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# Congress's Authority to Limit the Removal of Inspectors General

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## **Congress's Authority to Limit the Removal of Inspectors General**

Federal law establishes a variety of inspectors general (IGs), each of whom is generally tasked with detecting waste, fraud, and abuse through independent and objective investigations, audits, and reviews of the agency or program for which they are responsible. In 2020, the level of independence that IGs possess received significant public and congressional attention after President Donald Trump removed or replaced two permanent and two acting IGs in the span of two months.

Although IGs are independent and objective units, they are not completely insulated from executive branch influence. Under the Inspector General Act of 1978 (IG Act), IGs are appointed, supervised, and removed by either the President or agency leadership.

Various legislative proposals recently have been introduced to modify the statutory IG framework. Some of these proposals have chosen to strike the IG Act's current balance between autonomy, accountability, and supervision differently. Increasing IG independence and decreasing executive branch influence could be achieved in various ways, but restricting the ability of the President (or agency head) to remove IGs would perhaps be the most direct approach. Because the IG Act does not appear to limit substantively the reasons for which the President can exercise his removal power, Congress could look to protect IGs from what it may view as unwarranted removals by prohibiting termination of an IG except "for cause." Congress's constitutional authority in this area, however, is fraught with uncertainty and directly implicates the President's removal power and the constitutional separation of powers.

While Congress's power to use removal restrictions to encourage independence for some offices is established, the Supreme Court has recently characterized these past decisions as narrow exceptions to the President's otherwise broad removal power. Nevertheless, the typical IG exercises a unique mixture of powers that, as a matter of current constitutional law, appear to fall within the existing judicial carve-out. As such, for cause removal restrictions would appear to be a constitutionally permissible means of encouraging independence for most IGs. This conclusion is subject to two important caveats. First, because the Court's removal jurisprudence continues to evolve, Congress's authority to use for cause protections to promote independence remains the subject of significant uncertainty. And second, Congress's power to provide for cause protections may not extend to IGs who are currently removable not by the President, but by an independent agency board or commission whose members also possess for cause protections.

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**Todd Garvey**  
Legislative Attorney

For a copy of the full report, please call 7-5700 or visit [www.crs.gov](http://www.crs.gov).

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Federal law establishes a variety of inspectors general (IGs), who are generally tasked with detecting waste, fraud, and abuse in the agency or program for which they are responsible through independent and objective investigations, audits, and reviews.<sup>1</sup> In 2020, the level of independence that IGs in fact possess received significant public and congressional attention after President Donald Trump removed or replaced two permanent and two acting Inspectors General in the span of two months.<sup>2</sup> The removals prompted investigations from various congressional committees;<sup>3</sup> a letter from a bipartisan group of Senators asking President Trump for a more detailed explanation of the reasons for his actions;<sup>4</sup> and the introduction of legislation to strengthen statutory protections for all IGs by, among other measures, explicitly restricting the President's authority to remove IGs in the future.<sup>5</sup> The House, for example, adopted the HEROES Act, which would have made alterations to the existing IG framework, including by allowing the removal of IGs only for enumerated reasons such as inefficiency, malfeasance, gross mismanagement, or abuse of authority.<sup>6</sup>

The events of 2020 have prompted heightened congressional interest in the independence provided to IGs under the Inspector General Act (IG Act) and other statutory provisions. Although IGs are “independent and objective units” charged with improving executive branch efficiency and accountability through oversight, they are not insulated from presidential influence, for the President has the power to select and—perhaps more importantly—remove many IGs.<sup>7</sup> Removal is “a powerful tool for control,”<sup>8</sup> the Supreme Court once observed, as it is that authority that a subordinate official “must fear and, in the performance of his functions, obey.”<sup>9</sup>

But it is precisely because removal is such an effective tool of presidential control that *protecting* an official from removal is perhaps Congress's most effective means of encouraging autonomy, especially when Congress has determined that a given function should be carried out with limited

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<sup>1</sup> For a general discussion of inspectors general in the federal government, see CRS Report R45450, *Statutory Inspectors General in the Federal Government: A Primer*, by Ben Wilhelm.

<sup>2</sup> See Letter from Donald Trump, President of the United States, to Richard Burr, Chairman, Senate Select Committee on Intelligence (Apr. 3, 2020), available at <https://www.politico.com/f/?id=00000171-4308-d6b1-a3f1-c7d8ee3f0000h>; Kyle Cheney and Connor O'Brien, *Trump Removes Independent Watchdog for Coronavirus Funds, Upending Oversight Panel*, POLITICO (Apr. 7, 2020, 12:03 PM EDT); Letter from Donald Trump, President of the United States, to Nancy Pelosi, Speaker, House of Representatives (May 15, 2020), available at <https://thehill.com/homenews/administration/498115-read-trump-letter-on-removing-state-dept-inspector-general>; Ian Duncan and Michael Laris, *Democrats Open Investigation into Trump's Replacement of Acting Transportation Department Inspector General*, WASH. POST (May, 19, 2020, 6:06 p.m. EDT).

<sup>3</sup> See Press Release, H. Comm. on Foreign Affairs, *Engel and Menendez Launch Probe into Removal of State Department Inspector General*, (May 16, 2020).

<sup>4</sup> See Letter from Senator Charles Grassley et al, to Donald Trump, President of the United States (Apr. 8, 2020), <https://www.grassley.senate.gov/news/news-releases/grassley-leads-bipartisan-call-safeguard-inspector-general-independence-following>.

<sup>5</sup> See CRS In Focus IF11698, *Legislative Proposals Related to the Removal of Inspectors General in the 116th Congress*, by Ben Wilhelm. See also S. 587, 117th Cong. (2021); H.R. 23, 117th Cong. (2021) (as passed by the House, Jan. 5, 2021).

<sup>6</sup> H.R. 6800, 116th Cong., Div. G, § 70104 (2020) (as passed by the House, May 15, 2020).

<sup>7</sup> 5 U.S.C. App. §§ 2-3. Even when the power to remove an IG is conferred to an agency head, the President may still be able to exert significant influence over that official's personnel decisions. See Elana Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2246 (2001) (“We live today in an era of presidential administration.”).

<sup>8</sup> *Edmond v. United States*, 520 U.S. 651, 664 (1997) (“The power to remove officers, we have recognized, is a powerful tool for control.”).

<sup>9</sup> *Bowsher v. Synar*, 478 U.S. 714, 726 (1986) (citation omitted).

presidential oversight or political influence.<sup>10</sup> An official who serves at the President's pleasure generally must comply with the President's wishes and conform to the President's priorities, but one who cannot be removed at will is more likely to discharge their statutory obligations with "an attitude of independence."<sup>11</sup>

Recognizing the significant role that removal plays in the independence of a given office, this report addresses the extent to which Congress could, as a constitutional matter, alter the existing IG framework by further protecting IGs from removal.<sup>12</sup> The Supreme Court's recent removal jurisprudence suggests that it has adopted only limited exceptions to the President's otherwise broad power to remove executive branch officers.<sup>13</sup> Nevertheless, IGs would appear to fall within this narrow judicial carve-out as they do not seem to hold the type of office or exercise the type of powers that the Constitution requires be discharged by an official subject to unrestricted removal by the President. As such, prohibiting the President or another executive branch officer from removing IGs except "for cause" would likely be a constitutionally permissible means of encouraging independence for most, but perhaps not all IGs. Still, because the Court's removal jurisprudence continues to evolve, Congress's authority to use for cause protections to promote independence remains the subject of significant debate.

## The Inspector General Act and IG Independence

Congress has statutorily established a variety of IGs in the executive branch, the vast majority of whom are governed by the IG Act.<sup>14</sup> The IG Act set up<sup>15</sup> a series of IG offices as "independent and objective units" located within various federal agencies.<sup>16</sup> Originally establishing a handful of IG offices, the IG Act now governs the operation of more than 70 IGs.<sup>17</sup> These include two slightly different classes of IG: (1) "establishment" IGs, positioned in typical executive departments and agencies, who are appointed by the President with the advice and consent of the Senate;<sup>18</sup> and (2) "designated federal entity" (DFE) IGs, positioned in other federal entities (including many government corporations and independent agencies), who are appointed by the identified head of the DFE.<sup>19</sup> "Special" IGs represent a third category of IG established outside of

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<sup>10</sup> See *Collins v. Mnuchin*, 896 F.3d 640, 660 (5th Cir. 2018), *reh'g en banc*, 938 F.3d 553 (2019), *cert. granted*, 141 S. Ct. 193 (2020) ("The quintessential independence-promoting mechanism is restricting the Executive Branch's ability to remove agency leaders at will.").

<sup>11</sup> *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629 (1935) ("[I]t is quite evident 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.").

<sup>12</sup> For testimony relating to the possible advantages and disadvantages of providing IGs with removal protections, see *Inspectors General: Independence and Integrity, Hearing Before the Subcomm. on Govt., Mgmt., Org. and Procurement of the H. Comm. on Oversight and Govt. Reform*, 110th Cong., at 48 (2007).

<sup>13</sup> See *Seila Law, LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2192 (2020) (noting that "[o]ur precedents have recognized only two exceptions to the President's unrestricted removal power").

<sup>14</sup> 5 U.S.C. App. §§ 1-13.

<sup>15</sup> The IG Act built on a handful of existing IGs and internal auditing offices in individual agencies. See Wilhelm, *supra* note 1, at 1-2.

<sup>16</sup> 5 U.S.C. App. § 2.

<sup>17</sup> Wilhelm, *supra* note 1, at 27-30.

<sup>18</sup> 5 U.S.C. App. §§ 3, 12.

<sup>19</sup> *Id.* § 8G(a)(2). Although their method of appointment and removal may differ, establishment and DFE IGs exercise similar powers. See *id.* § 8G(g)(1) ("Sections 4, 5, 6 (other than subsections (a)(7) and (a)(8) thereof), and 7 of this Act shall apply to each Inspector General and Office of Inspector General of a designated Federal entity"). "Special" IGs

the IG Act.<sup>20</sup> Special IGs, who are generally vested with cross-cutting jurisdiction rather than confined to the operations of a single agency, are typically appointed by the President with the advice and consent of the Senate.<sup>21</sup>

The overriding purpose of the IG office is to promote “economy, efficiency, and effectiveness” in agency operations, mainly by rooting out waste, fraud, and abuse.<sup>22</sup> Each IG is charged with the relatively unique obligation of keeping both the head of the agency *and* Congress “fully and currently informed about problems and deficiencies” that may require “corrective action.”<sup>23</sup> Different IGs have slightly different authorities,<sup>24</sup> but as a general matter, most IG powers typically relate to investigating and auditing the “programs and operations” of the agency for which they are given responsibility and then reporting findings and recommendations to the agency head, Congress, and the public.<sup>25</sup> While an IG can recommend that an agency implement specific “policies” or “corrective action” following an investigation or audit, IGs can neither compel nor prohibit agency activity.<sup>26</sup> Nor can they be delegated any “program operating responsibilities” or conduct “regulatory compliance” activities, both of which Congress has entrusted only to the agency’s responsibility.<sup>27</sup>

Each IG has a variety of information-gathering tools to carry out his or her investigative and informing functions. Central to the toolbox is a statutory right of “timely access to all records . . . or other materials available to” their agency and “direct and prompt access” to the agency head and agency personnel.<sup>28</sup> In addition, IGs may request “information or assistance . . . from any Federal, State, or local governmental agency,” administer oaths, and issue judicially enforceable subpoenas for the production of all necessary and relevant information.<sup>29</sup> IGs may not, however, use subpoenas to obtain information from federal agencies and are instead instructed to use other

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represent a third category.

<sup>20</sup> Statutory provisions creating special IGs and other freestanding IGs not established within the IG Act nevertheless tend to cross-reference many of the authorities and restrictions of the IG Act. *See, e.g.*, 12 U.S.C. § 5231 (Special Inspector General for the Troubled Asset Relief Program). Thus, the IG Act operates as a generally applicable law and is the central law cited for the authorities of IGs in this report.

<sup>21</sup> *See* Wilhelm, *supra* note 1, at 30. Special IGs are generally vested with cross-cutting jurisdiction, untethered to a specific agency. Typically appointed by the President with the advice and consent of the Senate, statutory provisions creating Special IGs and other freestanding IGs not established within the IG Act nevertheless tend to cross-reference many of the authorities and restrictions of the IG Act. *See, e.g.*, 12 U.S.C. § 5231 (Special Inspector General for the Troubled Asset Relief Program). For a catalogue of all existing IGs, see generally Wilhelm, *supra* note 1.

<sup>22</sup> 5 U.S.C. App. § 2.

<sup>23</sup> *Id.* §§ 2, 4.

<sup>24</sup> Some IG’s are governed exclusively by the general provisions of the IG Act. *See, e.g., id.* §§ 4-6 (governing typical agency IGs). Others are governed by their own specific provisions of the IG Act. *See, e.g. id.* §§ 8-8H (governing IGS for the Department of Defense, Nuclear Regulatory Commission, and others). Still others are governed by freestanding provisions. *See, e.g.,* 50 U.S.C. §§ 3033, 3517 (governing the IG of the Intelligence Community and the Central Intelligence Agency).

<sup>25</sup> 5 U.S.C. App. §§ 2-5.

<sup>26</sup> *Id.* § 4.

<sup>27</sup> *Id.* § 9(a)(2); *Burlington N. R. Co. v. Off. of Inspector Gen., R. Ret. Bd.*, 983 F.2d 631, 642 (5th Cir. 1993) (“If an Inspector General were to assume an agency’s regulatory compliance function, his independence and objectiveness—qualities that Congress has expressly recognized are essential to the function of combatting fraud, abuse, waste, and mismanagement—would, in our view, be compromised.”).

<sup>28</sup> 5 U.S.C. App. § 6(a). Despite this language, IGs are not always given access to requested agency information. *See generally Obstructing Oversight: Concerns from Inspectors General: Hearing before the House Committee on Oversight and Government Reform*, 113th Cong. (2014) (hearing concerning IG access to agency information).

<sup>29</sup> 5 U.S.C. App. § 6(a).

“procedures.”<sup>30</sup> Notably, the IG Act also provides IGs and their employees with an avenue to exercise certain law enforcement authorities, including the power to make arrests while “engaged in official duties” and execute warrants upon probable cause, subject to supervision by the Attorney General.<sup>31</sup>

## IG Features of Independence

Both Congress and the Supreme Court have recognized the unique nature of IGs and the centrality of independence, autonomy, impartiality, and objectivity to effective oversight of agency programs. The legislative history of the IG Act reflects lawmakers’ calculation that because agency officials will “not always identify or come forward with evidence of failings” in their own programs, internal investigative functions should be assigned to an “outsider” with “no vested interest in the programs...they are evaluating” and “an unusual degree of independence.”<sup>32</sup> The Supreme Court has similarly recognized that IG autonomy is “vital to effectuating Congress’ intent and maintaining an opportunity for objective inquiries into bureaucratic waste, fraud, abuse, and mismanagement.”<sup>33</sup>

The IG Act seeks to provide that independence in various ways, including by

- requiring appointment of IGs “solely on the basis of integrity” and “without regard to political affiliation;”<sup>34</sup>
- subjecting establishment IG appointments to Senate confirmation;<sup>35</sup>
- prohibiting (with some exceptions) the agency head from blocking an investigation or audit;<sup>36</sup>
- requiring IGs to comply with generally accepted government auditing standards (GAGAS);<sup>37</sup>
- providing IGs with a direct line of communication to Congress;<sup>38</sup>

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<sup>30</sup> *Id.* § 6(a)(4) (“[P]rocedures other than subpoenas shall be used by the Inspector General to obtain documents and information from Federal agencies.”).

<sup>31</sup> *Id.* § 6(f).

<sup>32</sup> S. REP. NO. 95-1071, at 7, 9. (1978). *See also* S. REP. NO. 110-262, at 1 (2008) (in report of Senate Committee on Homeland Security and Government Affairs accompanying the Senate version of the IG Reform Act of 2008, observing that “[i]t is essential that Inspectors General operate with sufficient independence,” at least from their agency, in order “to do their jobs well”).

<sup>33</sup> *See NASA v. Fed. Labor Rels. Auth.*, 527 U.S. 229, 240 (1999) (“In conducting their work, Congress certainly intended that the various OIGs would enjoy a great deal of autonomy. . .”).

<sup>34</sup> 5 U.S.C. App. §§ 3(a), 8G(c). S. REP. NO. 95-1071, at 25 (1978) (“[T]he committee intends to safeguard against the appointment of an Inspector and Auditor General that is motivated by any considerations other than merit.”).

<sup>35</sup> 5 U.S.C. App. § 3.

<sup>36</sup> *Id.* §§ 3(a), 8G(d)(1).

<sup>37</sup> *See* U.S. GOV’T ACCOUNTABILITY OFF., GAO-20-639R 8-751, INSPECTORS GENERAL INDEPENDENCE 3 (2020) (noting that GAGAS “helps protect IG independence” by emphasizing the “need for auditors to identify any threats to their independence and to put in place any appropriate safeguards needed to mitigate them.”).

<sup>38</sup> Agency heads may comment on but not alter IG reports to Congress. 5 U.S.C. App. § 5(b). *See also The Inspector General Act: 20 Years Later: Hearings before the Senate Committee on Governmental Affairs*, 105th Cong., 2d Sess., 2 (1998) at 45 (statement of June Gibbs Brown, Inspector General of the U.S. Dept. of Health and Human Services) (“A key component of OIG independence is our direct communication with the Members and staff of the Congress...Information can and must go directly from the Inspectors General to the Hill, without prior agency and administration clearance.”). Some IGs have greater reporting obligations to Congress. *See* 50 U.S.C. § 3517(d)(3) (Central Intelligence Agency IG reporting requirements).

- detailing a process by which IG budget estimates are provided to Congress;<sup>39</sup> and
- requiring that the President (or, in the case of DFE IGs, the DFE head) provide written communication for any IG removal or transfer to both houses of Congress “not later than 30 days before the removal.”<sup>40</sup>

These various statutory features highlight the anatomy of independence. While restrictions on removal are the dominant consideration, they are not the only means by which Congress creates semi-autonomous entities.<sup>41</sup> Independence can arguably be achieved through a variety of features, each contributing to the overall reduction in the level of influence and control the executive branch wields over a given office.<sup>42</sup>

But as previously noted, IGs are by no means insulated from executive oversight. In addition to the fact that IGs are removable either by the President or the DFE head, the IG Act explicitly provides that IGs “report to” and are “under the general supervision” of the head of the agency they oversee.<sup>43</sup> This supervision has at times been described as “nominal” by reviewing courts.<sup>44</sup> But it nonetheless gives an agency head enough influence for the Supreme Court to deem the agency head to be one of the IGs supervising authorities.<sup>45</sup> The Court has also noted that IGs function as part of the agency they oversee, reasoning that they are “employed by, act on behalf of, and operate for the benefit of” the agency of which they are “a part.”<sup>46</sup>

The current IG framework, therefore, gives IGs freedom in carrying out their duties, but also puts the officials in a unique position—one in which they are responsible to different masters. Establishment IGs, for example, are simultaneously removable by the President, subject to supervision by the agency head, and required to keep Congress fully and currently informed.<sup>47</sup>

## Existing IG Removal Restrictions

The IG Act currently provides that an IG may be removed from office by the President or, in the case of a DFE IG, the DFE head.<sup>48</sup> However, if the IG is removed or transferred to another position, the President or the DFE head “shall communicate in writing the reasons for any such

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<sup>39</sup> See 5 U.S.C. App. § 6(g); Wilhelm, *supra* note 1, at 13-14 (discussing IG budget proposals).

<sup>40</sup> 5 U.S.C. App. §§ 3(b), 8G(e)(2). In the case of a DFE that is run by a board, the IG Act provides that “a removal under this subsection may only be made upon the written concurrence of a 2/3 majority of the board....” *Id.* § 8G(e)(1).

<sup>41</sup> See Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 825 (2013) (“Congress often structures agencies to be independent from the Executive Branch in hopes that a measure of political insulation will enable the agencies to pursue policy objectives that (hopefully) yield long-term benefits. To do so, Congress selects from a ‘menu of options’ in order ‘to structure the agency to be more or less insulated from presidential control.’”).

<sup>42</sup> See *id.* at 784-812 (describing various “indicia of independence traditionally associated with independent agencies”).

<sup>43</sup> 5 U.S.C. App § 3(a).

<sup>44</sup> *Nuclear Regul. Comm’n v. Fed. Labor Rel. Auth.*, 25 F.3d 229, 235 (4th Cir. 1994).

<sup>45</sup> *NASA v. Fed. Labor Rel. Auth.*, 527 U.S. 229, 240-41 (1999) (stating that “each Inspector General has no supervising authority—except the head of the agency of which the OIG is a part”).

<sup>46</sup> *Id.* at 241.

<sup>47</sup> *Id.* at 240 (“Other than congressional committees (which are the recipients of the reports prepared by each Inspector General) and the President (who has the power to remove an Inspector General), each Inspector General has no supervising authority—except the head of the agency of which the OIG is a part.”); S. REP. NO. 95-1071, at 7 (1978) (describing the IG as “an individual whose independence is clear and whose responsibility runs directly to the agency head and ultimately to the Congress.”).

<sup>48</sup> 5 U.S.C. App § 3(b).

removal or transfer to both Houses of Congress, not later than 30 days before the removal or transfer.”<sup>49</sup>

The IG Act’s text does not, by its terms, substantively limit the reasons for which the President or DFE head can remove an IG.<sup>50</sup> As a purely textual matter, the notification requirement appears to be primarily procedural. According to one federal appellate court, the provision is akin to a report-and-wait provision that was intended to give Congress “an opportunity for a more expansive discussion of the President’s reasons for removing an inspector general.”<sup>51</sup> In short, if Congress believes an IG removal to be unwarranted, the provision gives Congress a 30-day period to dissuade the President or a DFE head—through the use of Congress’s legislative powers and other levers of influence—from taking the announced course of action.<sup>52</sup>

The current 30-day notification in the IG Act was not in the original version of the legislation. The historical evolution of the IG Act’s removal provision reflects Congress’s intent to strike a delicate balance between autonomy and supervision: to give IGs enough independence to be effective, but not so much as to create an adversarial relationship to the executive branch.<sup>53</sup> An early House version of the IG Act would have required the President to notify both houses of Congress of the reasons for any IG removal, but did not require this notification to occur prior to the removal or transfer of the IG. The Department of Justice (DOJ) objected to that provision on constitutional grounds, arguing that such a provision would constitute “an improper restriction on the President’s exclusive power to remove presidentially-appointed executive officers.”<sup>54</sup> The House committee that reported out the bill disagreed with the DOJ’s position, but the House nevertheless removed the presidential notification requirement, instead adding language that would have mandated that the Comptroller General promptly investigate and report to Congress on the “circumstances” of any removal of an IG.<sup>55</sup>

The House bill was then taken up in the Senate, which reinstated the original House approach by requiring that the President “communicate the reasons for any [] removal to both Houses of Congress.”<sup>56</sup> The Senate committee report accompanying the Senate’s competing version of the IG Act acknowledged and rejected the DOJ’s constitutional objections, determining that the notification requirement was “justified and permissible.”<sup>57</sup> The Senate report also elaborated on the effect of the provision, stating that the intent was to provide IGs with a “measure of

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<sup>49</sup> *Id.*

<sup>50</sup> The Supreme Court recently suggested that a similar removal provision that requires the President to “communicate” his “reasons” for removing the Comptroller of the Currency” did not prevent the President from removing “the Comptroller for any reason.” *Seila Law, LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2201 n. 5 (2020).

<sup>51</sup> *Walpin v. Corp. For Nat’l & Cmty. Servs.*, 630 F.3d 184, 188 (D.C. Cir. 2011).

<sup>52</sup> *See Walpin v. Corp. for Nat’l, & Cmty. Serv.*, 718 F. Supp. 2d 18, 23 (D.D.C. 2010) (describing the IG Act as “giving Congress a mechanism by which it receives advance notice that the President would be removing an Inspector General, allowing Congress, not the Inspector General himself, to act by communicating with the President”).

<sup>53</sup> As the Senate report accompanying the IG Act legislation observed, an IG’s “efforts will be significantly impaired if he does not have a smooth working relationship with the [agency] head....” S. REP. NO. 95-1071, at 9 (1978).

<sup>54</sup> *Memorandum Opinion for the Attorney General: Inspector General Legislation*, 1 Op. Off. Legal Counsel 16, 18 (1977).

<sup>55</sup> H.R. REP. NO. 95-584, at 2 (1977) (noting that the notification requirement did not restrict the President’s removal power but “specifically allow[ed] the President to remove any Inspector General at any time”).

<sup>56</sup> S. REP. NO. 95-1071, at 45 (1978).

<sup>57</sup> *Id.* at 26 (“[T]he committee believes that unlike a provision which permitted the President to remove an official only for cause, requiring communication by the President to Congress, after the fact of removal, does not impair the President’s right to remove an executive official. But even if the requirement does place some constraint on the President’s removal power, the committee believes the requirement is justified and permissible.”).

independence” and noting the Senate’s intent that the provision act as something more than a procedural notice requirement:

While the committee has not required the President to have “cause” before removing an Inspector and Auditor General, the committee expects that there would be some justification—other than the desire to remove an Inspector and Auditor General who is performing his duties in a way which embarrasses the executive—to warrant the removal action.<sup>58</sup>

The House ultimately acceded to the Senate version.

Congress amended the IG Act notification provision in 2008 to “strengthen” and “safeguard” IG independence by requiring notification *prior* to the removal of an IG, rather than at the time of removal, as originally directed under the statute.<sup>59</sup> The 2008 reforms added the current time limitation, which now requires the President to communicate his reasons for any “removal or transfer to both Houses of Congress, not later than 30 days before the removal or transfer.”<sup>60</sup> The legislative history of the 2008 amendment suggests that the purpose of this change was to alter the after-the-fact nature of the notification requirement and instead “allow for an appropriate dialogue with Congress in the event that the planned transfer or removal is viewed as an inappropriate or politically motivated attempt to terminate an effective Inspector General.”<sup>61</sup> While the Senate report accompanying the amendment expressed “hope” that the provision would “encourage useful communication between Congress and the Executive Branch on IG performance and serve as an effective deterrent against improper terminations,” it also stated that “the provision does not alter the President’s ultimate authorities with respect to Executive Branch employees.”<sup>62</sup> As in 1978, the legislative history for the 2008 amendments suggests that Congress viewed the notification requirement as not only a procedural requirement, but also a mechanism to deter unwarranted presidential removals:

The Committee intends that Inspectors General who fail to perform their duties properly whether through malfeasance or nonfeasance, or whose personal actions bring discredit upon the office, be removed. The requirement to notify the Congress in advance of the reasons for the removal should serve to ensure that Inspectors General are not removed for political reasons or because they are doing their jobs of ferreting out fraud, waste and abuse.<sup>63</sup>

Although Congress considered imposing explicit statutory restrictions on the reasons for which a President could remove an IG in 2008 (indeed, the House initially approved such a provision), Congress opted not to do so.<sup>64</sup> As described by the Government Accountability Office, the general

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<sup>58</sup> *Id.* See also U.S. GOV’T ACCOUNTABILITY OFF., GAO-06-931SP, HIGHLIGHTS OF THE COMPTROLLER GENERAL’S PANEL ON FEDERAL OVERSIGHT AND THE INSPECTORS GENERAL 5 (2006) (“The removal authority of the President is intended to permit the President to make changes when the performance of an IG is unsatisfactory or when it appears that appointment of another individual might result in more effective performance. Removal of IGs without cause could give the appearance of political maneuvering to control these important offices.”).

<sup>59</sup> S. REP. NO. 110-262, at 1-2 (2008) (Senate committee report for legislation eventually incorporated into the enacted version of the IG Reform Act of 2008).

<sup>60</sup> 5 U.S.C. App. § 3(b).

<sup>61</sup> S. REP. NO. 110-262, at 4 (2008).

<sup>62</sup> *Id.* at 5.

<sup>63</sup> *Id.* at 8-9.

<sup>64</sup> See H.R. 928, 110th Cong. § 3 (2007); S. REP. NO 110-262, at 5 (2008) (“This advance notice provision was widely endorsed by the IG community as a useful deterrent against improper intimidation or dismissal. By contrast, the Inspectors General were divided over proposals to create fixed terms for IGs with dismissal only ‘for cause.’”).

debate over further strengthening IG removal protections related to the proper balancing of autonomy, supervision, and accountability, with some arguing that limiting the President to “removal for cause could help relieve immediate pressures of removal, but such independence could also lead to an IG who is isolated from the agency head and the rest of the agency,” thereby threatening the “IG concept” and the need for the IG to maintain a working relationship with the agency.<sup>65</sup> Nevertheless, given the relative infrequency of IG removals since 1978, the notification provision (in combination with other IG Act provisions that support IG independence) has, as a historical matter, arguably deterred Presidents from treating IGs like officials who serve at the President’s pleasure.<sup>66</sup>

Recent Presidents have construed the notice provision narrowly, interpreting it as imposing neither substantive restrictions on removal, nor requiring any significant explanation or discussion of the reason for removal, nor barring the President from taking employment action against the IG short of removal within the 30-day waiting period. For example, both President Obama and President Trump have removed IGs due to a “lack of confidence” and placed IGs on administrative leave during the 30-day waiting period.<sup>67</sup> The U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) appears to have endorsed this vision of the statute, at least in the context of a mandamus suit in which a removed IG asked the court to restore him to his position.<sup>68</sup> In *Walpin v. Corporation for National and Community Services*, a former IG argued that President Obama had violated the IG Act by placing him on administrative leave during the waiting period and providing Congress with an inadequate justification for his removal.<sup>69</sup> President Obama’s explanation for the IG’s removal stated only that he had lost “fullest confidence” in the IG.<sup>70</sup> Both the D.C. Circuit and the district court below rejected the IG’s arguments, holding that the President’s “explanation satisfies the minimal statutory mandate” as the IG Act notification provision “imposes no ‘clear duty’ to explain the reasons in any greater detail.”<sup>71</sup> The D.C. Circuit also suggested that placing the IG on administrative leave during the 30-day waiting period did not appear to amount to a removal or transfer without notice in violation of the IG Act, reasoning that the Act “provides no right to continued duty performance but only to deferral of ‘removal’ until thirty days after notice is given.”<sup>72</sup>

Although the D.C. Circuit’s interpretation of the statutory text suggests a narrow construction of the notification provision, there is evidence that Congress’s intent was that the provision would work as more than a procedural waiting period before formal removal. As previously discussed, the legislative history of the IG Act—both when initially enacted in 1978 and later when amended in 2008—suggests that Congress believed that the notification should at least provide Congress

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<sup>65</sup> U.S. GOV’T ACCOUNTABILITY OFF., GAO-06-931SP, HIGHLIGHTS OF THE COMPTROLLER GENERAL’S PANEL ON FEDERAL OVERSIGHT AND THE INSPECTORS GENERAL 6 (2006).

<sup>66</sup> See CRS In Focus IF11546, *Removal of Inspectors General: Rules, Practice, and Considerations for Congress*, by Ben Wilhelm.

<sup>67</sup> See Letter from Donald Trump, President of the United States, to Nancy Pelosi, Speaker, House of Representatives (May 15, 2020); Joint Staff Report, Sen. Fin. Comm., *The Firing of the Inspector General for the Corporation for National and Community Service*, 111th Cong. (2009) at 47.

<sup>68</sup> *Walpin v. Corp. For Nat’l & Cmty. Servs.*, 630 F.3d 184, 187 (D.C. Cir. 2011). In a mandamus suit, a party must show a “‘clear and indisputable right to relief’ based on a ‘clear and compelling duty’ to act....” *Id.*

<sup>69</sup> *Id.* at 185.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 187.

<sup>72</sup> *Id.*

with enough information to assess whether a planned IG removal is based on grounds that Congress would deem concerning.<sup>73</sup>

Thus, while recent presidential actions may comply with IG Act requirements, the President's placing an IG on administrative leave prior to removal and articulating only that the removal is based on a lack of confidence appears to be inconsistent with Congress's aspirational intent for how the notification requirements would work in practice. The legislative history of the IG Act seems to indicate Congress's hope that the advanced notification requirement would not only deter removals motivated by either political disagreement or a desire to avoid the embarrassment inherent in IGs exposing waste, fraud, or abuse, but also provide Congress with the information necessary to make an informed response to the presidential action.<sup>74</sup>

To give force and effect to its aspirational intent, but mindful of the possible operational implications to IGs, Congress could choose to strike the balance between autonomy, accountability, and supervision differently. Increasing IG independence and decreasing executive branch influence could be achieved in various ways, but restricting the President's (or a DFE's) ability to remove IGs would perhaps be the most direct approach. Congress could, therefore, look to protect IGs from what it may view as unwarranted removals by prohibiting termination of an IG except "for cause."<sup>75</sup> Yet, Congress's constitutional authority in this area is fraught with uncertainty and directly implicates the constitutional separation of powers and the President's Article II powers. Altering the removal of IGs would accordingly be subject to certain constitutional constraints and considerations addressed below.

## Legal Principles of Removal: Constitutional Parameters of Statutory Controls

Congress has the constitutional authority to create executive branch offices; empower those offices through the delegation of authority; select (subject to the constraints of the Appointments Clause) the method by which an office is filled; and when necessary, design an office in a way

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<sup>73</sup> For instance, the legislative history accompanying the IG Act and its subsequent amendments reflect a view that Congress should have an opportunity to assess whether a removal was motivated by an inappropriate desire to remove an IG for "political reasons," because an IG investigation risked "embarrass[ment]," or because the IG was "doing their job[] of ferreting out fraud, waste and abuse." S. REP. NO. 110-262, at 9 (2008). *See also* S. REP. NO. 95-1071, at 26 (1978) ("While the committee has not required the President to have 'cause' before removing an Inspector and Auditor General, the committee expects that there would be some justification—other than the desire to remove an Inspector and Auditor General who is performing his duties in a way which embarrasses the executive—to warrant the removal action.").

<sup>74</sup> S. REP. NO. 95-1071, at 26 (1978); S. REP. NO. 110-262, at 8-9 (2008).

<sup>75</sup> In the 116<sup>th</sup> Congress, the House approved legislation that would do just that. H.R. 6800, 116th Cong. Div. G, § 70104 (2020) (as passed by the House, May 15, 2020). Moreover, federal law already extends "for cause" protections to the Postal Service IG. *See* 39 U.S.C. § 202(e) (providing that the Postal Service IG shall be "at any time be removed upon the written concurrence of at least 7 Governors, but only for cause."). The constitutionality of that provision, however, may be in question as a result of the Supreme Court's ruling in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010), holding that Congress cannot insulate an officer from presidential control with dual layers of for cause protections. *See infra* notes 166-68. The Postal Service IG may only be removed for cause by the Postal Service Board of Governors, who in turn, are only removable by the President "for cause." As described below, however, that may depend on whether the Postal Service IG is an "Officer of the United States." *See infra* "Are IGs Officers of the United States?"

that encourages operational independence from the political influence of the executive branch or (much less frequently) Congress itself.<sup>76</sup>

In practice, the independence enjoyed by a given office is not easily quantifiable, nor even sometimes readily discernible.<sup>77</sup> And rather than representing a binary choice, independence arguably rests on a sliding scale that Congress can calibrate (within constitutional limits) to achieve the desired level of autonomy through the use of various statutory characteristics.<sup>78</sup> Typical “independence-promoting features” provided in statute include options such as fixed-length terms for officeholders, apolitical or bipartisan appointment requirements, reduced day-to-day supervision, exemption from centralized executive branch rulemaking or appropriations review, independent litigating authority, and most importantly, removal restrictions.<sup>79</sup>

## Statutory Removal Restrictions

Removal restrictions are creatures of statute, meaning they can vary by legislative enactment. Restrictions can be primarily procedural, as with the existing IG Act provision that requires only that the President provide advance notice prior to a removal.<sup>80</sup> Or they can impose substantive limitations on the reasons for which the President can remove an official. These substantive restrictions often take the form of a provision that permits the President to remove an official only “for cause.” These “for cause” removal provisions do not completely deny the President the power of removal,<sup>81</sup> but instead cabin that power by explicitly articulating the permissible justifications for its exercise.

There is no uniform “for cause” statutory template to be applied to every IG. However, the typical provision prevents the President, or another executive branch officer, from removing an identified official except in cases of “inefficiency, neglect of duty, or malfeasance in office.”<sup>82</sup> Congress, however, can adjust this language to make a given provision either more or less restrictive.<sup>83</sup> Yet,

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<sup>76</sup> See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 500 (2010) (“Congress has plenary control over the salary, duties, and even existence of executive offices.”); *Myers v. United States*, 272 U.S. 52, 129 (1926) (“To Congress under its legislative power is given the establishment of offices, the determination of their functions and jurisdiction, the prescribing of reasonable and relevant qualifications and rules of eligibility of appointees, and the fixing of the term for which they are to be appointed and their compensation.”). See generally CRS Report R45442, *Congress’s Authority to Influence and Control Executive Branch Agencies*, by Todd Garvey and Daniel J. Sheffner.

<sup>77</sup> *Seila Law, LLC, v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2237 (2020) (Kagan, J. dissenting in part) (“A given agency’s independence (or lack of it) depends on a wealth of features, relating not just to removal standards, but also to appointments practices, procedural rules, internal organization, oversight regimes, historical traditions, cultural norms, and (inevitably) personal relationships. It is hard to pinpoint how those factors work individually, much less in concert, to influence the distance between an agency and a President.”).

<sup>78</sup> See *Datla and Revesz*, *supra* note 39, at 784 (noting that “the binary distinction between independent and executive agencies is false.”).

<sup>79</sup> See, e.g., *Collins v. Mnuchin*, 896 F.3d 640, 660-61 (5th Cir. 2018), *reh’g en banc*, 938 F.3d 553 (2019), *cert. granted*, 141 S. Ct. 193 (2020).

<sup>80</sup> 5 U.S.C. App. § 3(b).

<sup>81</sup> *Morrison v. Olson*, 487 U.S. 654, 692 (1988) (noting that for cause removal protections do not create “a case in which the power to remove an executive official has been completely stripped from the President, thus providing no means for the President to ensure the ‘faithful execution’ of the laws”).

<sup>82</sup> See *Bowsher v. Synar*, 478 U.S. 714, 725 n.4 (1986) (noting that “statutes establishing independent agencies typically specify that an official is removable only “for inefficiency, neglect of duty, or malfeasance in office”).

<sup>83</sup> See *Free Enter. Fund*, 561 U.S. at 503 (describing the removal provision limiting PCAOB members’ removal to willful violations of certain laws as an “unusually high standard”).

because “it appears that no President has ever actually sought to” directly test “the scope of a ‘for cause’ provision,” the courts have never clearly defined what type of misconduct falls within the meaning of the typical language.<sup>84</sup>

The Supreme Court has suggested that “inefficiency,” “neglect of duty,” and “malfeasance” are “very broad” terms and could “sustain removal . . . for any number of actual or perceived transgressions. . . .”<sup>85</sup> The D.C. Circuit has similarly described the usual for cause formulation as a “modest” limitation, requiring only that the official may not be removed for “personal or partisan reasons, or for no reason at all.”<sup>86</sup> But most recently, in *Seila Law v. Consumer Financial Protection Bureau (CFPB)*, the Supreme Court viewed the for cause provision protecting the Director of the CFPB as “impos[ing] a meaningful restriction on the President’s removal authority,” at least when read in the context of the statute creating the CFPB.<sup>87</sup> As such, despite the relative prevalence of “for cause” restrictions in federal law, there is significant uncertainty as to the degree of protection the provisions actually provide. However interpreted, Congress’s authority to provide executive branch officials with removal restrictions is subject to important, though ambiguous, constitutional limits.

## The Removal Power

Congress’s exercise of its broad power to create and structure the executive branch bureaucracy at times comes into tension with other constitutional principles, including the separation of powers. For example, congressional attempts to design agencies or offices in a way that encourages independence can collide with the President’s implied constitutional power to exercise “general administrative control” over the executive branch and its officials.<sup>88</sup> This presidential power over executive branch personnel derives from Article II of the Constitution.<sup>89</sup> It is founded in the proposition that the Constitution—by vesting “the executive Power” solely in the President and making it his personal responsibility to “take Care that the Laws be faithfully executed”—confers upon the President both the power and the duty to supervise and control those who exercise executive power.<sup>90</sup> The doctrine also serves to protect the Constitution’s interest in accountability: those who execute the law must be accountable to the President who, in turn, is accountable to the voting public. Absent that “clear and effective chain of command,” accountability is diffused, and “the public cannot determine where the blame for a pernicious measure should fall.”<sup>91</sup> As such, statutory features that excessively insulate an official from the President, such that he no longer exercises the “meaningful” or “adequate” control necessary to ensure accountability, violate the separation of powers.

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<sup>84</sup> *Id.* at 524 (Breyer, J., dissenting). See also Aditya Bamzai, *Taft, Frankfurter, and the First Presidential For-Cause Removal*, 52 U. RICH. L. REV. 691, 691-737 (2018) (describing President Taft’s removal of an official after providing notice and a hearing).

<sup>85</sup> This statement was made in connection to a provision that protected the Comptroller General from at will removal by Congress. *Bowsher*, 478 U.S. at 729.

<sup>86</sup> *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 90 (D.C. Cir. 2018), *abrogated by* *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020).

<sup>87</sup> *Seila Law*, 140 S. Ct. at 2207. The court was “not persuaded” that the provision left the President with “substantial discretion” to remove the Director. *Id.* at 2206.

<sup>88</sup> See *Free Enter. Fund*, 561 U.S. at 492-93 (“Article II confers on the President “the general administrative control of those executing the laws.”) (citing *Myers v. United States*, 272 U.S. 52, 164 (1926)).

<sup>89</sup> *Id.*

<sup>90</sup> U.S. CONST. art. II, §§ 1, 2.

<sup>91</sup> *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 479 (2010).

While a President can control executive officials in various ways, such as through leveraging the influence of his office, the Supreme Court has observed that the “‘bureaucratic minutiae’ a President might use to corral agency personnel is no substitute for at will removal.”<sup>92</sup> Thus, a key mechanism by which the President supervises his subordinates’ enforcement and execution of the law, and thereby ensures their accountability to him, is the power of removal.<sup>93</sup> As previously noted, the Supreme Court has recognized that the power to remove an official is “a powerful tool for control,” for it is that authority that the subordinate official “must fear and, in the performance of his functions, obey.”<sup>94</sup> The mere threat of removal thereby acts as a “Damocles’ sword,” hanging over an official and deterring (but not prohibiting) action inconsistent with presidential priorities.<sup>95</sup>

Removal is not only an effective tool of control, it is also one that the President possesses by virtue of the Constitution.<sup>96</sup> Although the Constitution does not speak directly on the matter, the Supreme Court has made clear that “the Constitution has been understood to empower the President to keep [his] officers accountable—by removing them from office, if necessary.”<sup>97</sup> It is a power that “has long been confirmed by history and precedent” and one that ensures that the President remain responsible for exercises of “[t]he executive Power.”<sup>98</sup>

The removal power also derives from the practical nature of governing. Although “[t]he executive Power” is vested in the President alone, it has been described as too great for “one man” to perform on his own.<sup>99</sup> As such, lesser executive branch offices have and may be created by Congress to assist the President. But, if it is the President’s responsibility to “take care that the laws be faithfully executed,” then the President “must have some ‘power of removing those for whom he cannot continue to be responsible.’”<sup>100</sup> Thus, the Constitution generally confers the President with “the authority to remove those who assist him in carrying out his duties.”<sup>101</sup>

The question is what authority Congress has to limit this constitutional power of removal. On that front, the Court’s removal jurisprudence continues to shift and develop. For some time, the Supreme Court sought to balance the powers of Congress and the President by asking whether the independence created by a given removal restriction impermissibly interfered with the President’s ability to carry out his constitutional function, including his responsibility to “take care” that his subordinates faithfully execute the law.<sup>102</sup> This analytical framework established few clear lines, and as a result, judicial assessment of statutory removal limitations often plunged courts into “a

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<sup>92</sup> *Seila Law*, 140 S. Ct. at 2207 (citing *Free Enter. Fund*, 561 U.S. at 500).

<sup>93</sup> *Free Enter. Fund*, 561 U.S. at 501 (“A key ‘constitutional means’ vested in the President—perhaps the key means—was ‘the power of appointing, overseeing, and controlling those who execute the laws.’”) (citations omitted).

<sup>94</sup> *Edmond v. United States*, 520 U.S. 651, 664 (1997); *Bowsher v. Synar*, 478 U.S. 714, 726 (1986). Or, as Justice Kavanaugh put it while serving on the D.C. Circuit: “the power to remove is the power to control.” *In re Aiken Cty.*, 645 F.3d 428, 442 (D.C. Cir. 2011).

<sup>95</sup> *Wiener v. United States*, 357 U.S. 349, 356 (1958).

<sup>96</sup> See *Seila Law*, 140 S. Ct. at 2206 (“[T]ext, first principles, the First Congress’s decision in 1789, *Myers*, and *Free Enterprise Fund* all establish that the President’s removal power is the rule, not the exception.”).

<sup>97</sup> 1 ANNALS OF CONG. 463 (1789) (“If any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the law.”).

<sup>98</sup> *Seila Law*, 140 S. Ct. at 2197.

<sup>99</sup> *Id.*

<sup>100</sup> *Free Enter. Fund*, 561 U.S. at 493. But those subordinate officers “must remain accountable to the President, whose authority they wield.” *Seila Law*, 140 S. Ct. at 2197.

<sup>101</sup> *Seila Law*, 140 S. Ct. at 2198 (citing *Free Enter. Fund*, 561 U.S. at 513-14).

<sup>102</sup> U.S. CONST. art. II, § 2.

vast ‘field of doubt,’” where they were left to wrestle with the question of how much independence is too much?<sup>103</sup> But, as discussed below, the Court now appears to be settling on a more explicit conception of the removal power, including a default constitutional principle that the President must retain the power to remove executive branch officers, subject to at least two identified exceptions: one for “multi-member expert agencies that do not wield substantial executive power” and another for individual “inferior officers with limited duties and no policymaking or administrative authority.”<sup>104</sup>

## The Relationship Between Appointment and Removal

Before addressing the Court’s removal jurisprudence, it is important to note that removal cases often involve issues arising from the Appointments Clause. The constitutional principles applying to appointments and removals are intimately related: one governs the start of an official’s tenure, while the other governs the end. By ensuring that those executing the laws are responsible and accountable to the President, each principle acts as a guardrail to Congress’s authority to structure executive offices, and they ensure that the President may staff the highest levels of the executive bureaucracy with officials of his own choosing.

The Appointments Clause limits Congress’s involvement in the appointment of “Officers of the United States” and ensures the President’s role in selecting the most powerful executive branch officials.<sup>105</sup> Under the Clause, principal officers must be appointed by the President, “with the Advice and Consent of the Senate,” while Congress may vest the appointment of “inferior Officers” “in the President alone, in the Courts of Law, or in the Heads of Departments.”<sup>106</sup> Non-officers—that is, “mere employees”—are not subject to any constitutionally required method of appointment.<sup>107</sup> As the Supreme Court recently put it, “the Appointments Clause cares not a whit about who name[s]” employees.”<sup>108</sup>

An executive branch official’s classification for Appointments Clause purposes typically depends both on the amount of authority the official exercises and the discretion with which they wield that authority.<sup>109</sup> Generally, if an executive official<sup>110</sup> holds a “continuing position established by law” and has “significant authority pursuant to the laws of the United States,” he is an “Officer of

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<sup>103</sup> *Collins v. Mnuchin*, 896 F.3d 640, 661 (5th Cir. 2018), *reh’g en banc*, 938 F.3d 553 (2019), *cert. granted*, 141 S. Ct. 193 (2020) (citing *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 632 (1935)). *See also* *Bowsher v. Synar*, 478 U.S. 714, 762-763 (1986) (White, J., dissenting) (“This inquiry is, to be sure, not one that will beget easy answers; it provides nothing approaching a bright-line rule or set of rules.”).

<sup>104</sup> *Seila Law*, 140 S. Ct. at 2200.

<sup>105</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>106</sup> *Id.*; *Freytag v. Comm’r*, 501 U.S. 868, 878 (1991) (“Thus, the Constitution limits congressional discretion to vest power to appoint ‘inferior Officers’ to three sources: ‘the President alone,’ ‘the Heads of Departments,’ and ‘the Courts of Law.’”).

<sup>107</sup> *Lucia v. SEC*, 138 S. Ct. 2044, 2049 (2018) (explaining that officers constitute “a class of government officials distinct from mere employees”); *Buckley v. Valeo*, 424 U.S. 1, 126 n.162 (1976) (per curiam) (stating that “[e]mployees are lesser functionaries subordinate to officers of the United States”).

<sup>108</sup> *Lucia*, 138 S. Ct. at 2051.

<sup>109</sup> *See, e.g.*, *Edmond v. United States*, 520 U.S. 651, 662 (1997) (acknowledging that military appellate judges exercise “significant authority”); *Freytag*, 501 U.S. at 881–82 (holding that special trial judges of an Article I tax court are “Officers of the United States” based on the degree of authority they exercise); *Buckley*, 424 U.S. at 138 (concluding that members of the Federal Election Commission exercised “significant authority”).

<sup>110</sup> An officer also generally must hold a position that is “continuing position established by law.” *Lucia*, 138 S. Ct. at 2051 (citing *United States v. Germaine*, 99 U.S. 508, 511 (1879)).

the United States.”<sup>111</sup> So with respect to most statutorily established offices, the judicially created dividing line between “officers” and “employees” is the easily stated, but highly malleable standard of “significant authority.”<sup>112</sup> The Supreme Court has provided no clear definition of what constitutes “significant authority,” and as such, “virtually every court and commentator begins” an Appointments Clause analysis “by conceding that the case law, and hence, the doctrine . . . is unclear.”<sup>113</sup> Yet finding that a position within the executive branch exercises “significant authority” triggers a series of important constitutional requirements. If a power is significant, it may be exercised only by an “Officer,” and an Officer (either inferior or principal) must be appointed in the manner prescribed by the Appointments Clause.<sup>114</sup>

If it is established that the “significant authority” threshold is crossed, the applicable standard for then distinguishing between principal officers—who must be appointed with the advice and consent of the Senate—and inferior officers—whose appointment Congress may vest elsewhere—is also subject to some debate.<sup>115</sup> The Supreme Court has “not set forth an exclusive criterion for distinguishing between principal and inferior officers.”<sup>116</sup> Indeed, in *Seila Law* the Court explained that although it had never “set forth an exclusive criterion for distinguishing between principal and inferior officers,” it had considered previously “factors such as the nature, scope, and duration of an officer’s duties. More recently, we have focused on whether the officer’s work is ‘directed and supervised’ by a principal officer.”<sup>117</sup> The Court’s more recent focus on whether the officer’s work is directed and supervised by another suggests that the distinction between an inferior and principal officer hinges mainly on whether the officer is subject to supervision by some higher official.<sup>118</sup> Under this approach, principal officers are generally subject only to supervision by the President, while inferior officers are generally subject to supervision by a higher-ranking, Senate-confirmed official.<sup>119</sup>

An executive branch official’s classification as employee, inferior officer, or principal officer largely governs the method by which they may be appointed under the Appointment Clause. That same classification also has a role in determining Congress’ freedom to impose removal restrictions, but it is not necessarily a dispositive one.<sup>120</sup> The Supreme Court has in the past

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<sup>111</sup> *Id.*; *Buckley*, 424 U.S. at 126 (internal quotation marks omitted).

<sup>112</sup> The powers and functions that may constitute “significant authority” are discussed in greater detail *infra*, “Are IGs Officers of the United States?”

<sup>113</sup> John T. Plecnik, *Officers Under the Appointments Clause*, 11 PITT. TAX REV. 201, 204 (2014).

<sup>114</sup> *Buckley*, 424 U.S. at 126 (“Any appointee exercising significant authority pursuant to the laws of the United States is an ‘Officer of the United States,’ and must, therefore, be appointed in the manner prescribed by § 2, cl. 2, of [Article II].”).

<sup>115</sup> *Edmond*, 520 U.S. at 661 (“Our cases have not set forth an exclusive criterion for distinguishing between principal and inferior officers for Appointment Clause purposes.”).

<sup>116</sup> *Seila Law, LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2199 n.3 (2020) (citing *Edmond*, 520 U.S. at 661). In *Morrison*, for example, the Court employed a functional analysis that would suggest that the principal/inferior distinction is governed by evaluating the degree of authority exercised by a particular officer. *See Morrison v. Olson*, 487 U.S. 654, 671-72 (1988) (deciding that “[s]everal factors lead to th[e] conclusion” that the independent counsel is an inferior officer).

<sup>117</sup> *Seila Law*, 140 S. Ct. at 2199 n. 3.

<sup>118</sup> *Edmond*, 520 U.S. at 663; *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 510 (2010); *Seila Law*, 140 S. Ct. at 2199 n.3.

<sup>119</sup> *Edmond*, 520 U.S. at 663.

<sup>120</sup> *Seila Law*, 140 S. Ct. at 2192 (describing different standards for removal restrictions on principal and inferior officers); *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 96 n.2 (D.C. Cir. 2018) (“While that distinction is constitutionally relevant to the President’s appointments power, it is not determinative of the removal.”).

upheld “for cause” removal protections for *both* inferior officers and principal officers (when part of a certain type of multimember commission).

This report now turns to the Court’s attempt to reconcile Congress’s authority to create independent offices with the President’s power of removal.

## The Supreme Court’s Removal Jurisprudence: *Myers* Through *Seila Law*

The Supreme Court’s removal jurisprudence has evolved over time. That progression is evident in six seminal cases, including *Seila Law*, issued by the Supreme Court in 2020. After initially adopting a relatively broad view of the President’s removal power in *Myers*, the Court subsequently narrowed that holding by recognizing Congress’ authority to limit the removal of executive branch officials in cases like *Humphrey’s Executor v. United States*, *Wiener v. United States*, and *Morrison v. Olson*. More recently, however, the Court has adjusted course and rebuffed congressional attempts to create novel structural arrangements that include for cause protections in favor of protecting the President’s power to hold his subordinates accountable through an unrestricted removal power.

The 1926 decision of *Myers v. United States* invalidated a statutory provision that prohibited the President from removing an executive official—a postmaster—without first obtaining the advice and consent of the Senate.<sup>121</sup> *Myers* recognized that “the executive power” vested in the President by Article II includes “the power of appointment and removal of executive officers.”<sup>122</sup> “To hold otherwise,” and permit Congress to control effectively the removal of an executive branch official, the Court concluded, “would make it impossible for the President...to take care that the laws be faithfully executed.”<sup>123</sup>

But the Court’s holding in *Myers* extended beyond removal, also laying the foundation for the broader presidential power to exercise “general administrative control of those executing the laws...”<sup>124</sup> The various duties assigned to executive branch officers by law, the Court reasoned, “come under the general administrative control of the President by virtue of the general grant to him of the executive power, and he 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...”<sup>125</sup>

The Court began a long process of chipping away at *Myers*’ broad conception of presidential power shortly thereafter in *Humphrey’s Executor v. United States*.<sup>126</sup> In *Humphrey’s*, the Court

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<sup>121</sup> *Myers v. United States*, 272 U.S. 52 (1926).

<sup>122</sup> *Id.* at 164.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 163-64 (“Article II grants to the President the executive power of the Government, i.e., the general administrative control of those executing the laws, including the power of appointment and removal of executive officers—a conclusion confirmed by his obligation to take care that the laws be faithfully executed.”).

<sup>125</sup> *Id.* at 135. This statement is in some tension with the Court’s earlier statement in *Kendall v. United States*, 37 U.S. 524, 610 (1838) (“There are certain political duties imposed upon many officers in the executive department, the discharge of which is under the direction of the President. But it would be an alarming doctrine, that congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the constitution; and in such cases, the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President.”).

<sup>126</sup> 295 U.S. 602 (1935). See *Wiener v. United States*, 357 U.S. 349, 352 (1958) (“The assumption was short-lived that the *Myers* case recognized the President’s inherent constitutional power to remove officials no matter what the relation

made clear that the President's removal power was not "illimitable," and the Court gave its explicit consent to the use of "for cause" removal restrictions, at least as applied to officers (in this case principal officers) whose function necessitates some degree of political independence.<sup>127</sup> The *Humphrey's* opinion held that Congress could limit the President's ability to remove members of the Federal Trade Commission (FTC)—a multimember independent agency—primarily because of what the *Humphrey's* Court characterized as the "quasi-legislative and quasi-judicial" function of the agency.<sup>128</sup> In this manner *Humphrey's* distinguished *Myers*, and instead balanced the powers of Congress and the President differently depending on whether the "character of the office" could be deemed to be "purely executive."<sup>129</sup> Unlike a postmaster, the Court found the FTC was clearly not "purely executive." Its authority to make "investigations and reports [] for the information of Congress" suggested that it operated "in aid of the legislative power," and indeed was acting in that capacity as "a legislative agency."<sup>130</sup> The Court reasoned that when creating such an office, Congress's authority "to require" the official "to act in discharge of their duties independently of executive control... and to forbid their removal except for cause" could not be "doubted."<sup>131</sup>

In reaching its decision, the *Humphrey's* Court recognized the practical importance of the removal protections to Congress's goal of FTC independence. The Court noted that the FTC was "to be non-partisan" and "act with entire impartiality."<sup>132</sup> "Its duties," the Court noted, "are neither political nor executive, but predominantly quasi-judicial and quasi-legislative."<sup>133</sup> The necessity of removal protections in designing such an office was "evident" to the Court as "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."<sup>134</sup>

If *Humphrey's* began the narrowing of *Myers*, then *Wiener v. United States* continued it with vigor.<sup>135</sup> In *Wiener*, a member of a federal commission established to adjudicate war claims arising from World War II challenged President Eisenhower's authority to remove him without cause. Cutting straight to the scope of the President's constitutional power, *Wiener* held that even in the absence of statutory removal protections, the President had no "inherent power" to remove a member of a quasi-judicial body "merely because he wanted his own appointees" in the position.<sup>136</sup> Distinguishing *Myers*, the Court stated:

[t]he assumption was short-lived that the *Myers* case recognized the President's inherent constitutional power to remove officials no matter what the relation of the executive to the

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of the executive to the discharge of their duties and no matter what restrictions Congress may have imposed regarding the nature of their tenure.").

<sup>127</sup> *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629 (1935). The statute at issue in *Humphrey's* provided that individual commissioners could only be removed during their seven-year term for "inefficiency, neglect of duty, or malfeasance in office." *Id.* at 621-22.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 631.

<sup>130</sup> *Id.* at 628.

<sup>131</sup> *Id.* at 629.

<sup>132</sup> *Id.* at 624.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* 629.

<sup>135</sup> *Wiener v. United States*, 357 U.S. 349 (1958).

<sup>136</sup> *Id.* at 356 ("[W]e are compelled to conclude that no such power is given to the President directly by the Constitution, and none is impliedly confirmed upon him by statute. . . .").

discharge of their duties and no matter what restrictions Congress may have imposed regarding the nature of their tenure.<sup>137</sup>

Instead, like *Humphrey's*, the Court looked to the function of the Commission, and drew a “sharp differentiation” between those who were “part of the Executive establishment and were thus removable by virtue of the President’s constitutional powers,” and those “whose tasks require absolute freedom from Executive interference” who were not.<sup>138</sup> As such, the *Weiner* opinion held that even in the absence of explicit removal protections, the Constitution grants the President no power to remove a member of the commission “merely because he wanted his own appointees” to serve.<sup>139</sup>

The Court’s march away from *Myers*’ broad formulation of the President’s removal power culminated in *Morrison v. Olson*.<sup>140</sup> In *Morrison*, the Court again approved of statutorily imposed for cause removal protections, this time as applied to an Independent Counsel (IC). The IC was an inferior officer authorized to conduct independent investigations and prosecutions of high-level government officials.<sup>141</sup> The Court upheld a statutory framework that prevented the Attorney General from removing the IC except “for cause,”<sup>142</sup> but only after determining that Congress had afforded the President adequate authority to oversee the IC and ensure that the official faithfully executed and enforced the law. This oversight was primarily exercised through the Attorney General, who controlled whether an IC was appointed, played a significant role in initially limiting the ICs jurisdiction, established DOJ policies and regulations to which the IC was subject, and could remove the IC for cause.<sup>143</sup>

As in *Humphrey's*, the Court acknowledged that the removal restrictions were “essential...to establish the necessary independence of the office.”<sup>144</sup> But notably, the *Morrison* opinion explicitly departed from *Humphrey's* and its distinction between quasi-legislative or quasi-judicial functions and purely executive functions.<sup>145</sup> Instead, the Court noted that its prior removal jurisprudence was “designed not to define rigid categories of those officials who may or may not

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<sup>137</sup> *Id.* at 352.

<sup>138</sup> *Id.* at 353. The Court viewed the claims commission as having a “judicial character” because “[t]he claims were to be ‘adjudicated according to law,’ that is, on the merits of each claim, supported by evidence and governing legal considerations, by a body that was ‘entirely free from the control or coercive influence, direct or indirect,’ of either the Executive or the Congress.” *Id.* at 355-56 (citing *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629 (1935)).

<sup>139</sup> *Id.* at 356 (“Judging the matter in all the nakedness in which it is presented, namely, the claim that the President could remove a member of an adjudicatory body like the War Claims Commission merely because he wanted his own appointees on such a Commission, we are compelled to conclude that no such power is given to the President directly by the Constitution, and none is impliedly conferred upon him by statute simply because Congress said nothing about it.”).

<sup>140</sup> *Morrison v. Olson*, 487 U.S. 654 (1988).

<sup>141</sup> *Id.* at 671.

<sup>142</sup> The IC was removable by the Attorney General “only for good cause, physical or mental disability . . . or any other condition that substantially impairs the performance of such independent counsel’s duties.” 28 U.S.C. § 596. The IC provisions have since sunset. *See id.* § 599.

<sup>143</sup> *Morrison*, 487 U.S. at 692 (“[T]he Executive, through the Attorney General, retains ample authority to assure that the counsel is competently performing his or her statutory responsibilities in a manner that comports with the provisions of the Act.”). The Attorney General was vested with the authority to trigger the appointment of an IC, but the actual selection was at the discretion of the special division. 28 U.S.C. §§ 592, 593.

<sup>144</sup> *Morrison*, 487 U.S. at 693.

<sup>145</sup> *Id.* at 689 (“We undoubtedly did rely on the terms ‘quasi-legislative’ and ‘quasi-judicial’ to distinguish the officials involved in *Humphrey's Executor* and *Wiener* from those in *Myers*, but our present considered view is that the determination of whether the Constitution allows Congress to impose a ‘good cause’-type restriction on the President’s power to remove an official cannot be made to turn on whether or not that official is classified as ‘purely executive.’”).

be removed at will by the President, but to ensure that Congress does not interfere with the President's exercise of the "executive power" and his constitutionally appointed duty to "take care that the laws be faithfully executed" under Article II."<sup>146</sup> Thus, the appropriate standard to be applied was whether "the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty."<sup>147</sup>

Engaging in that assessment, the Court considered both the IC's function and the degree to which the statutory for cause protection undermined the President's ability to control the IC. With regard to the IC's function, the Court acknowledged that there was "no real dispute" that "functions performed by the independent counsel are 'executive.'"<sup>148</sup> However, because the IC was "an inferior officer under the Appointments Clause, with limited jurisdiction and tenure and lacking policymaking or significant administrative authority," the Court concluded that "we simply do not see how the President's need to control the exercise of that discretion is so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the President."<sup>149</sup>

As to the President's actual control, the *Morrison* opinion acknowledged that the IC exercised "no small amount of discretion and judgment in deciding how to carry out his or her duties" and that it was "undeniable that the Act reduces the amount of control or supervision that the Attorney General and, through him, the President exercises over the" IC.<sup>150</sup> The Court nevertheless held that "because the independent counsel may be terminated for 'good cause,' (including removal for "misconduct") the Executive, through the Attorney General, retains ample authority to assure that the counsel is competently performing his or her statutory responsibilities in a manner that comports with the provisions of the Act."<sup>151</sup> Congress, the court concluded, had not "sufficiently deprive[d] the President of control over the independent counsel to interfere impermissibly with his constitutional obligation to ensure the faithful execution of the laws."<sup>152</sup>

The Court altered course toward a more *Myers*-centric and restrained view of Congress's authority to limit the President's removal power in the 2010 case of *Free Enterprise Fund v. Public Company Accounting Oversight Board (PCAOB)*.<sup>153</sup> There, the Court invalidated statutory provisions providing that members of the PCAOB could be removed only for cause by the Securities and Exchange Commission (SEC), whose members were, in turn, also protected from removal by for cause removal protections.<sup>154</sup> By insulating PCAOB members (who were deemed to be inferior officers) from presidential control with *two layers* of for cause removal protections,

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<sup>146</sup> *Id.* at 689-90.

<sup>147</sup> *Id.* at 693-96 ("Although the counsel exercises no small amount of discretion and judgment in deciding how to carry out his or her duties under the Act, we simply do not see how the President's need to control the exercise of that discretion is so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the President.").

<sup>148</sup> *Id.* at 691.

<sup>149</sup> *Id.* at 691-92.

<sup>150</sup> *Id.* at 695.

<sup>151</sup> *Id.* at 692.

<sup>152</sup> *Id.* at 693.

<sup>153</sup> Between *Morrison* (1988) and *Free Enterprise Fund* (2010) the Court considered other Appointments Clause cases that, though not directly addressing the removal of federal officers, might be relevant to an analysis of that issue. See e.g., *Edmond v. United States*, 520 U.S. 651 (1997) (classifying a Coast Guard Court of Criminal Appeals judge as an inferior officer) *Freytag v. Comm'r*, 501 U.S. 868 (1991) (classifying a U.S. Tax Court special trial judge as an inferior officer).

<sup>154</sup> 561 U.S. 477, 491-98 (2010).

the law had “impaired” the President’s necessary authority to “hold[] his subordinates accountable for their conduct” and “subvert[ed] the President’s ability to ensure that the laws are faithfully executed.”<sup>155</sup>

*Free Enterprise Fund* clearly affirmed *Myers*’ principal holding that Article II vests the President with “general administrative control of those executing the laws.”<sup>156</sup> “The President cannot ‘take Care that the Laws be faithfully executed,’” the Court held, “if he cannot oversee the faithfulness of the officers who execute them.”<sup>157</sup> In short, “Officers of the United States” exercising significant executive power must be accountable to the President. But, by leaving the removal protections provided to the SEC commissioners undisturbed, the Court also implicitly affirmed Congress’s authority to use for-cause removal restrictions to promote independence of officers in certain circumstances. The opinion also explicitly left open the question of how much control, if any, the President must exercise over non-officers.<sup>158</sup> It did not decide “whether ‘lesser functionaries subordinate to officers of the United States’ must be subject to the same sort of control as those who exercise ‘significant authority pursuant to the laws.’”<sup>159</sup>

*Free Enterprise Fund* indicated the Court’s renewed resistance to extending Congress’s authority to insulate executive officers from presidential removal beyond those configurations already approved in prior precedents. In its most recent removal opinion, *Seila Law v. CFPB*, the Court reaffirmed that same approach by again invalidating the use of for cause removal restrictions in another “novel context”—this time with respect to an independent agency with significant executive power and led by a single Director.<sup>160</sup>

*Seila Law* involved a challenge to the structure of the CFPB, which as created by the Dodd Frank Act, is led by a single director with a five-year term. That Director was a principal officer exercising significant and extensive executive power, but removable by the President only for cause.<sup>161</sup> The Director was authorized to issue rules and regulations, conduct investigations, file lawsuits in federal court, bring enforcement actions, and impose civil penalties for violations of consumer finance law.<sup>162</sup> He was also authorized to request funding directly from the Federal Reserve, rather than through the annual congressional appropriations process, which gives the CFPB added independence from Congress.<sup>163</sup>

Ultimately the Court held in *Seila Law* that Congress cannot vest a principal officer with “significant executive power,” place that officer in sole charge of an agency, and then protect that individual from presidential removal except for cause.<sup>164</sup> In doing so, the opinion solidified the

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<sup>155</sup> *Id.* at 495–98 (concluding that the “[a]dded layer of tenure protection...not only protects Board members from removal except for good cause, but withdraws from the President any decision on whether that good cause exists”).

<sup>156</sup> *Id.* at 492 (citing *Myers*, 272 U.S. at 164).

<sup>157</sup> *Id.* at 484.

<sup>158</sup> *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam).

<sup>159</sup> *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 506 (2010) (noting that, in theory, the constitutional defect could be avoided if the Court could “blue-pencil a sufficient number of the Board’s responsibilities so that its members would no longer be ‘Officers of the United States’”).

<sup>160</sup> *Seila Law, LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2192 (2020).

<sup>161</sup> 12 U.S.C. § 5491(c)(3). *Seila Law*, 140 S. Ct. at 2191 (“The CFPB Director has no boss, peers, or voters to report to. Yet the Director wields vast rulemaking, enforcement, and adjudicatory authority over a significant portion of the U. S. economy.”).

<sup>162</sup> 12 U.S.C. §§ 5512, 5562-64.

<sup>163</sup> *Id.* § 5497.

<sup>164</sup> *Seila Law*, 140 S. Ct. at 2192.

beachhead against further expansion of Congress's authority to restrict the removal of executive branch officers that was started in *Free Enterprise*.

The Court also averred that it had “recognized only two exceptions to the President’s unrestricted” power to remove “those who assist him in carrying out his duties.”<sup>165</sup> First, under *Humphrey’s*, Congress can “create expert agencies led by a *group* of principal officers removable by the President only for good cause.”<sup>166</sup> And second, under cases like *Morrison*, Congress can “provide tenure protections to certain *inferior* officers with narrowly defined duties.”<sup>167</sup> The CFPB Director was not analogous to either exception because the Director was neither a member of a multimember commission nor an inferior officer, but instead unilaterally wielded “significant governmental power” while being “accountable to no one.”<sup>168</sup> Upholding this “almost wholly unprecedented” configuration would thus require the Court to “extend” the existing exceptions to the President’s “unrestricted removal power,” something the Court was not willing to do.<sup>169</sup>

The *Seila Law* opinion is notable for a variety of reasons. First, the opinion establishes that “principal officers who, acting alone, wield significant executive power,” must be removable by the President at will.<sup>170</sup> It appears then, that Congress may not structure agencies (at least those that wield significant governmental power) so as to be led by a single official protected by for cause removal protections. Such an arrangement is not only a “historical anomaly” supported only by “modern and contested” examples, but also “incompatible” with the Constitution’s penchant for dividing power to “avoid[] concentrating power in the hands of any single individual.”<sup>171</sup> Whether distributing authority between the federal government and the states, the three branches, or even between the House and the Senate, the Framers diffused power in order to combat its abuse.<sup>172</sup> Allowing Congress to create an agency that concentrated significant amounts of executive power in a single individual not directly accountable to the President, the Court reasoned, “contravenes this carefully calibrated system.”<sup>173</sup>

But perhaps of greater significance, the opinion also clarified the scope of the “exceptions” to presidential removal established in *Humphrey’s* and *Morrison*. The Court reiterated that *Humphrey’s* and *Morrison* mark the “outermost constitutional limits of permissible congressional restrictions on the President’s removal power” and characterized both cases as narrow exceptions to the President’s otherwise “unrestricted removal power.”<sup>174</sup> The Court arguably narrowed both decisions: describing *Humphrey’s* as approving for cause protections for principal officers when they are part of a “multimember body of experts, balanced along partisan lines, that performed legislative and judicial functions and was said not to exercise *any* executive power,”<sup>175</sup> while *Morrison* approved only of for cause protections for “inferior officers with limited duties and no

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<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 2203.

<sup>169</sup> *Id.* at 2192, 2201.

<sup>170</sup> *Id.* at 2211.

<sup>171</sup> *Id.* at 2202.

<sup>172</sup> *Id.* at 2202-203.

<sup>173</sup> *Id.* at 2203.

<sup>174</sup> *Id.* at 2200, 2189.

<sup>175</sup> *Id.* at 2199 (emphasis added).

policymaking or administrative authority.” Notably, however, the Court stated that it saw no need to “revisit” either precedent.<sup>176</sup>

But in arguably narrowing the application of both *Humphrey’s* and *Morrison* cases, the *Seila Law* opinion underscored the importance of an official’s status as either an inferior or principal officer to the permissibility of removal restrictions.<sup>177</sup> *Seila Law’s* chief impact, especially with regard to removal protections for sole officials, may therefore be to enlarge the role Appointments Clause principles will play in future removal cases. Under *Seila Law*, Congress is generally restricted from providing a sole principal officer with for cause removal protections—though the case appears to leave open the question of whether Congress can limit the President’s authority to remove a principal officer who is *not* “vested with significant executive power.”<sup>178</sup> Inferior officers are treated differently. Unlike a principal officer, an inferior officer who wields power unilaterally may be made removable for cause, so long as the officer’s function is analogous to that of the IC—namely that the inferior officer is charged with “limited duties” and has “no policymaking or administrative authority.”<sup>179</sup>

## Summary of the Supreme Court’s Removal Principles

Although Congress’s authority to limit the President’s power of removal is somewhat opaque, certain basic principles appear at this point to be well established:

- As a default rule, the Constitution implicitly provides the President with the authority to remove executive branch officers who assist him in carrying out the “Executive power.”<sup>180</sup>
- This necessarily includes the power to freely remove principal officers who unilaterally (i.e., not as part of a multimember body) exercise substantial amounts of executive power, such as cabinet officials and the sole heads of most federal agencies.<sup>181</sup>
- The Constitution does not give the President absolute authority to remove all executive branch officials for any reason and at any time. In exercising its legislative power to create and design federal offices, Congress has constitutional

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<sup>176</sup> *Id.* at 2206.

<sup>177</sup> *Seila Law* described the *Morrison* and *Humphrey’s* exceptions with reference to an official’s status as either a principal or inferior officer. See *Seila Law*, 140 S. Ct. at 2192 (“Our precedents have recognized only two exceptions to the President’s unrestricted removal power. In *Humphrey’s Executor v. United States*, we held that Congress could create expert agencies led by a group of principal officers removable by the President only for good cause. And in . . . *Morrison v. Olson*, we held that Congress could provide tenure protections to certain inferior officers with narrowly defined duties.”) (citations omitted).

<sup>178</sup> *Seila Law* stressed the breadth of the CFPB’s power—including the agency’s substantial rulemaking authority, “potent enforcement powers,” and “extensive adjudicatory authority”—and distinguished it from other agencies led by a sole official like the Social Security Administration and the Office of Special Counsel. *Seila Law*, 140 S. Ct. at 2193-94, 2201-02. This discussion of the CFPB Director’s authority will likely inform future understanding of what qualifies as the type of “significant executive power” that may be exercised only by an official removable by the President at will. *Id.* at 2192. The discussion also implicitly suggests that whether a lone official possesses “significant executive power” in the context of removal is a different, higher standard than whether an official possesses “significant authority” for purposes of the Appointments Clause.

<sup>179</sup> *Id.* at 2200.

<sup>180</sup> *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 496-97 (2010).

<sup>181</sup> *Seila Law*, 140 S. Ct. at 2192. (rejecting Congress’s authority to create an “independent agency that wields significant executive power and is run by a single individual who cannot be removed by the President unless certain statutory criteria are met”).

authority to use statutory removal restrictions to encourage independence under certain circumstances.<sup>182</sup>

- The Court has explicitly approved the use of for cause removal restrictions under two scenarios. First, for a principal officer who is part of a multimember board or commission that is designed to be “balanced along partisan lines” and which is not vested with executive power.<sup>183</sup> Second, for an inferior officer who unilaterally wields executive power so long as that officer has “limited duties and no policymaking or administrative authority.”<sup>184</sup>
- The precise scope of these exceptions remains unresolved, but wherever the limits to these exceptions may lie, for cause removal restrictions for an executive branch officer whose function is neither analogous to the IC or the typical multimember independent agency would appear to be of questionable validity. As such, historical precedent clearly plays a role. A removal restriction with no clear historical analogue is less likely to survive judicial scrutiny than one applied to a function that Congress has historically determined requires some degree of independence from political influence in order to be implemented effectively.<sup>185</sup>
- Even if an officer may otherwise be eligible for removal protections, there are additional limitations. Congress may not completely deprive the President of his ability to remove those who execute the law or reserve for itself the power to remove executive branch officials except through the power of impeachment.<sup>186</sup> Nor may Congress restrict the President’s power to remove an officer in a way that excessively and impermissibly interferes with the President’s ability to “oversee the faithfulness of the officers who execute” the law.<sup>187</sup> This final limitation includes a prohibition on insulating an executive branch officer from the President with dual layers of for cause protections.<sup>188</sup>

Although much ambiguity remains in the Court’s removal jurisprudence, it would appear that other principles, though not clearly established, may nonetheless be gleaned from the above caselaw.

- The two approved uses of removal restrictions are not necessarily the *only* scenarios in which Congress can use for cause removal restrictions. Instead, the multimember commission and inferior officer “exceptions” represent the “*outermost* constitutional limits of permissible congressional restrictions on the President’s removal power....”<sup>189</sup> As such, other uses of for cause removal

<sup>182</sup> See, e.g., *Humphrey's Ex'r v. United States*, 295 U.S. 602, 627-29 (1935); *Morrison v. Olson*, 487 U.S. 654, 689-92 (1988); *United States v. Perkins*, 116 U.S. 483, 485 (1886).

<sup>183</sup> *Seila Law*, 140 S. Ct. at 2199 (citing *Humphrey's*, 295 U.S. at 632).

<sup>184</sup> *Id.* at 2200 (citing *Morrison*, 497 U.S. at 691).

<sup>185</sup> *Id.* at 2201 (“Perhaps the most telling indication of [a] severe constitutional problem’ with an executive entity ‘is [a] lack of historical precedent’ to support it.”) (citing *Free Enter. Fund*, 561 U. S., at 505).

<sup>186</sup> See *Bowsher v. Synar*, 478 U.S. 714, 732 (1986); *Myers*, 272 U.S. at 176.

<sup>187</sup> See *Free Enter. Fund*, 561 U.S. at 484.

<sup>188</sup> See *id.* at 514. It is unclear whether having two layers of removal protection between an inferior officer and the President is unconstitutional in all circumstances. As noted, the PCAOB removal provision was particularly restrictive and presented “an even more serious threat to executive control than an ‘ordinary’ dual for-cause standard.” 561 U.S. at 502–03.

<sup>189</sup> See *Seila Law*, 140 S. Ct. at 2200 (citing *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F. 3d 75, 196 (D.C. Cir. 2018) (Kavanaugh, J., dissenting)) (emphasis added).

provisions (or other less restrictive removal protections such as notification requirements) that impose *less* of a burden on the President's ability to supervise the exercise of executive power by subordinate officials would appear to remain permissible.

- It appears that the more “executive” and the more significant the power exercised by an official the more constitutionally worrisome a direct lack of accountability to the President becomes.<sup>190</sup> But the inverse may also be true: the less significant and the less executive the authority, the less concern for accountability, and the less need for the President to control an official through removal. This principle is reflected in two aspects of the Court's jurisprudence: First, the Court has shown reluctance to approve removal restrictions on “purely executive” offices, those that wield “significant executive power,” or those with “policymaking or administrative authority.”<sup>191</sup> Second, the Court seems to have concluded that Congress has greater flexibility to impose for cause restrictions on inferior officers than it does on principal officers, while leaving open the question of what power of removal the President must be accorded over non-officer employees.<sup>192</sup>

## Providing For Cause Protections to IGs

Providing officials with removal restrictions can be a useful tool for encouraging independence from the President and possibly greater responsiveness to Congress. But, as noted, the Court's removal cases impose significant, if somewhat undefined, limitations on Congress's authority to do so. In the absence of explicit constitutional text and in light of the Court's historically evolving jurisprudence, the executive branch has adopted a rather broad view of the President's implied removal power. Indeed, the executive branch has previously voiced constitutional concerns with statutory restrictions that inhibit the President's power to remove IGs.<sup>193</sup> This includes the IG Act's notification requirement, as well as past proposals to provide IGs with for cause removal protections.<sup>194</sup> In both instances, the executive branch suggested that the proposed provision

<sup>190</sup> See *Free Enter. Fund*, 561 U.S. at 513- 514 (concluding that without the power to “remove those who assist him in carrying out his duties...the President could not be held fully accountable for discharging his own responsibilities”). Both *Free Enterprise Fund* and *Seila Law* explicitly articulate concerns with removal protections for those that exercise “significant executive power.” *Id.* at 514 (“While we have sustained in certain cases limits on the President's removal power, the Act before us imposes a new type of restriction—two levels of protection from removal for those who nonetheless exercise significant executive power.”) See *Seila Law*, 140 S. Ct. at 2201 (“The question instead is whether to extend those precedents to the ‘new situation’ before us, namely an independent agency led by a single Director and vested with significant executive power.”).

<sup>191</sup> See *Seila Law*, 140 S. Ct. at 2199 (citing *Humphrey's Ex'r v. United States*, 295 U.S. 602, 632 (1935) and *Morrison v. Olson*, 487 U.S. 654, 691 (1988)).

<sup>192</sup> *Free Enter. Fund*, 561 U.S. at 506.

<sup>193</sup> See, e.g., Letter from Pat Cipollone, Counsel to President Donald J. Trump, to Hon. Charles E. Grassley (May 26, 2020), available at <https://assets.documentcloud.org/documents/6929203/2020-05-26-White-House-Counsel-to-CEG-IC-IG-and.pdf>; *Memorandum Opinion for the Attorney General: Inspector General Legislation*, 1 Op. O.L.C. 16, 18 (1977) (concluding that a “requirement that the President notify both Houses of Congress of the reasons for his removal of an Inspector General constitutes an improper restriction on the President's exclusive power to remove Presidentially appointed executive officers.”).

<sup>194</sup> Statement of Administration Policy: H.R. 928 (Statement of Administration Policy: H.R. 928 (objecting to legislation providing IGs with for cause removal protections as an “intrusion on the President's removal authority and his ability to hold IGs accountable for their performance”); Statement by President George Bush Upon Signing H.R. 2748, 1989 U.S.C.C.A.N. 1222, 1224 ( Nov. 30, 1989) (concluding that the IG Act imposes a “burden” on the

impermissibly burdened the President's prerogative to remove subordinate executive branch officials.<sup>195</sup>

This position was reiterated in a 2020 letter from the Trump Administration to Congress following a bipartisan request for further explanation of the earlier IG removals. The letter noted that because “[t]he Constitution vests the executive power in the President and charges him with the supervision of all executive officers, including inspectors general...Executive Branch officials of both parties have long believed that the [IG Act’s] notification requirement raises serious constitutional concerns.”<sup>196</sup> As with past administrations, the Trump Administration expressed concern with the “burden” the existing 30-day notification provision in the IG Act places on the President’s removal power, and as such, concluded that the President complied with the provision not out of a sense of legal requirement, but “as a matter of accommodation and presidential prerogative.”<sup>197</sup>

As the previously discussed caselaw makes clear, not all burdens on the President’s removal power are unconstitutional. Nevertheless, in light of the Executive’s objections to the notification requirement, it seems that the executive branch could object to any new amendment to the IG Act that would impose more significant restrictions on IG removal, including one that would explicitly prevent the President or DFE leadership from removing an IG except for cause.

Notwithstanding possible objections, neither the Supreme Court’s existing removal holdings nor the general principles discussed above appear to clearly bar Congress from enacting removal restrictions to encourage IG independence, at least in most cases. There are, however, important caveats to be made. First, IGs do not fit neatly into the molds previously used by the Court in addressing appointment and removal questions. IGs not only serve a somewhat unique function in our governmental structure, but the powers, duties, and degree of supervision applicable to IGs can vary. Second, *Free Enterprise Fund* may cast doubt on the use of for cause protections for a limited number of DFE IGs whose designated agency leadership is also protected by a for cause provision.<sup>198</sup> Third, the fact that IGs do not serve a fixed term and that the IG Act indirectly delegates law enforcement authorities to IGs add a layer of complexity to the constitutional question.

As the Supreme Court has stated, “the nature of the function” performed, or the “character of the office” are generally important factors in assessing the burden removal restrictions impose on presidential power.<sup>199</sup> Before specifically applying the Court’s removal jurisprudence to IGs, it may be useful to first address the unique nature of the IG function—a function that combines aspects of both executive and legislative power.

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President’s removal power); *Memorandum Opinion for the Attorney General: Inspector General Legislation*, 1 Op. O.L.C. 16, 18 (1977).

<sup>195</sup> *Id.*

<sup>196</sup> Letter from Pat Cipollone, Counsel to President Donald J. Trump, to Hon. Charles E. Grassley (May 26, 2020).

<sup>197</sup> *Id.* The White House noted the existence of a “burden” despite asserting that the legislative history behind the IG Act suggests that the law “specifically allow[s] the President to remove any Inspector General at any time.” *Id.*

<sup>198</sup> See *infra* “Free Enterprise Fund and Dual Layers of For Cause Protections.”

<sup>199</sup> *Seila Law*, 140 S. Ct. at 2198 (“Congress’s ability to impose such removal restrictions ‘will depend upon the character of the office.’”) (citing *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 629 (1931); *Wiener*, 357 U.S. at 353).

## Assessing the IG Function

As noted above, the Supreme Court's removal jurisprudence seems to suggest that the more centrally executive the powers and functions of an office, the *more* control the President likely needs to exercise and the *less* likely that for cause restrictions can be used to insulate the official from presidential supervision and oversight. In *Humphrey's*, this principle was evident in the Courts now-discarded conclusion that the FTC exercised "no part of the executive power."<sup>200</sup> In *Morrison*, the same principle took a new form, with the court asking whether "the President's need to control the exercise" of certain powers and functions "is so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the President."<sup>201</sup> And in *Seila Law* the principle was apparent in the Court's conclusion that principal officers who "wield significant executive power" and inferior officers who wield "policymaking or administrative authority" must do so "dependent on the President."<sup>202</sup>

The argument that the IG function is far removed from typical executive power finds support in the Supreme Court's opinion in *Buckley v. Valeo*. In *Buckley*, the Court invalidated an appointment scheme that allowed congressional leadership to appoint commissioners of the Federal Election Commission (Commission).<sup>203</sup> In doing so, however, the Court reasoned in what may be dicta that "investigative" powers relating to the "flow of necessary information" such as "receipt, dissemination, and investigation," are *not* executive in nature.<sup>204</sup> This included Commission powers that arguably parallel those discharged by IGs, including the Commission's authority to conduct "audits and field investigations"; "report apparent violations of law to the appropriate law enforcement authorities"; and contract for the completion of "independent studies of the administration of elections" to be "published by the Commission and . . . made available to the general public."<sup>205</sup> The Court viewed these powers as legislative, reasoning that a delegation of powers akin to those that "Congress might delegate to one of its own committees" is made "merely in aid of congressional authority to legislate" when "sufficiently removed from the administration and enforcement of public law."<sup>206</sup>

As such, it appears that *Buckley* would suggest that many IG powers could be viewed as connected to the legislative rather than the executive function. Congress and its committees clearly have the authority to investigate and report. That "power of inquiry" is an essential auxiliary to the legislative powers vested in Congress under Article I.<sup>207</sup> Moreover, at least one of the main purposes of the IG Act is to keep Congress informed and assist Congress in its oversight function.<sup>208</sup> As one dissenting opinion of the Supreme Court has put it, IGs serve "more than just

<sup>200</sup> *Humphrey's* 295 U.S. at 628. In *Seila Law*, the Court stated that "[t]he Court's conclusion that the FTC did not exercise executive power has not withstood the test of time." 140 S. Ct. 2198 n.2.

<sup>201</sup> *Morrison v. Olson*, 487 U.S. 654, 691-92 (1988).

<sup>202</sup> *Seila Law*, 140 S. Ct. at 2207, 2211.

<sup>203</sup> *Buckley v. Valeo*, 424 U.S. 1, 140 (1976) (per curiam).

<sup>204</sup> *Buckley*, 424 U.S. at 137.

<sup>205</sup> 2 U.S.C. § 438 (1970).

<sup>206</sup> *Buckley*, 424 U.S. at 139.

<sup>207</sup> *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927) ("[T]he power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function.").

<sup>208</sup> 5 U.S.C. App § 4(a)(5). The DOJ has acknowledged, but challenged the IGs' role in assisting Congress in oversight of the executive branch. See *Inspector General Legislation*, 1 Op. O.L.C. 16, 17 (1977) ("As a threshold matter, the Justice Department has repeatedly taken the position that continuous oversight of the functioning of executive agencies, such as that contemplated by the requirement that the Inspector General keep Congress fully and currently informed, is not a proper legislative function. In our opinion, such continuing supervision amounts to an assumption of the

agency concerns,” but also perform “the separate function of keeping Congress aware of agency developments, a function that is of substantial assistance to the congressional oversight function.”<sup>209</sup>

The argument that much of the authority exercised by IGs is not executive in nature finds further support in *Bowsher v. Synar*.<sup>210</sup> There, the Court held that Congress could not vest an official subject to removal by Congress—in that case, the Comptroller General—with “executive powers.”<sup>211</sup> In determining whether Congress had acted impermissibly, the Court was persuaded by the fact that under the challenged law the Comptroller General had “the ultimate authority to determine” budget cuts that must be made by the President.<sup>212</sup> Indeed, the law authorized the Comptroller General to direct presidential action.<sup>213</sup> This authority to interpret “a law enacted by Congress to implement the legislative mandate is the very essence of ‘execution’ of the law,” and thus constituted executive power.<sup>214</sup>

Unlike the Comptroller General in *Bowsher*, IGs have not been entrusted with authority to execute or implement the law. They do not have “ultimate authority” over agency activities or decisions. Indeed, they generally do not command agency action in any way.<sup>215</sup> The limited nature of the IG function is supported by the fact that IGs generally serve an advisory role. For example, the executive branch has previously recognized that IGs “merely report[] and recommend[] action” to the agency and that “[i]t is for the agency head, not the IG, to direct and supervise an agency’s officials.”<sup>216</sup> And while some advisory functions, such as those exercised by close presidential aids, may nonetheless implicate core executive functions and powers, that does not appear to be the case for most IGs.<sup>217</sup>

This is not to say that IGs discharge their duties *only* to aid Congress in its legislative function. As previously noted, IGs are relatively unique in that they are located within the executive branch, but serve the interests of, and are responsible to, *both* the legislative and executive branches. An IG’s obligations to his or her agency are substantial. They are generally required to “provide leadership and coordination and recommend policies” to their agency while also keeping the agency head “fully and currently informed about problems and deficiencies” in agency

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Executive’s role of administering or executing the laws. However, at the same time it must be acknowledged that Congress has enacted numerous statutes with similar requirements, many of which are currently in force.”)

<sup>209</sup> *NASA v. Fed. Labor Rels. Auth.*, 527 U.S. 229, 260 (1999) (Thomas J. dissenting).

<sup>210</sup> *Bowsher v. Synar*, 478 U.S. 714 (1986).

<sup>211</sup> *Id.* at 732.

<sup>212</sup> *Id.* at 733.

<sup>213</sup> *Id.* (“Indeed, the Comptroller General commands the President himself to carry out, without the slightest variation . . . the directive of the Comptroller General as to the budget reductions. . .”).

<sup>214</sup> *Id.* at 732-733.

<sup>215</sup> *See NASA*, 527 U.S. at 253 (Thomas, J., dissenting) (“OIG has no authority over persons employed within the agency outside of its Office and similarly has no authority to direct agency personnel outside of the Office. Inspectors General, moreover, have no authority under the Inspector General Act to punish agency employees, to take corrective action with respect to agency programs, or to implement any reforms in agency programs that they might recommend on their own.”).

<sup>216</sup> *Application of the Appointments Clause to a Statutory Provision concerning the Inspector General Position at the Chemical Safety and Hazard Investigation Board*, 30 Op. O.L.C. 92, 102 (2006).

<sup>217</sup> Moreover, executive privilege has a role to play in IG investigations. While IGs are required to keep Congress informed, the legislative history of the IG Act suggests that Congress’s intent was to “preserve for the President the opportunity to assert privilege where he deems it necessary.” S. REP. NO. 95-1071, at 32 (1978). Congress intended that privilege disputes “should be left for resolution on a case-by-case basis as they arise in the course of implementing this legislation” through, for example, “alterations or deletions” made by the agency head but indicated to Congress. *Id.*

programs.<sup>218</sup> IGs also are required to provide various reports to their agency head.<sup>219</sup> Moreover, the Supreme Court has suggested that for purposes of federal labor law, the IGs “act on behalf of, and operate for the benefit of” the agency of which they are a part.<sup>220</sup> The Supreme Court has at times viewed an IG as a “representative” of the agency working in “concert” with its agency head.<sup>221</sup>

IGs also exercise limited “law enforcement” powers that are of a type that is generally considered executive in nature. These powers may require a more significant degree of presidential supervision, though how much more is not clear.<sup>222</sup> Most strikingly, the IG Act provides IGs with limited and conditional law enforcement authorities to be exercised pursuant to guidelines established by the Attorney General. Under § 6(f) of the IG Act, the Attorney General “may” (upon a finding that certain criteria are met) authorize an IG and certain employees of an IG office to

- “carry a firearm”;
- “make an arrest without a warrant while engaged in official duties . . . for any offense against the United States committed in the presence of” the authorized IG official or for “any felony” so long as the official has “reasonable grounds to believe” the felony was committed; and
- “seek and execute warrants for arrest, search of a premises, or seizure of evidence issued under the authority of the United States upon probable cause to believe that a violation has been committed.”<sup>223</sup>

Once delegated, these law enforcement authorities may be “rescinded or suspended” if the Attorney General determines that the criteria underlying the delegation are no longer met, or if the IG office or official violates the Attorney General’s guidelines.<sup>224</sup> Exercise of these powers, and the IGs’ larger role in executive branch criminal investigations and prosecutions, appear to be substantial. According to the Council of the Inspectors General on Integrity and Efficiency (CIGIE), IG investigations led to 4,749 indictments or informations and over 4,000 successful criminal prosecutions in FY2017.<sup>225</sup> Still, IGs have no power to prosecute and can only refer

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<sup>218</sup> 5 U.S.C. App. §§ 2, 4.

<sup>219</sup> *Id.* § 5.

<sup>220</sup> *NASA*, 527 U.S. at 240-41.

<sup>221</sup> *Id.* at 242 n.7.

<sup>222</sup> The IG Act provides IGs with authority to issue subpoenas and if not complied with, those subpoenas “shall be enforceable by order of any appropriate United States district court.” 5 U.S.C. App. § 6(a)(4). Pursuant to this provision, IGs may initiate civil lawsuits in federal court to obtain a court order directing compliance with a subpoena. Though arguably constituting enforcement power, the power to issue subpoenas to private parties and enforce those demands in federal court is one that is also possessed by Congress. *See, e.g.*, Sen. Permanent Subcomm. on Investigations v. Ferrer, 199 F. Supp. 3d 125, 133 (D.D.C. 2016).

<sup>223</sup> 5 U.S.C. App. § 6(f)(1). The Attorney General’s “initial determination” includes a finding that “(A) the affected Office of Inspector General is significantly hampered in the performance of responsibilities established by this Act as a result of the lack of such powers; (B) available assistance from other law enforcement agencies is insufficient to meet the need for such powers; and (C) adequate internal safeguards and management procedures exist to ensure proper exercise of such powers.” *Id.* § 6(f)(2). Some agency IGs are exempt from this initial determination. *Id.* § 6(f)(3).

<sup>224</sup> *Id.* § (6)(f)(5). *See* Attorney General Guidelines for Offices of Inspector General with Statutory Law Enforcement Authority (Dec. 8, 2003) available at <https://www.ignet.gov/sites/default/files/files/agleguidelines.pdf>. While it may be that the constitutional concerns are somewhat mitigated by the degree of control the President wields, through the Attorney General, over the exercise of those law enforcement powers, the Supreme Court has suggested that other means of supervision are no “substitute” for at will removal. *Seila Law*, 140 S. Ct. at 2207.

<sup>225</sup> Council of the Inspectors General on Integrity and Efficiency, *Annual Report to the President and Congress, fiscal*

violations of federal criminal law to the DOJ, which must ultimately decide whether to pursue criminal charges.

Congress provided general law enforcement authorities to establishment IGs (those appointed by the President with advice and consent of the Senate) through an amendment to the IG Act in 2002 and extended them to DFE IGs in 2008.<sup>226</sup> Prior to the IG Act amendments, criminal investigators in IG offices had exercised similar limited law enforcement powers either pursuant to designations as Special Deputy U.S. Marshals, or in limited circumstances, pursuant to statutory authorizations outside of the IG Act.<sup>227</sup> Originally made on a case-by-case basis, deputations later evolved into blanket deputations to entire IG offices.<sup>228</sup> Seeing a lack of oversight over the use of these powers, the administrative burdens on the Marshalls Service, and administrative delays in the renewal of designations, Congress found it necessary to regularize and codify the process.<sup>229</sup>

There are, therefore, some aspects of typical IG powers that can be viewed as aiding legislative functions, and some that appear more quintessentially executive. For purposes of removal, however, the question is not simply whether the IG function is legislative or executive—though that determination could have a substantial impact on how a court views the need for presidential supervision and control. The question is instead whether IGs hold an office that can be protected from removal except for cause.

## Application of the Supreme Court's Existing Removal Holdings to IGs

The permissibility of for cause removal protections for IGs would appear to be governed by the standards set forth by the Supreme Court in *Morrison* and *Seila Law*, rather than *Humphrey's*.<sup>230</sup> The power IGs possess is wielded unilaterally (like the IC in *Morrison* and CFPB Director in *Seila Law*), not as part of a multimember board with fixed and staggered terms and partisan balance (like the FTC in *Humphrey's*).<sup>231</sup> Taken together, *Morrison* and *Seila Law* suggest that Congress cannot provide for cause protections to a sole principal officer “vested with significant executive power,” but can provide such protections to a sole inferior officer “with limited duties and no policymaking or administrative authority.”<sup>232</sup> The permissibility of removal protections for IGs would therefore appear to turn on how IGs are classified under the Appointments Clause

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Year 2017, at 19.

<sup>226</sup> See generally CRS Report R43722, *Offices of Inspectors General and Law Enforcement Authority: In Brief*, by Kathryn A. Francis.

<sup>227</sup> See U.S. GOV'T ACCOUNTABILITY OFF., GAO-02-437, INSPECTORS GENERAL: COMPARISON OF WAYS LAW ENFORCEMENT AUTHORITY IS GRANTED 4-5 (2002); Vicky L. Powell, *Why Isn't Law Enforcement Authority in the Inspector General Act?* J. OF PUB. INQUIRY (Spring/summer 1998).

<sup>228</sup> S. REP. NO. 107-176, at 2 (2002) (“Criminal investigators for the Offices of Inspectors General...have been exercising law enforcement authorities for many years.”). At that time, IGs were not viewed as either “an investigative or law enforcement officer.” *Art Metal-U.S.A., Inc. v. United States*, 577 F. Supp. 182, 185-86 (D.D.C. 1983)

<sup>229</sup> S. REP. NO. 107-176, at 2-3 (2002).

<sup>230</sup> At least under the *Myers* and *Humphrey's* framework, it appears that because IGs discharge a blend of executive and legislative functions, they likely do not serve the type of “purely executive” function that “must be performed by officers subject to removal at will by the President.” *Bowsher v. Synar*, 478 U.S. 714, 762 (1986) (White, J., dissenting).

<sup>231</sup> Though IGs are “objective,” and the appointment of an IG is to be made “without regard to political affiliation” and based on “demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, or investigations.” 5 U.S.C. App. §§ 2-3.

<sup>232</sup> *Seila Law*, 140 S. Ct. at 2200, 2201.

(principal officer, inferior officer, or employee) and the type of power they wield. It is to those questions that this report now turns.

## Are IGs Officers of the United States?

As previously discussed, the Supreme Court has distinguished between “Officers of the United States,” who exercise “significant authority” and “employees,” who do not.<sup>233</sup> The unique functions and discretion provided to IGs under the IG Act do not appear to fit neatly into the typical Appointments Clause classifications, and as a result, whether IGs in fact exercise “significant authority” is an open question that no court has addressed.<sup>234</sup>

With no clear definition, “significant authority” is best understood with reference to the general categories of powers and functions the Court has previously viewed as either significant or not. For example, Supreme Court jurisprudence on the Appointments Clause suggests that powers directly relevant to the execution of law, such as the “administration and enforcement of public law,” are likely significant and generally may be exercised only by “Officers of the United States.”<sup>235</sup> The authority to issue legally binding, final decisions is also likely to be deemed “significant,” but the Court recently made clear in *Lucia v. Securities and Exchange Commission (SEC)* that while final decisionmaking authority may be sufficient to establish officer status, it is not necessary.<sup>236</sup> Instead, an official who lacks final decisionmaking authority, like the SEC Administrative Law Judges (ALJs) at issue in *Lucia*, may still be deemed an Officer if they exercise “significant discretion” in carrying out “important functions.”<sup>237</sup>

At the other end of the spectrum, investigative and informational powers do not appear to be “significant.” In *Buckley*, the Court reasoned that unlike the regulatory and enforcement powers given to the Commission, powers “relating to the flow of necessary information,” such as “receipt, dissemination, and investigation,” do not qualify as “significant authority.”<sup>238</sup> The Court has also suggested elsewhere that “purely recommendatory” powers, for example powers commonly exercised by advisory commissions, likewise do not amount to significant authority.<sup>239</sup>

The argument that IGs are employees would likely focus on the investigatory and advisory nature of IG powers. IGs have not been delegated the regulatory or direct enforcement powers that generally have been viewed to constitute “significant authority.”<sup>240</sup> IGs do not administer or implement statutes, they do not issue rules, and they generally cannot enforce federal

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<sup>233</sup> *Lucia v. SEC*, 138 S. Ct. 2044, 2051 (2018) (quoting *United States v. Germaine*, 99 U.S. 508, 511 (1879) and *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam)).

<sup>234</sup> This uncertainty is arguably reflected in the fact that the IG Act currently provides different appointment structures for different IGs—one consistent with principal officer status and one generally consistent with inferior officer status. In *Jefferson v. Harris*, the U.S. District Court for the District of Columbia determined that Members of the Council of the Inspector General on Integrity and Efficiency’s Integrity Committee, which includes IGs, are not officers. In reaching that determination, the district court noted that the IG members of the Integrity Committee “carry out functions that at least mirror . . . those that they carry out as Inspectors General of their own ‘Federal entities.’” *Jefferson v. Harris*, 285 F. Supp. 3d 173, 190 (D.D.C. 2018).

<sup>235</sup> *Buckley*, 424 U.S. at 135-140. *Id.* at 124 (noting that the Appointments Clause is one provision through which the separation of powers was “woven into the” Constitution).

<sup>236</sup> *Lucia*, 138 S. Ct. at 2052.

<sup>237</sup> *Id.* at 2053.

<sup>238</sup> *Buckley*, 424 U.S. at 137.

<sup>239</sup> *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 507 n.10 (2010).

<sup>240</sup> *See Buckley*, 424 U.S. at 137-42 (holding that the Federal Election Commission’s administrative, rulemaking, and enforcement powers could “be discharged only by persons who are ‘Officers of the United States’”).

requirements against either federal officials or members of the public. Outside of their limited arrest and search powers, the IG role is predominantly “informational,” which *Buckley* suggests is not significant for purposes of the Appointments Clause.<sup>241</sup>

The fact that IGs generally serve an advisory role also supports, but does not guarantee, a conclusion that they could be viewed as employees for purposes of the Appointments Clause. In *Free Enterprise Fund*, the Court suggested that those who exercise “purely recommendatory” powers do not exercise significant authority and are not officers.<sup>242</sup> As noted, IGs do not direct or prohibit agency activity, but instead “recommend” policy.<sup>243</sup> Still, as discussed below, *Lucia* established that an official’s inability to make final and binding decisions does not mean they are necessarily an employee, but it does acknowledge that it is a factor that would support that conclusion.<sup>244</sup>

The argument that an IG is instead an “Officer of the United States” under the Appointments Clause would likely focus on the IG’s current appointment method; the IG’s limited law enforcement powers; and an application of standards articulated in *Lucia*.

IGs are currently appointed in a manner that suggests officer status. Establishment IGs are appointed by the President, with advice and consent of the Senate—a method of appointment consistent with principal officer status.<sup>245</sup> DFE IGs are directly appointed by an agency head—a method of appointment generally consistent with inferior officer status.<sup>246</sup> These choices may suggest that Congress views IGs as officers, but as the Supreme Court has noted, Congress may at times “wish to require Senate confirmation for policy reasons.”<sup>247</sup> Moreover, the mere fact that Congress chooses an appointment method that satisfies the Appointments Clause does not necessarily make that official an “Officer of the United States.”<sup>248</sup>

With respect to IG law enforcement powers, *Buckley* holds that the “administration and enforcement of public law” is significant authority that may be discharged only by Officers.<sup>249</sup> And it appears that if a position possesses one power that is deemed “significant,” then that official is an officer.<sup>250</sup> But does the power to arrest and execute warrants alone constitute the “enforcement of law”? The DOJ has concluded that “we have no doubt that the authority to seek and execute search warrants, or to make arrests in the name of the United States is ‘significant authority’ under *Buckley*.”<sup>251</sup> Whether this is in fact the case, and whether the type of enforcement

<sup>241</sup> See *supra* notes 207-09.

<sup>242</sup> *Free Enter. Fund*, 561 U.S. at 507 n.10.

<sup>243</sup> 5 U.S.C. App. § 4.

<sup>244</sup> *Lucia v. SEC*, 138 S. Ct. 2044, 2054 (2018).

<sup>245</sup> 5 U.S.C. App § 3(a).

<sup>246</sup> *Id.* § 8G(c). There may be some question as to whether each DFE appointing authority qualifies as the head of a “department” for purposes of the Appointments Clause. *Free Enter. Fund*, 561 U.S. at 511 (defining a department as “a freestanding component of the Executive Branch, not subordinate to or contained within any other such component”).

<sup>247</sup> See *Fin. Oversight and Management Bd. for Puerto Rico v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1658 (2020).

<sup>248</sup> *Id.* (“We do not mean to suggest that every time Congress chooses to require advice and consent procedures it does so because they are constitutionally required.”).

<sup>249</sup> *Buckley v. Valeo*, 424 U.S. 1, 135-40 (1976) (per curiam).

<sup>250</sup> *Freytag v. Comm’r*, 501 U.S. 868, 882 (1991) (concluding that “Special trial judges are not inferior officers for purposes of some of their duties ... but mere employees with respect to other responsibilities. The fact that an inferior officer on occasion performs duties that may be performed by an employee not subject to the Appointments Clause does not transform his status under the Constitution”).

<sup>251</sup> See *Constitutional Limitations on “Contracting Out” Department of Justice Functions under OMB Circular A-76*, 14 Op. O.L.C. 94, 100 (1990).

authorities exercised by IGs is significant, is unclear. For example, the authority to make arrests for violations of federal law in limited situations is a power that can be exercised by various persons, including legislative branch officials, state officials, and private citizens.<sup>252</sup>

The argument that IGs are officers may also rely on the standard recently employed by the Supreme Court in *Lucia*. There, the Court held that SEC ALJs were officers, despite the fact that they did not have “final decisionmaking authority.”<sup>253</sup> *Lucia*, and some of the earlier cases it relied upon, including *Freytag v. Commissioner*, involved executive branch *adjudicative* officials.<sup>254</sup> In *Lucia*, the Court determined that SEC ALJs held a continuing position established by law,<sup>255</sup> and exercised significant authority because they had “significant discretion” in deciding how to carry out “important functions.”<sup>256</sup> The “important functions” identified by the *Lucia* Court included the ALJs’ authority to “take testimony, conduct trials, rule on the admissibility of evidence, and . . . enforce compliance with discovery orders,” including by punishing “[c]ontemptuous conduct.”<sup>257</sup> The cases provided little insight into the meaning of “significant discretion,” though the ALJs generally exercised their powers at their own judgment, at least within the confines of their adjudication.<sup>258</sup>

In addition to the IGs investigative powers (including the power to issue subpoenas) and law enforcement functions, other functions that could be considered constitutionally relevant include the authority to submit annual budget estimates to the agency that must be included as part of the President’s formal budget request,<sup>259</sup> and the power to “select, appoint, and employ” staff “necessary for carrying out the functions” of the IG office.<sup>260</sup> But it is difficult to apply the principles of *Lucia* to IGs, as the “important” adjudicative functions of SEC ALJs at issue in that case are not easily analogized to the functions carried out by IGs. Indeed, it could be argued that the reasoning in *Lucia* and *Freytag* (which involved special trial judges appointed by the Chief Judge of the Tax Court) may not extend to nonadjudicative officials—at least as regards determining whether a certain function is sufficiently “important” for those persons to be considered “Officers of the United States” under the Appointments Clause. That said, like the SEC ALJs at issue in *Lucia*, it would appear that IGs operate with considerable discretion, at least within the realm of investigations and audits. As noted, IGs are free to make investigations and

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<sup>252</sup> Members of the U.S. Capitol Police are authorized to make arrests and “enforce the laws of the United States, including the laws of the District of Columbia” under certain circumstances and generally within geographic proximity of the U.S. Capitol or Members of Congress (but not merely on Capitol grounds). 2 U.S.C. § 1967. Federal law also permits the Attorney General to authorize state law enforcement officers to make arrest for violation of federal law, and the courts have recognized private citizens’ common law arrest power. See Dina Mishra, *An Executive-Power Non-Delegation Doctrine for the Private Administration of Federal Law*, 68 VAND. L. REV. 1509, 1537 (2015).

<sup>253</sup> *Lucia v. SEC*, 138 S. Ct. 2044, 2047-48, 2052 n.4 (2018).

<sup>254</sup> *Freytag v. Comm’r*, 501 U.S. 868 (1991).

<sup>255</sup> The Court reasoned that the positions at issue were “created by statute” with the “duties, salary, and means of appointment for that office [] specified by statute.” *Lucia*, 138 S. Ct. at 2047, 2053.

<sup>256</sup> *Lucia*, 138 S. Ct. at 2053.

<sup>257</sup> *Id.* at 2047.

<sup>258</sup> *Id.* at 2152-53.

<sup>259</sup> 5 U.S.C. App. § 6(g). In addition to the IG’s budget estimate, the President may also submit his own request for IG funding levels. IGs also often receive a separate appropriations account, making reprogramming of funds away from the IG office more difficult. See Wilhelm, *supra* note 1, at 13-14. In *Seila Law*, the Court stated that the CFPB’s ability to receive funding from the Federal Reserve, rather than from Congress “aggravates the agency’s threat to Presidential control.” *Seila Law*, 140 S. Ct. at 2204. IGs, on the other hand, operate within the traditional congressional appropriations process.

<sup>260</sup> 5 U.S.C. App. § 6(a)(7).

reports that are “in the judgment of the Inspector General, necessary or desirable,” without interference from the agency head.<sup>261</sup> Indeed, as the Supreme Court has identified, “the ability to proceed without consent from agency higher-ups is vital to effectuating Congress’ intent and maintaining an opportunity for objective inquiries into bureaucratic waste, fraud, abuse, and mismanagement.”<sup>262</sup> But, as previously discussed, the IGs’ other functions are not carried out with that same discretion.<sup>263</sup>

As such, it appears that IGs are neither clearly officers under the Appointment Clause nor clearly employees who are outside the Clause’s purview. If IGs are employees, limitations on Congress’s authority to provide an office with for cause removal protections in *Seila Law and Free Enterprise Fund*—which appear to address only Officers of the United States—would not appear to be directly applicable. This would leave Congress with significant flexibility in protecting IGs from removal. But IG authority to make arrests and execute warrants, in combination with the fact that IGs enjoy considerable discretion in carrying out what may be viewed as “important functions,” could preclude a determination that IGs are mere employees.

But even assuming that IGs do cross the “significant authority” threshold and are determined to be “Officers of the United States,” *Seila Law* would appear to cast doubt on Congress’s authority to protect them from removal if they are either (1) principal officers wielding “significant executive power,” or (2) inferior officers who exercise policymaking or administrative power.<sup>264</sup> As described below, IGs appear to be neither.

### Principal or Inferior Officer?

As previously noted, the Court has established no explicit test for distinguishing between inferior and principal officers.<sup>265</sup> In *Morrison*, for example, the Court applied a functional multifactor test to determine that the IC was an inferior officer.<sup>266</sup> That approach included reference to the fact that the IC was removable by a “higher executive branch official” other than the President and had only limited duties, tenure, and jurisdiction.<sup>267</sup> Under that test, IGs would appear to have limited duties and jurisdiction, but generally unlike the IC in *Morrison*, do not have limited tenure. Moreover, whereas like the IC in *Morrison*, DFE IGs are removable by an executive branch officer other than the President, establishment IGs in contrast are removable by the President alone.<sup>268</sup>

But as the Supreme Court later observed, “*Morrison* did not purport to set forth a definitive test for whether an office is ‘inferior’ under the Appointments Clause.”<sup>269</sup> More recently the Court has generally suggested that the distinguishing factor between the two types of officers is that principal officers are supervised only by the President, while the work of inferior officers is

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<sup>261</sup> 5 U.S.C. App. § 6(a)(2).

<sup>262</sup> *NASA v. Fed. Labor Rels. Auth.*, 527 U.S. 229, 240 (1999).

<sup>263</sup> The Court addressed a mixture of functions in *Freytag*, noting that “The fact that an inferior officer on occasion performs duties that may be performed by an employee not subject to the Appointments Clause does not transform his status under the Constitution.” 501 U.S. at 882.

<sup>264</sup> *Seila Law*, 140 S. Ct. at 2192.

<sup>265</sup> *See supra* “The Relationship Between Appointment and Removal.”

<sup>266</sup> *Morrison v. Olson*, 487 U.S. 654, 671-72 (1988).

<sup>267</sup> *Id.*

<sup>268</sup> 5 U.S.C. App. §§ 3, 8G.

<sup>269</sup> *Edmond v. United States*, 520 U.S. 651, 661 (1997).

“directed and supervised at some level” by another principal officer.<sup>270</sup> Thus, if IGs are officers, the primary factor in determining whether they are inferior or principal appears to be whether IGs are supervised by another officer.<sup>271</sup>

As addressed above, the IG Act established IG offices as “independent units” and provides them with a number of structural and operational features to ensure ongoing independence.<sup>272</sup> However, the law also explicitly states that IGs shall “report to and be under the *general supervision* of the head of the establishment.”<sup>273</sup> As a statutory matter then, even establishment IGs are supervised by an executive branch officer directly accountable to the President. That general supervision is restricted by the fact that most agency heads may not “prevent or prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation, or from issuing any subpoena during the course of any audit or investigation.”<sup>274</sup> It could be that an IG’s unsupervised investigative powers are enough to turn them into principal officers,<sup>275</sup> but the IG Act’s specific prohibition on agency supervision has not prevented the Supreme Court from describing the agency head in one case as constituting an establishment IG’s “supervising authority.”<sup>276</sup>

Moreover, it is only an IG’s audit and investigatory powers that are generally subject to diminished supervision.<sup>277</sup> Other IG activities remain subject to more traditional controls by the agency head, the Attorney General, and to a limited degree by the CIGIE Integrity Committee (Committee).<sup>278</sup> For example, IG misconduct is supervised by the Committee and the agency head,<sup>279</sup> while an IG’s exercise of law enforcement powers remains subject to supervision by the Attorney General. The IG Act does not delegate law enforcement powers directly to IGs. Instead, it is a conditional grant of authority that is in some cases dependent on initial approval from the Attorney General, but in all cases subject to his continuous supervision.<sup>280</sup> Ultimately, IG law

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<sup>270</sup> *Id.* at 662 (“Generally speaking, the term ‘inferior officer’ connotes a relationship with some higher ranking officer or officers below the President: Whether one is an ‘inferior’ officer depends on whether he has a superior.”); *Seila Law*, 140 S.Ct. at 2199 n. 3.

<sup>271</sup> In *Edmond*, the Court found that the military judge at issue was an inferior officer despite the fact that the office had neither a limited tenure nor limited jurisdiction. *Edmond*, 520 U.S. at 661.

<sup>272</sup> See *supra* “IG Features of Independence.”

<sup>273</sup> 5 U.S.C. App. § 3(a) (emphasis added).

<sup>274</sup> Some agency heads *do* have authority to prevent (or limit) IGs from engaging in certain investigations. See, e.g., 5 U.S.C. App. § 8E(a) (DOJ); *id.* § 8(b) (DOD); 50 U.S.C. § 3517(b)(3)-(4) (CIA).

<sup>275</sup> In *Association of American Railroads v. Department of Transportation*, the D.C. Circuit held that a single unsupervised power was enough to make an appointed arbitrator a principal officer. 821 F.3d 19, 38-9 (D.C. Cir. 2016). But unlike the IG Act, the statute at issue did not “suggest the arbitrator ‘is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate’” and empowered the arbitrator to determine “final agency action.” *Id.* at 39.

<sup>276</sup> See *NASA v. Fed. Labor Rels. Auth.*, 527 U.S. 229, 240 (1999) ([E]ach Inspector General has no supervising authority—except the head of the agency of which the OIG is a part.”).

<sup>277</sup> 5 U.S.C. App. §§ 3(a), 8G(d).

<sup>278</sup> See *NASA*, 527 U.S. at 259 (“The truth of the matter is that upon receipt of information from OIG, agency management has the discretion to impose discipline but it need not do so. And OIG has no determinative role in agency management’s decision.”) In *Edmond*, the Supreme Court recognized that necessary supervision can come from the cumulative oversight of multiple principal officers. 520 U.S. at 666.

<sup>279</sup> Under the IG Act, the Committee “receive[s], review[s], and refer[s] for investigation allegations of wrongdoing that are made against Inspectors General and staff members.” The Committee, however, is only empowered to refer matters, with recommendations, to the agency head and the President for “disposition.” 5 U.S.C. App. § 11(d). The agency heads retain the authority to take disciplinary action against IGs for misconduct.

<sup>280</sup> 5 U.S.C. App. § (6)(f).

enforcement authority can be “rescinded or suspended” at any time if the Attorney General determines that an IG office has failed to comply with the Attorney General’s guidelines.<sup>281</sup>

These features of supervision must be weighed against the IGs’ many “independence-promoting features” discussed previously. Still, to conclude that IGs are not “supervised” by their agency head would be in tension with explicit statutory text of the IG Act and language from the Supreme Court to the contrary.<sup>282</sup> Ultimately, the degree to which each individual IG is supervised varies, but at least for Appointments Clause and removal purposes, it appears that assuming IGs are officers, most are likely to be viewed as inferior officers.<sup>283</sup>

### *Policymaking and Administrative Authority?*

If most IGs are inferior officers, then *Seila Law* suggests that Congress can give them for cause removal protections so long as they possess “limited duties and no policymaking or administrative authority.”<sup>284</sup> An IG’s duties are likely “limited,” as much of their authority is advisory and informational and requires a nexus to their agency’s “programs and operations.”<sup>285</sup> While it is not entirely clear what precisely constitutes “policymaking or administrative authority,” it would appear that *Morrison* and its discussion of the IC is the crucial guide.

In *Morrison*, the Court upheld for cause protections for a lone official whose powers exceeded those possessed by IGs—both in their significance and in their proximity to executive functions.<sup>286</sup> Whereas IGs are generally limited to investigating and auditing agency operations and programs, the IC was authorized to both investigate and prosecute criminal acts of a broad swath of high-level government officials.<sup>287</sup> Indeed, the IC possessed the full array of federal criminal law enforcement powers, including “full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice.”<sup>288</sup> Although Congress had vested the IC with significant law enforcement powers, the Court noted that Congress had not

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<sup>281</sup> *Id.*

<sup>282</sup> Moreover, a conclusion that IGs are principal officers could bring the appointment of DFE IGs into question, since DFE IGs are not appointed by the President with the advice and consent of the Senate. 5 U.S.C. App. § 8G(c).

<sup>283</sup> Even if a given IG was viewed as a principal officer, they arguably still may not be the type of principal officer that must be removable at will by the President. Whether supervised or not, IGs do not approach the type of “significant executive power” that was vested in the Director of the CFPB. For example, in *Seila Law*, the Court distinguished the CFPB from other offices, including the Office of Special Counsel (OSC), a free-standing office headed by a sole official with for cause removal protections that “exercises only limited jurisdiction to enforce certain rules governing Federal Government employers and employees.” *See Seila Law*, 140 S. Ct. at 2201-02; 5 U.S.C. §§ 1211-1219. The Court appears to have viewed the head of the OSC as a “principal officer,” but not one that can “bind private parties at all or wield regulatory authority comparable to the CFPB.” *See Seila Law*, 140 S. Ct. at 2202. Although there are many similarities between the OSC and an IG, unlike IGs, the OSC has authority to issue and enforce certain federal employment rules. 5 U.S.C. § 1212. *Seila Law* also distinguished the CFPB Director from the Social Security Commissioner. *Seila Law*, 140 S. Ct. at 2201.

<sup>284</sup> *Seila Law*, 140 S. Ct. at 2200. However, the jurisdiction of some IGs extends to multiple agencies. *See Wilhelm, supra* note 1, at 6.

<sup>285</sup> 5 U.S.C. App. §§ 2-4.

<sup>286</sup> *Morrison v. Olson*, 487 U.S. 654, 689-90 (1988).

<sup>287</sup> 28 U.S.C. § 594 (providing “an independent counsel appointed under this chapter shall have, with respect to all matters in such independent counsel’s prosecutorial jurisdiction established under this chapter, full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice”).

<sup>288</sup> *Morrison*, 487 U.S. at 671.

given the IC “any authority to formulate policy for the Government or the Executive Branch” nor “any administrative duties outside of those necessary to operate her office.”<sup>289</sup> *Seila Law* added a gloss to *Morrison*’s description, concluding that the IC’s powers, “while significant” and associated with “core” executive powers, were not policymaking or administrative authority because they were “trained inward” to government officials rather than toward private entities, and “confined to a specified matter.”<sup>290</sup>

If the IC did not possess “policymaking or administrative authority” in the view of the Supreme Court, then it is difficult to argue that IGs do. IGs neither “formulate policy” for the executive branch nor administer any federal statutory requirements “outside of those necessary to operate [their] office.” As previously noted, while an IG can recommend that an agency implement specific “policies” or “corrective action” following an investigation or audit, IGs can neither compel nor prohibit agency activity. Nor can they be delegated any “program operating responsibilities” or conduct “regulatory compliance” activities, both of which Congress has entrusted only to the agency’s responsibility.<sup>291</sup> IGs do have significant administrative control over their office, both in hiring and firing staff and—to some extent—the process by which the IG budget estimate is submitted to Congress.<sup>292</sup> However, *Morrison* makes clear that administrative powers “necessary to operate” the IG office would not be considered the type of “administrative authority” sufficient to trigger at will presidential removal.<sup>293</sup>

Like the IC in *Morrison*, IG activity is also often “inward” facing in that their jurisdiction generally relates to waste, fraud, and abuse within the “programs and operations” of the agency for which they are given responsibility.<sup>294</sup> But this is not always the case. While the purpose of an IG investigation generally must relate to agency activity, IG investigative power, including IG subpoena power, can be trained on members of the public who have a relationship to the agency. The courts, for example, have previously enforced IG subpoenas issued to private parties who are participating in agency programs, receiving agency funds, or operating pursuant to agency contracts.<sup>295</sup> Nevertheless, whatever limited authority IGs have to affect the rights of private citizens, it does not seem comparable to that of the CFPB Director’s found problematic in *Seila Law*.<sup>296</sup>

<sup>289</sup> *Id.* at 671-72.

<sup>290</sup> *Seila Law*, 140 S. Ct. at 2200.

<sup>291</sup> 5 U.S.C. App. § 9(a)(2).

<sup>292</sup> *Id.* §§ 3(d), 6(g). Under the IG Act, the IG submits a “budget estimate” to the agency head and the agency head then submits a budget proposal to the President that includes an “aggregate request” for the IG and any “comments” from the IG. When the President submits a budget to Congress, that budget must include “a separate statement of the budget estimate” that was initially prepared by the IG. *Id.* § 6(g)(1)-(3).

<sup>293</sup> *Morrison*, 487 U.S. at 671-72.

<sup>294</sup> 5 U.S.C. App. §§ 2-6.

<sup>295</sup> *See, e.g.*, *Inspector Gen. of the United States Dep’t of Agric. v. Glenn*, 122 F.3d 1007, 1011 (11th Cir. 1997) (“While we agree that IGA’s main function is to detect abuse within agencies themselves, the IGA’s legislative history indicates that Inspectors General are permitted and expected to investigate public involvement with the programs in certain situations.”); *Winters Ranch Pshp. v. Viadero*, 123 F.3d 327, 333 (5th Cir. 1997) (“The Inspector General Act clearly authorizes an IG to require by subpoena information from persons who receive federal funds in connection with a federal agency program or operation for the purpose of evaluating the agency’s programs in terms of their management, efficiency, rate of error, and vulnerability to fraud, abuses, and other problems.”); *United States v. Hunton & Williams*, 952 F. Supp. 843, 851 (D.D.C. 1997) (enforcing subpoena to contractor).

<sup>296</sup> *See Seila Law*, 140 S. Ct. at 2200-201 (“By contrast, the CFPB Director has the authority to bring the coercive power of the state to bear on millions of private citizens and businesses, imposing even billion-dollar penalties through administrative adjudications and civil actions.”).

It would appear that if removal protections for the IC were consistent with the Constitution, then similar protections for IGs would likely be as well. If this is true, then any decision invalidating for cause removal protections for IGs would likely have to either break from *Morrison*, or find some way to distinguish IGs from ICs sufficiently. In that vein, it is possible that a distinction could be made between the IC, who served a temporary function, and an IG, who serves a permanent one.<sup>297</sup> One factor contributing to the permissibility of the IC's removal protections in *Morrison* was that the IC was "limited in tenure." Although there was "no time limit on the appointment of a particular counsel," the IC was "'temporary' in the sense that an independent counsel is appointed essentially to accomplish a single task, and when that task is over, the office is terminated." In comparison, most IGs have "ongoing" responsibilities with no fixed or limited tenure.<sup>298</sup> It is notable however, that the only IG who currently possesses for cause protections (the U.S. Postal Service IG) serves a seven-year term.<sup>299</sup> Whether the tenure distinction is constitutionally significant is not clear. The Supreme Court has never plainly held that a for cause protection *must* be joined by a term of years.<sup>300</sup> But if a reviewing court were to view the provision of for cause protections to an inferior officer with a permanent function as a "novel" structure or as requiring an "extension" of *Morrison* or other precedents, then the tenure question could play a significant role in any judicial consideration of IG removal protections.<sup>301</sup>

### ***Free Enterprise Fund* and Dual Layers of For Cause Protections**

There may be special constitutional considerations at play if for cause removal protections were extended to DFE IGs in independent agencies. The Supreme Court's decision in *Free Enterprise Fund* seems to indicate that conferring removal protections on these DFE IGs could impermissibly insulate them from presidential control and accountability through dual layers of removal protections.

The Court's opinion in *Free Enterprise* did not question Congress's use of a single layer of for cause protection to promote the independence of an executive branch officer.<sup>302</sup> Instead, the Court was addressing only the "unusual situation" of "two layers of for-cause tenure."<sup>303</sup> As such,

<sup>297</sup> *Morrison*, at 487 U.S. at 672 (concluding that "the office of independent counsel is 'temporary' in the sense that an independent counsel is appointed essentially to accomplish a single task, and when that task is over the office is terminated, either by the counsel herself or by action of the Special Division"). See also *United States v. Smith*, 962 F.3d 755 (4th Cir. 2020) ("Someone who temporarily performs the duties of a principal officer is an inferior officer for constitutional purposes....").

<sup>298</sup> Some special IGs serve a "limited tenure." See 15 U.S.C. § 9053(h) (providing that the Office of the Special Inspector General for Pandemic Recovery "shall terminate on the date 5 years after March 27, 2020").

<sup>299</sup> 39 U.S.C. § 202. Although the HEROES Act, H.R. 6800, 116th Cong., Div. G, § 70104, (2020), which passed the House in 2020, did not include a term of years, other legislative proposals have. See, e.g., S. 3664, H.R. 6668 (establishing a term of seven years), 116th Cong. (2020).

<sup>300</sup> See *United States v. Perkins*, 116 U.S. 483, 485 (1886) (upholding a statute providing that "no officer in the military or naval service shall in time of peace, be dismissed ... except upon and in pursuance of the sentence of a court-martial"). Some ALJs are inferior officers with for cause removal restrictions and no limited tenure. See Jeffrey S. Lubbers, *The Federal Administrative Judiciary: Establishing an Appropriate System of Performance Evaluation for ALJs*, 7 ADMIN. L.J. AM. U. 589, 592 (1994) (noting that Congress "omitt[ed] fixed term appointments" and that "ALJs, once appointed, essentially achieve life tenure"). The Chief Actuary of the Centers for Medicare and Medicaid Services has also been provided with for cause removal protections and no fixed-term. 42 U.S.C. § 1317.

<sup>301</sup> *Seila Law*, 140 S. Ct. at 2192,

<sup>302</sup> *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 501 (2010) ("The point is not to take issue with for-cause limitations in general; we do not do that.").

<sup>303</sup> *Id.* ("And though it may be criticized as 'elementary arithmetical logic,' two layers are not the same as one.") (citations omitted).

insulating establishment IGs from the President with a single layer of for cause protection does not appear to violate the holding of *Free Enterprise Fund*.

However, that opinion could limit the provision of for cause protections to certain DFE IGs who are removable only by DFE board members who are already protected by for cause protections. This would include IGs in the Securities Exchange Commission, the Consumer Product Safety Commission, the Federal Trade Commission, and the Federal Labor Relations Authority, among others.<sup>304</sup> Such an arrangement would separate the IG from the President with dual layers of removal protections, insulating the IG from presidential control in possible violation of *Free Enterprise Fund*.

But *Free Enterprise Fund* may suggest that this would be the case only if IGs are “Officers of the United States” exercising “significant authority.”<sup>305</sup> By its own terms, *Free Enterprise Fund* limited its reach by identifying groups of “lesser functionaries” that might not be covered by the opinion’s holding, including members of the civil service and—in the Court’s view at that time—ALJs.<sup>306</sup> As previously discussed, there appears to be no clear answer under current caselaw on whether IGs are officers or employees.<sup>307</sup> Nevertheless, *Free Enterprise Fund*’s discussion of ALJs may be instructive for understanding whether that opinion could apply to IGs. The opinion explicitly did “not address” ALJs because the Court found those officials to be distinguishable from PCAOB board members at issue in the case before it.<sup>308</sup> As opposed to board members, ALJs’ status as Officers was at that time “disputed” (the Court has since determined that some, and perhaps most, ALJs are officers, but has not yet addressed the separate question of whether they can be separated from the President with dual layers of for cause protections).<sup>309</sup> And unlike PCAOB board members, they performed “adjudicative” or “purely recommendatory” powers “rather than enforcement or policymaking functions,” and they did not “enjoy the same significant and unusual protections from Presidential oversight.”<sup>310</sup>

Eight years after *Free Enterprise Fund*, the Court recognized in *Lucia* that most ALJs are “Officers of the United States” under the Appointments Clause.<sup>311</sup> But the distinctions drawn in *Free Enterprise Fund* between PCAOB board members and ALJs could nevertheless suggest that the restriction on dual layers of for cause protections may not apply to IGs. IGs may not be officers; generally perform “purely recommendatory” powers; do not discharge “policymaking”

<sup>304</sup> 5 U.S.C. App. § 8G(e)(1). For a list of DFEs for purposes of the IG Act see 5 U.S.C. § 8G(a)(2). For a list of agencies whose leadership is protected by for cause protections, see *Free Enter. Fund*, 561 U.S. at 550-553 (Breyer, J., dissenting).

<sup>305</sup> *Free Enter. Fund*, 561 U.S. at 506 (reasoning that “many civil servants within independent agencies would not qualify as ‘Officers of the United States,’ who ‘exercis[e] significant authority pursuant to the laws of the United States’” and are therefore not “similarly situated to the Board”).

<sup>306</sup> *Id.*

<sup>307</sup> See *supra* “Are IGs Officers of the United States?”

<sup>308</sup> *Free Enter. Fund*, 561 U.S. at 507 n. 10.

<sup>309</sup> In *Fleming v. United States Department of Agriculture*, 987 F.3d 1093 (D.C. Cir. 2021), the majority of a D.C. Circuit panel did not reach the constitutional question, but a dissenting judge would have ruled that separating certain Department of Agriculture ALJs from the President with dual layers of for cause protections violates *Free Enterprise Fund*. See *id.* at 1104-24 (D.C. Cir. 2021) (Rao, J., dissenting).

<sup>310</sup> *Free Enter. Fund*, 561 U.S. at 507 n. 10. The PCAOB removal provision was uniquely restrictive, allowing for removal only for “willful violations of the Act, Board rules, or the securities laws; willful abuse of authority; or unreasonable failure to enforce compliance....” *Id.* at 502-03 (concluding that “Congress enacted an unusually high standard that must be met before Board members may be removed”).

<sup>311</sup> See *Lucia*, 138 S. Ct. at 2051-56. For a discussion of ALJs’ status following *Lucia* and *Free Enterprise Fund*, see Kent Barnett, *Regulating Impartiality in Agency Adjudication*, 69 DUKE L.J. 1695, 1699 (2020).

functions; perform only limited “enforcement” functions; and if given typical for cause protections, would not possess the “unusually high”<sup>312</sup> protections that were afforded to PCAOB members.<sup>313</sup>

In sum, *Free Enterprise Fund* does not appear to prohibit Congress from protecting establishment IGs from removal with a single layer of for cause protections. However, if DFE IGs in independent agencies hold the type of office to which *Free Enterprise Fund* applies, then it would appear that those IGs cannot be insulated from presidential control through dual layers of for cause protections.

## Conclusion

Congress’s use of for cause removal protections and other statutory, independence-promoting features are a recognition that certain government functions should be carried out objectively, impartially, and free from political influence. Yet while the Supreme Court has previously upheld limitations on the President’s removal power, the Court appears to have recently cabined Congress’s authority to use these statutory restrictions to a specified and arguably narrow class of executive branch officers. Nevertheless, the typical IG appears to exercise a unique mixture of powers that, as a matter of current constitutional law, fall within this existing judicial carve-out. As such, it would appear that for cause removal restrictions would likely be a constitutionally permissible means of encouraging independence for most IGs, except perhaps those DFE IGs who would be impermissibly insulated from presidential control by multiple layers of removal protections.

## Author Information

Todd Garvey  
Legislative Attorney

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<sup>312</sup> *Free Enter. Fund*, 561 U.S. at 503 (describing, compared to the typical for cause removal restriction, the “unusually high standard that must be met before Board members may be removed”).

<sup>313</sup> *See supra* “Assessing the IG Function.”