THE CONSTITUTIONALITY OF FOR-CAUSE REMOVAL PROTECTIONS FOR INSPECTORS GENERAL

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ABSTRACT

Questions surrounding the constitutionality of for-cause removal protections for executive officials have been at the forefront of recent major Supreme Court cases. Over the past several years, the Court has struck down such protections for members of the Public Company Accounting Oversight Board, the director of the Consumer Financial Protection Bureau, and the director of the Federal Housing Finance Agency. The next development in this area of doctrine may arise soon. Recently introduced bills in the U.S. House of Representatives have sought to amend the Inspector General Act to grant for-cause removal protection to inspectors general in the executive branch. If one of those bills, or a similar one, is enacted into law, the Supreme Court may face questions about the constitutionality of such provisions.

This Note considers whether for-cause removal protections for inspectors general would unconstitutionally restrict the president's removal power. Nearly a century ago, the Supreme Court held in its landmark Myers v. United States *decision that the power to remove executive officials*

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is part of the president's executive power under Article II of the U.S. Constitution. In the decades since, the Court strayed from this approach. Since 2010, however, the Court has inched back towards its embrace of Myers*, favoring presidential removal power. Most prominently, in 2020, the Supreme Court in* Seila Law v. Consumer Financial Protection Bureau *clarified its presidential removal doctrine, holding that there exists a presumption against removal restrictions for executive officers outside of two narrow exceptions: members of multi-head agencies and "inferior officers" with limited duties.*

This Note concludes that inspectors general fall outside of the Seila Law *exceptions, and are therefore subject to the baseline* Myers *rule against for-cause removal restrictions. The Supreme Court has construed the exceptions narrowly, holding that even slight variations from the paradigmatic outliers referenced in* Seila Law *can place an official outside the scope of the relevant exception. Because inspectors general fall outside the* Seila Law *exceptions, for-cause protections for inspectors general are likely unconstitutional.*

INTRODUCTION

Inspector General ("IG"/"IGs") independence from presidential control has been the subject of heightened attention since former President Donald Trump removed the Intelligence Community's and State Department's IGs in the spring of 2020.[1] Since then, the House of Representatives has passed the Inspector General Protection Act[2] and proposed the Protecting Our Democracy Act ("PODA"),[3] both of which aim to protect IGs from presidential control by amending the Inspector General Act ("IG Act") to add for-cause removal protection for IGs. This Note analyzes the constitutionality of provisions providing IGs for-cause removal protection.

This Note argues that such provisions are unconstitutional. Under the Supreme Court's presidential removal power doctrine, whether Congress may restrict the president from firing a class of executive branch officials depends on whether those officials are best classified as "employees," "inferior officers," or "principal officers" of the United States. It also depends on the scope of the officials' authority and character of their office. This Note concludes that IGs are officers of the United States and not mere employees, IGs are inferior officers and not principal officers, and that IGs' duties are sufficiently broad such that Congress cannot constitutionally insulate them from the President's removal power.

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[1] TODD GARVEY, CONG. RSCH. SERV., R46762, CONGRESS'S AUTHORITY TO LIMIT THE REMOVAL OF INSPECTORS GENERAL 1 (2021); Letter from Pat A. Cipollone, Counsel to Pres. Donald J. Trump, to Hon. Charles E. Grassley (May 26, 2020), *available at* https://foreignaffairs.house.gov/_cache/files/a/b/aba462f3-09e5-4757-9228-21b2d46730e8/D86F423895BAEA1DC3FFE06E6600F962.bbresponse-engel-060120.pdf [https://perma.cc/7C67-EHKR] (hereinafter "Letter from Pat Cipollone"). Garvey's piece contains a thorough and excellent analysis of this topic, which comes to a different conclusion than does this Note. I recommend that anyone interested in this topic consult Garvey's article as well.

[2] H.R. 23, 117th Cong. (2021) (as passed by House, Jan. 5, 2021).

[3] H.R. 5314, 117th Cong. (2021) (hereinafter "PODA").

Part I provides historical context surrounding the IG Act and the executive branch's longstanding constitutional concerns. Part II provides an overview of Supreme Court jurisprudence covering for-cause removal provisions and lays out the modern framework. Finally, Part III analyzes the office of the IG under the modern framework. A conclusion follows.

I. THE IG ACT

A. IG Act and Proposed Amendments

The Inspector General Act of 1978[4] reorganized the executive branch by creating IG offices within several agencies. The Act was intended to create "independent and objective units" to conduct investigations and audits; provide leadership, coordination, and policy recommendations; and keep agency heads and Congress "fully and currently informed about problems and deficiencies" within the agencies.[5]

The IG Act created two types of IGs.[6] The first is an "establishment"[7] IG who operates from within most executive agencies.[8] The second is a "designated federal entity"[9] IG ("DFE IG"), operating within certain other federal entities, such as the Securities and Exchange Commission, and appointed by the head of the DFE.[10]

The President appoints establishment IGs with the advice and consent of the Senate.[11] In terms of agency hierarchy, IGs "report to and . . . [are] under the general supervision" of their respective agency heads.[12] However, agency heads do not have the power to

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[4] 5 U.S.C. app. §§ 1–13 (hereinafter "IG Act").

[5] IG Act § 2.

[6] GARVEY, *supra* note 1, at 2. A third type of IG, "Special" IGs, was created outside of the IG Act and therefore is not part of this analysis. *Id.* at 2–3.

[7] IG Act § 3.

[8] GARVEY, *supra* note 1, at 2 (citing IG Act §§ 3, 12).

[9] IG Act § 8G(a)(2).

[10] GARVEY, *supra* note 1, at 2 (citing IG Act §§ 8G(a)(2), 8G(g)(1)).

[11] IG Act § 3(a).

[12] *Id.*

"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."[13] As for the President's power to remove an IG, § 3(b) of the IG Act stipulates that: "[a]n Inspector General may be removed from office by the President. The President shall communicate the reasons for any such removal to both Houses of Congress[.]"[14] Agency heads can remove DFE IGs pursuant to § 8G(e)(2), which uses similar language as § 3(b) regarding communication to Congress.[15]

Congress has proposed amendments to both aforementioned sections of the IG Act. PODA §§ 702–703 seek to limit the President's power to remove an IG and, similarly, protect DFE IGs from being removed by agency heads. The bill would restrict the grounds under which the president may remove IGs. Those specific grounds include criminal activity, neglect of duty, inefficiency, or permanent incapacity. PODA also requires the president to "communicate the substantive rationale, including detailed and case-specific reasons" for removal, backed up by documentation of the grounds cited.[16] PODA's for-cause removal restrictions apply to both establishment IGs and DFE IGs. This Note seeks to resolve whether the aforementioned for-cause protections are constitutional.[17]

B. History of Executive Branch Opposition

Since the passage of the 1978 IG Act, both Democratic and Republican presidential administrations have objected to the Act's constraints on the president's power to remove IGs. For example,

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[13] *Id.*

[14] *Id.* § 3(b).

[15] *See id.* § 8G(e)(2).

[16] PODA §§ 702–703.

[17] Note that for-cause protections already exist for the Postal Service IG under 39 U.S.C. § 202(e). The constitutionality of that statutory provision might nevertheless be in question after *Free Enterprise Fund v. Public Company Oversight Board*, 561 U.S. 477 (2010). *See* GARVEY, *supra* note 1, at 9 n.75.

during President Jimmy Carter's administration, an opinion by the Office of Legal Counsel[18] objected to the requirement that the president notify the House and Senate of the reasons for removal, referring to such a requirement as "an improper restriction on the President's exclusive power to remove Presidentially appointed executive officers."[19] When signing a different bill that included a similar requirement, President George H.W. Bush wrote that "its obvious effect is to burden" the exercise of a president's constitutional removal authority.[20] President Barack Obama, when removing an IG, communicated to Congress merely that he "'no longer' had 'the fullest confidence' in" the IG, and argued that a requirement that he provide any more "reason" would be unconstitutional.[21] The D.C. Circuit accepted President Obama's position.[22] President Donald Trump referenced all these precedents when he removed two IGs in 2020, citing a lack of confidence.[23] The foregoing suggests that the executive branch has held a decades-long position that the IG Act, even in its current form, unconstitutionally restricts or conditions the president's removal power.

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[18] The Office of Legal Counsel, part of the U.S. Department of Justice, "provides legal advice to the President and all executive branch agencies . . . . The Office is also responsible for reviewing and commenting on the constitutionality of pending legislation." *Office of Legal Counsel*, U.S. DEP'T OF JUST., https://www.justice.gov/olc [https://perma.cc/Z2GZ-AH9U] (last visited Aug. 8, 2022).

[19] Inspector General Legislation, 1 Op. O.L.C. 16, 18 (1977) (citing Myers v. United States, 272 U.S. 52 (1926)).

[20] George H.W. Bush, Statement on Signing the Intelligence Authorization Act, Fiscal Year 1990 (Nov. 30, 1989), *in* 25 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 1851–53 (1989).

[21] Walpin v. Corp. for Nat'l & Cmty. Servs., 630 F.3d 184, 187 (D.C. Cir. 2011) (quoting Letter from Barack Obama, Pres., U.S., to Joseph R. Biden, Pres., U.S. Senate (June 11, 2009), *available at* https://abcnews.go.com/images/Politics/Biden_letter_to_Obama.pdf [https://perma.cc/PJS2-9NFL]).

[22] *Id*. ("This explanation satisfies the minimal statutory mandate that the President communicate to the Congress his 'reasons' for removal.").

[23] Letter from Pat Cipollone, *supra* note 1.

II. HISTORY OF FOR-CAUSE REMOVAL RESTRICTIONS FROM *MYERS* TO TODAY

Nearly a century ago, the Supreme Court held in *Myers v. United States*[24] that the president's executive power under Article II of the Constitution included "the power of appointment and removal of executive officers."[25] As a result, President Woodrow Wilson was empowered, without further Senate approval, to direct the Postmaster General to remove a Senate-confirmed postmaster.[26]

The Supreme Court subsequently narrowed *Myers*' broad holding in *Humphrey's Executor v. United States*.[27] After President Franklin Roosevelt tried to remove a member of the Federal Trade Commission, the Court held that the president's removal power was not unlimited and that Congress could include for-cause removal protection for executive officers in "quasi-legislative or quasi-judicial agencies[.]"[28] The Court distinguished the office of postmaster in *Myers*, which included "no duty at all related to either the legislative or judicial power," with an "administrative body," such as the FTC, "created by Congress to carry into effect legislative policies[.]"[29]

In *Wiener v. United States*,[30] the Court continued to apply the restrictive view of presidential removal power articulated in *Humphrey's Executor*. In *Wiener*, President Dwight Eisenhower sought to replace members of a commission that adjudicated war claims from World War II. Even though there was no statutory removal re-

[24] 272 U.S. 52 (1926).
[25] *See id.* at 164.
[26] *Id.* at 60.
[27] 295 U.S. 602 (1935).
[28] *Id.* at 629.
[29] *Id.* at 627–28.
[30] 357 U.S. 349 (1958).

striction, the Court held that a president did not have the constitutional power to remove members of a quasi-judicial body "merely because he wanted his own appointees . . . ."[31]

Decades later, in *Morrison v. Olson*,[32] the Supreme Court upheld statutory for-cause protections for the position of Independent Counsel ("IC")—an inferior officer charged with conducting investigations of and legal proceedings against government officials.[33] The Court discarded the *Humphrey's Executor* analysis of executive functions versus quasi-judicial or quasi-legislative functions.[34] Instead, the Court considered a balance of the importance of protecting the "necessary independence of the office" in question[35] with the importance of protecting "the President's ability to perform his constitutional duty[.]"[36] Looking to the details of the IC's characterization as an "inferior officer," and its function, such as its "limited jurisdiction and tenure and lacking policymaking or significant administrative authority[,]"[37] the Court concluded that for-cause protection struck an appropriate balance.[38]

The Supreme Court has drifted back towards the *Myers* standard of unrestricted presidential removal authority in recent years.

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[31] *Id.* at 356.

[32] 487 U.S. 654 (1988).

[33] *See id.* at 662.

[34] *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.'"). Notably, the Court did admit "*Myers* was undoubtedly correct in its holding, and in its broader suggestion that there are some 'purely executive' officials who must be removable by the President at will if he is to be able to accomplish his constitutional role." *Id.* at 690.

[35] *Id.* at 693.

[36] *Id.* at 691.

[37] *Id.*

[38] *Id.* at 691–92 ("[W]e 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.").

In *Free Enterprise Fund v. Public Company Accounting Oversight Board*,[39] the Court invalidated a statute whereby members of the Public Company Accounting Oversight Board ("PCAOB") were removable by Securities and Exchange Commission ("SEC") commissioners—and only for cause. The majority assumed without deciding that the SEC members themselves had for-cause removal protection.[40] The Supreme Court invalidated the PCAOB members' for-cause removal provision on the grounds that two layers of executive officials with for-cause removal protection in an agency hierarchy unconstitutionally restricted the president's ability to control the executive branch.[41] However, the Court did not directly rule on the constitutionality of the SEC commissioners' for-cause removal protection, perhaps implicitly affirming the constitutionality of such provisions.[42]

A decade later, in *Seila Law v. Consumer Financial Protection Bureau*,[43] the Supreme Court once again held unconstitutional a for-cause removal protection, this time for the director of the Consumer Financial Protection Bureau ("CFPB"). The Court determined that the director was vested with "significant executive power,"[44] such as "the authority to conduct investigations, issue subpoenas and civil investigative demands, initiate administrative adjudications, and prosecute civil actions in federal court."[45] In reviewing its prior decisions, the Court asserted that the President's broad removal power was "settled by the First Congress" and "confirmed in the

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[39] 561 U.S. 477 (2010).

[40] *See id.* at 487; *see also id.* at 545 (Breyer, J., dissenting) (criticizing the majority opinion for assuming without deciding that SEC commissioners themselves are removable only for cause).

[41] *Id.* at 484 ("The President cannot 'take Care that the Laws be faithfully executed' if he cannot oversee the faithfulness of the officers who execute them.").

[42] GARVEY, *supra* note 1, at 19.

[43] 140 S. Ct. 2183 (2020).

[44] *Id.* at 2192.

[45] *Id.* at 2193 (citing 12 U.S.C. §§ 5562, 5564(a), (f)).

landmark [*Myers*] decision," and that *Humphrey's Executor* and *Morrison* represent the only two recognized exceptions.[46] As the *Seila Law* majority put it, *Humphrey's Executor* allowed for-cause removal protections for "expert agencies led by a *group* of principal officers" and *Morrison* held the same for "certain *inferior* officers with narrowly defined duties."[47] However, the Court declined to extend the limits on the president's removal power to "principal officers who, acting alone, wield significant executive power," such as the CFPB director.[48]

Finally, in *Collins v. Yellen*,[49] the Supreme Court applied its holding in *Seila Law* to invalidate for-cause removal protections for the director of the Federal Housing Finance Agency ("FHFA"). The Court characterized this as a "straightforward application of [its] reasoning in *Seila Law*" noting the similar structures of the FHFA and CFPB.[50] Arguably, though, the Court's opinion in *Collins* went further. Whereas Chief Justice Roberts' opinion in *Seila Law* highlighted the CFPB director's "significant executive power,"[51] Justice Alito's majority opinion in *Collins* discarded the need to measure the scope of an agency's power and authority precisely.[52] Indeed, Justice Kagan, concurring in judgement on *stare decisis* grounds, criticized the Court for "careen[ing] right past that boundary line" in holding that "[a]ny 'agency led by a single Director,' no matter how much executive power it wields, now becomes subject to the requirement of at-will removal."[53] *Collins* thus represents the latest

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[46] *Id.* at 2191–92.

[47] *Id.* (emphasis in original).

[48] *Id.* at 2211.

[49] 141 S. Ct. 1761 (2021).

[50] *Id.* at 1784.

[51] *Selia Law*, 140 S. Ct. at 2211.

[52] *Collins*, 141 S. Ct. at 1785 ("Courts are not well-suited to weigh the relative importance of the regulatory and enforcement authority of disparate agencies, and we do not think that the constitutionality of removal restrictions hinges on such an inquiry.") (internal citations omitted).

[53] *Id.* at 1801 (Kagan, J., concurring in part and concurring in the judgment) (quoting *id.* at 1783–84 (majority opinion)).

step in the Court's return to a presumption against for-cause removal restrictions while viewing earlier decisions to the contrary as narrowly-defined exceptions.

III. CONSTITUTIONAL ANALYSIS OF FOR-CAUSE REMOVAL RESTRICTIONS

Seila Law provided the most authoritative explanation of the doctrine of presidential removal power—it stands as the most recent, comprehensive formulation of the relevant tests. The Court appeared to hold that there is a general presumption of presidential removal power, as the Court held in *Myers*.[54] That presumption holds for all executive officers outside of two narrow exceptions—the multi-head agency as in *Humphrey's Executor*[55] and inferior officers with limited duties and powers as in *Morrison*.[56] IGs do not fall within the multi-head agency exception, but they might be comparable to the inferior officer with limited duties like the IC in *Morrison*. A separate factor to consider is whether layers of hierarchy separate the president from an officer when the officer in question enjoys for-cause removal protection, which *Free Enterprise Fund* held is unconstitutional when that officer's superior also enjoys such protection.[57]

Part III will analyze whether IGs qualify for one of the two exceptions that allow them to receive for-cause removal protection under the modern removal doctrine. First, this Part considers whether IGs are officers or mere employees. Next, this Part examines whether IGs are principal or inferior officers. If IGs are principal officers, then it would be unconstitutional under *Myers* for IGs to enjoy for-cause removal protection. After considering what type of officer IGs are, this Part analyzes the type and degree of the IGs'

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[54] *See Selia Law*, 140 S. Ct. at 2192.

[55] *Collins* probably eliminates the inquiry into the scope of an agency's powers. *See supra* note 52.

[56] *See Selia Law*, 140 S. Ct. at 2192.

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

authority, which can make for-cause removal protection unconstitutional even for inferior officers. Finally, Part III concludes by discussing how and whether the dual layers analysis from *Free Enterprise Fund* applies to IGs.

It is important to note that:

> [T]he precise scope of these exceptions remains unresolved . . . . 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."[58]

Therefore, even if IGs do not perfectly fit into the *Morrison* exception, they may still warrant for-cause protection.

A. Are IGs Officers or Employees?

Unlike officers, "mere employees" are "not subject to the Appointments Clause."[59] The Supreme Court declined in *Free Enterprise Fund* to rule whether employees are "subject to the same sort of control" as officers.[60] Given the strong link between the Appointments Clause and the removal power, employees not subject to the former will likely not be subject to the latter.[61]

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[58] GARVEY, *supra* note 1, at 22 (emphasis in original) (quoting *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))).

[59] Lucia v. SEC, 138 S. Ct. 2044, 2062 (2018) (Breyer, J., concurring in the judgment in part and dissenting in part). *See also* Buckley v. Valeo, 424 U.S. 1, 126 n.162 (1976) (per curiam) ("Employees are lesser functionaries subordinate to officers of the United States.").

[60] *Free Enter. Fund*, 561 U.S. at 506.

[61] GARVEY, *supra* note 1, at 13–14 ("The constitutional principles applying to appointments and removals are intimately related . . . . [But while a]n executive branch official's classification as employee, inferior officer, or principal officer . . . has a role in determining Congress' freedom to impose removal restrictions, . . . it is not necessarily a dispositive one.").

The key distinction between officers and mere employees is whether the appointee possesses "significant authority pursuant to the laws of the United States."[62] What exactly "significant authority" *is* remains unclear, and the Court recently declined to clarify the uncertainty.[63] But other precedents can provide clues. In *Buckley v. Valeo*, the Court held that "administration and enforcement of public law" are "administrative functions [which] may . . . be exercised only by persons who are 'Officers of the United States.'"[64] However, "functions relating to the flow of necessary information—receipt, dissemination, and investigation" were not required to be performed by executive officers.[65] Additionally, the Court has suggested that "purely recommendatory powers" do not rise to the level of authority sufficient to establish officer status.[66]

On the other hand, officials in adjudicatory roles are more likely to be considered officers. *Lucia v. SEC* held that administrative law judges at the SEC were officers because they exercised "significant discretion" when carrying out "important functions" such as "the authority needed to ensure fair and orderly adversarial hearings—indeed, nearly all the tools of federal trial judges."[67] The Court's *Lucia* holding followed its earlier opinion in *Freytag v. Commissioner of Internal Revenue*,[68] which held that special trial judges in tax courts

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[62] *Buckley*, 424 U.S. at 126.

[63] *Lucia*, 138 S. Ct. at 2051 ("Both the *amicus* and the Government urge us to elaborate on *Buckley*'s 'significant authority' test, but another of our precedents makes that project unnecessary. The standard is no doubt framed in general terms, tempting advocates to add whatever glosses best suit their arguments.").

[64] *Buckley*, 424 U.S. at 141.

[65] *Id.* at 137.

[66] Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 507 n.10 (2010) (emphasizing that the Court's holding does not necessarily mean that administrative law judges are "officers" in part because they possess "purely recommendatory powers"); *see also id.* at 509 (suggesting that restricting the CFPB's enforcement powers "so that it would be a purely recommendatory panel" would be one way to eliminate the officer status of the CFPB's board members).

[67] *Lucia*, 138 S. Ct. at 2053 (citing Freytag v. Comm'r of Internal Revenue, 501 U.S. 868, 882 (1991)).

[68] 501 U.S. 868 (1991).

were officers because they "take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders."[69] Taken together, these special trial judges enjoyed "'significant discretion' when carrying out . . . 'important functions.'"[70] The Court in *Lucia* went further to say that "[e]ven if the duties . . . were not as significant as we . . . have found them . . . our conclusion would be unchanged"[71] because the officials had "independent authority"[72] in even "minor matters."[73] The independence and discretion enjoyed by the special trial judges were thus the critical factors making them officers instead of employees.

Taking all these factors together, IGs would seem to be officers, not mere employees. Though much of their role is "recommendatory," which *Free Enterprise Fund* suggested is not enough to be an officer, "[t]he 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."[74] Rather, IGs have "independent authority"[75] and "significant discretion"[76] in conducting investigations, given the fact that agency heads do not have the power to "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."[77] As such, IGs are likely officers, subject to constitutional rules regarding appointment and removal.

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[69] *Id.* at 881–82.
[70] *Lucia*, 138 S. Ct. at 2053 (quoting *Freytag*, 501 U.S. at 882).
[71] *Id.* at 2052 n.4 (quoting *Freytag*, 501 U.S. at 882).
[72] *Id.* (quoting *Freytag*, 501 U.S. at 882).
[73] *Id.* (quoting *Freytag*, 501 U.S. at 873).
[74] *Freytag*, 501 U.S. at 882.
[75] *Id.*
[76] *Id.*
[77] IG Act § 3(a).

B. Are IGs Principal or Inferior Officers?

IGs are most likely inferior officers. *Seila Law* noted the distinction between principal and inferior officers in interpreting the two historical exceptions to the *Myers* rule against removal restrictions. "In [*Humphrey's Executor*], 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*], we held that Congress could provide tenure protections to certain *inferior* officers with narrowly defined duties."[78] Whether IGs are principal or inferior officers determines which type of exception they must satisfy to qualify for for-cause removal protection. If IGs are principal officers, restrictions on the president's removal power would likely be unconstitutional as IGs are not members of multi-head expert agencies as in *Humphrey's Executor*. But if IGs are inferior officers, the constitutionality of for-cause removal protection would depend on an analysis of the IGs' "narrowly defined duties" compared to the IC in *Morrison*. This will be discussed in Part III.C.

In *Edmond v. United States*,[79] the Supreme Court crafted a test to help courts determine whether an official is a principal or inferior officer.

> 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. . . . "[I]nferior officers" are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.[80]

The Court held that Coast Guard Court of Criminal Appeals judges were inferior officers "by reason of the supervision over

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[78] Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2192 (2020) (emphasis in original).

[79] 520 U.S. 651 (1997).

[80] *Id.* at 662–63.

their work exercised by the General Counsel of the Department of Transportation in his capacity as Judge Advocate General and the Court of Appeals for the Armed Forces."[81] More recently, the Court in *Seila Law* rubber-stamped the approach detailed above.[82]

Whether IGs are principal or inferior officers under the *Edmond* test is complicated. On the one hand, the IG Act designed the office as "independent and objective units"[83] with layers of protection from interference in their work.[84] On the other hand, the IG Act is explicit that the IG "shall report to and be under the general supervision of the head of the establishment involved."[85] Perhaps the Supreme Court's opinion in *NASA v. Federal Labor Relations Authority*[86] can break the tie. *NASA* held that IGs are considered agency representatives under the Federal Service Labor-Management Relations Statute,[87] because "each Inspector General has no supervising authority—except the head of the agency of which the [Office of the Inspector General] is a part."[88] Although *NASA* dealt with an entirely different context (unfair labor practices), the Court's description of an agency head as being a "supervising authority" over the IG most likely tips the balance of the *Edmond* test in favor of viewing IGs as an inferior officers.

C. Scope and Degree of IGs' Authority

Because IGs are most likely inferior officers, *Seila Law* points to the *Morrison* exception of "limited duties and no policymaking or administrative authority" to determine whether for-cause removal

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[81] *Id.* at 666.

[82] *Seila Law*, 140 S. Ct. at 2199 n.3.

[83] IG Act § 2.

[84] *Id.* at § 3(a) ("Neither the head of the establishment nor the officer next in rank below such head shall 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.").

[85] *Id.*

[86] 527 U.S. 229 (1999).

[87] 5 U.S.C. § 7101 *et seq*.

[88] *NASA*, 527 U.S. at 240.

protection is constitutional.[89] *Morrison* held that for-cause protection was appropriate for ICs under that theory.[90] Arguably, ICs have an even broader set of powers than do IGs, including "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice."[91] "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."[92] However precise the analogy between IGs and ICs, the relationship is certainly closer than that between IGs and the CFPB Director, whose for-cause removal protection the Supreme Court ruled unconstitutional in *Seila Law*.[93]

This analysis, however, is complicated by *Seila Law*'s articulation of the Court's removal doctrine, which largely discarded the analytical framework of *Morrison* and the other earlier opinions. Instead, the majority in *Seila Law* stressed that *Myers* was the default rule while *Humphrey's Executor* and *Morrison* represented the "*outermost* constitutional limits of permissible congressional restrictions on the President's removal power."[94] This holding may indicate that an official with *any* power beyond those of the IC is outside of the *Morrison* exception.

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[89] Seila Law v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2200 (2020).

[90] Specifically, the Court held that the IC's "limited jurisdiction and tenure and lacking policymaking or significant administrative authority" was sufficient evidence that for-cause removal protection did not "unduly trammel[] on executive authority." Morrison v. Olson, 487 U.S. 654, 691 (1988).

[91] *Id.* at 671 (quoting 28 U.S.C. § 594(a)).

[92] GARVEY, *supra* note 1, at 34.

[93] *Seila Law*, 140 S. Ct. at 2200–01 ("By contrast [to the IC], 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.").

[94] *Id.* at 2200 (emphasis added) (quoting *PHH*, 881 F.3d at 196 (Kavanaugh, J., dissenting) (internal quotation marks omitted)).

The Court in *Collins* conducted just this type of inquiry, comparing the scope of power of one agency to that of another. Rejecting an argument that the FHFA was less powerful than the CFPB in *Seila Law* and thus entitled to *Humphrey's Executor*-like insulation from presidential power, the Court commented that "the CFPB might be thought to wield more power than the FHFA in some respects. But the FHFA might in other respects be considered more powerful than the CFPB."[95] Justice Alito's majority opinion declined to weigh the net difference in authority between the CFPB and the FHFA with precision.[96] Rather, the critical determination was that there were some areas in which the FHFA's authority surpassed the CFPB's authority.[97]

Analogously, whether IGs receive the same insulation from presidential power as ICs may depend on a comparison of their respective scopes of power and authority. As the Court held in *Collins*, it is unnecessary to conclude that the IGs' authority sweeps more broadly than does that of the ICs *on net*. Rather, if IGs wield more power than ICs in particular respects, that alone may necessitate the conclusion that IGs are not entitled to *Morrison*-like insulation from presidential removal power.

IGs' permanent position, as opposed to the "temporary" nature of ICs, is one such feature of IGs' power that eclipses that of ICs. Far from being just an example of *any* factor which grants IGs more power than ICs, the "temporary" nature of the IC position was one of the *key* factors the Court considered when deciding that ICs were inferior officers with permissible for-cause removal protections.[98]

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[95] Collins v. Yellen, 141 S. Ct. 1761, 1784 (2021).

[96] *See supra* note 52 (quoting *Collins*, 141 S. Ct. at 1768 ("[T]he nature and breadth of an agency's authority is not dispositive in determining whether Congress may limit the President's power to remove its head.")).

[97] *See Collins*, 141 S. Ct. at 1784–85.

[98] Morrison v. Olson, 487 U.S. 654, 672 ("[T]he 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 . . . ."); *id.* at 679

This element very well may place IGs outside of the "outermost limits" of the *Morrison* exception. Notably, "the only IG who currently possesses for cause protections (the U.S. Postal Service IG) serves a seven-year term."[99] The unlimited tenure of IGs (in general), therefore, might be a dispositive factor in concluding that IGs' "duties" and "authority" sweep more broadly than those of ICs. Overall, while it is a close question, under *Seila Law*'s gloss of *Morrison*, and under *Collins*' application of *Seila Law*, IGs are likely inferior officers that nevertheless retain too much authority for Congress to insulate them from the president's constitutional removal power under applicable Supreme Court precedent.

D. Multiple Layers Analysis

Provided the close questions presented above, it is worth considering whether the "multiple layers" consideration from *Free Enterprise Fund* affects the analysis. Recall that *Free Enterprise Fund* held that "multilevel protection from removal" violates the Constitution because it "contravenes the President's 'constitutional obligation to ensure the faithful execution of the laws.'"[100] This doctrinal point may be relevant for DFE IGs within independent agencies. *Free Enterprise Fund* applied to "Officers of the United States" who "exercis[e] significant authority."[101] As discussed in

("Particularly when, as here, Congress creates a temporary 'office' the nature and duties of which will by necessity vary with the factual circumstances giving rise to the need for an appointment in the first place, it may vest the power to define the scope of the office in the court as an incident to the appointment of the officer pursuant to the Appointments Clause.").

[99] GARVEY, *supra* note 1, at 36 (citing 39 U.S.C. § 202).

[100] Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 484 (2010) (quoting *Morrison*, 487 U.S. at 693).

[101] *Id.* at 506.

Part III.A, IGs are most likely officers under *Lucia* and *Freytag* because of their "independent authority"[102] and "significant discretion[.]"[103] Therefore, it would probably be unconstitutional for DFE IGs to be removable only by officers who themselves receive for-cause removal protection, whether those higher level officers obtain of the *Humphrey's Executor* multi-head agency exception or the *Morrison* limited duties exception.

CONCLUSION

For the foregoing reasons, for-cause removal protections for IGs are likely unconstitutional. However, this analysis presents close questions, specifically whether IGs are principal or inferior officers, and whether the scope of the IGs' authority goes beyond that of the ICs. The trajectory of the Supreme Court's decisions on this issue over the past decade-plus is informative, and it suggests that the Court will err toward a return to the *Myers* standard, which is protective of presidential removal power.

[102] Lucia v. SEC, 138 S. Ct. 2044, 2052 n.4 (2018) (quoting Freytag v. Commissioner of Internal Revenue, 501 U.S. 868, 882 (1991)).

[103] *Id.* at 2053 (quoting *Freytag*, 501 U.S. at 882).