The Future Of DOL Judge Removal Challenges After Slaughter

By **Mark Ishu** (September 9, 2026)

Mark Ishu

On June 29, the U.S. Supreme Court decided Trump v. Slaughter, holding that statutory for-cause removal protections for commissioners of the Federal Trade Commission violate Article II, overruling its 1935 decision in Humphrey's Executor v. U.S.

Although Slaughter did not address administrative law judges, its reasoning has potentially significant implications for U.S. Department of Labor ALJs, who are protected from removal by a statutory structure that places two layers of removal protection between the president and the ALJ.

For lawyers handling DOL whistleblower claims, Slaughter raises significant questions about the constitutionality of DOL ALJ removal protections, and whether those protections can be severed without altering the adjudicatory structure Congress created.

The answers may differ among whistleblower statutes, making the governing statute important not only to the constitutional analysis, but also to the practical choice between preserving the issue through administrative review and seeking prospective relief in federal court.

Slaughter's Significance for DOL ALJs

Slaughter builds on a line of Supreme Court decisions emphasizing presidential accountability for officials exercising executive power. Notably, the court's 2010 decision in Free Enterprise Fund v. Public Company Accounting Oversight Board invalidated a structure in which PCAOB members were removable only for cause by commissioners of the U.S. Securities and Exchange Commission, who themselves were protected from removal by the president.

Slaughter went further, overruling Humphrey's Executor and reaffirming the general Article II rule that officers exercising executive power must remain accountable to the president through his removal authority. In doing so, the court rejected Humphrey's reliance on labels such as quasi-legislative or quasi-judicial to justify removal protection.

Although the court did not address ALJs or Title 5 of the U.S. Code, Section 7521, which governs actions against ALJs, its reasoning calls into question whether the statutory protections applicable to DOL ALJs remain constitutional. DOL ALJs conduct formal hearings, rule on evidence and motions, examine witnesses, and issue decisions and orders. Importantly, the Supreme Court's 2018 holding in Lucia v. SEC establishes that ALJs exercising these kinds of powers may qualify as constitutional officers of the U.S.

The post-Slaughter question is whether DOL ALJs exercising significant governmental authority may constitutionally remain insulated from presidential removal by two layers of statutory protection.

The DOL ALJ Removal Structure

Section 7521 provides that an action against an ALJ may be taken only for good cause as established and determined by the U.S. Merit Systems Protection Board after an opportunity for hearing. MSPB members, in turn, are subject to statutory removal protections under Title 5 of the U.S. Code, Section 1202(d).

In the resulting structure, the secretary of labor cannot remove an ALJ at will; removal requires a good cause determination through the statutory MSPB process. However, that structure presents the concern identified in Free Enterprise Fund, because the officials responsible for determining whether good cause exists are themselves protected from presidential removal.

The Impartiality Problem

The strongest response to a removal challenge is that ALJs are supposed to be impartial adjudicators. Their independence from political influence is not an incidental feature of the system; it is part of the reason Congress created administrative adjudication.

That consideration creates tension after Slaughter. If an executive official could remove an ALJ because they believed the judge was reaching the wrong results, the practical independence of the adjudicator would be substantially diminished.

Congress protected ALJs from removal, except for good cause, in part to prevent this type of pressure. If that protection is unconstitutional, the resulting system could place an adjudicator in the unusual position of exercising substantial adjudicatory authority while their tenure is subject to greater executive control.

This does not establish that an at-will removal regime is itself unconstitutional, but eliminating tenure protection may materially change the institutional design that Congress selected. That consideration becomes important both in evaluating prospective relief and in determining whether an unconstitutional removal restriction can simply be severed.

Why the Governing Whistleblower Statute Matters

The constitutional issue concerning Section 7521 does not turn on which whistleblower statute the DOL ALJ is administering. However, the practical consequences of a challenge may substantially depend on the procedures and avenues that Congress created for judicial review under the particular statute.

The Pipeline Safety Improvement Act illustrates this point. An employee may request a de novo hearing before a DOL ALJ if the Occupational Safety and Health Administration's investigation doesn't find merit to the employee's claim. Although the proceeding is trial-like, it is not identical to litigation in federal district court. For instance, formal rules of evidence do not apply in PSIA administrative proceedings.[1]

As a result, evidence that might be excluded in federal court for hearsay, lack of foundation or similar evidentiary deficiencies may become part of the administrative record, with those deficiencies instead going to the weight the ALJ gives the evidence. This difference may be particularly significant where a complainant proceeds pro se and is afforded greater latitude in developing the evidentiary record.

The PSIA also contains a kick-out provision: If the administrative process is delayed beyond a defined statutory period, the employee — but not the employer — may bring an original action in federal district court, and either party may request a jury trial.[2] This feature is important because access to a jury depends not only on agency timing, but also on the employee's decision of whether to leave the administrative process.

That distinction has practical consequences. If counsel proceeds through the administrative process, meaningful judicial consideration of the removal challenge may not occur until review of the final agency order in the appropriate court of appeals. By then, the ALJ may already have conducted the hearing, ruled on evidence, made credibility determinations and created the administrative record.

Two features are important for practitioners. First, Congress contemplated materially different adjudicatory forums: administrative adjudication before the DOL and, under specific circumstances, de novo adjudication before an Article III court with a jury. Second, the employee — not the employer — controls whether to invoke the statutory kick-out provision, so an employer cannot use that provision to remove a pending case from the agency.

The potential significance of that distinction is illustrated by the U.S. Court of Appeals for the Eighth Circuit's Sept. 3 decision in BNSF Railway Co. v. DOL. Addressing the Federal Railroad Safety Act's similar employee-controlled kick-out provision, the court held that the employer had a Seventh Amendment right to a jury trial and found no justification for conditioning that right on agency timing or the employee's decision to proceed in federal court.

Other DOL whistleblower statutes demonstrate why counsel should conduct the same analysis under the statute governing the case. The Sarbanes-Oxley Act likewise provides a complainant-controlled route to de novo district court adjudication after a specified period of agency delay and provides a jury right. The Clean Air Act, by contrast, contains no comparable de novo kick-out provision; judicial review of a final agency order proceeds in the court of appeals.

These differences may inform both strategy and remedy. For an employer, a complainant-controlled kick-out provides no means of leaving the administrative process. But the statutory design may matter to severability. Under statutes like the PSIA or Sarbanes-Oxley, counsel can point to Congress' express creation of different administrative and Article III forums.

A statute without a comparable kick-out provision presents the issue differently: Counsel should consider whether Congress' decision to channel the dispute through administrative adjudication before judicial review makes the characteristics of that tribunal significant to the statutory design.

Severability

If Section 7521's removal restriction is unconstitutional, the next question is remedy. The Supreme Court generally favors severing an unconstitutional removal restriction, rather than invalidating the broader statutory scheme. Its holding in Free Enterprise Fund, and its 2020 decision in Seila Law LLC v. Consumer Financial Protection Bureau, both followed that approach. Slaughter, however, indicates that congressional reliance on independence may remain relevant to severability.

Counsel should therefore examine the applicable statutes. Section 7521 contains no severability provision, although the substantive whistleblower statute or broader act may. The Clean Air Act, for example, contains an express separability clause.[3] However, even without such a clause, courts apply a strong presumption of severability.

Because Section 7521 is separate from the substantive whistleblower statutes, a court could sever the removal restriction while leaving the underlying adjudicatory scheme intact. But the inquiry should not end there. Eliminating tenure protection may alter the decisional independence Congress built into administrative adjudication, thereby changing the adjudicatory structure Congress selected.

Recent National Labor Relations Board cases illustrate the remedial disagreement. In May, the U.S. District Court for the Northern District of Texas declined to sever the removal restrictions in Aunt Bertha d/b/a Findhelp v. NLRB, reasoning that choosing which layer of protection to eliminate would require the court to reconstruct the statutory scheme.

By contrast, on July 27, in Aimbridge Employee Service Corp. v. NLRB, the U.S. District Court for the Eastern District of Texas severed Section 7521 as applied to NLRB ALJs, leaving them removable at will. Neither decision controls the DOL context, but they illustrate the disagreement over whether severance preserves or instead alters the statutory adjudicatory structure.

The governing whistleblower statute's adjudicatory structure may inform that analysis. Under the PSIA, Congress authorized both administrative adjudication and, after 210 days, de novo district court adjudication at the employee's election. That statutory design provides a basis to ask whether eliminating ALJ tenure protection merely cures the constitutional defect or materially changes one of the adjudicatory forums Congress selected. Statutes without a comparable district court option may present the issue differently.

The strong presumption of severability remains important, and a court may conclude that the proper remedy is continued administrative adjudication under a constitutionally permissible removal regime. But employer counsel should analyze the governing statute, any severability provision and Congress' design of the administrative forum before assuming that severance necessarily resolves the constitutional problem.

Practical Considerations for Practitioners

For an employer considering a constitutional challenge to the removal protections applicable to DOL ALJs, counsel should first map the statutory path from the administrative proceeding to federal court. This includes identifying the administrative review process, the route for judicial review of a final agency order and whether the statute contains a complainant-controlled kick-out provision. If it does, counsel should consider when it becomes available and whether it provides for de novo review or a jury trial.

Counsel should also raise and preserve the Article II objection early in the administrative proceeding. However, preservation should be distinguished from obtaining a ruling on the constitutional challenge.

DOL adjudicators have recognized limits on their authority to pass on the constitutional validity of the statutes and regulations they administer, even while recognizing authority in some circumstances to consider as-applied constitutional issues. Therefore, counsel may need to preserve the removal challenge before the ALJ and the Administrative Review Board without obtaining an agency ruling that resolves the underlying constitutional question.

The Eighth Circuit's decision in BNSF reinforces that distinction, holding that the employer preserved its Seventh Amendment challenge by raising it before the Administrative Review Board, even though the board likely lacked authority to grant relief.

Moreover, under the Supreme Court's 2021 decision in Collins v. Yellen, an unconstitutional removal restriction does not automatically invalidate the official's actions; a party seeking retrospective relief may face the additional question of whether the unconstitutional restriction caused compensable harm.

Counsel should therefore separately consider whether the circumstances warrant seeking prospective relief in federal district court before the administrative hearing occurs. If the agency cannot grant the requested constitutional relief and ordinary judicial review will not occur until after the administrative process, waiting may mean undergoing the very proceeding that the constitutional challenge seeks to prevent.

The Supreme Court's 2023 decision in Axon Enterprise Inc. v. FTC provides the framework for considering district court jurisdiction over certain structural constitutional challenges, notwithstanding a statutory scheme providing for later judicial review. Controlling circuit law also matters.

In Space Exploration Technologies Corp. v. NLRB last year, the U.S. Court of Appeals for the Fifth Circuit distinguished retrospective challenges governed by Collins from prospective challenges to ongoing agency proceedings, reasoning that in the latter context the proceeding itself may constitute the injury.

Neither Axon nor SpaceX establishes that every challenge to DOL ALJ removal protections may proceed directly in district court.

That option is not merely theoretical. In Kinder Morgan Inc. v. DOL in April, an employer facing a PSIA whistleblower proceeding brought a separate action in the U.S. District Court for the Southern District of Texas challenging removal protections applicable to the DOL ALJ and obtained injunctive relief preventing the administrative proceeding from continuing.

Although not controlling authority, Kinder Morgan illustrates why counsel confronting an imminent hearing should consider prospective relief, rather than assume that preservation for eventual appellate review provides an equivalent remedy.

Finally, counsel should identify the requested remedy at the outset. If the constitutional defect is an unlawful restriction on removal, is the appropriate remedy simply to sever that restriction and permit the administrative proceeding to continue? Or does the governing whistleblower statute provide a basis for arguing that doing so would materially alter the adjudicatory forum that Congress created?

Conclusion

Slaughter does not resolve whether Section 7521's removal protections for DOL ALJs are constitutional, but it materially changes the landscape in which that question will be litigated.

For employer counsel, the practical consequences depend on the governing whistleblower statute, its severability provisions, the available forums for adjudication and judicial review, and the remedy for any constitutional defect. Those considerations should inform whether counsel preserves an Article II objection through the administrative process or considers prospective federal court relief before the administrative hearing occurs.

Mark Henry Ishu is senior counsel at Conn Maciel Carey LLP. He previously served as a trial attorney for the DOL's Office of the Solicitor.

[1] See 29 C.F.R. § 1981.107(d).

[2] See 49 U.S.C. § 60129(b)(3)(D).

[3] See 42 U.S.C. § 7615.