APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 25-5025 **September Term, 2024**

1:25-cv-00385-ABJ

Filed On: February 12, 2025

Hampton Dellinger, in his personal capacity and in his official capacity as Special Counsel of the Office of Special Counsel,

Appellee

v.

Scott Bessent, in his official capacity as Secretary of the Treasury, et al.,

Appellants

BEFORE: Katsas*, Childs, and Pan, Circuit Judges

O R D E R

Upon consideration of the emergency motion for stay, the opposition thereto, and the reply, and the February 11, 2025 letter, it is

ORDERED, on the court's own motion, that this appeal be dismissed for lack of jurisdiction. Appellants have not shown that the district court's February 10, 2025 minute order, which entered a three-day administrative stay to afford time to consider appellee's motion for a temporary restraining order, had the effect of granting an injunction that is appealable under 28 U.S.C. § 1292(a)(1). See Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994) (holding that the party asserting jurisdiction bears the burden of establishing it). It is

FURTHER ORDERED that, to the extent appellants request mandamus relief, that request be denied. Appellants have not shown that they are entitled to the extraordinary remedy of mandamus. See Cheney v. U.S. Dist. Ct. for the Dist. of Columbia, 542 U.S. 367, 380-81 (2004). It is

FURTHER ORDERED that the emergency motion for stay be dismissed as moot.

*A statement by Circuit Judge Katsas, concurring in this order, is attached.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 25-5025 **September Term, 2024**

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Clifton B. Cislak, Clerk

BY: /s/

Scott H. Atchue
Deputy Clerk

Katsas, *Circuit Judge*, concurring: This case arises from the President's removal of Special Counsel Hampton Dellinger on Friday, February 7, 2025. On Monday, February 10, Dellinger filed a complaint challenging the removal and sought a temporary restraining order reinstating him. Later that day, before the government was able to file a written opposition, the district court held a hearing on the motion. The same day, the court entered what it described as an "administrative stay" pending further consideration of the TRO motion. The order requires the government to recognize Dellinger as Special Counsel and to provide him access to that Office. The order further prohibits the government from recognizing the President's designation of Doug Collins, the Secretary of Veterans Affairs, as Acting Special Counsel. The order runs through Thursday, February 13, while the district court further considers the pending TRO motion.

The pending TRO motion raises its share of difficulties. For one thing, it would be difficult for Dellinger to show a likelihood of success in light of *Collins v. Yellen*, 594 U.S. 220 (2021), and *Seila Law LLC v. CFPB*, 591 U.S. 197 (2020), which held that Article II of the Constitution prevents Congress from restricting the President's ability to remove officers who serve as the sole heads of agencies that wield significant executive power. For another, it would be difficult for Dellinger to show irreparable injury during whatever modest amount of time may be necessary to adjudicate an expedited motion for preliminary injunction, either to himself or to an agency that would otherwise have a presidentially designated acting head. The entry of a TRO, no less than the entry of a preliminary injunction, would require showings of both a likelihood of success on the merits and interim irreparable injury. *See*, *e.g.*, 11A C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 2951 n.45 (3d ed.) (collecting cases). And the district court, in the order before us today, did not address likelihood of success and made only a tentative finding of possible irreparable injury.

All of that said, the district court has not yet adjudicated even a TRO, much less a preliminary injunction that would be appealable as of right under 28 U.S.C. § 1292(a)(1). To obtain relief at this juncture, the government thus must show both that (1) the administrative stay operates as a TRO, which in turn (2) operates as a preliminary injunction. That requires a functional analysis of, among other things, how intrusive the interim order is and how long it runs. *See*, *e.g.*, *OPM v. AFGE*, 473 U.S. 1301, 1304–05 (1985) (Burger, C.J., in chambers); *Adams v. Vance*, 570 F.2d 950, 952–53 (D.C. Cir. 1978); *see also* Bray, The Purpose of the Preliminary Injunction, 78 Vand. L. Rev. 1, 43–44 (forthcoming 2025). On the record before us, the government invokes serious but abstract separation-of-powers concerns. It is unclear whether these amount to the kind of concrete, immediate, irreversible consequences that would warrant treating an administrative stay or a TRO as a preliminary injunction. *See*, *e.g.*, *Ne. Ohio Coal. for Homeless & SEIU v. Blackwell*, 467 F.3d 999, 1005 (6th Cir. 2006); *Adams*, 570 F.2d at 952; *Belknap v. Leary*, 427 F.2d 496, 497–98 (2d Cir. 1970) (Friendly, J.). But one other consideration cuts strongly against interlocutory review at this juncture: The order at issue by its terms expires *tomorrow*.

In joining this disposition, I express no view on the appealability or merits of any later order granting interim relief to Dellinger based on findings of a likelihood of success or of interim irreparable injury, whether styled as a preliminary injunction or TRO.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAMPTON DELLINGER *in his personal capacity and in his official capacity as Special Counsel of the Office of Special Counsel*, Plaintiff, v. **SCOTT BESSENT** *in his official capacity as Secretary of the Treasury*, *et al.*, Defendants.	Civil Action No. 25-0385 (ABJ)

ORDER

Plaintiff Hampton Dellinger brought this action against defendants Scott Bessent, in his official capacity as Secretary of the Treasury; Sergio Gor, in his official capacity as Director of the White House Presidential Personnel Office; Karen Gorman, in her official capacity as Principal Deputy Special Counsel; Karl Kammann, in his official capacity as the Chief Operating Officer of the Office of Special Counsel; Donald J. Trump, in his official capacity as President of the United States; and Russell Vought, in his official capacity as Director of the Office of Management and Budget. *See* Compl. [Dkt. # 1]. Pending before the Court is plaintiff's motion for a temporary restraining order preventing defendants from removing him from his position as Special Counsel, who heads the Office of the Special Counsel ("OSC"). Pl.'s Mot. for a Temporary Restraining Order [Dkt. # 2] ("Pl.'s TRO"); Compl. ¶ 1.

After receiving plaintiff's motion for a temporary restraining order on February 10, 2025, the Court set what it intended to be scheduling hearing for 4:30 p.m. the same day. *See* Notice of Hr'g (Feb. 10, 2025). At the hearing, counsel for defendants represented that they had not yet had an opportunity to file a response to the motion, and that defendants were "not prepared to" take a position as to whether they would be willing to freeze plaintiff's firing until the Court resolved the legal issues. Tr. of Proceedings [Dkt. # 9] ("Tr.") at 3.

After hearing some argument from both sides with respect to the applicable factors, the Court decided to issue a brief administrative stay so that it could consider the matter with the benefit of the defendants' position. *See* Minute Order (Feb. 10, 2025). The administrative stay ordered that plaintiff continue to serve as Special Counsel until midnight on February 13, 2025. *Id.*

In addition to filing an emergency appeal of the Court's administrative stay, Notice of Appeal [Dkt. # 7],[1] and a motion to stay the Court's administrative stay, Mot. to Stay Ct.'s Administrative Stay [Dkt. # 10], defendants have filed their opposition to the motion for temporary restraining order. Defs.' Opp. to Pl.'s TRO [Dkt. # 11] ("Defs.' Opp.).

1 Defendants' appeal of the administrative stay did not divest this Court of jurisdiction to consider the instant motion. Only "a non-frivolous appeal from the district court's order divests the district court of jurisdiction over those aspects of the case on appeal." *Bombadier Corp. v. Nat'l R.R. Passenger Corp.*, No. 02-7125, 2002 WL 31818924, at *1 (D.C. Cir. 2002), citing *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982). A motion is "frivolous" when its disposition is obvious and the legal arguments are wholly without merit. *Reliance Ins. Co. v. Sweeney Corp.*, 792 F.2d 1137, 1138 (D.C. Cir. 1986). It is well-settled that even a temporary restraining order "is not generally appealable," *Adams v. Vance*, 570 F.2d 950 (D.C. Cir. 1978), and that principle applies to the brief administrative stay entered to preserve the status quo. *See Griggs*, 459 U.S. at 58 ("[N]otice of appeal from unappealable order does not divest district court of jurisdiction."), citing *Ruby v. Sec'y of the U.S. Navy*, 365 F.2d 385, 389 (9th Cir. 1966).

For the reasons stated below, plaintiff's motion for a temporary restraining order will be **GRANTED.**

BACKGROUND

A. Statutory Background

The Office of Special Counsel is an independent agency originally created by the Civil Service Reform Act of 1978 ("CSRA"), 5 U.S.C. § 1206 *et seq.*, to "safeguard" federal civil service employees "who 'blow the whistle' on illegal or improper official conduct." *See Wren v. Merit Systems Protection Bd.*, 681 F.2d 867, 872–83 (D.C. Cir. 1982). The OSC was first established as a part of the Merit Systems Protection Board ("MSPB"), but in 1989, Congress separated the OSC as an independent agency in the Whistleblower Protection Act of 1989, Pub. L. No. 101–12, 103 Stat. 16 (Apr. 10, 1989).

The statute that spells out the powers and functions of the Office of the Special Counsel states that OSC "shall protect [federal] employees, former employees, and applicants for employment from prohibited personnel practices." 5 U.S.C. § 1212(a)(1). To fulfill this mandate, OSC is authorized to "receive and investigate allegations of prohibited personnel practices," and "where appropriate, bring petitions for stays and petitions for corrective action." *Id.* § 1212(a)(2).

The statute enables the agency to operate in three primary ways. First, under section 1213, the agency acts as a confidential channel for a federal employee to disclose "information" that the individual "reasonably believes evidences": (1) "a violation of any law, rule, or regulation"; (2) "gross mismanagement"; (3) "a gross waste of funds"; (4) "an abuse of authority"; or (5) a "substantial and specific danger to public health or safety." *Id.* § 1213(a)(1)(A), (B). The "identity of any individual who makes a disclosure . . . may not be disclosed by the Special Counsel, with certain narrow exceptions. *Id.* § 1213(h). If the Special Counsel determines that there is a

"substantial likelihood" that the information discloses a violation of law, or other enumerated wrongdoing, the Special Counsel asks the relevant agency to investigate and report on the matter. *Id.* § 1213(c). The OSC then reviews the agency's report, gives the whistleblower an opportunity to comment, creates its own assessment of the report, and submits both the agency report and the OSC's findings to Congress and the President. *Id.* § 1213(e). In these types of disclosure cases, the OSC does not have independent authority to investigate. *See generally id.* § 1213.

Second, the agency can "receive" and "investigate" allegations of prohibited personnel practices, including whistleblower and other types of discrimination or retaliation. *Id.* § 1212(a)(2); *id.* § 2302(b)(1)–(14) (defining "prohibited personal practice"). In furtherance of this duty, the OSC may "issue subpoenas" and order "the taking of depositions" and "responses to written interrogatories." *Id.* § 1212(b)(2)(A), (B).

If the OSC determines "that there are reasonable grounds to believe" that a prohibited practice has occurred, exists, or will occur, it can work with the relevant agency to ensure that is corrective action is taken. *See id.* § 1214(b)(2). But, "[i]f, after a reasonable period of time, the agency does not act to correct the prohibited personnel practice," OSC may petition the Merits System Review Board for corrective action. *Id.* § 1214(b)(2)(C); *id.* § 1212(a)(2)(A). The OSC has no authority over the MSPB, which is itself an independent adjudicatory agency. *See id.* § 1202.

Similarly, the OSC has authority under the Hatch Act, 5 U.S.C. § 7321 *et seq.*, to investigate "any allegation" concerning prohibited "political activity" and "any activity relating to political intrusion in personnel decisionmaking." *Id.* § 1216(a)(1), (4). If the Special Counsel determines "that disciplinary action should be taken," the Special Counsel must "prepare a written complaint against the employee" to present to the MSPB, which ultimately adjudicates the matter

and determines whether disciplinary measures are appropriate. *Id.* § 1215. The OSC also has authority to investigate and enforce claims under the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), 38 U.S.C. §§ 4301–35, which prohibits employment discrimination against members of the uniformed services and veterans "because of their service in the uniformed services." 38 U.S.C. §§ 4301(a)(3), 4311. The agency can further "review rules and regulations issued by the Director of the Office of Personnel Management" and can "file a written complaint" with the MSPB if it "finds that any such rule or regulation would, on its face or as implemented, require the commission of a prohibited personnel practice." 5 U.S.C. § 1212(a)(4).

Third, the OSC has reporting obligations to Congress. The Special Counsel must submit a report to Congress "[o]n an annual basis" regarding the "activities" of the agency, which must include, among other things, "the number, types, and disposition of allegations of prohibited personnel practices filed with the Special Counsel and the costs of resolving such allegations." *Id.* § 1218(1)–(13). And each time the OSC resolves an allegation "by an agreement between any agency and an individual," it must submit a report to Congress "regarding the agreement." *Id.* § 1217(b)(1). Further, "on the request of any committee or subcommittee," the Special Counsel or his designee "shall transmit to the Congress . . . by report, testimony, or otherwise, information and the Special Counsel's views on functions, responsibilities, or other matters relating to the Office." *Id.* § 1217(a). That information is also "transmitted concurrently to the President and any other appropriate agency in the executive branch." *Id.*

The Office of the Special Counsel is led by the Special Counsel, 5 U.S.C. § 1211(a), who is "appointed by the President, by and with the advice and consent of the Senate" to serve "for a term of five years." *Id.* § 1211(b). Congress requires that the Special Counsel must "be an attorney

who, by demonstrated ability, background, training, or experience, is especially qualified to carry out the functions of the position." *Id.* And, by statute, "[t]he Special Counsel may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office." *Id.*

B. Factual Background

On October 3, 2023, President Biden nominated Hampton Dellinger to be Special Counsel. Compl. ¶ 30. The Senate confirmed Dellinger on February 27, 2024, and he was sworn into office on March 6, 2024. Compl. ¶ 30. His five-year term will expire in 2029. Compl. ¶ 30.

At 7:22 p.m. on Friday, February 7, 2025, Sergio N. Gor, identified in his email signature as "Assistant to the President, Director of Presidential Personnel Office" sent Dellinger an email that stated simply:

> On behalf of President Donald J. Trump, I am writing to inform you that your position as Special Counsel of the US Office of Special Counsel is terminated, effective immediately."

Ex. A to Compl. [Dkt. # 1-1] ("Ex. A").

Plaintiff filed this action on Monday morning, February 10, 2025, and the complaint consists of five claims. *See* Compl. Count One alleges that the termination by President Trump was *ultra vires* and in "clear violation" of 5 U.S.C. § 1211(b). Compl. ¶¶ 37–41. Count Two alleges that to the extent defendants Bessent, Gor, Gorman, Kammann, and Vought exercise authority on behalf of the Office of Special Counsel without regard to plaintiff's position as Special Counsel, those actions are "not in accordance with law," "contrary to a constitutional right, power, privilege, or immunity," and "in excess of statutory jurisdiction" under the Administrative Procedure Act, 5 U.S.C. § 706(2). Compl. ¶ 43. Count Three seeks a declaratory judgment that the President does not have authority to remove plaintiff absent inefficiency, neglect of duty, or malfeasance in office. Compl. ¶ 45. Count Four alleges a violation of the separation of powers

under Article I, section 8 and Article II, sections 2 and 3 of the Constitution. Compl. ¶ 47. And Count Five seeks a writ of mandamus prohibiting plaintiff's removal from office. Compl. ¶ 50.

ANALYSIS

I. Legal Standard

"A temporary restraining order is an extraordinary remedy, one that should be granted only when the moving party, by a clear showing, carries the burden of persuasion." *Sibley v. Obama,* 810 F. Supp. 2d 309, 310 (D.D.C. 2011), citing *Mazurek v. Armstrong,* 520 U.S. 968, 972, (1997); *Munaf v. Geren,* 553 U.S. 674, 690–91 (2008).

As the Supreme Court explained in *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008), when considering a motion for a preliminary injunction, the Court must consider whether the movant has met its burden of demonstrating that: 1) it "is likely to succeed on the merits"; 2) it is "likely to suffer irreparable harm in the absence of preliminary relief"; 3) "the balance of equities tips in [its] favor"; and 4) an injunction serves the public interest. *Id.* "The court considers the same factors in ruling on a motion for a temporary restraining order." *Morgan Stanley DW Inc. v. Rothe*, 150 F. Supp. 2d 67, 72 (D.D.C. 2001).

The manner in which courts should weigh the four factors "remains an open question" in this Circuit. *Aamer v. Obama*, 742 F.3d 1023, 1043 (D.C. Cir. 2014). For some time, the Court of Appeals adhered to the "sliding-scale" approach, where "a strong showing on one factor could make up for a weaker showing on another." *Sherley v. Sebelius*, 644 F.3d 388, 392 (D.C. Cir. 2011) (citations omitted). However, the *Sherley* opinion explains that because the Supreme Court's decision in *Winter* "seemed to treat the four factors as independent requirements," the Court of Appeals has more recently "read *Winter* at least to suggest if not to hold 'that a likelihood of success is an independent, free-standing requirement for a preliminary injunction.'"

Id. at 393, quoting *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1296 (D.C. Cir. 2009) (Kavanaugh, J., concurring). The Court will follow this approach.

Although the D.C. Circuit has not yet announced "whether the 'sliding scale' approach remains valid after *Winter*," *League of Women Voters v. Newby*, 838 F.3d 1, 7 (D.C. Cir. 2016), it has ruled that a failure to show a likelihood of success on the merits is sufficient to defeat a motion for a preliminary injunction. *See Ark. Dairy Coop. Ass'n, Inc. v. U.S. Dep't of Agric.*, 573 F.3d 815, 832 (D.C. Cir. 2009); *Apotex, Inc. v. FDA*, 449 F.3d 1249, 1253–54 (D.C. Cir. 2006). As another court in this district has observed, "absent a substantial indication of likely success on the merits, there would be no justification for the Court's intrusion into the ordinary processes of administration and judicial review." *Navistar, Inc. v. EPA*, Civil Action No. 11-cv-449 (RLW), 2011 WL 3743732, at *3 (D.D.C. Aug. 25, 2011) (alteration omitted), quoting *Hubbard v. United States*, 496 F. Supp. 2d 194, 198 (D.D.C. 2007).

Regardless of whether the sliding scale framework applies, it remains the law in this Circuit that a movant must demonstrate irreparable harm, which has "always" been a "basis of injunctive relief in the federal courts." *Sampson v. Murray*, 415 U.S. 61, 88 (1974), quoting *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506–07 (1959). A failure to show irreparable harm is grounds for the Court to refuse to issue an injunction, "even if the other three factors entering the calculus merit such relief." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006).

II. The likelihood of success on the merits.

The Court finds that there is a substantial likelihood that plaintiff will succeed on the merits. The effort by the White House to terminate the Special Counsel without identifying any cause plainly contravenes the statute, which states, "[t]he Special Counsel may be removed by the

President only for inefficiency, neglect of duty, or malfeasance in office." 5 U.S.C. § 1211(b). This language expresses Congress's clear intent to ensure the independence of the Special Counsel and insulate his work from being buffeted by the winds of political change.

Defendants' only response to this inarguable reading of the text is that the statute is unconstitutional. Defs.' Opp. at 8–11. But no court has said so, and to date, the Supreme Court has taken pains to carve the OSC *out* of its pronouncements concerning the President's broad authority to remove officials who assist him in discharging his duties at will. Moreover, the reasoning underlying the decisions relied upon by defendants does not extend to the unique office and official involved in this case.

In *Seila Law LLC v. CFPB,* 591 U.S. 197 (2020), a party resisting a civil investigative demand ("CID") issued by the Consumer Finance Protection Bureau ("CFPB") challenged the legitimacy of the agency's structure. *Id.* at 208. The Ninth Circuit upheld the for-cause removal protection for the single head of the independent agency, agreeing with the *en banc* decision of the D.C. Circuit in *PHH Corp. v. CFPB,* 881 F.3d 75 (D.C. Cir. 2018). *See CFPB v. Seila Law LLC*, 923 F.3d 680, 682 (9th Cir. 2019). The Supreme Court granted certiorari. Because the government agreed with the petitioner on the constitutional issue, the Court appointed an amicus to defend the judgment of the Ninth Circuit. *Seila Law*, 591 U.S. at 209

The Court began by repeating its prior holding that "'as a general matter,' the Constitution gives the President 'the authority to remove those who assist him in carrying out his duties." *Id.* at 204, quoting *Free Enterprise Fund v. Pub. Co. Acct. Oversight Bd.,* 561 U.S. 477, 513–14 (2010). It explained that "[t]he President's power to remove – and thus supervise – those who wield executive power on his behalf flows from the text of Article II," and that "[w]ithout such

power, the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else." *Seila* Law, 591 U.S. at 204.

But the Court did not announce a blanket rule that the President has the power to remove the head of every independent agency led by a single director, as defendants would have this Court believe. The Court held that the CFPB's leadership by a single individual removable only for statutorily prescribed reasons violated the separation of powers, *id.* at 205, and it went into considerable detail as to why the Director of the CFPB in particular should not be shielded from Presidential control.

Before it turned its attention to the CFPB, the Court reviewed its prior decisions concerning the President's removal power in general, and it repeated its observation in *Humphrey's Executor v. United States*, 295 U.S. 602, 631–32 (1935) that Congress's ability to impose removal restrictions "will depend upon the character of the office." *Seila Law*, 591 U.S. at 215. *Humphrey's Executor* involved the President's authority to replace five members of the New Deal-era Federal Trade Commission ("FTC"), and looking at the agency as it was constituted in 1935, the Court held that the restrictions on replacing the panel members were lawful. *Humphrey's Executor*, 295 U.S. at 619, 623–25, 628–29. In the *Seila Law* opinion, the Supreme Court listed some of the circumstances that animated its opinion in *Humphrey's Executor*, and several of them pertain to the OSC today: the Court noted that the agency performed specified duties to aid the legislature, such as making investigations and reports to Congress, and like the OSC, the five member board of the FTC was "designed to be non-partisan and to act with entire impartiality." *Seila Law*, 591 U.S. at 215–16 (internal quotation marks omitted). The *Seila Law* Court also pointed out that *Humphrey's Executor* found that "[t]he FTC's duties were 'neither political nor executive,' but

instead called for 'the trained judgment of a body of experts' 'informed by experience.'" *Id.* at 216, quoting 295 U.S. at 64.

Here we have a statute that incorporates Congress's judgment with respect to the qualifications to be the Special Counsel, *see* 5 U.S.C. § 1211(b) ("The Special Counsel shall be an attorney who, by demonstrated ability, background, training, or experience, is especially qualified to carry out the functions of the position."), as well as the restrictions on removal. *Id.* *Seila Law* summed up *Humphrey's Executive* as recognizing the President's "unrestrictable power . . . to remove *purely executive* officers," but it did not extend the principle to less obvious situations. *Seila Law*, 591 U.S. at 217 (emphasis added).

The *Seila Law* court also chose not to walk away from the Court's decision in *Morrison v. Olson*, 487 U.S. 654 (1988) that upheld the statutory protection from removal afforded to an independent counsel under the now-defunct Independent Counsel Act. *See Seila Law*, 591 U.S. at 217–18. Even though the independent counsel was a single person exercising law enforcement functions typically performed by the executive branch, the Court held that the requirement of for-cause removal did not unduly interfere with the President's powers because the petitioner was "an inferior officer under the Appointments Clause, with limited jurisdiction and tenure and lacking policymaking or significant administrative authority." *Morrison*, 487 U.S. at 691. While plaintiff does not argue here, and the Court would not presume to rule at this time that the Special Counsel is an "inferior officer" akin to a naval cadet engineer, *see United States v. Perkins*, 116 U.S. 483, 485 (1886), it is relevant that like the independent counsel, plaintiff does not appear to have policymaking or significant administrative authority.

Seila Law then differentiated the agency officials it found were entitled to protection from removal in *Humphrey's Executor* from the Director of the CFPB:

> [T]he CFPB Director is hardly a mere legislative or judicial aid. Instead of making reports and recommendations to Congress, as the 1935 FTC did, the Director possesses the authority to promulgate binding rules fleshing out 19 federal statutes, including a broad prohibition on unfair and deceptive practices in a major segment of the U.S. economy. And instead of submitting recommended dispositions to an Article III court, the Director may unilaterally issue final decisions awarding legal and equitable relief in administrative adjudications. Finally, the Director's enforcement authority includes the power to seek daunting monetary penalties against private parties on behalf of the United States in federal court—a quintessentially executive power not considered in *Humphrey's Executor*.

Seila Law, 591 U.S. at 218–19. And then it distinguished the Director of the CFPB from the independent counsel in *Morrison*:

> Unlike the independent counsel, who lacked policymaking or administrative authority, the Director has the sole responsibility to administer 19 separate consumer-protection statutes that cover everything from credit cards and car payments to mortgages and student loans. It is true that the independent counsel in *Morrison* was empowered to initiate criminal investigations and prosecutions, and in that respect wielded core executive power. But that power, while significant, was trained inward to high-ranking Governmental actors identified by others, and was confined to a specified matter in which the Department of Justice had a potential conflict of interest. By contrast, the CFPB Director has the authority to bring the coercive power of the state to bear on millions of private citizens and businesses, imposing even billion-dollar penalties through administrative adjudications and civil actions.

Id. at 219.[2]

All of this points to a conclusion that *Seila Law* does not answer the question presented in this case. While the Special Counsel's role is not entirely analogous to that of the FTC panel

2 The Court also observed that the CFPB does not rely on the annual Congressional appropriations process, but it receives its funding directly from the Federal Reserve, which is also funded outside the appropriations process. *Seila Law*, 591 U.S. at 207; *see also id.* at 225 ("The Director does not even depend on Congress for annual appropriations.") and 226 ("The CFPB's receipt of funds outside the appropriations process further aggravates the agency's threat to Presidential Control."). The OSC does not present these concerns.

members from 1935 or an individual appointed under the old Independent Counsel Act, who was confined to a single criminal prosecution, the circumstances do not present the sort of concerns that troubled the Supreme Court when it looked at the functions assigned to the Director of the CFPB.

Indeed, the Chief Justice took the trouble to say just that.

The CFPB's defenders tried to compare the agency to the OSC, but the Court resisted the analogy:

> The OSC exercises only limited jurisdiction to enforce certain rules governing Federal Government employers and employees. *See* 5 U.S.C. § 1212. It does not bind private parties at all or wield regulatory authority comparable to the CFPB.

Id. at 221.[3]

This Court's review of the statutory provisions establishing the Special Counsel's purview confirms that the agency is not "comparable to the CFPB," *id.*, and that *Seila Law* does not compel the conclusion advanced by the defendants. One can hardly describe the OSC as "an independent agency led by a single director *and vested with significant executive power*" as *Seila Law* described the CFPB. *Id.* at 220 (emphasis added). Therefore, the showing that the statute establishing the

3 Before making this comparison, the Court did point out that while the OSC had been headed by a single officer since 1978, its structure "drew a contemporaneous constitutional objection from the Office of Legal Counsel under President Carter and a subsequent veto on constitutional grounds by President Reagan." *Seila Law*, 591 U.S. at 221, citing *Memorandum Opinion for the General Counsel, Civil Service Commission*, 2 Op. O.L.C. 120, 122 (1978); Public Papers of the Presidents, Ronald Reagan, Vol. II, Oct. 26, 1988, 1391–92 (1991). It is equally worth observing that notwithstanding that opinion, President Carter signed the legislation in 1978, and that after President Reagan's action in 1988, negotiations concerning the legislation continued, and President George H.W. Bush signed the Whistleblower Protection Act into law in 1989. The Court has not been provided with materials showing that any administration since then has sought to have the statute amended.

Office of Special Counsel has been unquestionably violated supports a finding that plaintiff has made the necessary showing of a likelihood of success on the merits.

The holding in *Collins v. Yellin,* 594 U.S. 220 (2021), does not compel a different conclusion. The opinion reiterated the importance of guarding against new intrusions on the President's Article II powers, and it explained that the "nature and breadth of an agency's authority" should not be "dispositive in determining whether Congress may limit the President's power to remove its head." *Id*. at 251–52. The Court rejected the notion that it should apply different rules depending on an agency's size, power, or perceived "importance." *Id.* at 252–53. But when the court-appointed *amicus curiae* in that case warned that a decision invalidating the removal restrictions in the Housing and Economic Recovery Act would call into question the constitutionality of other agencies, including the OSC, the Court chose to reply, "[n]one of these agencies is before us, and we do not comment on the constitutionality of any removal restriction that applies to their officers." *Id.* at 256 n.21.

Also, while the opinion made clear that the number of individuals or businesses regulated by any particular agency should not be the touchstone, it noted that the agency in question, the Federal Housing Finance Agency, did in fact "regulate[] a small number of Government-sponsored enterprises," receiving roughly half of its budget from those regulated entities. *Id.* at 251. It also pointed out:

> [W]hile the CFPB has direct regulatory and enforcement authority over purely private individuals and businesses, the FHFA has regulatory and enforcement authority over two companies that dominate the secondary mortgage market an have the power to reshape the housing sector . . . . FHFA actions with respect to those companies could have an immediate impact on millions of private individuals and the economy at large.

Id. at 253; *see also id.* at 224 ("[T]he President's removal powers serves important purposes regardless of whether the agency in question affects ordinary Americans by directly regulating them or by taking actions that have a profound but indirect effect on their lives.") These things cannot be said about the OSC, even if, like the FHFA, it is authorized to issue subpoenas. *See id.* at 254.[4]

The OSC is not an agency endowed with the power to articulate, implement, or enforce policy that affects a broad swath of the American public or its economy. It does not have broad rulemaking authority or wield substantial enforcement authority over private actors; it has no authority over private actors. It is an agency with limited jurisdiction: its job is to investigate government employees' allegations of specifically identified prohibited personnel practices, and where appropriate, to seek corrective or disciplinary action. The agency's statutory functions require it to report directly to Congress about what it has found and whether any executive agency has stood in its way. While the federal workforce includes a large number of

4 It is notable that after *Collins*, the Office of Legal Counsel issued an opinion firmly concluding that the combination of the rulings in *Seila Law* and *Collins* compelled the conclusion that the protections against removing the Commissioner of the Social Security Administration ("SSA") were constitutionally infirm. *Constitutionality of the Commissioner of Social Security's Tenure Protection*, 45 Op. O.L.C. __, 1 (O.L.C. July 8, 2021). But the OLC included an explicit caveat that this vindication of the President's prerogative did not necessarily extend to the Office of Special Counsel. *See id.* at 10 n.3 ("This opinion does not address the validity of tenure protections conferred on the Special Counsel, whose removal restrictions implicate different considerations," contrasting the massive impact, enormous budget, and exceptionally broad rulemaking authority of the SSA with the OSC's right to recommend regulatory changes); *see also id.* at 15, citing *Seila Law*, 591 U.S. at 217–18 ("We emphasize the limited scope of our conclusion regarding the [SSA] Commissioner. It does not imply any similar determination with respect to the validity of tenure protections conferred on other executive officials – for example, the Special Counsel, another single member agency had whose removal restrictions implicate different considerations, such as the Special Counsel's primary investigative function and 'limited jurisdiction.'").

people, the Special Counsel is only called upon to interact with a small subset of them on an individual basis, and only in connection with one aspect of their personal employment situations; he does not guide or direct them in any way in connection with the policies they will promulgate or implement in the course of that employment.

In sum, the OSC is an independent agency headed by a single individual, but otherwise, it cannot be compared to those involved when the Supreme Court found the removal for cause requirement to be an unconstitutional intrusion on Presidential power.

III. Irreparable harm

Next, the plaintiff must show that he is likely to suffer irreparable harm in the absence of preliminary relief. *Winter*, 555 U.S. at 20.

The D.C. Circuit "has set a high standard for irreparable injury" – it "'must be both certain and great; [and] it must be actual and not theoretical.'" *Chaplaincy of Full Gospel Churches,* 454 F.3d at 297, quoting *Wisc. Gas Co. v. FERC,* 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam). The same opinion instructs that "the injury must be beyond remediation." *Id.* It explains:

> The key word in this consideration is *irreparable.* Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation weighs heavily against a claim of irreparable harm.

Id. (emphasis in original), quoting *Va. Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958).

Plaintiff asserts that being deprived of his "statutory entitlement to serve as the lawful agency head of OSC" – his right to fulfill the five-year position created and defined by Congress to which he was nominated and confirmed by the Senate – has caused and will continue to cause him to suffer irreparable harm. Pl.'s TRO at 14–15. He submits that this is not something that can

be remediated with economic damages, and it is compounded by the loss of the opportunity to fulfill the duty he owes to all federal employees, and whistleblowers in particular, regardless of their political affiliation, to be free from prohibited practices on the part of federal agencies. *See* Pl.'s TRO at 15.

Defense counsel announced at the hearing that injunctive relief was completely foreclosed by *Sampson v. Murray*, 415 U.S. 61 (1974), which counsel represented to be "binding precedent that job loss does not constitute irreparable harm." Tr. at 4, 6. Defendants backed away from that overstatement in their written submission and argued that under *Sampson,* "[t]he loss of government employment constitutes irreparable harm only in a genuinely extraordinary situation," Defs.' Opp. at 2 (internal quotations omitted), and they maintain that the circumstances in this case do not meet that test.

But that authority is entirely distinguishable. In *Sampson*, the district court temporarily enjoined the discharge of a "probationary employee" from the General Services Administration pending an administrative appeal to the Civil Service Commission. *Sampson*, 415 U.S. at 62–63. The plaintiff claimed that the discharge, which came just four months after she started, would cause irreparable harm by depriving her of income and causing "her to suffer the embarrassment of being wrongfully discharged." *Id.* at 62–63, 66.

It is well established now, of course, that allegations of economic losses that can be cured with money damages do not constitute irreparable harm. But there is no claim for lost earnings or compensation in the complaint.

Sampson held that while a district court "is not totally without authority to grant interim injunctive relief to a discharged [g]overnment employee," *Sampson*, 415 U.S. at 63, the claimed irreparable injury was insufficient to support a temporary injunction. *Id.* at 92–93. The Court

explained that the irreparable harm must be "in kind and degree to override" three factors that the court should "give serious weight": (1) the "disruptive effect which the grant of the temporary relief" has on the administrative process; (2) "the well-established rule that the [g]overnment has traditionally been granted the widest latitude in the dispatch of its own internal affairs"; and (3) "the traditional unwillingness of courts . . . to enforce contracts for personal service." *Id*. at 83 (internal quotation marks omitted). But *Sampson* recognized that:

> [C]ases may arise in which the circumstances surrounding an employee's discharge, together with the resultant effect on the employee, may so far depart from the normal situation that irreparable injury might be found. Such extraordinary cases are hard to define in advance of their occurrence . . . . [W]e do not wish to be understood as foreclosing relief in the genuinely extraordinary situation. Use of the court's injunctive power, however, when discharge of probationary employees is an issue, should be reserved for that situation rather than employed in the routine case.

Id. at 92 n.68.

This is not a routine case. There is no contract for personal services involved, and plaintiff is not a "probationary employee"; he was appointed to serve the statutory term of five years. Compl. ¶ 30. The *Sampson* court observed that it was "dealing . . . not with a permanent Government employee, a class for which Congress has specified certain substantive and procedural protections, but with a probationary employee, a class which Congress has specifically recognized as entitled to less comprehensive procedures." *Sampson*, 415 U.S. at 80–81. So, its analysis is of little utility here.

There are no facts to suggest that an order maintaining Dellinger in the role he occupied for the past year would have a "disruptive" effect on any administrative process; if anything, it

would be his removal that is disruptive, as he suggests.[5] And while it may be that the government traditionally has wide "latitude" in dispatching its internal affairs, whether it does or should have that latitude in the face of a statutory provision to the contrary is the question at the heart of the merits.

Furthermore, plaintiff's irreparable injury cannot be compared to the loss of income or embarrassment involved in the typical employment action, for which there are remedies that do not involve equitable relief. This case falls outside of the typical paradigm since the OSC is an independent agency and the White House is not plaintiff's employer. In short, plaintiff's injury stems directly from "extraordinary" circumstances as *Sampson* requires; namely, that for the first time, a President has removed the Special Counsel from his statutorily prescribed term without any cause or explanation.

Plaintiff relies on *Berry v. Reagan*, Civil Action No. 83-3182, 1983 WL 538 (D.D.C. Nov. 14, 1983), and the Court finds it to be instructive although not on all fours with the instant situation. In *Berry*, the plaintiffs moved for a temporary restraining order and preliminary injunction "to enjoin the President . . . from removing them as Commissioners of the U.S. Commission on Civil Rights." *Id.* at *1. The Commission was a "temporary, bipartisan agency established by Congress," that was "composed of six members, appointed by the

5 By hanging their hat on *Sampson,* defendants imply that it would be too disruptive to the business of the agency to have Special Counsel Dellinger resume his work. But any disruption to the work of the agency was occasioned by the White House. It's as if the bull in the china shop looked back over his shoulder and said, "What a mess!" Moreover, any disruption caused by the proposed temporary restraining order would be minimal; plaintiff served as Special Counsel from March 6, 2024 through the end of the workday on Friday, February 7, 2025. Compl. ¶¶ 2, 30, He received the email announcing that his position was terminated later that evening, and according to defendants, the Acting Special Counsel took over on Monday morning. By Monday night, this Court had already entered an administrative stay restoring the Special Counsel to the position he'd occupied for the prior year. *See* Minute Order (Feb. 10, 2025). Defendants have not proffered any facts to show that maintaining this rapid return of the torch will affect agency operations.

President, . . . with the advice and consent of the Senate," who investigated and collected information "regarding deprivations of both civil rights and equal administration of justice." *Id.* To perform its function, the Commission was permitted to "hold hearings and issue subpoenas for the attendance and testimony of witnesses and the production of evidence." *Id.* One month before the Commission was set to expire, President Regan terminated the plaintiffs from the Commission. *Id.* at 1, n.1.

Berry undertook to apply the *Sampson* test that "a federal employee seeking injunctive relief must make a strong showing of irreparable injury 'sufficient in kind and degree to override the factors cutting against the general availability of preliminary injunctions [such as disruption of the administrative process] in Government personnel cases.'" *Berry*, 1983 WL 538 at *5, quoting *Sampson*, 415 U.S. at 84. It then explained that the "deprivation of [plaintiffs'] statutory right to function as Commissioners until the Commission expires," and "their unlawful removal from office by the President" did constitute irreparable injury. *Id*. The Court noted the "obviously disruptive effect" that denial of preliminary relief would have on the Commission's final activities, including that it would leave the Commission "without a quorum" to conduct its mandated "wind–up" duties. *Id.* The Court further stated it was "not clear that the President has the power to remove Commissioners at his discretion," and that the plaintiffs did not have "administrative, statutory, or other relief that is readily available to many federal employees." *Id.*

While the Special Counsel is not a "temporary" employee with a set term in which his duties must be completed, plaintiff was appointed for a fixed term, and he has a statutory mission that his removal has rendered him unable to fulfill: to "protect employees, former employees, and applicants for employment from prohibited personnel practices." 5 U.S.C. § 1212. And the loss

of the ability to do what Congress specifically directed him to do cannot be remediated with anything other than equitable relief.[6]

Defendants insist, though, that there is authority that has already foreclosed the argument that the deprivation of a "statutory right to function" is irreparable harm. Defs.' Opp. at 2. They note that in *English v. Trump*, 279 F. Supp. 3d 307 (D.D.C. 2018), "another district court in this Circuit rejected the identical argument in analogous circumstances." Defs.' Opp. at 2. But putting aside the point that district court opinions are not binding on this Court, the circumstances in *English* are in no way "analogous."

The statute establishing the Consumer Finance Protection Bureau prescribes that the Deputy Director "shall . . . serve as acting Director in the absence or unavailability of the Director." 12 U.S.C. § 5491(b)(5). In *English*, the Director of the CFPB resigned and named the plaintiff as his Deputy Director in what the court characterized as "an apparent attempt to select his successor." *English*, 279 F. Supp. 3d at 311. Meanwhile, the President appointed a different acting Director pursuant to his power under the Federal Vacancies Reform Act of 1998. *Id*. The plaintiff filed suit to temporarily enjoin the President's pick from serving as the head of the CFPB

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6 Plaintiff directs the court to another district court opinion, *Mackie v. Bush*, 809 F. Supp. 144 (D.D.C. 1993), but it is not comparable. *See* Pl.'s TRO at 15. In *Mackie*, the plaintiffs were members of the Board of Governors of the Postal Service Board, which was "a party to litigation pending" in the D.C. Circuit. 809 F. Supp. at 144–145. The President threatened to remove the plaintiffs if they did not withdraw from that lawsuit, and the district court temporarily enjoined "removal of the plaintiffs" because the removal "could jeopardize" the jurisdiction of the D.C. Circuit over the Postal Service Board's pending suit, which could have determined that the Board was "independent." *Id.* at 146. The Court also noted that "in the circumstances here, neither a damages remedy nor a declaratory judgment would provide an adequate remedy" because "neither a damage award in the Claims Court nor a declaratory judgment in [the district court] would afford our Court of Appeals, and thus the Judicial Branch, an opportunity to protect its jurisdiction over a matter pending before it and the several issues lurking there." *Id.* at 147 (footnote omitted). So, the procedural and jurisdictional concerns dictating temporary relief do not pertain here.

and restrain the President from appointing any acting Director other than herself. *Id.* at 315. The court summarized the issue presented as "whether the President is authorized to name an acting Director of the [CFPB] or whether his choice must yield to the ascension of the Deputy Director, who was installed in that office by the outgoing Director in the hours before he resigned." *Id.* at 311. The court denied the temporary relief on the grounds that the plaintiff had not demonstrated a likelihood of success on the merits, not had she made a showing of the necessary irreparable harm. *Id.* at 333, 336.

In making that finding, the court looked to *Sampson* and it differentiated the case before it from the way *Sampson* was applied in *Berry.* It noted that in *Berry,* the court considered the Commission's inability to complete its work and the individual plaintiffs' injury to be one and the same: the frustrated statutory objective also applied to each of them personally, as they could not do what they had been appointed and confirmed to do. *Id.* at 335. But English, according to the court, did not identify any harm that she would suffer personally if the injunction did not issue, as the work of the agency would go forward. *Id.* And while she may have been appointed as Deputy Director in a manner that was arguably consistent with the governing statute, she did not occupy a position established by Congress, for which she was subject to Senate confirmation, like the plaintiff in our case does.

But the more significant distinction drawn by the court in *English* was that "in *Berry,* the plaintiffs were attempting to preserve a status quo in which they had a 'statutory right to function as Commissioners,' after they were appointed by President Carter, with the advice and consent of the Senate, pursuant to the authorizing statute of the Commission. In contrast, there was never a time here in which English functioned as the CFPB's acting Director." *Id*. (citation omitted). In other words, the requested order requiring the President to withdraw his choice for acting Director

and name the plaintiff to that position would not restore the "status quo," which is defined as the "last uncontested status which preceded the pending controversy," *Id*. at 335–36, citing *District 50, United Mine Workers of Am. v. Int'l Union, United Mine Workers of Am.*, 412 F.2d 165, 168 (D.C. Cir. 1969). Plaintiff had never been the acting Director, but she was simply picked by the outgoing Director to serve as his Deputy, who would be entitled to then ascend to the Director's position.[7]

Finally, defendants argue that the harm is not irreparable because the OSC "continues to operate" with another individual "functioning as acting Special Counsel." Defs.' Opp. at 13 (internal quotations omitted); Tr. at 4 ("There is currently an acting special counsel who is another official from the Office of Special Counsel who is serving in that rule currently."). Plaintiff submits that whether the agency is still up and running in some format, with some person at the helm, is not the point. He is concerned that in the absence of a leader lawfully appointed to fulfill the statutory duties of the Special Counsel, there would be no way to ensure the confidentiality and continuity of ongoing matters under his purview, no clarity as to what employees who have been subjected to prohibited actions or retaliation should do or where they should turn, and no

7 Defendants also argue that the harm is not irreparable because if plaintiff prevails in this lawsuit, he can be restored to his position then. *English* did observe that while the harm suffered by the plaintiff Commissioners in *Berry* was irreparable because once the term of the Commission expired, they could no longer be reappointed to it by a court, English could be reinstated to the "Acting" Deputy slot if her suit succeeded. *See English*, 279 F. Supp. 3d at 335. Here, plaintiff worries that unless he is restored to his position, the President could choose to fill the vacancy he unlawfully created, extinguishing any possible judicial remedy. That appears to be less speculative than the scenario rejected by the court in *English,* where the President had not just deposed the Senate-confirmed agency head. But even if the Court were to find *English* to be instructive, it would not advance the defendants' position given the fundamental difference between the equitable relief the plaintiff is seeking here and what was at issue in *English*. Dellinger wants to maintain the Presidential appointment he held until his removal; English was seeking an appointment to a position for which she was eligible, but she never received. Moreover, English is not a fair comparator as she was not ejected from a Presidential appointment with a fixed term.

assurance that only people with appropriate authorization will access the confidential and sensitive information maintained by the OSC, including information it is required by statute to keep secret. *See* 5 U.S.C. § 1213(h); Tr. at 18–19.

Plaintiff's assertion that it is irreparable harm to be deprived of the ability to perform his statutory functions and fulfill his statutory obligations to current and future whistleblowers overlaps considerably with his argument on the merits: that it is Congress that established his position, his duties, and the sole grounds for his removal, and that the structure of the OSC reflects a Congressional determination that his independence is fundamental to the position it created. One problem in *English* was that the Court found that the complaint failed on the merits, while this Court has already found that plaintiff has made a strong showing of success on the merits. Since it also it finds that he has made a sufficient showing, for now, that these harms are indeed significant, impending, and irreparable, it will, consistent with *Winter* and *Sherley*, go on to the third and fourth factors.

IV. The balance of the equities and the public interest

Plaintiff advances the arguments concerning the third and fourth factors together, Pl.'s TRO at 16–17, and defendants' response addresses them together as well. Defs.'s Opp. at 14–15. The Court agrees that in this case, they are necessarily intertwined: plaintiff is a public official suing public officials, and both the scope of legitimate Presidential authority and the existence and extent of any remedies available to displaced civil servants and officials are very much matters of public interest.

Plaintiff maintains that recent "personnel actions have generated widespread uncertainty," and that "[i]n this context, the proper functioning of the OSC is more vital than ever." Pl.'s TRO at 16. According to plaintiff, his termination "creates a gap in protections provided by the OSC,

risking severe confusion over the leadership, mission, and role of the agency (as well as doubt over the lawfulness of any actions that it takes and fear that confidential information may fall into unauthorized hands)." *Id*.

For purposes of the temporary restraining order, the Court can and will consider these factors without characterizing or purporting to address the lawfulness of Presidential actions that have not been presented to it for review and may well be the subject of proceedings before other courts.

Defendants tie their argument to the merits: that the relief requested would cause harm to the Executive and to the separation of powers by intruding on his Article II authority. Defs.' Opp. at 2, 14–15. But they proffer no circumstances that required the President's hasty, unexplained action, or that would justify the immediate ejection of the Senate-confirmed Special Counsel while the legal issue is subject to calm and thorough deliberation.

The Office of Special Counsel is a unique federal agency with a unique, but narrow focus. Congress created the position of Special Counsel to play a singular and important role that has strong bipartisan support: to protect whistleblowers within the executive branch from reprisals and prohibited personnel practices, even as administrations change hands. *See* Whistleblower Protection Act of 1989, Pub. L. No. 101–12, 103 Stat. 16 (Apr. 10, 1989) ("[T]he primary role of the Office of Special Counsel is to protect employees, especially whistleblowers, from prohibited personnel practices[.]"). Notwithstanding defendants' assertion, unsupported by any authority, that "the public interest is better served by a Special Counsel who holds the President's confidence," Defs.' Opp. at 15, Congress contemplated and established a structure that reflects a different priority. Independence is essential to any Special Counsel's ability to perform the unique set of duties and reporting requirements set forth in the statute. Defendants have identified no

impending injury or alleged constitutional error that cannot be fixed in the future that would outweigh the harm that will flow from the precise circumstance Congress deliberately chose to prohibit. Therefore, the Court finds that the last two factors weigh heavily in favor of the temporary restraining order.

CONCLUSION

For the reasons set forth above, plaintiff's motion for a temporary restraining order [Dkt. # 2] is **GRANTED**.

It is hereby **ORDERED** that from the date of entry of this order until the Court rules on the entry of a preliminary injunction, plaintiff Hampton Dellinger shall continue to serve as the Special Counsel of the Office of Special Counsel, the position he occupied at 7:22 p.m. on Friday, February 7, 2025 when he received the email from the Assistant to the President. Defendants may not deny him access to the resources or materials of that office or recognize the authority of any other person as Special Counsel.

In light of this Order, the administrative stay entered on February 10, 2025, *see* Minute Order (Feb. 10, 2025) is hereby **VACATED,** and defendants' motion to stay the Court's administrative stay [Dkt. # 10], which was never granted, is **DENIED AS MOOT**.[8]

8 Putting aside the question of whether 5 U.S.C. § 3345 gives the President authority to appoint an Acting Special Counsel under the circumstances here, the appointment described in defendants' Notice [Dkt. # 13] as having taken place on February 11, 2025 may have been contrary to the order the Court issued on February 10th. *See* Minute Order (Feb. 10, 2025) ("[I]t is HEREBY ORDERED that from the time of this order through midnight on February 13, 2025, plaintiff Hampton Dellinger shall continue to serve as the Special Counsel of the Office of Special Counsel, the position he occupied at 7:22 p.m. on Friday, February 7, 2025 . . . ."). As of that date, there was no vacancy to fill.

The Court will hold a hearing on plaintiff's request for an injunction pending resolution of the case on the merits, i.e., an appealable preliminary injunction, on **February 26, at 10:00 a.m**. The parties are directed to confer and inform the court by **February 14** of their position (or positions if they do not agree) on whether, given the legal nature of the dispute, the Court should consolidate consideration of the request for a preliminary injunction with consideration of the merits pursuant to Federal Rule of Civil Procedure 65(a)(2), and they must submit a proposed schedule for any additional submissions they believe are warranted. The parties may propose that the Court deem the motion in support of the temporary restraining order to be a memorandum in support of a motion for preliminary injunction, with the opposition and reply similarly designated, and/or existing pleadings can be deemed to be motions and oppositions or cross motions under Federal Rule of Civil Procedure 56. The Court notes that an order of consolidation does not require the consent of the parties.

SO ORDERED.

Amy B. Jackson

AMY BERMAN JACKSON
United States District Judge

DATE: February 12, 2025

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAMPTON DELLINGER *in his personal capacity and in his official capacity as Special Counsel of the Office of Special Counsel*, Plaintiff, v. **SCOTT BESSENT** *in his official capacity as Secretary of the Treasury, et al.*, Defendants.	Civil Action No. 25-0385 (ABJ)

ORDER

On Friday, February 7, 2025 at 7:21 p.m., plaintiff Dellinger was the Special Counsel in the Office of Special Counsel, having been nominated by a President and confirmed by the Senate. Compl. ¶ 30. That was the status quo. At 7:22 p.m., the White House informed him that his position was terminated without cause. Ex. A to Compl. [Dkt. # 1-1].

That action was contested. In a lawsuit filed on Monday, February 10, plaintiff maintained that it plainly violated an unambiguous provision of the United States Code that was enacted by Congress and signed into law by President George H.W. Bush: 5 U.S.C. § 1211(b). Compl. ¶¶ 20, 38–41. And on that day, this Court entered an administrative stay to restore the status quo existing before the contested action, that is, Dellinger's position as Special Counsel, for a very brief period of time – until midnight on February 13 – so that it could receive the benefit of the defendants' briefing before it ruled on plaintiff's pending motion seeking a temporary restraining order. *See* Minute Order (Feb. 10, 2025). Defendants appealed and moved for a stay of that unappealable order, but apparently, they did not comply with it. *See* Defs.' Notice of the President's Designation of Acting Special Counsel [Dkt. # 13]. Their appeal has since been dismissed for lack of jurisdiction. *See* Order, *Dellinger v. Bessent*, No. 25-5025 (D.C. Cir. Feb. 12, 2025).

On February 12 – ahead of its own schedule – the Court issued a temporary restraining order, again calling for the restoration of the duly appointed Special Counsel, i.e., the status quo, until it rules on the request for a preliminary injunction. *See* Order [Dkt. # 14]. In the same order, the Court set a prompt hearing date for the preliminary injunction, which is to be held on February 26, 2025. And again, defendants have moved for a stay while they appeal what is also an order of limited duration that is not subject to appeal.

Defendants' position is that the statutory restrictions on the Special Counsel's removal are unconstitutional. They are eager to have that issue heard and resolved by a higher court. They will have that opportunity in due course, but first, the issue has to be fully briefed in this Court, where the case is pending. There has to be a hearing, and this Court has to issue an appealable order. In the meantime, defendants must appreciate that moving for a stay is not the same thing as receiving a stay. Indeed, as the Order issued on February 12 observes, the defendants have not identified any harm to themselves or the public that could flow from the Special Counsel's continuing to perform his statutory duty to protect whistleblowers in the federal government on a non-partisan basis. Order at 25.

The Court respects the importance of the matter and the Article II powers and responsibilities defendants are seeking to vindicate, and that is precisely why full briefing and a hearing are required. It also respects the concerns underlying the very unique role the Office of Special Counsel was designed to play and the provisions Congress decided – after lengthy negotiations with the executive branch – were necessary to enable the Special Counsel to fulfill that role free of political interference. His situation may not be found comparable to that of a typical agency head who wields significant executive power to promulgate regulations or enforce the law.

The Court has acted and will continue to act with extreme expedition. It has alerted the parties to the fact that it is considering consolidation of the request for interim relief with consideration of the merits, but it gave the parties the courtesy of expressing their views on that issue by tomorrow instead of doing so *sua sponte*.

For all of these reasons, defendants' motion to stay the February 12, 2025 temporary restraining order is **DENIED**.

Amy B Jackson

AMY BERMAN JACKSON
United States District Judge

DATE: February 13, 2025

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 25-5028 **September Term, 2024**

1:25-cv-00385-ABJ

Filed On: February 15, 2025

Hampton Dellinger, in his personal capacity and in his official capacity as Special Counsel of the Office of Special Counsel,

Appellee

v.

Scott Bessent, in his official capacity as Secretary of the Treasury, et al.,

Appellants

BEFORE: Katsas*, Childs, and Pan, Circuit Judges

O R D E R

Upon consideration of the emergency motion for stay and the opposition thereto, it is

ORDERED that this appeal be dismissed for lack of jurisdiction, the emergency motion for stay be dismissed as moot, and the alternative request for mandamus relief be denied.

This case comes before the court on the government's appeal of a temporary restraining order ("TRO") entered by the district court on February 12, 2025, and the government's request that we stay the TRO pending resolution of the appeal. The TRO mandates that Hampton Dellinger "continue to serve as the Special Counsel of the Office of Special Counsel," even though the President, acting through the Presidential Personnel Office, sought to remove Dellinger from that position on February 7, 2025. Order Granting TRO, *Dellinger v. Bessent*, 25-cv-385 (ABJ), at 26 (D.D.C. Feb. 12, 2025), ECF No. 14. The TRO is in place for only fourteen days, until February 26, 2025, when the district court will hold a hearing on Dellinger's motion for a preliminary injunction. If granted, a preliminary injunction would extend relief through the pendency of the case, *i.e.*, until the case is resolved on the merits.

* A statement by Circuit Judge Katsas, dissenting from this order, is attached.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 25-5028 **September Term, 2024**

Although a TRO ordinarily is not an appealable order, the government asks us to make an exception and hear its appeal because the TRO "works an extraordinary harm" and is set to last for fourteen days. Stay Mot. 8–9. Alternatively, the government requests that we construe its stay motion as a petition for a writ of mandamus and grant the petition, which would have the effect of reversing the TRO. The government filed its appeal and stay motion on the evening of February 12, 2025, and requested a ruling from this court within two days, by noon on February 14, 2025, so that the Acting Solicitor General "has the opportunity to seek expeditious review from the Supreme Court if this Court denies relief." *Id.* at 3.

The relief requested by the government is a sharp departure from established procedures that balance and protect the interests of litigants, and ensure the orderly consideration of cases before the district court and this court. Instead of entertaining an emergency appeal of a TRO, the normal course would be for us to wait for the district court to issue a ruling on the preliminary injunction, which would be immediately appealable. Indeed, many of the issues raised in the stay motion will be addressed by the district court at the preliminary-injunction hearing on February 26, 2025. The district court has promised to issue its preliminary-injunction ruling with "extreme expedition." Order Denying Stay Mot., *Dellinger v. Bessent*, No. 25-385 (ABJ), at 2 (D.D.C. Feb. 13, 2025), ECF No. 19. Moreover, that ruling will rest upon a more complete record for our review, and an appeal of the preliminary-injunction decision will not require us to act within the fourteen-day lifespan of a TRO, in a case that raises weighty constitutional issues.

Because it would be inconsistent with governing legal standards and ill-advised to hold that a TRO is appealable based solely on unsubstantiated claims of "extraordinary harm" for fourteen days, we decline to treat the TRO as an appealable injunction. Nor has the government established its entitlement to the extraordinary remedy of mandamus. We therefore dismiss the appeal, dismiss the stay motion as moot, and deny the petition for a writ of mandamus.

I.

The Office of Special Counsel ("OSC") is an independent agency of the United States that "safeguard[s] employees . . . who 'blow the whistle' on illegal or improper official conduct." *Wren v. Merit Sys. Prot. Bd.*, 681 F.2d 867, 872 (D.C. Cir. 1982). Among other powers, the OSC investigates complaints of prohibited personnel practices by federal employers, assists in settlement or alternative dispute resolution, and can seek corrective action on behalf of an employee before the Merit Systems Protection Board. *See* 5 U.S.C. §§ 1212, 1214–15. The OSC is led by the Special

Counsel, who must be nominated by the President and confirmed by the Senate. *See id*. § 1211. Once confirmed, the Special Counsel serves a five-year term. *Id.* § 1211(b). By statutory mandate, "[t]he Special Counsel may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office." *Id.*

On October 3, 2023, then-President Biden nominated Hampton Dellinger to be Special Counsel of OSC. The Senate confirmed Dellinger, and he took office on March 6, 2024. His five-year term expires in 2029. But at 7:22 p.m. on February 7, 2025, Dellinger received an email from the Director of the Presidential Personnel Office, Sergio Gor. The email stated: "On behalf of President Donald J. Trump, I am writing to inform you that your position as Special Counsel of the US Office of Special Counsel is terminated, effective immediately. Thank you for your service[.]"

On February 10, 2025, Dellinger filed a civil action in the district court against President Trump, Gor, the Director of the Office of Management and Budget, the Secretary of the Treasury, the Acting Special Counsel of OSC, and the Chief Operating Officer of OSC. In relevant part, the complaint asserted that Dellinger's removal violated 5 U.S.C. § 1211(b) because his removal was not "for inefficiency, neglect of duty, or malfeasance in office." He sought an order declaring that his removal was unlawful and that he remains Special Counsel and must be fully treated as such. Dellinger also sought a TRO enjoining the defendants from removing him from his post pending further consideration of the merits.

That afternoon, the district court held a hearing to discuss whether a TRO should be entered. To allow time for briefing and consideration of the TRO request, the district court issued a three-day "administrative stay" "to preserve the status quo" that existed before the White House sought to remove Dellinger. Min. Order Issuing Admin. Stay, *Dellinger v. Bessent*, No. 25-385 (ABJ) (D.D.C. Feb. 10, 2025). The administrative stay provided that "through midnight on February 13, 2025, plaintiff Hampton Dellinger shall continue to serve as the Special Counsel," and that "the defendants may not deny him access to the resources or materials of that office or recognize the authority of any other person as Special Counsel." *Id.*

That evening, the government noticed an appeal of the district court's administrative stay. The government then filed an emergency motion in this court, seeking to stay the administrative stay. The government argued that this court had jurisdiction over the administrative-stay order because it was "in substance a temporary restraining order" that is "akin to [an] injunction[]," which is appealable under 28 U.S.C. § 1292(a)(1). 1st Stay Mot. 18–20. The government also argued that if the court

concluded that the administrative stay was not appealable, the court should treat the government's motion as a mandamus petition and grant it. *Id.*

During the pendency of the appeal of the administrative stay, on February 11, 2025, the President designated Doug Collins, the Secretary of Veterans Affairs, as Acting Special Counsel. Later that day, we dismissed the administrative-stay appeal for lack of jurisdiction because the government had not shown that the district court's minute order "had the effect of granting an injunction that is appealable under 28 U.S.C. § 1292(a)(1)." Order, *Dellinger v. Bessent*, No. 25-5025 (D.C. Cir. Feb. 11, 2025). We also ruled that the government had not demonstrated its entitlement to the extraordinary remedy of mandamus.

On February 12, 2025, the district court vacated the administrative stay and granted Dellinger's motion for a TRO. The TRO mandates that, until the district court rules on Dellinger's request for a preliminary injunction, "Dellinger shall continue to serve as Special Counsel" and "[d]efendants may not deny him access to the resources or materials of that office or recognize the authority of any other person as Special Counsel." Order Granting TRO 26. The district court scheduled a preliminary-injunction hearing for February 26, 2025, fourteen days later. Moreover, the district court directed the parties to inform the court whether it should "consolidate consideration of the request for a preliminary injunction with consideration of the merits" and whether further briefing was warranted. *Id.* at 27.

That night, the government noticed an appeal of the TRO and asked the district court to stay the TRO pending appeal. The district court denied the motion to stay. On February 13, 2025, the government filed an emergency motion in this court, asking us to stay the TRO pending appeal or, in the alternative, provide mandamus relief. In response, Dellinger argues that this court lacks jurisdiction over the TRO and that the government fails to support its request for mandamus relief.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 25-5028 **September Term, 2024**

II.

The crux of the case before the district court is whether the President had authority to remove Dellinger from his post as Special Counsel without any finding of "inefficiency, neglect of duty, or malfeasance in office," as required by 5 U.S.C. § 1211(b). The outcome will turn on whether the statute's constraint on the President's removal power is constitutional: The government contends that the law is unconstitutional and can have no effect, while Dellinger asserts that the statute does not violate the Constitution and he is entitled to its protections. To determine the parties' rights and obligations for now, until that dispute is resolved, the district court is following procedures prescribed by the Federal Rules of Civil Procedure regarding the issuance of TROs and preliminary injunctions.

Rule 65 authorizes a district court to issue a TRO or a preliminary injunction to prevent irreparable injury and to preserve the status quo while the district court assesses the merits of a case. *See Cobell v. Kempthorne*, 455 F.3d 301, 314 (D.C. Cir. 2006) ("The usual role of a preliminary injunction is to preserve the status quo pending the outcome of litigation." (cleaned up)); *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981) (same); Wright & Miller, 11A Fed. Prac. & Proc. Civ. § 2951 (3d ed. June 2024 update) (observing that TROs are "designed to preserve the status quo until there is an opportunity to hold a hearing on the application for a preliminary injunction"); *see also* Fed. R. Civ. P. 65(a), (b). As Justice Holmes explained, until the district court can determine how to proceed, "it ha[s] authority, from the necessity of the case, to make orders to preserve the existing conditions and the subject of the petition," as "the law contemplates the possibility of a decision either way, and therefore must provide for it." *United States v. Shipp*, 203 U.S. 563, 573 (1906) (Holmes, J.).

A TRO often is used to provide immediate relief upon the filing of a lawsuit and may be issued without notice to the adverse party. *See* Fed. R. Civ. P. 65(b)(1). But a TRO "expires at the time after entry — not to exceed 14 days — that the court sets, unless before that time the court, for good cause, extends it for a like period or the adverse party consents to a longer extension." Fed. R. Civ. P. 65(b)(2). Beyond the timeframe of a TRO, the district court may grant a preliminary injunction to provide relief that extends until the lawsuit is resolved. The standard for obtaining either a TRO or a preliminary injunction is identical. *See Gordon v. Holder*, 632 F.3d 722, 723–24 (D.C. Cir. 2011). The party seeking such relief "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The district court typically keeps a TRO in place only until it can hold a hearing on a request for a

preliminary injunction and issue a ruling on the preliminary injunction. Such a hearing allows the court to apply the applicable legal standard with the benefit of briefing, evidence (if necessary), and oral argument. *See* Order Denying Stay Mot. 2 ("The Court respects the importance of the matter and the Article II powers and responsibilities defendants are seeking to vindicate, and that is precisely why full briefing and a hearing are required.").

Preliminary injunctions are appealable, but TROs generally are not. "Under 28 U.S.C. § 1291, our appellate jurisdiction generally extends only to the 'final decisions' of district courts." *Salazar ex rel. Salazar v. District of Columbia*, 671 F.3d 1258, 1261 (D.C. Cir. 2012). One "exception," *id.*, is found in 28 U.S.C. § 1292(a)(1), which authorizes a court of appeals to exercise jurisdiction over "[i]nterlocutory orders . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions." That subsection allows parties to appeal a preliminary injunction, but "[t]here is no statutory provision for the appeal of a temporary restraining order." Wright & Miller, Fed. Prac. & Proc. Civ. § 2951 (3d ed. June 2024 update); *see also Adams v. Vance*, 570 F.2d 950, 953 (D.C. Cir. 1978) ("The grant of a temporary restraining order under Rule 65(b), Fed. R. Civ. P., is generally not appealable.").

Nevertheless, we have held that "the label attached to an order by the trial court is not decisive with regard to whether it falls under Rule 65(a) [as a preliminary injunction] or Rule 65(b) [as a TRO] and the appellate court will look to other factors to determine whether an appeal should be allowed.'" *Adams*, 570 F.2d at 953 (cleaned up). In *Adams*, we held that "[t]he order" under review "was in purpose and effect a mandatory injunction appealable under 28 U.S.C. § 1292(a)(1)" because "[i]t did not merely preserve the status quo pending further proceedings, but commanded an unprecedented action irreversibly altering the delicate diplomatic balance in the environmental arena." *Id.* We explained that "[w]hen an order directs action so potent with consequences so irretrievable, we provide an immediate appeal to protect the rights of the parties." *Id.* But the exception articulated in *Adams* establishes a "high threshold." *Native Vill. of Chenaga Bay v. Lujan*, No. 91-5042, 1991 WL 40471, at *1 (D.C. Cir. Mar. 8, 1991). As Judge Friendly observed, it is "the rare case" when denial of a TRO is effectively the denial of a preliminary injunction and thus appealable. *Hoh v. Pepsico, Inc.*, 491 F.2d 556, 559–60 (2d Cir. 1974) (Friendly, J.).

Whether the granting, denying, or dissolving of a TRO is appealable depends on whether the disputed order should be treated as a preliminary injunction, and in making that determination courts generally look to several factors. As particularly relevant to this case and discussed in more detail *infra*, courts consider whether the order had irreparable consequences that warrant immediate relief. *See, e.g.*, *Berrigan v. Sigler*,

475 F.2d 918, 919 (D.C. Cir. 1973) ("While the denial of a temporary restraining order is normally not appealable, an exception is made where the denial serves for all practical purposes to render the cause of action moot or where appellant's rights will be irretrievably lost absent review."); *Env't Def. Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 590 n.8 (D.C. Cir. 1971) (observing that "[t]he denial of a temporary restraining order is appealable as a final decision under 28 U.S.C. § 1291 when it determines substantial rights of the parties which will be irreparably lost if review is delayed" (cleaned up)).

Courts also look to: (1) whether the order will remain in force longer than the time permissible for a TRO under Rule 65(b), *see, e.g.*, *Sampson v. Murray*, 415 U.S. 61, 86 (1974) (endorsing view that "a temporary restraining order continued beyond the time permissible under Rule 65 must be treated as a preliminary injunction, and must conform to the standards applicable to preliminary injunctions"); (2) whether the district court entered the order after a contested hearing, akin to a hearing held on a motion for preliminary injunction, *see, e.g.*, *United States v. Hubbard*, 650 F.2d 293, 314 n.73 (D.C. Cir. 1980) (explaining that denial of TRO was "equatable to denial of a preliminary injunction" "because the denial came only after the Church was heard on the merits" (citing *Sampson*, 415 U.S. at 86–88)); and (3) whether the order foreclosed future action for injunctive relief, *see, e.g.*, *Belbacha v. Bush*, 520 F.3d 452, 455 (D.C. Cir. 2008) ("Although the district court characterized the relief [appellant] seeks as a 'temporary restraining order,' that court's order dismissing his motion 'effectively foreclose[s]' [appellant] 'from pursuing further interlocutory relief in the form of a preliminary injunction,' and is therefore 'tantamount to denial of a preliminary injunction,' appealable under 28 U.S.C. § 1292(a)(1)." (quoting *Levesque v. Maine*, 587 F.2d 78, 80 (1st Cir. 1978))).

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 25-5028 **September Term, 2024**

III.

The government bears the burden of showing that the TRO in this case functions as an appealable injunction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (party asserting court's jurisdiction has the burden of establishing jurisdiction). Although a TRO is "generally not appealable," *Adams*, 570 F.2d at 953, the government claims that the instant TRO is, in fact, an injunction because: (1) the district court's "order works an extraordinary harm to the President's authority over the Executive Branch by reinstating the principal officer of a single-headed agency after the President's removal of the officer," Stay Mot. 8; and (2) "the district court has now considerably prolonged that harm by setting its TRO to last for 14 days, on top of the two-day duration of its 'administrative stay,'" *id.* at 9. We are unpersuaded that the cited reasons make the TRO appealable; and we decline to set a precedent that would enable litigants to file appeals of TROs based solely on unsubstantiated claims of "extraordinary harm" during the period that the TRO is in effect.

The relief requested by the government is itself extraordinary: The government asks us to resolve disputed issues that plainly have not been finally adjudicated by the district court. The litigation of Dellinger's motion for a preliminary injunction is ongoing in the court below, and that litigation raises issues that are overlapping, if not identical, to those that would be presented in an appeal of the TRO. Moreover, the district court has stated its intention to rule on the preliminary injunction with "extreme expedition," and any appeal of the TRO must be resolved before February 26, when the TRO expires (which presumably would render the appeal moot). If we ruled on an appeal of the TRO or the stay motion by February 26, our ruling would disrupt, if not render obsolete, the proceedings in the district court. For example, our ruling on the stay motion necessarily would include analysis of the parties' likelihood of success on the merits. *See Nken v. Holder*, 556 U.S. 418, 434 (2009) (standard for stay pending appeal); *see also* Dissent 7–10 (analyzing likelihood of success on the merits). It is unclear how the district court could make an independent ruling on the preliminary-injunction motion or the merits of the case if we prejudged such a significant issue in advance of the February 26 hearing. In short, a decision by this court to opine on substantial legal issues at this point in the litigation, before the district court has finished its work and issued a ruling on the preliminary injunction, would throw a monkey wrench into the district court proceedings. *See Salazar*, 671 F.3d at 1261 (although limiting appellate jurisdiction only to final decisions "necessarily delays the resolution of important legal questions, Congress has determined that such delay must be tolerated in order to avoid 'the debilitating effect on judicial administration' that would otherwise result from 'piecemeal appe[llate] disposition of what is, in practical consequence, but a single controversy'") (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 471 (1978));

cf. In re Flynn, 973 F.3d 74, 79 (D.C. Cir. 2020) (en banc) (noting in the mandamus context "[t]he interest in allowing the District Court to decide a pending motion in the first instance").

Granting a stay of the TRO under the present circumstances would set a problematic precedent. If we were to accept the proposition that a party's bare assertion of "extraordinary harm" for fourteen days can render a TRO appealable, many litigants subject to TROs would be encouraged to appeal them and to seek a stay. Fourteen days is a standard lifespan for a TRO, and any TRO, by its nature, grants emergency relief that is likely to do perceived harm to someone. Thus, at a time when emergency litigation is becoming more prevalent, we surely would be faced with a deluge of TRO appeals. And, like in this case, each of those appeals would be litigated at a breakneck pace to avoid mootness and to preserve the parties' ability to appeal our ruling to the Supreme Court before the fourteen-day clock ran out. We see no reason to incentivize more requests for two-day rulings when the appeal of preliminary injunctions in the normal course has heretofore been adequate to protect the interests of litigants, including the government, in the vast majority of cases.

The government and our dissenting colleague lean heavily on the importance of the constitutional dispute in this case, and the prospect of "extraordinary harm" to the Executive's Article II prerogatives if the Special Counsel post is not immediately filled by an individual of the President's choosing. But the interests asserted by the government will be vindicated on an expedited basis in the preliminary-injunction proceedings: In just two weeks, the district court might rule in favor of the government; and if it does not, the government can appeal any contrary ruling. Waiting two weeks to make arguments to the district court and then, potentially, to this court is not so prejudicial to the government's interests that we must rush to issue a ruling in two days, while scrambling the normal appellate process.

But even more fundamentally, the "extraordinary harm" argument adopted by the government and the dissent is analytically flawed because it presumes that the government is correct on the merits. The cited "extraordinary harm" is the incursion on the President's authority to remove executive-branch officials at will — but the legality of such constraints in 5 U.S.C. § 1211(b) is the very merits issue that has not yet been adjudicated by the district court. We cannot presume "extraordinary harm" without presuming that section 1211(b) is unconstitutional, and presuming the invalidity of a duly enacted statute is the opposite of what courts normally do. *See Rostker v. Goldberg*, 453 U.S. 57, 64 (1981) ("Whenever called upon to judge the constitutionality of an Act of Congress . . . the Court accords 'great weight to the decisions of

Congress.'" (quoting *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 102 (1973)).

Our dissenting colleague deems the TRO "extraordinary" because it "directs the President to recognize and work with an agency head whom he has already removed." Dissent 4. That assertion declines to recognize the possibility that the removal may have been unlawful. Congress, a coequal branch of government, enacted section 1211(b), which was signed into law by President Carter. That statute explicitly states: "The Special Counsel may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office." 5 U.S.C. § 1211(b). There is no dispute that the President violated the statute by not making any finding of "inefficiency, neglect of duty, or malfeasance in office" before removing Dellinger. The district court granted the TRO only after it made a finding that Dellinger's argument that the statute is constitutional and binding is likely to succeed on the merits. *See* Order Granting TRO 8–16. The dissent nevertheless appears to take the position that any time the President merely alleges or argues that his Article II powers have been infringed, he is entitled to immediate appellate review. Dissent 5 ("Where a lower court allegedly impinges on the President's core Article II powers, immediate appellate review should be generally available."). And yet, none of the authorities cited by the government or the dissent hold that the rules of civil procedure and appellate jurisdiction are suspended when the President is included as a party to a lawsuit. *Cf. Fed. Open Mkt. Comm. of Fed. Rsrv. Sys. v. Merrill*, 443 U.S. 340, 356 (1979) ("The Federal Rules [of Civil Procedure], of course, are fully applicable to the United States as a party."). The question here is not whether the President is entitled to prompt review of his important constitutional arguments. Of course he is. The issue before us is whether his mere *claim* of extraordinary harm justifies this court's *immediate* review, which would essentially remove the legal issues from the district court's ambit before its proceedings have concluded.[1]

[1] In addition, although the government does not raise this argument, the dissent suggests that the district court's TRO improperly enjoined the President himself. *See* Dissent 5–6 (citing *Mississippi v. Johnson*, 71 U.S. 475 (1866)). To be sure, "in general" a court may not "enjoin the President in the performance of his official duties." *Franklin v. Massachusetts*, 505 U.S. 788, 802–03 (1992) (plurality opinion) (quoting *Johnson*, 71 U.S. at 501). But that principle is beside the point because a court can unquestionably review the legality of the President's action by enjoining the officers who would attempt to enforce the President's order. *See, e.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). So, in this case, the TRO is properly read as not applying directly to the President but rather to the other defendants acting on his behalf.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 25-5028 **September Term, 2024**

Our dissenting colleague suggests that we should proceed with a premature review of the merits of this case because the district court "thoroughly addressed" the constitutional questions presented, which are "purely legal in nature." Dissent 2. But the district court has unequivocally stated that it has not yet completed its work and that the substantial issues raised by the government warrant briefing and a full hearing so that it may render its final judgment. *See* Order Denying Stay Mot. 2 ("There has to be a hearing, and this Court has to issue an appealable order . . . . The Court respects the importance of the matter and the Article II powers and responsibilities defendants are seeking to vindicate, and that is precisely why full briefing and a hearing are required."). "We are a court of review, not of first view." *New LifeCare Hosps. of N. Carolina, LLC v. Becerra*, 7 F.4th 1215, 1225 (D.C. Cir. 2021) (cleaned up). No matter how strong the merits arguments appear, our job is to wait to address them in the context of reviewing the district court's ruling on either an appealable preliminary injunction or a final judgment on the merits.

The government relies on *Adams* to argue that "the significance of the harm that a TRO poses" is a relevant factor in determining a TRO's appealability. Stay Mot. 8–9. That is true, but the harm that was at issue in *Adams* is readily distinguishable. In *Adams*, the International Whaling Commission, an international treaty body, banned Alaskan Native hunting of a certain species of whale, subject to the United States's objection. *See Adams*, 570 F.2d at 952. Four days before the deadline to object, plaintiffs, representing a group of Alaskan Natives asserting a right to hunt whales, sued the Secretary of State; and the district court issued a TRO ordering the Secretary to object. *Id.* We held that we had jurisdiction over the government's appeal. We explained that "the order was in purpose and effect a mandatory injunction appealable under 28 U.S.C. § 1292(a)(1)" because "[i]t did not merely preserve the status quo pending further proceedings, but commanded an unprecedented action irreversibly altering the delicate diplomatic balance in the environmental arena." *Id.* "When an order directs action so potent with consequences so irretrievable," we added, "we provide an immediate appeal to protect the rights of the parties." *Id.* at 953. We noted that the district court's order "was based on the unwarranted assumption that such objection would not harm the United States because the objection could be withdrawn" and that this "assumption . . . is an unwarranted intrusion on executive discretion in the field of foreign policy and agreements insofar as it represents a judgment." *Id.* at 952.

Unlike the court order in *Adams*, the district court's TRO maintains the status quo and does not command unprecedented action — to the contrary, Dellinger has served as Special Counsel for nearly a year. *See Huisha-Huisha v. Mayorkas*, 27 F.4th 718, 732 (D.C. Cir. 2022) (noting that in the context of a preliminary injunction, "[t]he status quo is the last uncontested status which preceded the pending controversy" (cleaned

up)). Nor is the TRO irreversible. It is in effect only until the preliminary-injunction hearing on February 26, 2025, at which point the district court can deny the preliminary injunction and allow the President to remove Dellinger, if the court so chooses. Moreover, the court order in *Adams* "direct[ed] action by the Secretary of State in foreign affairs," which "plainly" and "deeply" intruded into "the core concerns of the executive branch." *Adams*, 570 F.2d at 954. Here, by contrast, the asserted harm to the President's authority is disputed: Whether the constraint on the President's removal authority imposed by section 1211(b) is constitutional is still to be litigated on the merits.

The government's remaining argument is that the TRO should be treated as a preliminary injunction because "the district court has now considerably prolonged [extraordinary] harm by setting its TRO to last for 14 days, on top of the two-day duration of its 'administrative stay.'" Stay Mot. 9. But the government fails to explain why the expiration date of the TRO converts the TRO into an injunction. Rule 65(a) permits the district court to set the expiration date of a TRO and specifies that such an order may not "exceed 14 days" unless the court, "for good cause, extends it." Fed. R. Civ. P. 65(b)(2). The government does not argue that the TRO's fourteen-day period is longer than permitted by the Rule, but instead seems to suggest that the harm of keeping a Special Counsel in place against the President's wishes is so intolerable that the wrong must be corrected immediately. Fourteen days is not a long time in the realm of litigation, and it is a standard period for a TRO to be in effect under Rule 65(b). The government does not meet its burden to show why this factor weighs in favor of finding the TRO appealable. In sum, the government fails to meet the "high threshold" for demonstrating that the district court's TRO should be treated as a preliminary injunction, subject to interlocutory appeal. *See Native Vill. of Chenaga Bay*, 1991 WL 40471, at *1.[2]

IV.

The Supreme Court noted in *Cheney* that, with respect to petitions involving the President or Vice President, "mandamus standards are broad enough to allow a court of appeals to prevent a lower court from interfering with a co-equal branch's ability to

[2] The government does not rely on any of the other considerations that courts have looked to in determining whether a TRO is appealable: It has not argued that the TRO will foreclose future action for injunctive relief or that it is functionally a preliminary injunction because the district court issued it after a contested hearing. *See Al-Tamimi v. Adelson*, 916 F.3d 1, 6 (D.C. Cir. 2019) ("A party forfeits an argument by failing to raise it in his opening brief.").

discharge its constitutional responsibilities." *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 382 (2004). Thus, a writ of mandamus is the most appropriate relief for the government to seek when asserting harms that implicate the separation of powers and executive authority. Yet, the government relegates mandamus to a secondary, alternative claim, arguing only that if the TRO is unappealable, we should "exercise [our] discretion to treat [the stay motion] as a petition for writ of mandamus." Stay Mot. 10. The government fails to meet the rigorous standard for mandamus relief.

As the Supreme Court has emphasized, a writ of mandamus "is a 'drastic and extraordinary' remedy 'reserved for really extraordinary causes.'" *Cheney*, 542 U.S. at 380 (quoting *Ex parte Fahey*, 332 U.S. 258, 259–60 (1947)). "'[T]he writ cannot be used to actually control the decision of the trial court,' because '[a]s an appellate court, we are a court of review, not of first view.'" *Flynn*, 973 F.3d at 78 (cleaned up) (first quoting *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 383 (1953); and then *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005)).

A court should issue a writ of mandamus "only if: (1) 'the party seeking issuance of the writ [has] no other adequate means to attain the relief he desires'; (2) 'the petitioner [satisfies] the burden of showing that his right to issuance of the writ is clear and indisputable'; and (3) 'the issuing court, in the exercise of its discretion, [is] satisfied that the writ is appropriate under the circumstances.'" *Flynn*, 973 F.3d at 78 (quoting *Cheney*, 542 U.S. at 380–81). When a case "implicates the separation of powers, the Court of Appeals must also ask, as part of this inquiry, whether the District Court's actions constituted an unwarranted impairment of another branch in the performance of its constitutional duties." *Cheney*, 542 U.S. at 390.

The government fails the *Cheney* test at every step. First, the government obviously has other adequate means to attain the relief it seeks — it can attempt to persuade the district court to deny the preliminary-injunction motion and allow the President to remove Dellinger during the pendency of the case; and if the government fails in that attempt, it is entitled to appeal the district court's ruling. *See* 28 U.S.C. § 1292(a)(1). As noted, the legal standard governing the issuance of preliminary injunctions is identical to that governing the entry of TROs. Thus, a premature appeal of the TRO ruling would unduly impinge on the district court's ability to resolve the preliminary-injunction motion that is presently before it. In *Flynn*, we noted that we were unaware of any precedent in which "our Court, or any court, issued the writ to compel a district court to decide an *undecided* motion *in a particular way — i.e.*, when the district court might yet decide the motion in that way on its own." *Flynn*, 973 F.3d at 79 (emphasis in original); *see also id.* at 82 ("Try as they might, neither Petitioner, nor the Government, nor the dissent has identified a single instance where any court of appeals

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

has granted the writ to decide a trial court motion without first giving the district court an opportunity to make a decision."). Appellate review after the preliminary-injunction proceeding easily safeguards the government's interests here. *See Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 27–28 (1943) ("Ordinarily mandamus may not be resorted to as a mode of review where a statutory method of appeal has been prescribed . . . .").

Moreover, "[w]hen ordinary appellate review (or even, as here, further proceedings before the District Court) remains available, the writ may not issue unless the petitioner 'identif[ies] some 'irreparable' injury that will go unredressed if he does not secure mandamus relief.'" *Flynn*, 973 F.3d at 79 (quoting *In re al-Nashiri*, 791 F.3d 71, 79 (D.C. Cir. 2015)). But the harm alleged by the government is not irreparable because, as previously discussed, the alleged harm is largely contingent on the government prevailing on the merits.

Second, the government has not met its burden to show that its entitlement to mandamus is clear and indisputable. To meet this requirement, the petitioner must "point to 'cases in which a federal court has held that' relief is warranted 'in a matter involving like issues and comparable circumstances.'" *In re Al Baluchi*, 952 F.3d 363, 369 (D.C. Cir. 2020) (quoting *Doe v. Exxon Mobil Corp.*, 473 F.3d 345, 355 (D.C. Cir. 2007)). "Accordingly, we will deny mandamus even if a petitioner's argument, though 'pack[ing] substantial force,' is not clearly mandated by statutory authority or case law." *Id.* (quoting *In re Khadr*, 823 F.3d 92, 99–100 (D.C. Cir. 2016)). Indeed, we have recognized that open legal questions do not present a clear and indisputable right to mandamus relief. *See Al-Nashiri*, 791 F.3d at 85–86. Here, the government states only that "given the Supreme Court's recent decisions in *Collins v. Yellen*, 594 U.S. 220 (2021), and *Seila Law* [*LLC v. CFPB*, 591 U.S. 197 (2020)], the government's right to issuance of the writ is clear and undisputable." Stay Mot. 10 (cleaned up). But the cited cases do not hold that the President has unrestricted power to remove the Special Counsel. Rather, they pertain to the removal of heads of other government agencies. *Seila Law* specifically distinguishes the Office of Special Counsel in its analysis, *Seila Law*, 591 U.S. at 221, and *Collins* notes that the Court was "not comment[ing] on the constitutionality of" the removal restriction for the Office of Special Counsel, *Collins*, 594 U.S. at 256 n.21 Although the government argues that *Collins* and *Seila Law* support its position in this case, Stay Mot. 11–21, Dellinger argues that those cases actually support his view, Opp'n to Stay Mot. 15–20. Because the extent of the President's power to remove the Special Counsel is an open legal question, the government's right to mandamus is not clear and indisputable.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 25-5028 **September Term, 2024**

Finally, a writ of mandamus is not appropriate under the circumstances presented. This requirement calls for the court to exercise its discretion. *See Cheney*, 542 U.S. at 381 ("[E]ven if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances."); *Whitehouse v. Ill. Cent. R.R. Co.*, 349 U.S. 366, 373 (1955) ("[M]andamus is itself governed by equitable considerations and is to be granted only in the exercise of sound discretion."). Here, granting the writ would undermine the established framework for litigating TROs and preliminary injunctions, short-circuit ongoing proceedings before the district court, and prejudice the orderly administration of justice. It is therefore not appropriate to grant the writ.

Because none of the *Cheney* considerations are satisfied, we deny the petition for a writ of mandamus.

***

For the foregoing reasons, the appeal is dismissed for lack of jurisdiction, the emergency motion for a stay of the TRO is dismissed as moot, and the petition for a writ of mandamus is denied.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Clifton B. Cislak, Clerk

BY: /s/
Scott H. Atchue
Deputy Clerk

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 25-5028 **September Term, 2024**

KATSAS, *Circuit Judge*, dissenting: The President removed Hampton Dellinger from his position as Special Counsel, the sole head of a federal agency that wields executive power in prosecuting enforcement actions before the Merit Systems Protection Board. The district court then ordered the President to recognize Dellinger as the agency head for two weeks. Despite the limited duration of that order, I would stay it immediately. As explained below, the President is immune from injunctions directing the performance of his official duties, and Article II of the Constitution grants him the power to remove agency heads.

I

On Friday, February 7, 2025, President Trump removed Hampton Dellinger from his position as Special Counsel. On Monday, February 10, Dellinger sued the President, Secretary of the Treasury, Director of the Office of Personnel Management, and other executive-branch officials to challenge the removal decision. Dellinger moved for a temporary restraining order reinstating him to his post. That afternoon, before the government could file an opposition, the district court entered a brief administrative stay that reinstated Dellinger, required the defendants to provide him access to the resources and materials of his former Office, and prohibited the defendants from recognizing any other person as Special Counsel.

On Wednesday, February 12, after the government filed its opposition, the district court entered a TRO against all defendants extending the relief previously granted. That is, the district court ordered the President, along with other senior executive-branch officials, to recognize Dellinger as Special Counsel. It did so even though the President, pursuant to the Vacancies Reform Act, had already designated Doug Collins, the Secretary of Veterans Affairs, as Acting Special Counsel. The court suggested that the President, in making this designation, had violated its pre-TRO stay order. *See Dellinger v. Bessent*, No. 25-0385, 2025 WL 471022, at *14 n.8 (D.D.C. Feb. 12, 2025).

The district court extensively discussed the four factors governing the issuance of TROs and preliminary injunctions. It found that Dellinger was likely to succeed on the merits of his challenge to the President's removal order, that Dellinger would suffer irreparable injury in the absence of an order immediately reinstating him, and that the balance of harms and the public interest favored an order reinstating him as Special Counsel and requiring the President to recognize him as such. *See Dellinger*, 2025 WL 471022, at *4-13. The court set a preliminary-injunction hearing for February 26, and it ordered the parties to weigh in on whether to (1) treat the TRO briefing as briefing on a preliminary-injunction motion and (2) consolidate the preliminary-injunction hearing with the merits. *Id.* at *14.

The government immediately appealed and sought an emergency stay. In the meantime, the government requested consolidation in the district court, which Dellinger does not oppose. These positions presumably reflect that the questions presented, which the district court has thoroughly addressed, are purely legal in nature. And for that reason, they are fit for immediate review.

II

Congress established the Office of Special Counsel in the Civil Service Reform Act of 1978. Pub. L. No. 95-454, § 202, 92 Stat. 1111, 1121 (1978). The Office is headed by a single individual—the Special Counsel—who is appointed by the President and confirmed by the Senate. 5 U.S.C. § 1211(b). The Special Counsel serves a five-year term, and, under the statute's terms, may be removed "only for inefficiency, neglect of duty, or malfeasance in office." *Id.*

The Special Counsel has broad investigative and enforcement powers. He may "receive and investigate allegations of prohibited personnel practices" anywhere within the federal government. 5 U.S.C. §§ 1212(a)(2), 1214(a)(1)(A). The list of "prohibited personnel practices" is extensive. Among other things, it includes—for all past, current, or prospective federal employees—allegations of discrimination, unauthorized employment preferences, coerced political activity, retaliation for various protected activities, improper influence, deception, and obstruction. *See id.* § 2302(b); 5 C.F.R. § 1800.2(a). Additionally, the Special Counsel may investigate alleged violations of the Hatch Act, the Freedom of Information Act, the Uniformed Services Employment and Reemployment Rights Act, and more. *See* 5 U.S.C. § 1216(a); 5 C.F.R. § 1800.2(b). In certain circumstances, he may also "require an agency head to conduct an investigation and submit a written report." *See* 5 U.S.C. § 1213(a), (c)(2). To further his investigations, the Special Counsel may issue subpoenas, order depositions and interrogatories, examine witnesses under oath, and receive evidence. *Id.* § 1212(b). During an investigation, he must be given access to all relevant agency "records, data, reports, audits, reviews, documents, papers, recommendations, or other material," *id.* § 1212(b)(5)(A)(i), and he may "require" the agency to provide such materials, *id.* § 1212(b)(5)(A)(iii).

After investigating, the Special Counsel may bring enforcement actions before the MSPB. To protect employees harmed by prohibited personnel practices, he may seek "a stay of any personnel action" or other "corrective action." 5 U.S.C. §§ 1214(b)(1)(A)(i), 1214(b)(2)(B). And to discipline employees who allegedly have committed prohibited personnel practices or violated the other statutes within his investigatory jurisdiction, the Special Counsel may "file a complaint [with the MSPB] or

make recommendations for disciplinary action" to the Board, agency heads, or even the President. *See id.* §§ 1212(a)(2)(B), 1215(a), (b). The Special Counsel may seek sanctions including removal, debarment from federal employment, suspension, and civil penalties. *See id.* § 1215(a)(3).

Given these powers, our Court has labeled the Special Counsel a "prosecutor . . . of merit system abuses," who pursues "corrective action petitions" before the MSPB that are "comparable to criminal prosecutions designed to vindicate the public interest." *Frazier v. MSPB*, 672 F.2d 150, 163 (D.C. Cir. 1982) (cleaned up); *see also Barnhart v. Devine*, 771 F.2d 1515, 1520 (D.C. Cir. 1985) (Special Counsel is "prosecutorial arm" and MSPB is "adjudicatory apparatus"). The MSPB likewise has described the Special Counsel's relationship to it as like "that of a prosecuting attorney to a court." *Layser v. USDA*, 8 M.S.P.B. 72, 73 (1981).

III

Before addressing the government's request for a stay, I must consider this Court's jurisdiction over the underlying appeal. That question arises because the February 12 order is styled as a TRO and remains effective for only two weeks. As a general matter, TROs are not appealable. But in my view, *this* TRO—which orders the President to recognize the authority of an agency head whom he has formally removed—qualifies for immediate review.

A

Although orders granting preliminary injunctions are appealable, 28 U.S.C. § 1292(a)(1), TROs generally are not. *See Adams v. Vance*, 570 F.2d 950, 953 (D.C. Cir. 1978); 16 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3922.1 (3d ed.) (Wright & Miller). Courts have offered a practical justification for this rule: Because TROs are of "brief duration" and designed only "to preserve the opportunity to rule in orderly fashion upon a request for longer-lasting preliminary relief," they ordinarily do "not threaten irreparable injury." Wright & Miller, § 3922.1. But *some* TROs *do* threaten immediate irreparable injuries, no matter how short their duration. So, the rule against appealability is flexible; it gives way "on finding that in the circumstances of a particular case the need for immediate appeal overcomes the reasons for the general rule that appeal is not available." *Id.*; *see Ne. Ohio Coal. for Homeless & Serv. Emps. Int'l Union, Loc. 1199 v. Blackwell*, 467 F.3d 999, 1005 (6th Cir. 2006) (courts look "to the nature of the order and the substance of the proceeding below to determine whether the rationale for denying appeal applies"). For example, in *Adams*, to protect the Executive Branch from "irretrievable" consequences, this Court

reviewed and reversed a TRO directing the Secretary of State to object to an international whaling ban just before an impending deadline. *See* 570 F.2d at 953-57. In *Northeast Ohio Coalition*, the Sixth Circuit, to prevent "irretrievable harm on the State of Ohio," reviewed and reversed a TRO enjoining enforcement of its voter-identification law on the eve of an election. 467 F.3d at 1006. And in *Hope v. Warden York County Prison*, 956 F.3d 156 (3d Cir. 2020), the Third Circuit, to prevent "irreversible" harm to a county in Eastern Pennsylvania, reviewed a TRO compelling state officials to immediately release certain immigration detainees because of the COVID pandemic. *Id.* at 160-62 (citing *Adams*, 570 F.2d at 953).

B

The extraordinary character of the order at issue here—which directs the President to recognize and work with an agency head whom he has already removed—warrants immediate appellate review.

When it comes to judicial review, courts have long recognized the "special status of the President." *Chamber of Com. v. Reich*, 74 F.3d 1322, 1331 n.4 (D.C. Cir. 1996) (citations omitted). While the President is not absolutely immune from judicial process, it is "obvious" that a court may not "proceed against the president as against an ordinary individual." *United States v. Burr*, 25 F. Cas. 187, 192 (C.C.D. Va. 1807) (Marshall, C.J.). Indeed, the prospect of judicial encroachment on presidential authority informs various facets of separation-of-powers jurisprudence. For instance, the President enjoys unique evidentiary privileges, *United States v. Nixon*, 418 U.S. 683, 707-09 (1974); absolute immunity from damages suits for official acts, *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982); and at least presumptive immunity from criminal prosecution for official acts, *Trump v. United States*, 603 U.S. 593, 614 (2024).

Solicitude for the President also informs various doctrines regarding immediate appellate review. For example, in *United States v. Nixon*, the Supreme Court held that an order compelling the President to produce subpoenaed documents in a pending criminal case was a "final" decision supporting an immediate appeal under 28 U.S.C. § 1291—even though any other party would have had to defy the order and go into contempt to obtain review. *See* 418 U.S. at 690-92. In *Cheney v. United States District Court for the District of Columbia*, 542 U.S. 367 (2004), the Supreme Court allowed the Vice President to seek immediate review of discovery orders entered against him in a pending civil case. *Id.* at 378. The Vice President alleged "substantial intrusions on the process by which those in closest operational proximity to the President advise the President." *Id.* at 381 (cleaned up). The Court agreed, explaining that the allegations "remove[d] this case from the category of ordinary discovery orders where interlocutory

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

appellate review is unavailable." *Id.* For petitions "involving the President or Vice President," it held that "mandamus standards are broad enough to allow a court of appeals to prevent a lower court from interfering with a coequal branch's ability to discharge its constitutional responsibilities." *Id.* at 382. And it vacated the discovery orders based on the same considerations. *See id.* at 383-92. Finally, even apart from any question of immunity, the President may immediately appeal any interlocutory order rejecting an as-applied defense under Article II of the Constitution to a criminal prosecution. *See Trump*, 603 U.S. at 654 (Barrett, J., concurring). These decisions reflect a common theme: Where a lower court allegedly impinges on the President's core Article II powers, immediate appellate review should be generally available. The balancing of interests to determine appealability under *Adams* is flexible enough to accommodate the same outcome here.

Immunity considerations reinforce this conclusion. When a district court denies a claim of presidential immunity, the President may seek immediate review, *see Trump*, 603 U.S. at 606; *Nixon v. Fitzgerald*, 457 U.S. at 741, just like any other official or sovereign seeking to vindicate an asserted litigation immunity, *see Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 142-47 (1993); *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). And the President enjoys absolute immunity from injunctive actions. In *Franklin v. Massachusetts*, 505 U.S. 788 (1992), the Supreme Court reiterated long-settled law that the federal courts have "no jurisdiction of a bill to enjoin the President in the performance of his official duties." *Id.* at 802-03 (plurality op.) (quoting *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 501 (1867)); *see also id.* at 827 (Scalia, J., concurring in part and concurring in the judgment) (same); *Newdow v. Roberts*, 603 F.3d 1002, 1013 (D.C. Cir. 2010) ("With regard to the President, courts do not have jurisdiction to enjoin him." (cleaned up)). *Franklin*, *Mississippi*, and *Newdow* all phrased the President's absolute protection from injunctive actions as a jurisdictional bar, but it is one that restrains the Judiciary in order to protect the President. So the jurisdictional bar must also reflect an immunity from litigation burdens, just like the President's protections from criminal prosecution and civil damages actions. And the immunity extends, at a minimum, to all official acts that are not "purely 'ministerial.'" *Franklin*, 505 U.S. at 802 (quoting *Mississippi*, 71 U.S. (4 Wall.) at 498-99); *see also id.* at 826 (Scalia, J., concurring in part and concurring in the judgment) ("I think it clear that no court has authority to direct the President to take an official act.").[1]

[1] I do not suggest that insubstantial assertions of immunity would trigger a right to immediate appellate review. They would not. *See Process & Indus. Devs., Ltd. v. Federal Republic of Nigeria*, 962 F.3d 576, 583 (D.C. Cir. 2020). Likewise, the *Adams* inquiry is flexible enough to exclude insubstantial assertions. But here, as explained

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 25-5028 **September Term, 2024**

The order here is immediately reviewable under these principles. It purports to enjoin the President's removal of an agency head. Yet the "President's removal power serves vital purposes"; it "helps the President maintain a degree of control over the subordinates he needs to carry out his duties as the head of the Executive Branch, and it works to ensure that these subordinates serve the people effectively." *Collins v. Yellen*, 594 U.S. 220, 252 (2021). The removal power "is in no just sense ministerial," but instead "is purely executive and political." *Mississippi*, 71 U.S. at 499; *see In re Hennen*, 38 U.S. 230, 259-60 (1839). So the order ran afoul of *Mississippi v. Johnson*, and it usurped a core Article II power of the President. It is thus immediately appealable.[2]

C

Against all of this, Dellinger contends that we lack jurisdiction because the TRO merely preserves the status quo, defined as the last uncontested status just before the controversy arose. Our precedents do take that consideration into account, in assessing both irreparable injury, *see Huisha-Huisha v. Mayorkas*, 27 F.4th 718, 733-34 (D.C. Cir. 2022), and appealability, *see Adams*, 570 F.2d at 953. But it does not always carry the day. As explained above, TROs themselves sometimes inflict irreparable injury, and in those cases an immediate appeal is available to avoid it. For instance, the last uncontested status in *Northeast Ohio Coalition* was the world with no voter ID law, and the TRO at issue preserved that status. *See* 467 F.3d at 1006. Nonetheless, because the TRO unjustifiably inflicted irreparable harm on Ohio, the Sixth Circuit reviewed and reversed it. *See id.* The appealability inquiry thus ultimately turns less on trying to define the most relevant status quo, or trying to characterize the injunction as mandatory or prohibitory, than it does on a "weighing of relative hardships." Wright & Miller, § 3922.1; *cf. Labrador v. Poe ex rel. Poe*, 144 S. Ct. 921, 930-31 (2024) (Kavanaugh, J., concurring) ("difficulties emerge when trying to define

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below, the asserted immunity is more than colorable.

[2] My colleagues seek to cure the *Mississippi v. Johnson* problem by excluding the President from the scope of the TRO. *Ante* at 10 n.1. But by its terms, the order expressly applies to all "Defendants." *See Dellinger*, 2025 WL 471022, at *14. Moreover, the district court observed that the designation of Secretary Collins as the Acting Special Counsel—which only the President could do—"may have" violated the terms of its initial order. *Id.* at *14 n.8. And the TRO necessarily targets the President—the only official with the statutory and constitutional authority to appoint, remove, and supervise the Special Counsel.

the status quo," depending on whether the challenged conduct or the injunction of it is more injurious). Here, though the two-week timeframe mitigates some harms on both sides of the balance, the weighing still tips decidedly in favor of the government. As explained more fully below, the TRO unjustifiably intrudes into a core institutional prerogative of the President, while Dellinger's modest individual injury could be remedied in an action for backpay.

For these reasons, the TRO is immediately appealable.

IV

The government asks us to stay the TRO pending our resolution of the appeal. Four considerations are relevant: whether (1) the government has made a strong showing that it will prevail on appeal; (2) the government will be irreparably harmed absent a stay; (3) issuance of the stay will substantially harm Dellinger or others; and (4) the stay is in the public interest. *Nken v. Holder*, 556 U.S. 418, 425-26 (2009) (citation omitted). Applying these factors, I would grant a stay.

A

The government has shown a strong likelihood of success on the merits. An injunction preventing the President from firing an agency head—and thus controlling how he performs his official duties—is virtually unheard of. *See Franklin*, 505 U.S. at 827 (Scalia, J., concurring in part and concurring in the judgment) ("I am aware of only one instance in which we were specifically asked to issue an injunction requiring the President to take specified executive acts [and] we emphatically disclaimed the authority to do so"). And in any event, Article II of the Constitution empowers the President "to remove the head of an agency with a single top officer." *Collins*, 594 U.S. at 256.

1

To begin with, Dellinger cannot overcome various barriers to injunctive relief here. Most obviously, courts may not enjoin the President regarding the performance of his official acts, regarding removal or otherwise. *See Franklin*, 505 U.S. at 802-03 (plurality); *id.* at 827 (Scalia, J., concurring in part and concurring in the judgment); *Mississippi*, 71 U.S. (4 Wall.) at 501; *Newdow*, 603 F.3d at 1013. That is why removed executive officers traditionally have sought judicial review not through injunctive actions against the President for reinstatement, but through backpay actions for damages. *See, e.g., Weiner v. United States*, 357 U.S. 349, 349-51 (1958); *Humphrey's Ex'r v.*

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States, 295 U.S. 602, 622 (1935); *Myers v. United States*, 272 U.S. 52, 106 (1926). Perhaps it is also why the parties have identified just a single, unpublished district-court decision purporting to enjoin the President from removing any government official from office. *See Berry v. Reagan*, No. 83-3182, 1983 WL 538 (D.D.C. Nov. 14, 1983). And even *Berry* was a far cry from this case: It involved members of the United States Commission on Civil Rights, a temporary, multi-member agency charged with making reports to the President and Congress. The Commission thus had no coercive power beyond the ability to issue subpoenas. *See id.* at *1. So while the *Berry* court wrongly enjoined the President, it at least did not impair his ability to remove—and therefore supervise—subordinates wielding his power to faithfully execute federal law.

Moreover, even when not directed against the President, injunctions in federal personnel matters are highly disfavored. *Sampson v. Murray*, 415 U.S. 61, 83-84 (1974). The Supreme Court has long warned that judicial interference in government hiring and firing "would lead to the utmost confusion in the management of executive affairs," *White v. Berry*, 171 U.S. 366, 378 (1898), like the ongoing judicial and executive dispute over who is currently Special Counsel, *see Dellinger*, 2025 WL 471022, at *14 n.8. Even when seeking an "orthodox" injunction regarding federal personnel matters, a plaintiff must make a rigorous showing that he is entitled to relief. *Sampson*, 415 U.S. at 84. And here, the relief Dellinger seeks—an injunction restricting the President's exercise of his "conclusive and preclusive constitutional authority" to remove officers, *Trump*, 603 U.S. at 608-09—is anything but "orthodox." To obtain any injunction that so "deeply intrudes into the core concerns of the executive branch," Dellinger must at a minimum "make an extraordinarily strong showing" that he deserves relief. *Adams*, 570 F.2d at 954-55. As explained below, he cannot.

2

The order at issue rests on statutory removal protections that violate Article II of the Constitution, which vests "[t]he executive [p]ower" in the President and charges him with the faithful execution of the laws. U.S. Const. Art. II, §§ 1, 3. As the Supreme Court has long recognized, these provisions confer upon the President the power to remove executive officers at will. *See, e.g., Collins*, 594 U.S. at 250-51; *Seila Law LLC v. CFPB*, 591 U.S. 207, 213-15 (2020); *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 492-93 (2010); *Myers*, 272 U.S. at 108-17.

The Supreme Court has recently clarified the scope of this removal power. Consistent with history and tradition, the President is constitutionally empowered to "remove the agents who wield executive power." *Seila Law*, 591 U.S. at 238; *see Free Enter. Fund*, 561 U.S. at 513-14 (President has "authority to remove those who assist

him in carrying out his duties"). Congress may restrict that power only in "two limited exceptions." *Seila Law*, 591 U.S. at 228. The first exception, established in *Humphrey's Executor*, applies to officers who are part of a "multimember body of experts, balanced along partisan lines, that perform[s] legislative and judicial functions and [does not] exercise any executive power." *Id.* at 216. The second applies to "inferior officers with limited duties and no policymaking or administrative authority." *Id.* at 218. These two exceptions represent the "outermost constitutional limits of permissible congressional restrictions on the President's removal power." *Id.* (quoting *PHH Corp. v. CFPB*, 881 F.3d 75, 196 (D.C. Cir. 2018) (Kavanaugh, J., dissenting)). In recent decades, the Court has consistently declined to extend these exceptions or create new ones. *See Collins*, 594 U.S. at 250-51; *Seila Law*, 591 U.S. at 220; *Free Enter. Fund*, 561 U.S. at 483-84. And twice in the past five years, the Court has held that Congress may not exempt "an agency led by a single director" from the President's at-will removal power. *Collins*, 594 U.S. at 251; *Seila Law*, 591 U.S. at 204.

Under these rules, Congress cannot constitutionally restrict the President's power to remove the Special Counsel. *First*, the Special Counsel undoubtedly wields executive power. As described above, he may investigate all manner of prohibited personnel practices and other acts proscribed by specified federal statute. He may demand from other agencies any records related to one of his investigations. He may sometimes command other agency heads to conduct investigations. And most obviously, he may prosecute actions before the MSPB for various forms of corrective action or sanctions. Based on these powers, we repeatedly have recognized that the Special Counsel resembles an intra-governmental investigator and prosecutor. *See, e.g.*, *Barnhart*, 711 F.2d at 1525; *Frazier*, 672 F.2d at 163. And prosecutors indisputably wield core executive power. *Cmty. for Creative Non-Violence v. Pierce*, 786 F.2d 1199, 1201 (D.C. Cir. 1986).

Second, neither of the exceptions to the President's Article II removal power applies here. The Special Counsel is a single agency head, not a multimember commission, so the *Humphrey's Executor* exception does not apply. And the Special Counsel is not an inferior officer—one who is "directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." *United States v. Arthrex, Inc.*, 594 U.S. 1, 13 (2021); *see Edmond v. United States*, 520 U.S. 651, 663-65 (1997). As the sole head of an agency, he reports only to the President. And by statute, only the President may remove him. 5 U.S.C. § 1211.

The district court reasoned that *Seila Law* and *Collins* do not control because the Special Counsel exercises less executive power than the specific agency heads at

issue in those cases. Perhaps so, but both cases held that the President must be able to remove—and thus "maintain a degree of control over"—subordinates through whom he exercises his executive power. *Collins*, 594 U.S. at 252; *see Seila Law*, 591 U.S. at 204 ("The President's power to remove—and thus supervise—those who wield executive power on his behalf follows from the text of Article II, was settled by the First Congress, and was confirmed in the landmark decision in *Myers* . . . ."). And although the Court described the Special Counsel's jurisdiction as more "limited" than that of the CFPB, it also noted that the Office of Special Counsel is a relatively new creation whose constitutionality has been questioned since its inception. *See Seila Law*, 591 U.S. at 221. In any event, one year later, *Collins* held that the constitutionality of a removal restriction does not "hinge[]" on "the relative importance of the regulatory and enforcement authority of disparate agencies" that wield executive power. *See* 594 U.S. at 251-53. Thus, the Special Counsel's relatively limited executive functions do not distinguish *Seila Law* or *Collins*.

B

The remaining factors also counsel in favor of a stay.

Irreparable Injury. The injunction directs the President to recognize and work with an agency head whom he has already removed. In so doing, it impinges on the "conclusive and preclusive" power through which the President controls the Executive Branch that he is responsible for supervising. *Trump*, 603 U.S. at 608-09; *see also* The Federalist No. 70, at 424 (A. Hamilton) (C. Rossiter ed. 1961) (presidential supervision of the Executive Branch ensures "a due dependence on the people" and "a due responsibility" to them). If the district court had enjoined the removal of the Secretary of State, the grave and irreparable character of injury to the President would be apparent. *Cf. Adams*, 570 F.2d at 954 (stating that even "directing action by the Secretary of State in foreign affairs" constitutes an irreversible "intrusion" on "the core concerns of the executive branch"). And while the Special Counsel may be less prominent than the Secretary of State, that difference goes to the extent—not the character—of the President's injury. So too does the order's brief, two-week duration, which mitigates the extent—not the character—of harms to both the President and Dellinger.

In a much less fraught context, the Supreme Court in *Sampson* stressed the harm to the government from court-ordered reinstatement of terminated government employees. The Court held that a district court, in considering any such order, "is bound to give serious weight to the obviously disruptive effect" that a grant of even "temporary relief" would be "likely to have" on the government's management of its internal affairs. 415 U.S. at 83. And that case merely involved a probationary analyst in

the General Services Administration's Public Buildings Service. *Id.* at 62. If ordering the reinstatement of that employee harmed the government enough to raise an eyebrow, how much more concerning is an order preventing the President from removing, and compelling the President to supervise, an unwanted principal officer?

Finally, given the clarity of *Seila Law* and *Collins* on the constitutional question, the district court's injunction will likely expose the Office of Special Counsel to uncertainty and litigation. Individuals prosecuted by Dellinger in the MSPB inevitably will claim that because he now "lack[s] constitutional authority" to serve as the Special Counsel, his current governmental acts are "void ab initio." *Collins*, 594 U.S. at 257. Even if the OSC ultimately prevails on those issues, the claims will create risk and distraction. And if it does not, every action taken by the Special Counsel during the pendency of the district court's TRO could be vulnerable to legal challenge. While my colleagues correctly note that fourteen days is relatively brief "in the realm of litigation," *ante* at 12, the same cannot be said for the Executive Branch, *see, e.g.*, *Seila Law*, 591 U.S. at 223-25; The Federalist No. 70 (A. Hamilton) (discussing the need for an energetic Executive).

Injury to Dellinger and others. Granting a stay would not substantially harm Dellinger. In *Sampson*, the Supreme Court held that removal from federal office does not warrant injunctive relief so long as statutory backpay remedies are available. 415 U.S. at 90-92. Here, the Back Pay Act would provide Dellinger a remedy in the unlikely event that his challenge were to succeed on the merits. An officer is eligible for back pay if he was (1) a civil service officer appointed by the President, (2) engaged in performing a federal function authorized by law, and (3) subject to supervision by the President. 5 U.S.C. § 2105(a); *see Lambert v. United States*, 4 Cl. Ct. 303, 305 (1984), aff'd, 746 F.2d 1490 (Fed. Cir. 1984). Dellinger checks all three boxes. First, he was a presidential appointee, and the "civil service" includes all appointive positions in the Executive Branch except for the uniformed service. *See* 5 U.S.C. § 2101(1). Second, he was engaged in federal statutory functions. Third, like all principal officers, he was subject to presidential supervision. Because Dellinger would qualify for backpay if he were to prevail on the merits, he is disqualified from preliminary injunctive relief.

The district court focused on Dellinger's asserted statutory entitlement to serve out his term, regardless of any compensation. But with scant likelihood of success, it does not count for much. Moreover, the district court derived that asserted harm from the unpublished *Berry* decision, which reasoned that the plaintiffs' "deprivation of their statutory right to function as Commissioners" would cause *institutional* injury in the form of disrupting proceedings of the Civil Rights Commission. *See* 1983 WL 538, at *5. But in *Berry*, the challenged removals deprived the Commission of a quorum and thus

disabled it from functioning at all. *Id.* Here, in contrast, Dellinger's removal created a single vacancy, and the President immediately designated an Acting Special Counsel, as allowed by the Vacancies Reform Act, until a successor could be nominated, confirmed, and appointed. There is no reason to think that routine succession would tend to destabilize the OSC. To the contrary, turnover among agency heads is routine. And over the last few decades, Executive Departments have had almost as many acting heads as they have Senate-confirmed ones. O'Connell, *Actings*, 120 Colum. L. Rev. 613, 642 (2020).

Public Interest. A stay is also in the public interest. "Only the President (along with the Vice President) is elected by the entire Nation." *Seila Law*, 591 U.S. at 224. So, only through the President can the Executive Branch and its millions of personnel be held democratically accountable. Allowing another branch of government to insulate executive officers from presidential control—whether by congressional statute or judicial injunction—would sever a key constitutional link between the People and their government.

V

For these reasons, I would grant the government's stay motion. As my colleagues dismiss the appeal for lack of jurisdiction, I respectfully dissent.