



## **WHEN ONE DOOR CLOSES: WHAT FEDERAL COURTS, AND CONGRESS, OWE FEDERAL WORKERS AS INDEPENDENT AGENCIES FALL**

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In 1978, the Civil Service Reform Act (CSRA) was enacted in response to widespread public concern that the federal civil service was vulnerable to political manipulation and lacked protections for whistleblowers. In addition to creating new, independent agencies inside the executive branch, the CSRA established new civil service protections for federal employees. Most importantly, Congress outlined prohibited personnel practices. Pursuant to the CSRA, a federal employee subjected to a prohibited personnel practice could seek relief through the Merit Systems Protection Board (MSPB), sometimes with the aid of the Office of Special Counsel (OSC).

Through the CSRA, Congress created a comprehensive system to investigate and adjudicate these claims inside the executive branch. In doing so, Congress generally precluded federal workers from going directly to federal court, instead channeling disputes to an independent, expert tribunal, the MSPB, at times supported by an independent, expert watchdog, OSC. But today, the civil service system is in crisis: Thousands of federal employees have been unlawfully terminated and retaliated against. At the same time, the MSPB is being stripped of its independence, while OSC has been transformed from an independent watchdog to a lapdog of the President.

In Part I, we give background on the history of the federal civil service and the merit system. In Part II, we argue that given the unraveling of the CSRA, federal courts must be available to federal employees. Congressional repairs to the legal framework in place for the past half century will be complicated and could be thwarted by more court decisions based on the

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unitary executive theory, under which “all federal officers exercising executive power” are understood to be “subject to the direct control of the President.”<sup>1</sup> In the meantime, under existing law, Article III courts can and should be available in the first instance for federal employees bringing claims of retaliation, unlawful termination, and other prohibited personnel practices. Under the U.S. Supreme Court’s established *Thunder Basin Coal Co. v. Reich*<sup>2</sup> test, Congress could not have intended to preclude review in federal court while the MSPB and OSC are stripped of independence.

In Part III, we lay out the case for broad civil service reform. Congress can and should restructure the civil service adjudicatory system to safeguard the rights of federal employees by preserving independent review of their claims. First, unless the Supreme Court upholds the MSPB members’ for-cause protection, Congress must restructure the MSPB to restore its independence. To accomplish this, Congress could either transform the MSPB into an Article I tribunal or shutter it and transfer its jurisdiction to an existing Article I court, like the U.S. Court of Federal Claims. Second, OSC should be abolished. The agency that for 50 years safeguarded the civil service system has lost its independence and, as Hampton Dellinger explains in an accompanying essay,<sup>3</sup> now does more harm than good. Congress should either fully shutter OSC or remove it from the executive branch, transforming it into an Article I agency tasked with oversight and advisory powers for Congress, like the U.S. Government Accountability Office (GAO).<sup>4</sup>

## I. BACKGROUND ON THE CSRA AND FEDERAL MERIT SYSTEM

The status of federal employment has long been politically contentious. President Andrew Jackson ushered in the era of the “spoils system,” which ironically was originally designed to democratize power exerted by the executive branch.<sup>5</sup> But by the late 1870s, rampant corruption and patronage throughout the civil service triggered the first genuine movement for reform.

In 1883, the Pendleton Civil Service Reform Act was signed into law by President Chester Arthur, creating the first merit-based system for federal employment.<sup>6</sup> The law was passed shortly after the assassination of

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<sup>1</sup> Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1158 (1992); see also Blake Emerson, *Liberty and Democracy Through the Administrative State: A Critique of the Roberts Court’s Political Theory*, 73 HASTINGS L.J. 371 (2022).

<sup>2</sup> 510 U.S. 200, 207 (1994).

<sup>3</sup> Hampton Dellinger, *No Independence? No Need*, REGUL. REV. (Mar. 9, 2026), <https://www.theregreview.org/2026/03/09/dellinger-no-independence-no-need> [<https://perma.cc/DY97-EEUW>].

<sup>4</sup> U.S. Gov’t Accountability Off., *What GAO Does*, <https://www.gao.gov/about/what-gao-does> [<https://perma.cc/2GCT-YK2P>].

<sup>5</sup> See *Developments in the Law—Public Employment*, 97 HARV. L. REV. 1619, 1624 (1984).

<sup>6</sup> Pendleton Civil Service Reform Act, ch. 27, 22 Stat. 403 (1883).

President James A. Garfield, who had championed civil service reform but was murdered by a disgruntled former political supporter spurned by President Garfield's refusal to grant him a patronage job in his Administration. Instead of patronage, the new system prized individual merit and rejected political tests for federal employment. Crucially, the Pendleton Act provided protections for federal employees fired or retaliated against for political reasons. These protections were enforced by the newly created Civil Service Commission, a bipartisan body.

But despite worthy intentions, the Pendleton Act provided only modest improvements. Nearly a century later, two key factors catalyzed a renewed movement for reform: first, the rapid expansion of the federal government that began in the New Deal, and second, the Watergate scandal, which exposed vulnerabilities in a new, powerful executive branch and created substantial public pressure for reform. Amid the fallout from Watergate and widespread public outrage about the status of the federal civil service, President Jimmy Carter became focused on civil service reform.

The impetus behind the push for broad civil service reform was the concern that the civil service system was vulnerable to political manipulation and provided insufficient protection for whistleblowers.<sup>7</sup> In a message to Congress, President Carter recommended replacing the feeble Civil Service Commission with the MSPB, a nonpartisan board whose members were removable by the President only for cause, to adjudicate disputes involving federal employees.<sup>8</sup> President Carter also recommended that a "Special Counsel" be created to investigate violations of new civil service protections and to protect whistleblowers.

President Carter explained that this structure would "guarantee independent and impartial protection to employees" and thereby "safeguard the rights of federal employees who 'blow the whistle' on violations of laws or regulations by other employees, including their supervisors."<sup>9</sup> Congress, after extensive debate, accepted President Carter's proposal, enacting the CSRA into law. The new CSRA eliminated the Civil Service Commission, created the MSPB and the Special Counsel, and enacted a series of new substantive protections for federal employees.<sup>10</sup> The protections include outlined prohibited personnel practices, violations of which can be vindicated by federal employees through the MSPB adjudicatory process.<sup>11</sup> Essentially, Congress established the MSPB to "protect[] the merit system

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<sup>7</sup> *Developments in the Law*, *supra* note 5, at 1631–32.

<sup>8</sup> Jimmy Carter, Federal Civil Service Reform: Message to the Congress (Mar. 2, 1978), *The American Presidency Project* (Gerhard Peters & John T. Woolley eds.), <https://www.presidency.ucsb.edu/documents/federal-civil-service-reform-message-the-congress> [<https://perma.cc/6G5S-ZAQ5>].

<sup>9</sup> *Id.*

<sup>10</sup> See S. 2640, 95th Cong. (Mar. 3, 1978); H.R. Rep. No. 95-1403, at 388 (1978) (supp. views of Rep. S. Solarz); Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978).

<sup>11</sup> 5 U.S.C. § 2302.

principles and adjudicat[e] conflicts between federal workers and their employing agencies.”<sup>12</sup> And vitally, Congress ensured that both the MSPB and Special Counsel were insulated from improper political pressure, conferring the Special Counsel and members of the MSPB with for-cause removal protection.

From the beginning, independence from political influence was core to the new scheme, which governed for nearly half a century—until last year when unprecedented attacks on the civil service began. Early in 2025, the Trump Administration initiated an all-out assault on the federal workforce. Tens of thousands of federal employees were fired. Hundreds of thousands more were disrespected, intimidated, and urged to quit before they were fired. By the end of 2025, the federal workforce had shrunk by more than 200,000 employees.<sup>13</sup> Long-standing protections for federal employees were eliminated, lurching the civil service back toward the era of the spoils system, where patronage and political influence trounce merit. Nearly every day, there is a new story about federal employees being fired for following the law or terminated for asking others to adhere to it.<sup>14</sup> For half a century, the CSRA ensured that workers were meaningfully protected when they blew the whistle on wasteful, abusive, or unlawful government activity. Today, targeting whistleblowers is commonplace, and federal employees can be left without any meaningful recourse.

The Trump Administration has further decimated civil service protections by challenging the independence of the MSPB and OSC, the fundamental building blocks of the CSRA and the modern merit system. Along with the heads of other previously independent agencies, the President has sought to fire the heads of the MSPB and OSC, including one of the authors, without any purported cause, in violation of the clear text of the CSRA. The courts have largely upheld these unprecedented firings, justifying them on a novel theory of the “unitary executive.”<sup>15</sup> Today, the MSPB and OSC are run by essentially at-will leaders who can be ousted at any moment should they fail to cater to every presidential whim and preference. The independence that was the backbone of civil service reform and the CSRA has been destroyed.

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<sup>12</sup> *Frazier v. Merit Sys. Prot. Bd.*, 672 F.2d 150, 154 (D.C. Cir. 1982).

<sup>13</sup> Reuters, *US Federal Employment Drops Again as DOGE Cuts Stack Up*, REUTERS (May 2, 2025), <https://www.reuters.com/business/world-at-work/us-federal-employment-drops-again-doge-cuts-stack-up-2025-05-02/> [<https://perma.cc/6W5M-CD7H>].

<sup>14</sup> The Trump Administration’s relentless assault on the civil service continues as this essay goes to press. In February, the Administration issued a proposed rule to remove reductions-in-force appeals from MSPB jurisdiction. *Reduction in Force Appeals*, 91 Fed. Reg. 5,861 (Feb. 10, 2026). And just days before, the Administration finalized a rule to strip at least 50,000 career federal employees of civil service protections. Chris Marr & Ian Kullgrem, *Trump Eases Path to Firing Federal Workers in Landmark Rule (2)*, BLOOMBERG L. (Feb. 5, 2026), <https://news.bloomberglaw.com/daily-labor-report/trump-eases-path-to-firing-federal-workers-with-landmark-rule> [<https://perma.cc/U7SE-JR2N>]. Notably, that rule known as “Schedule F,” also prohibits reclassified federal employees from filing whistleblower retaliation claims.

<sup>15</sup> See generally Emerson, *supra* note 1.

## II. WITHOUT MSPB AND OSC INDEPENDENCE, THE CSRA SHOULD NOT PRECLUDE DIRECT ACCESS TO FEDERAL COURTS

As written in 1978, the CSRA instructed that, in most cases, when federal employees are terminated, retaliated against, or face another prohibited personnel practice, they must first go to the MSPB and OSC to seek relief before going to federal court. Thus, “when a federal employee seeks relief from an action covered by the Civil Service Reform Act, she is required to comply with the prescribed scheme of administrative and judicial review and may not generally bring an initial claim in federal court.”<sup>16</sup> Typically, a federal employee first alerts OSC and can then file in the MSPB, and after receiving a final decision there, can appeal to the U.S. Court of Appeals for the Federal Circuit.<sup>17</sup>

But for two reasons, the CSRA should not preclude federal workers from going straight to federal court today. First, applying the Supreme Court’s test on preclusion of district court jurisdiction over challenges to agency action, Congress did not intend to preclude federal employees from going straight to federal court without MSPB and OSC independence.<sup>18</sup> Second, courts have begun to invalidate as unconstitutional the key provisions of the CSRA that provide for-cause removal protections for MSPB members and the Special Counsel. Under a conventional statutory severability analysis, the preclusion provisions of the CSRA are not severable from the independence provisions, and the preclusion provisions should thus too be struck down. Either way, while Congress determines how to provide a permanent fix for the federal civil service, federal employees should be able to seek immediate review of their claims in federal court.

### *A. Direct Review of Federal Employees’ Claims is Available*

In enacting the CSRA, Congress provided an alternate channel for federal employees to bring their claims: through the MSPB rather than federal court. In *Elgin v. Department of Treasury*,<sup>19</sup> the Supreme Court held that this grant of jurisdiction to the newly created MSPB in effect stripped federal district courts from hearing these claims. Justice Clarence Thomas explained that, through the CSRA, Congress “established a comprehensive system for reviewing personnel action taken against federal employees.”<sup>20</sup> These claims ordinarily would be heard in federal court, and despite the CSRA not expressly barring claims in federal court, the Court held that the CSRA’s “comprehensive system” of review impliedly precluded direct access

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<sup>16</sup> Nat’l Ass’n of Immigr. Judges v. Owen, 139 F.4th 293, 299 (4th Cir. 2025).

<sup>17</sup> Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, 1143–44 (1978); see Fed. L. Enf’t Officers Ass’n v. Ahuja, 62 F.4th 551, 555 (D.C. Cir. 2023).

<sup>18</sup> See Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 207 (1994).

<sup>19</sup> 567 U.S. 1 (2012).

<sup>20</sup> *Id.* at 5 (quoting *United States v. Fausto*, 484 U.S. 439, 455 (1988)) (internal quotation marks omitted).

to federal courts.<sup>21</sup> In effect, the Court held that Congress generally divested district courts of jurisdiction, channeling that jurisdiction exclusively to the MSPB.

As Justice Thomas explained in *Elgin*, under *Thunder Basin Coal Co. v. Reich*,<sup>22</sup> the “appropriate inquiry” for courts is “whether Congress’s intent to preclude district court jurisdiction [is] ‘fairly discernible in the statutory scheme.’”<sup>23</sup> To answer that question, courts must look to the “CSRA’s text, structure, and purpose.”<sup>24</sup> Courts should then move to the second step of the *Thunder Basin* inquiry, asking whether the claim raised is “of the type Congress intended to be reviewed within th[e] statutory structure.”<sup>25</sup> For all the Court’s discussion of the primacy of textualism, CSRA preclusion is squarely one of statutory intent and congressional purpose.<sup>26</sup>

When *Elgin* was decided in 2012, the CSRA was functioning as designed, with an independent and effective MSPB and OSC. But that is no longer the case today.<sup>27</sup> In 2012, the Court had no reason to question whether the present status of the merit system affected Congress’s implied intent to preclude direct access to federal courts. With the MSPB and OSC functioning as intended, federal employees’ claims “can receive meaningful review within the CSRA scheme.”<sup>28</sup> But although it may be “‘fairly discernible’ that Congress intended the CSRA to foreclose judicial review in at least some circumstances,”<sup>29</sup> there is no reason to think that Congress intended to preclude review in *all* circumstances, especially when the merit system is not operating as intended and courts have rewritten portions of the CSRA.

If Congress’s intent and purpose are the relevant question, it is clear beyond dispute that independence, and in particular independence from political pressure, was vital to the new scheme established by CSRA. When President Carter first proposed civil service reform in 1978, he stressed the importance of guaranteeing “independent and impartial protection to employees” in order to “safeguard the rights of federal employees.”<sup>30</sup> Congress agreed. The CSRA enshrined for-cause removal protection for both

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<sup>21</sup> *Id.* (internal quotation marks omitted).

<sup>22</sup> 510 U.S. at 200.

<sup>23</sup> 567 U.S. at 17 (quoting *Thunder Basin*, 510 U.S. at 207).

<sup>24</sup> *Id.* (citing *Thunder Basin*, 510 U.S. at 207); *Thunder Basin*, 510 U.S. at 207 (explaining that in determining whether Congress intended to preclude review, courts must look to “the statute’s language, structure, [ ] purpose, [and] its legislative history”).

<sup>25</sup> *Thunder Basin*, 510 U.S. at 212.

<sup>26</sup> If courts were inclined to approach the question of CSRA preclusion from a textualist framework, as they have approached so many other statutory questions over the last two decades, the answer would be clear: The CSRA does not preclude direct access to federal courts because the CSRA is utterly silent on the issue. Absent any textual indication that Congress sought to preclude access to the federal courts, the general grant of federal question jurisdiction under 28 U.S.C. §1331 governs, and courts should open their doors to these kinds of claims.

<sup>27</sup> See Nat’l Ass’n of Immigr. Judges v. Owen, 139 F.4th 293, 299 (4th Cir. 2025).

<sup>28</sup> *Elgin*, 567 U.S. at 22.

<sup>29</sup> Rydie v. Biden, No. 21-2359, 2022 WL 1153249, at \*4 (4th Cir. Apr. 19, 2022) (quoting *Elgin*, 567 U.S. at 23).

<sup>30</sup> Carter, Federal Civil Service Reform: Message to the Congress, *supra* note 8.

MSPB members and the Special Counsel. And the legislative record, vital to ascertaining Congress's intent, provides further support. U.S. Senator Charles Percy (R-Ill.), who co-sponsored the CSRA, explained that "much effort" was dedicated to ensuring that the new scheme "absolutely insure[d] against any form of destructive political manipulation" of the federal civil service.<sup>31</sup> Other lawmakers expressly said that the overarching goal was to avoid a return to the pre-civil service reform system dominated by "political or personal favoritism."<sup>32</sup> In creating the MSPB, Congress sought to shield the new adjudicatory system from "control or direction by the President."<sup>33</sup>

But even without looking to legislative history to establish Congress's purpose, the text and structure of the CSRA makes clear that this independence is crucial to the statutory scheme. Both MSPB board members and the Special Counsel serve terms longer than a presidential term—MSPB board members for seven years and the Special Counsel for five. And in 1988, Congress doubled down on this independence by separating the Special Counsel from the MSPB, through the creation of OSC. Congress sought there to "strengthen and improve protection for the rights of federal employees, to prevent reprisals, and to help eliminate wrongdoing within the Government."<sup>34</sup>

But most crucially, Congress granted both the Special Counsel and MSPB board members for-cause removal protection, guaranteeing that they could be removed "by the President only for inefficiency, neglect of duty, or malfeasance in office."<sup>35</sup> The Civil Service Commission, replaced by the MSPB, consisted of members who were removable at will, "at any time for any reason."<sup>36</sup> These for-cause removal protections ensured that the MSPB and OSC function as independent adjudicators and investigators of prohibited personnel actions and adverse employment actions.

In some ways, it is impossible to even answer either step of the *Thunder Basin* test that the Supreme Court said should govern in *Elgin*. At its core, *Thunder Basin* instructs courts to inquire whether it is apparent in the statutory scheme that Congress intended to assign federal workers claims regarding their employment to the exclusive jurisdiction of the MSPB. But the statutory scheme of administrative review established by Congress in the CSRA, with expert independent review, no longer exists.

Today, there is no independence at either the MSPB or OSC. And without that independence, the "comprehensive scheme" established by Congress in the CSRA and reiterated in the Whistleblower Protection Act no longer exists. What is left today is a system of administrative review prosecuted and adjudicated by officials who are not independent of nor have protection from the political officials against whom federal employees

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<sup>31</sup> 124 Cong. Rec. 27,566 (1978).

<sup>32</sup> S. Rep. No. 95-969, at 2-3 (1978).

<sup>33</sup> *Id.* at 25.

<sup>34</sup> Whistleblower Protection Act of 1989 § 2(b), Pub. L. No. 101-12, 103 Stat. 16 (1989).

<sup>35</sup> Civil Service Reform Act of 1978, Pub. L. No. 95-454, §§ 1204, 1211(b), 92 Stat. 1122 (1978).

<sup>36</sup> 124 Cong. Rec. 27,536 (1978).

allege misconduct. This bears no resemblance to the scheme established by Congress in 1978.

When the Court in *Elgin* applied the *Thunder Basin* test, it determined that Congress's intent to preclude was "fairly discernible in the statutory scheme" because of the "comprehensive system for reviewing personnel action taken against federal employees."<sup>37</sup> The Court pointed to the "elaborate framework" and "painstaking detail" prescribed by the CSRA.<sup>38</sup> But without independence, the core of the CSRA, the scheme is no longer "comprehensive," and courts have done significant damage to the statute's "elaborate framework." The CSRA no longer operates as Congress intended, and the independence provisions have been stripped from the text of the statute. Without independence, federal employees can no longer "receive meaningful review within the CSRA scheme."<sup>39</sup> It is apparent from the statutory text, structure, and purpose of the CSRA that Congress sought to preclude access to federal courts only when the CSRA functions as written and as intended, with review of federal employees' claims by an MSPB and OSC independent of political pressure. It is not "discernible in the statutory scheme" that Congress intended to preclude access to federal courts with a judicially rewritten CSRA.<sup>40</sup>

*B. The CSRA's Removal Protections Are Not Severable from Its Preclusion Provisions*

It is clear that, to the extent that Congress intended to preclude federal employees from going directly to federal court to vindicate their claims, preclusion went hand in hand with independence in the new adjudicatory system established by the CSRA. And while the factual developments over the last year alone are sufficient to hold that CSRA preclusion no longer applies under *Thunder Basin* and *Elgin*, more than just the facts have changed. Since *Elgin* was decided, federal courts have effectively rewritten the CSRA, changing its meaning dramatically.

It is not just that the Trump Administration has been targeting the MSPB's and OSC's independence. In response, courts are beginning to actually invalidate as unconstitutional the CSRA's for-cause removal protections. After the Supreme Court issued a stay in *Trump v. Wilcox*,<sup>41</sup> finding that the government was likely to succeed on its argument that the for-cause removal protections for MSPB members in the CSRA violate the separation of powers, the U.S. Court of Appeals for the D.C. Circuit so ruled and invalidated the removal protections.<sup>42</sup> The D.C. Circuit similarly rejected OSC's for-cause provision in *Dellinger v. Bessent*.<sup>43</sup>

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<sup>37</sup> *Elgin v. Dep't of the Treasury*, 567 U.S. 1, 5 (2012).

<sup>38</sup> *Id.* at 11.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 17.

<sup>41</sup> 145 S. Ct. 1415 (2025).

<sup>42</sup> *Harris v. Bessent*, 160 F.4th 1235 (D.C. Cir. 2025).

<sup>43</sup> No. 25-5052, 2025 WL 887518(D.C. Cir. Mar. 10, 2025).

Under a conventional severability analysis, the invalidated removal protections in the CSRA are not severable from the provisions that impliedly preclude direct review in federal court. The CSRA does not have a severability clause, and for all the reasons discussed in Part II(A), it is clear that Congress could not possibly have intended to preclude direct review in federal court, if the alternative was review through a politically manipulated MSPB and OSC.

The U.S. Court of Appeals for the Fourth Circuit recently took the same position as we take in Part II(A), in *National Association of Immigration Judges v. Owen*.<sup>44</sup> There, the district court dismissed a suit from immigration judges challenging a speech policy, holding that the court lacked jurisdiction because the CSRA precludes such actions. The Fourth Circuit reversed, explaining that “Congress intended for the Civil Service Reform Act to strip district courts of jurisdiction only if federal employees were otherwise able to receive adequate and independent review of their claims.”<sup>45</sup> The Fourth Circuit remanded to the district court to consider whether the CSRA has been “so undermined that the jurisdiction stripping scheme no longer controls.”<sup>46</sup> The Fourth Circuit denied a petition for a rehearing by the full court, over a dissent by Judge A. Marvin Quattlebaum, Jr., who argued that it is improper for “unelected judges to update the intent of *unchanged* congressional statutes if the court believes recent political events—like those of the current administration it cites—alter the operation of a statute from the way Congress intended.”<sup>47</sup> But crucially, the congressional statute is not unchanged. It is not only recent political events that have done damage to the statutory scheme but judicial opinions invalidating core provisions of the CSRA.

Another way to phrase this dilemma is that when courts take the extraordinary step of invalidating statutory provisions as unconstitutional, they have the corresponding obligation to determine whether related provisions are so intertwined with the invalid provision that they must also fall. Much like the *Thunder Basin* inquiry, severability is a question of statutory intent.

When courts take the extraordinary step of invalidating a provision of a statute, they then engage in a severability analysis to determine what portions, if any, of the remainder of the statute can stay in effect. The Supreme Court first laid out the two-part severability test in *Alaska Airlines v. Brock*.<sup>48</sup> The first step asks whether “the statute will function in a *manner* consistent with the intent of Congress.”<sup>49</sup> At the second step, even if the statute could still function consistent with the general intent of Congress, the court then asks whether “the statute created in its absence is

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<sup>44</sup> 139 F.4th 293, 299 (4th Cir. 2025).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 300.

<sup>47</sup> *Nat’l Ass’n of Immigr. Judges v. Owen*, 160 F.4th 100, 108 (Quattlebaum, J., dissenting) (emphasis added).

<sup>48</sup> 480 U.S. 678, 684 (1987).

<sup>49</sup> *Id.* (emphasis in original).

legislation that Congress would not have enacted.”<sup>50</sup> Essentially, courts ask here if Congress would have intended the remaining provision to function independently had Congress known that the now-invalidated portion would be struck down.

The answer here is clear for the same reasons discussed in Part II(A). Independence from political influence was vital to Congress’s enactment of the CSRA. Without MSPB independence, the CSRA is not functioning “in a manner consistent with the intent of Congress.”<sup>51</sup> Congress could not have intended to preclude these kinds of claims under a new statutory regime stripped of OSC and MSPB independence.

### III. IF THE SUPREME COURT UPHOLDS CSRA PRECLUSION AND DOES NOT RESTORE MSPB AND OSC INDEPENDENCE, CONGRESS MUST FIX THE FEDERAL MERIT SYSTEM

Allowing federal employees to bring their claims directly in federal court is only a short-term fix. Congress was right to design an expert, independent, investigative, and adjudicatory system in the CSRA and Whistleblower Protection Act. Yet, although the courts afford significantly more independence than a politically co-opted MSPB and OSC, they lack the MSPB’s subject-matter expertise. Moreover, courts’ ruling against CSRA preclusion of direct suits in federal court does not remedy the political co-option of OSC. Although allowing federal courts to hear federal employee suits is a necessary step in the short term and—under existing law—required, in the longer term, Congress must step in and once again enact broad civil service reform to restore the independence of the MSPB and OSC.

#### *A. Congress Must Restore the MSPB’s Independence by Transforming It Into an Article I Court or Transferring Its Jurisdiction to an Existing Article I Court*

Unless the Supreme Court reverses the D.C. Circuit’s decision in *Harris v. Bessent* and restores independence to the MSPB (as it should), Congress must step in and restore the MSPB’s independence—either by transforming it into a new Article I court or by transferring its jurisdiction to an existing Article I court.<sup>52</sup>

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<sup>50</sup> *Id.* at 685.

<sup>51</sup> *Id.*

<sup>52</sup> To the extent that fired-MSPB member Cathy Harris argues in continued litigation over her removal that MSPB is in fact already an Article I court, we agree. The authors urge the U.S. Supreme Court to reverse the D.C. Circuit’s decision in *Harris v. Bessent* that invalidated removal protections for the NLRB and MSPB. But if the Supreme Court fails to do so, Congress should immediately pass legislation newly constituting the MSPB as a new Article I court, thus immunizing it from political pressure by executive branch officials and restoring Congress’s intent in the CSRA.

By the time Congress seriously considers civil service reform, the courts may have invalidated for-cause removal protections for nearly all previously independent agency leaders, including the MSPB. The MSPB as an *independent agency*, as designed by Congress, would then no longer exist.<sup>53</sup> The easiest fix, then, would be for Congress to reconstitute the original MSPB as a new Article I court, like the U.S. Tax Court, U.S. Court of Federal Claims, U.S. Court of Appeals for Veterans Claims, and U.S. Court of Appeals for the Armed Forces. As an Article I court, the MSPB would be shielded from undue presidential control and political manipulation.<sup>54</sup>

These Article I courts, though called courts, are not Article III federal courts. An Article III court is a federal court established pursuant to Article III of the U.S. Constitution, which provides that judges appointed to these courts enjoy lifetime tenure and protection from congressional diminution of their salaries.<sup>55</sup> Separately, Congress can establish other courts and other court-like adjudicatory bodies housed in other branches. Article I of the Constitution authorizes Congress to create tribunals inferior to the Supreme Court, distinct from its power to create lower Article III courts that exercise the “judicial Power” under the Constitution.<sup>56</sup>

Sometimes called legislative courts, these Article I tribunals are established by Congress and can issue final, enforceable judgments. Most legislative courts fit within certain historical categories—most often, territorial courts, military courts, or courts adjudicating public-rights disputes.<sup>57</sup> These courts lack power to decide things like state law claims, but they can entertain public-rights disputes.<sup>58</sup> Federal employment disputes fall within the public-rights category.<sup>59</sup>

If the judiciary continues to strike down congressional statutes authorizing removal restrictions for members of independent agencies, Congress could restore independence by removing the body from the executive branch. The MSPB is an adjudicatory agency, and unlike administrative law judges inside the executive branch, Article I judges cannot

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<sup>53</sup> The Supreme Court will soon decide whether statutory removal protections for members of the Federal Trade Commission violate the separation of powers. *Trump v. Slaughter*, No. 25-322 (U.S. Sept. 22, 2025) (granting certiorari before judgment).

<sup>54</sup> The Supreme Court has in recent years held that Congress cannot provide removal protections for officers inside the executive branch who exercise significant executive power, *see, e.g.*, *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U. S. 197 (2020), under the unitary executive theory, *see* note 1. But there is no reason to think that limitation, which is premised on the concern that Congress in creating removal protections intrudes on the President’s executive power, applies to offices created *inside the legislative branch*, like Article I courts, who are not executive officers, mitigating any separation of powers concern.

<sup>55</sup> *See* U.S. CONST. art. III.

<sup>56</sup> *Id.* at § 2.

<sup>57</sup> *Stern v. Marshall*, 564 U.S. 462, 505 (2011).

<sup>58</sup> *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 69–72 (1982).

<sup>59</sup> *See Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 584 U.S. 325, 344 (2018).

be removed by the President.<sup>60</sup> To restore independence to the MSPB, Congress should amend the CSRA to either transform the MSPB into an Article I court or transfer its jurisdiction to an existing Article I court like the Court of Federal Claims, which already has subject-matter expertise in cases brought against the federal government. Under either scenario, federal employees would have an expert, independent body in which to bring their claims. They deserve no less.

*B. Congress Should Either Abolish OSC or Transform It Into an Article I Agency*

To fully restore independence to the federal watchdogs tasked with protecting the federal merit system, Congress must also either abolish OSC or transform it into an Article I entity. Like the MSPB, OSC has been stripped of its independence by the Trump Administration, aided by the judiciary.<sup>61</sup> But even worse than the MSPB, which is tasked with being an independent adjudicator, OSC—the supposed advocate for federal workers—has become hostile to the federal workers it is designed to protect and appears to have been co-opted by the political officials it is tasked with investigating.<sup>62</sup> Having lost its independence, OSC is not just ineffectual; it does more harm than good, as Hampton Dellinger explains in an accompanying essay.<sup>63</sup> OSC is now a shell of what it once was.

Congress must either abolish OSC entirely or transform it into an Article I agency, like GAO. In that new form, OSC could be tasked with oversight and advisory powers for Congress. It could investigate cases of wrongdoing and provide reports and make recommendations, including in individual personnel matters, to both a restructured MSPB and Congress.

Article I agencies, sometimes called legislative agencies, are bodies created by Congress that exist inside the legislative branch. They exercise a range of duties delegated to them from Congress, often in investigatory or information-gathering roles. A renewed Article I OSC could be modeled after GAO—another watchdog agency tasked with investigating wrongdoing in the federal government, especially waste, fraud, and abuse. Alternatively, Congress could abolish OSC and portions of its jurisdiction, especially its investigatory functions, could be transferred to GAO itself. Either fix, while

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<sup>60</sup> See 28 U.S.C. § 176. Judges on the Court of Federal Claims—the best model for a renewed Article I MSPB—can be removed only for cause, by a majority vote of Article III judges on the Court of Appeals for the Federal Circuit. *Id.*

<sup>61</sup> *Dellinger v. Bessent*, No. 25-5052, 2025 WL 887518 (D.C. Cir. Mar. 10, 2025) (upholding President Trump’s firing of then-Special Counsel Hampton Dellinger without cause in violation of the statute and declaring OSC’s removal protections likely unconstitutional).

<sup>62</sup> See Ian Kullgren, *Watchdog Agency “in a Coma” Faces Uncertain Future Under Trump*, BLOOMBERG L. (Nov. 26, 2025), <https://news.bloomberglaw.com/daily-labor-report/watchdog-agency-in-a-coma-faces-uncertain-future-under-trump> [<https://perma.cc/9BZ7-ZFJ6>].

<sup>63</sup> Dellinger, *supra* note 3.

imperfect, is better than a politicized OSC averse to whistleblowers and the merit system itself.

#### CONCLUSION

The federal civil service is on the brink. For the first time in over 50 years, federal employees are left without vital protections, and the investigators and adjudicators of violations of civil service law have been stripped of their congressionally mandated independence. President Trump has brought an onslaught against federal employees, many of whom (unlike the President) are military veterans. Sadly, the courts have largely allowed the Administration to sustain its assault, including through the extraordinary act of invalidating as unconstitutional core aspects of the statutory scheme enacted by Congress nearly half a century ago.

But the fight to protect the civil service is not over. Millions of federal workers have stayed in their jobs, continuing to serve the American people, even in the face of unprecedented intimidation, harassment, and deliberate impediments to them fulfilling their duties. They deserve better. In the short term, federal courts must open their doors to federal workers alleging claims of retaliation and other prohibited personnel practices. With the MSPB and OSC stripped of their independence, the MSPB no longer provides the expert, impartial forum created by Congress in the CSRA in 1978. Accordingly, the CSRA no longer precludes these workers' claims in federal court, and their cases should be allowed to proceed. But that alone is insufficient. To fully restore independence, efficiency, and merit to the civil service, Congress must step in and amend the CSRA and Whistleblower Protection Act. Half a century after Watergate, and nearly 150 years after President Garfield initiated the passage of the Pendleton Act, the time has yet again come for broad civil service reform.

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