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MSPB Strikes Down Tenure Protections for Immigration Judges

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The latest MSPB case poses significant concerns for the civil service.

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Shortly after President Trump's second inauguration, the Executive Office of Immigration Review (EOIR) removed several immigration judges from their positions, citing only the president's authority under Article II. Like other career employees, however, immigration judges may be removed "only for such cause as will promote the efficiency of the service." The Supreme Court has consistently upheld these tenure protections as a permissible exercise of Congress's authority over inferior officers and employees.

In *Jackler and Jaroch Consolidation v. Department of Justice*, the Merit Systems Protection Board (MSPB)—the agency tasked with adjudicating federal employment disputes—held that it could adjudicate the government's constitutional defense to the removal of two assistant chief immigration judges. On the merits, the board concluded that immigration judges are inferior officers who exercised significant adjudicative and policymaking authority such that the usual civil service framework could not constitutionally limit their removal.

The board's conclusion rests on two premises: First, immigration judges are inferior officers under the Appointments Clause. Second, their duties are sufficiently significant that Congress may not insulate them from at-will presidential removal. The first premise is correct, though the board's reasoning is incomplete. The second is wrong. It misreads the Supreme Court's precedents and overlooks the supervisory framework that has long justified tenure protections for inferior officers. If accepted, the board's approach would strip tenure protections from a wide range of career employees.

The MSPB's Opinion in *Jackler* and *Jaroch*

On Feb. 14, 2025, the EOIR removed Megan Jackler and Brandon Jaroch from their positions as assistant chief immigration judges. Before the MSPB, the EOIR argued that "Article II of the U.S. Constitution authorized the Attorney General to remove individuals qualifying as inferior officers, such as [Jackler and Jaroch], without restriction; and that exercise of this authority abrogated otherwise applicable statutory removal protections." Accepting the government's argument would mean that tenure protections—codified at 5 U.S.C. § 7513—could not be constitutionally applied to immigration judges.

The board first addressed whether it could consider the agency's constitutional argument. Historically, the board has refused to consider the constitutionality of the Civil Service Reform Act. In *Davis-Clewis v. Department of Veterans Affairs*, the board concluded that it lacked authority to consider the constitutionality of 5 U.S.C. § 7513 because it cannot "invalidate one or more provisions of the statute that created it." After the Department of Justice had removed Jackler and Jaroch, the Department of Justice's Office of Legal Counsel published an opinion stating that the MSPB is obligated to consider constitutional issues raised by agencies during its proceedings. The agency then filed a motion in *Jackler* stating that OLC's opinion "provides binding legal advice within the Executive Branch" and therefore must control the MSPB's handling of the constitutional question in *Jackler*.

Although the board reaffirmed that it lacks power to consider facial challenges to a statute, it concluded that it may adjudicate as-applied constitutional challenges while determining its own jurisdiction. The agency argued that it did not seek to invalidate 5 U.S.C. § 7513 wholesale but, instead, that the statute could not constitutionally be applied to immigration judges. The board agreed and held that the constitutional question was properly before it and reversed the initial administrative judge's contrary conclusion.

On the merits, the board concluded that immigration judges qualify as inferior officers under the Appointments Clause. Drawing on *Lucia v. SEC*—which held that Securities and Exchange Commission administrative law judges are inferior officers—and *Freytag v. Commissioner*—which reached the same conclusion for special trial judges of the Tax Court—the board emphasized that immigration judges occupy continuing positions established by law and exercise significant adjudicative authority. They administer oaths, receive and evaluate evidence, examine witnesses, issue subpoenas, impose sanctions, and ultimately determine whether an individual may remain in the United States. The board concluded that, because those responsibilities closely resemble the adjudicatory roles at issue in *Lucia* and *Freytag*, the appellants qualify as inferior officers rather than employees.

Having classified the appellants as inferior officers, the board then turned to whether Article II prohibited the application of 5 U.S.C. § 7513 to immigration judges. Framing the issue through what it described as the "*Perkins*/*Morrison*/*Seila Law*" framework, the board reasoned that although Congress may impose removal restrictions for certain inferior officers, those restrictions are permissible only where the officer has limited duties and lacks

policymaking or significant administrative authority. The board determined that the appellants did not fall within that exception. It emphasized that immigration judges exercise independent judgment in adjudicating removal proceedings, that their decisions may become final if not appealed, and that they possess substantial discretion in administering hearings and granting relief. It further emphasized that these responsibilities arise in the immigration field, which it characterized as an area of "significant consequences." On that basis, it concluded that the appellants must be subject to at-will removal under Article II and that 5 U.S.C. § 7513 could not constitutionally be applied to them. Because those protections supply the basis for MSPB review, the board held that it lacked jurisdiction over the appeals and dismissed them accordingly.

Inferior Officers and Removal Protections

The MSPB's decision has prompted immediate debate over whether it correctly applied the governing Appointments Clause framework. Two disputes emerge from the decision.

Inferior Officers

First, was the MSPB correct that Jackler and Jaroch are inferior officers? The short answer is yes, but for reasons that the board failed to fully explore.

In *Buckley v. Valeo*, the Supreme Court established that an "officer" is someone who exercises "significant authority pursuant to the laws of the United States." As the board detailed, the judges' responsibilities and powers closely resemble those of the officials identified as inferior officers in *Lucia*, *Freytag*, and *United States v. Arthrex Inc.*: They administer oaths, take evidence, issue subpoenas, and adjudicate disputes with significant legal consequences. That comparison is helpful in establishing that immigration judges are officers, but the board neither mentioned *Buckley* nor engaged with the "significant authority" standard. Moreover, that standard answers only whether an official qualifies as an Article II officer. It does not determine whether the officer is principal or inferior.

The principal-inferior distinction turns instead on supervision. In *Edmond v. United States*, the Court explained that inferior officers are those "directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." This question of supervision has two related components: administrative oversight and "final say" authority.

Administrative oversight asks whether a superior, also known as "principal," officer assigns tasks, sets the rules governing the official's work, and retains some authority over employment, including removal. Every Supreme Court case to consider this issue has found sufficient administrative oversight.

The "final say" test asks whether there is a principal officer who sits above you who can override your decision. In *Edmond*, the Supreme Court concluded that inferior officers of the Coast Guard Court of Criminal Appeals were properly supervised

because the Court of Appeals for the Armed Services could reverse their decisions. In *Kennedy v. Braidwood Management*, the secretary of health and human services was found to properly supervise members of the U.S. Preventive Services Task Force, because the secretary retained authority to block the task force's recommendations. By contrast, in *Arthrex*, the Supreme Court concluded that administrative patent judges (APJs)—who were appointed as inferior officers—*did* have the final say over their decisions, which led the Court to conclude that they had been improperly appointed to their office. The Court remedied that failing by empowering the Patent and Trademark Office (PTO) director—a principal officer—to review all APJ decisions.

Immigration judges satisfy both components of this framework. They are subject to administrative supervision by the EOIR, which hires them, assigns them to particular geographic offices, and establishes the rules and policies governing their work. They also do not have final say over their decisions. Although they issue decisions in removal proceedings, those decisions, as the board noted, are subject to review by the Board of Immigration Appeals and the Attorney General and do not carry precedential force.

The board's failure to examine the supervision of immigration judges is not merely a finer point regarding the application of the inferior officer test. It obscures the connection between supervision and removal protections, which has been central to the Supreme Court's understanding of why Congress may insulate inferior officers from removal.

Removal of Inferior Officers

When the MSPB turned to removal, it concluded that Jackler and Jaroch could not be protected by Congress. It did so, however, based on a misstatement of the rule from *Perkins* and *Morrison* in *Seila Law LLC v. Consumer Financial Protection Bureau* and a misunderstanding of the role of final decision-making.

The classic case for understanding the removal of inferior officers is *United States v. Perkins*. *Perkins* involved navel-cadet engineer Lyman Perkins whom the Navy attempted to discharge as part of a law requiring a reduction in the naval officer corps. If that reduction law did not apply to Perkins, the only other way to remove naval officers, according to the applicable statute, was by court-martial.

In the lower court, Perkins had to prove that he was not just an undergraduate or trainee but rather a graduate of the Naval Academy and an officer under Article II. When the Court of Claims sided with Perkins, it then faced the question of the basis for the Navy's discharge. Because Perkins had not been dismissed after a court-martial, he had not been properly discharged.

When the government appealed the decision to the Supreme Court, it argued that Congress's requirement to court-martial Perkins was "an infringement upon the constitutional prerogative of the executive." The Court disagreed. Critically, the Court explained why removal protections for Perkins and other inferior officers fit Article II's commands:

> We have no doubt that 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.

Perkins stands for the broad proposition that Congress may limit the removal of inferior officers and, *a fortiori*, employees.

Since it was decided, *Perkins* has been cited by the Supreme Court only six times. In *Myers v. United States*, Chief Justice William Howard Taft explained how *Perkins* fit into the larger scheme of removal protections even as he offered a strong interpretation of the president's inherent removal power under Article II. In *Morrison v. Olson*, both the majority and Justice Antonin Scalia's dissent affirmed the continued vitality of *Perkins*. In fact, Scalia concluded that the Constitution "requires that [the president] have plenary power to remove principal officers such as the independent counsel, but it does not require that he have plenary power to remove inferior officers."

Why would both Chief Justice Taft in *Myers* and Justice Scalia in *Morrison*, both of whom embraced the principle that the president may remove principal officers at will, agree that *Perkins* was correctly decided? As Scalia explained, removal protections are permissible for inferior officers because they are "subject to the supervision of principal officers who (being removable at will) have the President's complete confidence." What matters for the purposes of executive control is not the formal ability to remove at will, but the practical ability to direct and countermand subordinate officers. So long as a principal officer retains final authority to override the decisions made by those below, the executive branch remains fully accountable for the exercise of executive power.

Until recently, the Court had never suggested *Perkins* is somehow limited. Nor has it otherwise engaged with Scalia's understanding of *Perkins*. But in *Seila Law*, a case involving the removal protections of a principal officer who was the single head of an agency, the Court seemed to change how it described *Perkins* and *Morrison*. There, it reframed the holding of *Morrison* and *Perkins* as an exception to the president's removal power "for inferior officers with limited duties and no policymaking or administrative authority."

This statement is not just inconsistent with both *Morrison* and *Perkins*. It also makes no sense. If one has only limited duties and does not possess policymaking or administrative authority, how does one also exercise significant authority as required to be an inferior officer under *Buckley*? If taken seriously, *Seila Law*'s dicta could mean no inferior officers will ever be entitled to removal protections precisely because they qualify as inferior officers. The Court cannot have intended to upend a century of precedent and the civil service laws in a single sentence when the precise issue was not before the Court.

The board, however, never wrestled with any of this. After describing the appellants' duties, the board placed substantial weight on the fact that immigration adjudication operates in an area of "significant consequence" for the nation, emphasizing its effects on foreign relations and national policy. That emphasis introduced a consideration not found in the Supreme Court's Appointments Clause cases, which focus on the nature of the authority exercised and the framework within which it is exercised—not on the importance of the policy domain in which that authority is deployed. By elevating the significance of the subject matter, the board appears to substitute the traditional inquiries with a criterion that lacks a clear doctrinal basis.

In the one instance in which it did attempt to distinguish its decision from the Court's precedents, the board simply got it wrong. The Court in *Arthrex* held that APJs were unconstitutionally insulated from supervision because they exercised unreviewable decision-making authority. To remedy that failure, the Court severed the statutory restriction on review and vested the PTO director with authority to review APJ decisions. The Court's reasoning makes clear that the *availability* of review by a principal officer—even if not mandatory—is sufficient to establish the supervision necessary to sustain both inferior-officer status and associated removal protections.

The board nevertheless claimed that, because review of immigration judges' decisions is "limited and conditional" and depends on whether the Board of Immigration Appeals or the attorney general elects to intervene, the case was distinguishable from *Arthrex*. But review of APJ decisions in *Arthrex* was also discretionary.

That misstep illustrates the board's incomplete analysis in reaching its conclusion that removal protections are impermissible. The board failed to engage with the Court's tests for inferior officers and did not explore the supervisory mechanisms that, since *Perkins*, have been viewed as sufficient to sustain Congress's choice to adopt removal protections.

The Meaning of *Jackler* and *Jaroch* for the Civil Service

The MSPB's decision, if followed, would have consequences well beyond immigration judges. Two features of the opinion are especially troubling: its potential to sweep in large numbers of career officials who currently enjoy civil

service protections, and its effective prohibition on tenure protections for agency adjudicators.

First, the line between inferior officers and mere employees is far less clear than the board's opinion suggests. The Supreme Court has held that an "officer" is someone who exercises "significant authority pursuant to the laws of the United States," but neither the Court nor Congress has ever drawn a precise boundary between inferior officers and employees. Scholars remain deeply divided over whether "officer" encompasses most federal employees or only a narrow subset. The result is a standard that invites reclassification. Many career employees exercise some measure of independent judgment, manage subordinates, or make consequential decisions within their areas of expertise. Under the board's approach—which emphasizes the significance of the duties performed and the policy domain in which they arise—many of these officials could be recharacterized as inferior officers and thereby stripped of the tenure protections that Congress has provided through 5 U.S.C. § 7513.

The risk is not hypothetical. The federal government employs thousands of officials who play an indispensable role in administering law in areas of "significant consequence." Career members of the Senior Executive Service administer large programs, and many exercise considerably more policymaking authority than immigration judges. Under the board's framework, they would be among the first officials stripped of tenure protections. Career attorneys—who make charging decisions, file court briefs, exercise prosecutorial discretion, and advise on matters with significant regulatory and national security consequences—are also at risk. Food and Drug Administration reviewers issue legally binding product approvals. Internal Revenue Service auditors determine whether taxpayers owe additional taxes. Environmental Protection Agency scientists engage in legally required analyses needed to support new environmental regulations. Under existing Supreme Court precedent, these officials would all be deemed inferior officers or mere employees because they are properly supervised by a principal officer. But the board's decision raises questions as to whether Congress may insulate these officials from removal simply because they operate in areas of "significant consequence" and a principal officer may choose not to exercise their discretion to review their decisions.

Second, the board's reasoning amounts to a categorical prohibition on tenure protections for agency adjudicators. Congress has deliberately chosen to insulate many agency adjudicators from the threat of removal. These protections safeguard the impartiality of officials who must decide individual cases on the merits, free from the threat that an unfavorable ruling will cost them their positions. If the board's reasoning in *Jackler* and *Jaroch* were accepted, no agency adjudicator who qualifies as an inferior officer could ever be constitutionally insulated from at-will removal. The independence that Congress built into administrative adjudication would be undone not by a considered reexamination of *Perkins*, but by a misreading of dicta in *Seila Law*.

Jackler and *Jaroch*'s significance extends beyond its doctrinal errors. By collapsing the distinction between the authority that makes someone an officer and the authority that supposedly disqualifies them from removal protections, the board has adopted a framework that, if taken to its logical conclusion, would render much of the civil service vulnerable to at-will removal. Courts reviewing this decision should reject the MSPB's reasoning and reaffirm what *Perkins* has stood for since 1886: Congress may protect inferior officers from at-will removal.

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