



U.S. Department of Justice
Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

February 25, 2025

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

Re: Restrictions on the Removal of Members of the Merit Systems Protection Board

Dear Mr. Speaker:

Pursuant to 28 U.S.C. 530D, I am writing to advise you that the Department of Justice has determined that the statutory for-cause removal provision applicable to members of the Merit Systems Protection Board (Board), 5 U.S.C. 1202(d), is unconstitutional and the Department has taken that position in a brief filed in defense of the President's decision to remove Cathy A. Harris from her position as a member of that Board. See Gov't Opp. to Pl.'s Mot. for TRO 6-10, *Harris v. Bessent*, No. 25-cv-412 (D.D.C. filed Feb. 13, 2025). A copy of that brief is enclosed.

The Board is empowered to enforce the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, against other components of the federal government. It consists of three members appointed by the President with the advice and consent of the Senate to seven-year terms of office. 5 U.S.C. 1201, 1202(a). The statute limits the President to removing Board members "only for inefficiency, neglect of duty, or malfeasance in office." 5 U.S.C. 1202(d).

On February 10, 2025, the President removed Ms. Harris from her position as a member of the Board. The following day, Ms. Harris sued several federal officials seeking reinstatement to her former position and a variety of other relief. She contends that her dismissal violated the statutory tenure protection afforded Board members in 5 U.S.C. 1202(d). The Department has taken the position in that litigation that the Board members' tenure protection is unconstitutional.

In *Myers v. United States*, 272 U.S. 52 (1926), the Supreme Court recognized that Article II of the Constitution give the President an "unrestricted" power of "removing executive officers who had been appointed by him 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). *Id.* at 629. In the Court's view, the FTC "exercise[d] no part of the executive power vested by the Constitution in the President." *Id.* at 628.

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 removal authority. *Selia Law LLC v. Consumer Fin. Protection Bureau*, 591 U.S. 197, 215, 218 (2020) (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.

For the reasons stated in the attached brief, the Department has determined that the members of the Board exercise substantial executive power as Board members and therefore may be removed by the President without restriction. The Board, for example, hears federal-employee appeals of adverse personnel actions involving alleged violations of the federal civil-service laws and has authority to take final action on such matters, subject to judicial review. 5 U.S.C. 1204(a)(1). The Board also may order any federal agency or employee to comply with its decisions and enforce any such order. 5 U.S.C. 1204(a)(2).

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., *Selia 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,

A handwritten signature in black ink, appearing to read "Sarah M. Harris".

Sarah M. Harris
Acting Solicitor General