JARKESY V. SEC RAPID REACTION: DO SEC COMMISSIONERS REALLY HAVE FOR-CAUSE REMOVAL PROTECTION?

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Jarkesy v. SEC Rapid Reaction: Do SEC Commissioners Really Have For-Cause Removal Protection?

By Zachary Grouev[1]

Last month, the Fifth Circuit continued its habit of making administrative law waves when a panel comprised of Judges Davis, Elrod, and Oldham issued a decision in *Jarkesy v. SEC*, ___ F.4th ___, No. 20-61007, 2022 WL 1563613 (5th Cir., May 18, 2022) (*Jarkesy II*). In *Jarkesy II*, the Securities and Exchange Commission alleged that George R. Jarkesy, who had established a pair of hedge funds, and Patriot28, L.L.C., a firm that Jarkesy had selected as investment advisor for the funds, each committed securities fraud.[2] Following a multi-year investigation, the Commission brought an administrative enforcement action against Jarkesy and Patriot28 ("the petitioners") alleging that both had committed fraud under the Securities Act, Securities Exchange Act, and Advisers Act.[3] Importantly, the Commission chose to press its charges in an internal agency proceeding before one of its own administrative law judges rather than sue in federal district court.[4]

After the Commission launched its enforcement action, the petitioners began a long and somewhat circuitous journey to the Fifth Circuit. First, they attempted to challenge their agency adjudication by seeking an injunction in the United States District Court for the District of Columbia.[5] But the district court determined that it lacked subject matter jurisdiction over the petitioners' claims, and the D.C. Circuit affirmed in a published opinion.[6] Without an injunction, the adjudication proceeded apace. After an evidentiary hearing, an SEC administrative law judge concluded that Jarkesy and Patriot28 had in fact committed securities fraud.[7] The petitioners then asked the Commission to review their adjudication, which it affirmed.[8] As punishment for their alleged misconduct, the Commission ordered that the petitioners cease and desist from further violations and pay a $300,000 civil penalty.[9] It also ordered Patriot28 to disgorge just under $700,000 and permanently barred Jarkesy from participating in various securities-related activities.[10] Having now properly exhausted their administrative remedies, the petitioners again

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[2] *Jarkesy II*, 2022 WL 1563613, at *1.

[3] *Id.*

[4] *Id.*

[5] *Id.*; *see generally Jarkesy v. SEC*, 48 F. Supp. 3d 32, 35–36 (D.D.C. 2014) ("Jarkesy I"), *aff'd*, 803 F.3d 9, 30 (D.C. Cir. 2015).

[6] *Jarkesy I*, 48 F. Supp. 3d at 40, *aff'd*, 803 F.3d at 15 (holding that Congress had "implicitly precluded" district court jurisdiction over the petitioners' claims "by channeling [their] challenges through the securities laws' scheme of administrative adjudication and judicial review in a court of appeals").

[7] *Jarkesy II*, 2022 WL 1563613, at *1.

[8] *Id.* at *1–2.

[9] *Id.* at *2.

[10] *Id.*; Record Excerpts at 50–51, *Jarkesy II*, 2022 WL 1563613 (No. 20-61007) (ordering that Jarkesy be (1) barred from "associating with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization"; (2) barred from "acting as a promoter, finder, consultant, or agent, or otherwise engaging in activities with a broker, dealer, or issuer for purposes of the issuance

turned to federal court, this time asking the Fifth Circuit to reverse the Commission's decision under the Securities Act's appellate review provision.[11] This second bite at the petitioners' underlying constitutional challenges would prove to be more fruitful.

On Jarkesy and Patriot28's petition for review, the Fifth Circuit held that the Commission's administrative adjudication of securities fraud claims violated several provisions of the Constitution.[12] Thus, the panel vacated the Commission's order affirming its administrative law judge and remanded for further proceedings.[13] Unless the panel's decision is vacated, or stayed pending further appeal, those proceedings will need to be in the form of a civil suit in federal district court.

The majority opinion, written by Judge Elrod, ruled for the petitioners on three separate constitutional grounds: (1) that adjudicating securities fraud claims for monetary penalties before an administrative law judge violated the petitioners' Seventh Amendment right to a civil jury; (2) that 15 U.S.C. § 78u-2(a), which gives the Commission discretion to choose whether to bring securities fraud claims as either civil actions in federal courts or agency adjudications before an administrative law judge, is an unconstitutional delegation of legislative power; and (3) that the Commission's administrative law judges are unconstitutionally insulated from presidential control by a multi-layer system of for-cause removal protection.[14] Each holding is important in its own right, and any one of them would have likely been enough to give the petitioners the relief they requested: vacatur of the Commission's order.[15] Given the prospect of overlapping unconstitutionality, Judge Elrod ensured that at least the first two conclusions would be enshrined as circuit precedent by expressly identifying them as alternative holdings.[16] The Fifth Circuit, like many circuit courts of appeals, treats such holdings as binding law rather than mere persuasive dicta.[17] And although the panel declined to decide the proper remedy for the Commission's removal protection problem, Judge Elrod's determination that the problem exists as a matter of law will likely still bind future Fifth Circuit panels to consider the issue.[18]

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or trading in any penny stocky, or inducing or attempting to induce the purchase or sale of any penny stock"; and (3) permanently prohibited from "serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person. . . .").

[11] *Id.*; *see* 15 U.S.C. § 77i(a) ("Any person aggrieved by an order of the Commission may obtain a review of such order in the court of appeals of the United States, within any circuit wherein such person resides or has his principal place of business . . . by filing in such Court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or be set aside in whole or in part.").

[12] *Jarkesy II*, 2022 WL 1563613, at *2.

[13] *Id.* at *2, 13.

[14] *Id.* at *2.

[15] *But see id.* at *11 n.17 (declining to decide whether vacatur is the appropriate remedy when a decision rendered by an executive branch official is successfully challenged based on that official's unconstitutional insulation from presidential control).

[16] *Id.* at *8 n.9 (identifying the panel's nondelegation holding as an alternative holding);

[17] *See id.* at *8 n.9; *Texas v. United States*, 809 F.3d 134, 178 n.158 (5th Cir. 2015).

[18] *Cf. Pruitt v. Levi Strauss & Co.*, 932 F.2d 458, 465 (5th Cir. 1991) (citing *U.S. v. Adamson*, 665 F.2d 649, 656 n.19 (5th Cir. Unit B, 1982) ("It is common practice for an appellate court to consider and decide issues which are fully presented and litigated and which will likely arise on retrial, even though such decision may not be necessary to support the narrow decision to reverse.")), *abrogated on other grounds by Floors Unlimited, Inc. v. Fieldcrest*

This piece focuses on the panel's third and final holding: that the Commission's administrative law judges are unconstitutionally insulated from presidential control. In short, the Fifth Circuit's conclusion likely follows logically, if perhaps debatably, from existing precedent. In doing so, however, the decision assumes a particular answer to the yet undecided question of whether SEC Commissioners may be removed by the President only for cause. To illustrate the potential problem with this assumption, we need to trace Judge Elrod's reasoning and establish the facts of the statutes at issue.

First, the reasoning. The panel's principle authorities on the removal question are two recent Supreme Court decisions, *Free Enterprise Fund v. Public Company Accounting Oversight Board*[19] and *Lucia v. SEC*.[20] In *Free Enterprise Fund*, the Court held that a statute that "restricted [the President's] ability to remove a principal officer, who [was] in turn restricted in his ability to remove an inferior officer, even though that inferior officer determine[d] the policy and enforce[d] the laws of the United States[,]" was unconstitutional.[21] Such a "multilevel protection" scheme, the Court explained, was "contrary to Article II's vesting of the executive power in the President."[22] One of the layers of protection in *Free Enterprise Fund* applied to Commissioners of the Securities and Exchange Commission, whom the Court assumed, but did not decide, could be removed only for "inefficiency, neglect of duty, or malfeasance in office."[23] In *Lucia*, the Court held that SEC administrative law judges were "Officers of the United States," placing them within the ambit of *Free Enterprise Fund*.[24]

Second, the facts of the provisions challenged in *Jarkesy II*. SEC administrative law judges are appointed by the Commission under 5 U.S.C. § 3105, and are removable by the Commission "for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board."[25] Members of the Board are themselves removable only under the *Humphrey's Executor* standard of "inefficiency, neglect of duty, or malfeasance in office."[26]

Applying the law to the facts, the panel's decision makes intuitive sense. SEC administrative law judges are officers of the United States according to *Lucia*, so they likely fit within *Free Enterprise Fund's* framework holding multi-level removal protection schemes unconstitutional.[27] Section 7521 expressly provides that administrative law judges are removable

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Cannon, Inc., 55 F.3d 181 (5th Cir. 1995); *Jarkesy II*, 2022 WL 1563613, at *11 n.17 (impliedly identifying the panel's removal holding as an alternative holding except for the remedies question).

[19] 561 U.S. 477 (2010).

[20] 585 U.S. ___, 138 S. Ct. 2044 (2018).

[21] 561 U.S. at 484.

[22] *Id.* at 484, 496.

[23] *Id.* at 487 (quoting *Humphrey's Ex'r v. United States*, 295 U.S. 602, 620 (1935)).

[24] 138 S. Ct. at 2051, 2053.

[25] 5 U.S.C. § 7521.

[26] 5 U.S.C. § 1202.

[27] The Supreme Court has twice declined to decide whether SEC administrative law judges have a *Free Enterprise Fund* problem. First in *Free Enterprise Fund* itself, 561 U.S. at 507 n.10, where the issue was not before the Court, and again in *Lucia*, 138 S. Ct. at 2050 n.1, where the Court declined to take up the question for lack of percolation. Although footnote ten in *Free Enterprise Fund* offers a possible ground for distinguishing administrative law judges from the Public Company Accounting Oversight Board based on the former's adjudicative function, that footnote

only for "good cause,"[28] so the only question left is whether the principal officers in charge of that removal are themselves insulated. This is where things get tricky. Section 7521 provides that administrative law judges are removable by the Commission, but only if "good cause" is "established and determined by the Merit Systems Protection Board."[29] So there are two sets of removing officers involved. The Board's members have express removal protection, but they were not the subject of *Free Enterprise Fund*, and unlike the Commission in that case, cannot initiate removal proceedings concerning the inferior officers in question. The Commission *can* launch removal proceedings and make removal decisions, but it must comply with the Board's procedural requirements and obtain a "good cause" determination to follow through. And it remains an open question whether Commissioners have removal protection at all. The Supreme Court assumed that they enjoyed such protection in *Free Enterprise Fund* on the stipulation of the parties,[30] but it has never squarely addressed the issue. For its part, the panel took the same approach, asserting removal protection only by citing *Free Enterprise Fund*, declining to conduct an independent analysis of the Commission's organic statute, and assuming that both the Board and the Commission were insulated from presidential control.[31] But as explained above, *Free Enterprise Fund* never *held anythin*g about whether Commissioners enjoy removal protection. It simply employed an "understanding" of the parties to decide the issue before it.[32] Such understandings are not binding precedent. If not compelled by precedent, a closer look at the organic statute, 15 U.S.C. § 78d, reveals that the panel's assumption is anything but obvious. This is important because, if in fact the Commissioners are removable at will, the case starts to look less like *Free Enterprise Fund* and more like an alternative hypothetical where the President retains the authority to at least reliably order the removal of the allegedly over-insulated inferior officers.[33]

To explain why the panel's assertion of removal protection for SEC Commissioners is at minimum contestable, we'll need to understand how the courts interpret agency organic statutes, both generally and in the specific context of determining whether an agency official may be removed only for cause, rather than at the will of the President.

We begin with two general principles of statutory interpretation. First, courts look to the text of agency organic statutes, just as they do with any other act of Congress, when determining their meaning.[34] Second, courts do not generally rewrite statutes to add provisions that Congress

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only purports to explain what the Court's holding "does not address." 561 U.S. at 507 n.10; *see Jarkesy II*, 2022 WL 1563613, at *12 (responding to Judge Davis's dissent on this point by suggesting that footnote ten is dicta and inconsistent with more recent removal decisions besides).

[28] 5 U.S.C. § 7521.

[29] *Id.*

[30] 561 U.S. at 487.

[31] *Jarkesy II*, 2022 WL 1563613, at *12.

[32] 561 U.S. at 487.

[33] *See Free Enter. Fund*, 561 U.S. at 502–08 (suggesting in dicta that the form of multi-layer removal protection was particularly egregious and declining to resolve issues not before the court like the constitutionality of the Merit Systems Protection Board).

[34] *See, e.g.*, *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) (plurality opinion) (explaining that a court's inquiry in statutory interpretation "begins with the statutory text, and ends there as well if the text is unambiguous").

never included; the legislature legislates and the judiciary judges.[35] Add to these a general principle of removal jurisprudence: that at-will removal is the default rule.[36] Together, these principles form the consistently reiterated doctrinal statement that an organic statute must expressly endow a given agency official with removal protection if such protection is to exist at all.[37] Congress understands this rule of construction and has drafted large numbers of organic statutes that expressly provide for removal protection, often tracking the language approved by the Court in *Humphrey's Executor*.[38] But, harmless though this rule of construction may appear, the devil is in the details. There is only one exception to the rule statement above, but it is, to speak colloquially, a whopper. Originating in the Supreme Court's 1958 decision in *Wiener v. United States*, this exception allows a court to read for-cause removal protection into an agency organic statute based on the "nature of the function" that Congress "vest[s]" in an agency.[39] The function at issue in *Wiener* was the adjudication of certain claims by Americans against Japan arising out of the Second World War, which Congress vested in a War Claims Commission whose decisions were unreviewable "by any other official of the United States or by any court."[40] The Supreme Court explained that this function "require[d] absolute freedom from Executive interference" so as to merit an implied grant of removal protection.[41] The Court's most recent mention of the doctrine—contained in a brief footnote in *Collins v. Yellen*, decided sixty years after *Wiener*—serves only to remind us that whatever *Wiener* stands for, it applies only when agencies are charged with adjudication.[42]

With that background in hand, let's return to the organic statute at issue in *Jarkesy II*: 15 U.S.C. § 78d. A quick scan of the statute reveals that it contains no express removal provision. Indeed, the word "removal" is absent from the statutory text, as are the magic words "inefficiency, neglect of duty, or malfeasance in office" from *Humphrey's Executor*.[43] Because the Commission's organic statute lacks an express grant of removal protection, the case law tells us

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[35] See *Bostock v. Clayton Cnty., Ga.*, 590 U.S. ___, 140 S. Ct. 1731, 1738–39 (2020) (when interpreting a statute, the Court "must determine the ordinary public meaning" by "orient[ing] [itself] to the time of the statute's adoption, . . . examining the key statutory terms, . . . and then confirming [its] work against [its] precedents"); *cf. Wyeth v. Levine*, 555 U.S. 555, 586 (2009) (Thomas, J., concurring in the judgment) ("The Supremacy Clause . . . requires that pre-emptive effect be given only to those federal standards and policies that are set forth in, or necessarily follow from, the statutory text that was produced through the constitutionally required bicameral and presentment procedures."); *Zuni Pub. School Dist. No. 89 v. Dep't of Ed.*, 550 U.S. 81, 119 (2007) (Scalia, J., dissenting) ("To be governed by legislated text rather than legislators' intentions is what it means to be 'a Government of laws, not of men.'").

[36] *Shurtleff v. United States*, 189 U.S. 311, 316 (1903) (explaining that "[t]he right of removal . . . inheres in the right to appoint, unless . . . . plain [constitutional or statutory] language . . . take[s] it away").

[37] *Collins v. Yellen*, 594 U.S. ___, 141 S. Ct. 1761, 1783 (2021); *Carlucci v. Doe*, 488 U.S. 93, 95 (1988) ("[A]bsent a 'specific provision to the contrary, the power of removal from office is incident to the power of appointment.'" (quoting *Keim v. United States*, 177 U.S. 290, 293 (1900))); *Keim*, 177 U.S. at 293–94 ("In the absence of all constitutional provision or statutory regulation it would seem to be a sound and necessary rule to consider the power of removal as incident to the power of appointment." (quoting *Ex parte Hennen*, 38 U.S. 230, 259 (1839))).

[38] *See, e.g.*, Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (And Executive Agencies)*, 98 CORNELL L. REV. 769, 786 (2013) (collecting agencies with statutory removal protection).

[39] *Wiener v. United States*, 357 U.S. 349, 353 (1958).

[40] *Id.* at 354-55; 50 U.S.C. § 4109.

[41] *Wiener*, 357 U.S. at 353.

[42] *Collins*, 141 S. Ct. at 1783 n.18 (explaining that *Wiener* was inapplicable because unlike the War Claims Commission, the Federal Housing Finance Agency "is not an adjudicatory body").

[43] 295 U.S. 602, 619 (1935).

that the only potential source of such protection is *Wiener's* doctrine of implied for-cause removal for adjudicatory agencies. And because the Commission's function is at least partially adjudicatory, as *Jarkesy II's* extensive discussion of agency adjudication bears out, we might think that the Fifth Circuit was correct on the law, even if it could have conducted a more searching analysis. But *Wiener* expressly relied on the "philosophy of *Humphrey's Executor*,"[44] and is deeply inconsistent with the Court's more recent removal decisions and general principles of statutory interpretation. That inconsistency, which was already apparent when the Court sidestepped the issue in *Free Enterprise Fund*,[45] has only grown more pronounced since the Court decided *Seila Law LLC v. Consumer Finance Protection Bureau*[46] and *Collins v. Yellen*.[47] Those decisions confirm that a majority of the Court has rejected both the philosophy of quasi-adjudicative and quasi-legislative power that undergirded the argument for removal protections in *Humphrey's Executor* and the functionalist analysis of organic statutes that supported implied removal protections in *Wiener*.[48] Without those modes of analysis, a doctrine that requires courts to read removal protection provisions into agency organic statutes has little to stand on beyond *stare decisis*.[49] And as Justice Thomas has recently opined, a doctrine for which the only defense is *stare decisis* is a doctrine that is "out of arguments," and thus on perilous footing indeed.[50]

But although the case is stronger now than it was in 2010, who is to say that the Commission will make the argument, or that the Court will bite if it does? One reason is that, after

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[44] *Wiener*, 357 U.S. at 356.

[45] 561 U.S. at 545–548 (Breyer, J., dissenting) (explaining that the SEC's organic statute contains no for cause removal provision and arguing that the lack of such a provision cuts strongly towards an assumption that the Commissioners are removable by the President at will); *see also* Gary Lawson, *Stipulating the Law*, 109 MICH. L. REV. 1191, 1193–95 (2011) (highlighting Justice Breyer's contention that SEC Commissioners are removable at will); Peter L. Strauss, *On the Difficulties of Generalization–PCAOB In the Footsteps of* Myers, Humphrey's Executor, Morrison, *and* Freytag, 32 CARDOZO L. REV. 2255, 2276–77 (2011) (same).

[46] 591 U.S. ___, 140 S. Ct. 2183 (2020).

[47] 141 S. Ct. 1761.

[48] *Seila Law LLC*, 140 S. Ct. at 2199 (explaining that the Court has "[b]ack[ed] away from the reliance in *Humphrey's Executor* on the concepts of 'quasi-legislative' and 'quasi-judicial' power"); *Collins*, 141 S. Ct. at 1784 ("[T]he nature and breadth of an agency's authority is not dispositive in determining whether Congress may limit the President's power to remove its head."), 1785 ("Courts are not well-suited to weigh the relative importance of the regulatory and enforcement authority of disparate agencies, and we do not think that the constitutionality of removal restrictions hinges on such an inquiry.").

[49] Any historical claim that Congress intended the Commissioners to be removable only for cause is likely tenuous, as the Securities and Exchange Act became law before *Humphrey's Executor* was decided. *See Free Enter. Fund*, 561 U.S. at 546–47 (Breyer, J., dissenting). Under the prevailing regime of *Myers v. United States*, 272 U.S. 52 (1926), any such protection would have been at best highly suspect. Nor do potential alternative rationales for the holding in *Wiener* suffice to save the Commissioners. For example, if the real problem with the War Claims Commission was that its decisions were completely unreviewable, that rationale is inapplicable to the SEC, whose decisions are reviewable by the federal courts of appeals under 15 U.S.C. § 77i(a). Likewise, if the Court was exercising *sub silentio* constitutional avoidance in 1958 to head off a due process problem were a president to attempt to improperly influence adjudications, *Free Enterprise Fund*, *Seila Law*, and *Collins* make clear that there is at least an equally strong countervailing constitutional avoidance interest in not reading statutes to contain stricter removal restrictions than their text supports only to declare those restrictions unconstitutional. *See, e.g.*, *Free Enter. Fund*, 561 U.S. at 546 (Breyer, J., dissenting).

[50] CSPAN, *Justice Clarence Thomas on Racial Equality and the Supreme Court* (May 13, 2022) (discussion begins at timestamp 44:35), https://www.c-span.org/video/?517582-1/justice-thomas-leak-supreme-court-opinion-damages-rule-law [https://perma.cc/X9MZ-H24Y].

over sixty years of relative obscurity, the doctrine of implied removal protection is gaining salience in the federal courts, and rapidly. *Jarkesy II* directly implicates the doctrine and would offer the Court an opportunity to set the record straight on removal protections for SEC Commissioners. But it is far from the only case or controversy poised to present the issue. In the D.C. Circuit, two potentially high-profile appeals stand to directly turn on the doctrine. In the first suit, plaintiffs Sean Spicer and Russel Vought have challenged their removal from positions on the Board of Visitors of the United States Naval Academy, arguing that they were subject to removal only for cause.[51] Because the Board of Visitors' organic statute contains no express for-cause provision, plaintiffs' claims on the merits and any eventual appeal will both necessarily turn on the applicability of *Wiener*.[52] In the second action, plaintiff Roger Severino is challenging his removal from the Administrative Conference of the United States on a similar theory.[53] A district court dismissed Severino's complaint and he has appealed, setting the table for a D.C. Circuit opinion discussing implied for-cause removal.[54]And even more potential controversy looms on the horizon. Mehmet Oz and Herschel Walker were recently removed from the President's Council on Sports, Fitness & Nutrition, an advisory body created by executive order under the Federal Advisory Committee Act.[55] Although created via executive order rather than by statute, the operative provisions of the relevant executive orders at the time of Oz and Walker's removal are quite similar to those in the existing plaintiffs' respective organic statutes.[56] Thus, to the degree that Severino, Spicer, and Vought see any successes, additional suits raising the issue may well follow.

At bottom, the Fifth Circuit's removal holding is likely a logical extension of *Free Enterprise Fund* and *Lucia*. But it is an extension that relies in large part on a conclusory assertion about the removability of SEC Commissioners, albeit one the Supreme Court has operated under in the past. That assertion hinges on a legal doctrine that is on unsteady ground at best, especially after *Seila Law* and *Collins* emphatically rejected the philosophies of *Humphrey's Executor* and *Wiener*. Given the increasing salience of the doctrine in the federal courts, the Supreme Court is likely to have a case land on its docket forcing the issue of implied for-cause removal sooner rather than later.

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[51] *Spicer v. Biden*, No. 21-2493, 2021 U.S. Dist. WL 5769458 (D.D.C. Dec. 4, 2021) (denying a request for a preliminary injunction largely based on a conclusion that the plaintiffs had not shown a likelihood of success on the merits as to their claim that appointees to the Board of Visitors are removable only for cause).
[52] *See id.* at *13–15.
[53] *Severino v. Biden*, No. 21-0314, 2022 U.S. Dist. WL 168321 (D.D.C., Jan. 19, 2022) (Notice of Appeal filed Feb. 22, 2022, No. 22-5047).
[54] *See id.*
[55] Dr. Mehmet Oz (@DrOz), TWITTER (Mar. 26, 2022), https://twitter.com/DrOz/status/1507726091062059008?s=20&t=RFOmNi8b25yAtbwZ6laMgA [https://perma.cc/SW3Q-3WLX]; Herschel Walker (@HerschelWalker), TWITTER (Mar. 24, 2022), https://twitter.com/HerschelWalker/status/1507016038851899404?s=20&t=w0EXLBdv_130qjSVlvkcEA [https://perma.cc/KES6-7BHG].
[56] *Compare* Continuance or Reestablishment of Certain Federal Advisory Committees and Amendments to Other Executive Orders, 86 Fed. Reg. 55465 (2021) *and* President's Council on Sports, Fitness, and Nutrition 83 Fed. Reg. 8923 *with* 10 U.S.C. § 8468(b) *and* 5 U.S.C. § 595(b).