UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

Administrative Proceedings Rulings
Release No. 6675 / September 16, 2019

Administrative Proceeding
File No. 3-17950

In the Matter of

David Pruitt, CPA

Order Denying Respondent's Motion to Dismiss

Respondent David Pruitt moves to dismiss this proceeding, arguing that it violates the Constitution's separation of powers and the Seventh Amendment. The Division of Enforcement opposes Pruitt's motion. For the reasons discussed below, Pruitt's motion is denied.

Separation of Powers

In what is called the Appointments Clause, the Constitution gives the President the power to appoint certain enumerated officers "with the Advice and Consent of the Senate" and the power to appoint:

> all other Officers of the United States whose Appointments are not herein otherwise provided for, and which shall be established by Law: *but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments*.[1]

Under the Constitution, therefore, there are two types of executive officers: principal officers, who are "selected by the President with the advice and

[1] U.S. Const. art. II, § 2, cl. 2 (emphasis added). The emphasized language "is sometimes referred to as the 'Excepting Clause.'" *Edmond v. United States*, 520 U.S. 651, 660 (1997).

consent of the Senate," and inferior officers, whose appointments Congress may vest in the President, the heads of departments, or the judiciary.[2]

The Supreme Court recently decided that the Commission's administrative law judges are inferior officers subject to the Appointments Clause and noted the parties' agreement that the Commission, as the head of a department, can constitutionally appoint them.[3] But the Court left open the issue Pruitt now raises: whether the multiple layers of tenure protection that administrative law judges enjoy violate the Constitution's separation of powers.[4] To fully understand this issue, it is necessary to put it in historical perspective.

Supreme Court precedent

In *United States v. Perkins*, a cadet engineer who graduated from the United States Naval Academy protested the Secretary of the Navy's decision to discharge him from the naval service.[5] In ruling on Perkins's petition, the Supreme Court noted that Congress had vested the appointment of cadet engineers in the Secretary of the Navy and had also provided that during peace time, naval officers could only be removed by court-martial.[6] After quoting the Appointments Clause and noting that Perkins's case did not involve an appointment with the advice and consent of the Senate, the Court held that:

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[2] *See Morrison v. Olson*, 487 U.S. 654, 670 (1988) (quoting *Buckley v. Valeo*, 424 U.S. 1, 132 (1976)).

[3] *Lucia v. SEC*, 138 S. Ct. 2044, 2049–51, 2055 & n.3 (2018); *see* 5 U.S.C. § 3105; 15 U.S.C. § 78d-1(a).

[4] *See Lucia*, 138 S. Ct. at 2050 n.1. An administrative law judge may not be removed from office or disciplined except for good cause shown before the Merit Systems Protection Board. 5 U.S.C. § 7521(a); 5 C.F.R. § 930.211. Members of the Merit Systems Protection Board are removable only for "inefficiency, neglect of duty, or malfeasance in office." 5 U.S.C. § 1202(d). Although the Securities Exchange Act of 1934 does not address the removal of members of the Commission, *see* 15 U.S.C. § 78d, the Supreme Court has assumed that "the Commissioners cannot themselves be removed by the President except under the … standard of 'inefficiency, neglect of duty, or malfeasance in office'" set forth in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 487 (2010).

[5] 116 U.S. 483, 483 (1886).

[6] *Id.* at 483–84.

> when congress, by law, vests the appointment of inferior officers in the heads of departments, *it may limit and restrict the power of removal as it deems best for the public interest*. The constitutional authority in congress to thus vest the appointment implies authority to limit, restrict, and regulate the removal by such laws as congress may enact in relation to the officers so appointed. The head of a department has no constitutional prerogative of appointment to offices independently of the legislation of congress, and by such legislation he must be governed, not only in making appointments, but in all that is incident thereto.[7]

Forty years later in *Myers v. United States*, the Court considered the removal of a postmaster first class, an inferior officer who was appointed, with the advice and consent of the Senate, to a statutorily fixed four-year term.[8] The Court determined that, since 1789, it had been recognized as a matter of "constitutional and statutory construction" that the executive power to appoint encompassed the power to remove.[9] The Court found support for this proposition by comparison with *Perkins* and the Excepting Clause. Citing *Perkins*, the Court noted that the Excepting Clause gave Congress the authority to vest the appointment of inferior officers in officials other than the President.[10] According to the Court, the language of the Excepting Clause—"But Congress may by law vest"—was the same as saying "excepting that Congress may by law vest."[11] And this "express … exception" as to the appointment and removal of inferior officers, "plain[ly] … excludes congressional dealing with appointments or removals of executive officers not

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[7] *Id.* at 485 (emphasis added). The Court quoted a lower court, whose "views" it "adopt[ed]." *Id.*

[8] 272 U.S. 52, 106–07 (1926).

[9] *Id.* at 119; *see id.* at 146–59 (discussing the "legislative decision of 1789"); *id.* at 161 ("The power to remove inferior executive officers, like that to remove superior executive officers, is an incident of the power to appoint them, and is in its nature an executive power.").

[10] *Id.* at 127.

[11] *Id.*

falling within the exception and leaves unaffected the executive power of the President to appoint and remove them."[12]

Recognizing that under *Perkins*, Congress could "prescribe incidental regulations controlling and restricting the [heads of departments] in the exercise of the power of removal," the Court held that Congress could not, by contrast, exercise "the power to remove or the right to participate in the exercise of that power."[13] Instead, unless Congress exercised "the power … to regulate removals as incidental to the exercise of its constitutional power to vest appointments of inferior officers in the heads of departments," the power of removal of inferior officers would rest with the President.[14] The Court thus invalidated a statute that limited the President's ability to remove first-class postmasters.[15]

Tenure protection arose again nine years later in *Humphrey's Executor v. United States*, in which President Roosevelt purported to remove a commissioner of the Federal Trade Commission.[16] Commissioners were appointed for fixed terms and were only removable "for inefficiency, neglect of duty, or malfeasance in office."[17] The Court distinguished *Myers*, holding that it applied to "*purely executive officers*" and involved "an executive officer restricted to the performance of executive functions" who was "charged with no duty at all related to either the legislative or judicial power."[18] The Court then

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[12] *Id.*

[13] *Id.* at 161.

[14] *Id.*; *see id.* at 162 ("If [Congress] does not choose to intrust the appointment of … inferior officers to less authority than the President with the consent of the Senate, it has no power of providing for their removal.").

[15] *Id.* at 176.

[16] 295 U.S. at 618–19.

[17] *Id.* at 619.

[18] *Id.* at 627–28 (emphasis added). The emphasized language—*purely executive officers*—is used five times in *Humphrey's Executor*. *Id.* at 628, 631–32. It echoes James Madison's statement, during debate in 1789 about creation of a comptroller of the Treasury, that if an office's "properties … are not purely of an executive nature," but rather partly "partake of a judiciary quality … there may be strong reasons why an officer of this kind should not hold his office at the pleasure of" the President. 1 Annals of Cong. 635–36 (1789) (Joseph Gales ed., 1834), https://memory.loc.gov/ammem/amlaw

observed that the Federal Trade Commission "acts in part quasi legislatively and in part quasi judicially" and that its commissioners must necessarily "discharge of their duties independently of executive control."[19] Otherwise, the "coercive influence" of the "power of removal" would "threaten[] the [Commission's] independence."[20] Having reached these conclusions, the Court announced the rule that determining whether Congress can limit the President's power to remove an officer "will depend upon the character of the office" in question.[21] Given the stated character of the Commission, the Court concluded that the commissioners' tenure protections were constitutional.[22]

Next up is *Wiener v. United States*, which involved a suit for back pay by a petitioner who was appointed to the War Claims Commission by President Truman and who alleged he was unlawfully removed by President Eisenhower.[23] Congress created that Commission to adjudicate "claims for compensating internees, prisoners of war, and religious organizations, who suffered personal injury or property damage at the hands of the enemy in connection with World War II."[24] The commissioners were appointed with the advice and consent of the Senate and their terms lasted for the life of the

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/lwaclink.html; *see Humphrey's Ex'r*, 295 U.S. at 631 (discussing Madison's statement).

[19] *Humphrey's Ex'r*, 295 U.S. at 628–29. One might doubt the Court's explanation that the Federal Trade Commission "exercises … executive function" only "in the discharge and effectuation of its quasi legislative or quasi judicial powers." *Id*. at 628; *see Morrison v. Olson*, 487 U.S. 654, 689 n.28 (1988) ("[I]t is hard to dispute that the powers of the FTC at the time of *Humphrey's Executor* would at the present time be considered 'executive,' at least to some degree."). Whether the Court's description is accurate, however, is less relevant than the broader point for which *Humphrey's Executor* stands as to the Court's view of officials who exercise adjudicatory authority.

[20] *Humphrey's Ex'r*, 295 U.S. at 630.

[21] *Id*. at 631. The Court also limited *Myers* "to purely executive officers." *Id*. at 632.

[22] *Id*. at 632.

[23] 357 U.S. 349, 349 (1958).

[24] *Id*. at 350 (citations omitted).

Commission.[25] Importantly, "Congress made no provision for removal of a Commissioner."[26]

In *Wiener*, the Court noted that *Humphrey's Executor* drew a distinction between executive branch officials who were "removable by virtue of the President's constitutional powers, and" officials who are obligated "'to exercise … judgment without the leave or hindrance of any other official.'"[27] As to the latter group, the Court stated that an executive "power of removal [could] exist[] only if Congress may fairly be said to have conferred it."[28]

The Court then explained that the most important factor to consider in determining whether the President retained the power of removal was the nature of the function of the office in question.[29] Given that the Commission was created to "adjudicate" claims "according to law," a responsibility the Court described as inherently "judicial," the Court held that it must "be inferred that Congress [would] not wish" that the commissioners be removable at will.[30] The Court was thus compelled to conclude that in the case of an adjudicatory body, the President had no power under the Constitution to remove a member of the body at will.[31] And it would not infer, based on Congressional silence, that such power was conferred by statute.[32]

This brings us to *Morrison v. Olson*, which involved a challenge to the independent counsel provisions of the Ethics in Government Act.[33] The independent counsel investigated and prosecuted government officials

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25 *Id.*

26 *Id.*

27 *Id.* at 353 (quoting *Humphrey's Ex'r*, 295 U.S. at 625–26).

28 *Id.*

29 *Id.* ("[T]he most reliable factor for drawing an inference regarding the President's power of removal in our case is the nature of the function that Congress vested in the War Claims Commission.").

30 *Id.* at 355–56.

31 *Id.* at 356.

32 *Id.*

33 487 U.S. 654 (1988).

involved in alleged criminal violations.[34] The independent counsel was not appointed by the Attorney General or the President but instead by a special court created for the purpose of appointing her.[35] Relevant to this case, once appointed, an independent counsel was removable only for "good cause."[36]

In considering whether a *good cause* removal restriction was constitutional, the Court somewhat backed away from *Wiener*, holding the decision whether a removal restriction is constitutional "cannot … turn on whether or not that official is classified as 'purely executive.'"[37] According to the Court, when it previously referred to agencies as *quasi-legislative* or *quasi-judicial*, it did so in the context of the determination "that it was not essential to the President's proper execution of his Article II powers that" the agencies in *Wiener* and *Humphrey's Executor* "be headed up by individuals who were removable at will."[38] The Court conceded, however, the that term *quasi-judicial* could serve as a useful shorthand for situations in which Congress might determine that, in order to properly function, an official must necessarily have a "degree of independence from the Executive, such as that afforded by a 'good cause' removal standard."[39] And although "an analysis of the functions served by the officials at issue is" relevant, "the real question is whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty."[40] The "functions of the officials in question must be analyzed in that light."[41]

In upholding the *good cause* provision at issue, the Court in *Morrison* was influenced by the fact that although the independent counsel exercised discretion and executive authority, her jurisdiction and tenure were limited and she "lack[ed] policymaking or significant administrative authority."[42]

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34 *Id.* at 660.

35 *Id.* at 661.

36 *Id.* at 663.

37 *Id.* at 689.

38 *Id.* at 690–91.

39 *Id.* at 691 n.30.

40 *Id.* at 691.

41 *Id.*

42 *Id.*

Based on these circumstances, the Court could not "see how the President's need to control the exercise of [the independent counsel's] discretion [was] 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."[43]

Finally, I turn to *Free Enterprise Fund v. Public Company Accounting Oversight Board*, the principal case on which Pruitt relies.[44] Congress created the Public Company Accounting Oversight Board "to oversee the audit of public companies that are subject to the securities laws."[45] Congress gave the Board "expansive powers" to "regulate every detail of an accounting firm's practice."[46] The Board was thus empowered to "promulgate[] . . . standards, perform[] routine inspections of all accounting firms, demand[] documents and testimony, and initiate[] formal investigations and disciplinary proceedings."[47] Congress also gave the Board authority to "issue severe sanctions in its disciplinary proceedings."[48] Although the Board was placed under the Commission's authority, its members could be removed only "'for good cause shown,' 'in accordance with' certain procedures."[49] And, as noted, the Supreme Court assumed that members of the Commission can be removed only for "inefficiency, neglect of duty, or malfeasance in office."[50]

The Supreme Court ultimately concluded that the double layer of removal protection afforded to members of the Board violated the Constitution's separation of powers. After reviewing *Perkins*, *Myers*, *Humphrey's Executor*, and *Morrison*, it noted that its previous approval of restrictions on the

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[43] *Id.* at 691–92.

[44] 561 U.S. 477 (2010); *see* Mot. at 2–4.

[45] *See* Sarbanes–Oxley Act of 2002, Pub. L. 107-204, §101(a), 116 Stat. 745, 750 (codified at 15 U.S.C. § 7211(a)).

[46] *Free Enter.*, 561 U.S. at 485.

[47] *Id.*

[48] *Id.*

[49] *Id.* at 486.

[50] *Id.* at 487. For a discussion of how this assumption arose, see Gary Lawson, *Stipulating the Law*, 109 Mich. L. Rev. 1191, 1200–03 (2011).

President's removal power involved "only one level of protected tenure separat[ing] the President from officers exercising executive power."[51]

Continuing, the Court noted that the Sarbanes–Oxley Act not only protected "Board members from removal except for good cause, but [it] withdr[ew] from the President any decision on whether that good cause exists" and instead gave that authority to commissioners who are not "subject to the President's direct control."[52] Under this regime, the Board was "not accountable to the President," and the President was "not responsible for the Board."[53] And this situation presented a constitutional problem because it diminished the President's constitutionally assigned "ability to execute the laws."[54] As the Supreme Court put it, the President "is not the one who decides whether Board members are abusing their offices or neglecting their duties. He can neither ensure that the laws are faithfully executed, nor be held responsible for a Board member's breach of faith."[55]

Having identified the constitutional violation, the Supreme Court concluded by clarifying that it was not the existence of the Board itself that violated the constitution.[56] Rather, it was the Board members' tenure protection in combination with the functions the Board performed that caused the violation.[57] Removal of the Board members' tenure protection thus served to remedy the separation of powers violation, and the rest of the Sarbanes–Oxley Act remained "fully operative as a law."[58]

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51 *Free Enter.*, 561 U.S. at 492–95.

52 *Id.* at 495.

53 *Id.*

54 *Id.* at 496 ("The President is stripped of the power our precedents have preserved, and his ability to execute the laws—by holding his subordinates accountable for their conduct—is impaired.").

55 *Id.*; *see id.* at 498 ("By granting the Board executive power without the Executive's oversight, this Act subverts the President's ability to ensure that the laws are faithfully executed . . . .").

56 *Id.* at 508–09.

57 *Id.* at 508–09.

58 *Id.* at 509 (quoting *New York v. United States*, 505 U.S. 144, 186 (1992)).

In its decision, the Court noted that it was not overruling *Humphrey's Executor*, *Morrison*, or *Perkins*.[59] And it was careful to note that its decision did not apply to administrative law judges in independent agencies.[60] As the Court noted, "unlike members of the Board, many administrative law judges … perform adjudicative rather than enforcement or policymaking functions, or possess purely recommendatory powers."[61]

Discussion

Some general principles can be derived from this precedent. In the case of principal and inferior officers who perform "purely executive" functions, tenure protections that impede the President's ability to perform his Article II responsibilities are unconstitutional.[62] And determining whether an officer's tenure protections will impede the President requires a functional analysis of the office the officer occupies.[63]

Additionally, by the terms of the Excepting Clause, Congress can vest the appointment of an inferior officer in the head of a department.[64] If Congress does so, it may place restrictions on the removal of the inferior officer.[65] Further, because adjudicative officials must maintain a degree of independence from the officers who appoint them, it is appropriate to afford them tenure protection.[66]

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[59] *Id.* at 483 ("The parties do not ask us to reexamine any of these precedents, and we do not do so.").

[60] *Id.* at 507 n.10.

[61] *Id.* (citations omitted).

[62] *See Morrison*, 487 U.S. at 689–92; *see also Free Enter.*, 561 U.S. at 498.

[63] *See Morrison*, 487 U.S. at 691; *see also Free Enter.*, 561 U.S. at 485–86, 507 n.10 (considering the Board's executive functions and distinguishing administrative law judges who perform adjudicative functions).

[64] *Myers*, 272 U.S. at 127.

[65] *Id.* at 161; *Perkins*, 116 U.S. at 485.

[66] *See Wiener*, 357 U.S. at 355–56 (presuming that an adjudicative office included tenure protection); Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 Ala. L. Rev. 1205, 1249 (2014) ("[C]ourts have reaffirmed the insulation of adjudicators from removal at will, and this

Applying these principles here, I reject Pruitt's argument that tenure protections for administrative law judges are unconstitutional. Because administrative law judges are inferior officers, Congress can vest their appointments in the heads of departments.[67] The Commissioners collectively are the head of a department.[68] And because Congress vested the Commission with the authority to appoint administrative law judges, Congress was authorized to "limit and restrict the [Commission's] power [to] remov[e]" its administrative law judges "as [Congress] deems best for the public interest."[69]

Pruitt relies on *Free Enterprise* and on principles concerning the relation between the President's ability to fulfill his constitutional responsibilities and authority to remove subordinates.[70] Because, in his view, "even a single layer of insulation from presidential control would impinge presidential authority," Pruitt asserts that multiple layers must be unconstitutional.[71]

To the extent Pruitt argues that President must be able to remove all inferior officers at will,[72] he ignores the fact, recognized in *Myers*, that Congress may "limit and regulate removal of … inferior officers by heads of

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longstanding and largely unquestioned understanding has developed into a very strong convention." (footnotes omitted)).

67 U.S. Const. art. II, § 2, cl. 2.

68 *Free Enter.*, 561 U.S. at 512–13.

69 *Perkins*, 116 U.S. at 485; *see* 5 U.S.C. § 3105; 15 U.S.C. § 78d-1(a). It has been suggested that *Perkins* might not have survived *Edmond*. *See United States v. Concord Mgmt. & Consulting LLC*, 317 F. Supp. 3d 598, 614 (D.D.C. 2018), *appeal dismissed*, No. 18-3061, 2018 WL 5115521 (D.C. Cir. Sept. 17, 2018). But the Supreme Court specifically stated in *Free Enterprise* that it was not overruling *Perkins*. 561 U.S. at 483. And it has also cautioned against assuming that it has overruled its precedent *sub silentio*. *See Hohn v. United States*, 524 U.S. 236, 252–53 (1998).

70 Mot. at 2.

71 *Id*. at 3; *see* Reply at 3 ("[T]his structure disables the President from acting to 'ensure that the laws are faithfully executed' and thereby violates the 'basic principle that the President cannot delegate ultimate responsibility or the active obligation to supervise that goes with it, because Article II makes a single President responsible for the actions of the Executive Branch.'" (quoting *Free Enter.*, 561 U.S. at 496–97)).

72 *See* Mot. at 3.

departments."[73] He also largely ignores the Excepting Clause and the precedent discussed above. Although he broadly suggests that removal restrictions impinge on the President's ability to carry out his Article II responsibilities, Pruitt ignores the fact that the Supreme Court has approved of removal restrictions for the principal officers in *Wiener* because they exercised adjudicative functions, and for the independent counsel in *Morrison*, because her "exercise of … discretion [was not] 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."[74]

Pruitt thus fails to address whether, considering a Commission administrative law judge's functions, the removal restrictions at issue in this case "are of such a nature that they impede the President's ability to perform his constitutional duty."[75] This matters because the Court in *Wiener* recognized a presumption of tenure protection for adjudicators, and in *Free Enterprise* made plain that its holding did not apply to administrative law judges who engage in adjudicative functions.[76]

This perhaps explains the fact that Pruitt cites no case in which the Supreme Court has invalidated removal protections for officials who occupy only an adjudicatory office with no policymaking or prosecutorial authority. Indeed, the case on which he principally relies, *Free Enterprise*, involved officers whose authority is readily distinguished from that of a Commission

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[73] 272 U.S. at 127; *see also Free Enter.*, 561 U.S. at 493 ("This Court has upheld for-cause limitations on [the] power" to remove inferior officers).

[74] *Morrison*, 487 U.S. at 691–92; *Wiener*, 357 U.S. at 355–56.

[75] *Morrison*, 487 U.S. at 691; *see Free Enter.*, 561 U.S. at 507 n.10 (distinguishing administrative law judges based on the functions they perform).

[76] *Free Enter.*, 561 U.S. at 507 n.10; *Wiener*, 357 U.S. at 355–56.; *see Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 537 F.3d 667, 699 n.8 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) (noting that administrative law judges "perform only adjudicatory functions that are subject to review by agency officials and that arguably would not be considered 'central to the functioning of the Executive Branch' for purposes of the Article II removal precedents," and stating that "[n]othing in this dissenting opinion is intended to or would affect the status of … administrative law judges" (citation omitted)), *aff'd in part and rev'd in part*, 561 U.S. 477 (2010).

administrative law judge.[77] In contrast with members of the Board who exercise classically executive functions,[78] the Commission's administrative law judges exercise only adjudicatory functions.[79] Indeed, they are barred from performing any other functions.[80] Furthermore, the jurisdiction of the Commission's administrative law judges is limited to a specific subject matter and they "lack[] policymaking or significant administrative authority," factors the Court has found significant in upholding tenure protections.[81] As a result, it is telling that Pruitt does not explain how the tenure protection afforded administrative law judges could impair the President's ability to perform functions "central to the functioning of the Executive Branch."[82] Indeed, it is not clear how the subject tenure protections could do so.[83]

Further, crediting Pruitt's argument and eliminating tenure protection could undermine an administrative law judge's ability to independently judge the facts presented "free from pressures by the parties or other officials within the agency."[84] And the Supreme Court "has repeatedly held that 'a "good cause"

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77 *See* 561 U.S. at 485 (noting that Board members had "expansive powers" to "regulate every detail of an accounting firm's practice," to "promulgate[] . . . standards, perform[] routine inspections of all accounting firms, demand[] documents and testimony, and initiate[] formal investigations and disciplinary proceedings").

78 *See id.*

79 *See Free Enter.*, 537 F.3d at 699 n.8 (Kavanaugh, J., dissenting); *see also Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 756–57 (2002) (discussing the similarities between trial judges and administrative law judges and between "administrative adjudications and judicial proceedings").

80 5 U.S.C. § 3105.

81 *See Morrison*, 487 U.S. at 691.

82 *Id.*

83 *See* Rao, 65 Ala. L. Rev. at 1247 ("[T]here are some good reasons for the conventional and established view that the President's control does not require at will removal for administrative law judges or other officials who solely adjudicate within the executive branch.").

84 *Butz v. Economou*, 438 U.S. 478, 513–14 (1978); *see* Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2363 (2001) (stating that "presidential participation" in agency adjudication "would contravene procedural norms and inject an inappropriate influence into the resolution of

removal standard' does not impermissibly burden the President's Article II powers, where 'a degree of independence from the Executive … is necessary to the proper functioning of the agency or official."[85]

Finally, in *Free Enterprise*, the Court quoted then-Judge Kavanaugh's dissent below that "the most telling indication of the severe constitutional problem with the [Board] is the lack of historical precedent for" it.[86] But resort to historical precedent cuts against Pruitt because the Administrative Procedure Act and administrative law judges and their tenure protections—in one form or another—have been around for seventy years. Unlike the Board, they and their tenure protections are neither novel nor new.[87]

But even if Pruitt is correct that there is a constitutional violation, dismissal is unwarranted. Indeed, in *Free Enterprise*, the Court refused to grant injunctive relief and instead granted declaratory relief.[88] As the Supreme Court explained, the result of its judgment was simply that there was only "a single level of insulation [between] the President" and the Board's members.[89] This fact only "affect[ed] the conditions under which those officers might someday be removed, and [had] no effect … on the validity of any officer's continuance in office."[90] Thus, when the case returned to the district court on remand, the result was simply that a few lines were excised from two sections of the Sarbanes–Oxley Act.[91]

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controversies" and opining that disallowing presidential "disrupt[ion] … preserv[es] [adjudicators'] ability to serve their intended, special objectives").

85 *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 79 (D.C. Cir. 2018) (en banc).

86 561 U.S. at 505 (quoting *Free Enter.*, 537 F.3d at 699).

87 *See* Rao, 65 Ala. L. Rev. at 1249; c*f. Free Enter.*, 537 F.3d at 699 (Kavanaugh, J., dissenting) ("[A] page of history is worth a volume of logic." (quoting *N.Y. Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921))).

88 561 U.S. at 513.

89 *Id.* at 508.

90 *Id.*

91 Judgment, *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, No. 1:06-cv-217 (D.D.C. Feb. 23, 2011), ECF No. 66.

And even then, it is not clear which tenure-protection provision would be excised. As Pruitt notes, more than one is implicated in this case.[92] But in another context, the Supreme Court has explained that when remedying a constitutional violation in a statute, "[t]he choice between [remedial] outcomes is governed by the legislature's intent, as revealed by the statute at hand."[93] Pruitt, however, does not engage this analysis choosing instead only to focus on the tenure protection afforded administrative law judges while ignoring the implication of the Supreme Court's assumption that the Commissioners also enjoy tenure protection.[94]

A final note on this issue. Pruitt faults the Division for echoing the Solicitor General's argument in *Lucia* about how to interpret the term *good cause* in order to avoid perceived constitutional problems associated with the tenure protections for administrative law judges.[95] There is no need to explore the interpretation of the term *good cause*. The parties have cited no case in which a court has invalidated a *good cause* tenure protection provision for an agency official who only exercises adjudicatory authority. And as Pruitt notes, courts defer to the Merit Systems Protection Board's interpretation of *good cause*.[96] Further, although the Solicitor General has suggested that a restrictive interpretation of the term good cause is necessary to avoid constitutional concerns,[97] the Department of Justice's Office of Legal Counsel[98] opined prior to *Free Enterprise* that:

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92 Mot. at 3.

93 *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1699 (2017); *cf. Free Enter.*, 561 U.S. at 509 ("We therefore must sustain [the] remaining provisions" of the Sarbanes–Oxley Act "'[u]nless it is evident that the Legislature would not have enacted those provisions ... independently of that which is [invalid].'" (quoting *New York*, 505 U.S. at 186)).

94 *See Free Enter.*, 561 U.S. at 546–47 (Breyer, J., dissenting). *Wiener* may be the historical precedent supporting the assumption that the commissioners enjoy tenure protection.

95 Reply at 3–5; *see* Opp'n at 2–4.

96 Reply at 4.

97 Brief for Respondent Supporting Petitioners at 45–55, *Lucia v. SEC*, 138 S. Ct. 2044 (2018) (No. 17-130), 2018 WL 1251862.

98 The Office of Legal Counsel exercises the Attorney General's delegated authority to provide advice on questions of law to the President and the heads

> for-cause and fixed-term limitations on the power to remove officers with adjudicatory duties affecting the rights of private individuals will continue to meet with consistent judicial approval: the contention that the essential role of the executive branch would be imperiled by giving a measure of independence to such officials is untenable under both precedent and principle.[99]

For the foregoing reasons, the separation of powers aspect of Pruitt's motion is denied.

Seventh Amendment

Pruitt argues that this proceeding violates his Seventh Amendment right to a jury trial. Again, some historical perspective is necessary.

Background

Although Article III of the Constitution provides for "[t]he trial of all Crimes … by Jury," it is silent as to a right to trial by jury in civil cases.[100] The right to a jury trial in civil cases was added to the Constitution through the Seventh Amendment, which provides that "[i]n Suits at common law, … the right of trial by jury shall be preserved."[101] The phrase *suits at common law* refers to "suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered."[102] The Amendment thus preserves not only the right to a jury trial as that right existed in 1791, but extends to new causes of action created by statute, as long as those statutes "create[] legal

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of the departments. *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Justice*, 922 F.3d 480, 483 (D.C. Cir. 2019).

99 The Constitutional Separation of Powers Between the President & Cong., 20 Op. O.L.C. 124, 169 (1996), 1996 WL 876050, at *28, https://www.justice.gov/file/20061/download.

100 U.S. Const. art. III, § 2, cl. 3.

101 U.S. Const. amend. VII.

102 *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 447 (1830).

rights and remedies … enforceable in an action for damages in the ordinary courts of law."[103]

Notwithstanding the Seventh Amendment, the Supreme Court has recognized that:

> there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.[104]

The Court has explained that "[t]he mode of determining matters of this class is completely within congressional control. Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals."[105]

In *St. Joseph Stock Yards Co. v. United States*, the Supreme Court explained that "there is a distinction between action within the sphere of legislative authority and action which transcends the limits of legislative power."[106] When acting within its sphere of authority, Congress has "broad discretion" and "may exercise that authority directly, or through the agency it creates or appoints."[107] Federal courts will thus not "substitute [their] judgment for that of [Congress] or its agents as to matters within the province of either."[108] Moreover, when Congress "appoints an agent to act within that sphere of legislative authority, it may endow the agent with power to make

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103 *Curtis v. Loether*, 415 U.S. 189, 193–94 (1974); *accord Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 41–42 (1989).

104 *Murray's Lessee v. Hoboken Land & Imp. Co.*, 59 U.S. (18 How.) 272, 284 (1855).

105 *Crowell v. Benson*, 285 U.S. 22, 50 (1932) (quoting *Ex parte Bakelite Corp.*, 279 U.S. 438, 451 (1929)).

106 298 U.S. 38, 50 (1936).

107 *Id.*

108 *Id.* at 51.

findings of fact which are conclusive," assuming constitutional requisites are met.[109]

This brings us to the Supreme Court's decision in *Atlas Roofing Co. v. Occupational Safety and Health Review Commission*.[110] There, two businesses were cited by the Secretary of Labor for work-place health and safety violations.[111] They contested the citations before an administrative law judge, who imposed civil monetary penalties.[112] After review before the Commission and a court of appeals, the Supreme Court granted certiorari.[113] The Court held that as to *public rights*, which it defined as "cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact," the Seventh Amendment did not bar adjudication before an administrative agency.[114] The Court added that "when Congress creates new statutory 'public rights,'" it could assign adjudication of those rights to an administrative agency "even if the Seventh Amendment would have required a jury where the adjudication of those rights is assigned instead to a federal court of law."[115]

The Court also stressed two points. First, it emphasized that administrative fact-finding is permissible when public rights are being litigated, such as suits in which "the Government is involved in its sovereign capacity under an otherwise valid statute creating enforceable public rights."[116] Second, the Court stressed that fact-finding in civil cases "was never the exclusive province of the jury … at the time of the adoption of the Seventh Amendment; and the question whether a fact would be found by a jury turned

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109 *Id.*

110 430 U.S. 442 (1977).

111 *Id.* at 447.

112 *Id.* at 447–48.

113 *Id.* at 448–49.

114 *Id.* at 450; *accord Granfinanciera*, 492 U.S. at 51 ("adher[ing] to [*Atlas Roofing*'s] general teaching").

115 *Atlas Roofing*, 430 U.S. at 455.

116 *Id.* at 458.

to a considerable degree on the nature of the forum in which a litigant found himself."[117]

The Court reemphasized these points in *Granfinanciera, S.A. v. Nordberg*.[118] In *Granfinanciera*, a bankruptcy judge presided without a jury over a suit to recover an allegedly fraudulent monetary transfer.[119] In deciding whether the petitioners were entitled a jury trial, the Court explained that to decide whether a statutory action comes within the ambit of the Seventh Amendment, it first "compare[s] the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity."[120] Second, it "examine[s] the remedy sought and determine[s] whether it is legal or equitable in nature."[121] This second inquiry is more important than the first.[122] "If, on balance, these two factors indicate that a party is entitled to a jury trial under the Seventh Amendment, [the Court] must decide whether Congress may assign and has assigned resolution of the relevant claim to a non-Article III adjudicative body that does not use a jury as factfinder."[123]

But the Court also explained that the inquiry into whether Congress can assign adjudication to an administrative agency is "quite distinct."[124] That question depends on whether the adjudication involves a public right. And "[i]f a claim that is legal in nature asserts a 'public right,' … then the Seventh Amendment does not entitle the parties to a jury trial if Congress assigns its

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117 *Id.* As to these points, in presenting the government's case, Solicitor General Bork's primary argument—the public rights rationale adopted by the Court amounted to a fallback position—was that the Seventh Amendment never applies in suits in which the government is a party. Brief for Respondents at 19–82, *Irey v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442 (1977) (Nos. 75-748, 75-746), 1976 WL 181396.

118 492 U.S. 33 (1989).

119 *Id.* at 36–37.

120 *Id.* at 42 (quoting *Tull v. United States*, 481 U.S. 412, 417 (1987)).

121 *Id.* (quoting *Tull*, 481 U.S. at 417–18).

122 *Id.* (citing *Tull*, 481 U.S. at 421).

123 *Id.*

124 *Id.* at 42 n.4.

adjudication to an administrative agency or specialized court of equity."[125] As a result, "Congress may devise novel causes of action involving public rights free from the strictures of the Seventh Amendment if it assigns their adjudication to tribunals without statutory authority to employ juries as factfinders."[126]

Discussion

According to Pruitt, the Seventh Amendment bars this proceeding because civil penalty actions must be tried before a jury because they are analogous to common law legal actions.[127] But this argument fails because this proceeding, brought under the Securities Exchange Act of 1934, is for the enforcement of public rights—it involves the Government acting "in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact."[128] And because it involves adjudication of public rights, Congress was permitted to assign it to a non-Article III tribunal for adjudication.[129] Indeed,

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[125] *Id.*

[126] *Id.* at 51. The Court also broadened its view of public rights, holding "that the Federal Government need not be a party for a case to revolve around 'public rights,'" so long as the "right" being litigated "is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary." *Id.* at 54.

[127] Mot. at 5.

[128] *Atlas Roofing*, 430 U.S. at 450; *see also Granfinanciera*, 492 U.S. at 52 ("Congress may fashion causes of action that are closely *analogous* to common-law claims and place them beyond the ambit of the Seventh Amendment by assigning their resolution to a forum in which jury trials are unavailable.").

[129] *See Granfinanciera*, 492 U.S. at 42 n.4, 51–54 & n.8; *Atlas Roofing*, 430 U.S. at 450, 458, 460–61. Although the Court recently noted that its "precedents applying the public-rights doctrine have not been entirely consistent," it re-affirmed the public-rights doctrine's applicability to matters arising between the government and others and the principle that "when Congress properly assigns a matter to adjudication in a non-Article III tribunal, the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder." *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1373, 1379 (2018) (internal quotation marks omitted). The securities laws reflect the public-rights nature of this proceeding. *See, e.g.*, 15 U.S.C. § 78b (setting forth the necessity for regulation of securities markets); Dodd–Frank Wall Street Reform and

Atlas Roofing itself involved a civil monetary penalty assessed by an agency's administrative law judge and upheld by the agency.[130] The fact that Pruitt would have been entitled to a jury had his case been filed in district court is, as the Court in *Atlas Roofing* held, beside the point.[131]

Pruitt argues that the action the Commission has pursued against him is not a new cause of action exempt from a jury trial under the Seventh Amendment because Congress authorized the Commission to bring actions under preexisting enforcement provisions before an administrative tribunal.[132] It is true that Congress authorized administrative proceedings such as this one after enacting the statutory provisions that are the basis for Pruitt's alleged violations.[133] But Pruitt cites no authority holding or even suggesting that

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Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, 1376 (2010) (same).

[130] 430 U.S. at 447–48.

[131] *Id.* at 455 ("Congress is not required by the Seventh Amendment to choke the already crowded federal courts with new types of litigation or prevented from committing some new types of litigation to administrative agencies with special competence in the relevant field. This is the case even if the Seventh Amendment would have required a jury where the adjudication of those rights is assigned instead to a federal court of law instead of an administrative agency."); *id.* at 460–61 ("[H]istory and our cases support the proposition that the right to a jury trial turns not solely on the nature of the issue to be resolved but also on the forum in which it is to be resolved."); *see Granfinanciera*, 492 U.S. at 53 ("Congress may effectively supplant a common-law cause of action carrying with it a right to a jury trial with a statutory cause of action shorn of a jury trial right if that statutory cause of action inheres in, or lies against, the Federal Government in its sovereign capacity."). Pruitt's reliance on *Tull*, which involved a civil suit in a United States district court under the Clean Water Act, is thus misplaced. Mot. at 4–6; *see Tull*, 481 U.S. at 418 n.4. Indeed, there is no right to a jury trial in an administrative enforcement action for a civil penalty under the Clean Water Act. *Sasser v. Adm'r, U.S. EPA*, 990 F.2d 127, 129–30 (4th Cir. 1993).

[132] Mot. at 6; Reply at 7–8.

[133] *See* OIP at 11 (charging Pruitt with violations of Exchange Act Section 13(b)(2)(A) and (b)(5), and Rule 13b2-1); Foreign Corrupt Practices Act Amendments of 1988, Pub. L. No. 100-418, § 5002, 102 Stat. 1107, 1415 (enacting Section 13(b)(5)); Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, § 102, 91 Stat. 1494, 1494 (enacting Section 13(b)(2)(A)); Promotion of the Reliability of Financial Information and Prevention of the Concealment of

Congress may not reassign public rights to administrative proceedings. And the Supreme Court has held that as to public-rights cases, the fact that "Congress chose the courts in the past does not foreclose its choice of" a non-Article III adjudicator "today."[134] For Seventh Amendment purposes, the relevant point is that this statutory proceeding is one unknown to the common law and for the enforcement of public rights, under a federal regulatory program that Congress established many years after the Seventh Amendment's ratification.[135]

The Seventh Amendment aspect of Pruitt's motion is denied.

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James E. Grimes
Administrative Law Judge

Questionable or Illegal Corporate Payments and Practices, 44 Fed. Reg. 10,964, 10,966–67, 10,970 (Feb. 23, 1979) (promulgating Rule 13b2-1 as a means to implement Section 13(b)(2)); *see also* OIP at 1, 11 (instituting proceeding under Exchange Act Sections 4C and 21C, and Commission Rule of Practice 102(e) and authorizing consideration of whether a civil penalty may be imposed under Section 21B(a)); Dodd–Frank, § 929P(a)(2), 124 Stat. at 1863 (enacting Section 21B(a)(2), which authorized civil penalties in cease-and-desist proceedings under Section 21C); Sarbanes–Oxley, § 602, 116 Stat. at 794 (enacting Section 4C); Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Pub. L. No. 101-429, § 203, 104 Stat 931, 939–40 (enacting Section 21C).

134 *Oil States*, 138 S. Ct. at 1378.

135 *See NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48–49 (1937) ("The proceeding is one unknown to the common law. It is a statutory proceeding. Reinstatement of the employee and payment for time lost are requirements imposed for violation of the statute and are remedies appropriate to its enforcement. The contention under the Seventh Amendment is without merit.").