



U.S. Department of Justice

Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

February 13, 2025

The Honorable Mike Johnson
Speaker
U.S. House of Representatives
Washington, D.C. 20515

Re: Restrictions on Removal of the Special Counsel, 5 U.S.C. 1211(b)

Dear Mr. Speaker:

Pursuant to 28 U.S.C. 530D, I am writing to advise you that the Department of Justice has determined, consistent with its longstanding view, that the statutory for-cause removal provision applicable to the Special Counsel who heads the Office of Special Counsel, 5 U.S.C. 1211(b), is unconstitutional and that the Department has taken that position in briefs filed in defense of the President's February 7, 2025, decision to remove the Special Counsel from office. That litigation remains ongoing at this time. See *Dellinger v. Bessent*, No. 25-cv-385 (D.D.C.); *Dellinger v. Bessent*, No. 25-5028 (D.C. Cir.).

The Office of Special Counsel is empowered, among other things, to investigate and litigate allegations of prohibited personnel practices by other federal agencies. See 5 U.S.C. 1212(a). Its head is a single Special Counsel, who is appointed by the President with the advice and consent of the Senate to a five-year term. 5 U.S.C. 1211(b). By statute, the Special Counsel is removable by the President "only for inefficiency, neglect of duty, or malfeasance in office." *Ibid*.

On February 7, 2025, the President removed Special Counsel Hampton Dellinger from office. Three days later, Mr. Dellinger sued several federal officials in their official capacities seeking reinstatement to his former position and a variety of other relief. Mr. Dellinger contends that his dismissal violated his statutory tenure protection in 5 U.S.C. 1211(b). In defense of the removal, the Department has contended in several recently filed briefs that the Special Counsel's tenure protection is unconstitutional. Copies of two representative filings are attached.

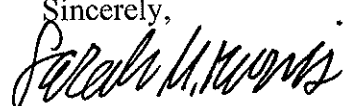
In *Myers v. United States*, 272 U.S. 52 (1926), the Supreme Court recognized that Article II of the Constitution gives the President an "unrestricted" power of "removing executive officers who had been appointed by him by and with the advice and consent of the Senate." *Id.* at 176. In *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), the Supreme Court created an exception to that rule. The Court held that Congress may "forbid the[] removal except for cause" of members of the Federal Trade Commission (FTC), on the ground that the FTC exercised merely "quasi-legislative or quasi-judicial powers" and its members could therefore be required to "act in discharge of their duties independently of executive control." *Id.* at 628-629.

Since 1978, when the office of Special Counsel was created in the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, the Executive Branch has on multiple occasions expressed the view that the tenure protection applicable to the Special Counsel is unconstitutional under the general rule established by *Myers* and does not fit within the exception to that rule created by *Humphrey's Executor*. See *Seila Law LLC v. Consumer Fin. Protection Bureau*, 591 U.S. 197, 221 (2020) (noting the Executive Branch's view).

In recent years, the Supreme Court has clarified that the *Humphrey's Executor* "exception" to the "unrestricted removal power" that the President generally has over principal executive officers represents "'the outermost constitutional limit[] of permissible congressional restrictions'" on the President's authority to remove such officers. *Seila Law*, 591 U.S. at 215, 218 (citation omitted). In particular, the holding of *Humphrey's Executor* applies only to administrative bodies that do not exercise "substantial executive power." *Id.* at 218. And in two recent decisions—*Seila Law* and *Collins v. Yellen*, 594 U.S. 220 (2021)—the Supreme Court has concluded that statutes "vesting significant governmental power in the hands of a single individual accountable to no one," *Seila Law*, 591 U.S. at 224, unconstitutionally insulate executive power from presidential control.

For the reasons stated in the attached briefs, the Department has determined to adhere to its position that the Special Counsel, the singular head of an agency devoted to investigating potential violations of federal law, exercises executive power and therefore may be removed by the President without restriction. To the extent that *Humphrey's Executor* requires otherwise, the Department intends to urge the Supreme Court to overrule that decision, which prevents the President from adequately supervising principal officers in the Executive Branch who execute the laws on the President's behalf, and which has already been severely eroded by recent Supreme Court decisions. See, e.g., *Seila Law*, 591 U.S. at 223-229; *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 492-494 (2010).

Please let me know if I can be of any further assistance in this matter.

Sincerely,

Sarah M. Harris
Acting Solicitor General