Constitutionality of the Foreign Service Grievance Board's Oversight Authority

The final decisionmaking authority of the Foreign Service Grievance Board violates the Appointments Clause of Article II because members of the Board are inferior officers who are not subject to the direction and supervision of a politically accountable Executive Branch official.

Those provisions of the Foreign Service Act that vest the Board with final decisionmaking authority cannot be constitutionally enforced. Instead, such provisions must be severed and final decisionmaking authority returned to the relevant presidentially accountable officer—the Secretary of State.

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MEMORANDUM OPINION FOR THE LEGAL ADVISER DEPARTMENT OF STATE

The Foreign Service Grievance Board ("FSGB" or "Board") hears grievances filed by members of the Foreign Service. 22 U.S.C. § 4135. Although the Secretary of State is responsible for appointing Board members, the statute prevents him from removing them except for cause and gives the Board final decisionmaking authority within the Executive Branch. This means that, for example, if a high-ranking diplomatic official in the Foreign Service files a grievance after being separated from the Foreign Service or otherwise disciplined by the Secretary, the Board can reinstate the official over the Secretary's objection.

Affording the Board final decisionmaking authority in this way violates the Appointments Clause of Article II. In *United States v. Arthrex, Inc.*, the Supreme Court held that "the exercise of executive power by inferior officers must at some level be subject to the direction and supervision of" a politically accountable officer. 141 S. Ct. 1970, 1988 (2021). But that requirement has not been met here. The Board is comprised of inferior officers removable only for cause, yet the statute empowers it to make decisions that are not reviewable by any politically accountable officer, rendering the statute unconstitutional.

The appropriate solution to this problem is to "sever[] the unconstitutional portion of the statute." *Id.* at 1986 (plurality opinion). The statute here can be salvaged if the Department of State were to decline to enforce those sections of the statute that purport to limit the scope of the Secretary's review of Board decisions and to vest the Board with final decisionmaking authority. By declining to enforce those portions of the statute, final decisionmaking authority will be appropriately returned to the relevant Executive Branch official—either the Secretary of State or the President himself.

I.

A.

Article II of the Constitution vests in the President the "executive Power," which carries with it a "vast share of responsibility for the conduct of our foreign relations." *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring)). Since the early days of the Republic, the President has been "the sole organ of the nation in its external relations, and its sole representative with foreign nations." *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936) (quoting then-Representative and future-Chief Justice Marshall's statement, 10 Annals of Cong. 613 (1800)). The President enjoys, for example, the exclusive power to "negotiate treaties," nominate ambassadors, and "dispatch[] other diplomatic agents." *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 13 (2015). And he alone can "open diplomatic channels" with other countries, "engag[e] in direct diplomacy with foreign heads of state and their ministers," and formally "recognize foreign nations and governments." *Id.* at 13–14. Although the Constitution requires Senate approval to "make Treaties," U.S. Const. art. II, § 2, cl. 2, the President has long exercised the unilateral power "to make 'executive agreements' with other countries," settling controversies and resolving disputes on the world stage, *American Insurance*, 539 U.S. at 415.

Because the President's myriad responsibilities exceed the capacity of any single person, "no one could 'execute the laws' 'alone and unaided,'" *Trump v. Slaughter*, 146 S. Ct. 2283, 2291 (2026) (quoting *Myers v. United States*, 272 U.S. 52, 117 (1926)), and "the Framers expected that the President would rely on subordinate officers for assistance," *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2191 (2020). In its inaugural session, the First Congress created the predecessors to the Department and Secretary of State, to conduct whatever "matters respecting foreign affairs" they would be assigned by the President. Act of July 27, 1789, ch. 4, § 1, 1 Stat. 28, 29. As the country grew, so did the

Executive's need for officers conducting its business abroad. In 1924, Congress merged the preexisting diplomatic and consular services to create the modern United States Foreign Service. Pub. L. No. 68-135, § 1, 43 Stat. 140, 140 (1924); *see also Vance v. Bradley*, 440 U.S. 93, 98 (1979).

Today, the Foreign Service boasts thousands of members who serve under the direction of the Secretary of State and "represent the interests of the United States in relation to foreign countries and international organizations." 22 U.S.C. § 3904(1). According to numbers published by the State Department's Bureau of Global Talent Management, there were over 14,000 members of the Foreign Service at the end of September 2024, including 8,488 "[g]eneralist" officials and 5,911 "[s]pecialist[s]." U.S. Dep't of State, *GTM Fact Sheet* (2024), https://perma.cc/K5H2-2KS8.

Members' duties vary widely in scope and importance. At the top of the hierarchical ladder, members can be "[c]hiefs of mission," who are "in charge of a diplomatic mission of the United States or of a United States office abroad," 22 U.S.C. §§ 3902(3), 3903(1)—that is, the highest-ranking American diplomats in each country and the official heads of the U.S. embassies. At the bottom, entry-level personnel assist with logistical operations abroad, providing the "skills and services required" for the Service's "effective performance." *Id.* § 3903(5). And there are members performing duties everywhere in between, such as "Senior Foreign Service" members, who "are the corps of leaders and experts for the management of the Service and the performance of its functions," and mid-level "Foreign Service officers," who have "general responsibility for carrying out" the Service's main functions. *Id.* § 3903(3)–(4). All these various roles are filled by members of the Foreign Service.

B.

In 1980, Congress sought to "strengthen and improve" the United States Foreign Service with the Foreign Service Act of 1980, Pub. L. No. 96-465, § 101(b), 94 Stat. 2071, 2074 (codified at 22 U.S.C. § 3901(b)) ("Act"). One of the Act's features is the FSGB, which was created to resolve any "grievances" brought by a Foreign Service member ("FSM"). 22 U.S.C. § 3901(b)(4); *see id.* §§ 4131–4140. In general, a "grievance" under the Act is "any act, omission, or condition subject to the control of the Secretary which is alleged to deprive a[n] [FSM] . . .

of a right or benefit authorized by law or regulation or which is otherwise a source of concern or dissatisfaction to the [FSM]." *Id.* § 4131(a)(1). This can include any number of employment actions, ranging from retaliation to discipline to termination. *See id.* § 4131(a)(1)(A)–(C), (F).

Members of the Board are appointed by the Secretary from a list of candidates chosen by the agencies subject to Board oversight, but they cannot be employees of the State Department or part of the Foreign Service. *Id.* § 4135(a)–(b). The statute also requires that members be U.S. citizens who are "independent, distinguished," and "well known for their integrity." *Id.* § 4135(a). Members of the Board serve for two-year terms and can be removed by the Secretary only "for corruption, neglect of duty, malfeasance, or demonstrated incapacity to perform his or her functions, established at a hearing." *Id.* § 4135(b), (d). The statute provides no other way for the Secretary to reassign members of the Board or otherwise relieve them of their duties. *Cf.* 5 U.S.C. § 3395 (providing for the reassignment of members of the Senior Executive Service).

Grievances filed with the Board sometimes culminate in hearings. A grievant is entitled to a hearing if his case involves "disciplinary action" taken against him or pertains to mandated retirement from the Foreign Service. 22 U.S.C. § 4136(1); *see also id.* §§ 4007, 4008. The Board controls the procedures available to a grievant and may order an oral hearing on any issue that it determines could be best resolved through that avenue. *Id.* § 4136(1). Where no oral hearing is held, the parties can make written submissions. *Id.* § 4136(6). In either case, when proceedings are complete, the Board issues a written decision that lays out the "findings of fact and a statement of the reasons for the decision." *Id.* § 4137(a). And on the basis of such a decision, the Board has "the authority to direct the Department" to take any "remedial action" it deems "appropriate," *id.* § 4137(b), including ordering the Department to correct an inaccurate personnel record, *id.* § 4137(b)(1); reverse a decision denying compensation or some other benefit, *id.* § 4137(b)(2); "retain" the grievant in a case that could otherwise result in his separation from the Service, *id.* § 4137(b)(3); "reinstate" the grievant, if he has already been separated from the Service, and grant him back pay, *id.* § 4137(b)(4); or "pay reasonable attorney fees to the grievant," *id.* § 4137(b)(5).

In most cases, the Board's decision is "final, subject only to judicial review." *Id.* § 4137(c). This includes decisions on cases arising out of an

FSM's removal. *See id.* § 4131(a)(1)(A), (C) (defining "grievance" to include cases arising from the "separation" of an FSM and "allegedly wrongful disciplinary action"). For instance, if an FSM files a grievance alleging wrongful termination and the Board finds that grievance meritorious, the Board can order the Department to retain or reinstate the FSM, and the Department has no recourse. This is true regardless of the FSM's rank within the Foreign Service, the stated rationale for removal, or the identity of the removing official—even if it is the President.

A narrow subset of Board decisions *can* trigger a second layer of review by the Secretary. The Board is required to submit as a "recommendation" to the Secretary any decision ordering remedial action that (i) "relates directly to promotion, tenure[,] or assignment of the grievant," (ii) is "not otherwise provided for" in the statute, or (iii) includes a Board recommendation for disciplinary action. *Id.* § 4137(d)(1). But these categories do not generally include grievances about an FSM's removal or other discipline directed by the Secretary or the President. Promotion, tenure, and assignment refer to specific employment actions in the Foreign Service. *See* U.S. Dep't of State, 3 *Foreign Affairs Manual* 2323, https://perma.cc/VFS7-Z3ZS (laying out the promotion process for FSMs); *id.* 2241.4(3), 2245, https://perma.cc/7MKX-4VJB (defining "[t]enure" as the "[g]ranting of career status" and setting out the tenure process); *id.* 2400, https://perma.cc/4XGL-Z7QB (outlining how FSMs are "assigned" for placement abroad). And the statute's allowance for Secretary review of disciplinary action applies only where "*the Board* finds that the evidence before it warrants disciplinary action"—not where the discipline is initiated by the Department and reversed by the Board. 22 U.S.C. § 4137(d)(1) (emphasis added). That section therefore currently does not afford the Secretary the final word on all grievances arising from removals or other disciplinary action.

If a decision does fall within one of these categories, however, the Secretary can then decide to "reject[]" the Board's recommendation "in whole or in part" if he finds that implementing it "would be contrary to law or would adversely affect the foreign policy or national security of the United States." *Id.* If he finds the decision adverse to foreign policy or national security, then his rejection is considered final and ends the matter.

But if the Secretary rejects the Board's recommendation for being "contrary to law," he must submit that decision in writing to the Board for yet another review. *Id.* § 4137(d)(3)(A). The Board then has the choice to "confirm[], modify[], or vacat[e] its original recommendation" in the light of the Secretary's views. *Id.* § 4137(d)(3)(B)(i). And the Board ultimately holds the final decision: Once the Board issues this last recommendation, the Act provides that it "shall be implemented by the Secretary." *Id.* § 4137(d)(3)(C).

The effect of this procedure is that the Secretary exercises final decisionmaking authority with respect to the Board's decisions only in circumstances where the decision falls within section 4137(d) *and* its implementation would be adverse to foreign policy or national security. In decisions that do not fall within section 4137(d)—for example, a ruling in a grievance arising from the removal of a senior member of the Foreign Service who has failed to carry out the President's objectives abroad—the Secretary has no review authority under the statute at all. In other words, under this statute, important Executive Branch personnel decisions can be reversed by an administrative board that is not accountable to the President or any Executive Branch officer and whose members cannot be removed except for cause.

II.

A.

The Appointments Clause requires that principal officers be appointed by the President with the advice and consent of the Senate. U.S. Const. art. II, § 2, cl. 2; *Edmond v. United States*, 520 U.S. 651, 658–61 (1997). Out of "administrative convenience," the Framers permitted Congress to vest the appointment of "inferior Officers" elsewhere: "in the Courts of Law, or in the Heads of Departments." *Edmond*, 520 U.S. at 660 (quoting U.S. Const. art. II, § 2, cl. 2). These requirements, far from being mere "etiquette or protocol," are "among the significant structural safeguards of the constitutional scheme" and are "designed to preserve political accountability relative to important Government assignments." *Id.* at 659, 663 (citation omitted). They ensure that "[w]hen power is exercised well, the people know whom to thank; when power is exercised poorly, they know whom to blame—and whom to fire." *Slaughter*, 146 S. Ct. at 2304.

An "officer" is anyone who exercises "significant authority pursuant to the laws of the United States." *Edmond*, 520 U.S. at 662 (quoting *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam)). However, the line between "inferior" and "principal" officers is not always clear. *See Morrison v. Olson*, 487 U.S. 654, 671 (1988). "In determining whether an officer may properly be characterized as inferior, we believe that the most important issues are the extent of the officer's discretion to make autonomous policy choices and the location of the powers to supervise and to remove the officer." *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 150 (1996) ("*Separation of Powers*"). Indeed, the Supreme Court has held that "whether one is an inferior officer depends on whether he has a superior other than the President." *Arthrex*, 141 S. Ct. at 1980 (cleaned up). Generally, then, "'inferior 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." *Edmond*, 520 U.S. at 663; *see also Separation of Powers*, 20 Op. O.L.C. at 150.

Another factor used to evaluate inferior-officer status is "whether the relevant officer has the 'power to render a final decision on behalf of the United States' without review by a principal officer." *Kennedy v. Braidwood Mgmt., Inc.*, 145 S. Ct. 2427, 2445 (2025) (quoting *Edmond*, 520 U.S. at 665). In *Arthrex*, the Court considered whether Administrative Patent Judges ("APJs") sitting on the Patent Trial and Appeal Board ("PTAB") were "inferior officers" even though their decisions could not be reviewed by a politically accountable superior. 141 S. Ct. at 1976–78 (majority opinion). The PTAB is "an executive adjudicatory body" within the Department of Commerce's Patent and Trademark Office that "decides whether an invention satisfies the standards for patentability on review of decisions by primary examiners." *Id.* at 1977. Before *Arthrex*, the PTAB's three-member panels, typically composed of APJs appointed by the Secretary of Commerce, were issuing final decisions that were not reviewable by any other Executive Branch official. *Id.* Thus, although APJs were appointed as *inferior* officers by the head of a department, they were exercising the final decisionmaking power of a *principal* officer. *See id.* at 1983.

The Court held that this exercise of "unreviewable authority" by inferior officers violated the Appointments Clause. *Id.* at 1985. By vesting the appointment of PTAB members in the Secretary of Commerce, Congress provided that APJs would be "inferior officers." *Id.* at 1979–80. At the same time, however, Congress "assigned APJs 'significant authority' in adjudicating the public rights of private parties" and "insulat[ed] their decisions from review and their offices from removal." *Id.* at 1986 (quoting *Buckley*, 424 U.S. at 126). These features in combination produced an unconstitutional result. Giving APJs "unchecked . . . executive power," without making them ultimately answerable to the President (or another politically accountable official), "blur[red] the lines of accountability demanded by" Article II. *Id.* at 1982–83. In the end, "the exercise of executive power by inferior officers must at some level be subject to the direction and supervision of an officer nominated by the President and confirmed by the Senate." *Id.* at 1988.

B.

The structure of the FSGB suffers from the same constitutional infirmities identified in *Arthrex*. The FSGB is comprised of "officers" according to *Buckley*, *see* 424 U.S. at 126, but like the PTAB in *Arthrex*, the structure of the FSGB violates the Appointments Clause because FSGB decisions are not ultimately reversible by a politically accountable executive official.

Start with officer status. Members of the FSGB are "officers" because they "exercise[e] significant authority pursuant to the laws of the United States." *Buckley*, 424 U.S. at 126. FSGB members hold an office that is "established by Law." U.S. Const. art. II, § 2, cl. 2; *see also Freytag v. Comm'r*, 501 U.S. 868, 881 (1991) (finding the same with respect to United States Tax Court special trial judges ("STJs")). They also serve the "important function[]" of adjudicating certain kinds of controversies between the government and members of the Foreign Service and, in the course of carrying out that function, exercise "significant discretion." *Lucia v. SEC*, 585 U.S. 237, 248 (2018) (quoting *Freytag*, 501 U.S. at 882) (applying these factors to administrative law judges ("ALJs") on the Securities and Exchange Commission). The FSGB also has authority comparable to the ALJs in *Lucia* and the STJs in *Freytag*, including the authority to "take testimony, conduct trials, [and] rule on the admissibility of evidence." *Id.* at 247 (quoting *Freytag*, 501 U.S. at 881–82).[1] This

[1] *See also, e.g.*, 22 U.S.C. § 4136(1) (imbuing the Board with the authority to conduct hearings); *id.* § 4136(2)–(3) (authorizing witness testimony, cross-examination, depositions, and interrogatories, unless the Board "finds such interrogatory irrelevant, immaterial, or unduly repetitive"); *id.* § 4136(4) (empowering the Board to "exclude" any "oral or documentary evidence" that is deemed similarly "irrelevant").

is more than enough under *Arthrex*, *Lucia*, and *Freytag* to render members of the FSGB "officers" for purposes of the Appointments Clause.

The finality of FSGB decisions cannot withstand scrutiny after *Arthrex*.[2] Like members of the PTAB, FSGB members are appointed by a Cabinet secretary and are removable only for cause. And like the APJs in *Arthrex*, Congress has given members of the FSGB "'significant authority' . . . , while also insulating [certain categories of] their decisions from review and their offices from removal." 141 S. Ct. at 1986 (quoting *Buckley*, 424 U.S. at 126). The Foreign Service Act gives the FSGB authority to adjudicate certain employment disputes between the government and FSMs, including FSMs who wield significant executive power abroad. This authority is an exercise of executive power that can have far-reaching consequences for the President's foreign-policy agenda.

Worse yet, the reversal of certain decisions of the FSGB cannot be ultimately overridden by the Secretary or even by the President. 22 U.S.C. § 4137(c) ("[D]ecisions of the Board under this subchapter shall be final . . . ."). Under the Act, an ambassador fired by the President can earn reinstatement by filing a grievance and convincing the FSGB to side with him. But this flatly contravenes Article II. "Subordinates who exercise the President's power," here or abroad, must be "subject to removal by him." *Slaughter*, 146 S. Ct. at 2310. That the President have power to remove principal officers is necessary to maintain political accountability in the Executive Branch. *See id.* at 2303. For the same reason, officers who are not directly responsible to the President, like those who comprise the Board, cannot exercise final executive decisionmaking power. *Arthrex*, 141 S. Ct. at 1988. Such unchecked executive power being wielded by inferior officers offends the Appointments Clause of Article II. *Id.*

Nor can we avoid the *Arthrex* problem by invoking our longstanding presumption that absent a contrary indication by Congress, principal officers may review the decisions of those whom they supervise. *See Secretary of Education Review of Administrative Law Judge Decisions*, 15 Op. O.L.C. 8, 10 (1991). That presumption applies where the relevant statute provides that the adjudicatory board's decision is "final" and then contemplates no further review. *Id.* at 10–11 ("[T]he [Administrative

[2] For the avoidance of doubt, we are not opining on the consistency with Article II of the rest of the Board's structure.

Procedure Act ('APA')] expressly provides that an agency action can be 'final' for purposes of the APA, and thus for purposes of judicial review, even though it is subject to reconsideration or appeal to a higher authority within the agency."); *see also* 88 Fed. Reg. 70,586, 70,588–89 (Oct. 12, 2023) (discussing the presumption in the context of the Office of the Chief Administrative Hearing Officer). But where the statute accounts for the possibility of additional review and expressly vests final decisionmaking authority in the entity conducting that review (here, the Board), our contrary presumption cannot overcome the plain text.

III.

The President must "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. In exercising that duty, he will inevitably encounter laws that contain some unconstitutional provisions but are otherwise valid. *See Constitutionality of Race-Based Department of Education Programs*, 49 Op. O.L.C. __, at *13–14 (Dec. 2, 2025). Such cases require the President to determine whether the "unconstitutional provisions are severable from the rest of [the relevant statute], thus allowing him to execute the remaining part of the law . . . in a manner consistent with the Constitution." *Id.* at *14.

Unconstitutional provisions are presumptively severable. *Id.*; *see also Slaughter*, 146 S. Ct. at 2304 n.3. Where there is "a conflict between the Constitution and a statute," the usual solution is to "give 'full effect' to the Constitution and to whatever portions of the statute are 'not repugnant' to the Constitution," while disregarding the provisions that are unconstitutional. *Arthrex*, 141 S. Ct. at 1986 (plurality opinion) (quoting *Bank of Hamilton v. Dudley's Lessee*, 27 U.S. (2 Pet.) 492, 526 (1829)). The "normal rule" is that "partial, rather than facial, invalidation is the required course." *Id.* (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985)). Indeed, presuming severability manifests "respect for Congress's legislative role" by not "unnecessarily disturbing a law apart from invalidating the provision that is unconstitutional." *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2351 (2020).

But the presumption of severability can be overcome. An unconstitutional provision is not severable—and the President therefore should not enforce any part of the statute—where it is "incapable of functioning independently" without the unconstitutional provisions, or where the statute would not "function in a *manner* consistent with the intent of Congress." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684–85 (1987) (emphasis in original). Even so, it is "fairly unusual" for a law not to function without the unconstitutional provisions, *see Political Consultants*, 140 S. Ct. at 2352, and the Court has recognized that using "a scalpel rather than a bulldozer" will generally be preferable, *Seila Law*, 140 S. Ct. at 2210 (opinion of Roberts, C.J.).

In applying this standard, *Arthrex* is again instructive. The Court's remedy in that case was to invalidate the portion of the relevant statute that gave final authority to the PTAB, thereby returning the ultimate decisionmaking power to the presidentially appointed Executive Branch official at the head of the relevant agency. *See* 141 S. Ct. at 1986–88 (plurality opinion). This remedy resulted in the fewest changes of available options to the structure of the agency. *Id.* Moreover, the remaining portions of the statute that did not have constitutional infirmities could function independently and in a manner consistent with the intent of Congress.

The same severability course is appropriate here. The unconstitutional, and therefore unenforceable, portions of the Act are those in section 4137(d) that limit the scope of the Secretary's review authority in certain types of grievance cases and vest final decisionmaking power in the Board. But those portions can be severed—giving the Secretary full review authority and decisionmaking power—without affecting the statute's overall functionality and purpose. This can be accomplished by severing section 4137(d)(1) in part and section 4137(d)(3) in its entirety.

First, the limits that section 4137(d)(1) places on the scope of the Secretary's review authority are unconstitutional. For the statute to comply with the Appointments Clause, those limiting provisions cannot be enforced. Thus, the first sentence of section 4137(d)(1), if we read only those provisions that are consistent with the Constitution, would provide: "If the Board finds that the grievance is meritorious, it shall make an appropriate recommendation to the Secretary." Enforcing only these provisions would have the effect of expanding the Secretary's review authority to include any Board decision that finds a grievance meritorious. Rather than having the ability to review only certain cases, the Secretary would enjoy discretion to review any case that decides in favor of the grievant and reject any Board decision that he determines is "contrary to law or would adversely affect the foreign policy or national security of the United States." 22 U.S.C. § 4137(d)(1).

Second, no part of section 4137(d)(3) can lawfully be enforced. That section sets out a procedure that purports to give the Board the final decision in cases where the Secretary has determined that the Board's recommended course of action is contrary to law. But *Arthrex* recognized that the Board cannot have the final decision. Disregarding section 4137(d)(3) as unenforceable would leave the final decision to the Secretary, making his rejection of any Board recommendation the last word on the matter and returning decisionmaking authority to the duly appointed principal officer, in conformity with the Appointments Clause.

Interpreting the statute in this manner is the best way to preserve Congress's statutory scheme to the maximum amount permitted by Article II. Although it might be simpler if the for-cause removal protections in section 4135(d) were treated as inoperative, *see, e.g., Constitutionality of the Commissioner of Social Security's Tenure Protection*, 45 Op. O.L.C. __, at *15–17 (July 8, 2021), vesting the final decisionmaking authority in the Secretary is consistent with both the "structure of supervision" at the State Department and the procedures established by the statute, *Arthrex*, 141 S. Ct. at 1987 (plurality opinion). The Secretary already leads the Foreign Service and the State Department. And just as the principal officer in *Arthrex* had "the authority to provide for a means of reviewing PTAB decisions," so too does the Secretary already have authority under the statute to review and reject certain FSGB decisions. *Id*. To bring the scheme into compliance with constitutional principles, the Secretary's authority need only be made final as to *all* FSGB decisions. The severance we describe accomplishes that end, "follow[ing] the almost-universal model of adjudication in the Executive Branch" without rewriting the statute. *Id.* And it does so in a way that leaves the remaining enforceable provisions both "[]capable of functioning independently" and "consistent with the intent of Congress." *Alaska Airlines*, 480 U.S. at 684–85.

The Third Circuit's decision in *Lofstad v. Raimondo* reinforces our conclusion here. 117 F.4th 493 (3d Cir. 2024). That case considered a provision of the Magnuson-Stevens Act that permitted a multimember council overseeing U.S. fisheries to overrule certain decisions made by the Secretary of Commerce. *Id.* at 496–97. This power, like the power of the FSGB to overrule the Secretary of State, violated the Appointments Clause because the council had unreviewable authority over the decisions of a principal officer. *Id.* at 501. The court determined that the proper remedy was to sever the provisions giving the council authority over the Secretary of Commerce. *Id.* This directly addressed the constitutional violation, while leaving the statute "fully operative." *Id.* (quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 509 (2010)).

Treating only the for-cause removal protections as unenforceable would be insufficient for at least one other reason. Because the statute gives the Board authority to thwart the removal of inferior officers in the Foreign Service, it could be understood as an unconstitutional delegation of the power to remove those FSMs who are inferior officers and who can be removed only by the President or the Secretary. *See Suspension of a United States Marshal*, 17 Op. O.L.C. 75, 75–76 (1993); *Appointment and Removal of Federal Reserve Bank Members of the Federal Open Market Committee*, 43 Op. O.L.C. 263, 282 (2019) ("[T]he authority to remove inferior officers may not be delegated to an agency official other than the department head, or another official constitutionally competent to appoint that officer in the first place."). This problem resolves when final authority is returned to the Secretary, a presidentially accountable officer; but it would persist if we were to instead conclude that Board members are removable at will.[3]

For all these reasons, we conclude that severance of the provisions giving the FSGB authority over the Secretary of State is appropriate here. It is thus the Secretary's modification or rejection of a FSGB decision that shall be considered a final action under section 4137(d)(2) and implemented by the Secretary—without another stop at the FSGB first.

IV.

The Act violates the Appointments Clause by vesting final decisionmaking authority in the Board, rather than the presidentially accountable Secretary. This problem goes away, however, if the Board exercises such authority subject to the review of a presidentially appointed

[3] Because severing the Board's final decisionmaking authority is sufficient to resolve the present question, we do not address the separate question of whether Board members are "inferior officers with limited duties and no policymaking or administrative authority," such that their statutory protection from removal is permissible under the framework for constitutional tenure protection set out in *Seila Law*. 140 S. Ct. at 2199–200; *see also id.* at 2191–92.

official. We therefore recommend that the Department of State decline to give effect to those portions of section 4137(d)(1) and (d)(3) that purport to strip final decisionmaking authority from the Secretary, in violation of the Appointments Clause of Article II.

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