No. 2015-3086

IN THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

SHARON M. HELMAN,

Petitioner,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

On Petition for Review of the Merit Systems Protection Board
in Case No. DE-0707-15-0091-J-1

BRIEF FOR THE RESPONDENT

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STATEMENT OF RELATED CASES

The government is not aware of any related cases within the meaning of Federal Circuit Rule 47.5(b).

INTRODUCTION

Congress enacted section 713 of Title 38 to make it easier for the Secretary of Veterans Affairs to remove senior executives in the agency for misconduct or poor performance. The statute streamlines the normal procedures that govern the removal of such executives and provides for expedited appeals to the Merit Systems Protection Board (MSPB or Board). In these respects, Congress acted well within its legislative discretion to determine how best to promote the effective management of the federal workforce at the Department of Veterans Affairs for the benefit of veterans and the public.

In authorizing appeals of the Secretary's decisions under section 713 to the Merit Systems Protection Board, however, Congress did not merely provide for expedition. Section 713 also transfers the final adjudicative authority of the Board in this important category of cases to one of the Board's own employees. The statute eliminates the Board's normal discretion to hear an appeal itself in the first instance, requiring instead that the Board refer all appeals under section 713 to an administrative judge. 38 U.S.C. § 713(e)(1). And the statute provides that the administrative judge's decision "shall be final and shall not be subject to any further appeal," *id.* § 713(e)(2), thereby precluding review of the administrative judge's decision by the Board or this Court.

The Department of Justice declines to defend the constitutionality of an Act of Congress only with the greatest reluctance. After careful review, however, the

Department has determined that section 713 violates the Appointments Clause, U.S. Const. art. II, § 2, cl. 2, to the extent that it vests a federal employee with final authority, unreviewable by any Officer in the Executive Branch, to determine whether the Secretary's removal of a senior executive comports with the federal civil service laws. That kind of "significant authority pursuant to the laws of the United States" can only be exercised by an "Officer[] of the United States" who has been appointed in the manner prescribed by the Constitution. *Buckley v. Valeo*, 424 U.S. 1, 125-26 (1976) (per curiam).

In this case, petitioner was properly removed from her senior executive position in the Department of Veterans Affairs for a range of misconduct. That misconduct included knowingly accepting, and intentionally failing to report, tens of thousands of dollars in gifts—including tickets to a Beyoncé concert and a Disneyland vacation—from a consultant who represented companies actively seeking business with the agency. Petitioner's due process challenges to her removal are without merit. Furthermore, she recently admitted committing much of the conduct for which she was removed when she pleaded guilty to a felony charge of willfully making a false statement to a government agency. *See United States v. Helman*, No. CR-16-00245, Dkt. No. 38 (D. Ariz. May 16, 2016) (plea agreement).

Petitioner's removal, however, was affirmed by an administrative judge exercising final authority that Congress could not lawfully vest in an employee. The appropriate remedy is for the Court to declare invalid and sever section 713(e)(2), the

provision that renders the administrative judge's decision final and unreviewable, as well as the related portions of section 713(e) that are logically intertwined with that provision. The Court should then remand this case to the Board for further proceedings.

STATEMENT OF JURISDICTION

This is a petition for review of a decision of the Merit Systems Protection Board under 38 U.S.C. § 713. An MSPB administrative judge issued a decision sustaining petitioner's removal on December 22, 2014. A3.[1] Section 713 provides that, "[n]otwithstanding any other provision of law, including section 7703 of title 5," the administrative judge's decision "shall be final and shall not be subject to any further appeal." 38 U.S.C. § 713(e)(2). Petitioner sought review from the Board, which refused to take any action on petitioner's appeal. A1.

On February 20, 2015, within the sixty-day period otherwise prescribed for petitions for review of decisions of the Merit Systems Protection Board, *see* 5 U.S.C. § 7703(b)(1)(A), petitioner filed this petition for review. *See* Dkt. No. 1. For the reasons discussed below, this Court has jurisdiction under 28 U.S.C. § 1295(a)(9).

[1] "A__" denotes a citation to petitioner's appendix.

STATEMENT OF THE ISSUES

1. Whether this Court has jurisdiction to decide petitioner's constitutional claims notwithstanding 38 U.S.C. § 713(e)(2).

2. Whether petitioner's removal satisfied the requirements of due process where petitioner received advance notice of the charges against her, a copy of the agency's evidence file, and an opportunity to respond, followed by a post-termination evidentiary hearing before a neutral administrative judge.

3. Whether section 713 violates the Appointments Clause, U.S. Const. art. II, § 2, cl. 2, to the extent it vests an employee of the Merit Systems Protection Board with final authority, unreviewable by any Officer in the Executive Branch, to determine whether the Secretary's removal of a senior executive comports with the federal civil service laws.

STATEMENT OF THE CASE

A. Statutory Background

In 2014, Congress began investigating reports that senior executives in the Department of Veterans Affairs (DVA) had manipulated hospital performance metrics by maintaining secret wait lists of veterans who needed care. In response, legislators proposed a variety of reforms, including measures designed to make it easier for the Secretary of Veterans Affairs to remove or demote senior executives in the agency for misconduct or poor performance.

These proposals culminated in August 2014 in the enactment of section 713 of Title 38. *See* Veterans Access, Choice, and Accountability Act of 2014 (Veterans Access Act), Pub. L. No. 113-146, § 707, 128 Stat. 1754, 1798 (codified at 38 U.S.C. § 713). Section 713 authorizes the Secretary to remove any individual from a senior executive position at the DVA under streamlined procedures "if the Secretary determines the performance or misconduct of the individual warrants such removal." 38 U.S.C. § 713(a)(1). If the Secretary so determines, the executive may be removed from the civil service altogether or, in the case of certain executives, transferred to a General Schedule position "at any grade . . . for which the individual is qualified and that the Secretary determines is appropriate." *Id.* § 713(a)(1)(A), (B).

The authority conferred on the Secretary by section 713 is "in addition to" the usual powers of an agency to remove or demote a senior executive under Title 5. *See* 38 U.S.C. § 713(f)(1). If the Secretary chooses to act under section 713, however, the standard procedures that govern proceedings under Title 5, such as the requirement for thirty days' advance written notice of any proposed personnel action, "shall not apply." *Id.* § 713(d)(1).

Section 713 also creates special rules for expedited appeals to the Merit Systems Protection Board. Under the statute, "any removal or transfer" of a DVA senior executive "may be appealed to the Merit Systems Protection Board under section 7701 of title 5." 38 U.S.C. § 713(d)(2)(A). Any such appeal, however, must be filed

within seven days of the date of removal, *id.* § 713(d)(2)(B), and the Board "may not stay any removal or transfer" pending resolution of the appeal, *id.* § 713(e)(4).

Section 713 further stipulates that any appeal to the Merit Systems Protection Board shall be decided, not by the Board itself, but by an MSPB "administrative judge." *See* 38 U.S.C. § 713(e)(1). Ordinarily, the Board may choose to decide an appeal itself in the first instance, or, alternatively, it may refer the case to "an employee of the Board designated by the Board to hear such cases," subject to the Board's right of review. 5 U.S.C. § 7701(b)(1), (e)(1); *see id.* § 1204(b)(1) (authorizing "any employee of the Board designated by the Board" to "administer oaths, examine witnesses, take depositions, and receive evidence"). Such an employee is known as an "administrative judge." *See* 5 C.F.R. § 1201.4 (defining the term "judge" to include such employees).[2]

Under section 713, however, the Board itself may neither hear an appeal by a removed DVA senior executive in the first instance nor review the decision of a Board administrative judge in such a case. Congress specified that, upon receipt of an appeal from a DVA senior executive, the Board "shall refer such appeal to an administrative judge." 38 U.S.C. § 713(e)(1). The administrative judge "shall expedite

[2] An "administrative judge" of the Board need not be, and typically is not, an "administrative law judge" appointed under 5 U.S.C. § 3105. The term "judge" under Board rules encompasses both administrative law judges and other employees designated by the Board to hear appeals. 5 C.F.R. § 1201.4(a); *see* 5 U.S.C. § 7701(b)(1). The distinction is not significant for this case.

any such appeal . . . and, in any such case, shall issue a decision not later than 21 days after the date of the appeal." *Id.* If the administrative judge fails to issue a decision within 21 days, "the removal or transfer is final." *Id.* § 713(e)(3). And if the administrative judge issues a timely decision, that decision is final and unappealable: "Notwithstanding any other provision of law, including section 7703 of title 5, the decision of an administrative judge under paragraph (1) shall be final and shall not be subject to any further appeal." *Id.* § 713(e)(2).

The President signed the Veterans Access Act into law on August 7, 2014. Shortly before he did so, the three Senate-confirmed members of the Merit Systems Protection Board sent a letter to the President expressing "very serious concerns" over the constitutionality of barring review by the MSPB of the administrative judge's decision. *See* Letter from the MSPB to the President 1 (Aug. 1, 2014) (reproduced at A2407).[3] Although they recognized that the provision was "only one provision of a more comprehensive piece of legislation" and that "a presidential veto is unlikely," the Board members objected that section 713 "prohibits presidentially-appointed, Senate-confirmed officers of the executive branch from performing the responsibilities for which those officers were appointed and confirmed." *Id.* "Indeed, the Supreme Court has made clear that significant governmental duties, exercised pursuant to public law, must be performed by 'Officers of the United States,' within the meaning

[3] http://go.usa.gov/cJchJ.

of Article II of the Constitution." *Id.* Consequently, the Board cautioned, section 713 "is on weak constitutional footing." *Id.*[4]

Subsequently, in April 2015, the Chairman of the House Veterans Affairs Committee introduced a new bill, H.R. 1994, which would have authorized the Secretary to remove any employee in the DVA under procedures identical to those in section 713. *See* H.R. 1994, § 2(a), 114th Cong. (2015). Like section 713, H.R. 1994 would have provided for an appeal only to an MSPB administrative judge, whose decision would have been final and not subject to further appeal. *Id.* In July 2015, the Office of Management and Budget (OMB) issued a Statement of Administration Policy opposing the bill. *See* OMB, *Statement of Administration Policy, H.R. 1994*, at 1 (July 28, 2015).[5] Among other objections, the statement expressed the Administration's view that "[t]he legislation raises serious concerns under the Appointments Clause of the U.S. Constitution" and indicated that, "[i]f the President

[4] The Board reiterated these concerns in its Federal Register notice promulgating interim rules for appeals under section 713. *See* 79 Fed. Reg. 48,941, 48,942 (Aug. 19, 2014) ("[T]he MSPB questions the constitutionality of any provision of law that prohibits presidentially-appointed, Senate-confirmed Officers of the United States Government from carrying out the mission of the agency to which they were appointed and confirmed to lead.").

[5] http://go.usa.gov/cJx4A.

were presented with H.R. 1994, his senior advisors would recommend that he veto the bill." *Id.* at 2.[6]

B. Factual Background and Procedural History

Petitioner Sharon Helman was the Director of the Phoenix VA Health Care System (the Phoenix VA), an integrated health care system operated by the DVA for the benefit of the veteran population in central Arizona. A5. She was appointed to that position in February 2012, having previously served in executive positions in other DVA facilities. *Id.*; A3661; Pet. Br. 8.[7] Petitioner was first appointed to the Senior Executive Service in 2007. A5.

1. Evidence of petitioner's mismanagement and personal misconduct

Petitioner's performance as a senior executive became a focus of concern for DVA leadership in the spring of 2014. The agency's Office of Inspector General (OIG) had reported for years on scheduling deficiencies and long wait times at DVA facilities across the country, including at the Phoenix VA. *See* A4-A5; Pet. Br. 9. In April 2014, however, Representative Jeff Miller, Chairman of the House Committee on Veterans Affairs, announced allegations that veterans had died while languishing

[6] H.R. 1994 subsequently passed the House, but the Senate has not taken up the measure.

[7] The administrative judge's decision erroneously states that petitioner became the director of the Phoenix VA in February 2013 (rather than 2012). A5. This appears to be a typographical error, as the date of petitioner's appointment is uncontested. *See* Pet. Br. 8.

on secret wait lists at the Phoenix VA. A8, A176. The Office of Inspector General was asked to investigate allegations of "gross mismanagement of VA resources and criminal misconduct by VA senior hospital leadership" at the Phoenix VA. A9, A176. At the Secretary's order, petitioner was placed on administrative leave while the investigation unfolded. A9, A1731.

In late May 2014, the Office of Inspector General issued an interim report on its investigation into the Phoenix VA under petitioner's leadership. A9; *see generally* A174-A208 (interim OIG report). The interim report "substantiated serious conditions" at the Phoenix VA, including the use of unofficial wait lists, and it specifically faulted "the Phoenix [VA] leadership" for understating the length of time that new patients waited for primary care appointments. A178. Two days after the release of the interim OIG report, the agency formally proposed petitioner's removal, charging her with failure to provide adequate oversight. A10; A1977. The notice of proposed removal was issued under the general Title 5 provisions governing the removal of career employees.

Meanwhile, the Office of Inspector General continued to investigate conditions at the Phoenix VA under petitioner's leadership. A10. In August 2014, the OIG issued its final report. *Id.*; *see* A210-A352 (final OIG report). Although the report was unable to verify that any veteran died as a direct consequence of the Phoenix VA's delays in delivering care, the final report identified more than 3500 veterans who were awaiting care but whose names appeared only on unofficial wait lists. A10-A11;

A215-A216; A266. The report found that management of the Phoenix VA "was aware of many of the documents that we identified as unofficial wait lists" and that "administrative and clinical leaders did not effectively address these access problems." A11; A266. The final OIG report also rejected petitioner's contention that access times for veterans had improved under her tenure: "Despite Ms. Helman's claims of successful improvements in access measures during FY 2013, we found those accomplishments were inaccurate and unsupported." A11; A282.

Agency officials also investigated reports that petitioner had taken or approved retaliatory actions against employees under her supervision who engaged in protected whistleblowing activities. In one instance, after the director of the Phoenix VA's emergency department disclosed to Senator McCain's office a list of veteran patients who had committed suicide, petitioner responded by ordering that the disclosing official be placed on administrative leave. A7-A8; A35-A36; A434-A451 (Mitchell investigation report). In another case, an investigator recommended that "administrative action should be initiated against Ms. Helman" and another supervisor for permitting the reassignment of a public affairs employee at the Phoenix VA, apparently in retaliation for that employee's disclosure of staffing and resources problems to the previous Phoenix VA director. A6-A7; A12-A13; A817-A837 (Pedene investigation report).

Finally, the agency determined that petitioner had accepted—and knowingly failed to report—gifts worth tens of thousands of dollars from a consultant who was

actively lobbying the Phoenix VA on behalf of companies seeking to do business with the agency. *See* A39-A53. These gifts included:

- tickets to a Beyoncé concert worth more than $700, *see* A40, A50-A51;
- an eight-night trip to Disneyland for petitioner and her family worth more than $11,000, which the consultant arranged with Disney as a "secret gift to this family" so that "only Sharon knows the source," *see* A41-A42;
- roundtrip airfare to various destinations, *see* A40, A45-A46, A49-A50; and
- entry fees for destination marathons in Napa, Mississippi, and Arizona, *see* A40, A41, A42.

2. Petitioner's removal under section 713

In light of this additional evidence, the agency rescinded its earlier notice of proposed removal and issued a new notice to petitioner. A13. On November 10, 2014, Deputy Secretary Gibson notified petitioner in writing that the agency proposed to remove her from the civil service under the newly enacted authority of 38 U.S.C. § 713.[8] A13; *see* A90-A94. The notice alleged three charges of "misconduct that warrants removal from federal service": (1) lack of oversight, supported by four specifications related to the unofficial wait lists at Phoenix VA and to petitioner's treatment of whistleblowers; (2) conduct unbecoming a senior executive, supported

[8] The Secretary delegated his authority under section 713 to Deputy Secretary Gibson. *See* 38 U.S.C. § 512(a); A3756 (Gibson decl. ¶ 4).

by two specifications related to petitioner's treatment of a whistleblower and to her acceptance of gifts from an improper source; and (3) failure to report gifts, supported by two specifications related to petitioner's failure to disclose the gifts she accepted on annual ethics forms. *See generally* A90-A93 (notice to petitioner describing each charge and specification in detail).

Deputy Secretary Gibson offered petitioner "five business days after receipt of this notice to submit a written response showing why the charges are unfounded and any other reasons why your removal should not be effected." A94. The notice stressed that "[t]he final decision to effect this action has not been made" and advised petitioner of her right to be "represented by an attorney or other representative of your choice at all stages of this matter, up to and including the issuance of the decision." *Id.* Petitioner counter-signed the notice to acknowledge her receipt of both the notice and a copy of the agency's evidence file. *See id.* (petitioner's signature acknowledging receipt of notice); A95-A97 (index of agency's evidence file); A97 (petitioner's signature acknowledging receipt of agency's evidence file).

Petitioner timely responded, in writing and through counsel, on November 17, 2014. *See* A98-A111. Her response ran twelve single-spaced pages and attached twenty-five different exhibits. *Id.*; *see* A110-A111 (exhibit list). She argued that the proceeding was a "sham" and that her removal was politically motivated and a violation of her Fifth Amendment right to due process. A103-A105. She also addressed and rejected each of the charges and specifications against her. A106-A109.

On November 24, 2014, Deputy Secretary Gibson notified petitioner that, after considering her response and all of the evidence, he had "decided to remove [petitioner] from federal service effective immediately." A112-A114. The agency sustained each of the charges and specifications against petitioner. A112-A113. In addition, the Deputy Secretary wrote, "[w]hile I have taken into consideration the various mitigating factors that you raised in your response, I have concluded that the sustained charges against you are of such gravity, both separately and together, that mitigation of the penalty is not warranted." A113.

3. The administrative judge's decision

Petitioner appealed her removal to the Merit Systems Protection Board on December 1, 2014, within the seven-day period provided by 38 U.S.C. § 713(d)(2)(B). *See* A3. Petitioner waived her right to an oral hearing and requested a decision based on the written record. A64. The administrative judge ruled in favor of the agency and upheld petitioner's removal in a lengthy decision issued on December 22, 2014, within the 21-day period provided by section 713(e)(1). *See* A3-A63.

The administrative judge declined to sustain the agency's charge that petitioner had failed to provide adequate oversight of the Phoenix VA. A15-A34. The administrative judge found no reason to doubt the accuracy of the final OIG report's conclusions regarding the serious off-the-books patient backlog under petitioner's leadership, A18, and also recognized that petitioner at no point asserted that she alerted anyone above her to the severity of the situation, A21. He concluded,

however, that the agency had failed to prove any specific act of misconduct constituting a failure of oversight. A15-A16; A21-A22. The administrative judge also concluded that the agency had failed to establish a lack of oversight with respect to petitioner's treatment of DVA whistleblowers. A22-A34.

The administrative judge found, however, that the agency had proved that petitioner placed a DVA whistleblower on administrative leave for disclosing information about patient suicides to Senator McCain's office and that petitioner "knew or should have known" that doing so "could be perceived as retaliation." A35; *see* A34-A38. Indeed, the administrative judge noted, "the underlying facts do not appear to be in real dispute." A35. The administrative judge further rejected petitioner's contention that creating the appearance of reprisal against a whistleblower was not "actionable misconduct" under section 713. A36-A38. The judge explained that section 713 gives the Secretary broad discretion to remove senior executives "if the Secretary determines the performance or misconduct of the individual warrants such removal," A37 (quoting 38 U.S.C. § 713(a)(1)), and that the Secretary was entitled to determine that creating the perception of reprisal against whistleblowers qualified as actionable misconduct for DVA senior executives, A38.

The administrative judge additionally found that the agency had proved that petitioner knowingly accepted thousands of dollars in gifts from a consultant who represented companies seeking contracts with the DVA and, furthermore, that petitioner had knowingly failed to report those gifts on annual ethics forms. A39-

A53. The administrative judge credited the agency's voluminous evidence documenting the gifts, which included not only airline tickets (*e.g.*, A45), Disney computer records (A42), and registration confirmations for gift entries to marathons (*e.g.*, A42), but also email correspondence directly between petitioner and the consultant, *see, e.g.*, A41 ("Enjoy."), A52 ("Good Luck!"); A53 ("Whoooo hoooo!"). The administrative judge found that petitioner knew at the time she accepted these gifts that the consultant was "doing business or seeking to do business directly with the agency." A42. The judge determined that, in at least one instance, petitioner's "official duties as Director of the [Phoenix VA] placed her at the opposite end of the negotiating table from [the consultant's company] and its clients." A43. The administrative judge also found that, when she answered the question on her annual ethics forms requiring disclosure of all gifts in excess of $350 from a single source, petitioner checked "none." A45, A47; *see, e.g.*, A1019.

The administrative judge next discussed and rejected each of petitioner's affirmative defenses. A53-A58. Rejecting petitioner's claim that her removal violated her constitutional right to due process, the administrative judge found that the agency's decision was not dictated by political pressure, A55; that the evidence supported Deputy Secretary Gibson's sworn testimony that he had reached his decision freely and impartially, *id.*; that petitioner had failed to prove that she was deprived of a meaningful opportunity to respond to agency's charges before her

removal, *id.*; and that petitioner had in fact declined an offer from Deputy Secretary Gibson of an extension of time to respond, A57.

Finally, the administrative judge rejected petitioner's contention that removal constituted an unreasonable penalty for her misconduct. A59-A63. Petitioner's conduct, the judge observed, "was not inadvertent." A61. "Sincerely forgetting about one of the plane rides purchased for her might be understandable in some circumstances," but "the notion she actually forgot them all strains credulity." *Id.* "I conclude [petitioner's] offenses are serious and more likely than not, intentional." *Id.* For many of the same reasons, the administrative judge found that petitioner had little rehabilitative potential: "She has steadfastly denied any wrongdoing in the course of this appeal and attempted to deflect attention from her own actions by pointing to political considerations and complaining the agency has been looking in to her private life." A62. Given the seriousness of the allegations against her, the judge observed, "a close look was not unwarranted under the circumstances," and when the agency did look, "it found serious financial improprieties on her part. They are not to be simply ignored." A62-A63.

At the end of his decision, the administrative judge included the following notice: "Pursuant to 38 U.S.C. § 713(e)(2), this decision is final and not subject to any further appeal." A63.

4. Subsequent proceedings

In January 2015, petitioner sought an extension of time to file an appeal from the administrative judge's decision to the full Board. A1. The clerk of the Board refused to act on the motion. *Id.* In a letter to petitioner's counsel, the clerk explained that, pursuant to section 713, the administrative judge's decision was final and not subject to appeal. "Accordingly, the Merit Systems Protection Board will take no further action on this appeal and will not consider any further submissions by the parties." *Id.*

On February 20, 2015, within the sixty-day period otherwise prescribed for petitions for review of decisions of the Board, *see* 5 U.S.C. § 7703(b)(1)(A), petitioner filed this petition for review. Dkt. No. 1. The government moved to dismiss the petition for lack of jurisdiction. Dkt. No. 13. On July 15, 2015, this Court denied the motion and directed the parties to address the Court's jurisdiction in their merits briefs. Dkt. No. 33.

5. Petitioner's criminal guilty plea

In March 2016, the United States charged petitioner with one felony count of willfully making a false statement to a government agency, in violation of 18 U.S.C. § 1001, based on her knowing and intentional failure to report the gifts she received from the consultant. *See United States v. Helman*, No. CR-16-00245, Dkt. No. 4 (D. Ariz. March 4, 2016) (*Helman*) (criminal information).

Petitioner pleaded guilty. *See Helman*, Dkt. No. 38 (filed May 16, 2016) (plea agreement). In her plea agreement, petitioner admitted receiving and intentionally failing to report many of the same gifts that the DVA cited in removing her from the civil service, including the Beyoncé concert tickets, airfare, marathon registration fees, and the Disneyland vacation. *See id.* at 7, 9, 10. She also admitted receiving a variety of additional gifts from the same source, including an automobile, resort spa services, and several checks for cash. *See id.* at 7 (automobile worth $11,900), 8 ($5000 check), 9 (resort spa gift card worth $1000), 10 (checks totaling $16,000).

On May 16, 2016, the district court accepted petitioner's guilty plea and entered judgment on her conviction. *See Helman*, Dkt. No. 36 (filed May 16, 2016).

SUMMARY OF ARGUMENT

Petitioner was properly removed from her senior executive position in the Department of Veterans Affairs for a range of serious misconduct, much of which she subsequently admitted in pleading guilty to a federal criminal offense. Petitioner's removal was affirmed, however, by an administrative judge exercising final and unreviewable discretion under 38 U.S.C. § 713. Under the Appointments Clause, U.S. Const. art. II, § 2, cl. 2, such significant authority can only be exercised by a properly appointed Officer of the United States. The Court should accordingly declare invalid and sever the statutory provision that renders the administrative judge's decision final and unreviewable, *see* 38 U.S.C. § 713(e)(2), as well as the related portions of section

713(e) that are inextricably intertwined with that provision. The Court should then remand this matter to the Board for further proceedings.

1. The government no longer contends that this Court lacks jurisdiction to decide petitioner's constitutional claims. Although Congress provided in 38 U.S.C. § 713(e)(2) that the decision of an administrative judge under section 713 "shall be final and shall not be subject to any further appeal," the Supreme Court has declined to interpret similar provisions to preclude judicial review of constitutional claims. In addition, the government agrees that petitioner's constitutional claims are properly asserted in this Court, rather than in a new action in district court under the Administrative Procedure Act.

2. There is no merit to petitioner's contention that her removal violated her Fifth Amendment right to due process. Petitioner received advance notice, in writing, of each of the charges and supporting specifications relied upon by the agency as a basis for her removal, as well as a copy of the agency's complete evidence file. She was offered an opportunity to tell her side of the story, and did so in writing and through counsel, submitting a twelve-page response with twenty-five exhibits. Finally, she received a post-termination evidentiary hearing before a neutral administrative judge in a proceeding in which the agency carried the burden to prove its charges by a preponderance of the evidence. Petitioner cites no example of a case in which the removal of a public employee under similar procedures was nonetheless held to violate the minimum requirements of due process.

Although petitioner asserts that the agency's decision to remove her was the product of political pressure, she does not—and in light of her criminal guilty plea, could not—suggest that her removal was actually unsupported by the evidence cited by the agency. Nor does petitioner make any attempt to square her arguments on this score with the declaration of Deputy Secretary Gibson, the deciding official. The Deputy Secretary explained under penalty of perjury that he made the decision to remove petitioner based solely on the evidence, after consideration of petitioner's response, and that no agency official pressured him to reach a particular outcome.

Petitioner likewise fails to identify any respect in which her post-termination hearing violated the Due Process Clause. She objects that the 21-day timetable for appeals under section 713 was too abbreviated to permit full discovery. The Constitution, however, does not require discovery in administrative proceedings at all, and in any event petitioner identifies no respect in which she was actually prejudiced by the constraints on discovery. Likewise, petitioner objects that section 713 did not allow the administrative judge to stay the proceeding pending the outcome of her criminal case, but this Court has held that such stays are not constitutionally required. Finally, petitioner asserts that Congress cannot impose an arbitrary deadline that denies an employee a meaningful opportunity for a hearing. Petitioner, however, received a meaningful hearing, and the administrative judge issued his decision within the statutory deadline.

3. Petitioner is correct, however, that section 713 violates the Appointments Clause to the extent it requires the Merit Systems Protection Board to refer an appeal by a DVA senior executive to an administrative judge for resolution in that judge's final and unreviewable discretion. *See* 38 U.S.C. § 713(e)(1)-(2). An MSPB administrative judge is not appointed as an Officer of the United States, but is simply an employee of the Board. Section 713 thus by statute vests a federal employee with the final authority—unreviewable by any Officer in the Executive Branch—to determine whether to uphold the removal of a DVA senior executive, which includes the power to overrule the decision of a Cabinet-level Officer. That scheme, which impairs the President's ability to supervise the execution of the federal civil service laws, is inconsistent with the Appointments Clause.

STANDARD OF REVIEW

Subject-matter jurisdiction is a question of law that this Court reviews de novo. *Litecubes, LLC v. Northern Light Prods., Inc.*, 523 F.3d 1353, 1360 (Fed. Cir. 2008). The constitutionality of an Act of Congress is likewise a question of law that this Court decides de novo. *Brooks v. Dunlop Mfg. Inc.*, 702 F.3d 624, 628 (Fed. Cir. 2012).

ARGUMENT

I. This Court Has Jurisdiction To Decide Petitioner's Constitutional Claims Notwithstanding Section 713(e)(2).

Section 713 permits a senior executive who has been removed by the Secretary to appeal to the Merit Systems Protection Board. 38 U.S.C. § 713(d)(2)(A). The statute specifies, however, that the Board must refer any such appeal to an administrative judge. *Id.* § 713(e)(1). It further provides that, "[n]otwithstanding any other provision of law, including section 7703 of title 5, the decision of [the] administrative judge . . . shall be final and shall not be subject to any further appeal." *Id.* § 713(e)(2).

After the administrative judge affirmed her removal, the Board refused to entertain petitioner's appeal of that decision. *See* A1 (citing section 713(e)(2)). Petitioner then filed this petition for review. The government filed a motion in this Court to dismiss the petition for lack of subject-matter jurisdiction, citing section 713(e)(2). The Court denied the government's motion and directed the parties to address the Court's jurisdiction in their merit briefs. *See* Dkt. No. 33.

After further consideration, the government no longer contends that section 713(e)(2) precludes judicial review of petitioner's constitutional claims. We also agree that petitioner's constitutional challenges are properly raised directly in this Court, rather than in a new civil action in district court.

A. Section 713(e)(2) does not preclude judicial review of petitioner's constitutional claims.

Section 713(e)(2) bars judicial review of the merits of an administrative judge's decision in an appeal under section 713. The statute specifies that the administrative judge's decision shall be final and unappealable "[n]otwithstanding any other provision of law, *including section 7703 of title 5*." 38 U.S.C. § 713(e)(2) (emphasis added). Section 7703, entitled "Judicial review of decisions of the Merit Systems Protection Board," is the only provision of Title 5 that authorizes an employee adversely affected by a decision of the Board to obtain judicial review in this Court. *See* 5 U.S.C. § 7703(a)(1) ("Any employee . . . adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision."); *id.* § 7703(b)(1)(A) (in general, "a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit").

Section 713(e)(2) thus clearly precludes judicial review of the administrative judge's ruling in this case on the merits. But the Supreme Court has consistently declined to interpret provisions like section 713(e)(2) to preclude judicial review of colorable constitutional claims. In *Johnson v. Robison*, 415 U.S. 361 (1974), for example, the Supreme Court held that a statute specifying that administrative decisions related to veterans benefits "shall be final and conclusive and no . . . court of the United States shall have power or jurisdiction to review any such decision," *id.* at 367, did not

preclude judicial review of constitutional challenges to the statute under the First and Fifth Amendments, *id.* at 366-74. Likewise, in *Demore v. Kim*, 538 U.S. 510 (2003), the Court held that a statute providing that certain decisions of the Attorney General "shall not be subject to review" did not foreclose judicial review of constitutional claims. *Id.* at 516-17. In these and other cases, the Supreme Court has explained that "where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear." *Webster v. Doe*, 486 U.S. 592, 603 (1988).

Congress enacted section 713(e)(2) against the backdrop of this settled principle. Congress plainly intended to prohibit judicial review—indeed, to prohibit review by *any* Officer of the United States, executive or judicial—of the merits of the administrative judge's decision. But nothing in the statute or its legislative history indicates that Congress intended to take the additional step of precluding judicial review of constitutional questions. Accordingly, the government concurs with petitioner (Pet. Br. 30-32) that section 713(e)(2) does not preclude judicial review of petitioner's constitutional claims.

B. Jurisdiction is appropriate in this Court.

A related jurisdictional question is whether petitioner's constitutional challenges are properly asserted in *this* Court, or whether instead petitioner should have filed a freestanding action in federal district court under the Administrative Procedure Act. The answer to that question depends on whether petitioner challenges a "final order

or decision *of the Board*" under the statute that channels review of Board decisions directly to this Court. 5 U.S.C. § 7703(b)(1)(A) (emphasis added); *cf. id.* § 703.

The government agrees that the administrative judge's decision is best understood as a final decision "of the Board" for jurisdictional purposes. The administrative judge's decision is plainly not attributable to the three members of the Merit Systems Protection Board themselves, who can neither decide an appeal under section 713 in the first instance nor review the administrative judge's decision. 38 U.S.C. § 713(e)(1)-(2); *see also* A1 (letter to petitioner from the clerk of the Board indicating that the Board could take no action on petitioner's appeal). Indeed, one of Congress's principal purposes in enacting the appeal bar in section 713(e)(2) was to avoid "a second level review by the three-person board at the MSPB." H.R. Rep. No. 113-564, at 80 (2014).

Nevertheless, the statute treats the administrative judge's decision as one rendered on behalf of the Board as an institution. The administrative judge's decision marks the culmination of what Congress expressly described as an appeal "to the Merit Systems Protection Board under section 7701 of title 5." 38 U.S.C. § 713(d)(2). And in any event, petitioner attempted to appeal from the administrative judge to the Board, which refused to entertain her appeal. *See* A1. Her petition for review in this Court seeks review both of the Board's order and of the administrative judge's decision on the merits. *See* Dkt. No. 1. The government accordingly agrees that

petitioner properly seeks review in this Court of a "final order or decision of the Board" within the meaning of section 7703(b)(1)(A).

II. Petitioner Received Due Process.

Petitioner contends that she was removed from her position in violation of her right to due process because (1) she had no meaningful opportunity before her removal to respond to the charges against her, and (2) her post-termination process was constitutionally inadequate. Pet. Br. 50-63. Neither contention has merit.

A. Petitioner received adequate pre-termination process.

"The essential requirements of due process . . . are notice and an opportunity to respond." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985). For the removal of a tenured public employee, the Supreme Court has explained that due process requires only "a very limited hearing prior to [the employee's] termination, to be followed by a more comprehensive post-termination hearing." *Gilbert v. Homar*, 520 U.S. 924, 929 (1997). As a statutory matter, Congress can and often does provide additional procedural protections for federal employees. *See, e.g.*, 5 U.S.C. § 7543(b) (pre-termination rights for employees disciplined under Title 5). As a constitutional matter, however, the "pretermination process need only include oral or written notice of the charges, an explanation of the employer's evidence, and an opportunity for the employee to tell [her] side of the story." *Gilbert*, 520 U.S. at 929. "To require more than this prior to termination would intrude to an unwarranted extent on the

government's interest in quickly removing an unsatisfactory employee." *Loudermill*, 470 U.S. at 546; *accord, e.g., Stone v. FDIC*, 179 F.3d 1368, 1375 (Fed. Cir. 1999).

Petitioner received all of the pre-termination process that the Fifth Amendment requires, and more. She received advance notice, in writing, of each of the charges and supporting specifications relied upon by the agency as a basis for her removal, as well as a copy of the agency's entire evidence file. A90-A94; *see* A94 (petitioner's signature acknowledging receipt of notice of charges); A95-A97 (index of agency's evidence file); A97 (petitioner's signature acknowledging receipt of all evidence in index). She was advised of her right to be "represented by an attorney or other representative . . . at all stages of this matter, up to and including the issuance of the decision." A94. She was offered an opportunity to tell her side of the story, *see id.*, and did so in writing and through counsel, submitting a twelve-page response with twenty-five exhibits. *See* A98-A111. And she received a timely final decision in writing that explained the basis for her removal and provided a clear explanation of her options for seeking further review. A112-A114.

Petitioner makes no serious argument that these procedures were inadequate to satisfy the Fifth Amendment. She argued below that the five business days (eight calendar days) she was afforded to prepare her response were constitutionally inadequate. The administrative judge rejected that contention, however, finding that petitioner had enough time and that she had actually declined Deputy Secretary

Gibson's offer of an extension. A56-A57. Petitioner does not contend in this Court that she was given inadequate time to prepare her response.

She argues, however, that political pressures on the agency precluded a fair consideration of the facts of her case, and that the outcome was thus foreordained. Pet. Br. 52-57. Petitioner makes no attempt to square this assertion with the declaration of Deputy Secretary Gibson, the deciding agency official, who explained under penalty of perjury that he decided to remove petitioner based "solely" on the evidence in the record, including petitioner's response and the attached exhibits. A3760 (¶ 24); *see generally* A3756-A3761 (Gibson declaration). The Deputy Secretary stated that "[n]either the Secretary nor any other [DVA] employee pressured me to make a particular decision concerning the discipline of [petitioner]." A3760-A3761 (¶ 25). He further testified that "I felt no pressure from the media or Congress to take a particular action against [petitioner]; in fact, I do not allow the media or Congress to pressure or influence me in the performance of my official duties as Deputy Secretary." A3761 (¶ 26). The administrative judge credited this testimony and rejected petitioner's argument that the Deputy Secretary was unwilling to give her arguments fair consideration. *See* A55 ("I find insufficient reason to disbelieve the deciding official's sworn claim of impartiality.").

Petitioner quotes various public statements by DVA officials promising to investigate claims of secret wait lists and to discipline or fire the officials who were responsible. *See* Pet. Br. 53-54. Such statements were entirely appropriate, and none

suggested that the DVA would discipline employees without regard to the evidence. Petitioner emphasizes, for example, that Secretary McDonald stated in a November 2014 letter to Congress that the agency had not yet taken personnel actions because the "goal all along has been to collect the appropriate evidence to ensure VA's final administrative actions withstand review." Pet. Br. 54 (quoting A3802) (emphasis omitted). That statement does not suggest a disregard for due process, but the opposite: the Secretary was cautioning Congress that the DVA would not act until it was confident that the evidence supported what it proposed to do. Indeed, in the same November 2014 letter, the Secretary stressed that "when Congress enacts authorities for agencies to use in removing employees, those authorities must be exercised consistent with Constitutional due process, including meaningful notice and an opportunity to be heard before employment is terminated." A3800. *See also* A56 (administrative judge's findings) (concluding that the Secretary simply "assured Congress and the public that the process would proceed as quickly as practicable and that the course of events would be determined by the law and the evidence").

Petitioner also suggests that the agency's November 2014 notice to petitioner of her proposed removal itself demonstrated that the agency had already determined to remove her. Pet. Br. 54-55. Petitioner stresses that the notice began with the statement: "You have engaged in misconduct that warrants removal from federal service." *Id.* at 54 (quoting A90). The Constitution requires that an employee receive notice of her proposed removal and an opportunity to respond. It does not require

that the agency phrase its allegations in equivocal or uncertain terms. In any event, the same November 2014 notice specifically stated that "[t]he final decision to effect this action has *not* been made" (A94) (emphasis added); invited petitioner to "submit a written response . . . showing why the charges are unfounded and any other reasons why your removal should not be effected" (A93); and assured petitioner that the Deputy Secretary would "give full consideration to your reply" (A94).

Finally, petitioner argues that the fact that the administrative judge rejected some of the charges against her shows that the agency had unfairly prejudged her guilt. Pet. Br. 55-57. This contention is difficult to fathom. Petitioner does not and cannot claim that her removal was unsupported by the evidence. Petitioner has admitted in her criminal guilty plea that she accepted and willfully failed to disclose many of the same gifts from a consultant that the DVA cited in removing her, including the Beyoncé concert tickets and Disneyland vacation. *See Helman*, Dkt. No. 38, at 7, 9, 10 (May 16, 2016) (plea agreement).

Moreover, the determination by the administrative judge that the agency failed to carry its burden with respect to certain charges against petitioner does not suggest that the agency impermissibly "pre-judged" these grounds for removal. Indeed, with respect to the charges related to secret wait lists at the Phoenix VA, the administrative judge did not find that petitioner was actually innocent of misconduct. To the contrary, the administrative judge found no reason to doubt the accuracy of the final OIG report's conclusions regarding the serious off-the-books patient backlog under

petitioner's leadership, *see* A18, and he noted that petitioner at no point claimed to have alerted anyone above her to the severity of the situation, *see* A21. The judge refused to sustain petitioner's removal on charge 1, specification A only because he concluded that the agency had not pointed to a *specific* act of misconduct by petitioner, as opposed to a systemic failure of oversight. A15-A16; A21-A22.

Petitioner's reliance on *Ciechon v. City of Chicago*, 686 F.2d 511 (7th Cir. 1982), is thus misplaced. Pet. Br. 56-57. In *Ciechon*, the court of appeals concluded that the city violated due process when it succumbed to media pressure to discharge a paramedic for the death of a patient, concluding that investigators "failed even to look at available documentary evidence" contradicting the city's allegations and that the evidence overall did not "rationally support the decision" to seek the paramedic's removal. *Ciechon,* 686 F.2d at 518. In this case, Deputy Secretary Gibson considered the evidence submitted by petitioner, *see* A3760 (¶ 24), and petitioner now concedes that she committed the "serious financial improprieties" (A63) for which she was found responsible.

B. Petitioner received adequate post-termination process.

Petitioner's contention that she received insufficient *post*-termination process to satisfy the minimum requirements of the Due Process Clause, Pet. Br. 58-62, is similarly without basis. Petitioner received an evidentiary hearing before an impartial administrative judge in a proceeding in which the agency carried the burden to prove its charges by a preponderance of the evidence. *See* A75-A76 (*Burgess* order and

notice). The administrative judge carefully weighed the parties' arguments and evidence and issued a sixty-page written decision analyzing each charge and specification, as well as each of petitioner's affirmative defenses. A3-A63. As discussed below, the unreviewable discretion that section 713 vests in the administrative judge is constitutionally flawed for other reasons. For Fifth Amendment purposes, however, petitioner received all the process that was due.

Petitioner argues that the 21-day timetable for the conduct of appeals under section 713 deprived her of "any meaningful post-termination hearing" because discovery was limited and she was unable to take depositions. Pet. Br. 58. Because there is no general constitutional right to discovery in administrative proceedings at all, *see, e.g., Kelly v. EPA*, 203 F.3d 519, 523 (7th Cir. 2000); *NLRB v. Interboro Contractors, Inc.*, 432 F.2d 854, 857-58 (2d Cir. 1970); 32 Charles Alan Wright & Charles H. Koch, Jr., *Federal Practice and Procedure: Judicial Review of Administrative Action* § 8228 n.1 (1st ed. 2016) ("Discovery is not generally required by due process."), the fact that petitioner was unable to seek all of the discovery to which she would have been entitled in a civil action in federal district court has no constitutional significance. And in any event, notwithstanding the statutory timeline, petitioner did obtain substantial discovery under expedited Board rules developed for cases under section 713. *See* A57 (citing 5 C.F.R. § 1210.12). Petitioner does not identify any factual question that she was prevented from adequately investigating, let alone explain how she was prejudiced by that inability. *Cf. Gambill v. Shinseki*, 576 F.3d

1307, 1311-1312 (Fed. Cir. 2009) (inability to serve interrogatories in veterans benefits proceeding was harmless). As the administrative judge observed, petitioner could also have asked the judge to waive the discovery limitations—for example, to allow a particular deposition—but did not do so. A57.

Petitioner argues that the 21-day deadline violated her right to due process because she was unable to seek a stay of proceedings in light of the pending criminal investigation. Pet. Br. 59-61. As this Court has recognized, however, "[t]he Constitution does not require a stay of civil proceedings pending the outcome of criminal proceedings." *Afro-Lecon, Inc. v. United States*, 820 F.2d 1198, 1202 (Fed. Cir. 1987); *see also United States v. Kordel*, 397 U.S. 1, 11 (1970). Petitioner's assertion that she could not fully respond to the charges related to the gifts she accepted without incriminating herself similarly does not state a due process claim. The Supreme Court has explained that "the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them." *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976). The administrative judge honored petitioner's assertion of her Fifth Amendment privilege against self-incrimination and excused her from responding to various interrogatories, document requests, and requests for admissions. *See* A66. Nothing more was required.

Finally, relying on *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), petitioner argues that the 21-day deadline in section 713 is arbitrary and violates due process on

its face. Pet. Br. 61-62. In *Logan*, the Supreme Court held that an employee could not be denied the opportunity to assert a discrimination claim merely because the responsible state agency, through no fault of the employee's, failed to commence a factfinding conference within the statutorily prescribed period. 455 U.S. at 429-39. Petitioner argues that section 713 creates a risk of similar results because, if the administrative judge had failed to issue a decision within 21 days, her removal would have become final by operation of law. *See* 38 U.S.C. § 713(e)(3). But this case does not present that question, because the administrative judge *did* issue his decision within the statutory period after a full consideration of petitioner's arguments and the evidence. This case is therefore unlike *Logan*, in which the Supreme Court stressed that the employee's claim was terminated without the opportunity "to have the [agency] consider the merits of his charge." 455 U.S. at 434.

III. Section 713 Violates The Appointments Clause.

Petitioner also contends that section 713 violates the Appointments Clause, U.S. Const. art. II, § 2, cl. 2. Petitioner argues that the statute impermissibly vests a federal employee with legal authority of a kind that can only properly be exercised by a constitutionally appointed Officer of the United States. Pet. Br. 36-46.

For the reasons discussed below, the government agrees that section 713 violates the Appointments Clause and infringes on the constitutional prerogatives of the President to the extent that the statute vests an MSPB employee with final authority, unreviewable by any Officer in the Executive Branch, to determine whether

the Secretary's removal of a senior executive comports with the federal civil service laws.[9] The appropriate remedy is to declare invalid and sever the provision of section 713 that renders the administrative judge's decision final and unappealable, *see* 38 U.S.C. § 713(e)(2), as well as the related portions of section 713(e) that are inextricably intertwined with that provision. The Court should then remand this case to the Board for further proceedings.

A. Section 713 impermissibly vests in a federal employee powers that must be exercised by an appointed "Officer[] of the United States."

The Appointments Clause provides:

> [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.

[9] Only in a rare case will the Department of Justice decline to defend the constitutionality of an Act of Congress. It may appropriately do so where, as here, the statute "infringes on the constitutional power of the Executive." *The Attorney General's Duty to Defend the Constitutionality of Statutes*, 43 Op. Att'y Gen. 325, 325-26 (1981) (letter from Att'y Gen. William French Smith to Sen. Strom Thurmond). Pursuant to 28 U.S.C. § 530D(a)(1)(B), the Attorney General notified Congress on May 31, 2016, of the Department's determination that section 713 violates the Appointments Clause. Contemporaneously with the filing of this brief, the parties are filing a joint motion for a 30-day extension of the time for filing petitioner's reply brief to permit Congress time to appear in defense of the statute if it wishes. *See* 28 U.S.C. § 530D(b)(2).

U.S. Const. art. II, § 2, cl. 2. "Officers of the United States," including principal and inferior officers, are those officials of the federal government who "exercis[e] significant authority pursuant to the laws of the United States." *Buckley v. Valeo*, 424 U.S. 1, 125-26 (1976) (per curiam). "Officers" do not include, however, "lesser functionaries subordinate to officers of the United States," who are employees and not subject to the same constitutional requirements. *Id.* at 126 n.162.

The Supreme Court has not further demarcated the boundary between officers and employees, and petitioner's own account seriously overstates the varieties of tasks that can be performed only by "Officers" under the Constitution. Petitioner misreads *Freytag v. Commissioner*, 501 U.S. 868 (1991), for example, in suggesting that the special trial judges of the Tax Court were "Officers" merely because they could "take testimony, conduct trials, rule on the admissibility of evidence, and [had] the power to enforce compliance with discovery orders." Pet. Br. 38 (quoting *Freytag*, 501 U.S. at 881-82). In fact, the special trial judges in *Freytag* had the authority in a variety of circumstances to enter final decisions of the Tax Court, which is an Article I court whose judgments are enforceable by fine or imprisonment. 26 U.S.C. § 7456(c). For that reason, the government "concede[d]" in the Supreme Court that the special trial judges acted as inferior Officers for those purposes. *See Freytag*, 501 U.S. at 882. Likewise, petitioner mistakenly relies (Pet. Br. 38-39) on district court decisions holding that administrative law judges in the Securities and Exchange Commission are inferior Officers. Those decisions, which the government has appealed, cannot be

reconciled with the D.C. Circuit's decision in *Landry v. FDIC*, 204 F.3d 1125 (D.C. Cir. 2000). As *Landry* recognized, ordinary administrative law judges—whose decisions are subject to de novo review by the head of the agency—are employees, not inferior Officers.[10]

In this case, however, the government agrees with petitioner that the authority that Congress assigned to administrative judges under section 713 constitutes "significant authority pursuant to the laws of the United States." Congress created the Merit Systems Protection Board to interpret and apply the federal civil service laws in order to protect the merit-based civil service in the United States. *See generally* Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111. Congress intended the Board to function as a "vigorous protector of the merit system." S. Rep. No. 95-

[10] Petitioner also cites (Pet. Br. 39 n.5) several early Supreme Court cases characterizing various government actors as inferior Officers. But as the D.C. Circuit has recognized, *see Landry*, 204 F.3d at 1132-33, those cases provide a poor compass for modern Appointments Clause analysis because the Supreme Court at that time generally determined whether an official was an Officer of the United States by looking to the prescribed manner of appointment, without any separate inquiry into whether the official exercised significant authority under federal law. *See, e.g.*, *United States v. Mouat*, 124 U.S. 303, 307 (1888) ("Unless a person . . . holds his place by virtue of an appointment by the President, or of one of the courts of justice or heads of Departments authorized by law to make such an appointment, he is not, strictly speaking, an officer of the United States."); *see also Landry*, 204 F.3d at 1132-33 (noting that "the earliest Appointments Clause cases often employed circular logic"); Edward Susolik, *Separation of Powers and Liberty*, 63 S. Cal. L. Rev. 1515, 1545 (1990) (these early cases "posit conclusions rather than arguments and provide little insight"). Petitioner correctly does not advocate that antiquated mode of analysis. *See Buckley*, 424 U.S. at 125-26.

969, at 6 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2723, 2729. Consistent with that public mandate, Congress provided that the Board's members would be appointed by the President and subject to confirmation by the Senate. *See* 5 U.S.C. § 1201.

Section 713 effectively transfers the final adjudicative authority of the Merit Systems Protection Board in an important category of cases to one of the Board's own employees. The statute provides that any appeal from the Secretary's removal of a senior executive in the DVA shall be finally decided, not by the Board, but by an administrative judge. *See* 38 U.S.C. § 713(e)(1)-(2). An "administrative judge" is simply an "employee of the Board designated by the Board" to hear appeals and render initial decisions. 5 U.S.C. § 7701(b)(1); *see also* 5 U.S.C. § 1204(b)(1) (authorizing "any employee of the Board designated by the Board" to "administer oaths, examine witnesses, take depositions, and receive evidence"); 5 C.F.R. § 1201.4 (defining the term "judge" to include any Board employee designated to perform these functions).

The Board's use of administrative judges to render initial decisions generally poses no constitutional difficulties because the Board itself always retains the authority to review an administrative judge's decision, whether on a party's appeal or on the Board's own motion. *See* 5 U.S.C. § 7701(e)(1). The final authority to interpret and apply the civil service laws of the United States thus remains in the hands of officials properly appointed under the Appointments Clause. Under section 713, however, the Board is precluded by statute from hearing an appeal from a DVA

senior executive in the first instance, because Congress required the Board to refer every such appeal to an administrative judge. *See* 38 U.S.C. § 713(e)(1). And the Board is likewise precluded by statute from reviewing the administrative judge's disposition of such a case, because Congress provided that the administrative judge's decision "shall be final and shall not be subject to any further appeal." *Id.* § 713(e)(2).

Section 713 thus authorizes a regular government employee to render a final decision interpreting and applying the federal civil service laws that is, by statute, unreviewable by any constitutionally appointed Officer in the Executive Branch. In rendering that decision, moreover, the employee determines the lawfulness of a personnel action taken by or in the name of the Secretary of Veterans Affairs, a member of the President's Cabinet and a principal Officer of the United States. That kind of significant authority is normally exercised by the Senate-confirmed members of the Merit Systems Protection Board. Congress cannot properly assign such authority to an employee.

B. The Court should cure the constitutional error by declaring invalid section 713(e)(2) and related provisions.

The core of the constitutional defect in section 713 is the provision that renders the decision of the administrative judge final and unreviewable by the Board. *See* 38 U.S.C. § 713(e)(2). That provision had its genesis in a compromise struck in conference committee between the House and Senate versions of the legislation. *See generally* H.R. Rep. No. 113-564, at 79-80 (Conf. Rep.). The Senate bill would have

allowed a senior executive who was removed by the Secretary to obtain review by the Merit Systems Protection Board, which would have been required to issue a decision within 21 days. *Id.* at 79; *see* S. 2450, 113th Cong. § 409 (2014). The House bill, by contrast, would have authorized the Secretary to remove senior executives essentially at will. Conf. Rep. 80; *see* H.R. 4031, 113th Cong. (2014). The conference committee resolved the disagreement by adopting the Senate provision, but "with an amendment to change the level of review at the MSPB." Conf. Rep. 80. Specifically, "[t]he substitute requires that the expedited review by the MSPB be conducted by an Administrative Judge at the MSPB." *Id.* "The substitute does not allow for any further appeal beyond the Administrative Judge, and does not allow for a second level review by the three-person board at the MSPB." *Id.* Both Houses of Congress then passed the conference substitute without further debate.

Striking this amendment will cure the Appointments Clause problem that it introduced into section 713. "Generally speaking, when confronting a constitutional flaw in a statute," a court must "try to limit the solution to the problem," severing any "problematic portions while leaving the remainder intact." *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 508 (2010) (quoting *Ayotte v. Planned Parenthood*, 546 U.S. 320, 328-29 (2006)); *see, e.g.*, *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987) ("[W]henever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it is valid." (alteration in original)). "The

standard for determining the severability of an unconstitutional provision is well established: 'Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.'" *Alaska Airlines*, 480 U.S. at 684 (quoting *Buckley*, 424 U.S. at 108 (quoting *Champlin Refining Co. v. Corporation Comm'n*, 286 U.S. 210, 234 (1932))); *see Carnival Cruise Lines, Inc. v. United States*, 200 F.3d 1361, 1366 (Fed. Cir. 2000).

Applying these principles, the Court should declare section 713(e)(2) invalid and sever it from the remainder of the statute, thereby restoring the traditional—and constitutionally unremarkable—function of the administrative judge as an employee who prepares initial decisions subject to plenary review by the Board. *See* 5 U.S.C. § 7701(b), (e). In addition, the Court should sever and declare invalid two related portions of section 713(e) whose operation is expressly keyed to the finality of the administrative judge's decision: the portion of the first sentence of section 713(e)(3) specifying that a senior executive's removal becomes final if the administrative judge fails to issue a decision within 21 days; and the clause of section 713(e)(5) specifying that a removed employee's disqualification from pay ends "on the date that the administrative judge issues a final decision."[11] 38 U.S.C. § 713(e)(3), (5). These

[11] Section 713(e)(5) simply confirms the general principle, undisputed in this case, that an employee removed from the federal civil service ceases to receive

provisions make little sense in the absence of the finality provision in section 713(e)(2), and there is no reason to believe Congress would have enacted them if it had recognized that foreclosing Board review of administrative judge decisions would violate the Appointments Clause.

With these provisions severed, section 713 both remains fully operative as law and advances the ends that Congress sought to achieve by its enactment. The Secretary has broad discretion to remove or transfer DVA senior executives for misconduct or poor performance. *See* 38 U.S.C. § 713(a)(1). The procedures attending such removals or transfers are streamlined, *see id.* § 713(d)(1), and the Secretary and the Board are still obliged to expedite the resolution of appeals involving the removal of DVA senior executives. *See id.* § 713(e)(1), (6); *see also* Veterans Access Act § 707(b)(1), (3), 128 Stat. 1754, 1800 (codified at 38 U.S.C. § 713 note) (requiring the Board to promulgate rules for the processing of expedited appeals under section 713 and authorizing the Board to waive any regulation as necessary for that purpose). But because the administrative judge's decision is no longer final and unreviewable, the Board has full authority to review the administrative judge's

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compensation and benefits, effective on the date of her removal, unless the removal is set aside.

decision in the ordinary course, *see* 5 U.S.C. § 7701(e), thereby restoring the proper relationship of Officers and employees under the Constitution.[12]

C. This case should be remanded to the Board for further proceedings.

Because petitioner's removal was affirmed by an administrative judge exercising final authority that he could not lawfully exercise under the Constitution, the case should be remanded to the Board for further proceedings. Given petitioner's admission in her recent criminal plea agreement that she knowingly engaged in the financial misconduct for which she was removed, *see Helman*, Dkt. No. 38, at 7, 9, 10 (May 16, 2016), it is difficult to imagine that petitioner will succeed in overturning her removal on the merits. *Cf. Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111, 121 (D.C. Cir. 2015) ("Identifying an Appointments Clause infirmity in a decision does not guarantee that a party will get the merits decision it wants."). But because she is entitled to press that challenge if she chooses under a scheme that satisfies the requirements of the Appointments Clause, remand is appropriate.

[12] Because section 713(e)(2) violates the Appointments Clause, there is no need for the Court to reach petitioner's separate constitutional arguments (Pet. Br. 47-49) concerning the President's power of removal. Limitations on the removal of employees (as opposed to Officers) generally have no constitutional significance. Declaring section 713(e)(2) invalid under the Appointments Clause will therefore render any removal issue moot because the administrative judge will be restored to his proper functions as a federal employee.

CONCLUSION

For the foregoing reasons, the case should be remanded to the Board for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 10,921 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

s/ Mark R. Freeman

Mark R. Freeman

CERTIFICATE OF SERVICE

I hereby certify that on June 1, 2016, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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