



Appointment, Removal, and Ratification:
Is the U.S. International Trade Commission
Constitutional After *Slaughter* and *Sidak*?

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In the space of ten weeks in 2026, the Supreme Court of the United States and the U.S. Court of Appeals for the D.C. Circuit unsettled the constitutional foundation of an agency that has regulated the U.S. import trade for more than a century. On April 24, 2026, the D.C. Circuit affirmed a permanent injunction barring the U.S. International Trade Commission (ITC) from using against me an administrative protective order (APO) issued by an administrative law judge (ALJ) whose appointment violated the Appointments Clause—a defect that the ITC conceded after I commenced litigation against it. The court emphasized that the ITC had not ratified the ALJ’s prior action and that, if broader reliance interests were affected, the Commission was to blame. That unanimous decision was *Sidak v. U.S. International Trade Commission*.¹ On June 29, 2026, the Supreme Court held in *Trump v. Slaughter* that the for-cause removal protection surrounding the Commissioners of the Federal Trade Commission (FTC) could not be reconciled with the separation of powers, and the Court expressly overruled *Humphrey’s Executor v. United States*.² Although only the first of those

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¹ 174 F.4th 151 (D.C. Cir. 2026) (Walker, J.) (argued May 7, 2024; no concurring or dissenting opinion issued by the D.C. Circuit; deadline for a petition for certiorari lapsed July 23, 2026). I was the plaintiff-appellee in *Sidak*. Christopher Landau represented me in *Sidak* up to and including oral argument in the D.C. Circuit. On Monday, March 24, 2025, the Senate confirmed Mr. Landau as Deputy Secretary of State, and on Tuesday, March 25, 2025, he moved to withdraw as my counsel. See Motion for Withdrawal of Counsel, *Sidak v. U.S. Int’l Trade Comm’n*, No. 23-5149 (D.C. Cir. Mar. 25, 2025). Paul Clement, former Solicitor General of the United States, entered an appearance on my behalf on March 3, 2025, in *Sidak v. U.S. International Trade Commission* as my new counsel. See Entry of Appearance, *Sidak v. U.S. Int’l Trade Comm’n*, No. 23-5149 (D.C. Cir. Mar. 3, 2025). The precise day of Mr. Landau’s imminent confirmation vote in the Senate was not known. Hence, Mr. Clement’s overlapping representation of me between March 3, 2025, and March 25, 2025.

² *Trump v. Slaughter*, 609 U.S. 422, 450 (2026) (Roberts, C.J.) (overruling *Humphrey’s Ex’r v. United States*, 295 U.S. 602 (1935) (Sutherland, J.)).

decisions names the ITC as the defendant, together the two decisions leave the ITC exposed on both axes of the accountability that Article II of the U.S. Constitution demands: appointment and removal.

Slaughter addresses removal, holding that a principal Officer who exercises the executive power must remain removable by the President, and dissolving the category of the independent, quasi-judicial Commission on which the ITC's supposed insulation from presidential control has rested.³ *Sidak* addresses the appointment of inferior Officers. The ITC conceded that the ALJ's appointment violated the Appointments Clause, and the D.C. Circuit affirmed relief against enforcement of an unratified act of that unconstitutionally appointed ALJ.⁴ The Supreme Court taught in *Free Enterprise Fund v. Public Company Accounting Oversight Board* that appointment and removal are two expressions of one principle: that those who wield the power of the Executive must answer, through a chain of dependence, to the federal official whom the people elect.⁵

In this article, I advance four propositions.

First, *Slaughter*'s reasoning, although addressed to the FTC, reaches the ITC, because the ITC exercises executive power and fits neither the Federal Reserve exception nor the unresolved non-Article III category.

Second, *Sidak* is evidence of a structural constitutional defect: the ITC had subdelegated executive power to an Officer who held it unlawfully, and the Agency failed to cure the defect even after *Lucia v. SEC* had placed the ITC on notice.⁶ By saying that the ITC had "subdelegated" executive power, I mean that the Agency placed executive authority into the hands of a subordinate whose appointment did not comply with the Appointments Clause; I do not use the word "subdelegated" to connote a separate statutory-subdelegation violation by the ITC.

Third, the two decisions together indicate that a President may remove ITC Commissioners—without cause, because *Slaughter* supplies a general rule of at-will removal that, for the reasons I discuss in Part II, reaches the ITC. And furthermore, even if a hypothetical for-cause regime applies, a President may still remove ITC Commissioners with cause, because maintaining executive authority in unconstitutionally appointed hands after controlling precedent placed the Commission on notice could constitute gross neglect of duty. And a Chairman of the ITC who appointed the Agency's ALJs on her own authority is exposed on a further ground, for she exercised alone a power that the Constitution commits to the ITC's Commissioners collectively as Head of Department.

³ *Id.* at 454–56; see also *id.* at 465, 479 (Gorsuch, J., concurring); *id.* at 515–16 (Sotomayor, J., dissenting).

⁴ See *Sidak v. ITC*, 174 F.4th at 153.

⁵ 561 U.S. 477, 483, 492–93 (2010) (Roberts, C.J.).

⁶ 585 U.S. 237, 251–52 (2018) (Kagan, J.).

Fourth, to the extent that the defect remains, the duty to cure it has passed to the Commissioners who now hold office. The Solicitor General in 2018 recommended remedial measures that included rehearing, reconsideration, or ratification of prior decisions in pending proceedings,⁷ but the ITC took none of them.⁸ Even after submitting many FOIA requests, I am not aware of any record evidence that the acts of unconstitutionally installed ITC ALJs have been validly ratified, or even that every currently sitting ITC ALJ has been constitutionally appointed.

In Part I, I explain that, although the ITC's organizing statute contains no express for-cause removal clause, the statute resembles others that were thought, before *Slaughter*, impliedly to shield agency heads from at-will removal by the President. In Part II, I explain why *Slaughter*'s rule captures the ITC and why neither category shelters it. In Part III, I discuss *Sidak* and the appointment defect it exposed. In Part IV, I join *Slaughter* and *Sidak* through the principle that appointment and removal are two links in the same chain of executive accountability. In Part V, I explain why the President may remove ITC Commissioners at will and why, even under a hypothetical for-cause regime, an uncured Appointments Clause violation could supply cause for removal. In Part VI, I assess the remedy and the institutional stakes: the ITC may continue to exist, but its asserted independence cannot.

I. THE ITC AS PARADIGM

The ITC is the paradigmatic Commission. It is composed of six Commissioners, principal Officers whom the President appoints, with the advice and consent of the Senate, to serve collectively as “Head[] of Department[].”⁹ Each Commissioner serves a staggered term of nine years,¹⁰ with no more than three Commissioners drawn from one political party.¹¹ Since 2017 the Commission has seldom had its full complement. From February 2025 until July 2026, it functioned with three Commissioners, each of whom served in holdover status after the expiration of his or her

⁷ See Off. of Solic. Gen., U.S. Dep’t of Just., Guidance on Administrative Law Judges After *Lucia v. SEC* (S. Ct.) 7–8 (July 2018), <https://perma.cc/TXK2-QP2B>.

⁸ See *Sidak v. U.S. Int’l Trade Comm’n*, 678 F. Supp. 3d 1, 10 (D.D.C. 2023) (McFadden, J.) (observing that “[t]he Commission concedes that ALJ Pender was unconstitutionally appointed when he entered the protective order” in the 1065 Investigation, and that the Agency “does not contend that a duly appointed officer subsequently ratified that order”), *aff’d*, 174 F.4th 151 (D.C. Cir. 2026) (Walker, J.); *id.* at 6–7 (“[A]gainst the Solicitor General’s advice, the Commission did not direct its ALJs to rehear, reconsider, or ratify any decisions that they had made in pending proceedings. The Commission does not explain its disinterest in fixing its constitutional errors.”) (citation omitted) (footnote omitted); *id.* at 20 (“If any broader reliance interests are affected in this case, the Commission is to blame. Unlike other agencies—and contrary to the Solicitor General’s advice to undertake proper remedial actions in light of *Lucia*—the Commission took insufficient curative action.”).

⁹ U.S. CONST. art. II, § 2, cl. 2.

¹⁰ 19 U.S.C. § 1330(b).

¹¹ *Id.* § 1330(a).

term. On July 16, 2026, the Senate confirmed five new Commissioners. By September 10, 2026, all five had taken office, returning the Commission to its full complement of six, with one Commissioner remaining in holdover status.¹² The statute that organizes the ITC provides that the Commission “shall be considered to be an independent regulatory agency for purposes of chapter 35 of title 44”—the Paperwork Reduction Act.¹³ In every structural respect, the ITC follows the Progressive Era archetype: a multimember body balanced between the political parties, staffed by “experts,” and set at one remove from the President.

The ITC’s functions are those of law execution. Under section 337 of the Tariff Act of 1930, the ITC investigates unfair methods of competition in the importation of articles (typically articles that allegedly infringe a U.S. patent), adjudicates the alleged violation through a trial-type proceeding conducted by an ALJ and reviewed by the Commissioners, and remedies a violation by issuing an exclusion order that U.S. Customs and Border Protection enforces at the border (and cease-and-desist orders to prohibit the distribution of infringing articles already in domestic inventory).¹⁴ The ITC also determines injury in antidumping and countervailing-duty proceedings, conducts safeguard investigations, and maintains the Harmonized Tariff Schedule. The exclusion order is the ITC’s characteristic instrument, and it operates against goods directly, with an immediacy that a plaintiff in a federal district court rarely commands.

Unlike the statute that governs the FTC, which purports to permit the Presidential removal of a Commissioner only for “inefficiency, neglect of duty, or malfeasance in office,” the statute that organizes the ITC contains

¹² The Senate confirmed Brett Doyle, David Foley Jr., Samuel Negatu, Peter-Anthony Pappas, and Bartholomew Thanhauser as Commissioners on July 16, 2026. Mr. Doyle was sworn in on July 17, 2026, and President Trump designated him Chairman on July 20, 2026, for a term expiring June 16, 2028. See Press Release, U.S. Int’l Trade Comm’n, Brett Doyle Sworn in as U.S. International Trade Commissioner (July 20, 2026), https://www.usitc.gov/press_room/news_release/2026/ero720_68938.htm; Press Release, U.S. Int’l Trade Comm’n, Brett Doyle Named Chairman of the U.S. International Trade Commission (July 21, 2026), https://www.usitc.gov/press_room/news_release/2026/ero721_68944.htm. Commissioner Pappas was sworn in on August 3, 2026. See Press Release, U.S. Int’l Trade Comm’n, Peter-Anthony Pappas Sworn in as U.S. International Trade Commissioner (Aug. 3, 2026), https://www.usitc.gov/press_room/news_release/2026/ero803_69025.htm. Commissioners Foley and Thanhauser were sworn in on Aug. 17, 2026. See Press Release, U.S. Int’l Trade Comm’n, David Foley Jr. Sworn in as U.S. International Trade Commissioner (Aug. 17, 2026), https://www.usitc.gov/press_room/news_release/2026/ero817_69096.htm; Press Release, U.S. Int’l Trade Comm’n, Bart Thanhauser Sworn in as U.S. International Trade Commissioner (Aug. 17, 2026), https://www.usitc.gov/press_room/news_release/2026/ero817_69095.htm. Commissioner Negatu was sworn in on Sept. 10, 2026. See Press Release, U.S. Int’l Trade Comm’n, Samuel T. Negatu Sworn in as U.S. International Trade Commissioner (Sept. 10, 2026), https://www.usitc.gov/press_room/news_release/2026/ero910_69205.htm. None of the five was confirmed to succeed Commissioner Jason E. Kearns, whose term expired on Dec. 16, 2024. By statute, Mr. Kearns may continue to serve until a successor is appointed and qualified. See 19 U.S.C. § 1330(b)(2).

¹³ 19 U.S.C. § 1330(f).

¹⁴ *Id.* § 1337.

no express limitation on removal at all.¹⁵ The ITC's "independence" has therefore rested not on a for-cause clause but on staggered terms of nine years for Commissioners, the requirement of partisan balance, and a statutory label of independence that Congress conferred only for the purposes of the Paperwork Reduction Act. Those same structural indicia were before the Supreme Court in 2010 in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*. The SEC's organizing statute, like the ITC's, contained no express for-cause removal restriction. The Court nonetheless assumed that the SEC's Commissioners could be removed only for cause, because the parties had so stipulated.¹⁶ That assumption followed the parties' stipulation, not the statutory silence. The Court has since clarified that, absent separate removal protection, a fixed term is a tenure ceiling, not a floor. Whether other ITC features supply such protection is the question to which I now turn.

II. SLAUGHTER AND THE COLLAPSE OF THE INDEPENDENT-COMMISSION CATEGORY

The removal power has oscillated for a century between two poles. The Supreme Court in *Myers v. United States* in 1926 held that the Constitution vests in the President the general administrative control of those who execute the laws, including the power to remove them.¹⁷ Nine years later, in *Humphrey's Executor v. United States* in 1935, the Court carved out an exception for the FTC's Commissioners, reasoning that a body exercising functions "neither political nor executive" but "quasi-judicial and quasi-legislative" exercised "no part of the executive power" and so might be insulated from removal.¹⁸ For the better part of a century, that exception sustained the independent regulatory Commission.

Slaughter ends that exception. The Supreme Court reasoned that the premise of *Humphrey's Executor*—that an agency such as the FTC exercises no part of the executive power—had not withstood the test of time, a recognition the Court had already voiced in *Seila Law LLC v. Consumer Financial Protection Bureau*¹⁹ and, before it, in *Morrison v. Olson*.²⁰ Rulemaking, investigation, in-house adjudication, and civil enforcement are, the Court held, "the very

¹⁵ Compare 15 U.S.C. § 41 (permitting removal of a Federal Trade Commissioner for "inefficiency, neglect of duty, or malfeasance in office"), with 19 U.S.C. § 1330 (containing no removal provision). On the treatment of a fixed term of years as the operative protection, see Jane Manners & Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 COLUM. L. REV. 1 (2021).

¹⁶ 561 U.S. 477, 487 (2010) (Roberts, C.J.); see also *Trump v. Cook*, 609 U.S. 528, 554 n.5 (2026) (Roberts, C.J.).

¹⁷ 272 U.S. 52, 163–64 (1926) (Taft, C.J.).

¹⁸ 295 U.S. 602, 624, 628 (1935) (Sutherland, J.).

¹⁹ 591 U.S. 197, 216 & n.2 (2020) (Roberts, C.J.).

²⁰ 487 U.S. 654, 690 n.28 (1988) (Rehnquist, C.J.).

essence of “execution” of the law.”²¹ An agency that executes a congressional mandate against private parties exercises executive power, the Court observed, whatever the “quasi” modifiers once attached to its functions; and an Officer who exercises that power must remain subject to the President’s removal at will.²²

The ITC falls within that rule. The investigation of unfair trade practices, the adjudication of those practices, and the exclusion of goods at the border are not less executive than the FTC’s enforcement docket. If anything, the ITC’s activities are more coercive, because the exclusion order operates *in rem*, directly against the imported articles themselves. Pursuant to *Slaughter’s* rule, the Commissioners who direct that power must answer to the President.

In addition, a tribunal whose judgments the President may nullify for policy reasons decidedly does not repose within the judicial branch. After the ITC issues a determination finding a violation in a section 337 investigation, the President, if he “disapproves” that determination “for policy reasons,” has 60 days to “notif[y] the Commission of his disapproval.”²³ Then, “effective on the date of such notice, such determination and the action taken under subsection [section 1337](d), (e), (f), (g), or (i) with respect thereto shall have no force or effect.”²⁴ President Obama exercised that control over the ITC in 2013 when, through his U.S. Trade Representative, Michael Froman, the President vetoed an exclusion order that the ITC had issued against Apple products that it found to have infringed Samsung’s standard-essential patents.²⁵

Nor does the Federal Reserve exception or the non-Article III question left open by the Court shelter the ITC.

The first is the Federal Reserve exception, which the Court located in the tradition of the First and Second Banks of the United States.²⁶ The ITC has no claim to that lineage, as it is a trade-enforcement agency, not a central bank. The Supreme Court marked the boundary of that exception on the same day. In *Trump v. Cook*, the Court denied the Government’s stay application and upheld the Federal Reserve’s statutory for-cause removal protection, relying on the singular history of the First and Second Banks of the United States and on the Nation’s tradition of central banking protected

²¹ *Trump v. Slaughter*, 609 U.S. 422, 454 (2026) (Roberts, C.J.) (quoting *Bowsher v. Synar*, 478 U.S. 714, 733 (1986) (Burger, C.J.)).

²² *Id.* at 455–56.

²³ 19 U.S.C. § 1337(j)(2).

²⁴ *Id.*

²⁵ Letter from Michael B.G. Froman, Ambassador, Exec. Off. of the President, to Irving A. Williamson, Chairman, U.S. Int’l Trade Comm’n at 3 (Aug. 3, 2013), https://ustr.gov/sites/default/files/o8032013%20Letter_1.PDF; see also J. Gregory Sidak, *International Trade Commission Exclusion Orders for the Infringement of Standard-Essential Patents*, 26 CORNELL J.L. & PUB. POL’Y 125, 128, 145–57 (2016).

²⁶ *Slaughter*, 609 U.S. at 456; cf. *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 222 n.8 (2020) (Roberts, C.J.).

from political interference.²⁷ John Yoo, a professor of law at the University of California, Berkeley, and a former Deputy Assistant Attorney General in the Office of Legal Counsel of the U.S. Department of Justice, has identified three factors that sustain the exception: historical pedigree, a quasi-private character, and the distinctive harm that political control of the subject matter would inflict. The ITC has none of the three.²⁸ It descends from the Tariff Commission that Congress created in 1916, not from an institution of the Founding era. Private shareholders capitalized the First and Second Banks and chose most of their directors, whereas the ITC has no shareholders, no proprietary capital, and no commercial undertaking of its own. And no claim of distinctive harm can be made for the enforcement of the trade laws, an area in which the President already holds an express statutory veto over the ITC's determinations. Yoo concludes that no agency other than the Federal Reserve qualifies, and that the exception will reach at most those entities that do not enforce federal law. *Cook*, he writes, "does not create a living exception; it only recognizes a living unicorn."²⁹ The ITC enforces federal law against private parties, and it does so at the federal border.

The second is the question the Court left open: whether judges of "non-Article III courts," such as the Tax Court and the Court of Federal Claims, may receive tenure protection.³⁰ The ITC might be expected to analogize its section 337 adjudication to the work of such a court, but the analogy fails. That unresolved category comprises tribunals whose business is to decide cases between parties. The ITC, by contrast, is a regulatory agency that adjudicates as only one aspect of its broader mission. It also investigates, prosecutes, maintains the tariff schedule, and issues the executive remedy of exclusion.³¹ Its characteristic order is not a judgment between two litigants but an enforcement act of the sovereign. And the lone precedent on which such an agency might rely, *Wiener v. United States*,³² rested expressly on the philosophy of *Humphrey's Executor*—the philosophy that *Slaughter* has now repudiated. Ilan Wurman, the Julius E. Davis Professor of Law at the University of Minnesota, doubts that Congress may insulate from removal even the judges of the legislative courts implicated by that question, and his reasoning is instructive. A matter that Congress could have decided itself by private bill, or assigned to an Article III court, does not escape constitutional

²⁷ *Trump v. Cook*, 609 U.S. 528, 555–56 (2026) (Roberts, C.J.); see also *id.* at 566–70 (Thomas, J., dissenting) (rejecting the historical justification for the exception on the ground that the Federal Reserve Board enforces federal law against private banks and private individuals); *id.* at 601–03 (Barrett, J., dissenting) (asking whether history sanctions other exceptions).

²⁸ John Yoo, *There Is Only One Exception to Slaughter*, CIVITAS OUTLOOK (Sept. 3, 2026), <https://www.civitasoutlook.com/symposium-articles/there-is-only-one-exception-to-slaughter>.

²⁹ *Id.*

³⁰ *Slaughter*, 609 U.S. at 456.

³¹ See 19 U.S.C. § 1337.

³² 357 U.S. 349, 356 (1958) (Frankfurter, J.).

discipline because Congress assigned it instead to a tribunal that sits outside both. A tribunal outside Article III and outside Congress answers to Article II.³³ A section 337 investigation is such a matter, and the ITC is such a tribunal. Even if analogous tenure protection extends to the ALJs, it does nothing to cure the separate appointment defect identified in Part III.

A third point bears emphasis. Because the ITC's organizing statute contains no express for-cause removal clause, *Slaughter* voids no statutory text as applied to the ITC. If the staggered term, the partisan balance, and the statutory label together conferred upon the ITC's Commissioners genuine insulation from at-will removal by the President—as the practice of treating the ITC as “independent” presupposed—then *Slaughter* renders that asserted insulation unenforceable just as it invalidated the FTC's express clause. If those features conferred no real insulation, then the ITC's “independence” was always a fictive convention rather than a constitutional entitlement, and the ITC's Commissioners have served at the President's pleasure all along. The statutory label adds nothing. Congress called the ITC an independent regulatory agency for the purposes of the Paperwork Reduction Act, and for no other purpose.³⁴ A congressional label does not fix constitutional status. Congress declared that Amtrak would not be an agency or establishment of the U.S. Government,³⁵ yet the Supreme Court held Amtrak to be a part of the Government for the purposes of the Bill of Rights.³⁶ On any reading, the ITC cannot be what it has held itself out to be. It is not an independent tribunal beyond the President's reach.

An illustration is at hand. From February 2025 until July 2026, the ITC functioned with three Commissioners, each of whom held office after his or her term had run. On July 16, 2026, the Senate confirmed five new Commissioners, and the holdovers began to depart. The President removed no one. He nominated five new Commissioners, the Senate confirmed them, and their assumption of office displaced the holdovers they were appointed to succeed. One Commissioner, however, remains in holdover status because no successor has been appointed to his seat. Whatever protection a fixed term of years is thought to supply, it supplies nothing once the term has expired.

³³ Ilan Wurman, *What's Next for Agency Independence?*, CIVITAS OUTLOOK (Sept. 3, 2026), <https://www.civitasoutlook.com/symposium-articles/whats-next-for-agency-independence>.

³⁴ 19 U.S.C. § 1330(f) (captioned “Treatment of Commission under Paperwork Reduction Act”) (“The Commission shall be considered to be an independent regulatory agency for purposes of chapter 35 of title 44.”). Congress added subsection (f) in 1988. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1612, 102 Stat. 1107, 1262. Chapter 35 of title 44 is the Paperwork Reduction Act. 44 U.S.C. §§ 3501–3521.

³⁵ 45 U.S.C. § 541 (1988) (providing that Amtrak “will not be an agency or establishment of the United States Government”), the provision construed in *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374 (1995) (Scalia, J.), recodified as amended at 49 U.S.C. § 24301(a)(3) (“Amtrak . . . is not a department, agency, or instrumentality of the United States Government, and shall not be subject to title 31.”).

³⁶ *Lebron*, 513 U.S. at 394, 400; see also 49 U.S.C. § 24301(a)(3). Yoo draws the same inference for any agency that Congress might hereafter design to mimic the Federal Reserve.

For some years the “independence” of the ITC has been the independence of Officers whose tenure had already lapsed.³⁷

III. SIDAK AND THE APPOINTMENT AXIS

Slaughter resolves removal; *Sidak v. ITC* addresses appointment. For decades, the ITC’s Chairman purported to appoint the Agency’s ALJs unilaterally, without a vote of all Commissioners acting collectively.³⁸ (References in this article to the Chairman are to the office rather than to any particular incumbent.) After the Supreme Court held in *Lucia* in 2018 that the ALJs of the SEC are “Officers of the United States” who must be appointed in conformity with the Appointments Clause, and that an appointment made by staff rather than by the head of a department was void, the defect in the ITC’s practice became unmistakable. An Officer exercising the executive-adjudicatory power of the United States had been installed by the Chairman alone, not by the ITC’s Commissioners acting collectively as “Head[] of Department[].”³⁹

The consequences reached me. In the section 337 investigation arising from the patent-infringement dispute in 2017 between Qualcomm and Apple, an ALJ whose appointment suffered that defect issued an administrative protective order governing confidential information, an order that purported to bind me as an expert witness.⁴⁰ The ITC later purported to cure the appointment defect prospectively by having the Commissioners approve the ALJs’ appointments, but it took no comparable action with respect to the prior *acts* of the unconstitutionally installed ITC ALJs, including the APO.⁴¹

In 2021, I informed the Commissioners of the ITC and the Attorney General, Merrick Garland, that the ITC had appointed its ALJs in violation of the Appointments Clause and that the ITC had never ratified their prior acts. I am not aware of any evidence that the ITC has ratified those acts or withdrawn the orders that rested upon them.

Rather than ratify the prior acts of its ALJs or withdraw the orders that rested upon them, the ITC opened a separate proceeding against me.

³⁷ See *supra* note 12 and accompanying text.

³⁸ *Sidak v. U.S. Int’l Trade Comm’n*, 174 F.4th 151, 153 (D.C. Cir. 2026) (Walker, J.).

³⁹ U.S. CONST. art. II, § 2, cl. 2 (“[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.”), *quoted in Lucia v. SEC*, 585 U.S. 237, 251–55 (2018) (Kagan, J.).

⁴⁰ See *Sidak*, 174 F.4th at 152 (recounting the protective order entered in the section 337 investigation arising from the patent-infringement dispute between Qualcomm and Apple). The underlying proceeding was Certain Mobile Electronic Devices and Radio Frequency and Processing Components Thereof, Inv. No. 337-TA-1065 (USITC Aug. 8, 2017), notice of institution published at 82 Fed. Reg. 37,899 (Aug. 14, 2017).

⁴¹ *Sidak*, 174 F.4th at 153.

That proceeding bears a docket of its own. It is APO Breach Investigation No. 407,⁴² and it should not be confused with the section 337 proceeding in which I had testified as an expert economic witness, Investigation No. 337-TA-1065, informally called “the 1065 Investigation.”

In APO Breach Investigation No. 407, the ITC alleged that I had violated the APO in the 1065 Investigation. The Agency placed upon me the burdens of production and of proof. It inverted, in substance, the ordinary allocation of proof, under which the accuser bears the burden of establishing the violation that it alleges. It warned that my failure to provide a sworn affidavit could cause the ITC to assume facts adverse to my interests. It declined to permit me to appear solely through counsel.

I sued to enjoin that investigation on the ground that an APO issued by an unconstitutionally appointed Officer, never ratified, was void and unenforceable against me.

The District Court agreed and permanently enjoined the ITC’s use of the APO to investigate and sanction me,⁴³ and the D.C. Circuit affirmed.⁴⁴ The ITC conceded its constitutional violation. The contested questions were whether my challenge was timely, ripe, and within the District Court’s jurisdiction, and the D.C. Circuit (affirming the District Court) resolved each question against the ITC.⁴⁵ Because I had been a third-party witness in the 1065 Investigation rather than a party to that underlying section 337 proceeding, I had possessed no earlier occasion to contest the constitutionality of the ALJ’s supposed “appointment.” The D.C. Circuit reasoned that agreeing to testify differs materially from a party’s affirmatively invoking a forum and seeking a ruling. It expressly described its timeliness holding as “narrow” and did not hold that parties to administrative proceedings may belatedly attack any adverse order based on a defect in the adjudicator’s authority.⁴⁶ Invoking the principle that violations of the Appointments Clause demand “remedies with bite,”⁴⁷ the D.C. Circuit rejected the ITC’s arguments against the injunction and left in place the permanent bar on using the APO against me. The D.C. Circuit observed that, if reliance interests were unsettled by the result, the ITC was to blame.⁴⁸

⁴² Possible Breach of the Administrative Protective Order in Certain Mobile Electronic Devices and Radio Frequency and Processing Components, Inv. No. 337-TA-1065 (Violation) (APO Breach Inv. No. 407) (USITC May 25, 2022).

⁴³ *Sidak v. U.S. Int’l Trade Comm’n*, 678 F. Supp. 3d 1, 10 (D.D.C. 2023) (McFadden, J.), *aff’d*, 174 F.4th 151 (D.C. Cir. 2026) (Walker, J.).

⁴⁴ *Sidak*, 174 F.4th 151.

⁴⁵ *Id.* at 155–58.

⁴⁶ *Id.* at 158–59.

⁴⁷ *Id.* at 160 (quoting *Cody v. Kijakazi*, 48 F.4th 956, 960 (9th Cir. 2022) (Bumatay, J.)).

⁴⁸ *Id.* (“If any broader reliance interests are affected in this case, the Commission is to blame.”) (quoting *Sidak*, 678 F. Supp. 3d at 20).

The ITC had vested the executive power of administrative adjudication in an Officer whom its Commissioners had never constitutionally appointed, and the Agency had failed to cure the defect even after *Lucia* had announced the governing rule in June 2018. The Solicitor General had recommended rehearing, reconsideration, or ratification of prior decisions in pending proceedings; but the ITC declined to take any of those steps.⁴⁹ The judicial finding that the ITC was to blame supports the conclusion that the Commission neglected a duty that lay within its power to discharge. Whether that neglect also breached the duty to “take Care that the Laws be faithfully executed” requires a distinction. That duty is textually the President’s, not the Agency’s.⁵⁰ But the President executes the laws through the Officers who act in his name, and Article VI of the Constitution separately requires that “all executive and judicial Officers . . . of the United States . . . shall be bound by Oath or Affirmation, to support this Constitution.”⁵¹ A Commission that leaves the executive power in unappointed hands, after the Supreme Court has identified the defect, disables the President from keeping that charge. The neglect is therefore not the Agency’s alone. It is a frustration of the Take Care Clause worked by the very Officers through whom the President must act. Part V turns to the consequence of that failure.

IV. THE CONVERGENCE: TWO AXES OF ONE PRINCIPLE

Free Enterprise Fund supplies the proposition that unites the two decisions: the Appointments Clause and the removal power are two facets of the same accountability to the elected Executive, and a defect in either breaks the chain of dependence that runs from the lowest Officer to the President, and from the President to the people.⁵² *Sidak* establishes a defect on the appointment side: the ITC subdelegated the authority reserved to the Executive to an inferior Officer who held no lawful commission. *Slaughter* supplies, on the removal side, the general rule that principal Officers exercising executive power are removable at will; for the reasons I discussed in Part II, that rule reaches an ITC Commissioner.

The chain of Executive power at the ITC runs through three distinct tiers.

⁴⁹ *Id.* (“[T]he ITC could have tried—and still can try—to ratify past actions like the Qualcomm-Apple protective order. That is what other agencies did after *Lucia*, and it is what the Solicitor General advised the ITC to do.”); see also *supra* notes 7–8 and accompanying text.

⁵⁰ U.S. CONST. art. II, § 3.

⁵¹ *Id.* art. VI, cl. 3.

⁵² *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 492–93 (2010) (Roberts, C.J.); see also THE FEDERALIST NO. 72, at 436 (Alexander Hamilton) (Clinton Rossiter ed., New American Library 1961).

In the first tier, the Commissioners are principal Officers, and *Slaughter*'s rule reaches them directly (to the extent that they were ever thought subject to a for-cause removal requirement).

In the second tier, the ALJs are inferior Officers. *Lucia* governs their appointment, and the D.C. Circuit's decision in *Sidak* demonstrates the consequences that can follow when an appointment defect is raised in a timely manner.

The third tier at the ITC consists of employees. A constitutional problem arises if the Agency assigns any such employee functions that only an Officer may perform. As to that possibility, a caution is in order, because the intuition that at-will removal must descend the hierarchy (that is, if the President may remove the principal Officer, then *a fortiori* may the President remove the inferior Officer and the employee) inverts the actual gradient of the doctrine. The Constitution appears to tolerate more restriction on the removal of inferior Officers at so-called "independent" federal agencies than of principal Officers. The Supreme Court's 1886 decision in *United States v. Perkins*,⁵³ which the majority in *Slaughter* did not address, appeared to permit Congress to protect at least some inferior Officers from removal at the President's will. Richard Epstein, the inaugural Laurence A. Tisch Professor of Law at New York University, makes the same observation and treats the Court's silence about *Perkins* as a defect in its reasoning.⁵⁴ Wurman would sustain such protection on a condition, which is that the inferior Officer remain subject to orders, or that his decision remain reviewable and countermandable within the agency. On that reasoning he regards the treatment of ALJs under the Administrative Procedure Act as constitutional.⁵⁵ The ITC satisfies the condition, for its Commissioners review the determinations of their ALJs. But the condition addresses tenure, not commission. An ALJ whose decisions the ITC may review is no better appointed for that fact, and the argument therefore leaves the defect that *Sidak* identified exactly where it stood. Yet an employee who exercises the executive power reserved to an Officer is, consistent with the plain language of the Appointments Clause, and with *Buckley v. Valeo*⁵⁶ and *Lucia*,⁵⁷ not an employee at all but an Officer who needed an appointment he never received. The defect in such a subdelegation is that the power was placed in unappointed hands, and the remedy is likely to be that the exercise of such executive power is void, not that the President may dismiss the subdelegee.

⁵³ 116 U.S. 483, 485 (1886) (Matthews, J.).

⁵⁴ Richard A. Epstein, *Independent Agencies Serve the Separation of Powers*, CIVITAS OUTLOOK (Sept. 3, 2026), <https://www.civitasoutlook.com/symposium-articles/independent-agencies-serve-the-separation-of-powers>.

⁵⁵ Wurman, *What's Next for Agency Independence?*, *supra* note 33.

⁵⁶ 424 U.S. 1, 126, 137–38 (1976) (*per curiam*).

⁵⁷ *Lucia v. SEC*, 585 U.S. 237, 251 (2018) (Kagan, J.).

V. UNCONSTITUTIONAL SUBDELEGATION
AS A GROUND FOR REMOVING COMMISSIONERS

The convergence of *Slaughter* and *Sidak* yields a conclusion that neither decision states on its own. Suppose that an agency's Commissioners subdelegated the executive powers of adjudication, investigation, and issuing border remedies to ALJs who held office unlawfully, or assigned to employees functions that the Constitution permits only an Officer to perform. Suppose further that the Commissioners, placed on notice by *Lucia* and then by *Sidak*, still left those Officers exercising executive power without a constitutionally valid appointment and took no action to address the consequences of their prior acts. May the President then remove the responsible Commissioners?

On this argument, yes—on three independent grounds.

The first ground does not depend on the Commissioners' dereliction. *Slaughter* supplies a general rule that principal Officers who exercise executive power are removable by the President at will.⁵⁸ For the reasons I discussed in Part II, that rule reaches an ITC Commissioner. Because the Agency's organizing statute never expressly restricted removal, the President need not even displace an express statutory clause. On this first ground the President's allegation of misconduct by the ITC's Commissioners would be surplusage.

The second ground would suffice even if (contrary to the conclusion I reached in Part II) the Commissioners enjoyed for-cause protection. The classic standard permits removal for inefficiency, neglect of duty, or malfeasance in office.⁵⁹ A Commissioner who knowingly leaves the executive power in unappointed hands, and who declines to confine that power to lawfully constituted Officers after a controlling decision has identified the defect, would, on this reasoning, commit a paradigmatic neglect of duty. A Commissioner who defends or perpetuates the arrangement would likewise commit malfeasance, which is the doing of a wrongful act in office rather than the mere omission of a required one. The Commission whose orders are exposed to voidance because unauthorized hands have issued them is, in the institutional sense that the word was meant to capture, inefficient as well. Each characterization would support removal if a for-cause regime applied.

The third ground for removal reaches an individual Commissioner rather than the Commission as a body. The Appointments Clause permits Congress to vest the appointment of inferior Officers in the "Heads of Departments." At the ITC, the Head of Department is not the Chairman. It is the six Commissioners, who constitute the Head of Department collectively and

⁵⁸ See *Trump v. Slaughter*, 609 U.S. 422, 455–56 (2026) (Roberts, C.J.); *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 204–05 (2020) (Roberts, C.J.).

⁵⁹ See, e.g., 15 U.S.C. § 41 (purporting to supply the standard for removing a commissioner of the FTC).

who act only by the vote of a majority.⁶⁰ The Chairman's responsibility for the administration of the Commission is not an appointment power. For much of the period at issue, only three Commissioners were in office, so that two of them constituted the majority of the body in which the Appointments Clause vests the power to appoint inferior Officers.⁶¹ A Chairman who appoints an ALJ on her assertion of individual authority therefore commits two wrongs at once. First, she installs an Officer who holds no lawful commission. Second, she arrogates to herself a power that the Constitution places in a body of which she is merely one member of six. The second wrong is hers alone. It does not depend on the neglect or the acquiescence of her colleagues, and would, on this reasoning, supply a ground for the President's immediate removal of that Commissioner. One might argue that a single executive would serve an agency better than a multimember commission, for the reasons that Alexander Hamilton gave for the unity of the Executive—decision, activity, secrecy, and dispatch, and the accountability that attends a single responsible Officer.⁶² That is a question of institutional design for Congress. It is not a warrant for a Chairman to become the unitary executive of a body that Congress constituted as a collective one.

The cause, moreover, is constitutional and not merely statutory. The removal power exists, on the reasoning of (among other cases) *Myers*, *Free Enterprise Fund*, and *Slaughter*, because the President must “take Care that the Laws be faithfully executed” and cannot discharge that duty when subordinate Officers refuse to do so.⁶³ An Officer who maintains an unconstitutional subdelegation in defiance of precedent is the very specimen of unfaithful execution that the removal power was reserved to reach. A statute purporting to immunize such an Officer from removal would itself offend Article II under the rule that *Slaughter* applied to the FTC.

⁶⁰ U.S. CONST. art. II, § 2, cl. 2 (vesting in the “Heads of Departments” such appointment of inferior Officers as Congress may provide); *Sidak v. U.S. Int’l Trade Comm’n*, 174 F.4th 151, 153 (D.C. Cir. 2026) (Walker, J.) (holding that the ITC’s ALJs must be appointed by the Commissioners acting collectively, not by the Chairman alone); 19 U.S.C. § 1330(c)(6) (“A majority of the commissioners in office shall constitute a quorum, but the Commission may function notwithstanding vacancies.”); see also Reorg. Plan No. 2 of 1978, § 102, 43 Fed. Reg. 36,037, 92 Stat. 3783 (effective Jan. 1, 1979) (assigning to the Chairman responsibility for the administration of the Commission).

⁶¹ This article assumes that more than one Commissioner holds office. It does not address whether a sole Commissioner would constitute a quorum competent to appoint inferior Officers. Compare 19 U.S.C. § 1330(c)(6) (“A majority of the commissioners in office shall constitute a quorum[.]”), with 19 C.F.R. § 201.4(a) (“A majority of the members of the Commission constitutes a quorum[.]”). Whatever the answer, the vice that *Sidak* identified was the Chairman’s arrogation of a power belonging to a body of which she was one member of six. Wurman has since proposed a general quorum requirement as a means by which Congress might preserve a measure of agency independence after *Slaughter*, and he observes that a President could defeat such a requirement by declining to nominate, at the cost of his own duty to take care that the laws be faithfully executed. Wurman, *What’s Next for Agency Independence?*, *supra* note 33.

⁶² THE FEDERALIST NO. 70, at 423–24 (Alexander Hamilton) (Clinton Rossiter ed., New American Library 1961).

⁶³ U.S. CONST. art. II, § 3; see also *Myers v. United States*, 272 U.S. 52, 164 (1926) (Taft, C.J.).

To be sure, after *Slaughter*, the President need not identify grounds to remove a principal Officer from a so-called “independent” agency. At-will removal by the President of principal Officers is the backstop that the Constitution’s separation of powers was designed to provide. Nevertheless, political constraints typically counsel public justification for a given removal. And the dereliction present in *Sidak* would, on the reasoning developed above, supply a concrete example of “cause.”

One qualification is necessary. The President’s removal power does not imply that any sitting Commissioner should now be removed. A change in personnel, however, cures nothing. To the extent that the prior acts of the unconstitutionally installed ALJs remain without a valid cure, every order that rests upon those acts remains vulnerable on the reasoning of *Sidak*. On this argument, that duty now falls to the sitting Commissioners. After *Lucia*, the Solicitor General recommended remedial measures, but the ITC took none of them.⁶⁴ The D.C. Circuit itself observed that the ITC could have tried, and still can try, to ratify the prior acts of its unconstitutionally installed ALJs. The court did not decide, however, that a ratification undertaken now would necessarily be effective; it observed only that the ITC could try. The Commission’s obligation is therefore best stated as a duty to address the uncured consequences of the appointment defect, with ratification among the possible remedial measures.⁶⁵ If remedial action now unsettles expectations that have formed around those prior acts, the D.C. Circuit placed responsibility on the Commission. The Commissioners who held office from 2018 through the 2026 turnover evidently left the defect uncured while several of them remained in holdover status long after their terms had expired. A change in Commissioners does not itself validate acts performed by Officers who lacked constitutional appointments, and a Commission that leaves those consequences unaddressed makes the neglect its own.

VI. REMEDY AND INSTITUTIONAL STAKES

When the Supreme Court confronted unconstitutional removal restrictions in *Free Enterprise Fund* and *Seila Law*, it severed the offending protection and left the agency standing.⁶⁶ Because the ITC’s organizing statute contains no express for-cause removal clause, there might be no offending provision to sever. To the extent that the Commissioners’ fixed terms or other statutory features are construed to imply protection from at-will removal, the Supreme Court’s rule would render that protection unenforceable while leaving the

⁶⁴ See *supra* notes 7–8 and accompanying text.

⁶⁵ *Sidak*, 174 F.4th at 160.

⁶⁶ *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 508–09 (2010) (Roberts, C.J.); *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 237 (2020) (Roberts, C.J.).

Agency standing. Section 337 determinations have long been subject to presidential disapproval for policy reasons during the statutory review period, and the Commissioners would be removable by the President at will.⁶⁷ The Agency would persist, but its so-called independence would not.

That transformation is not cost-free for the parties who appear before the ITC. The legitimacy and weight of a section 337 determination have long drawn support from the conventional understanding that an “independent” tribunal rendered it. A respondent that faces an exclusion order issued by a body removable at the President’s pleasure may press concerns of impartiality and of due process that the older conception of the ITC foreclosed. The recharacterization that follows from applying *Slaughter* to the ITC—that the ITC’s adjudication is an exercise of the executive power—changes the constitutional description of every section 337 order.⁶⁸

Beyond removal lies the deeper question that Justice Gorsuch raised in his concurrence in *Slaughter*. The President now controls the independent agencies. Those agencies exercise not only executive power, but also legislative and judicial power. One might ask whether Congress would have delegated so much legislative and judicial power had it foreseen that result.⁶⁹ The ITC is a vivid instance, because it might be said to make rules, to investigate and enforce against unfair practices, and to adjudicate section 337 cases. *Humphrey’s Executor* tolerated that concentration only by denying that the power was executive. Now that *Slaughter* names the power executive, the lodging of all three functions in a single body under at-will presidential control raises a question that the removal holding alone does not resolve: whether such a commingling of three separable powers may stand. Epstein presses that question further. In his account the true error of *Humphrey’s Executor* was never its toleration of independent agencies but its acceptance of the amalgamation of legislative, executive, and judicial functions in one set of Commissioners, and the Supreme Court ought to have overruled the case on that ground rather than on the ground of removal. Epstein reads *Lucia*, *Oil States Energy Services, LLC v. Greene’s Energy Group, LLC*, and *SEC v. Jarkesy* as evidence of what the amalgamation produces, which is a proceeding in which an official of the prosecuting agency selects the judge who will decide

⁶⁷ See *supra* notes 23–25 and accompanying text.

⁶⁸ *City of Arlington v. FCC*, 569 U.S. 290, 305 n.4 (2013) (Scalia, J.) (executive-branch adjudication is an exercise of the executive power); see also Philip Hamburger, *A President with More Control But Less Power*, ATLANTIC, July 5, 2026 (contending that agency adjudicators subject to presidential control cannot act as neutral decisionmakers and that their in-house proceedings deny due process).

⁶⁹ *Trump v. Slaughter*, 609 U.S. 422, 465, 479 (2026) (Gorsuch, J., concurring); see also Hamburger, *A President with More Control But Less Power*, *supra* note 68 (describing the transformation as one of “more control over less”).

the agency's own case.⁷⁰ *Sidak* belongs to that line. The ALJ who issued the protective order was installed by the Chairman of the very Commission that later opened an investigation to enforce that order against me.

CONCLUSION

Beneath the international trade statutes, the contest over the International Trade Commission concerns executive accountability: who may exercise executive power, and under whose authority? The D.C. Circuit answered in *Sidak* the first question by affirming relief against an unratified act of an ALJ whom the ITC conceded had been unconstitutionally appointed. The Supreme Court in *Slaughter* held that principal Officers exercising executive power generally may not be insulated from at-will presidential removal; this article has demonstrated that that holding reaches the ITC's Commissioners. The placement of executive authority in unconstitutionally appointed hands is the hinge that joins the two decisions: it is the appointment defect exposed in *Sidak* and, on the argument developed here, a potential ground for removal under the rule that *Slaughter* recognizes.

The "independent," "quasi-judicial" ITC has decided U.S. international trade cases for more than a century. That century has ended. The ITC itself may constitutionally remain; an independent ITC may not.

⁷⁰ Epstein, *Independent Agencies Serve the Separation of Powers*, *supra* note 54 (first citing *Lucia v. SEC*, 585 U.S. 237 (2018) (Kagan, J.); then citing *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 584 U.S. 325 (2018) (Thomas, J.); and then citing *SEC v. Jarkesy*, 603 U.S. 109 (2024) (Roberts, C.J.)).