

How the US Supreme Court's Conservative Shift Could Clear a Path for Trump's Agency Purge

JURIST Staff

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The author, a professor and chair at Capital University Law School, argues that Trump's recent dismissals of independent agency heads signal a calculated bet that the Supreme Court's increasingly conservative majority will dismantle longstanding constraints on presidential power, fundamentally reshaping America's separation of powers...

Convention means nothing to Donald Trump. Neither does the Constitution. Since re-assuming office, he has summarily [dismissed the Chair](#) of the Federal Election Commission (FEC) and [a member of the National Labor Relations Board](#) (NLRB). [Inspectors General](#) across federal agencies, too, something that the [Biden administration](#) itself unfortunately practiced. Without hearings, without credible reasons and at least for members of the FEC and NLRB all outside the bounds of established law.

America's Constitution says little about the process for removing federal agency heads and their subordinates. To be sure, any executive or administrative officer may be removed through [Article I's impeachment](#)

[process](#) for their misdeed, but the Framers of the 1787 Constitution must have understood that agents more generally answered to political forces. And they have, with Cabinet-level positions since the time of Washington turning over with each new administration.

But does this mean the president alone may issue pink slips to members of his Cabinet? Those officers, after all, are appointed under Article II of the Constitution by the president with the advice and consent of the Senate. Should not the Senate have a say in their removal? Congress thought so under its 1867 [Tenure in Office Act](#), which was used as the basis for Andrew Johnson's impeachment after he unilaterally fired War Secretary Edwin Stanton.

Johnson was acquitted at his trial in the Senate. The Tenure in Office Act, meanwhile, would be ruled unconstitutional in [1926 by the Supreme Court](#), sixty years late as far as Johnson was concerned. The Senate, the Court ruled in that 1926 case, could only participate in the appointment of so-called "principal" officers; it played no part in removing them.

That left the question of who did remove these officers, and how. In [1935](#), a very conservative Court (this was before FDR remade it with his packing plan) ruled that Congress could insulate agency heads from Presidential removal by awarding them tenure. Regardless of where the removal trigger was placed, the Court ruled, "good cause" could be required, something that has been understood since not to include mere political disapproval.

What has followed over the course of the last one-hundred years has been the foundation of the modern administrative state. Congress has created two kinds of agencies; the first executive and the second independent. Executive agencies, including Cabinet-level positions,

answer to the president because he has discretion to remove their heads. Independent agencies, usually multi-members boards or commissions, do not. They can only be removed for cause, which requires both a due-process hearing and proof of some misfeasance. Because of these twin requirements, no President has in over eighty years (until Trump) attempted the cause-less removal of a tenured agency head like members of the National Labor Relations Board and Federal Election Commission. (Note that Biden's prior firing of the NLRB's General Counsel, who was thought to be independent though not an agency head, was ruled valid by [the DC Circuit](#) on the ground that the General Counsel is not independent like the members of the Board.)

Both the FEC and NLRB are independent agencies, according to Congress. Their members can only be removed for cause. Trump's pink slips plainly violate this established constitutional precedent. So what is Trump up to? He is betting that the current ultra-conservative Supreme Court will rewrite the constitutional rules that define America's separation of powers. And it probably will. In [2010](#), the Court ruled that the President must have some mechanism to remove administrative agents, something it had never said before. By [2020](#) it had ruled that singular independent agency heads cannot be given tenure. Reiterating that point the following year Justice [Alito's majority](#) wrote that "[t]he President must be able to remove not just officers who disobey his commands but also those who he finds negligent and inefficient, those who exercise their discretion in a way that is not intelligent or wise, those who have a different view of policy, those who come 'from a competing political party who is dead set against the President's agenda'"

Justice Thomas (joined by Gorsuch), meanwhile, concurred in the [2020 decision](#) awarding the president at-will authority to remove singular and ostensibly independent agency heads by announcing that the Court's

seminal 1935 decision to the contrary now after almost one-hundred years “poses a direct threat to our constitutional structure and, as a result, the liberty of the American people.”

Three solid Supreme Court votes from Thomas, Alito and Gorsuch favor Trump’s totalitarian plan. Chief Justice Roberts, who has joined all of the changes noted above, will add a probable fourth. That leaves one vote between a rewriting of America’s brand of democracy in favor of Trump’s. Justices Kavanaugh and Barrett have so far quietly joined these results. Given Kavanaugh’s vote in the Trump’s [2024 immunity case](#), there can be little doubt about his sentiments now. Trump will lose in the lower courts to be sure – the law is against him — but he will prevail in the high reactionary Court. Law, after all, means little there.

Mark Brown is a law professor and the Newton D. Baker/Baker & Hostetler Chair at Capital University Law School.

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