

# Quit Breathing Down My Neck: An Attempt to Secure Full Independence for Our Nation’s Watchdogs

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\* Georgetown University Law Center, J.D. expected 2026; University of North Carolina Chapel Hill, B.S. 2022. © 2025, Rebecca P. Weisberger. When I started this paper, I had no idea what lay on the horizon for our nation and for Appointments Clause litigation. I am far from an optimist, but in writing this Note, I wrote with the underlying assumption that *Morrison* would be decided the same way by the current Supreme Court, and current case law, while restrictive, did not absolutely foreclose the possibility of for-cause provisions being found constitutional. In light of the D.C. Circuit’s opinion in *Dellinger v. Bessent*, the future in this area of the law looks particularly bleak. As a result, the conclusions of this paper may be extremely unlikely, but as of today are not impossible.

## INTRODUCTION

The Inspector General's ability to remain quartered off from the push and pull of partisan politics has never been more vital to American democracy.<sup>1</sup> The reelection of Donald Trump has resulted in significant firings in the oversight community.<sup>2</sup> President Trump has made his deep distrust for the executive branch bureaucracy known.<sup>3</sup> Inspectors General (IG), the watchdogs seated within the executive agencies, are no exception.<sup>4</sup> In the spring of 2020, during his first term in office, President Trump went on a firing spree, removing two permanent and two acting IGs.<sup>5</sup> After only a month into his second term, seventeen IGs have already been fired by the President.<sup>6</sup> Overall, these actions have led to heightened congressional interest in securing further independence for IGs through the Inspector General Act.<sup>7</sup> One mechanism that has been heavily debated is the for-cause removal provision and whether it can constitutionally be applied to an IG.<sup>8</sup>

This Note will analyze whether for-cause removal protection would be constitutional as applied to the role of the IG. In Part I, this Note summarizes the Act. In Part II, this paper explores the IG jurisprudence from *Myers* to today. In Part III, the Note questions whether IGs are officers of the United States and Part V concludes IGs are inferior officers. Lastly, in Part V, this Note rewrites the statute that governs IGs to insulate them from the Court's past critiques of for-cause removal. While the case law remains inconclusive, this paper will rewrite the Act to frame IGs as inferior officers for whom the for-cause removal provision would be constitutional and then analyze whether reframing IGs as inferior officers undermines their core mission of independent oversight.

## I. THE ACT

The Inspector General Act of 1978 (the Act) was passed to promote integrity and accountability in the Executive Branch.<sup>9</sup> The Act created the Office of the

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1. See Nahal Toosi & Robbie Gramer, *Fear and Loathing in IG World*, POLITICO: NAT'L SEC. DAILY (Nov. 13, 2024, 4:19 PM), <https://www.politico.com/newsletters/national-security-daily/2024/11/13/fear-and-loathing-in-ig-world-00183727> [https://perma.cc/P5TW-RR7E].

2. See Chris Camerson, *Judge Refuses to Immediately Reinstate Inspectors General Fired by Trump*, N.Y. TIMES (Feb. 14, 2025), <https://www.nytimes.com/2025/02/14/us/politics/trump-inspectors-general-ruling.html> [https://perma.cc/Q36R-HL2S]; see also Joan E. Greve, *How a Republican Trifecta Makes Way for Trump's Rightwing Agenda*, THE GUARDIAN (Nov. 13, 2024, 11:15 PM), <https://www.theguardian.com/us-news/2024/nov/14/republican-house-senate-trump-rightwing-agenda> [https://perma.cc/SEA8-79TE].

3. Nahal Toosi et al., *'We Know What is Coming': Federal Bureaucrats Wrestle with Fight-or-Flight Response to Trump Election*, POLITICO (Nov. 9, 2024, 10:00 AM), <https://www.politico.com/news/2024/11/09/federal-bureaucrats-trump-fear-00188552> [https://perma.cc/BC4P-2H5K].

4. See Toosi & Gramer, *supra* note 1.

5. *Id.*

6. See *Trump Fires 17 Inspectors General*, ECON. POL'Y INST., (Feb. 5, 2025), <https://www.epi.org/policywatch/trump-fires-17-inspectors-general/> [https://perma.cc/S5TW-A56N].

7. TODD GARVEY, CONG. RSCH. SERV., R46762, CONGRESS'S AUTHORITY TO LIMIT THE REMOVAL OF INSPECTORS GENERAL I (2021).

8. *Id.*

9. Kimberly L. Wehle & Jackson Garrity, *Executive Accountability Legislation from Watergate to Trump—and Beyond*, 7 U. PA. J.L. & PUB. AFF. 37, 63 (2021).

Inspector General (OIG)<sup>10</sup> to sit in twelve federal agencies,<sup>11</sup> which over time evolved into seventy-four federal IGs.<sup>12</sup>

The Act designated IGs to serve as “independent and objective units” of oversight and empowered IGs to (1) “conduct and supervise audits and investigations relating to the programs and operations” of their agency; and (2) “provide leadership and coordination and recommend policies for activities designed” to “promote economy, efficiency, and effectiveness in the administration of those programs and operations” and “prevent and detect fraud and abuse in those programs and operations.”<sup>13</sup> The Act instructed IGs that they were “to provide a means for keeping the head of the establishments and Congress fully and currently informed about problems and deficiencies relating to the administration of those programs and operations and the necessity for and progress of corrective action.”<sup>14</sup>

The Act delineated substantive duties and responsibilities to the OIG.<sup>15</sup> These duties include conducting and supervising audits and investigations relating to agency programs; reviewing existing legislation and making recommendations in semiannual reports regarding the efficiency of such programs and the prevention and detection of fraud and abuse; supervising agency policies to avoid waste, fraud, and abuse; and overseeing the agency’s relationships with federal, state, and local agencies, and nongovernmental entities to promote the same goals of preventing fraud and abuse.<sup>16</sup> These are to be carried out all while keeping the head of the agency and Congress “fully and currently informed.”<sup>17</sup>

The Act takes steps to design the IG role as one with independence and nonpartisanship at its core. Establishment IGs, the class of IG this Note follows, are appointed by the President with the advice and consent of the Senate.<sup>18</sup> The Act is clear that such appointment shall be “without regard to political affiliation and solely on the basis of integrity.”<sup>19</sup> The Act attempts to insulate the work of IGs from interference and states “[n]either the head of the establishment nor the officer next in rank below the head shall prevent or prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation, or from issuing any subpoena during the course of any audit or investigation.”<sup>20</sup> An IG is

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10. The Act established two classes of IGs: establishment IGs, operating within the majority of federal agencies, appointed by the President with advice and consent of the Senate, and designated federal entity (DFE) IGs, appointed by the head of the DFE. This paper will focus exclusively on establishment IGs. Inspector General Act of 1978, Pub. L. No. 95–452, 92 Stat. 1101 (codified as amended at 5 U.S.C. §§ 401–24).

11. 5 U.S.C. § 401(1).

12. OFFICE OF THE INSPECTOR GENERAL, U.S. CHIEF INFORMATION OFFICERS COUNCIL, <https://www.cio.gov/handbook/key-organizations/oig/> [<https://perma.cc/T4L2-9CQG>] (last visited Nov. 17, 2024).

13. 5 U.S.C. § 402(b).

14. 5 U.S.C. § 402(3).

15. 5 U.S.C. § 404.

16. *Id.*

17. *Id.* § 404(5).

18. 5 U.S.C. § 403(a).

19. *Id.*

20. *Id.*

removable only by the President and “the President shall communicate in writing the reasons for any such removal or transfer to both Houses of Congress, not later than 30 days before the removal or transfer.”<sup>21</sup> A recent amendment to the original Act, changed the notice requirement to include “substantive rationale, including detailed and case-specific reasons,”<sup>22</sup> which moves the needle towards a for-cause removal provision.

Aside from the notice and reason requirement, however, there is no substantial barrier to removing IGs. This section of the Act is the extent of the original protection from political interference offered to IGs, yet it falls short of the aspirational goal of the position.<sup>23</sup>

## II. JURISPRUDENCE OF THE REMOVAL POWER: *MYERS* TO THE PRESENT

For nearly a century, the United States Supreme Court has grappled with the question of whether Congress can qualify the President’s removal power through the use of for-cause removal provisions to insulate specific roles within the executive branch.<sup>24</sup> In the seminal decision of *Myers v. United States*, the Court held that implicit in the Article II executive power vested in the President to see “that the laws be faithfully executed” is the power to appoint and remove executive officers.<sup>25</sup> In so holding, the Court invalidated a statute that required advice and consent of the Senate to remove postmasters. The Court interpreted the Appointment Power quite broadly, failing to state a clear limiting principle on the President’s removal power.<sup>26</sup>

Less than a decade later, in *Humphrey’s Executor v. United States*, the Court took a large step back in its conception of the removal power and found that the President’s power to remove was not “illimitable” and that in quasi-legislative and quasi-judicial roles, for-cause removal provisions were constitutional.<sup>27</sup> This case arose after President Roosevelt attempted to remove a member of the Federal Trade Commission (FTC).<sup>28</sup> That position was confirmed by the Senate, commissioned for a term of seven years, and removable for inefficiency, neglect of duty, or malfeasance in office.<sup>29</sup> A year and a half into Humphrey’s tenure, the

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21. *Id.* § 403(b).

22. Jack Goldsmith, *Trump Fired 17 Inspectors General—Was It Legal?*, LAWFARE (Jan. 27, 2025 9:25 AM), <https://www.lawfaremedia.org/article/trump-fired-17-inspectors-general-was-it-legal> [<https://perma.cc/9LQE-ELJT>]. This article argues that the updated notice provision is unconstitutional because it too closely resembles a for-cause provision and that under *Morrison* the IG role would actually not fit into the “limited duties” restriction. *Id.* Goldsmith offers a strong counter to my Note and one that more solemnly reflects the direction of the Supreme Court on this issue.

23. Wehle & Garrity, *supra* note 9, at 64; Garvey, *supra* note 7, at 9.

24. *Myers v. United States*, 272 U.S. 52, 122 (1926).

25. *Id.* at 164.

26. *Id.* at 138–39.

27. *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 629 (1935).

28. *Id.* at 618.

29. *Id.* at 618–19.

President asked for his resignation, writing the work of the FTC “can be carried out most effectively with personnel of my own selection.”<sup>30</sup> When Humphrey ignored his wishes, the President wrote him to announce his removal.<sup>31</sup>

The Court, however, later held such action was unconstitutional.<sup>32</sup> As the nature of the FTC was not “purely executive,” the President’s removal power could be restricted.<sup>33</sup> In examining the responsibilities of the FTC, the Court concluded it is a quasi-legislative and quasi-judicial role, rather than purely executive.<sup>34</sup> Notably, the Court characterized the power of the FTC to perform investigations and give such reports to Congress as a quasi-legislative power.<sup>35</sup> Congress’s authority to create quasi-legislative and quasi-judicial agencies encompassed the power to provide guardrails, specifically a for-cause removal provision, for removal of such positions to minimize executive control.<sup>36</sup> This decision restricted the holding of *Myers* as applicable only to purely executive officers.<sup>37</sup>

The practical nature of the commissioner role drove the Court’s analysis in concluding that a for-cause removal provision did not infringe upon the power of the executive. The FTC is nonpartisan and its duties require that it “act with entire impartiality.”<sup>38</sup> Further, the debates in both houses of Congress highlighted that the FTC was not subject to the orders of the President.<sup>39</sup> The intention behind shaping the role of the Commissioners was to protect them from political sway, as the Court explicitly noted: it is “evident that one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter’s will.”<sup>40</sup> The nonpartisan character of the role necessitated a level of protection from Presidential removal, without which the FTC’s integrity and function would be compromised.<sup>41</sup>

The Court continued its narrow application of the removal power in *Wiener v. United States*, holding that the President’s removal power does not extend to members of an independent adjudicatory body “merely because he wanted his own appointees.”<sup>42</sup> In *Wiener*, the petitioner had been nominated by President Truman and confirmed by the Senate to sit as a member of the War Claims Commission.<sup>43</sup> However, three years later, President Eisenhower removed him

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30. *Id.* at 618.

31. *Id.*

32. *Id.* at 631–32.

33. *Id.*

34. *Id.* at 628.

35. *Id.*

36. *Id.* at 629.

37. *Id.* at 632.

38. *Id.* at 624.

39. *Id.* at 625.

40. *Id.* at 629.

41. *Id.*

42. *Wiener v. United States*, 357 U.S. 349, 356 (1958).

43. *Id.* at 349–50.

with the intention of replacing him with someone of his own selection.<sup>44</sup> This was much like the action that transpired prior to the suit brought in *Humphrey's*; here, however, Congress included no provision for removing a Commissioner.<sup>45</sup> The Court held that even absent statutory removal protections, the President is not given the power to remove a member of this quasi-judicial body for the purpose of appointing his own.<sup>46</sup> Silence from Congress in not including a clause dictating the terms of a Commissioner's removal did not impliedly grant the President removal power beyond what has been conferred by the Constitution.<sup>47</sup>

In step with *Humphrey's*, the Court reaffirmed the distinction between officials "part of the Executive establishment," thus removable by the President's constitutional powers, and "those whose tasks require absolute freedom from Executive interference," where removal is proper only if Congress has fairly conferred it.<sup>48</sup> As the Court concluded, the War Claims Commission falls squarely within the second category, thus the President is not free to exercise such at will removal.<sup>49</sup>

The Court then sprinkled some key phrases into the Appointment Clause jurisprudence when deciding *Morrison v. Olson*. In this case, the Court upheld a for-cause removal provision as applied to the position of Independent Counsel (IC).<sup>50</sup> The Ethics in Government Act allowed for the appointment of an IC to investigate and prosecute government officials for federal crimes.<sup>51</sup> That act granted the IC the "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice."<sup>52</sup> The legislation also stated the IC may be removed by the Attorney General only for good cause.<sup>53</sup>

In this decision, the Court supplanted its original conception of what structurally makes for-cause removal provisions constitutional and stepped back from the precedent of *Humphrey's* and *Wiener*.<sup>54</sup> The Court's original query of whether an official is purely executive, rather than quasi-legislative and quasi-judicial, while still relevant, did not ultimately dictate whether such a removal provision could stand.<sup>55</sup> The appropriate question became "whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty."<sup>56</sup>

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44. *Id.* at 350.

45. *Id.* at 351.

46. *Id.* at 356.

47. *Id.*

48. *Id.* at 353.

49. *Id.* at 356.

50. *Morrison v. Olson*, 487 U.S. 654, 696–97 (1988).

51. *Id.* at 659–60.

52. *Id.* at 662.

53. *Id.* at 663.

54. *Id.* at 690–91.

55. *Id.*

56. *Id.* at 691.

After dismissing this categorical test, the Court analyzed whether a for-cause removal provision could stand as applied to the IC.<sup>57</sup> The Court was quick to articulate that the role of IC is executive in its law enforcement function.<sup>58</sup> However, the IC is an inferior officer under the Appointments Clause with “limited jurisdiction and tenure and lacking policymaking or significant administrative authority.”<sup>59</sup> While the IC exercises broad discretion in carrying out his or her duties, the power wielded by the IC is not so central to the functioning of the Executive Branch that it would constitutionally require an at-will termination by the President.<sup>60</sup> Limiting removal of the IC, therefore, does not undermine the President’s capacity to take care that the laws are faithfully executed.<sup>61</sup>

While it is unclear how much of the ruling was driven by this point, the Court concluded its analysis by stating that the provision was implemented to secure the necessary independence of the IC.<sup>62</sup> In the new sliding scale framework of whether such a limitation forecloses the President’s control to ensure the faithful execution of the law, the Court did not elaborate on what weight or value should be given to the necessary independence of the position.<sup>63</sup>

In a dissent lauded by the modern conservative legal movement, Justice Scalia struck at the heart of the majority’s reasoning. In his view, a separation of powers issue could not be cured by the mere fact that the executive role in question was not “so central to the Executive branch.”<sup>64</sup> Instead, “it is ultimately irrelevant how much the statute reduces Presidential control.”<sup>65</sup> As the Constitution prescribes all “purely executive powers . . . within the full control of the President,” removing any purely executive powers from the President’s full control is a constitutional violation.<sup>66</sup>

Perhaps motivated by Justice Scalia’s dissenting words, the Court in *Free Enterprise Fund v. Public Company Accounting Oversight Board* began the modern trend toward narrowing the scope of Congress’ power to condition removal.<sup>67</sup> The Court invalidated a statutory provision that made members of the Public Company Accounting Oversight Board (PCAOB) removable by the Securities

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57. *Id.* at 691–92.

58. *Id.*

59. *Id.*

60. *Id.* at 691–92.

61. *Id.* at 693.

62. *Id.*

63. *Id.* (“Here, as with the provision of the Act conferring the appointment authority of the independent counsel on the special court, the congressional determination to limit the removal power of the Attorney General was essential, in the view of Congress, to establish the necessary independence of the office. We do not think that this limitation as it presently stands sufficiently deprives the President of control over the independent counsel to interfere impermissibly with his constitutional obligation to ensure the faithful execution of the laws.”).

64. *See Morrison v. Olson*, 487 U.S. 654, 709 (Scalia, J., dissenting).

65. *Id.* at 708.

66. *Id.* at 709.

67. *See Free Enter. Fund v. Public Co. Acct. Oversight Bd.*, 561 U.S. 477 (2010).

and Exchange Commission (SEC) only for-cause.<sup>68</sup> The Court held that multilevel protection from removal runs afoul to the Article II power vested in the President, as “[t]he President cannot ‘take Care that the Laws be faithfully executed’ if he cannot oversee the faithfulness of the officers who execute them.”<sup>69</sup> The statute created “a Board that is not accountable to the President, and a President who is not responsible for the Board” by simultaneously protecting Board members from removal except for good cause and withdrawing from the President the power to determine whether good cause exists.<sup>70</sup> If the SEC lacked the power to remove a Board member at will, the President could not hold the Commission accountable for the Board’s conduct, ultimately undermining the President’s Article II power by stripping the power to hold his subordinates accountable for how they execute laws.<sup>71</sup> The Court left the for-cause removal protections of the SEC commissioners in place, implicitly affirming Congressional authority to weave such protections into law to promote independence of some officers in specific circumstances.<sup>72</sup>

A decade later, the Court again struck down a for-cause removal provision in *Seila Law v. Consumer Financial Protection Bureau* (CFPB).<sup>73</sup> The CFPB, an independent agency, was headed by a single Director, appointed by the President with the advice and consent of the Senate, for a five-year term, during which the President may only remove the Director for-cause.<sup>74</sup> The Director wielded broad power “including the authority to conduct investigations, issue subpoenas and civil investigative demands, initiate administrative adjudications, prosecute civil actions in federal court, and issue binding decisions in administrative proceedings.”<sup>75</sup> The Court held that a for-cause removal provision in the context of an independent agency led by a single Director harnessing “significant executive power,” was unconstitutional.

The Court explained that after *Free Enterprise Fund* only two exceptions remain for the President’s “unrestricted removal power.”<sup>76</sup> Even while upholding *Humphrey’s* and *Morrison*, the Court seemed to constrict them further: *Humphrey’s* now stood for the constitutionality of for-cause removal provisions for principal officers when they are part of “multimember expert agencies that do not wield substantial executive power” and *Morrison* stood in favor of for-cause removal provisions for “inferior officers with limited duties and no policymaking or administrative authority.”<sup>77</sup> In order to be upheld, a for-cause removal provision would now have to squeeze itself into the already narrow exceptions, construed even more restrictively

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68. *Id.*

69. *Id.* at 484.

70. *Id.* at 495.

71. *Id.* at 495–96.

72. Garvey, *supra* note 7, at 19.

73. *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 198 (2020).

74. *Id.* at 197.

75. *Id.*

76. *Id.* at 215.

77. *Id.* at 217–18.

by this decision, as the Court referred to them as the “outermost constitutional limits of permissible congressional restrictions on the President’s removal power.”<sup>78</sup>

Most recently, in *Collins v. Yellen*, the Court directly applied *Seila Law* to strike down the for-cause removal provision as applied to the Director of the Federal Housing Finance Agency (FHFA).<sup>79</sup> The FHFA, like the CFPB in *Seila Law*, is an independent agency led by a single Director, and the Court was unpersuaded to draw a distinction in the power disparity between the two.<sup>80</sup> The President’s removal power is unwavering under such conditions, regardless of the nature or breadth of an agency’s authority.<sup>81</sup> The constitutional goal of the removal power to effectuate the President’s duty to execute the law remains vital even when the agency is not the largest or most powerful.<sup>82</sup> Additionally, the Court stated the Constitution does not permit even “modest restrictions” on removal power for an agency with a single leader.<sup>83</sup> Taken together, the Court seemed to push more toward a unitary executive theory,<sup>84</sup> highlighting the importance of linking agency action to that of the President to create a stream of electoral accountability.<sup>85</sup> This emphasized that the exceptions of *Humphrey’s* and *Morrison* are meant to remain on the fringes of the sweeping holding of *Myers*.

### III. ARE IGS OFFICERS?

The first step in determining whether a for-cause removal provision would be upheld is to evaluate whether IGSs are considered officers of the United States. The Appointments Clause, the driving force behind striking down for-cause removal provisions, applies to “Officers of the United States,” which the Court has held are in a class of their own, separate from “mere employees.”<sup>86</sup> The Court defines an officer as a position with “significant authority.”<sup>87</sup> However, the Court has declined to put a finer point on that term, engaging only in fact-based inquiries of specific positions as questions arise through litigation.<sup>88</sup>

In *Buckley v. Valeo*, the Court stated that the power to administer and enforce the law was reserved only for officers.<sup>89</sup> Yet, powers relating to the “flow of

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78. *Id.* at 218.

79. *Collins v. Yellen*, 594 U.S. 220, 224 (2021).

80. *Id.* at 251.

81. *Id.*

82. *Id.* at 252.

83. *Id.* at 256.

84. See generally Cass R. Sunstein & Adrian Vermeule, *The Unitary Executive: Past, Present, Future*, 2020 SUP. CT. REV. 83 (2020) (describing one of the prevailing theories in constitutional law, which claims that the President has complete control over the entirety of the executive branch).

85. *Collins v. Yellen*, 594 U.S. 220, 252 (2021).

86. U.S. CONST. art. II, § 2, cl. 2.; *Lucia v. SEC*, 585 U.S. 237, 241 (2018).

87. *Buckley v. Valeo*, 424 U.S. 1, 126 (1976).

88. *Freytag v. C.I.R.*, 501 U.S. 868 (1991) (holding that special trial judges are inferior officers); *Edmond v. United States*, 520 U.S. 651 (1997) (holding that judges on the Coast Guard Court of Criminal Appeals are inferior officers); *Lucia*, 585 U.S. at 237 (holding that administrative-law judges are officers).

89. *Buckley*, 424 U.S. at 139–41.

necessary information” including “receipt, dissemination, and investigation” were insufficient alone to rise to the “significant authority” that makes an officer.<sup>90</sup> Confirming this distinction between legitimate enforcement powers and power which alone does not reach the threshold of officer, the Court stated in *Free Enterprise Fund* that a position with purely recommendatory power would be insufficient to constitute an officer.<sup>91</sup>

Recently, in *Lucia v. Securities and Exchange Commission*, the Court found that due to the “significant discretion” exercised by the administrative-law judges (ALJs) of the SEC when carrying out “important functions,” they are categorized as officers.<sup>92</sup> The Court compared ALJs to the officers in *Freytag v. C.I.R.*, acknowledging that their power to take testimony, receive evidence, examine witnesses, rule on the admissibility of evidence, and enforce compliance with discovery orders puts them on par with the judges in *Freytag* who were ultimately categorized as officers.<sup>93</sup> The Court in *Freytag* also held out the importance of the ability of those judges to exercise “independent authority” in determining them to be officers rather than employees.<sup>94</sup> Additionally, the fact that an inferior officer may occasionally perform duties more akin to an employee does not confer their officer status.<sup>95</sup>

Even with extensive case law surrounding this position,<sup>96</sup> the Court has failed to enunciate an all-encompassing definition for an “officer.” Piecing together the verbal scraps, one would be led to believe that an officer is a position vested with independent,<sup>97</sup> significant authority<sup>98</sup> and discretion,<sup>99</sup> with the power to administer and enforce the law<sup>100</sup> and carry out important functions,<sup>101</sup> excluding positions with purely recommendatory<sup>102</sup> or investigatory power.<sup>103</sup>

Despite the imprecise language used to outline the category of officer, it is highly likely IGs fit into the definition based on the duties designated in the Act. First, IGs seem to have “significant discretion” and “independent authority.”<sup>104</sup> This discretion manifests in an IG’s ability to elect which investigations and audits to carry out.<sup>105</sup> Second, the Act guarantees that no agency head has the

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90. *Id.* at 137.

91. *Free Enter. Fund v. Public Co. Acct. Oversight Bd.*, 561 U.S. 477, 509 (2010).

92. *Lucia v. SEC*, 585 U.S. 237, 248 (2018).

93. *Id.*

94. *Freytag v. C.I.R.*, 501 U.S. 868, 882 (1991).

95. *Id.*

96. *See Buckley v. Valeo*, 424 U.S. 1 (1976); *Freytag v. C.I.R.*, 501 U.S. 868 (1991); *Free Enter. Fund v. Public Co. Acct. Oversight Bd.*, 561 U.S. 477 (2010); *Lucia v. SEC*, 585 U.S. 237 (2018).

97. *Id.*

98. *Buckley v. Valeo*, 424 U.S. 1, 126 (1976).

99. *Lucia v. SEC*, 585 U.S. 237, 248 (2018).

100. *Buckley*, 424 U.S. at 139–41.

101. *Lucia*, 585 U.S. at 248.

102. *Free Enter. Fund v. Public Co. Acct. Oversight Bd.*, 561 U.S. 477, 509 (2010).

103. *Buckley*, 424 U.S. at 137.

104. *Freytag v. C.I.R.*, 501 U.S. 868, 882 (1991).

105. 5 U.S.C. § 404(a)(1).

power to quell such actions.<sup>106</sup> As the IG may decide its own investigatory docket and no one in the agency may prohibit such matters from being carried out, this clearly suggests independent authority. Taken together, the core tenets of an IGs role and scope of power seem to reflect what the Court believes distinguishes an inferior officer.<sup>107</sup>

The explicit appointment process of establishment IGs, furthermore, strongly suggests they are officers, rather than mere employees.<sup>108</sup> Currently, IGs are appointed by the President and confirmed by the Senate.<sup>109</sup> Although the appointment procedure of congressional advice and consent may be implemented for policy reasons in situations where it is not constitutionally mandated, its use here weighs in favor of categorizing IGs as officers. While neither are dispositive of the classification of officer, both have a tendency to show the Court would rule as such.

#### IV. INFERIOR OR PRINCIPAL OFFICER?

The constitutionality of a for-cause removal provision seems to hinge on whether IGs would be categorized by the Court as principal or inferior officers.<sup>110</sup> In *Seila*'s narrowing of the two avenues allowing a for-cause removal provision to be upheld, one outlined the criteria for principal officers and the other for inferior officers.<sup>111</sup> The exception for principal officers is for a multimember board of experts.<sup>112</sup> Because there is a single head of each IG Office, this exception surely would not suffice. As the current direction of the Court's Appointment jurisprudence shows, it would be unlikely for the Court to carve out another exception. Thus, the only opportunity for such a clause for IGs to be upheld is if they are considered inferior officers.<sup>113</sup>

*Morrison* did not establish a bright line test to determine whether an officer is principal or inferior.<sup>114</sup> Rather, the Court in *Edmond v. United States*, attempted to articulate a new test based on proximity to direct Presidential authority. The Court stated that whether a position is inferior depends on having a supervisor: "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."<sup>115</sup> In applying this principle, the Court held that judges within the Coast Guard Criminal Appeals were inferior officers, as their work

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106. *Id.*

107. *Id.*

108. Garvey, *supra* note 7, at 30.

109. 5 U.S.C. § 403(a).

110. *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 217–18 (2020).

111. *Id.* at 204.

112. *Id.* at 216.

113. *Id.* at 228.

114. *Edmond v. United States*, 520 U.S. 651, 661 (1997)

115. *Id.* at 663.

was supervised by the Judge Advocate General and the Court of Appeals for the Armed Forces. The Court was not persuaded to categorize these judges as principal officers, although the role was not “limited in tenure” nor “limited in jurisdiction,” two facets of the IC the Court highlighted in *Morrison* when it deemed the IC to be an inferior officer.<sup>116</sup>

There is no straightforward answer to whether IGs should be considered inferior officers under the *Edmond* test. The Act explicitly decrees IGs to be “independent and objective units.”<sup>117</sup> It appears counterintuitive to claim both that an IG is an independent unit, and the work of the office is directed by someone else. However, the Act also states that IGs “shall report to and be under the general supervision of the head of the establishment involved.”<sup>118</sup> This phrase seems to embrace the notion that IGs are inferior officers supervised by an agency head. The Court accepted this position in one case, calling the head of the agency the “supervising authority” of the IG and referred to IGs as “representatives” of the agency.<sup>119</sup>

A textual analysis may also resolve the tension between independence and supervision. The plain meaning of supervise is “to oversee or direct the execution.”<sup>120</sup> As the statute adds “general” before “supervision” it suggests the more muted definition of supervise, oversee rather than direct.<sup>121</sup> It is plausible for a role to have a position above it that merely watches over it without directing the role. Such is the case here: the agency head oversees the IG without controlling the work the IG does. As the express text appoints a supervisor above IGs, it would be disingenuous under the *Edmond* test to label IGs as anything other than inferior officers.

## V. REWRITING THE STATUTE

Given the Supreme Court’s recent holdings in this area, any IG removal protection is vulnerable to a Constitutional challenge. The question remains whether changes to the statutory language and scheme to more closely mirror the Constitutional limitations outlined by the Court may insulate the statute from such a challenge. Considering the Court’s push to narrow the instances in which for-cause removal provisions are constitutional and guarantee the majority of the executive power is vested directly in the hands of the President, it is doubtful that a loose designation of an IG as an ‘inferior officer’ would end the inquiry. Stronger language, directly mirroring that of the Court’s holdings, should be added to the Act to increase the likelihood of a for-cause removal provision being

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116. *Edmond v. United States*, 520 U.S. at 661; *Morrison v. Olson*, 487 U.S. 656, 696–97 (1988).

117. 5 U.S.C. § 402(b).

118. 5 U.S.C. § 403(a).

119. *NASA v. Fed. Lab. Rels. Auth.*, 527 U.S. 229, 240–41 (1999).

120. *Supervise*, OXFORD ENG. DICTIONARY, [https://www.oed.com/dictionary/supervise\\_v?tab=factsheet#19700127](https://www.oed.com/dictionary/supervise_v?tab=factsheet#19700127) [<https://perma.cc/4E72-2R2H>] (last visited May 15, 2025).

121. 5 U.S.C. § 403(a).

upheld. As the supervisory role designation of *Edmond* is satisfied by the existing statute, the focus will be on bringing the statutory grant of authority within the *Morrison* exception's "limited jurisdiction and tenure and lacking policymaking or significant administrative authority" language.<sup>122</sup> It is critical to note that should a future Court vindicate Justice Scalia's dissenting view in *Morrison*, even the most castrated statute containing a for-cause removal provision for any executive officer would likely be found unconstitutional. This Note, however, proceeds under the assumption that *Morrison* remains good law.

#### A. LIMITED DUTIES

The concept of an inferior officer having "limited duties" is not a quantitative analysis. Therefore, the list of duties defined in the statute is not inherently problematic. In *Morrison*, the Court said that the statute empowering the IC to act was sufficiently limited as the role was "restricted primarily to investigation, and if appropriate, prosecution for certain federal crimes."<sup>123</sup> The Ethics in Government Act, yet, imbues the IC with "full power and independent authority to exercise all investigative and prosecutorial functions."<sup>124</sup> In addition to the many powers bestowed upon the IC, the role is also given substantial removal protection, as the Ethics in Government Act states the IC may be removed, other than by impeachment or conviction, only by the Attorney General "and only for extraordinary impropriety, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such special prosecutor's duties."<sup>125</sup> It is evident based on the Court's reaction to that statute in *Morrison* that the volume of duties was not doing much legwork in the ultimate decision. Thus, there is no need to trim down the Act's current list of the IG's duties.

The investigation and reporting duties of the IC seem on par with that of an IG,<sup>126</sup> but the IC retains an additional power to prosecute.<sup>127</sup> If the IC is still considered to have such limited duties, it follows that an IG would too—an IG's role is limited in that much of the position is investigative and advisory, which is less powerful than prosecution.<sup>128</sup> However, as the Court explains in *Collins*, the magnitude of power wielded by the position does not determine whether a for-cause removal provision is constitutional.<sup>129</sup> It may be that the Court's decision in *Morrison*, then, is driven less by the expanse of duties the IC can carry out once the position has been filled and more by the fact that there is an executive official

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122. 5 U.S.C. § 403(a); *Morrison v. Olson*, 487 U.S. 654, 691 (1988).

123. *Morrison*, 487 U.S. at 671.

124. *See supra* Part II, pp. 5–6 (quoting 28 U.S.C. § 594).

125. 28 U.S.C. § 596.

126. *See supra* note p. 7. This Note operates on the underlying assumption that not only is *Morrison* good law, but that the current Court would decide it the same way if faced with the question again.

127. 28 U.S.C. § 595.

128. *See Garvey, supra* note 7, at 35–36.

129. *Collins v. Yellen*, 594 U.S. 220, 251 (2021).

between the IC and the President<sup>130</sup> that both handles the role's appointment and removal and circumscribes the position's jurisdiction each time an IC is created.<sup>131</sup>

Even so, the Court's failure to specify what is meant by limited duties makes it difficult to codify that phrase in the Act and recharacterize the present duties of the IG to reflect that limitation. The Court folded the conversation of limited tenure and jurisdiction into this umbrella of duties.<sup>132</sup> And while the Court disposed of the tenure inquiry in *Edmond*, language circumscribing the jurisdiction of IGs could still be used to guide the Court.<sup>133</sup> As the Act already directs the duties to fall within "the establishment within which the Inspector General's Office is established," adding a section confining its jurisdiction to within the agency may ease the Court into accepting an IG's duties as limited.<sup>134</sup> While such confinement may make investigations, especially collecting information outside the agency without subpoena power, more difficult, it would likely not undermine the essence of the role. In certain decisions, however, the Court has focused less on the breadth of the jurisdiction as a whole and more on whether the jurisdiction has been limited by another body. In *Edmond*, the Court acknowledged the limited jurisdiction of the IC was due to the fact that the jurisdiction over which the IC could prosecute was carved out by a separate panel of three judges.<sup>135</sup> If the Court insisted on a more literal approach to the notion of limited jurisdiction, it would require delegating the power to determine an IGs' jurisdiction to a separate body, which could significantly undercut the position's independent discretion to investigate areas as they felt necessary depending on who was drawing the jurisdictional boundaries.

## B. NO POLICYMAKING AUTHORITY

The Act already states IGs shall not be considered employees who determine policies, which seems to satisfy the lack of policymaking authority piece of *Morrison*.<sup>136</sup> The Court swiftly disposes of the idea that a grant of investigative power could include any authority to formulate policy for the executive branch or give the IC administrative power outside of the ability to operate the office.<sup>137</sup> The linguistic parameters of the Act as they stand mirror the curtailed policymaking

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130. *Free Enter. Fund v. Public Co. Acct. Oversight Bd.*, 561 U.S. 477, 484 (2010). Ironically, the gap between the official and the President that weighed in favor of upholding the for-cause provision in *Morrison*, is the same gap that weighed against it in *Free Enterprise Fund*. The operative difference is that the Attorney General, the official between the President and the IC, is subject to at-will removal, but the commissioners in *Free Enterprise Fund* have their own for-cause removal.

131. *Morrison v. Olson*, 487 U.S. 654, 671–72 (1988).

132. *Id.* at 672.

133. *Edmond v. United States*, 520 U.S. 651, 661 (1997).

134. 5 U.S.C. § 404(a).

135. *Edmond*, 520 U.S. at 661.

136. 5 U.S.C. § 403(c); *Morrison*, 487 U.S. at 691.

137. *Morrison*, 487 U.S. at 671–72.

power of the IC and, therefore, should assuage the Court's concern over the IG being anything apart from an inferior officer.

The Act also describes duties of IGs include "provid[ing] policy direction."<sup>138</sup> Despite lacking an enforcement arm, these two tasks could be seen as a shade of policymaking authority. As this is the bulk of an IG's impact, it could be helpful to add a clarifying statement at the end of the "[d]uties and responsibilities" section to the effect of: "Policy direction furnished by the Office of the Inspector General is purely recommendatory and agency leadership may adopt such recommendations at-will." This summary line reinforcing an IG's role as advisory would not undermine a core tenant of the role. Trimming the language relating to an IG's policy shaping capacity would likely be unhelpful as the role was explicitly delegated only the power "to recommend" policy for the narrow categories of "promoting economy and efficiency in the administration of, or preventing and detecting fraud and abuse in, its programs and operations."<sup>139</sup> This already narrow language describing an IG's role in the policy sphere, combined with extra assurance of the office having no authority to enforce said policies onto the agency at large could lead the Court to the conclusion that an IG wields no policymaking authority. As the Court has already confirmed that setting internal policy for an office does not weigh in this officer determination, no further language in that context need be added. Considering the tasks that the Court has labeled as recommendatory and advisory through this canon of jurisprudence, such language would likely be sufficient to appease it.

### C. NO ADMINISTRATIVE AUTHORITY

It would be challenging to argue that IGs possess administrative authority on a macro scale seeing as they can neither prohibit nor compel action of the agency in which they sit. IGs do have administrative power in how their own office operates, but such power is not the type of administrative authority the Court is concerned with in this context.<sup>140</sup> Any shedding of internal power would be unnecessary. Instead, a reiteration that an IG does not administer or enforce laws for the agency would be sufficient.

### CONCLUSION

An IG would most likely be considered an inferior officer. Through Congress adding a few phrases to the Act, the Court could find it more palatable to say the role of IG fits into the exception carved out in *Morrison* and therefore allows a for-cause removal provision to stand. While limiting the jurisdiction of IGs to the confines of their individual agency would increase the difficulty in conducting investigations, it is less compromising than a revolving door of IG leadership at

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138. 5 U.S.C. § 404(a)(1).

139. 5 U.S.C. § 404(a)(3).

140. *Morrison*, 487 U.S. at 671–72.

the will of the nation's Chief Executive. Adding language to reaffirm the law of policymaking and administrative authority would have no substantive burden on an IG. It may seem flowery to add these backstops, but it is no workaround. An IG's duties already fall in line with the Court's delineated exception for inferior officers. This new language would only aim to make it more explicitly known, so the Court can feel comfortable including IGs in the *Morrison* exception. None of the modifications would impede on an IG's ability to be independent. Adding this language in addition to the for-cause removal provision would put the Act on firmer footing with what the Court has required to uphold for-cause removal provisions. Inserting this language at the same time as the for-cause removal provision would clearly demonstrate congressional intent to frame IGs as inferior officers. This would secure ultimate independence and stability for IGs so they may continue to properly serve the American people.