

ZONES OF INDEPENDENCE AT THE NATIONAL LABOR RELATIONS BOARD AFTER *HUMPHREY'S EXECUTOR*

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If President Trump directs you to rule in favor of Amazon or Space X, and in opposition to the rights of their employees, would you do so?

—Senator Bernie Sanders to President Trump's nominees for the National Labor Relations Board, October 2025¹

Ladies, it ain't easy being independent.

—Destiny's Child, *Independent Women, Part I*²

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1. *Nominations of Scott Mayer to Be a Member of the National Labor Relations Board, James Murphy to Be a Member of the National Labor Relations Board, and Rosario Palmieri to Be Assistant Secretary of Labor for Policy: Hearing Before the S. Comm. on Health, Educ., Lab., and Pensions*, 119th Cong., 1st Sess., (2025) (statement of Sen. Bernard Sanders, Ranking Member), <https://www.help.senate.gov/hearings/nominations-of-scott-mayer-to-be-a-member-of-the-national-labor-relations-board-james-murphy-to-be-a-member-of-the-national-labor-relations-board-and-rosario-palmieri-to-be-assistant-secretary-of-labor-for-policy> [<https://perma.cc/GTH9-LAV7>].

2. DESTINY'S CHILD, *Independent Women, Part I*, on Charlie's Angels (CD, Columbia Records Oct. 24, 2000).

In 1935, Congress established the National Labor Relations Board (NLRB) independent of any cabinet department to resolve labor conflict and protected its members from at-will removal to ensure impartial and expert adjudication. Now, the unitary executive is triumphant. The President fired a Board member without cause, the Supreme Court has ended removal protections for Presidential appointees, and Congress doesn't seem to mind. Proponents of an independent NLRB have warned that subjecting Board members to the President's removal authority encourages White House interference in the disposition of individual labor disputes.

This Article, however, contends that the Constitution's Due Process Clause erects "zones of independence" that wall off the Board's adjudication from the pressure of the Executive. In numerous contexts, the courts have long recognized that excessive political interference in administrative adjudication violates parties' rights to due process of law and an impartial tribunal. The influence of politics must end at the courthouse steps. While the end of removal protections for Board members brings with it significant negative consequences, the potential demise of the independent agency does not necessarily mean the end of adjudicative independence for workers relying on the NLRB to protect their rights under the law.

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INTRODUCTION

To resolve the violent labor conflicts that plagued the country since the dawn of the industrial age, Congress established the National Labor Relations Board (NLRB) in 1935 and charged it with creating national labor policy through adjudication.³ Rejecting the Secretary of Labor's wishes to place the NLRB under the control of the Department of Labor, Congress established the NLRB as an independent agency.⁴ Given the Board's quasi-judicial role, Congress insulated Board members from summary dismissal to protect their independence, allowing the President to remove them only "upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause."⁵ Congress relied on the Supreme Court's contemporaneous decision in *Humphrey's Executor v. United States*,⁶ which held that Congress could insulate presidential appointees at independent agencies from at-will removal to guarantee adjudicative and evidence-based decisional autonomy.⁷ This independence was core to the National Labor Relations Act's (NLRA) vision of an expert agency, engaged in apolitical administrative adjudication.⁸ Since the NLRA's enactment, the Board has built a common law of labor relations, as Congress intended.⁹

Ninety years later, the unitary executive rules. Unitary executive theorists believe that the Constitution's vesting of all executive power in a singular President gives the President an indefeasible removal power over Executive Branch officers.¹⁰ Embracing this theory—and notwithstanding *Humphrey's Executor*—

3. See Fred B. Jacob & Anne Marie Lofaso, *Beyond Loper Bright: Iterative Construction at the National Labor Relations Board*, 77 U.C.L.J. 38, 51–61 (2025).

4. National Labor Relations Act (NLRA), 29 U.S.C. §§ 151–69; see Jacob & Lofaso, *supra* note 3, at 51–55 (describing Congress's decision to establish the National Labor Relations Board (NLRB) as independent of the Department of Labor (DOL)).

5. 29 U.S.C. § 153(a).

6. 295 U.S. 602 (1935).

7. *Id.* at 626, 629.

8. See Jacob & Lofaso, *supra* note 3, at 52–55.

9. *Id.* at 55–70.

10. See *infra* notes 61–63 and accompanying text. Many on both sides have examined the constitutional dimensions of unitary executive theory in scholarship and are doing it now in active litigation. See Christine Kexel Chabot, *Rejecting the Unitary Executive*, 2025 UTAH L. REV. 1001, 1009 (2025); Jed Handelsman Shugerman, *The Misuse of Ratification-Era Sources by Unitary Executive Theorists*, 58 MICH. J. L. REFORM 591, 600–06 (2025); Caleb Nelson, *Must Administrative Officers Serve at the President's Pleasure?*, DEMOCRACY PROJECT (Sep. 29, 2025) <https://democracyproject.org/posts/must-administrative-officers-serve-at-the-presidents-pleasure> [<https://perma.cc/5PCA-SG33>]; Aditya Bamzai & Saikrishna Bangalore Prakash, *The Executive Power of Removal*, 136 HARV. L. REV. 1756, 1763–76 (2023) (making historical case for the President's removal power); see also Emma Schartz, Camille Baker, Seamus Hughes, Bernard

President Donald J. Trump fired dozens of protected appointees without cause, including Board Member Gwynne Wilcox.¹¹ In response, the Supreme Court first stayed a district court order applying *Humphrey's Executor* and directing reinstatement of Member Wilcox,¹² then agreed to hear *Trump v. Slaughter*¹³ to consider whether to overrule *Humphrey's Executor*,¹⁴ and, finally, as most court watchers predicted,¹⁵ the Court cast *Humphrey's Executor* into history's dustbin.¹⁶

Without broad removal power, the President had few levers to compel appointees to independent agencies like the NLRB to exercise their statutory discretion in concert with the President's policies. With the power to discharge, however, the White House now has the ability—and some would say the obligation—to use the threat of removal as leverage to pressure Board members to decide individual labor disputes for the President's favored parties or interests.¹⁷ One former Board member speculated: “If President Trump prevails and the Supreme Court reverses *Humphrey's Executor*, there would be nothing to stop President Trump from directing NLRB Members on how individual cases should be decided under threat of removal.”¹⁸ In this vein, numerous critics have warned that the President's expanded removal power will endanger parties' rights to a fair hearing before an impartial tribunal.¹⁹

Mokam, Jasmine C. Lee, Lazaro Gamio et al., *The Trump Administration Has Been Sued More Than 750 Times. Track These Cases.*, N.Y. TIMES, <https://www.nytimes.com/interactive/2025/us/trump-administration-lawsuits.html#firings> [<https://perma.cc/8H2A-HRG5>] (last updated Aug. 19, 2026, at 15:57 ET). This Article leaves that work to the experts.

11. See Nina Totenberg, *Supreme Court Allows Trump to Fire Members of Independent Agency Boards—for Now*, NPR (May 22, 2025, at 18:26 ET), <https://www.npr.org/2025/05/22/nx-s1-5366714/supreme-court-nlrh-mspb> [<https://perma.cc/KCD9-TM4Q>] (analyzing the Supreme Court's response to the administration's emergency request to remove the heads of the NLRB and MSPB following the administration's sweeping personnel changes and firing of heads of multiple independent agencies).

12. *Trump v. Wilcox*, 145 S. Ct. 1415, 1416–17 (2025).

13. No. 25-332, 2026 WL 1855612 (U.S. June 29, 2026).

14. *Trump v. Slaughter*, 146 S. Ct. 18 (2025).

15. Amy Howe, *Court Seems Likely to Side with Trump on President's Power to Fire FTC Commissioner*, SCOTUSBLOG (Dec. 8, 2025, at 15:02 ET), <https://www.scotusblog.com/2025/12/court-seems-likely-to-side-with-trump-on-presidents-power-to-fire-ftc-commissioner> [<https://perma.cc/HF9E-KB3Y>].

16. *Slaughter*, 2026 WL 1855612, at *6.

17. See Sharon Block, *Trump Puts NLRB Independence on the Line*, ONLABOR (Feb. 10, 2025), <https://onlabor.org/humphreys-executor-explained> [<https://perma.cc/A3H7-8LEX>].

18. *Id.*

19. See Andrew Strom, *NLRB, RIP*, ONLABOR (Dec. 11, 2025), <https://onlabor.org/nlrh-rip/> [<https://perma.cc/SG8B-FX9Q>] (“If the President can fire Board Members if they are not doing what he wants them to do, it seems to follow that he can let them know in advance

Contrary to these critics, this Article contends that, even without *Humphrey's Executor*, longstanding constitutional norms will protect the public's entitlement to an impartial NLRB. The Due Process Clause guarantees that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law."²⁰ Administrative adjudication dates to the earliest days of the republic in one form or another, and the Constitution's due process guarantees apply there as much as in any other adjudicative tribunal.²¹ Over a century of developing rules governing administrative adjudication, the Supreme Court has recognized that the Due Process Clause guarantees the public what this Article calls "zones of independence." These zones buffer independent adjudicative agencies from improper outside influence, prejudice, and bias, fostering values dating back to the Magna Carta, as embraced by the Fifth Amendment's Due Process Clause and incorporated in the Administrative Procedure Act.²² In doing so, they stand for the fundamental principle that litigants whose rights depend on government action are entitled to a fair hearing before an impartial judge and to a decision based on the law, the record, and nothing more.²³

Zones of independence stem the influence of politics at the courthouse steps. To no one's surprise, politicians have long attempted to influence the outcome of judicial and administrative adjudication, in ways both opaque and transparent.²⁴ When such efforts have come to light, courts have recognized that constitutional due process values reject political pressure that creates an appearance of adjudicator bias and undermines public faith in the legal system.²⁵ In contexts ranging from unlawful *ex parte* White House contacts with environmental adjudicators, aggressive grilling of the Chairman of the Federal Trade Commission at a Senate hearing about a live case, and

what they ought to be doing."); Lauren McFerran, *Trump Executive Order Could Prevent Independent Agencies from Protecting Workers' Rights*, CENTURY FOUND. (Feb. 21, 2025), <https://tcf.org/content/commentary/trump-executive-order-could-prevent-independent-agencies-from-protecting-workers-rights> [https://perma.cc/F2VW-MLK5] ("Giving the White House such direct and unprecedented control over independent agency leaders' decisionmaking—including the ability to override their legal judgments and defund their work on specific matters—destroys these agencies' neutrality."); Block, *supra* note 17.

20. U.S. CONST. amend. V, cl. 3.

21. Todd Phillips, *A Change of Policy: Promoting Agency Policymaking by Adjudication*, 73 ADMIN. L. REV. 495, 507–08 (2021) (explaining history of agency adjudication).

22. Edward L. Rubin, *Due Process and the Administrative State*, 72 CALIF. L. REV. 1044, 1048–49 (1984).

23. See *infra* notes 154–158 and accompanying text.

24. See R. Douglas Arnold, *Political Control of Administrative Officials*, 3 J.L. ECON. & ORG. 279, 280 (1987).

25. See *infra* Part III.B.

personal pecuniary incentives for judges to rule for particular parties, the zones of independence protect administrative adjudication, judicial proceedings, and due process of law. For parties depending on the NLRB to adjust their rights under the law, due process guarantees that even the potential demise of the independent agency does not necessarily mean the end of adjudicative independence.

This, however, does not mean that the NLRB status quo survives *Slaughter's* slaughter. Due process mitigates the harm, but aggressive use of the removal power will have negative consequences for the Board's operations, reputation, and prestige. It will shift the costs of vindicating independence to the parties least able to bear them.²⁶ A move to philosophically and politically homogenize the Board destroys the deliberative agency composition that checks government power and prevents arbitrary action.²⁷ Prolonged vacancies caused by frequent discharges will interfere with agency operations.²⁸ Yet, a President with the power to discharge need not exercise it, and there is an outside chance that the threat of removal could cause Board members who hope to survive into the next presidential administration to moderate their decisionmaking.²⁹ If that longshot comes to pass, it could reduce policy oscillation and help restore the consensus-based adjudicative approach Senator Robert F. Wagner envisioned when Congress passed the NLRA in 1935.³⁰

The Article begins in 1935 with a brief history of the NLRA, focusing on Congress's decision to establish the NLRB as an independent agency.³¹ It then fast-forwards to 2026, reviewing President Trump's embrace of unitary executive theory and the Supreme Court's decision in *Trump v. Slaughter*³² overturning *Humphrey's Executor*.³³ Pivoting to an NLRA without removal protections that invites presidential intrusion in active adjudication, the Article discusses how the Due Process Clause erects the zones of independence that require an

26. Lauren McFerrnan & Celine McNicholas, *Trump's Assault on Independent Agencies Endangers Us All*, ECON. POL'Y INST. 12 (Oct. 22, 2025), <https://www.epi.org/publication/trumps-assault-on-independent-agencies-endangers-us-all/> [https://perma.cc/Y8B9-VC4U].

27. See Sharon B. Jacobs, *Administrative Dissents*, 59 WM. & MARY L. REV. 541, 590 (2017) (arguing that dissenting opinions in administrative decisions enhances visibility and reduces arbitrariness).

28. Nicholas R. Bednar & Todd Phillips, *Commission Quorums*, 78 STAN. L. REV. 1125, 1145–48 (2026).

29. See *infra* Part IV.

30. Fred B. Jacob, *The National Labor Relations Act, the Major Questions Doctrine, and Labor Peace in the Modern Workplace*, 65 B.C. L. REV. 1381, 1388 (2024) [hereinafter Jacob, *The National Labor Relations Act*].

31. See *infra* Part I.

32. No. 25-332, 2026 WL 1855612, at *1 (U.S. June 29, 2026).

33. See *infra* Part II.

independent officer and a decision based on record evidence, and how those zones impede the President's ability to pressure Board members in ongoing adjudication.³⁴ Finally, it contends that, while the chilling effect of an unlimited removal power is constitutionally manageable, *Slaughter* creates uncertainties that depend on politics, not law, for their resolution—a shift with possibilities that could undermine public trust in the NLRB and government writ large.³⁵

I. 1935: THE NATIONAL LABOR RELATIONS ACT AND ITS INDEPENDENT BOARD

The NLRA is “a bill of rights for American workers.”³⁶ In enacting the NLRA in July 1935, Congress fulfilled Senator Wagner's dream to codify the right to organize in statute, eliminate obstructions from labor strife to the nation's economic recovery in the darkest days of the Great Depression, and encourage the growth of democratic institutions to give voice to the working class.³⁷ The NLRA codifies a positive freedom for workers to organize and enlists the force of the federal government to protect that right.³⁸ Its first words articulate the policy of the United States:

[E]ncourag[e] the practice and procedure of collective bargaining . . . by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.³⁹

As I have previously explained, the NLRA takes a “three-pronged approach” to protecting worker freedom.⁴⁰ Section 7 is the NLRA's beating heart, guaranteeing workers:

the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other

34. See *infra* Part III.

35. See *infra* Part IV.

36. Jacob, *The National Labor Relations Act*, *supra* note 30, at 1387 (citing HARRY A. MILLIS & EMILY CLARK BROWN, *FROM THE WAGNER ACT TO TAFT-HARTLEY* 30 (1950)).

37. See Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379, 1410–11 (1993) (“Wagner had an all-consuming commitment to collective bargaining as an integral component of political democracy in the age of mass production.”). See generally JOSEPH HUTHMACHER, SENATOR ROBERT F. WAGNER AND THE RISE OF URBAN LIBERALISM (1968).

38. See Jacob & Lofaso, *supra* note 3, at 53 (“The NLRA guarantees American workers the right to join a union and establishes a system of industrial democracy supported by the muscle of the federal government.”).

39. 29 U.S.C. § 151.

40. Jacob, *The National Labor Relations Act*, *supra* note 36, at 1387–88 (citing 29 U.S.C. §§ 157, 158, 159).

concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities.⁴¹

Section 8 prevents employer and union “unfair labor practices” that cause industrial strife, such as interfering with employees’ Section 7 rights, discriminating against employees because of their union activity, and refusing to bargain in good faith.⁴² Section 9 guarantees employees representation elections so that they can freely choose whether to select union representation and provides that labor organizations designated or selected by a majority of employees in an appropriate bargaining unit are the “exclusive [bargaining] representatives of all the employees in [the] unit.”⁴³

Congress established the NLRB to enforce the law’s promises.⁴⁴ The President appoints five Senate-confirmed members to the Board, who serve staggered five-year terms. By longstanding norm, the Board consists of two Democrats and two Republicans, and a chairman from the President’s party.⁴⁵ Drawing from traditions of common-law precedential law making, labor arbitration, and prior federal experiments in regulating labor-management relations, the Act empowers the Board to employ administrative adjudication to resolve representation and unfair labor practice disputes.⁴⁶ The Board acts like a common-law court.⁴⁷ The President also appoints a Senate-confirmed General Counsel, who enjoys exclusive authority to investigate unfair labor practices, issue complaints, and prosecute cases before the Board.⁴⁸

41. 29 U.S.C. § 157.

42. *Id.* § 158.

43. *Id.* § 159(a).

44. *Id.* § 153; *see* *NLRB v. Aakash, Inc.*, 58 F.4th 1099, 1104 (9th Cir. 2023) (“Congress explicitly granted all judicial or quasi-judicial functions to the Board . . .”).

45. *See* Emma Barudi, Note, *An Assumed Tradition: How the 3-2 Balance of the NLRB Is More than the Sum of Its Appointments and an Argument for Its Continuation*, 26 N.Y.U.J. LEGIS. & PUB. POL’Y 817, 819–20 (2024); Joan Flynn, *A Quiet Revolution at the Labor Board: The Transformation of the NLRB, 1935–2000*, 61 OHIO ST. L.J. 1361, 1367–98 (2000).

46. Jacob & Lofaso, *supra* note 3, at 56–64 (discussing the connection between the common law, labor arbitration, the World War I War Labor Board, and the New Deal’s National Labor Board and Old NLRB).

47. *Id.* at 66.

48. 29 U.S.C. § 153(d); *see* *NLRB v. United Food & Com. Workers Union, Loc. 23*, 484 U.S. 112, 124 (1987) (noting the distinction between the General Counsel and the NLRB); *Aakash*, 58 F.4th at 1104–05 (determining that the NLRA permits for cause removal of Board members but not the General Counsel); *Exela Enter. Sols., Inc. v. NLRB*, 32 F.4th 436, 443–44 (5th Cir. 2022) (determining that the General Counsel has prosecutorial functions while Board members have adjudicatory functions).

Congress established the NLRB as an independent agency.⁴⁹ This was not an accident. Because Board members act as judges to protect the rights of private parties under the law, Senator Wagner recognized that the independence and neutrality of its “labor court”—particularly from the supervision of a cabinet department dedicated to protecting labor’s interests—was critical to winning public trust.⁵⁰ Secretary of Labor Frances Perkins, however, had pushed to place the new board under the auspices of the Department of Labor (DOL).⁵¹ She believed that the Board should sit under her purview because its adjudicative functions would inevitably intersect with DOL’s role in mediating strikes and other work stoppages.⁵² But, as Senator Wagner’s chief legislative aide wrote in a contemporaneous memo, unlike a strike or lock-out, “you cannot mediate an unfair labor practice.”⁵³ Moreover, given his belief that the Department of Justice had been reluctant to defend labor rights

49. National Labor Relations Act, ch. 372, § 3(a), 49 Stat 449, 451 (1935) (“There is hereby created a board, to be known as the ‘National Labor Relations Board.’”). As originally drafted and introduced, Senator Wagner’s bill created the NLRB “as an independent agency in the Executive branch of the Government.” Kenneth Casebeer, *Drafting Wagner’s Act: Leon Keyserling and the Precommittee Drafts of the Labor Disputes Act and the National Labor Relations Act*, 11 INDUS. RELS. L.J. 73, 122 (1989) (citing confidential first drafts of the National Labor Relations Act).

50. See IRVING BERNSTEIN, *THE NEW DEAL COLLECTIVE BARGAINING POLICY* 100, 105 (1950) (“Independence and impartiality were essential to a quasi-judicial body to gain the confidence of industry and public. Along with this fact . . . , it was equally important for people to think that the board was independent.”); *Minority View*, in NATIONAL LABOR RELATIONS BOARD, H.R. REP. NO. 74-972, at 24–25 (1935) (“The Board is to be solely a quasi-judicial body with clearly defined and limited powers. Its policies are marked out precisely by the law. That such an agency should be free from any other executive branch of the Government has been the recognized policy of Congress.”), reprinted in 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 2980 (1949) [hereinafter NLRA LEG. HIST.]; Leon H. Keyserling, *Wagner Act: Its Origin and Current Significance*, 29 GEO. WASH. L. REV. 199, 207–08 (1960) (“In commenting orally upon this minority report, Felix Frankfurter, then a professor at the Harvard Law School, said that its arguments were absolutely unanswerable from the viewpoint of desirable administrative practice in the case of a new agency having the quasi-judicial functions vested in the Labor Board.”).

51. *Letter from the Honorable Frances Perkins, May 15, 1935*, H.R. REP. NO. 74-1147, at 11 (1935).

52. *Id.* at 11–12 (“Mak[ing] the [NLRB] a part of [DOL] . . . recognizes the importance of constant integration of the problems of collective bargaining with other labor problems, which is essential if the Department and the Board are to have the greatest possible understanding of the ramifications of their decisions in the field of industrial relations.”), reprinted in NLRA LEG. HIST. at 3058–59.

53. Casebeer, *supra* note 49, at 92 n.117 (quoting an undated 1935 memo from Wagner aide Keyserling); see also *Letter from Chairman Francis Biddle*, H.R. REP. NO. 74-1147, at 13 (“[T]he rights of labor . . . are written into the law to be enforced, not to be bargained about or compromised.”), reprinted in NLRA LEG. HIST. at 3061.

under President Franklin D. Roosevelt's National Industrial Recovery Act, Senator Wagner insisted that the new NLRB have its own litigating authority so it could petition the courts to enforce its decisions independent of the litigation priorities of the political departments.⁵⁴ Although Senator Wagner had previously been willing to consider placing the labor board under DOL in an earlier draft of his bill,⁵⁵ by 1935, he and his congressional allies insisted that "there should be no compromise' . . . on the necessity for NLRB independence."⁵⁶

Congress was in its final deliberations over the NLRA in May 1935 when the Supreme Court handed down its decision in *Humphrey's Executor*,⁵⁷ which bolstered the appeal of NLRB independence.⁵⁸ As noted above, *Humphrey's Executor* blessed Congress's ability to protect appointees to independent agencies that engage in "quasi judicial" or "quasi legislative" activity from at-will removal when necessary to insulate their decision making from political influence.⁵⁹ *Humphrey's Executor* carved out an exception to an expansive presidential removal authority recognized nine years earlier in *Myers v. United States*.⁶⁰ In *Myers*, the Court had struck down, as inconsistent with Article II of the Constitution's vesting of the President with the duty to "take care that the laws be faithfully executed," a statute requiring Senate approval before

54. JAMES A. GROSS, THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD, 1933–1937, at 125–26 (1974); *Minority View*, in NATIONAL LABOR RELATIONS BOARD, H.R. REP. NO. 74-972, at 24–25 (noting the "vital need" for the NLRB to have "complete independence as a quasi-judicial board" to effectively address the "touchy subject" of labor), *reprinted in* NLRA LEG. HIST. at 2980.

55. Casebeer, *supra* note 49, at 94 ("[Senator] Wagner had by [early 1934] agreed to raise no objection to the suggestion of locating the National Labor Board in the Labor Department.").

56. GROSS, *supra* note 54, at 132 (quoting internal memoranda by Senator Wagner's legislative counsel, Phillip Levy).

57. 295 U.S. 602 (1935). *Humphrey's Executor's* companion case was *Rathbun v. United States*, after the name of the executor. In congressional debates cited here, legislators sometimes refer to the decision as "*Rathbun*." *Id.* at 602.

58. Alex Smith, *Labor Regulation and Agency Independence*, REGUL. REV. (Feb. 22, 2026), <https://www.theregreview.org/2026/02/22/spotlight-labor-regulation-and-agency-independence/> [<https://perma.cc/UAS2-RPF7>] (interview with former NLRB Chair Lauren McFerran) (explaining that *Humphrey's Executor* permits Congress to insulate multimember agencies like the NLRB from presidential removal, reinforcing their independence).

59. *Humphrey's Ex'r*, 295 U.S. at 626–32; see Emily S. Bremer & William N. Eskridge Jr., *The Unitary Executive and the Due Process State*, 101 NOTRE DAME L. REV. REFLECTION 1, 3–6 (2026) (explaining the due process values inherent in *Humphrey's Executor's* holding providing Congress the power to protect adjudicative officers from at-will dismissal).

60. 272 U.S. 52, 176 (1926).

the President could remove a local postmaster from his position.⁶¹ In an encyclopedic opinion from Chief Justice William Howard Taft, the Court justified a broad presidential removal power on the need for the President to have “implicit faith” in “each member of his official family[] and his chief executive subordinates”⁶² For these appointees, the President may “properly supervise and guide their construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone.”⁶³ According to *Myers*, removal is a necessary tool of the President’s constitutional power of supervision that Congress may not impede; without it, he is deprived of his authority under the Take Care Clause to faithfully execute the laws and supervise subordinates.⁶⁴ *Myers* is the urtext of the unitary executive theory.⁶⁵

President Roosevelt relied on *Myers* when he fired William Humphrey, a Federal Trade Commissioner appointed by President Herbert Hoover, solely for policy differences, even though the Federal Trade Commission (FTC) Act protected commissioners from removal for any reason other than “inefficiency, neglect of duty, or malfeasance in office.”⁶⁶ In a surprising rebuke, the Court unanimously rejected *Myers*’s rigid vision of executive removal

61. *Id.* at 106–108, 132–35 (citing U.S. CONST. art. II, § 3).

62. *Id.* at 134 (“The imperative reasons requiring an unrestricted power to remove the most important of his subordinates in their most important duties must, therefore, control the interpretation of the Constitution as to all appointed by him.”). These subordinates include presidentially appointed department heads requiring Senate confirmation under the Appointments Clause, presidential appointees not requiring Senate confirmation, and a catch-all group of “his appointees charged with other duties than those above described.” *Id.* at 134–35.

63. *Id.* at 135.

64. *Id.*

65. See Andrea Scoseria Katz & Noah A. Rosenblum, *Becoming the Administrator-in-Chief: Myers and the Progressive Presidency*, 123 COLUM. L. REV. 2153, 2177 (2023); Nikolas Bowie & Daphna Renan, *The Separation-of-Powers Counterrevolution*, 131 YALE L.J. 2020, 2072–77 (2022) (detailing Chief Justice Taft’s determination to preserve presidential power and control over the executive branch in the *Myers* opinion as well as personal letters).

66. *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 619–20 (1935) (citing 15 U.S.C. §§ 41, 42); *Wiener v. United States*, 357 U.S. 349, 351 (1958) (“President Roosevelt’s reliance upon the pronouncements of the Court in [*Myers*] in removing a member of the Federal Trade Commission on the ground that ‘the aims and purposes of the Administration with respect to the work of the Commission can be carried out most effectively with personnel of my own selection’ reflected contemporaneous professional opinion regarding the significance of the *Myers* decision.”); see also Abbie VanSickle, *For Landmark Test of Executive Power, Echoes of a 1930s Supreme Court Battle*, N.Y. TIMES (Dec. 7, 2025), <https://www.nytimes.com/2025/12/07/us/politics/supreme-court-humphrey-roosevelt.html> [<https://perma.cc/BDR8-H3RM>] (tracing the clash between Humphrey and President Roosevelt).

power in favor of a functional approach that “depend[ed] upon the character of the office”⁶⁷ In contrast to the Postmaster’s purely executive mail-delivery functions in *Myers*, an FTC commissioner’s responsibility to regulate unfair methods of competition by conducting studies and serving as an adjudicative judge constituted “quasijudicial” and “quasi-legislative” duties.⁶⁸ Expertise removed from political influence was key to these bodies’ evidence-based performance of their statutory assignments, and removal’s “coercive influence threatens the independence of a commission”⁶⁹ To protect that independence, the Court held that it was within Congress’s authority to cabin the President’s discretion to remove commissioners from agencies engaged in quasi-judicial or quasi-legislative functions for reasons other than cause.⁷⁰

Within weeks of the Court’s decision in *Humphrey’s Executor*, Congress adjusted language of the draft NLRA to reflect the Court’s holding.⁷¹ First, Congress inserted explicit protections against plenary removal into the Act to emphasize its quasi-judicial role, preventing the President from removing Board members except “for neglect of duty or malfeasance in office, but for no other cause.”⁷² Second, Congress firmly rejected placing the new agency

67. 295 U.S. at 631–32; *see also Wiener*, 357 U.S. at 353 (“[T]he most reliable factor for drawing an inference regarding the President’s power of removal . . . is the nature of the function that Congress vested . . .”).

68. 295 U.S. at 624 (“The commission is to be nonpartisan; and it must, from the very nature of its duties, act with entire impartiality. It is charged with the enforcement of no policy except the policy of the law. Its duties are neither political nor executive, but predominantly quasi-judicial and quasi-legislative. Like the Interstate Commerce Commission, its members are called upon to exercise the trained judgment of a body of experts ‘appointed by law and informed by experience.’”) (quoting *Ill. Cent. R. Co. v. Interstate Com. Comm’n*, 206 U.S. 441, 454 (1907); *Standard Oil Co. v. United States*, 283 U.S. 235, 238–39 (1931)). The “quasi” labels emerged in the late nineteenth and early twentieth centuries to describe the increasing use of multi-member executive bodies in local, state, and federal government to carry out duties previously reserved to legislatures and courts. By the time of *Humphrey’s Executor*, they enjoyed general acceptance in administrative law. *See* Beau J. Baumann, *Congress in the Myers-to-Humphrey’s Interregnum*, 175 U. PA. L. REV. (forthcoming) (manuscript at 7–14).

69. *Humphrey’s Ex’r*, 295 U.S. at 630.

70. *Id.* at 629 (“We think it plain under the Constitution that illimitable power of removal is not possessed by the President in respect of officers of the character of those just named.”).

71. *See Trump v. Slaughter*, No. 25-332, 2026 WL 1855612, at *45 (U.S. June 29, 2026) (Sotomayor, J., dissenting) (“Within weeks of *Humphrey’s* being decided . . . , the House amended the bill establishing the [NLRB] to include removal protections, with the express aim of ‘provid[ing] that the decision of the Supreme Court in the recent *Humphreys* case shall be embodied in the statute.’”) (quoting H.R. REP. NO. 74-1147, at 14 (1935)).

72. 29 U.S.C. § 153(a); *see* H.R. REP. NO. 1371 at 4 (1935) (Conf. Rep.), *reprinted in* 2 NLRA LEG. HIST. at 3255; H.R. REP. NO. 1147, at 14 (1935), *reprinted in* NLRA LEG. HIST. at 3062.

under the control of DOL, emphasizing its status as an independent agency like the FTC to bolster the argument for removal protection.⁷³ As Congressman Vito Marcantonio explained, if the House “recognize[s] the necessity of establishing a board with independence and dignity, . . . is it not the part of prudence to put the matter beyond doubt and establish the Board as a wholly independent agency?”⁷⁴ Otherwise, if the NLRB were placed under DOL, it “invites the risk that under the *Myers* case the President might have the unrestrained power of removal of the members of the Board during their statutory terms of office, contrary to the intent of Congress.”⁷⁵ When President Roosevelt signed the enacted NLRA on July 5, 1935, he affirmed that “[t]he National Labor Relations Board will be an independent quasi-judicial body.”⁷⁶

Humphrey’s Executor was about more than just removal power. Progressives of the early twentieth century trusted expertise as an antidote to political patronage and partisan short cuts.⁷⁷ In recognizing Congress’s power to build expert administrative governance outside the normal political process, *Humphrey’s Executor* allowed Congress to address modern problems in an increasingly nationalized economy and develop solutions that experimented with traditional government roles.⁷⁸ By the time of *Humphrey’s Executor*, Congress’s constitutional power to establish independent entities like the NLRB could not “well be doubted,” according to the Court.⁷⁹ In making the Board independent from DOL and protected from at-will removal, Congress asserted its authority to empower independence over politics, recognizing—as discussed extensively below—core values in Anglo-American law requiring fair hearings and unbiased judgment in quasi-judicial action.⁸⁰

73. H.R. REP. NO. 1371 at 4, *reprinted in* NLRA LEG. HIST. at 3255; H.R. REP. NO. 1147, at 14 (1935), *reprinted in* NLRA LEG. HIST. at 3255.

74. 79 CONG. REC. 9724–25 (1935), *reprinted in* NLRA LEG. HIST. at 3212.

75. *Id.*

76. *Text of Wagner Bill Statement*, 79 CONG. REC. 10720 (1935), *reprinted in* 2 NLRA LEG. HIST. at 3269. Sixty years later, Congress specifically identified the Board as an “independent regulatory agency” as part of the Paperwork Reduction Act, Pub. L. No. 104-13 § 2, 109 Stat. 163, 165 (1995) (codified at 44 U.S.C. § 3502(5)).

77. Baumann, *supra* note 68, at 9–11.

78. Hayley Durudogan & Michael Sozan, *What is Humphrey’s Executor and Why Should You Care About It?*, CTR. FOR AM. PROGRESS (Feb. 27, 2025), <https://www.americanprogress.org/article/what-is-humphreys-executor-and-why-should-you-care-about-it/> [<https://perma.cc/FH7B-P9VU>].

79. *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 629 (1935) (“The authority of Congress, in creating quasi-legislative or quasi-judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted; and that authority includes, as an appropriate incident, power to fix the period during which they shall continue in office, and to forbid their removal except for cause in the meantime.”).

80. See Bremer & Eskridge, *supra* note 59, at 9–12.

II. 2026: *TRUMP V. SLAUGHTER* AND A UNITARY EXECUTIVE UNLEASHED

At first, the Court and Congress doubled down on *Humphrey's Executor*. In 1958's *Wiener v. United States*,⁸¹ the Court found removal protections implicit in any adjudicative agency requiring independence, even where the statute was silent on the matter.⁸² In 1988's *Morrison v. Olson*,⁸³ while retreating from the "quasi" categories to support removal authority, the Court nevertheless blessed the appointment of an inferior officer to serve as an independent counsel whom the President could not remove at will when it did not significantly interfere with presidential duties.⁸⁴ In reliance on this precedent, Congress stood up over a dozen multi-member and single-director agencies with protection from removal when necessary to protect agency independence.⁸⁵ Meanwhile, in the early 1980s, a band of young scholars and lawyers working in the Reagan Department of Justice began to blanch at the President's lack of control over independent agency action.⁸⁶ Relying on *Myers*, these advocates developed a theory of unitary executive power based on Article II's vestiture of all executive power in the President and the Take Care Clause.⁸⁷ Under this theory, the Executive Branch is the President's untrammelled domain, and interference with his discretion is constitutionally suspect.⁸⁸

By the early twenty-first century, an increasingly conservative Supreme Court began to embrace the unitary executive, and restrictions on the President's ability to remove Executive Branch officials soon emerged as the theory's primary target. In three cases beginning in 2010, the Court began backing away from

81. 357 U.S. 349 (1958).

82. *Id.* at 356.

83. 487 U.S. 654 (1988).

84. *Id.* at 691–92.

85. Jane Manners & Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 COLUM. L. REV. 1 apps. A–B at 72–79 (2021) (collecting agencies' removal protections and statutory sources).

86. See Ashraf Ahmed, Lev Menand & Noah A. Rosenblum, *The Making of Presidential Administration*, 137 HARV. L. REV. 2131, 2186–99 (2024); Peter M. Shane, *The Unbearable Lightness of the Unitary Executive Theory*, REGUL. REV. (Mar. 3, 2025), <https://www.theregreview.org/2025/03/03/shane-the-unbearable-lightness-of-the-unitary-executive-theory> [<https://perma.cc/3LJR-HZ6L>]; Anne E. Marimow, *Conservative Project at Supreme Court Meets Trump's Push to Oust Officials*, N.Y. TIMES (Dec. 7, 2025), <https://www.nytimes.com/2025/12/07/us/politics/supreme-court-trump-independent-agencies.html> [<https://perma.cc/T22M-ML5E>] (reporting a 1983 memo written by Chief Justice Roberts when he was a young White House attorney contending that "[t]he 'time may be ripe to reconsider the existence of such entities, and take action to bring them back within the executive branch'").

87. See Cass R. Sunstein & Adrian Vermeule, *The Unitary Executive: Past, Present, Future*, 2020 SUP. CT. REV. 83, 88, 90 (2022).

88. *Id.*

Humphrey's Executor's pragmatic approach to presidential removal power, reincarnating *Myers's* broad sweep.⁸⁹ These decisions characterized *Humphrey's Executor*, *Wiener*, and *Morrison* as “limited restrictions on the President’s removal power.”⁹⁰ In succession, the Court struck down removal protections for members of a public accounting oversight board housed under the Securities and Exchange Commission;⁹¹ for the Director of the Consumer Financial Protection Bureau;⁹² and for the single-headed Federal Housing Finance Agency.⁹³ In these cases, the Court purported to respect *Humphrey's Executor* as good law, allowing removal protections for “multi-member expert agencies that do not wield substantial executive power,”⁹⁴ but its decisions fundamentally rejected *Humphrey's Executor's* functionalist underpinnings.⁹⁵

In January 2024, the NLRB’s General Counsel issued a complaint against Elon Musk’s SpaceX, alleging that the company unlawfully fired a group of employees for writing a letter complaining about Musk’s allegedly “inappropriate, disparaging, sexually charged comments on Twitter” and raising concerns that the tweets undermined company profitability and employee morale.⁹⁶ The day after the General Counsel served her complaint, SpaceX

89. Bamzai & Prakash, *supra* note 10, at 1758–60 (“In three opinions—*Free Enterprise Fund v. Public Co. Accounting Oversight Board*, *Seila Law LLC v. Consumer Financial Protection Bureau*, and *Collins v. Yellen*—the Court endorsed the traditional view that the Constitution grants the President the power to remove.”).

90. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 495 (2010); *see also* *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2192 (2020) (“Our precedents have recognized only two exceptions to the President’s unrestricted removal power.”).

91. *Free Enter. Fund*, 561 U.S. at 496–97 (finding that two layers of removal protection, the Public Company Accounting Board and the SEC, created too much constitutional distance for the President to adequately supervise the board members, and noting that, “[w]ithout the ability to oversee the Board, or to attribute the Board’s failings to those whom he *can* oversee, the President is no longer the judge of the Board’s conduct He can neither ensure that the laws are faithfully executed, nor be held responsible for a Board member’s breach of faith.”).

92. *Seila Law*, 140 S. Ct. at 2197.

93. *Collins v. Yellen*, 141 S. Ct. 1761, 1784–87 (2021).

94. *Seila Law*, 140 S. Ct. at 2199–2200; *accord* *Free Enter. Fund*, 561 U.S. at 493; *Seila Law*, 140 S. Ct. at 2206 (noting that “we do not revisit *Humphrey's Executor* or any other precedent today”); *Collins*, 141 S. Ct. at 1783 (recognizing that *Seila Law* did “not revisit . . . prior decisions”).

95. *Collins*, 141 S. Ct. at 1768 (“[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.”).

96. Josh Eidelson & Loren Grush, *SpaceX Illegally Fired Workers Critical of Musk*, *NLRB Says*, BLOOMBERG L. (Jan. 3, 2024, at 15:38 ET), <https://www.bloomberglaw.com/product/blaw/bloomberglawnews/bloomberg-law-news/X2UQQM7G000000> [<https://perma.cc/Y25X-4NL8>]; Diana S. Reddy, *Relitigating the New Deal: The Stakes of Current Constitutional Challenges to the NLRB*, 22 LAB.: STUD. IN WORKING CLASS HIST. 24, 24 (2025).

filed suit in federal district court to enjoin the proceedings, alleging, *inter alia*, that the Act unconstitutionally protected Board members from at-will removal and that SpaceX should not be subject to decision by an invalid tribunal.⁹⁷ SpaceX's lawsuit created a permission structure for other employers—including heavy hitters like Amazon, Starbucks, and Trader Joe's—to file similar lawsuits and raise constitutional defenses in NLRB litigation, resulting in dozens of copycat cases across the country by the end of 2024 contending that the Act was unconstitutional.⁹⁸

In January 2025, one week after his inauguration, President Trump fired Member Gwynne Wilcox with three and a half years left in her five-year term.⁹⁹ Like President Roosevelt's missive to Commissioner Humphrey, the White House's email to Member Wilcox "cited only political motivations," and it "asserted, in a footnote, that the restriction on the President's removal authority is unconstitutional as 'inconsistent with the vesting of the executive Power in the President.'"¹⁰⁰ Member Wilcox was in good company. Exercising his belief in an illimitable removal authority under Article II, President Trump also terminated members of the Merit Systems Protection Board, the Federal Labor Relations Authority, the National Transportation Safety Board, the Equal Employment Opportunity Commission, the Securities and Exchange Commission, and the Consumer Product Safety Commission, among others.¹⁰¹ Perhaps to tee up the perfect test case for *Humphrey's Executor*, he fired members of the FTC too.¹⁰² Congressional leadership barely complained, much less intervened.

NLRB Member Wilcox sued to challenge her removal without cause.¹⁰³ Finding her termination inconsistent with the Act and *Humphrey's Executor*, the District Court granted Member Wilcox summary judgment and issued a permanent injunction returning her to office.¹⁰⁴ The Supreme Court,

97. Loren Grush & Josh Eidelson, *SpaceX Sues US Labor Board Over Fired Employees Case*, BLOOMBERG L. (Jan. 4, 2024, at 16:11 ET), <https://www.bloomberglaw.com/product/blaw/bloomberglawnews/bloomberg-law-news/X8RFSFDS000000> [<https://perma.cc/PAL2-FSKP>].

98. See Reddy, *supra* note 96, at 28–30.

99. Wilcox v. Trump, 775 F. Supp. 3d 215, 222 (D.D.C. 2025), *rev'd sub nom.* Harris v. Bessent, 160 F.4th 1235 (D.C. Cir. 2025), *reh'g en banc denied*, No. 25-5037, 2025 WL 1033740 (D.C. Cir. Apr. 7, 2025), *cert. denied before judgment*, 146 S. Ct. 76 (2025).

100. *Id.*

101. Bremer & Eskridge, *supra* note 59, at 1–2; Schartz, Baker, Hughes, Mokam, Lee, Gamio, et al., *supra* note 10.

102. Slaughter v. Trump, 791 F. Supp. 3d 1, 8, 11–23 (D.D.C. 2025), *cert. granted before judgment sub nom.*, Trump v. Slaughter, 146 S. Ct. 18 (2025).

103. Wilcox, 775 F. Supp. 3d at 235.

104. *Id.* at 223–35.

however, stayed the District Court's decision.¹⁰⁵ Citing its modern removal precedent, it opined the following in a per curiam order (without citing *Humphrey's Executor*):

Because the Constitution vests the executive power in the President, *see* Art. II, § 1, cl. 1, he may remove without cause executive officers who exercise that power on his behalf, subject to narrow exceptions recognized by our precedents The stay reflects our judgment that the Government is likely to show that both the NLRB and [Merit Systems Protection Board] [whose fired Chairman also challenged her no-cause dismissal] exercise considerable executive power.¹⁰⁶

Two months later, the Court granted certiorari to decide whether to overrule *Humphrey's Executor* in *Trump v. Slaughter*, the case brought by the sacked members of the FTC.¹⁰⁷

Meanwhile, in the SpaceX litigation, the U.S. Court of Appeals for the Fifth Circuit, affirming the U.S. District Court for the Western District of Texas, read the tea leaves in the Supreme Court's decisions and limited *Humphrey's Executor* to agencies it construed as a "mirror image" of the FTC in 1935.¹⁰⁸ In a decision involving SpaceX and two other employers who had sought injunctions against ongoing NLRB proceedings, the Fifth Circuit held that the employers were likely to prevail on their claim that Board members exercise "substantial executive power" in administering the NLRA, which "renders the [NLRA's] removal provision constitutionally suspect under modern separation-of-powers doctrine."¹⁰⁹ The U.S. Court of Appeals for the D.C. Circuit followed suit shortly after, deciding three days before the Supreme Court heard argument in *Slaughter* that the President possessed the constitutional authority to fire Member Wilcox.¹¹⁰

Chief Justice Roberts's 6-to-3 opinion for the Court in *Trump v. Slaughter* did not disappoint unitary executive stans.¹¹¹ The Court cited the President's

105. *Trump v. Wilcox*, 145 S. Ct. 1415–16 (2025).

106. *Id.* at 1415; *see also* *Trump v. Boyle*, 145 S. Ct. 2653, 2654 (2025) (staying order finding removal of member of the Consumer Product Safety Commission unlawful because "the case does not otherwise differ from *Wilcox* in any pertinent respect").

107. *Trump v. Slaughter*, 146 S. Ct. 18 (2025).

108. *Space Expl. Techs. Corp. v. NLRB*, 151 F.4th 761, 778 (5th Cir. 2025), *aff'g* 741 F. Supp. 3d 630, 636 (W.D. Tex. 2024) ("Recent Supreme Court precedent suggests that this strict removal protection violates Article II of the Constitution given the substantial executive power that the Board wields.").

109. *Space Expl. Techs. Corp.*, 151 F.4th at 776.

110. *Harris v. Bessent*, 160 F.4th 1235, 1242, 1257 (D.C. Cir. 2025).

111. *Trump v. Slaughter*, No. 25-332, 2026 WL 1855612 (U.S. June 29, 2026); *see Stan*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/stan> [<https://perma.cc/QQB4-XY89>] (last visited July 15, 2026) ("[A]n extremely or excessively enthusiastic and devoted fan[.]").

constitutional appointment power and his responsibility under the Take Care Clause; embraced *Myers* without reservation; situated its recent unitary executive precedent as proof of *Myers*'s provenance; and characterized *Humphrey's* as an aberration rather than a building block of twentieth-century governance.¹¹² According to the Court, the *stare decisis* concerns in retaining *Humphrey's* were unpersuasive, as the decision was purportedly unworkable and the only relevant reliance interest—Congress's in expanding its power—"[was] hardly one of the 'legitimate' reliance interests that our precedents contemplate."¹¹³ Having surveyed both legislative and judicial history (or rewritten them, as Justice Sotomayor's dissent contended),¹¹⁴ the Court unsurprisingly held that the President's removal of Commissioner Slaughter from her position at the FTC was "not a close case."¹¹⁵ The FTC promulgates rules, conducts in-house adjudications, and initiates civil litigation in federal court, so it "unquestionably exercises executive power."¹¹⁶ "When an agency 'executes' a congressional mandate against private parties, it exercises executive power—no ifs, ands, or quasies about it."¹¹⁷ Accordingly, "Slaughter served as the President's subordinate at the FTC," and, under *Myers*, "the President was entitled to cut her tenure short."¹¹⁸

The Court's expansive opinion made few carve outs to the President's removal power. It noted that some congressionally chartered offices, like the Boy Scouts and Georgetown University, possess no executive power.¹¹⁹ It recognized that some traditions from the Nation's founding shape the President's removal authority, such as the "unique role" of the "Federal Reserve, to the extent that it follows in the distinct historical tradition of the First and Second Banks of the United States."¹²⁰ The Court declined to address tenure protections for non-Article III courts, such as the Tax Court and Court of Federal Claims.¹²¹ And

112. *Slaughter*, 2026 WL 1855612, at *7–15 (2026) ("*Humphrey's* is now far out of step with our cases, which have all but limited it to its facts."); *id.* at *15 (asserting that "[w]e applied [*Humphrey's*] only once, in 1958 . . .").

113. *Id.* at *16.

114. *Id.* at *30–43 (Sotomayor, J., dissenting) (challenging the majority's reading of legislative history and judicial precedent).

115. *Id.* at *17.

116. *Id.* at *17–18.

117. *Id.* at *15.

118. *Id.* at *18.

119. *Id.*

120. *Id.* at *18; see *infra* notes 297–299 and accompanying text.

121. *Slaughter*, 2026 WL 1855612, at *18. In the aftermath of *Trump v. Wilcox's* preliminary finding that "the Government is likely to show that . . . the NLRB . . . exercise[s] considerable executive power," 145 S. Ct. 1415, 1415 (2025), a group of labor experts proposed standing up an Article I Labor Court, akin to the Tax Court, Court of Federal Claims, and

it did not answer Justice Sotomayor's concerns that the majority's logic would swallow up removal protections for civil servants, administrative law judges, and inferior officers.¹²² In the dissent's opinion, *Slaughter* "leaves courts, agencies, and Congress with little guidance, and many new questions, on how they are supposed to assess removal questions going forward."¹²³

In addition to precipitating *Humphrey's* reversal by firing *Slaughter*, Wilcox, and their peers, early in his second term, President Trump issued an Executive Order placing independent agencies' regulatory policy and internal administration directly under his control, ostensibly so that independent agencies are "supervised and controlled by the people's elected President."¹²⁴ Although the Order does not address independent agencies' adjudication, it prohibits agencies from advancing "an interpretation of the law as the position of the United States that contravenes the President or the Attorney General's opinion on a matter of law, including but not limited to the issuance of regulations, guidance, and positions advanced in litigation."¹²⁵

Court of Appeals for the Armed Forces. See Samuel Estreicher, G. Roger King, and David S. Sherwyn, *The Labor Board Needs Restructuring, Not Destruction*, REGUL. REV. (May 27, 2025), <https://www.theregreview.org/2025/05/27/estreicher-king-sherwyn-the-labor-board-need-s-restructuring-not-destruction/> [https://perma.cc/6FGR-5GP6]. Its reed of constitutional viability in a post-*Slaughter* universe was its hope that the Supreme Court in *Slaughter* would carve out purely adjudicative bodies from a broad Presidential removal power. See Samuel Estreicher, G. Roger King, and David S. Sherwyn, *Dealing with the Likely Demise of Humphrey's Executor*, ONLABOR.ORG (June 25, 2025), <https://onlabor.org/dealing-with-the-likely-demise-of-humphreys-executor/> [https://perma.cc/BJ64-QB3X]. But like the NLRB, these Article I courts are facing constitutional challenges to their judges' removal protections, see, e.g., *Battat v. Comm'n*, 148 T.C. 32 (2017), *petition for review dismissed*, 2025 WL 2652443 (11th Cir. 2025) (unpublished), *cert. denied*, 2026 WL 1127252 (Apr. 27, 2026), and *Slaughter* did not put these challenges to rest. If anything, its refusal to address these courts' constitutional status invites future litigation over Article I courts.

122. *Slaughter*, 2026 WL 1855612, at *49–50 (Sotomayor, J., dissenting) ("With remarkable steadfastness, the majority simply refuses to explain where its theory leads or where it ends.").

123. *Id.* at *49 (Sotomayor, J., dissenting).

124. *Ensuring Accountability for All Agencies*, Exec. Ord. No. 14,215 § 1, 90 Fed. Reg. 10,447, 10,447 (Feb. 18, 2025); see also *Fact Sheet: President Donald J. Trump Reins in Independent Agencies to Restore a Government that Answers to the American People*, WHITE HOUSE (Feb. 18, 2025), <https://www.whitehouse.gov/fact-sheets/2025/02/fact-sheet-president-donald-j-trump-reins-in-independent-agencies-to-restore-a-government-that-answers-to-the-american-people> [https://perma.cc/4WVK-2RJ7] (explaining the implications of the executive order). See generally *Extending Regul. Rev. Under Exec. Order 12,866 to Indep. Regul. Agencies*, 43 Op. O.L.C. 232 (2019) (arguing the legal and historical basis for the order).

125. Exec. Ord. No. 14,215 § 7. One pro-employer organization has asked the Attorney General to direct the Board to abandon precedent outside of the adjudicative process. Press Release, Coalition for a Democratic Workplace, CDW Urges AG Bondi to Direct NLRB to

Here is where things stand: the Administration has embraced the strongest version of unitary executive theory, encompassing both the authority to remove and the authority to direct, even when Congress has vested discretion with other officers.¹²⁶ The Supreme Court has freed the President to fire Board members for a good reason, a bad reason, or no reason at all in service of his duty to take care that the laws be faithfully executed.¹²⁷ Granting the President the power to remove Board members and other agency appointees does not, *ipso facto*, give him the power to impose his will on how independent agencies carry out the functions Congress has vested in their discretion. But it provides the President a power to enforce his will against agency appointees that he did not previously possess. Without the power to remove, the President had few direct means to compel independent agencies to comply with his orders. But at-will removal power facilitates increased obeisance to presidential oversight, and thus threatens Congress's vision of an impartial "Supreme Court of labor law" to adjust worker rights under the NLRA.¹²⁸

III. THE DUE PROCESS CLAUSE CREATES "ZONES OF INDEPENDENCE" THAT MEDIATE THE THREAT OF PRESIDENTIAL PRE-DECISIONAL INTERFERENCE IN NLRB ADJUDICATION

At heart, the battle over presidential removal is a conflict between the enabling constitutional articles of the Legislative and Executive Branches.¹²⁹ But, regardless of whether Article I is subservient to Article II, the Fifth

Abandon Biden-Era Precedent (Apr. 3, 2025), <https://myprivateballot.com/2025/04/03/cdw-urges-ag-bondi-to-direct-nlrp-to-abandon-biden-era-precedent> [<https://perma.cc/3JT6-NKZJ>]. In another Executive Order focused on the employee status of student athletes, the President directed the "Secretary of Labor and the National Labor Relations Board" to "determine and implement the appropriate measures with respect to clarifying the status of collegiate athletes, including through guidance, rules, or other appropriate actions, that will maximize the educational benefits and opportunities provided by higher education institutions through athletics." *Saving College Sports*, Exec. Ord. No. 14,322 § 3, 90 Fed. Reg. 35,821, 35,823 (July 24, 2025).

126. See *Harris v. Bessent*, 160 F.4th 1235, 1276–80 (D.C. Cir. 2025) (Pan, J., dissenting) (describing the Government's theory of the "Maximalist Unitary Executive").

127. Adam White, *Is Humphrey's Executor Headed for Slaughter?*, SCOTUSBLOG (Oct. 2, 2025), <https://www.scotusblog.com/2025/10/is-humphreys-executor-headed-for-slaughter/> [<https://perma.cc/9RSU-Y92V>].

128. See McFerran, *supra* note 19 ("Presidential control of the day-to-day decisionmaking of these agencies compromises the entire adjudicative process, denying the people involved in these cases the ability to get a fair and impartial consideration of their claims.").

129. See Beau J. Baumann & Jed Handelsman Shugerman, *Quasi-Judicial: A History and Tradition*, 127 COLUM. L. REV. (forthcoming) (manuscript at 9); Jed Handelsman Shugerman & Gary Lawson, *Presidential Removal as Article I, Not Article II*, 121 NW. U. L. REV. (forthcoming 2026) (manuscript at 40–41).

Amendment's Due Process Clause overpowers them both.¹³⁰ The Due Process Clause checks governmental power. It ensures that, before the government exercises public authority against private interests, the public has a right to a hearing before an impartial decisionmaker.¹³¹ And, as shown below, it restrains judges, administrators, legislators, and Presidents by creating zones of independence protecting fair judicial and administrative adjudication.¹³² Even if the Constitution permits greater presidential control over agencies like the NLRB, the President has no discretion to exercise his enhanced power to deprive litigants of their basic constitutional right to a fair trial.¹³³ This constitutional guarantee repels presidential interference with the adjudicative process and ensures that the Board can continue to administer the NLRA with impartiality and fairness, even with the unitary executive theory on the rise.

A. From the Magna Carta to Myers, Due Process Restrains Executive Prerogative

If it can restrain a King, it should be able to restrain a President. The Due Process Clause's lineage dates to the Magna Carta, which England's King John signed in 1215 to make peace with a group of rebel barons challenging his rule.¹³⁴ As Pollock and Maitland wrote in their classic legal history, the Magna Carta "means this[:] that the King is and shall be below the law."¹³⁵ In Chapter thirty-nine of the Magna Carta, King John surrendered his right to inflict arbitrary justice, agreeing:

[n]o free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with

130. U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law").

131. See *Taylor v. Porter & Ford*, 4 Hill 140, 146 (N.Y. Sup. Ct. 1843) ("The meaning of the section then seems to be, that no member of the state shall be disfranchised, or deprived of any of his rights or privileges, unless the matter shall be adjudged against him upon trial had according to the course of the common law.") (relying upon decisions from North Carolina and Tennessee, see *Hoke v. Henderson*, 15 N.C. (4 Dev.) 1 (N.C. 1833); *Jones' Heirs v. Perry*, 18 Tenn. (10 Yer.) 59 (1836)).

132. See *infra* Part III.A.

133. *Den ex dem. Murray v. Hoboken Land & Improvement Co. (Murray's Lessee)*, 59 U.S. (18 How.) 272, 276 (1855).

134. Ben Johnson, *The History of the Magna Carta*, HISTORIC UK, <https://www.historic-uk.com/HistoryUK/HistoryofEngland/The-Origins-of-the-Magna-Carta/> [<https://perma.cc/2TP3-KDKE>] (last visited June 15, 2026).

135. 1 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 173 (2d ed. 1898) (alteration in original).

force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.¹³⁶

Professors Barnett and Bernick explain that, “[t]his language was directed against King John’s notorious efforts to impose his will by avoiding the regular processes of the common law courts, and attempting to rely instead upon prerogative courts that lacked independent, presumptively impartial judges, and traditional procedures designed to protect individual rights.”¹³⁷ Chapter thirty-nine began the slow march toward the American experiment, in which the people’s law restrained the executive, and governmental authority only ran as far as the governed allowed.¹³⁸

Over time, the Magna Carta’s requirement that the regent adhere to the “law of the land” became synonymous with the phrase “due process of law.”¹³⁹ Due process’s original meaning may have referred to the proper service of legal documents, but Sir Edmund Coke conflated the two in his influential *Institutes of the Laws of England*.¹⁴⁰ There, he explained that, “by the law of the land [means] by the due course and process of law,’ which [he] later defined as ‘by indictment or presentment of good and lawful men, where such deeds be done in due manner, or by writ original of the Common Law.’”¹⁴¹ The combined meaning stuck.¹⁴² And, under that combined meaning, due process of law held that the adjustment

136. *Magna Carta, 1215*, NAT’L ARCHIVES UK, <https://www.nationalarchives.gov.uk/education/resources/magna-carta/british-library-magna-carta-1215-runnymede/> [https://perma.cc/72RV-K2DD] (last visited June 15, 2026).

137. Randy E. Barnett & Evan D. Bernick, *No Arbitrary Power: An Originalist Theory of the Due Process of Law*, 60 WM. & MARY L. REV. 1599, 1606 (2019).

138. See *Magna Carta*, *supra* note 136.

139. Edward J. Eberle, *Procedural Due Process: The Original Understanding*, 4 CONST. COMMENT. 339, 341 (1987) (quoting I EDMUND COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 46, 50 (W. Clarke & Sons 1817)).

140. See *id.* at 340–41.

141. *Id.* at 340.

142. See *Den ex dem. Murray v. Hoboken Land & Improvement Co. (Murray’s Lessee)*, 59 U.S. (18 How.) 272, 276 (1855) (“The words, ‘due process of law,’ were undoubtedly intended to convey the same meaning as the words, ‘by the law of the land,’ in Magna Charta. Lord Coke, in his commentary on those words, (2 Inst. 50,) says they mean due process of law.”); see also *Duncan v. Louisiana*, 391 U.S. 145, 169 (1968) (Black, J., concurring) (“As early as 1354 the words ‘due process of law’ were used in an English statute interpreting Magna Carta, and by the end of the 14th century ‘due process of law’ and ‘law of the land’ were interchangeable.”); *id.* (“[T]he Due Process Clause gives all Americans, whoever they are and wherever they happen to be, the right to be tried by independent and unprejudiced courts using established procedures and applying valid pre-existing laws.”).

of private rights was subject to impartial judicial process, not executive whim.¹⁴³ As the Supreme Court noted in 1819, “the good sense of mankind has at length settled down to this: that [the words of the Magna Carta] were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.”¹⁴⁴

At the time of the ratification of the Fifth Amendment, this meaning held true.¹⁴⁵ Alexander Hamilton defined “due process of law” as “indictment or presentment of good and lawful men and trial and conviction in consequence.”¹⁴⁶ When the Supreme Court first interpreted the Fifth Amendment’s Due Process Clause in 1855’s *Murray’s Lessee v. Hoboken Land & Improvement Co.*,¹⁴⁷ it recognized that the Due Process Clause “is a restraint on the legislative as well as on the executive and judicial powers of the government,” and “generally implies and includes *actor, reus, judex*, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings[.]”¹⁴⁸ State courts of the period interpreted their parallel clauses similarly.¹⁴⁹ By mid-twentieth

143. Barnett & Bernick, *supra* note 137, at 1609 (“Coke affirmed that Magna Carta recognized the existence of a law that was higher than the actions of the King, and denied that ‘[t]he King in his own person [could] adjudge any case.’ . . . English judges held acts of the King unlawful and refused to defer to mere executive will, instead exercising independent judgment in accordance with the law of the land, even if it meant holding royal acts void.”).

144. *Bank of Columbia v. Okely*, 17 U.S. (4 Wheat.) 235, 244 (1819); *accord* Charles H. Koch, Jr. & Richard Murphy, *Procedural Due Process*, 1 ADMIN. L. & PRAC. § 2:20 (3d ed.) (“British administrative law scholars Wade and Forsyth observed: ‘The rules requiring impartial adjudicators and fair hearings can be traced back to medieval precedents, and, they were not unknown in the ancient world.’”) (quoting William Wade & Christopher Forsyth, *ADMINISTRATIVE LAW*, 443 (9th ed. 2004)).

145. *See* W.J. Brockelbank, *The Role of Due Process in American Constitutional Law*, 39 CORN. L. Q. 561, 566 (1954).

146. *Id.* (quoting 4 ALEXANDER HAMILTON, *THE WORKS OF ALEXANDER HAMILTON* 231–32 (Henry Cabot Lodge ed. 1904)).

147. 59 U.S. (18 How.) 272 (1855).

148. *Id.* at 276, 280 (citing COKE, *supra* note 139, at 47, 50); *Hoke v. Henderson*, 15 N.C. (4 Dev.) 1 (1833); *Taylor v. Porter*, 4 Hill 140, 146 (N.Y. Sup. Ct. 1843); *Vanzant v. Waddel*, 10 Tenn. (2 Yer.) 260 (1829); *Bank of State v. Cooper*, 10 Tenn. (2 Yer.) 599 (1831); *Jones’ Heirs v. Perry*, 18 Tenn. (10 Yer.) 59 (1836); *Greene v. Briggs*, 10 F. Cas. 1135 (C.C.D. R.I. 1852) (No. 5,764).

149. *See, e.g., Taylor*, 4 Hill at 146 (“The meaning of the section then seems to be, that no member of the state shall be disfranchised, or deprived of any of his rights or privileges, unless the matter shall be adjudged against him upon trial had according to the course of the common law.”) (relying upon decisions from North Carolina and Tennessee, such as *Hoke* and *Jones’ Heirs*); *see also* Eberle, *supra* note 139, at 355 (noting that *Taylor* and *Westervelt v. Gregg*, 12 N.Y. 202, 212 (1854), “illustrate graphically how the New York courts came to view the due process clause as a bulwark of substantive protection for private rights, ‘against all mere acts of power, whether flowing from

century, Justice Hugo Black plainly explained that, “the Due Process Clause gives all Americans, whoever they are and wherever they happen to be, the right to be tried by independent and unprejudiced courts using established procedures and applying valid pre-existing laws.”¹⁵⁰

Murray’s Lessee dropped just as the industrial revolution began forcing the United States to confront an increasingly nationalized economy, surging immigration, and significant economic inequality.¹⁵¹ It is a central principle of administrative law that “‘Congress may ‘seek[] assistance’ from its coordinate branches to secure the ‘effect intended by its acts of legislation.’”¹⁵² Although the creation of quasi-judicial posts in the Executive Branch dates back to the First Congress,¹⁵³ in a series of cases in the late nineteenth and early twentieth centuries, the Supreme Court cemented that parties to an administrative hearing deserved the fair and impartial hearing that the Magna Carta first guaranteed in 1215:¹⁵⁴

- Congress may validly assign adjudicative duties to the Executive Branch, but parties were entitled to a “fair though summary hearing” before the executive’s findings “may constitutionally be made conclusive;”¹⁵⁵
- A fair hearing entails an opportunity for the private party subject to governmental action to present evidence and call witnesses on their behalf;¹⁵⁶

the legislative or executive branches of the government,’ which implicated those rights but did not comply with the procedural requirements of due process.”).

150. *Duncan v. Louisiana*, 391 U.S. 145, 169 (1968) (Black, J., concurring).

151. Amy Hayes, *Radical Change: The Social Impact of the Industrial Revolution*, COLLECTOR (Oct. 16, 2022), <https://www.thecollector.com/industrial-revolution-social-impact/> [<https://perma.cc/K3BH-KYG6>].

152. *FCC v. Consumers’ Rsch.*, 145 S. Ct. 2482, 2496 (2025) (quoting *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928)).

153. Baumann & Shugerman, *supra* note 129.

154. Rubin, *supra* note 22, at 1048–49 (“To begin with, some administrative agencies were empowered to make decisions in areas previously governed by the common law. The Supreme Court applied the concept of due process to these proceedings with great rigor. In essence, it held that the agency’s decisionmaking must meet the procedural standards of a civil trial, and that even when the standards were met, only certain types of [non-constitutional] questions could be definitively decided by the agency.”).

155. *Zakonaite v. Wolf*, 226 U.S. 272, 275 (1912).

156. *Tang Tun v. Edsell*, 223 U.S. 673, 676 (1912) (“It is clear that the applicants had full opportunity to present their evidence and to produce witnesses on their behalf.”); *Chin Yow v. United States*, 208 U.S. 8, 13 (1908) (recognizing right in immigration hearings “to obtain witnesses which the petitioner desired to produce” and to “some control or choice as to the witnesses to be heard”); *United States v. Sing Tuck*, 194 U.S. 161, 170 (1904) (“No right is given to the officer to exercise any control or choice as to the witnesses to be heard . . .”).

- Parties are entitled to a decisionmaker free of bias;¹⁵⁷ and
- An administrative adjudication involving private parties must be based only on evidence introduced into the record and known to the parties (the “exclusive-record principle”).¹⁵⁸

In 1913, the Supreme Court acknowledged that:

it has been distinctly recognized that administrative orders, quasi-judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the ‘indisputable character of the evidence’ . . . , or if the facts found do not, as a matter of law, support the order made.¹⁵⁹

When the Supreme Court upheld the NLRA’s constitutionality in the seminal case of *NLRB v. Jones & Laughlin Steel*,¹⁶⁰ the Court summarily rejected due process challenges to the NLRB’s by then familiar administrative processes, “constru[ing] the [Act’s] procedural provisions as affording adequate opportunity to secure judicial protection against arbitrary action in accordance with the well-settled rules applicable to administrative agencies set

157. *Tang Tun*, 223 U.S. at 676–77 (rejecting the allegation “that the inspector who conducted the inquiry was biased, and that his unfairness is shown by the manner in which he dealt with the question whether Tang Tun had been admitted by the collector in 1897”).

158. *Ohio Bell Tel. Co. v. Pub. Utils. Comm’n of Ohio*, 301 U.S. 292, 300, 302 (1937) (finding that Ohio violated the Fourteenth Amendment’s Due Process Clause by taking “notice” of specific economic calculations to which respondent was not privy, observing that, “[f]rom the standpoint of due process—the protection of the individual against arbitrary action—a deeper vice is this, that even now we do not know the particular or evidential facts of which the Commission took judicial notice and on which it rested its conclusion. Not only are the facts unknown; there is no way to find them out.”); *United States v. Abilene & S. Ry. Co.*, 265 U.S. 274, 289 (1924) (holding that the Interstate Commerce Commission violated due process by relying on carriers’ annual reports without introducing them into evidence at the hearing because “the carriers were left without notice of the evidence with which they were, in fact, confronted, as later disclosed by the finding made. The requirement that in an adversary proceeding specific reference be made, is essential to the preservation of the substantial rights of the parties.”); see *Bremer & Eskridge*, *supra* note 59, at 15–16 (describing the “exclusive record principle” as a core guarantee of due process).

159. *Interstate Com. Comm’n v. Louisville & Nash. R.R. Co.*, 227 U.S. 88, 91 (1913) (quoting *Tang Tun*, 223 U.S. at 681); see also *Morgan v. United States*, 298 U.S. 468, 480 (1936) (“[Administrative adjudication] is a duty which carries with it fundamental procedural requirements. There must be a full hearing. There must be evidence adequate to support pertinent and necessary findings of fact. Nothing can be treated as evidence which is not introduced as such. Facts and circumstances which ought to be considered must not be excluded. Facts and circumstances must not be considered which should not legally influence the conclusion. Findings based on the evidence must embrace the basic facts which are needed to sustain the order.”) (citation omitted).

160. 301 U.S. 1 (1937).

up by Congress to aid in the enforcement of valid legislation.”¹⁶¹ Finally, as Professor Bremer recounts, when Congress enacted the Administrative Procedure Act (APA) in 1946, it codified these due process protections into the statute.¹⁶² As the Court summarized in 1975: “a ‘fair trial in a fair tribunal is a basic requirement of due process’” that applies to “administrative agencies [that] adjudicate as well as to courts.”¹⁶³

In sum, drawing on traditions from the Magna Carta to the APA, the American legal system has consistently recognized that the Fifth Amendment’s due process guarantee requires an independent and unbiased adjudicator who adjusts private parties’ liberty or property rights based only on record evidence after a fair hearing.¹⁶⁴ Because of this long tradition, even Chief Justice Taft’s ode to the unitary executive in *Myers* recognized the constitutional requirement for zones of independence in adjudication.¹⁶⁵ Although *Myers* granted the President a broad constitutional removal power, for administrative adjudicators the President’s supervision was limited. The Chief warned: “there may be duties of a quasi-judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President can not in a particular case properly influence or control.”¹⁶⁶ Although post-hoc removal was an option, intervention in active administrative litigation—

161. *Id.* at 46–47.

162. See Emily S. Bremer, *Presidential Adjudication*, 110 VA. L. REV. 1749, 1769 (2024) (“The statute’s ‘on the record’ language, as well as several other provisions of the APA’s hearing provisions, codified pre-APA case law under the Due Process Clause.”); see also Baumann & Shugerman, *supra* note 129, at 47 (noting that the APA’s provisions insulating adjudication from political control “served due process values and helped make the administrative state compatible with longstanding American legal traditions”); *Marathon Oil Co. v. EPA*, 564 F.2d 1253, 1261 (9th Cir. 1977) (“In setting out procedures that an agency must follow in making ‘adjudicatory’ determinations, Congress recognized that certain administrative decisions closely resemble judicial determinations and, in the interest of fairness, require similar procedural protections. These ‘quasi-judicial’ proceedings determine the specific rights of particular individuals or entities.”).

163. *Withrow v. Larkin*, 421 U.S. 35, 46–47 (1975) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955), and citing *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973)).

164. Cf. *Marathon Oil Co.*, 564 F.2d at 1262 n.29 (9th Cir. 1977) (“[I]t is not within our traditional concepts of due process to allow an administrative agency to saddle anyone with a new rate, charge, or fee without a full hearing that includes the right to present oral testimony, cross-examine witnesses, and present oral argument.”) (citations omitted).

165. *Myers v. United States*, 272 U.S. 52, 135 (1926).

166. *Id.*; see also *Wiener v. United States*, 357 U.S. 349, 352, 356 (1958) (observing that “one must take for granted” that Congress “precluded the President from influencing the Commission in passing on a particular claim” under the War Claims Act).

even in the exercise of supervising presidential subordinates—remained illegitimate, inconsistent with the notions of due process embedded in the Constitution. *Slaughter* said nothing to undermine Chief Justice Taft’s warning that Presidents should steer clear of interfering with adjudication.

B. Due Process Protects Litigants’ Rights to NLRB Adjudication Free from Political Interference

When faced with real-life political pre-decisional interference in Article II adjudication, courts have consistently invoked due process principles to prevent the kind of meddling in live cases that unitary executive opponents have rightly warned against. As *Myers* suggests, the Constitution demands that Board members and other administrative adjudicators perform their quasi-judicial duties free from improper external influence.¹⁶⁷ The public’s right to an objective judgment, based on the exclusive-record rule, prohibits external influences on adjudicators’ decisional processes that could create actual bias or an appearance of bias.¹⁶⁸ Professor Rodriguez has defined bias as occurring where “an administrator departs from baseline of neutrality” such that outside influence, prejudice, or self-interest infects their deliberations.¹⁶⁹ In each of these three categories, courts have recognized due process zones of independence to prevent political power from corrupting pre-decisional impartiality.¹⁷⁰

167. See Daniel B. Rodriguez, *Whither the Neutral Agency? Rethinking Bias in Regulatory Administration*, 69 *BUFF. L. REV.* 375, 375 (2021) (“A sacrosanct principle of administrative justice is that agency officials, especially in administrative adjudication, should be entirely neutral and objective.”); Richard J. Pierce, Jr., *Political Control Versus Impermissible Bias in Agency Decisionmaking: Lessons from Chevron and Mistretta*, 57 *U. CHI. L. REV.* 481, 481 (1990) (noting that “the right to an unbiased decisionmaker is one of the most important guarantees of our judicial system”) (citing Martin H. Redish and Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 *YALE L.J.* 455, 475–91 (1986); Henry J. Friendly, “*Some Kind of Hearing*,” 123 *U. PA. L. REV.* 1267, 1279–80 (1975)).

168. See *Dist. Hosp. Partners, L.P. v. NLRB*, 141 F.4th 1279, 1295 (D.C. Cir. 2025) (“The Supreme Court has emphasized that the Due Process Clause requires not only actual fairness in adjudication, but also the appearance of fairness.”); *Berkshire Emps. Ass’n of Berkshire Knitting Mills v. NLRB*, 121 F.2d 235, 238 (3d Cir. 1941) (“[I]f the administration of public affairs by administrative tribunals is to find its place within the present framework of our government it is essential that it proceed, on what may be termed its judicial side, without too violent a departure from what many generations of English speaking people have come to regard as essential to fair play. One of these essentials is the resolution of contested questions by an impartial and disinterested tribunal.”).

169. Rodriguez, *supra* note 167, at 382–83.

170. See *supra* Part III.B.1–3.

1. *Outside Influence: Presidents Can't Slip into Board Members' DMs*

As noted, the maximalist unitary executive theory embraces a full-throated vertical hierarchy in the Executive Branch; the President's assertion of broad removal authority and expanded oversight of administrative agencies telegraphs an entitlement under the Take Care Clause to conform Board decisionmaking to his political mandate. For adjudication with policymaking implications, the President would seemingly have an *obligation* under the Take Care Clause to ensure that policymaking aligns with his views.¹⁷¹ Given the coerciveness of pressure from the Chief Executive, a behind-the-scenes call from the White House about a pending case would likely tip the scales in favor of the President's desired outcome.¹⁷²

The exclusive-record principle and the right to rebut are foundational to due process.¹⁷³ Congress incorporated these values into the APA, which explicitly prohibits *ex parte* contacts from "interested person[s] outside the agency" in formal agency adjudication.¹⁷⁴ And the Ninth Circuit, at least, has applied these

171. Cf. *Sierra Club v. Costle*, 657 F.2d 298, 405 (D.C. Cir. 1981) ("The court recognizes the basic need of the President and his White House staff to monitor the consistency of executive agency regulations with Administration policy. He and his White House advisers surely must be briefed fully and frequently about rules in the making, and their contributions to policymaking considered. The executive power under our Constitution, after all, is not shared—it rests exclusively with the President.").

172. See Harold H. Bruff, *Presidential Power and Administrative Rulemaking*, 88 YALE L.J. 451, 504 (1979) ("The threat to these fairness goals is particularly severe if the President is involved in the *ex parte* contacts. His personal and institutional power potentially can deflect an agency from a decision that is otherwise consistent with both the record before it and the governing statute. Although deviation from such a decision may be supported by other evidence in the record and elements of the governing statute, essential fairness may be violated if the deviation resulted from a President's desire to advance a particular interest.").

173. *WKAT, Inc. v. F.C.C.*, 296 F.2d 375, 383 (D.C. Cir. 1961) ("Surreptitious efforts to influence an official charged with the duty of deciding contested issues upon an open record in accord with basic principles of our jurisprudence, eat at the very heart of our system of government—due process, fair play, open proceedings, unbiased, uninfluenced decision.").

174. See 5 U.S.C. § 557(d)(1)(A) ("[N]o interested person outside the agency shall make or knowingly cause to be made to any member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, an *ex parte* communication relevant to the merits of the proceeding"); *Bremer*, *supra* note 162 at 1770 ("The quasi-judicial aspect of the proceeding demanded that certain minimum procedural requirements be observed in the hearing and also required that the agency's ultimate decision be based on the hearing record. The APA's 'on the record' language distinguishes between this kind of hearing, which is defined by the exclusive record principle . . ."); accord Paul R. Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943, 978 (1980) ("[I]nformal adjudication

due process values to reject a “presidential prerogative to influence quasi-judicial administrative agency proceedings through behind-the-scenes lobbying.”¹⁷⁵ *Portland Audubon Society v. Endangered Species Committee*¹⁷⁶ involved the Endangered Species Act’s “God Squad,” an adjudicative body consisting of cabinet secretaries, agency heads, and presidential advisors charged as an “administrative court” to approve federal projects that might threaten endangered species.¹⁷⁷ After the God Squad exempted thirteen timber sales from the Endangered Species Act’s protection of the northern spotted owl, environmental groups alleged the White House violated the APA’s prohibition on ex parte contacts when it summoned at least three God Squad members to pressure them to vote for the exemption.¹⁷⁸ The Government countered that construing the APA to bar ex parte contacts between the President and his subordinates would violate the separation of powers by interfering with his constitutional authority, as set forth in *Myers*, to supervise and guide Executive Branch inferior officers.¹⁷⁹

The court rejected the Government’s “argument out of hand,” holding that, “carried to its logical conclusion . . . [it] would effectively destroy the integrity of all federal agency adjudications.”¹⁸⁰ In lessons relevant to post-*Humphrey*’s administrative adjudication, the court recognized that the APA incorporated longstanding Anglo-American traditions regarding the exclusive-record principle, fairness in the adversarial process, and transparency.¹⁸¹ Applying the ex parte restriction with an eye toward “common sense,” the court balanced litigants’ right to a hearing and decision free from behind-the-scenes influence—especially from the President of the United States—against the President’s

usually implicates due process concerns, creating a separate basis of support for imposing ex parte contact restrictions.”).

175. *Portland Audubon Soc’y v. Endangered Species Comm.*, 984 F.2d 1534, 1546 (9th Cir. 1993).

176. 984 F.2d 1534 (9th Cir. 1993).

177. *Id.* at 1537 & n.1 (first citing 16 U.S.C. § 1536(a)(2); and then citing 50 C.F.R. § 453.05(d)); *id.* at 1541.

178. *Id.* at 1538.

179. *Id.* at 1546.

180. *Id.*

181. *Id.* at 1543 (“Ex parte contacts are antithetical to the very concept of an administrative court reaching impartial decisions through formal adjudication.”); *id.* at 1545 (“No communication from any other person is more likely to deprive the parties and the public of their right to effective participation in a key governmental decision at a most crucial time.”); *id.* at 1546 (“It is a fundamental precept of administrative law that an [sic] when an agency performs a quasi-judicial (or a quasi-legislative) function its independence must be protected.”); *id.* at 1547 (“The government’s position in this case is antithetical to and destructive of these elementary legal precepts, and we unequivocally reject it.”).

constitutional authority to supervise his subordinates.¹⁸² It concluded that the “important objectives reflected in the enactment of the [ex parte communications ban in] the APA . . . outweigh any *de minimis* impact on presidential power.”¹⁸³ Citations to *Myers* and *Humphrey’s Executor*—both of which recognize adjudication’s zone of independence—made the point.¹⁸⁴

Portland Audubon recognizes that adjudication requires special protections that may not apply in other contexts, such as rulemaking.¹⁸⁵ Rulemaking is entirely prospective, its factfinding empirical, and its result, policy. For the Board at least, it would be fruitless to try to cleave adjudicative factfinding (upon which the President may not opine) from policymaking (upon which he may). As noted previously, Congress intended the Board to operate like a common law court. Based on experience with the NLRB’s predecessor agencies under the National Industrial Recovery Act, Congress knew that most labor disputes demanded individual resolution and that the common-law evolutionary approach was best suited for developing law under the Act.¹⁸⁶ Congress therefore gave the Board broad “administrative discretion ‘by employing general enabling language’”¹⁸⁷ for it to develop through “case-by-case evolution of statutory standards” (as *Chenery II* put it).¹⁸⁸ Accordingly, in a process Professor Lofaso and I have deemed “*iterative*

182. *Id.* at 1544.

183. *Id.* at 1546; see also Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1192–93 (2000) (“[I]f political involvement is off-the-record, i.e., it involves communications with the agency not known to the participants in the proceeding or subject to effective rebuttal, it plainly endangers the transparency of the agency’s proceeding.”).

184. *Portland Audubon Soc’y*, 984 F.2d at 1546–47.

185. See *id.* at 1545–46 (citing *Sierra Club v. Costle*, 657 F.2d 298, 406–07 (D.C. Cir. 1981)); see also Verkuil, *supra* note 174, at 960 (“This distinction between rulemaking and adjudication helps to confine the executive privilege doctrine and should discourage future Presidents from seeking to exploit the privilege beyond the policymaking context. For example, if a President intervened to direct the issuance of a television license to a campaign contributor, those participating in the licensing process could raise a due process objection that might move a court to require any presidential conversations with the FCC commissioners to be placed in the record.”).

186. Jacob & Lofaso, *supra* note 3, at 63–69; see *NLRB v. Bell Aerospace Co. Div. of Textron*, 416 U.S. 267, 294 (1974) (holding that, where “[i]t is doubtful whether any generalized standard could be framed which would have more than marginal utility,” the Board “has reason to proceed with caution, developing its standards in a case-by-case manner with attention to the specific character of . . . each company”); *Elec. Workers UE Loc. 761 v. NLRB*, 366 U.S. 667, 674 (1961) (“The nature of the problem, as revealed by unfolding variant situations, inevitably involves an evolutionary process for its rational response, not a quick, definitive formula as a comprehensive answer.”).

187. See GROSS, *supra* note 54 at 133.

188. *SEC v. Chenery Corp.*, 332 U.S. 194, 202–03 (1947) (“And the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency.”).

construction,” the Board translates cases into policy by “rel[ying] on experience accumulated through intertemporal evaluation of industrial disputes and reasonable inferences drawn over time.”¹⁸⁹ Each case the Board decides resolves factual disputes, applies those fact findings to legal standards, and inches the construction of the Act toward new evolutionary solutions to modern labor problems. Every case is the sum of all those that came before; “the Board must draw on enlightenment gained from experience.”¹⁹⁰ Its policymaking is inextricably intertwined with the lessons it draws from its factfinding, and the due process values discussed above preclude the President’s interference in the latter to control the former.

Portland Audubon’s holding prohibiting the President from bringing outside influence to on-the-record proceedings should not surprise. It speaks in harmony with other courts that have nixed similar political ex parte contacts in administrative adjudication.¹⁹¹ Even commentators who criticize *Portland Audubon*’s statutory analysis as facile nevertheless endorse its holding as a celebration of conventions of due process and American traditions.¹⁹² Allowing

189. Jacob & Lofaso, *supra* note 3, at 66.

190. *NLRB v. Seven-Up Bottling Co. of Miami*, 344 U.S. 344, 346, 349 (1953) (“‘Cumulative experience’ begets understanding and insight by which judgments not objectively demonstrable are validated or qualified or invalidated. The constant process of trial and error, on a wider and fuller scale than a single adversary litigation permits, differentiates perhaps more than anything else the administrative from the judicial process.”); *see also Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941).

191. *See Pro. Air Traffic Controllers Org. v. FLRA*, 685 F.2d 547, 568 (D.C. Cir. 1982) (analyzing whether ex parte contact from Secretary of Labor to Member of the FLRA in pending adjudicative matter tainted Authority’s decisionmaking); *Sierra Club v. Costle*, 657 F.2d 298, 406–07 (D.C. Cir. 1981) (“We recognize, however, that there may be instances where the docketing of conversations between the President or his staff and other Executive Branch officers or rulemakers may be necessary to ensure due process. This may be true, for example, where such conversations directly concern the outcome of adjudications or quasi-adjudicatory proceedings; there is no inherent executive power to control the rights of individuals in such settings.”). The Due Process Clause even prohibits ex parte communications during informal adjudications in which the APA doesn’t apply. *See Koniag, Inc. v. Andrus*, 580 F.2d 601, 609 (D.C. Cir. 1978) (“[W]e are guided by [the APA’s] requirements in a case such as this which entails due process rights but has no controlling statutory procedures.”).

192. *See* Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1225–26 (2013) (“It appears in a better light, however, when unwritten conventions of independence are brought into the picture. The panel’s mysterious appeals to ‘fundamental precept[s]’ and ‘well settled’ principles are best understood to point, implicitly, to a set of conventions that had grown up within the administrative state across many administrations of both parties and in a diverse range of settings.”); Richard W. Murphy, *The DIY Unitary Executive*, 63 ARIZ. L. REV. 439, 475 (2021) (“One very strong convention is that presidential interference with the results of on-the-record hearings ‘is simply not done.’ Presidents, although they may be the fountains of all executive power, are

the President to secretly direct adjudicators' votes in particular cases would break with due process traditions dating back before the nation's founding.

2. *Prejudice: Presidents Can't "Jawbone" Adjudicators About Live Cases*¹⁹³

While outside influence implicates exclusive-record values, prejudice implicates litigants' ability to trust in the judicial process. The law requires judges to recuse themselves based solely on the appearance of bias.¹⁹⁴ The promise of impartial adjudication is so core to the democratic project that the Constitution imposes a prophylactic buffer zone of independence, policing quasi-judicial actions that cast doubt on a proceeding's fairness without need for a subjective inquiry into actual bias.¹⁹⁵ Law is a substitute for conflict, and the public accepts this substitute because of its faith in an impartial hearing. As Senator Wagner and the framers of the NLRA recognized when arguing for the Board's independence, the appearance of bias destroys faith in the rule of law and undermines the Board's ability to resolve conflicts that lead to industrial strife.¹⁹⁶

"[A] long-recognized aspect of Presidential power is using the office's 'bully pulpit' to persuade Americans, including by speaking forcefully or critically, in ways that the President believes would advance the public

simply not supposed to interfere when the Federal Aviation Administration decides to revoke a pilot's license or the EPA decides to sanction a firm for polluting.") (footnote omitted).

193. *Jawboning*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/jawboning> [<https://perma.cc/SMR8-D2B8>] (last visited Apr. 15, 2026) (defining the term as "the use of public appeals (as by a president) to influence the actions especially of business and labor leaders" or broadly as "the use of spoken persuasion").

194. See *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 883 (2009) ("The difficulties of inquiring into actual bias, and the fact that the inquiry is often a private one, simply underscore the need for objective rules. . . . In lieu of exclusive reliance on that personal inquiry, or on appellate review of the judge's determination respecting actual bias, the Due Process Clause has been implemented by objective standards that do not require proof of actual bias."); *ATX, Inc. v. U.S. Dep't of Transp.*, 41 F.3d 1522, 1527 (D.C. Cir. 1994) ("Congressional interference in the administrative process is of heightened concern in a quasi-judicial proceeding, which is guided by two principles, [including that] 'the appearance of bias or pressure may be no less objectionable than the reality.'"); *Peter Kiewit Sons' Co. v. U.S. Army Corps of Eng'rs*, 714 F.2d 163, 169 (D.C. Cir. 1983) (noting that "if the [administrative] decision had been judicial or quasi-judicial, it could be invalidated by 'the appearance of bias or pressure,'" where "pressure on the decisionmaker alone, without proof of effect on the outcome, is sufficient to vacate a decision").

195. *Peter Kiewit*, 714 F.2d at 170–71 ("The stringent standards of *D.C. Federation and Pillsbury* protect against congressional infringement of these due process standards by requiring insulation of the decisionmaking process from congressional pressure.").

196. See *supra* note 49 and accompanying text.

interest.”¹⁹⁷ Presidents have not been shy about using their bully pulpit to influence labor relations. President Biden, for example, recorded a video urging employees to vote for union representation at Amazon’s Bessemer, Alabama warehouse and walked the picket line at a United Auto Workers’ strike.¹⁹⁸ It’s not hard to imagine a President going one step further and publicly haranguing Board members to reach his preferred outcome in a high-profile labor dispute. For an executive adept in the use of social, digital, and traditional media to drive narratives to specific audiences—including audiences of one—this type of “jawboning” might seem an effective way to influence an adjudicator on matters that the Due Process Clause puts beyond the President’s direct control.¹⁹⁹ But that would be wrong.

Using political intimidation to pressure adjudicators in public fora potentially carries with it an untenable risk of prejudice that violates due process. Take the seminal case, *Pillsbury Co. v. Federal Trade Commission*.²⁰⁰ While the case was still before the FTC, the Senate Judiciary Committee’s Subcommittee on Antitrust and Monopoly called the Commission’s Chairman to testify at an oversight hearing, where Senators subjected the Chairman to “a barrage of questioning” about “the correctness of [the Chairman’s] and the Commission’s position” in refusing to dismiss the complaint at an earlier stage of the case.²⁰¹ Even though it focused predominately on the FTC’s statutory interpretation, the Committee’s questioning on the case was so intense that the Chairman recused himself mid-hearing from further proceedings.²⁰² The Fifth Circuit held that the intensive congressional scrutiny

197. *Trump v. United States*, 144 S. Ct. 2312, 2340 (2024).

198. Glenn Thrush, *Biden Expresses Solidarity with Alabama Workers Attempting to Unionize an Amazon Warehouse*, N.Y. TIMES (Mar. 16, 2021), <https://www.nytimes.com/2021/03/01/us/politics/amazon-biden-alabama.html> [<https://perma.cc/G67V-J63Z>]; Deepa Shivaram, *Autoworkers Get a Historic Visitor to the Picket Line: President Biden*, NPR (Sep. 26, 2023, at 20:52 ET), <https://www.npr.org/2023/09/26/1201627330/biden-auto-workers-uaw-strike-michigan-detroit-trump> [<https://perma.cc/2EN4-5R5U>].

199. *See* Strom, *supra* note 19 (“[E]ven if the courts uphold the fig leaf that Board Members should not discuss pending cases with anyone but each other and their staffs, nothing would stop the President or his subordinates from using social media or press conferences to make sure that the Board Members understand what is expected of them.”).

200. *See Pillsbury Co. v. FTC*, 354 F.2d 952, 963–64 (5th Cir. 1966).

201. *Id.* at 955–56.

202. *Id.* at 961 (“I am sitting as a quasi-judicial officer . . . I think I will disqualify myself in the Pillsbury case for the rest of the case because of the inquiry which you have made about my mental processes in it.”).

interfered with Pillsbury's right to an impartial decisionmaker.²⁰³ The court explained:

[W]hen . . . an investigation focuses directly and substantially upon the mental decisional processes of a Commission in a case which is pending before it, Congress is no longer intervening in the agency's legislative function, but rather, in its judicial function. At this latter point, we become concerned with the right of private litigants to a fair trial and, equally important, with their right to the appearance of impartiality, which cannot be maintained unless those who exercise the judicial function are free from powerful external influences To subject an administrator to a searching examination as to how and why he reached his decision in a case still pending before him, and to criticize him for reaching the 'wrong' decision . . . sacrifices the appearance of impartiality—the sine qua non of American judicial justice.²⁰⁴

In subsequent cases, the D.C. Circuit adopted the Fifth Circuit's holding.²⁰⁵

Pillsbury stands for the basic principle that excessive congressional pressure—or, as the court more expansively put it, pressure from “powerful external influences”—can create the appearance of bias that denies litigants their right to a fair hearing.²⁰⁶ Although congressional oversight is part and parcel of our political system, and legislators may legitimately inquire into agency processes and opine on the proper outcome of agency adjudications,²⁰⁷ they may not use their political influence to directly pressure adjudicators to reach specific outcomes in live cases, as “congressional pressure [can] ‘sacrifice[] the appearance of impartiality’ and violate[] due process.”²⁰⁸ Thus, when Congress enacts a statute that commits adjudicative discretion to Executive Branch

203. *Id.* at 964.

204. *Id.* (emphasis omitted).

205. *See* *Aera Energy LLC v. Salazar*, 642 F.3d 212, 224 (D.C. Cir. 2011); *ATX, Inc. v. DOT*, 41 F.3d 1522, 1530 (D.C. Cir. 1994); *D.C. Fed'n of Civic Ass'ns v. Volpe*, 459 F.2d 1231, 1246 (D.C. Cir. 1971); *Koniag, Inc. v. Andrus*, 580 F.2d 601, 610 (D.C. Cir. 1978).

206. *Pillsbury*, 354 F.2d at 964.

207. *Id.*; *see also ATX*, 41 F.3d at 1528 (“[W]e have never questioned the authority of congressional representatives to exert pressure, and we have held that congressional actions not targeted directly at [agency] decision makers—such as contemporaneous hearings—do not invalidate an agency decision.”) (citation omitted).

208. *ATX*, 41 F.3d at 1529 (quoting *Pillsbury*, 354 F.2d at 964); *see also Pillsbury*, 354 F.2d at 963 (“[C]ommon justice to a litigant requires that we invalidate the order entered by a quasi-judicial tribunal that was importuned by members of the United States Senate, however innocent they intended their conduct to be, to arrive at the ultimate conclusion which they did reach.”); *Aera Energy*, 642 F.3d at 224 (“But sometimes political pressure crosses the line and prevents an agency from performing its statutorily prescribed duties.”); *Koniag*, 580 F.2d at 610–11 (finding that congressional letter to cabinet secretary to postpone adjudicative action due to substantive disagreements “compromised the appearance of the Secretary’s impartiality”).

actors, those officials must decide cases based only on factors the law deems relevant.²⁰⁹ Political pressure is *not* a relevant consideration.

This is a listener-focused doctrine, examining the potential appearance of bias based on what the decisionmaker *heard*, not what the politician *said*.²¹⁰ In what the D.C. Circuit has termed a “nexus” requirement,²¹¹ the *Pillsbury* doctrine echoes a fundamental principle of labor law, that any evaluation of allegedly coercive employer speech must focus on the listener-worker’s position as economic subordinate, “tak[ing] into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.”²¹² As a listener-focused doctrine, *Pillsbury* deprives a political actor of the ability to plead innocent intent;²¹³ rather, if the political pressure would reasonably “‘intrude[] into the *calculus of consideration*’ of the individual decisionmaker,” the parties’ right to a hearing free from the appearance of partiality has been compromised.²¹⁴

While *Pillsbury* cases typically focus on direct communications between legislators and executive branch adjudicators, their logic applies with equal force to intra-executive branch political pressure. The *Pillsbury* doctrine recognizes that “powerful” political pressure on live adjudication can carry with it an unconstitutional risk of an appearance of bias, especially when viewed from the perspective of the targeted adjudicator.²¹⁵ Recall Professor Bruff’s

209. See *Morgan v. United States*, 298 U.S. 468, 480 (1936) (“The ‘hearing’ is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action.”); *ATX*, 41 F.3d at 1528 (“[A]dministrative decision must be based ‘strictly on the merits and completely without regard to any considerations not made relevant by Congress in the applicable statutes.’”) (quoting *Volpe*, 459 F.2d at 1246); see also *Bremer*, *supra* note 162, at 1769–70 (discussing *Morgan*).

210. See *Peter Kiewit Sons’ Co. v. U.S. Army Corps of Eng’rs*, 714 F.2d 163, 169–70 (D.C. Cir. 1983) (“[T]he proper focus is not on the content of congressional communications in the abstract, but rather upon the relation between the communications and the adjudicator’s decisionmaking process.”); *ATX*, 41 F.3d at 1527; *Peter Kiewit*, 714 F.2d at 170 (“A court must consider the decisionmaker’s input, not the legislator’s output.”).

211. See *ATX*, 41 F.3d at 1527.

212. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969).

213. *Pillsbury Co. v. FTC*, 354 F.2d 952, 963 (5th Cir. 1966) (holding that Senators compromised *Pillsbury*’s due process rights, “however innocent they intended their conduct to be”).

214. *Peter Kiewit*, 714 F.2d at 170 (citing *D.C. Fed’n of Civic Ass’ns v. Volpe*, 459 F.2d 1231, 1246 (D.C. Cir. 1971) (emphasis added)).

215. See *Pillsbury*, 354 F.2d at 964; see also Bruff, *supra* note 172, at 504.

observation that the President’s “personal and institutional power potentially can deflect an agency from a decision that is otherwise consistent with both the record before it and the governing statute.”²¹⁶ With “the Damocles’ sword of removal” hanging over the adjudicator’s heads,²¹⁷ the Presidential bully pulpit can hit harder and farther than mere congressional pressure; after all, Congress has no power to remove the targeted Presidential appointee.²¹⁸ Imagine the temptation to consider political factors extraneous to the Act engendered by a Presidential quip at a press conference or White House social media post directing a Board member to take a particular action in a live case.²¹⁹ Only a rare Board member would have the resilience to divorce the President’s exhortations from their “calculus of considerations.”²²⁰ In such a case—to borrow another labor law principle—it is reasonable that the President should “be held to intend the very consequences which foreseeably and inescapably flow from his actions,”²²¹ and that the due process zone of independence should ensure that litigants receive a fair hearing by setting aside a determination that results from prejudicial Presidential statements.²²²

3. *Self-Interest: The President Cannot Make Retention, Reappointment, and Other Pecuniary Benefits Contingent on Votes in Individual Cases*

For reasons of policy and patriotism, one would expect that most Board members want to retain their jobs, and many would like the President to reappoint them to additional terms.²²³ If the President attempted to negotiate a quid pro quo with a Board member for continued employment in return for votes in particular cases, it would plainly violate the Due Process Clause in making explicit the bias only implied in *Portland Audubon*’s violation

216. Bruff, *supra* note 172, at 504.

217. *Wiener v. United States*, 357 U.S. 349, 356 (1958).

218. *Myers v. United States*, 272 U.S. 52, 132 (1926).

219. *See, e.g., Aera Energy Servs. Co. v. Salazar*, 642 F.3d 212, 224 (D.C. Cir. 2011) (finding letters from Senators created appearance of bias in first-level adjudicator’s evaluation of licensing application, although later corrected on administrative appeal); *Volpe*, 459 F.2d at 1246 (finding congressional threat to withhold transportation funding created appearance of bias in Secretary’s approval of bridge project); *Koniag, Inc. v. Andrus*, 580 F.2d 601, 610–11 (finding that congressional letter to cabinet secretary to postpone adjudicative action due to substantive disagreements “compromised the appearance of the Secretary’s impartiality”).

220. *See Volpe*, 459 F.2d at 1246.

221. *Cf. NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 228 (1963).

222. *Cf. Pillsbury Co. v. FTC*, 354 F.2d 952, 963 (5th Cir. 1966).

223. *See Members of the NLRB since 1935*, NLRB, <https://www.nlr.gov/about-nlr/who-we-are/the-board/members-of-the-nlr-since-1935> [https://perma.cc/VQ6Y-9Y7L] (last visited May 31, 2026) (detailing the frequency of Board members serving multiple terms).

of the exclusive-record principle (outside influence) and *Pillsbury's* appearance of partiality (prejudice).²²⁴ But it would implicate a different aspect of bias as well—self-interest.²²⁵ Board members are people with jobs, who depend on their federal salaries to support their families and pay their bills. Removal and reappointment have significant implications on members' financial stability, and the Supreme Court has made clear that "those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes."²²⁶ Not surprisingly, the primary pecuniary conflict around which the Court has built a zone of independence is a disqualifying interest in future salary or job security.

Drawing from Lord Coke's maxim that "no one ought to be a judge in his own cause,"²²⁷ the Court in 1927's *Tumey v. Ohio*²²⁸ prohibited adjudicators from sitting on cases where their financial self-interest could create an appearance of bias.²²⁹ In *Tumey*, Ohio law provided that local mayors could claim their costs for serving as a judge only from assessing fines under certain criminal laws,²³⁰ and there was "no way by which the Mayor may be paid for his service as judge, if he does not convict those who are brought before him."²³¹ In finding the scheme incompatible with the Due Process Clause, Chief Justice Taft explained that, "[e]very procedure which would offer a possible temptation to the average man as a judge . . . or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law."²³² Applying *Tumey*, the Court has repeatedly found that judges and administrative adjudicators violate due process when their financial interest in future professional compensation creates an untenable

224. Cf. *Portland Audubon Soc. v. Endangered Species Comm.*, 984 F.2d 1534, 1539, 1548 (9th Cir. 1993); *Pillsbury*, 354 F.2d at 954–55, 965.

225. See Rodriguez, *supra* note 167, at 383.

226. *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973) (citing *Tumey v. Ohio*, 273 U.S. 510, 523 (1927)).

227. *Dr. Bonham's Case*, (1610) 8 Co. Rep. 107a, 113b, 77 Eng. Rep. 638, 652 (K.B.).

228. 273 U.S. 510, 523 (1927).

229. Rodriguez, *supra* note 167, at 383 ("Acting on the basis of self-interest is the model case of improper decisionmaking. It collides with natural justice, under ancient principles in the English common law . . .").

230. *Tumey v. Ohio*, 273 U.S. 510, 520 (1927) ("[T]he North College Hill village council sought to remove all doubt on this point by providing, that he should receive or retain the amount of his costs in each case, in addition to his regular salary, as compensation for hearing such cases. But no fees or costs in such cases are paid him except by the defendant if convicted.") (citation omitted).

231. *Id.*

232. *Id.* at 532.

appearance of bias.²³³ Judicial codes and federal executive branch ethics laws implement these due process guarantees by prohibiting adjudicators from acting in any matter in which they have a financial interest.²³⁴

In *Caperton v. A.T. Massey Coal*,²³⁵ the Court extended the prohibition on pecuniary self-interest to the judicial appointment process.²³⁶ There, the owner of a coal company with a pending case in the West Virginia Supreme Court of Appeals backed a candidate challenging an incumbent justice,²³⁷ contributing “more than the total amount spent by all other . . . supporters and three times the amount spent by [candidate’s] own committee” to his election campaign.²³⁸ Applying its due process precedent on bias and pecuniary interest, the Supreme Court held that the new justice should have recused himself.²³⁹ Based on “a realistic appraisal of psychological tendencies and human weakness,” the Court “conclude[d] that there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge’s election

233. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 824 (1986) (holding that the judge violated the parties’ due process when he “acted as ‘a judge in his own case’” and “that his interest was ‘direct, personal, substantial, and pecuniary’”) (citation modified); *Connally v. Georgia*, 429 U.S. 245, 250 (1977) (finding due process violation where justice of the peace’s “financial welfare . . . is enhanced by positive action and is not enhanced by negative action” because his primary compensation consisted of a \$5 fee for each criminal search or arrest warrant issued); *Gibson v. Berryhill*, 411 U.S. 564, 578 (1973) (“Because the Board of Optometry was composed solely of optometrists in private practice for their own account, the District Court concluded that success in the Board’s efforts would possibly redound to the personal benefit of members of the Board, sufficiently so that in the opinion of the District Court the Board was constitutionally disqualified from hearing the charges filed against the appellees.”); *Ward v. Vill. of Monroeville*, 409 U.S. 57, 60 (1972) (“Possible temptation’ may also exist when the mayor’s executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor’s court.”); see also *Rodriguez*, *supra* note 167, at 386 (“[A]t long last, the Supreme Court . . . [held] in *Gibson v. Berryhill* that pecuniary self-interest is improper under the due process clause to administrative agency proceedings.”) (footnote omitted).

234. See Steven A. Glazer, *Toward a Model Code of Judicial Conduct for Federal Administrative Law Judges*, 64 ADMIN. L. REV. 337, 341–45 (2012) (discussing model codes of judicial conduct). Indeed, Congress has made it a criminal offense for Executive Branch adjudicators to participate personally and substantially in any matter in which they have a financial interest, and the Office of Government Ethics has implemented rules requiring recusal whenever participation in a matter would create an appearance of bias. 18 U.S.C. § 208; 5 C.F.R. § 2635.502 (2025).

235. 556 U.S. 868 (2009).

236. *Id.* at 878–83.

237. *Id.* at 873.

238. *Id.*

239. *Id.*

campaign when the case was pending or imminent.”²⁴⁰ Because that risk was “sufficiently substantial . . . it ‘must be forbidden if the guarantee of due process is to be adequately implemented.’”²⁴¹

Although *Caperton* may represent the outer limits of the pecuniary interest cases,²⁴² it nevertheless stands for the principle that extreme cases of financial self-interest—those approaching but not quite reaching a quid pro quo—can create an unacceptable risk of partiality to members of the public dependent on state actors for fair treatment. Even an implied suggestion by the President that continued employment as a Board Member, or reappointment to the position, is contingent on a specific vote in a specific case could give rise to an appearance of pecuniary self-interest contrary to the Due Process Clause. Unlike the prohibitions on influence and prejudice exemplified by *Portland Audubon* and *Pillsbury*, the prohibition on self-interest focuses inward, on the temptation we all face as humans to support ourselves and our families, maintain economic stability, and, maybe, if we’re lucky, enjoy financial and professional mobility. By building an adjudicative zone of independence against pecuniary self-interest, the Due Process Clause tempers the decisionmakers’ quintessentially American ambitions with the rule of law.

C. *Due Process Constrains the President’s Exercise of Removal Power to Influence or Control Live Adjudication*

The Due Process Clause’s zones of adjudicative independence require the President to refrain from inserting himself in the Board’s adjudication of cases. But, because *Myers* held that the President “may consider [a] decision after its rendition as a reason for removing the officer, on the ground that the discretion regularly entrusted to that officer by statute has not been on the whole intelligently or wisely exercised.”²⁴³ Board members now could be subject to immediate removal if they cast a vote not to the President’s liking. That threat of removal has the potential to chill adjudicators’ independent judgment.²⁴⁴ Because the thrust of the Court’s modern removal jurisprudence is that removal provides accountability, chill is a feature of the President’s removal authority, not a bug.²⁴⁵

240. *Id.* at 883–84 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

241. *Id.* at 885 (quoting *Withrow*, 421 U.S. at 47).

242. *Id.* at 887.

243. *Myers v. United States*, 272 U.S. 52, 135 (1926).

244. *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 629 (1935) (recognizing that “one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter’s will”); *see also infra* Part IV (discussing potential chilling effects of the removal threat).

245. *See Slaughter*, 2026 WL 1855612, at *7 (“To remain accountable to the President,

The post-*Slaughter* Board finds itself in the same position as numerous other adjudicative bodies, both administrative and judicial, in which political actors can remove judges for subjective reasons. For example, consider state laws subjecting judges to recall and retention elections. Eight states allow the public to recall judges.²⁴⁶ Nineteen states provide for judicial retention elections.²⁴⁷ Recall and retention elections are designed to reflect democratic values by giving the public a place to vent their moral outrage at judicial decisions they believe flout societal norms.²⁴⁸ But recall and retention elections, like all post-decisional removals, chill the rule of law in much the same way as removing a Board member for their adjudicative decisions.²⁴⁹ Both impose political appraisals on the interpretation of legal texts, evaluation of factual records, and difficult judgment calls; both create incentives for incumbent judges to sacrifice their independent judgment in favor of public opinion to avoid removal; and, in much the same way as an unlawful discharge, both send a message to former colleagues of removed

those officers must be removable by the President.”); *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2190 (2020) (“The Framers’ constitutional strategy is straightforward: divide power everywhere except for the Presidency, and render the President directly accountable to the people through regular elections. In that scheme, individual executive officials may wield significant authority, but that authority remains subject to the ongoing supervision and control of the elected President.”).

246. See *Recall of State Officials*, NAT’L CONF. OF STATE LEGS. (Aug. 27, 2025), <https://www.ncsl.org/elections-and-campaigns/recall-of-state-officials> [<https://perma.cc/ZTY2-BSF3>] (stating that recall elections allow citizens to vote on whether to remove a sitting judge before the expiration of their term of office.); Malia Reddick, *Colorado Supreme Court Ends Effort to Allow Recall of Judges, but Similar Proposals on the Table in Other States*, UNIV. OF DENVER INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. (June 25, 2014), <https://iaals.du.edu/blog/colorado-supreme-court-ends-effort-allow-recall-judges-similar-proposals-table-other-states> [<https://perma.cc/4Q52-M8W7>].

247. See *Retention Election*, BALLOTPEDIA https://ballotpedia.org/Retention_election [<https://perma.cc/2BU2-ABSW>] (last visited May 19, 2026) (stating retention elections are “yes” or “no” votes that allow citizens to choose whether to retain judges for another term in office after their current term expires); see also G. Alan Tarr, *Do Retention Elections Work?*, 74 MO. L. REV. 605, 605 n.3 (2009) (noting that, as of 2004, eighty-seven percent of state judges run for election or reelection).

248. Todd E. Pettys, *Judicial Retention Elections, the Rule of Law, and the Rhetorical Weakness of Consequentialism*, 60 BUFF. L. REV. 69, 127–30 (2012) (describing implications of moral outrage on judicial retention elections and judicial behavior); Jordan M. Singer, *Judicial Recall and Retention in the #MeToo Era*, 55 CT. REV. 36, 38 (2019) (noting that proponents of recall elections believed them to be “a way to surgically excise unaccountable judges from an otherwise trustworthy judicial branch”) (citing Senator Robert L. Owen, *The Recall of Judges*, 21 YALE L.J. 655, 656 (1911)).

249. But see *Republican Party of Minn. v. White*, 536 U.S. 765, 782 (2002) (“[E]lected judges—regardless of whether they have announced any views beforehand—*always* face the pressure of an electorate who might disagree with their rulings and therefore vote them off the bench.”).

adjudicators to change their thinking to avoid the same fate.²⁵⁰ These schemes accept the risk that the possibility of retaliatory removal could chill judicial independence and foist political considerations into judicial decisionmaking, believing the trade is worth it for democratic accountability.²⁵¹

Even in federal administrative adjudication, some statutes—like the Endangered Species Act in *Portland Audubon*—commit adjudicative authority to Cabinet secretaries, all of whom are subject to at-will removal.²⁵² Immigration judges, members of the Board of Immigration Appeals, and the Attorney General share adjudicative responsibility for deciding immigration petitions; the Merit Systems Protection Board has just held that the first two are inferior officers subject to at-will removal; the latter has long served entirely at the President’s pleasure.²⁵³ In addition, according to a recent study, the federal government employs almost 11,000 non-administrative law judge agency adjudicators, who primarily preside over informal adjudication where due process considerations generally apply.²⁵⁴ These numbers include patent examiners, Merit Systems Protection Board and Equal Employment Opportunity Commission administrative judges, members of contract appeals boards, and NLRB employees who conduct representation hearings, all of whom enjoy the same tenure of service as any other federal civil servant.²⁵⁵

In most of these contexts where adjudicators operate under a threat of removal, actual removal is rare. Successful judicial recall elections only occur in high-profile cases that spur significant public outrage.²⁵⁶ Voters in judicial

250. See Todd E. Pettys, *Judicial Retention Elections, the Rule of Law, and the Rhetorical Weakness of Consequentialism*, 60 BUFF. L. REV. 69, 89–98 (2012); see also *Pillsbury Co. v. FTC*, 354 F.2d 952, 964 (5th Cir. 1966).

251. Cf. *Withrow v. Larkin*, 421 U.S. 35, 51 (1975) (deferring to legislators on balancing the risk of bias in investing agencies with joint prosecutorial and adjudicative authority).

252. See *Myers v. United States*, 272 U.S. 52, 134 (explaining that the President’s “cabinet officers must do his will,” and “[t]he moment that he loses confidence in the intelligence, ability, judgment or loyalty of any one of them, he must have the power to remove him without delay”).

253. 8 C.F.R. § 1003.1(b), (d) (2025) (powers of Board of Immigration Appeals, also known as “Appellate Immigration Judges”); *id.* at § 1003.1(h) (referral to Attorney General); *id.* at § 1003.10 (powers of Immigration Judges); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 266 (1954) (holding that Board of Immigration Appeals and Attorney General must have distinct roles in the review process); see *Jackler v. DOJ*, 2026 M.S.P.B. 3, slip op. at 11–16 (Mar. 20, 2026) (holding that immigration judges are inferior officers subject to the President’s at-will removal), *pet. for initial en banc hearing granted*, 178 F.4th 1327 (Fed. Cir. 2026).

254. Kent Barnett & Russell Wheeler, *Non-ALJ Adjudicators in Federal Agencies: Status, Selection, Oversight, and Removal*, 53 GA. L. REV. 1, 32 (2018).

255. *Id.* at 84.

256. See Singer, *supra* note 248, at 38 & n.18 (noting that, prior to 2018, “there were 164 attempts to recall state officials in California,” but “[o]nly ten of these attempts actually made it to the ballot, and five were successful”).

retention elections overwhelmingly keep judges in their seats.²⁵⁷ For cabinet members like the Attorney General who may have adjudicative responsibilities, their terms of office typically end with the expiration of their President's term, not in retaliation for an unpopular quasi-judicial opinion. If Board member terms follow that pattern, removal will predictably sync with political cycles every four to eight years.

The infrequency of retaliatory removal suggests why removal's chilling effect remains too ambient to trigger significant due process concerns. The mere potential of future removal is generally too remote to interfere with due process absent evidence of improper pressure in a specific case, even though the ambient threat might influence adjudicators' decisional processes.²⁵⁸ As the D.C. Circuit pragmatically observed, it would not "assume that an [FLRA] Member would believe that his decisions are irrelevant to the President's determination whether to reappoint him."²⁵⁹ Aside from those with life tenure, the threat of future job loss hangs over all adjudicators, and their interest in retention is inevitably an implicit part of their philosophical calculus, given the political nature of all judicial or administrative appointment processes.²⁶⁰ Administrative adjudicators may have political or policy preferences aligned to the President who appointed them, but the courts have recognized that these general allegiances do not undermine adjudicators' ability to fairly judge the facts of individual disputes.²⁶¹ To determine the quantum of influence that the possibility

257. Joseph Brusgard, *Only Nine State Supreme Court Justices Have Lost Retention Elections Since 1990*, BALLOTPEdia NEWS (Nov. 17, 2025 at 17:44 ET), <https://news.ballotpedia.org/2025/11/17/only-nine-state-supreme-court-justices-have-lost-retention-elections-since-1990/> [<https://perma.cc/R6HT-8C8E>].

258. *But see* Martin H. Redish & Jennifer Aronoff, *The Real Constitutional Problem with State Judicial Selection: Due Process, Judicial Retention, and the Dangers of Popular Constitutionalism*, 56 W&M L. REV. 1 (2014) (identifying potential due process concerns with judicial retention elections).

259. *Pro. Air Traffic Controllers Org. v. FLRA*, 685 F.2d 547, 573 (D.C. Cir. 1982).

260. *See* *Republican Party of Minn. v. White*, 536 U.S. 765, 788–89 (2002) (O'Connor, J. concurring) ("But if judges are subject to regular elections they are likely to feel that they have at least some personal stake in the outcome of every publicized case. Elected judges cannot help being aware that if the public is not satisfied with the outcome of a particular case, it could hurt their reelection prospects.").

261. *See* Charles H. Koch Jr. & Richard Murphy, *Bias and Prejudgment*, 2 ADMIN. L. & PRAC. § 6:10 (3d ed.) ("Bias as to legal theory or policy cannot be attacked because bias as to policy or theory does not create a defect in the decisionmaking."); *Cinderella Career & Finishing Sch., Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970) ("The test for disqualification has been succinctly stated as being whether 'a disinterested observer may conclude that the agency has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.'") (citation modified) (citing *Gilligan, Will & Co. v. SEC*, 267 F.2d 461, 469 (2d Cir. 1959)).

of removal had on an adjudicator's thinking—as opposed to their evaluation of the facts, reading of the caselaw, or even their policy preferences—would require the kind of inquiry into administrators' mental processes the Supreme Court has presumptively put beyond reach.²⁶²

The Due Process Clause still plays a role in preventing adjudicators from acting on their base political ambition instead of the facts on the ground. The law presumes that Board members and other adjudicators hold fast to the due process requirement to render a decision based on only the facts and law. Although perhaps naively Pollyanna, the law assumes “honesty and integrity in those serving as adjudicators,”²⁶³ and that they are “capable of judging a particular controversy fairly on the basis of its own circumstances.”²⁶⁴ Whether called a presumption of “good faith,”²⁶⁵ “regularity,”²⁶⁶ or “legitimacy,”²⁶⁷ courts take government officials at their word that they have discharged their duties properly. “The presumption respects the oath of office that executive officers take”²⁶⁸ and “is largely consistent with ‘the prosaic notion’ that government

262. *United States v. Morgan*, 313 U.S. 409, 422 (1941) (“The proceeding before the Secretary ‘has a quality resembling that of a judicial proceeding.’ . . . We have explicitly held in this very litigation that ‘it was not the function of the court to probe the mental processes of the Secretary.’”) (quoting *Morgan v. United States*, 304 U.S. 1, 18 (1938)).

263. *Withrow v. Larkin*, 421 U.S. 35, 47 (1975); *accord Schweiker v. McClure*, 456 U.S. 188, 195 (1982) (“We must start, however, from the presumption that the hearing officers who decide Part B claims are unbiased.”).

264. *Morgan*, 313 U.S. at 421; *accord Pro. Air Traffic Controllers Org.*, 685 F.2d at 573 (“Absent a strong showing to the contrary, an agency adjudicator is presumed to act in good faith and to be capable of ignoring considerations not on the record.”).

265. See Aram A. Gavoort & Steven A. Platt, *In Search of the Presumption of Regularity*, 74 FLA. L. REV. 729, 743 (2022).

266. *Id.*

267. *Id.* at 746 (citing *Nat’l Archives & Recs. Admin. v. Favish*, 541 U.S. 157, 174 (2004)).

268. *Id.* at 757 (referring to U.S. CONST. art. VI, cl. 3 (“The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution.”)); see also Note, *The Presumption of Regularity in Judicial Review of the Executive Branch*, 131 HARV. L. REV. 2431, 2452 (2018) (“[T]he assumption that officials and entities follow procedures, act rationally, reasonably, and in good faith enables courts to credit the executive branch’s legal interpretations and policy judgments.”); Ryan Goodman, Siven Watt, Audrey Balliet, Margaret Lin, Michael Pusic & Jeremy Venook, *The “Presumption of Regularity” in Trump Administration Litigation*, JUSTSECURITY (Mar. 19, 2026), <https://www.justsecurity.org/120547/presumption-regularity-trump-administration-litigation> [<https://perma.cc/6YH2-FGGQ>] (“It generally instructs courts to presume, unless there is clear evidence to the contrary, that executive officials have ‘properly discharged their official duties’ and that government agencies have acted with procedural regularity and with bona fide, non-pretextual reasons.”).

officials tell ‘the truth about why they have taken specific actions;’ ‘have properly discharged their official duties;’ have ‘acted with proper motives;’ and are generally truthful, ethical, and professional.”²⁶⁹ The Supreme Court has described adjudicators as “bound in good conscience” to consider the evidence and nothing more,²⁷⁰ an observation that one scholar characterized as sounding “in constitutional terms.”²⁷¹ These promises have meaning.²⁷²

Where, however, “a meaningful evidentiary showing”²⁷³ demonstrates that political or pecuniary factors infected a decisionmaker’s independent judgment and created an appearance of bias that denied parties’ due process—as in *Portland Audubon*, *Pillsbury*, *Tumey*, and *Caperton*—the presumption of regularity falls.²⁷⁴ While this meaningful showing has traditionally been a difficult hurdle to overcome, courts have recently shown an increasing willingness to question the

269. Gavoor & Platt, *supra* note 265, at 733 (citation modified).

270. *Morgan v. United States*, 298 U.S. 468, 480–82 (1936).

271. Michael Asimow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies*, 81 COLUM. L. REV. 759, 785 (1981).

272. Gavoor & Platt, *supra* note 265, at 758 (“The Founders saw oaths as ‘serious matters,’ which oblige the oath taker, in Justice Joseph Story’s conception, to reflect on ‘due execution of the trusts reposed in them, and to support the constitution.’”) (footnote omitted). To this point, when Senator Sanders asked one of President Trump’s NLRB nominees whether he would follow the President’s instruction in individual cases, he responded that he would “‘question that directive under the law that [he is] obliged to apply,’ and, if ‘the President has the opportunity to remove [him], then the President would have that option.’” See *Nominations of Scott Mayer to Be a Member of the National Labor Relations Board, James Murphy to Be a Member of the National Labor Relations Board, and Rosario Palmieri to Be Assistant Secretary of Labor for Policy: Hearing Before the S. Comm. on Health Educ. Lab. & Pensions*, 119th Cong. 1 (2025), <https://www.help.senate.gov/hearings/nominations-of-scott-mayer-to-be-a-member-of-the-national-labor-relations-board-james-murphy-to-be-a-member-of-the-national-labor-relations-board-and-rosario-palmieri-to-be-assistant-secretary-of-labor-for-policy> [https://perma.cc/M9JU-FKNH] at 50:12 for a video recording of Mr. Murphy’s response to Senator Sanders.

273. Gavoor & Platt, *supra* note 265, at 733 (quoting Nat’l Archives & Recs. Admin. v. Favish, 541 U.S. 157, 174–75 (2004)).

274. See *Dep’t of Com. v. New York*, 139 S. Ct. 2551, 2573–74 (2019) (“[W]e have recognized a narrow exception to the general rule against inquiring into ‘the mental processes of administrative decisionmakers.’ On a ‘strong showing of bad faith or improper behavior,’ such an inquiry may be warranted and may justify extra-record discovery.”) (citing *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971)); *Favish*, 541 U.S. at 174 (“[T]here is a presumption of legitimacy accorded to the Government’s official conduct. The presumption perhaps is less a rule of evidence than a general working principle. However the rule is characterized, where the presumption is applicable, clear evidence is usually required to displace it.”) (first citing *United States v. Armstrong*, 517 U.S. 456, 464 (1996); and then citing *United States v. Chemical Found., Inc.*, 272 U.S. 1, 14–15 (1926)).

presumption,²⁷⁵ particularly where the public record pokes holes in the administration's asserted reasons for regulatory action.²⁷⁶ And scholars have recommended lightening the evidentiary burden for challengers to puncture the presumption.²⁷⁷ As such, to the extent that Board members fail to live up to their obligation to act with impartiality in the face of political pressure, judicial review is available under Section 10(f) of the NLRA to ensure comportment with the Due Process Clause and correct the members' errors of judgment.²⁷⁸

What happens, however, if a President exercises removal power so furiously that he transforms the ambient chill of removal into an atmospheric deep freeze? In immigration adjudication, for instance, Professor Family suggests that this freeze has already occurred.²⁷⁹ According to Professor Family, the current administration has used its removal power aggressively to influence outcomes in immigration adjudication, shrinking the size of the Board of Immigration Appeals, firing approximately 141 of 735 immigration judges without explanation, and backfilling many openings with handpicked replacements.²⁸⁰ The *New York Times* reported that the removals—combined with other measures such as surveilling immigration judges' decisional outcomes for “systematic bias or failure to adhere to applicable law”²⁸¹—have caused a dramatic increase in deportations and decline in grants of asylum.²⁸²

A campaign of mass removal intended to tip administrative decisionmaking against particular classes of litigants threatens due process. As noted above, *Myers*, which *Slaughter* described as the “best word” on the reach of the

275. See Goodman, Watt, Balliet, Lin, Pusic & Venook, *supra* note 268 (collecting 118 recent cases in which courts questioned the presumption of regularity in categories of non-compliance with judicial orders, distrust of government information and representations, and findings of “arbitrary and capricious” administrative action).

276. *Id.*

277. See Gavoor & Platt, *supra* note 265, at 765–66 (contending that challengers should be able to rebut the presumption with a preponderance of the evidence).

278. 29 U.S.C. § 160(f); *Berkshire Emps. Ass'n of Berkshire Knitting Mills v. NLRB*, 121 F.2d 235, 238 (3d Cir. 1941) (granting petition for review due to Board member's improper ex parte contact).

279. Jill E. Family, *The Sky Is Falling: Immigration Law and Agency Adjudicator Independence*, 2026 UTAH L. REV. (forthcoming).

280. *Id.* (manuscript at 25).

281. *Id.* (manuscript at 26) (quoting Memorandum on Adjudicator Independence and Partiality 25-42, Executive Office of Immigration Review (Aug. 22, 2025), <https://www.justice.gov/eoir/media/1411796/dl?inline> [<https://perma.cc/HZP7-NTP8>]).

282. Nicholas Nehamas, Allison McCann, Steven Rich, Jazmine Ulloa, & Hamed Aleaziz, *How Trump Purged Immigration Judges to Speed Up Deportations*, N.Y. TIMES (Apr. 13, 2026), <https://www.nytimes.com/2026/04/09/us/politics/trump-miller-immigration-judge-purge.html> [<https://perma.cc/CB2T-KLGY>].

President's removal authority,²⁸³ recognized that "there may be duties of a quasi-judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President cannot in a particular case properly influence or control."²⁸⁴ In that sentence, *Myers* first recognizes the legitimacy of assigning adjudicative discretion to Executive Branch officers, employing the then-generally accepted term "quasi-judicial" to describe the proceedings. Then, it distinguishes "quasi-judicial" adjudication from the Executive Branch's mill-run work due to adjudication's adjustment of individual interests "in a particular case" through hearing and decision. These words invoke the Court's nascent recognition of the exclusive-record and fair hearing principles in administrative adjudication, due process independence zones that Congress would incorporate in the APA.²⁸⁵ Finally, to protect these interests, *Myers* explains that "the President can not . . . properly influence or control" subordinates' exercise of adjudicative responsibilities.²⁸⁶ Rather, the President's only option is post-hoc—to "consider the decision after its rendition as a reason for removing the officer."²⁸⁷

As discussed above, the Due Process Clause restricts the President's exercise of executive power. *Myers* extends this restriction to using the removal power to "influence or control" adjudicators' pre-decisional considerations. Most disputes turn on the application of law to fact, a task reserved to the adjudicators who heard the witnesses, evaluated the record, and made credibility determinations. Policymaking adjudication like the Board's is inextricably linked to the facts determined in each case, like a common law court.²⁸⁸ When the President makes clear in public statements his preferred dispositions against specific parties or groups subject to Executive Branch adjudication, and then initiates a barrage of terminations to drive home the message, his exercise of removal power could deny litigants their constitutional entitlement to an impartial decisionmaker who resolves disputes based only on record evidence. This action is more than an ambient chill from occasional judicial recall elections or cyclical political removals; rather, it could be a deliberate infliction of pre-decisional chill against distinct

283. *Trump v. Slaughter*, No. 25-332, 2026 WL 1855612, at *12 (U.S. June 29, 2026).

284. *Myers v. United States*, 272 U.S. 52, 135 (1926) (emphasis added).

285. *See supra* notes 137–147 and accompanying text.

286. *Myers*, 272 U.S. at 135; *see also Wiener v. United States*, 357 U.S. 349, 356 (1958) (observing that "one must take for granted" that Congress "precluded the President from influencing the Commission in passing on a particular claim" under the War Claims Act).

287. *Myers*, 272 U.S. at 135.

288. *See supra* notes 159–166 and accompanying text; *see also Brown-Forman Corp. v. NLRB*, 169 F.4th 646, 660 (6th Cir. 2026) (noting that an agency "properly exercise[s] its adjudicatory authority" when it "derive[s] its conclusions from the particular facts in the case") (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 204 (1947)).

parties that rings of the political interference that the courts found inconsistent with due process values in *Portland Audubon* and *Pillsbury*.

If the President aggressively employs his removal power to signal incumbent adjudicators to rule against certain classes of litigants, removal becomes indistinguishable from direction. Under the “weak” version of unitary executive theory, when Congress has vested discretion to administer a statutory program in specific Executive Branch officers, the President may not instruct them how to complete their assigned tasks; he may, however, threaten, or subject them to, removal to obtain compliance.²⁸⁹ (As previously discussed, under *Myers*, the President can only remove an adjudicator *after* decision.) The weak version attempts to harmonize the President’s removal power with Congress’s co-equal power under Article I to structure the organization and functions of the Executive Branch.²⁹⁰ On the other hand, the “strong” version contends that the President possesses the authority to direct subordinates’ exercise of discretion, notwithstanding other statutory directions.²⁹¹ Unitary executive enthusiasts who support only the more limited version should be concerned that muzzle-velocity removal collapses any practical distinction between the “weak” and “strong” unitary executive theories, rendering impotent Congress’s constitutional power to vest adjudicative discretion with specific officers or employees.

Even a “strong” approach to unitary executive theory, however, does not necessarily give the President the authority to ignore constraints on the Executive Branch’s exercise of discretion. When the President directs or substitutes for an Executive Branch officer, he steps into that person’s shoes. If the Constitution or Congress has cabined that person’s discretion—say, by virtue of the Due Process Clause or the adjudication requirements of the APA—it similarly cabins the President’s transitive discretion.²⁹² Even if permitted under

289. See Ilan Wurman, *The Original Presidency: A Conception of Administrative Control*, 16 J. LEGAL ANALYSIS 26, 28–29 (2024) (contrasting the strong and weak theories of unitary executive); Beau Baumann, *On the Dark Side of the Appointments Clause*, Law & Liberty (Nov. 13, 2025), <https://lawliberty.org/on-the-dark-side-of-the-appointments-clause> [<https://perma.cc/AV5E-3ZXE>].

290. Wurman, *supra* note 289, at 29–30 (citing Michael McConnell, *THE PRESIDENT WHO WOULD NOT BE KING* 349 (2020); Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 ALA. L. REV. 1205, 1234–43 (2014)).

291. See Wurman, *supra* note 289, at 28–29; Baumann, *supra* note 289.

292. See Murphy, *supra* note 192, at 469 (“To see this difference, consider that, even if we grant that the President can, thanks to the Vesting Clause, take over the role of decider for an adjudication that Congress has assigned to an agency head, it should not follow that the President can give a binding order to the agency head requiring her to conduct an adjudication and then reach the President’s predetermined result.”); Kathryn E. Kovacs, *The Supersecretary in Chief*, 94 S. CAL. L. REV. POSTSCRIPT 61, 73 (2020) (“Congress may constrain presidential ‘value judgments in order to effectuate the execution of the law it creates.’”) (quoting Mark Seidenfeld, *A Process-Based Approach to Presidential Exit*, 67 DUKE L.J. 1775, 1787 (2018)).

Myers and *Slaughter*, the President's direction of agency adjudicators must allow them to exercise the independent judgment that the Due Process Clause and the APA require; alternatively, if the President chooses to become the decisionmaker, he must exercise independent judgment based only on the exclusive record. As Professor Murphy observed, "[t]he executive power to implement the laws does not carry with it the power to violate them (which would, in any event, violate the President's duties under the Take Care Clause)."²⁹³ It is as constitutionally objectionable for the President to abuse his removal or direction authority to deny parties a fair hearing as it was for Congress to ostensibly restrict his removal authority in the first place. If not more.

This conflict of constitutional values underscores the difficulty of subjecting adjudication to unitary executive theory. Chief Justice Taft in *Myers* knew this.²⁹⁴ The Supreme Court in *Wiener* knew this.²⁹⁵ And the modern Supreme Court knows it as well, as was evident in its questioning during the *Trump v. Slaughter* oral argument.²⁹⁶ In *Slaughter*, the Court recognized that traditions from the Nation's founding shape the President's removal authority.²⁹⁷ Indeed, on the same day *Slaughter* came down, the Court decided *Trump v. Cook*, which upheld removal protections for members of the Board of Governors of the Federal Reserve Bank.²⁹⁸ The Court explained that historical traditions allowed Congress to protect "[n]ot only the *fact* of independence but also the *appearance* of independence" in insulating Federal Reserve governors from Presidential interference.²⁹⁹

In the same way, the Founders incorporated into the Fifth Amendment due process protections dating back to the *Magna Carta* to ensure parties receive fair hearings before impartial judges. *Myers* recognized these historical values when it precluded pre-decisional Presidential interference with Executive Branch adjudication. The APA codified these due process values into

293. Murphy, *supra* note 192, at 472.

294. *Myers v. United States*, 272 U.S. 52, 135 (1926).

295. *Wiener v. United States*, 357 U.S. 349, 356 (1958).

296. Beau J. Baumann, *Slaughter Oral Argument Recap: Humphrey's is Dead! Long Live Wiener?*, NOTICE AND COMMENT, YALE J. ON REG. (Dec. 8, 2025) ("Americans expect judge-like officials to be insulated from hierarchical political control and removal. Judges *love* the quasi-judicial function because its logic is deeply complimentary to the role of jurists in our society.").

297. *Slaughter*, 2026 WL 1855612, at *18 (citing the "unique role" of the "Federal Reserve, to the extent that it follows in the distinct historical tradition of the First and Second Banks of the United States" in permitting Congress to provide removal protections to Governors of the Federal Reserve).

298. *Trump v. Cook*, No. 25A312, 2026 WL 1855613, at *14 (U.S. June 29, 2026) (relying on the founders' "experience . . . of the calamities that could arise from even the 'suspicion' of political manipulation of monetary policy" to uphold the Federal Reserve's removal protections).

299. *Id.* at *9.

the prohibition on ex parte contacts and the embrace of the exclusive record principle. And *Portland Audubon*, *Pillsbury*, and *Caperton* held judicial integrity and due process values so precious that they disqualified adjudicators not only for the *fact* of bias but also the *appearance* of bias (to paraphrase *Slaughter*).³⁰⁰ If historical pedigrees mean anything in the unitary executive calculus, in-house agency adjudication must comport with the meaning of the Magna Carta that the Supreme Court celebrated in 1819—that the foundational charter embraces zones of independence that “secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.”³⁰¹

IV. AT-WILL REMOVAL OF BOARD MEMBERS: “NOT GREAT, BOB!”

In *Mad Men*’s sixth season finale, smarmy ad exec Pete Campbell receives news that his mother has fallen overboard a luxury cruise liner. Dashing to the elevator, he encounters supercilious corporate climber Bob Benson, who cheerily asks, “How are you?” Pete’s meme-spawning answer—“Not great, Bob!”—embodies exasperation, frustration, and resignation in three words.³⁰²

While the Constitution’s zones ensure that the Board’s decisional process in individual cases respects due process guardrails, “Not great, Bob!” captures this Article’s take on the NLRB and overruling *Humphrey’s Executor*. *Slaughter* for *Humphrey’s* is not an even trade. The loss of fixed terms and the encouragement of additional Presidential control over the Board’s operations undermine the autonomy that Congress built into the NLRA’s DNA.³⁰³ After significant debate, Congress placed the Board outside the traditional cabinet departments, removed from direct Presidential supervision, to further its decisional independence.³⁰⁴ Even if the threat of removal creates only a minimal chilling effect, judicial impartiality would be better served without the presence of a removal threat at all.

More troubling, the shift from a bright-line rule preventing at-will removal to general due process standards as the primary means of protecting adjudicative independence imposes significant costs on the vulnerable populations that the Act is designed to protect. “Establishing a ‘rule’—a concise test—binds the decisionmaker ‘to respond in a determinate way to the presence of

300. See *supra* notes 273–278 and accompanying text.

301. *Bank of Columbia v. Okely*, 17 U.S. (4 Wheat.) 235, 244 (1819).

302. *MAD MEN: In Care Of* (AMC television broadcast, aired June 23, 2013); see Whitney Friedlander, ‘Not Great, Bob!’: The Making of *Mad Men*’s Greatest Meme, *VULTURE* (June 26, 2019), <https://www.vulture.com/2019/06/not-great-bob-mad-men-meme-making-of.html> [https://perma.cc/RFFV2-6UEW].

303. See Bremer & Eskridge, *supra* note 59, at 4, 11.

304. 1 NLRA LEG. HIST., *supra* note 50, at 1348.

delimited triggering facts.’ In contrast, a ‘standard’ approach—the use of a group of factors or considerations to assess the broader circumstances of a situation—‘tends to collapse decision making back into the direct application of the background principle or policy to a fact situation.’”³⁰⁵ A rule protecting NLRB members from ad-hoc removal imposes an *ex ante* prophylactic buffer around their decisionmaking, disincentivizing Presidential interference in adjudication by neutering the threat of job loss.

By pivoting to *ex post* litigation to protect due process standards, parties suspecting unconstitutional interference must mount a legal challenge in the courts of appeals to vindicate their rights, shifting the costs of litigation from the government to the workers, unions, and employers for whom Congress established the NLRB. Even as courts have recently shown an increasing willingness to question the presumption, litigation is costly and favors the deeper-resourced party. Uncovering evidence to rebut the presumption of regularity is difficult.³⁰⁶ And it is equally challenging to reach “nod and wink” suggestions from the Executive that fall short of a direct order but whose implications could not be clearer. The move from rule to standard makes it more difficult to prevent interference with the Board’s adjudication.

With his new illimitable power, the President could remove all NLRB members from the opposite party whom he does not believe will advance administration policies. If that becomes standard, every new administration going forward would see a Board comprised only of co-partisans the President selects after firing his predecessor’s appointees, who would serve for the duration of his administration and no longer. Unlike other multimember commissions, the Board has no partisan balancing requirement (because its framers envisioned non-partisan membership), so it would be lawful for a new President not only to fire any incumbent members from the prior administration but also to seat five new members from his political party.³⁰⁷

A one-party Board eliminates a fundamental check on government power in advancing the unitary executive’s authority.³⁰⁸ Joint decisionmaking is

305. David B. Schwartz, *NLRB Jurisdiction Over Charter Schools*, 39 HOFSTRA LAB. & EMP. L.J. 133, 139–40 (2021) (quoting Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58 (1992)).

306. See *supra* notes 271–278 and accompanying text.

307. See GROSS, *supra* note 54, at 132 (“There was no provision for partisan membership ‘since it has generally come to be recognized that such membership impairs the impartial action of the Board as a quasi-judicial body and leads to compromise and adaptation on questions of law’”) (quoting *Comparison of S. 2926 (73rd Cong.) and S. 1958 (74th Cong.)*, Senate Committee Print (74th Cong., 1st Sess., Mar. 11, 1935)).

308. PHH Corp. v. CFPB, 839 F.3d 1, 26 (D.C. Cir. 2016) (Kavanaugh, J.) (“As compared to single-Director independent agencies, multi-member independent agencies help prevent arbitrary decisionmaking and abuses of power, and thereby help protect individual liberty,

slow and cautious, modeled on the workings of legislatures and appellate courts.³⁰⁹ To exercise its delegated authority, Board members—experts with different backgrounds, politics, and experiences—must listen, persuade, and compromise. Through this process, arguments are tested and refined. When a member dissents, the majority further hones its reasoning in response, ensuring conformity with law, fact, and precedent. Professor Jacobs calls this process “deliberation forcing,” harnessing the heterogeneity of administrative agencies to promote decisional transparency and protect against arbitrary and capricious action.³¹⁰ While a hive-mind may advance the President’s priorities, it will not police the arbitrary exercise of government power.³¹¹

Aggressive use of presidential removal power to create partisan homogeneity will also likely increase policy oscillation at the Board to align with shifting presidential priorities, a significant problem NLRB stakeholders have long criticized.³¹² While labor and management typically decry policy oscillation only when they’re out of power and their favored precedents are endangered, frequent changes in precedent upset stakeholders’ reliance interests and their ability make investments in future organizing strategies and business planning. Due to the phenomenon of group polarization, however, the more politically homogenous an adjudicative body, the more its collective

because they do not concentrate power in the hands of one individual.”), *reh’g en banc granted, order vacated* (Feb. 16, 2017), *on reh’g en banc*, 881 F.3d 75 (D.C. Cir. 2018).

309. *Regulatory Organization*, 5 STUDY ON FEDERAL REGULATION: PREPARED PURSUANT TO S. RES. 71, TO AUTHORIZE A STUDY OF THE PURPOSE AND CURRENT EFFECTIVENESS OF CERTAIN FEDERAL AGENCIES, COMMITTEE ON GOVERNMENT OPERATIONS, UNITED STATES SENATE 31 (1977) (quoting Senator Hart’s explanation that independent agencies act as agents of Congress to explicate legislative activity).

310. See Sharon B. Jacobs, *Administrative Dissents*, 59 WM. & MARY L. REV. 541, 590–601 (2017); *accord PHH Corp.*, 839 F.3d at 26 (Kavanaugh, J.) (noting that “unlike single-Director independent agencies, multi-member independent agencies ‘can foster more deliberative decision making’” and “benefit from diverse perspectives and different points of view among the commissioners and board members . . . mak[ing] it more likely that the costs and downsides of proposed decisions will be more fully ventilated”) (internal quotations omitted).

311. For that matter, neither will vesting the President with unmediated power to control independent agencies, as Justice Gorsuch querulously warned in his *Slaughter* concurrence—while giving the President exactly that power. *Trump v. Slaughter*, No. 25-332, 2026 WL 1855612, at *22–29 (U.S. June 29, 2026) (Gorsuch, J., concurring).

312. Catherine L. Fisk & Deborah C. Malamud, *The NLRB in Administrative Law Exile: Problems with Its Structure and Function and Suggestions for Reform*, 58 DUKE L.J. 1013, 1015 (2009) (“Within its range of discretionary policymaking, the Board has oscillated between extremes with every change of controlling political party, bringing its legitimacy as expert policymaker sharply into question.”); Samuel Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rule-making*, 37 ADMIN. L. REV. 163 (1985).

judicial philosophy trends away from centrism and toward partisan extremes.³¹³ Because a politically homogenous Board would generally be ideologically aligned with each other, and presumably with the President who appointed them, it would need to make fewer compromises in its case adjudication.³¹⁴ With that ideological meld, the Board would be able to reverse the prior Board's precedent at a speedy clip, with few speedbumps beyond finding an appropriate vehicle. Consequently, the pendulum on Board law will swing farther and faster between the span of two growing extremes with every change in administration, especially with Board members aware that they could be removed for reaching decisions unacceptable to the President.

Finally, removing all Board members of the opposite party will deprive the Board of a quorum for an extended period while the President nominates, and the Senate confirms, new members.³¹⁵ If the Board is comprised entirely of Republicans or Democrats, a change in administration accompanied by a change in party control will reduce the Board's membership to zero. Board members are not subject to the Vacancies Act,³¹⁶ recess appointments have become extinct since the Supreme Court's decision in *NLRB v. Noel Canning*,³¹⁷ and no other mechanism exists to appoint acting members. The Board typically handles the agency's most intractable disputes—those that could not settle at a local level, either because the parties are dug in, the stakes are too high, or the law is unclear. As occurred in 2025 after the termination of Member Wilcox, the Board's inability to issue cases leads to long delays in the resolution of significant conflicts,

313. See Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 74 (2000) (explaining that “group polarization means that members of a deliberating group predictably move toward a more extreme point in the direction indicated by the members’ predeliberation tendencies”).

314. *Id.* at 103 (highlighting the tendency of a single-party multi-member commission to polarize “toward an extreme position, likely more extreme than . . . that of any member standing alone”).

315. See 29 U.S.C. § 153(b) (setting forth the Board's quorum requirements); see also *NLRB v. New Process Steel*, 560 U.S. 674, 680 (2010) (explaining that the Board requires three sitting members to function).

316. 5 U.S.C. § 3349(c)(1) (excluding from the provisions of the Federal Vacancies Reform Act “any member who is appointed by the President, by and with the advice and consent of the Senate to any board, commission, or similar entity that—(A) is composed of multiple members; and (B) governs an independent establishment or Government corporation”).

317. 573 U.S. 513 (2014) (holding that Presidents cannot make recess appointments when the Senate is out of session for fewer than ten days); see also *Bypassing the Senate: How Recess Appointments Can Affect the Regulatory Landscape*, GIBSONDUNN CLIENT ALERT (Jan. 7, 2025), <https://www.gibsondunn.com/bypassing-the-senate-how-recess-appointments-can-affect-the-regulatory-landscape> [<https://perma.cc/4ARB-QKCK>] (“Since *Noel Canning*, there has not been a single recess appointment because the Senate conducts ‘pro forma’ sessions every three days under Article I, Section 5, preventing the chamber from being in an official recess.”).

leaving labor strife to percolate in the absence of legal disposition.³¹⁸ And it allows parties to gamify the Board's powerlessness by taking advantage of the delay to undermine union strength.³¹⁹ Consequently, every change in presidential administration will deprive vulnerable stakeholders access to the Board's machinery, further placing the costs of the unitary executive on the parties least capable of bearing them.³²⁰

Senator Wagner and his colleagues understood that independence meant prestige. Independence telegraphed to the Board's stakeholders that the agency stood apart from the rough-and-tumble of everyday politics.³²¹ Independent agency status embodies the values of fairness, transparency, impartiality, and due process that Americans expect from their judges and provides credibility to administrative judicialization.³²² Staggered terms of office that span administrations tangibly underscore independent agencies' disconnect from the normal rhythm of presidential politics.³²³ Their bipartisan composition mirrors the American public and gives multiple constituencies a voice in agency operations.³²⁴ Although some contend that independent agencies are effectively indistinguishable from political actors in our modern

318. See, e.g., Bednar & Phillips, *supra* note 28 at 1145–48 (discussing adverse consequences of agency quorum losses).

319. *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 705 (1941) (explaining that, “procedural delays necessary fairly to determine charges of unfair labor practices might in this way be made the occasion for further procedural delays in connection with repeated requests for elections, thus providing employers a chance to profit from a stubborn refusal to abide by the law”).

320. See Adam White, *After Slaughter and Cook: Future Fed Fights, and Maybe Some Midnight Firings*, SCOTUSBLOG.COM (July 2, 2026), <https://www.scotusblog.com/2026/07/after-slaughter-and-cook-future-fed-fights-and-maybe-some-midnight-firings/> [<https://perma.cc/6KZN-C3ZX>] (“A president who see his successor with something less than equanimity will have a great opportunity to kneecap the new administration by firing all the remaining commissioners from the other party, so that the incoming administration will not have readily available commissioners to serve as acting chairmen.”).

321. See BERNSTEIN, *supra* note 50, at 105 (“[I]t was equally important for people to think that the board was independent. If the Secretary controlled personnel and budget, it would be charged that the agency promoted the aims of the department. There would, furthermore, be pressure to tailor decisions to the policies of the administration in power.”).

322. See Bremer & Eskridge, *supra* note 59, at 7–17 (explaining that Congress has a duty to implement the due process value of impartiality when it designs statutory schemes); Baumann & Shugerman, *supra* note 129, at 47 (“Ultimately, all major factions in the leadup to the Administrative Procedure Act of 1946 (APA) settled on the logic [of] administrative judicialization, which gave administrative adjudications a starring role in the modern state. The insulation of administrative law judges (ALJs) from hierarchical political control served due process values and helped make the administrative state compatible with longstanding American legal traditions.”).

323. See Bremer & Eskridge, *supra* note 59, at 4.

324. See *supra* note 27.

system,³²⁵ the appearance of even nominal independence in adjudication is preferable to an adjudicative body perceived as firmly under political control.

But it does not have to be this way. Just because a president *can* make a one-party Board does not mean that he will, though it may be a “200-to-1 shot . . . from the outside,” as an original supporter described the NLRA’s unexpected passage in 1935.³²⁶ Imagine these scenarios:

- The 2025 firing spree that included Member Wilcox was designed only to tee up test cases for Supreme Court review; going forward, the President allows the remaining Democratic appointee to serve out his term and holds removal power over the heads of future Board members as an existential threat but wields it sparingly in practice.
- The President faces a Senate controlled by the opposition party, which demands a return to bipartisan appointments at multimember agencies and no future firings as a condition of confirming the President’s nominees throughout the government.
- The President faces a Senate narrowly controlled by his own party, whose leadership makes a deal with the minority party requiring bipartisan nominees and no firings to achieve other legislative priorities, and the Senate majority leadership convinces the President to accept it.
- The Republican Party’s flirtation with the American labor movement proves resilient, and the prolabor faction persuades the Administration to name union nominees to the NLRB alongside the traditional management bar whom the Republican Party typically appoints.³²⁷ (For example, in April 2026, President Trump nominated Democratic Board Member David M. Prouty for a second term, pairing his nomination with Republican James Macy.)³²⁸ Similarly, business coalitions persuade Democratic administrations to include some management representation on the Board. This approach would align with

325. See Neal Devins & David E. Lewis, *The Independent Agency Myth*, 108 CORN. L. REV. 1305, 1346–62 (2023) (contending that, despite their structural distance from the White House, independent agencies typically exhibit the same characteristics of political control as other Executive Branch entities).

326. Huthmacher, *supra* note 37, at 196.

327. See Eyal Press, *Josh Hawley and the Republican Effort to Love Labor*, NEW YORKER (May 30, 2025), <https://www.newyorker.com/news/the-lede/josh-hawley-and-the-republican-effort-to-love-labor> [<https://perma.cc/6BEG-K9W5>]; Stef W. Kight, *Scoop: Hawley Leads Bipartisan Pro-Labor Push*, AXIOS (Mar. 4, 2025), <https://www.axios.com/2025/03/04/josh-hawley-unions-teamsters> [<https://perma.cc/C8SS-TXSK>].

328. See Daniel Wiessner, *Trump Taps Veteran Labor Lawyer to Fill out Republican NLRB Majority*, REUTERS (Apr. 13, 2026, at 18:21 ET), <https://www.reuters.com/legal/government/trump-taps-veteran-labor-lawyer-fill-out-republican-nlrbs-majority-2026-04-13> [<https://perma.cc/AJ5L-Z82T>].

Professor Flynn's construction of partisanship at the Board not as Republican/Democrat but as management/labor.³²⁹

These possibilities, if they came to fruition, would result in a bipartisan Board. For the minority members on the bipartisan Board, the threat of removal would be omnipresent so long as they serve under a President from the opposite party.³³⁰ For members of the majority—whether on a bipartisan Board or not—the bigger threat to removal will not come from the President who appointed them, but from the *next* president.³³¹ The threat of termination is at its zenith with a change of administration, where removal would likely be the presumption.

If Board members want to remain in office despite the threat of removal—what Joseph Schlesinger deemed “static ambition”³³²—they may try to position themselves as more palatable to the opposing party. Empirical evidence into the effects of retention elections on judicial decisions shows that judges moderate their rulings toward the norm of their electorate as an election draws near.³³³ This applies equally to “fixed-term appointive offices” like Board members, “with the relevant constituency being whoever controls the reappointment process for the desired office.”³³⁴ To retain some favor with constituencies on the other side of the labor-management divide, Board members might compromise more on controversial issues. And they may move more slowly in setting new precedent toward the end of an administration to draw less negative attention. Or they may pick their battles more carefully, deciding to leave some controversial precedent in place. In this way, an interest in avoiding future discharge *might* slow down the policy oscillation that has plagued the Board since at least the Eisenhower administration.³³⁵

329. Flynn, *supra* note 45, at 1368–98.

330. See Nick Bednar, *The Merit Systems Protection Board's Independence Is Dead*, LAWFARE (Jan. 20, 2026, at 10:26 ET), <https://www.lawfaremedia.org/article/the-merit-systems-protection-board-s-independence-is-dead> [<https://perma.cc/2JYP-CU4N>] (stating that if the President can remove bipartisan board members at will, statutory safeguards such as “partisan balancing, staggered terms, and decisional independence—become discretionary norms that only survive as long as the White House tolerates them”).

331. According to Professors Devins and Lewis, bipartisan independent agencies typically perform in accord with the policy agenda of the President in power. Devins & Lewis, *supra* note 325, at 1331–36.

332. Herbert M. Kritzer, *Impact of Judicial Elections on Judicial Decisions*, ANN. REV. L. & SOC. SCI., June 2016, at 353, 354 (discussing Joseph Schlesinger, AMBITIONS AND POLITICS: POLITICAL CAREERS IN THE UNITED STATES (1966)).

333. *Id.* at 359.

334. *Id.* at 354.

335. See *supra* notes 312–314 and accompanying text.

All of this depends, however, on a President willing to maintain the Board's bipartisan tradition. As the scenarios above illustrate, this question is more political than constitutional. When an agency (like the Board) conducts almost all its work through adjudication, the public's expectation of fairness has a political dimension.³³⁶ The due process values embedded in the Constitution, the APA, the NLRA, and the cases discussed throughout this Article are proscriptive *and* reflective.³³⁷ As this Article has shown, they create zones of independence that proscribe the President from intruding in the Board's adjudicative processes or directing Board members to favor his preferred unions or employers. But they also reflect Americans' expectations for the people who decide their cases, that they'll get a fair shake before an impartial judge.³³⁸ Acting with disregard for these values, which Congress embedded in the structure of quasi-judicial agencies, could create political risk at the ballot box for Presidents that choose to ignore them.

CONCLUSION

This Article's original title was "How to Ensure that the Unitary Executive Doesn't Make the Worker Secondary." In the fierce debates over Article I and Article II, *Myers*, *Humphrey's Executor*, and *Slaughter*, "quasi-judicial" and "quasi-legislative," it is easy for the worker to get lost. Congress birthed the many Progressive-era and New Deal agencies out of idealism. They reflected a legislative vision that some public problems were too important to leave to the politicians, but instead required expertise, bipartisanship, and continuity to do justice for the constituencies Congress built them to serve.³³⁹ The NLRA embodies this idealism. By the time of its passage, the courts and the politicians had shown their inability to provide a holistic solution to the labor strife that engulfed the country.³⁴⁰ The NLRB would bring impartial expert adjudication to adjusting the rights and obligations of labor and management, providing nationwide solutions to a nationwide problem.³⁴¹ While

336. See Bremer & Eskridge, *supra* note 59, at 6, 9.

337. See *supra* Part III.A.

338. See Bremer & Eskridge, *supra* note 59, at 10–22; Baumann & Shugerman, *supra* note 129, at 47.

339. See BERNSTEIN, *supra* note 50, at 105.

340. Harry A. Millis & Emily Clark Brown, FROM THE WAGNER ACT TO TAFT-HARTLEY 3–29 (1950).

341. See *Garner v. Teamsters, Chauffeurs & Helpers Loc. Union No. 776*, 346 U.S. 485, 490 (1953) ("Congress . . . considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies.").

realpolitik has brought many of those lofty aspirations down to earth during the NLRB's ninety-year existence, the Board's autonomy as an adjudicative body nevertheless sets it apart from the President's direct reports. And its institutional expertise has successfully led to the resolution of labor disputes through legal means instead strife in the streets.

For this reason, identifying administrative legitimacy in the wreckage of *Humphrey's Executor* is important. The zones of independence are no replacement for removal protections, but they provide a solid constitutional foundation to ensure that the resolution of individual disputes remains based on their merits alone. American workers, steeped in the values of due process and fairness, deserve no less.