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Union Arbitrators Overturn Most Federal Employee Dismissals

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TOPLINE POINTS

- ★ Grievance arbitration makes removing unionized federal employees very difficult. Unions help select these arbitrators, and arbitrators reinstate dismissed employees in three-fifths of cases.
- ★ The combination of lengthy delays, followed by high reversal rates and back pay obligations makes attempting to dismiss unionized employees very risky for agencies.
- ★ Grievance arbitration is an important reason why agencies rarely remove poor performers—to the consternation of both federal supervisors and employees.

Civil service protections make removing federal employees difficult. Dismissed employees can appeal to the Merit Systems Protection Board (MSPB), which reinstates employees in just over one-quarter of cases. Unionized federal employees can alternatively grieve removals before an arbitrator. Federal unions help select these arbitrators, and they are even more lenient than the MSPB. New analysis shows arbitrators reinstate employees in three-fifths of cases—more than twice as often as the MSPB.[1]

Arbitrators almost always award back wages to the employees they reinstate. Since arbitration takes an average of a year and a half, an agency that attempts to dismiss a unionized employee knows the decision will likely be overturned, and the agency will pay over a year of back wages. Arbitrators' leniency makes removing unionized employees prohibitively difficult and stacks the deck against hardworking taxpayers.

[1] The author extends his grateful thanks to America First Policy Institute (AFPI) interns Connor Merk, Jared Stone, and Mary Greco for their invaluable assistance analyzing arbitral awards for this report.

Congress could make removing problematic federal employees easier by prohibiting grievances over removals. If Congress does not do so, the courts may strike down grievance protections for some federal officials. The Supreme Court has held that Congress cannot give federal officers the type of robust removal protections that grievance arbitration provides. Courts have good reason to hold that arbitration unconstitutionally insulates federal officers from presidential supervision.

Poorly Performing Federal Employees Rarely Fired

Congress has directed federal agencies to dismiss poor performers. The Civil Service Reform Act of 1978 established Merit System Principles that state "[e]mployees should be retained on the basis of the adequacy of their performance … employees should be separated who cannot or will not improve their performance to meet required standards" (5 U.S.C. § 2301(6)).

This rarely happens. The Office of Personnel Management (OPM) reports that in FY 2021, agencies dismissed approximately 4,000 tenured employees for poor performance or misconduct (n.d.).[2] This figure represents approximately one-quarter of 1 percent of the federal government's 1.6 million tenured employees.[3]

The Federal Employee Viewpoint Survey (FEVS) shows widespread federal employee dissatisfaction with agencies' failures to address poor performers. Between 2017 and 2021, only 36 percent of federal employees reported that in their work unit, "steps are taken to deal with a poor performer who cannot or will not improve" (U.S. Office of Personnel Management, 2022, p. 15).[4] Half of federal employees report that they have poor performers in their work unit who remain on the job, continuing to underperform (U.S. Office of Personnel Management, 2022, p. 16).

Removal Restrictions Make Dismissals Difficult

Federal employees are rarely removed for poor performance or misconduct because—notwithstanding Congress's directive—federal law makes removing them very difficult, no matter the reason. Surveys show that only two-fifths of federal supervisors are confident they could remove an employee for serious misconduct, and just a quarter expect they could do so for poor performance (U.S. Merit Systems Protection Board, 2019, pp. 6,15).

Under federal law, federal employees can only be fired for cause. The law presumes they deserve to keep their jobs; agencies must prove employees' conduct or performance justified dismissal (5 U.S.C. §

[2] The term "tenured" refers to career employees who have completed their probationary period and receive civil service protections. In most agencies, the probationary period is 1 year, but in FY 2021 it was 2 years at the Department of Defense (DoD), which accounts for over one-third of the Federal non-postal workforce. Congress reduced the DoD probationary period to 1 year in the FY 2022 National Defense Authorization Act, but that reduction has not yet taken effect.

[3] FedScope data cubes (n.d.), maintained by OPM, show agencies removed 4,040 permanent full-time employees with at least two years of service for performance or misconduct in FY 2021. FedScope data cubes also show the federal government employed 1.6 million permanent full-time employees with two or more years of experience in September 2021. These figures exclude seasonal and non-permanent employees, such as political appointees.

[4] This figure is the average response between 2017 and 2021 to Federal Employee Viewpoint Survey question 10.

7513(a), 5 U.S.C. 4303(a)).[5] To establish good cause exists, agencies must collect evidence and navigate procedural steps, such as providing poor performers a "performance improvement period."[6] They must also demonstrate misconduct warranted removal—and not a lesser penalty—by evaluating that behavior through the twelve *Douglas* factors.[7] Then, once an agency removes an employee, they have multiple options to appeal.

Basic civil service appeals go to the Merit System Protection Board (MSPB). The MSPB overturns 28 percent of removals.[8] So while agencies win most MSPB appeals, employees get their jobs back in just over a quarter of cases.

Arbitrators Incentivized to Overturn Removals

Unions represent almost three-fifths of federal employees.[9] Unionized employees can alternatively contest removals through grievances.[10] Grievances are first processed internally within agencies. If the parties cannot come to an agreement, they then get heard by arbitrators with authority to reinstate employees. The arbitrators are private contractors who register for federal work with the Federal Mediation and Conciliation Service (FMCS). When a grievance goes to arbitration, the FMCS provides a list of potential arbitrators from their master roster. Collective bargaining agreements typically call for selecting arbitrators by having the agency and union alternatively strike names from the list until only one remains.

This process encourages arbitrators to rule for unions. While any one agency goes to arbitration only a few times a year, federal unions are in arbitration constantly across the government. Unions see the same names from the FMCS master arbitration roster frequently reappear. They track how arbitrators rule and strike those who often rule against them. Consequently, arbitrators who frequently rule against unions get little federal arbitration work. This creates strong financial incentives to "split the baby"—balancing wins and losses for unions irrespective of the underlying facts.

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[5] In general, agencies must demonstrate that the preponderance of the evidence shows an employee's removal improved the efficiency of the service for actions taken under 5 U.S.C. § 7513 or that substantial evidence supports a performance-based removal taken under 5 U.S.C. § 4303 (5 U.S.C. § 7701(c)(1)).

[6] Before removing an employee for unacceptable performance under Chapter 43, agencies must give the poor performer an opportunity to demonstrate acceptable performance, colloquially known as a performance improvement period or "PIP (5 U.S.C. § 4302(c)(6)). If the employee continues to perform unacceptably, or the employee improves but relapses within 12 months, the agency may remove them. To do so, the agency must first give the employee 30 days' advance notice of the proposed dismissal and provide an opportunity to respond (5 U.S.C. § 4303). Agencies using Chapter 75 authorities do not need to provide employees with a PIP. They do need to provide the 30-day advance notice during which the employee may respond to the charges. The agency may remove the employee after considering their response (5 U.S.C. § 7513)

[7] The *Douglas* factors are named after the seminal MSPB case establishing this framework, *Douglas v. Veterans Administration* (1981). Managers must show they evaluated each *Douglas* factor before proposing a removal.

[8] Author's analysis of case outcomes from 2011 to 2016 disclosed by the MSPB pursuant to a Freedom of Information Act request. Data and analysis are available from the author upon request. MSPB data shows the MSPB reversed or mitigated the agency removal decision in 28 percent of cases. This includes the disposition of initial appeals before an administrative law judge (ALJ) and petitions for review before the full MSPB. These figures do not reflect cases in which the parties settled their dispute without an ALJ or MSPB decision. The analysis ended in 2016 because the MSPB lacked a quorum between 2017 and 2022.

[9] OPM FedScope data cubes show that in March 2022 federal unions represent 1.22 million of the federal government's 2.16 million executive branch employees—56 percent of the total (OPM, n.d.).

[10] Employees can appeal to either the MSPB or an arbitrator, but not both (5 U.S.C. § 7121).

Ideally, arbitrators would ignore these incentives. The National Academy of Arbitrators' professional code of ethics prohibits issuing compromise rulings "for the sake of attempting to achieve personal acceptability" in future cases (2007, p. 6). Congress has also required arbitrators to apply the same legal standards as the MSPB (5 U.S.C. § 7121(e)(2)). If arbitrators uphold their professional and legal responsibilities, making decisions based only on the facts and the law, they should uphold removals about as often as MSPB adjudicators do.

However, federal human resources (HR) staff anecdotally report many arbitrators try to "split the baby." In removal cases, that often means agreeing the employee had conduct or performance issues but reducing the punishment to a less serious penalty. Career federal HR staff report that arbitrators frequently bend over backward to justify reinstating employees.[11] Agencies generally cannot appeal arbitrators' rulings in court, so arbitral reinstatements are almost always final.[12]

New Analysis of Arbitral Awards

Until now, there has been little analysis of whether these anecdotal impressions are accurate or whether arbitrators instead uphold their professional and legal responsibilities. However, President Donald J. Trump required agencies to submit arbitration awards to OPM (Exec. Order 13836). OPM has continued this policy in the Biden Administration (2021, p. 3). This has created a centralized database of arbitration awards researchers can analyze. The America First Policy Institute requested these records through a Freedom of Information Act (FOIA) request. To date, OPM has released 435 arbitration awards to AFPI.[13] This constitutes a large, representative sample of arbitral awards, which enables AFPI to analyze how arbitrators handle cases and compare them with administrative adjudicators.

Arbitrators Usually Overturn Dismissals

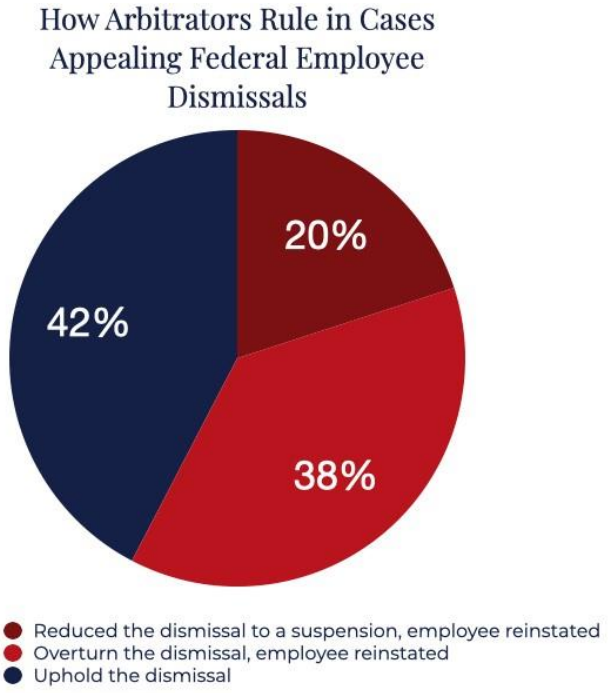
Arbitrators do seem to "split the baby." They rule for unions in 54 percent of all cases heard on the merits.[14] This is consistent with anecdotal reports that they try to balance their win-loss record to remain acceptable to unions. Unions do even better in grievances challenging removals. Arbitrators overturn removals in 58 percent of cases—more than twice as

[11] The author of this report served for 4 years on the White House Domestic Policy Council with responsibility for civil service issues. In that role, he heard senior professional staff in OPM and cabinet agencies frequently express these sentiments.

[12] Arbitral awards in removal proceedings are subject to judicial review in the same manner as decisions of the Merit Systems Protection Board (5 U.S.C. § 7121(f)). Employees can appeal adverse MSPB decisions to the Federal Circuit Court of Appeals. However, only the OPM director—not agencies—can seek judicial review of MSPB orders or arbitral awards that are adverse to the agency. The OPM director can seek judicial review only if he determines "that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive" (5 U.S.C. § 7703(d)). Agencies cannot otherwise appeal MSPB or arbitrator rulings ordering employees reinstated.

[13] The records released to date cover arbitration awards submitted to OPM between May 25, 2018 (when Executive Order 13836 was signed) and November 2020. OPM is still processing AFPI's Freedom of Information Act request for awards submitted to OPM after November 2020.

[14] Unions obtained either full or partial success in 221 of the 410 cases heard on the merits. The remaining cases were dismissed on procedural grounds, principally the union filing the grievance after the contractual filing deadline passed. These figures include both adverse action cases—such as removals or suspensions—and other cases, such as those alleging contractual violations.



often as the MSPB.[15] Conversely, the MSPB upholds 72 percent of dismissals, while arbitrators uphold only 42 percent.

In 38 percent of cases, arbitrators overturn removals entirely. In another 20 percent, they agreed the employee deserved discipline but found removal was too harsh and reduced the dismissal to a suspension. Despite being required to apply the same legal standards, arbitrators are much more lenient than the MSPB.[16] Most federal employees who grieve their removal get their job back.

Questionable Reinstatements

An examination of arbitral awards shows many examples of arbitrators reinstating employees in highly questionable cases. For example:

- The Department of Veterans Affairs (VA) Central Arkansas Veterans Healthcare System removed an operating room surgical tech in September 2017 for sexual harassment that created a hostile working environment. The tech admitted to peeping at coworkers over bathroom stalls and grabbing and groping coworkers' buttocks on multiple occasions. Her union grieved the removal. In November 2018, an arbitrator found the misconduct occurred but concluded removal was too harsh and reduced the punishment to a 30-day suspension. The arbitrator ordered VA to reinstate the tech with over a year of back wages (*American Federation of Government Employees Local 2054 and Department of Veterans Affairs, Central Arkansas Veterans Healthcare System*, 2018).

- Customs and Border Protection (CBP) rules prohibit employees from knowingly associating with illegal immigrants. A CBP officer stationed in San Diego, California, knowingly dated and subsequently married an illegal immigrant with Deferred Action for Childhood Arrivals (DACA) status. The Department of Homeland Security repeatedly informed its employees that DACA merely deferred prosecution of immigration violations but did not give recipients legal status. CBP

[15] Author's analysis of federal sector arbitration awards submitted to OPM between May 2018 and November 2020 that challenged an employee removal and were decided on the merits.
[16] Arbitrators are even more lenient in cases challenging suspensions, sustaining the agency action in only 40 percent of cases. In 25 percent of these cases arbitrators overturn the suspension entirely, while they reduce the penalty in 34 percent of cases (figures do not add to 100 percent due to rounding).

fired the officer in 2018 once it learned of the situation. His union grieved, and the arbitrator reinstated the employee with a year of back wages. The arbitrator reasoned that DACA residents actually do have legal status and the officer, therefore, did not violate CBP rules (*National Border Patrol Council and U.S. Customs and Border Protection*, 2019).

- A customer services representative at a Department of Veterans Affairs (VA) call center in Texas was arrested and jailed for possessing methamphetamine. The employee subsequently pled guilty to possessing and intending to deliver illegal drugs. VA fired him in December 2018 for conduct unbecoming a federal employee. His union grieved. In November 2019, an arbitrator reinstated him, albeit without back pay. The arbitrator reasoned that removal was too harsh a penalty because there was no evidence his conduct hurt the VA or impaired his job performance (*U.S. Department of Veterans Affairs and American Federation of Government Employees Local No. 1822*, 2019).

- Federal Aviation Administration (FAA) ethics rules prohibit safety inspectors from accepting gifts from individuals associated with the airports they investigate. The rule exists to prevent the appearance of bias in FAA inspections. An FAA airport certification safety inspector with a history of disciplinary infractions nonetheless accepted free lodging from a board member of an airport he was investigating. The employee admitted to doing so, and the FAA fired him in March 2018. His union grieved his dismissal. A year later, an arbitrator concluded the FAA had not investigated the charges quickly enough to justify dismissing the employee. The arbitrator reduced the penalty to a 30-day suspension and ordered the employee reinstated with over 10 months of back pay (*National Air Traffic Controllers Association and Federal Aviation Administration*, 2019).

- A Licensed Practical Nurse at a Pennsylvania VA medical center cared for a veteran resident with dementia. The patient found the movies “Back to the Future” and “Home Alone 1” very soothing, and the facility used the movies as a non-medical treatment. Other residents at the facility found constantly playing these DVDs irritating. One day this nurse hid the DVDs, causing the patient great distress. He came sobbing to the facility supervisor asking why he was being punished and begging for his movies back. An investigation ensued, and the nurse initially said she had no idea where the movies went. After further investigation, she admitted to hiding them. In the summer of 2017 VA fired her for obstructing the patient’s treatment and lying about it. The facility determined it could no longer trust her to provide veterans with “ethical, quality, safe care.” Her union grieved. In January 2020, an

arbitrator found the nurse committed the offenses but concluded removal was too severe a penalty. The arbitrator mitigated her removal to a 30-day suspension, ordering the nurse reinstated with more than 2 years of back pay (*U.S. Department of Veterans Affairs, James E. Van Zandt VA Medical Center and American Federation of Government Employees Local 1862*, 2020).

Lengthy Process with Back Pay Frequently Awarded

These lengthy delays with back pay are typical of grievance arbitration; arbitration usually takes longer than MSPB appeals. The MSPB takes an average of 3 months to issue initial decisions and another 6 months to hear appeals that go to the full Board—9 months total.[17] By contrast, the average arbitral ruling in removal cases comes 17 months after the employee was removed—almost a year and a half later.[18]

The law allows arbitrators to order agencies to pay reinstated employees back pay and benefits for time spent unemployed, plus interest (5 U.S.C. § 5596(b)).[19] Arbitrators regularly do so, requiring agencies to pay back wages to 84 percent of employees whose removals get overturned.[20]

Agencies Subsidize Grievances

Agencies also subsidize union grievances. Under federal law, taxpayers pay union representatives for pursuing grievances inside agencies (5 U.S.C. § 7131(d)).[21] Agencies spent $20 million underwriting union grievances in 2019.[22] Unions pay their own attorneys if the grievance advances to arbitration. However, arbitrators can require agencies to reimburse those attorney fees if the employee wins (5 U.S.C.

[17] The MSPB (2022, p. 8) reports it took an average of 105 days in FY 2021 to process initial appeals before an ALJ. If the ALJ rules against an employee, they can ask the presidentially appointed Board members to review their case (5 U.S.C. § 7701). The MSPB did not have a quorum between January 2017 and March 2022, so recent statistics for Board processing times do not exist. Before the MSPB lost its quorum, the Board (2017, p. 15) reported that it took an average of 185 days for MSPB headquarters to review initial decisions. Thus, notwithstanding the current backlog in cases due to the Board lacking a quorum for 5 years, it takes the MSPB an average of about 290 days to adjudicate appeals.

[18] Author's analysis of federal sector arbitration awards submitted to OPM between May 2018 and November 2020 that challenged an employee removal and were decided on the merits. In a small number of cases, the award indicated the date the agency notified the employee of their proposed removal but not the date of removal. In these cases, the author estimated the removal date by adding 30 days to the notice date.

[19] Back pay awards are typically reduced by income employees earned from different employers in the interim.

[20] Author's analysis of federal sector arbitration awards submitted to OPM between May 2018 and November 2020 that challenged an employee removal and were decided on the merits.

[21] 5 U.S.C. § 7131(d) requires agencies to bargain over allowing union representatives who work for the agency to perform union work while on the clock as an agency employee. Virtually all collective bargaining agreements allow unions to use this "taxpayer-funded union time" or "official time" to bring grievances, including grievances over removals. Executive Order 13837 (2018) prohibited using taxpayer-funded union time to bring grievances. However, President Biden rescinded this directive shortly after taking office (Exec. Order 14003).

[22] Author's calculations using data from OPM. Agencies spent $135 million on taxpayer-funded union time in FY 2019, and 14.9 percent of that time was used for "dispute resolution." That category covers "time used to file and process grievances up to and including arbitrations and to process appeals of bargaining unit employees to the Federal Labor Relations Authority (FLRA) and, as necessary, to the courts" (U.S. Office of Personnel Management, 2020, Appendices A & B). Union time expenses attributable to processing grievances are thus 14.9 percent of $135 million, or $20 million. This figure covers all grievances, not just those challenging removals.

§ 5596(b)(1)(A)(ii)).[23] Collective bargaining agreements also usually require the losing party to pay the arbitrator's fees. So, agencies typically cover most or all grievance costs when employees are reinstated.

Grievance Arbitration Discourages Dismissals and Performance Accountability

Grievance arbitration is an important reason federal managers feel incapable of removing problematic employees. The combination of high reversal rates, lengthy delays, back pay, and covering union costs makes attempted removals very risky for agencies. In a typical case, an arbitrator will reinstate the employee with back pay 1–2 years later. Thus, the agency pays the union to grieve the removal internally, bears its litigation expenses before the arbitrator, keeps the employee, and pays tens of thousands (or more) in back pay. In many cases, agencies must also pay the union's attorney fees. Agencies respond rationally to these incentives by not attempting to fire problematic employees in the first place.

For example, an employee in a Department of Labor enforcement agency repeatedly sent sexually harassing text messages to an individual he was investigating—including pictures of his genitals. This happened while on duty and using his government phone. Agency leadership wanted the employee dismissed immediately. The agency's senior HR leaders concluded that was impossible, in part because the employee was unionized, and his union would defend him. The employee was instead placed on indefinite administrative leave, keeping his job and pay (Sherk, 2022, p. 24).

The Civil Service Reform Act of 1978 directed agencies to systematically remove poor performers (5 U.S.C. § 2301(b)(6)). Grievance arbitration makes this functionally impossible. If Congress wants to improve federal performance accountability, Congress could end grievance arbitration of dismissals.

Grievance Arbitration May Be Unconstitutional Under Existing Doctrine

If Congress does not do so, courts may hold some removal grievances unconstitutional violations of existing legal doctrine. The Supreme Court established this doctrine in *Free Enterprise Fund v. Public Company Accounting Oversight Board* (2010). That case dealt with the Public Company Accounting Oversight Board (PCAOB), a sub-component of the Securities and Exchange Commission (SEC). The President can only remove SEC members for cause, and the law only allows the SEC to remove PCAOB members for cause. The Supreme Court invalidated these nested removal protections. The Court reasoned that:

> such multilevel protection from removal is contrary to Article II's vesting of the executive power in the President … Here the President cannot remove an officer who enjoys more than one level of good-cause protection, even if the

[23] It is not clear how often arbitrators award attorney fees. The overwhelming majority of arbitration awards submitted to OPM were silent on the subject, instead ordering the employees to be made whole in accordance with the Back Pay Act and remanding the details of those calculations to the parties to settle. The Back Pay Act provides for attorney fees for prevailing parties when in the "interest of justice"(5 U.S.C. §§ 5596(b)(1)(A)(ii), 7701(g)(1)). However, the ultimate settlements were not submitted to OPM, and it is not known if they provided for attorney fees. Arbitrators expressly addressed attorney fees in 13 cases in which an employee was reinstated. In 12 of those cases, the arbitrator awarded attorney fees.

> President determines that the officer is neglecting his duties or discharging them improperly. That judgment is instead committed to another officer, who may or may not agree with the President's determination, and whom the President cannot remove simply because that officer disagrees with him. This contravenes the President's constitutional obligation to ensure the faithful execution of the laws.

Grievance arbitration provides even stronger removal protections than those invalidated in *Free Enterprise Fund*. Union contracts give bargaining unit members for-cause removal protections. However, arbitrators wholly unaccountable to the executive branch determine whether this cause exists. This insulates bargaining unit members even more completely from presidential supervision than PCAOB members.[24]

The *Free Enterprise Fund* holding only applied to executive branch "officers"—individuals required to be appointed in accordance with the Constitution's Appointments Clause.[25] The Court's holding did not address non-officer employees. However, as Justice Breyer noted in his dissent, the definition of a constitutional officer is "unusually broad … [including] those who can be said to hold an office that has been created either by regulations or by statute." Federal collective bargaining agreements likely cover many constitutional officers.[26] Dismissal grievances for these officers are likely unconstitutional.

Conclusion

Grievance arbitration makes removing unionized federal employees very difficult. Unions help select arbitrators, and they reinstate employees in three-fifths of cases. This is more than twice as often as the MSPB. In some cases, arbitrators appear to bend over backward to reinstate employees. Grievance arbitration is an important reason why agencies rarely remove poor performers—to the consternation of both federal supervisors and employees. Congress could make removing poor performers easier by ending removal grievances. If Congress does not, courts have strong grounds to invalidate grievance protections for executive officers.

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[24] Chief Justice Roberts explained that the Court's holding did not threaten the civil service system in part because the president has statutory authority to waive civil service protections (the same authority President Trump invoked to issue his "Schedule F" executive order). However, the president has little authority to exempt agencies from grievance arbitration of dismissals. Executive Order 13839 (2018) directed agencies to try to remove dismissals from their grievance procedures. However, the Federal Service Impasses Panel found that D.C. Circuit Court precedent generally prevented agencies from doing so. See, for example, *National Park Service, Independence National Historical Park, and Fraternal Order of Police First Federal Lodge* (2021).

[25] Article II, Section 2, Clause 2 of the United States Constitution.

[26] For example, immigration judges in the U.S. Department of Justice were represented by the National Association of Immigration Judges until FLRA ruled they were ineligible for collective bargaining. The union is currently seeking to persuade the FLRA to reverse that ruling under the Biden Administration (Wagner, 2022). These immigration judges are likely constitutional officers under the Supreme Court's reasoning in *Lucia v. Securities and Exchange Commission* (2018).

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