal protections may still be in place. *See, e.g.*, Free Enter. Fund v. PCAOB, 561 U.S. 477, 487 (2010) (assuming, but not deciding, that SEC leaders enjoy removal protections as part of the justification to eliminate removal protections at the PCAOB); *see also* Jameson M. Payne, *Taken for Granted? SEC Implied For-Cause Removal Protection and Its Implications*, YALE J. ON REG.: NOTICE & COMMENT (June 24, 2022), https://www.yalejreg.com/nc/sec-for-cause-removal-protection/ [https://perma.cc/B8H4-N6NJ] (discussing the common assumption that SEC commissioners are insulated from removal by the President).

272. *See, e.g.*, Warren & Sanders, May 25, 2021 Letter, *supra* note 229. Note that within days of Warren and Sanders publishing their public letter, the SEC voted to remove the PCAOB chair. Jean Eaglesham & Dave Michaels, *Auditor Watchdog Is Overhauled After SEC Report Cites Years of Dysfunction*, WALL ST. J. (July 8, 2021, 8:00AM), https://www.wsj.com/articles/auditor-watchdog-is-overhauled-after-sec-report-cites-years-of-dysfunction-11625745600 [https://perma.cc/W6TP-KTCE].

independent agencies. PCAOB board vacancies are filled by the SEC alone, the same entity that may force a removal. By contrast, filling most other leadership vacancies requires a nomination by the President and confirmation by the Senate. Thus, early departures at these other agencies have a higher probability of resulting in a long-term vacancy compared to the PCAOB.[273] This risk may help to insulate these agency leaders from early departures even if their removal protections were to be eliminated.[274] This difference would suggest that our estimates of the effect of *Free Enterprise Fund* on early departures at the PCAOB provide an upper bound for what one may expect would happen should removal protections be eliminated at independent agencies with leadership positions that require a presidential nomination and confirmation by the Senate. However, perhaps the SEC being subject to Congress's subpoena power makes it less likely to remove PCAOB members for purely political reasons than the President seeking to remove the directors of the FHFA or SSA, for example.

Third, and conversely, the SEC is a multimember body that needs a majority to exercise its removal power, whereas a President can do so unilaterally. The President has been dubbed the "energetic executive" because he can act unilaterally in response to changing circumstances and the will of the populace.[275] Whipping up the votes—even within one's own party—takes additional effort and creates additional difficulties that do not apply when the President seeks to remove an agency official.

Overall, one might reasonably conclude that the effect of the change in the perceived enforceability of removal protections with respect to the PCAOB is higher or lower than the effect another agency with different structure would experience. Either way, the results in this Article should serve as a starting point in assessing the effect of removal restrictions for agency leaders.

CONCLUSION

Jurists have debated for more than two centuries whether and to what extent Congress can protect executive officials from removal. The trajectory of the Court's recent cases, moreover, suggests that the Justices may be preparing to further limit—if not reject outright—Congress's ability to prevent at-will removal of important executive officials. Indeed, either President

273. This risk, though, is sometimes mitigated by the ability of the President to appoint acting officials. Although not a perfect substitute, acting officials lessen the cost of removing an official without successfully appointing a successor.

274. *Cf.* Nielson & Walker, *supra* note 37, at 6–10 (discussing ways in which Congress can prevent removal, including by making successful appointment of a replacement more difficult).

275. Seila Law LLC v. CFPB, 591 U.S. 197, 223 (2020).

Trump's recent wave of forced removals at independent agencies or challenges by regulated parties will almost certainly present the Court with such an opportunity. A key premise of the argument for and against removal restrictions is that they change agency behavior. Most jurists and commentators treat that premise as self-evident. Here, we demonstrate that the judicial elimination of removal restrictions had no effect on tenure lengths of PCAOB members during the first eight years following their elimination but had a pronounced effect on increasing the risk of an early departure in the wake of the November 2020 election. This finding suggests that the conventional wisdom may have historically overinflated the importance of removal protections for some agencies, particularly when bipartisan norms supported limited political involvement in agency decisionmaking. But the findings also suggest that when those norms break down for an agency, removal restrictions do change agency behavior, at least as measured by early departures.

Thus, should the Court move forward with its piecemeal dismantling of removal restrictions in other independent agencies, our analysis suggests that this dismantling would likely cause more early departures at such agencies. Although early departures may be an effective means to enable the Executive Branch to ensure that the laws are faithfully executed, they may also expose independent agencies to shifting political preferences in a way that ultimately undermines their performance and legitimacy. Which of these forces dominate, on balance, is a different empirical question outside the scope of this project. And empirical analyses cannot answer the ultimate question whether involvement by democratically elected individuals is normatively more desirable than the effective pursuit of the missions of independent agencies by insulated technocrats. Nonetheless, we hope our analysis provides a road map for other empirical administrative law projects that attempt to answer this (and other) question(s).