No. 24-

IN THE

Supreme Court of the United States

HEIDI STIRRUP, PERSONALLY AND IN HER CAPACITY AS A MEMBER OF THE UNITED STATES AIR FORCE ACADEMY BOARD OF VISITORS, *et al.*,

Petitioners,

v.

U.S. DEPARTMENT OF DEFENSE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners were appointed to the Boards of Visitors of the three United States military academies. These Boards are advisory groups subject to the Federal Advisory Committees Act, and are not Executive Branch agencies. To ensure that the Boards exercise their "independent judgment," are not "inappropriately influenced by the appointing authority," the terms of presidentially appointed Board members are statutorily set at three years. The statutes do not authorize the President to remove Board members.

Despite these term-of-office protections, Respondents suspended the operations of the Boards for seven months, then removed Petitioners from their respective Boards, and authorized the creation of "subcommittees" of the Boards—"subcommittees" staffed by persons who are not members of the Boards.

Petitioners sued, but the Court of Appeals, held that because the three-year terms had expired by the time it ruled, the case was moot. The questions presented are:

1. Whether Petitioners may seek injunctive and declaratory relief given that the issues raised here are "capable of repetition, yet evading review."

2. Whether the President may remove at will any presidentially appointed members of these independent advisory Boards, whose three-year terms are specified by statute, and who exercise no executive authority; suspend the operation of the Boards; and establish alternative entities staffed by people who are not Board members.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioners, who were Plaintiffs-Appellants in the courts below, are Heidi Stirrup, Douglass Lengenfelder, and Robert A. Gleason—all members of the United States Air Force Academy Board of Visitors—Mark Edward Green, a member of the Board of Visitors of the United States Military Academy at West Point, and Sean Spicer,[1] a member of the United States Naval Academy Board of Visitors, all of whom sued both in their personal capacities and in their capacities as members of their Boards—as well as Ralph Warren Norman, Jr., who is a Member of Congress, and who sued both personally and in his official capacity as a Member of Congress.

Respondents are the United States Departments of Defense, Air Force, Army, and Navy; the United States Military Academy, Naval Academy, and Air Force Academy; Secretary of Defense Lloyd Austin; Sean Buck, Superintendent of the U.S. Naval Academy; Richard M. Clark, Superintendent of the U.S. Air Force Academy; Secretary of the Navy Carlos Del Toro; Deandra K. Ghostlaw, Designated Federal Officer of the U.S. Military Academy; Secretary of the Air Force Frank Kendall, III; Raphael J. Thakakottur, Designated Federal Officer of the U.S. Naval Academy Board of Visitors; Anthony Ryan McDonald, Designated Federal Officer of the

1. Petitioner Spicer challenges the suspension of the Boards and the creation of the "subcommittees," as detailed herein, but not his termination from the Board of Visitors, which was the subject of a separate lawsuit. *Spicer v. Biden*, 575 F.Supp.3d 93 (D.C. 2021).

U.S. Air Force Academy Board of Visitors; Darryl A. Williams, Superintendent of the U.S. Military Academy; and Secretary of the Army Christine E. Wormuth. All individually named Respondents were sued in their official capacities.

Because no Petitioner is a corporation, a corporate disclosure statement is not required under Rule 29.6.

RELATED PROCEEDINGS

There are no proceedings in state or federal trial courts, or in this Court, related to this case under Rule 14.1(b)(iii).

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The March 21, 2023, opinion of the District Court is reported at 662 F. Supp. 3d 12 (D.D.C. Mar. 21, 2023), and is set out in the Appendix at App. 9a–40a. The June 7, 2024, opinion of the District of Columbia Circuit Court of Appeals is unreported, and can be found at 2024 WL 2873780 (D.C. Cir. June 7, 2024). It is set out in App. 1a–8a.

JURISDICTION

The decision of the Court of Appeals was entered on June 7, 2024. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The District Court had jurisdiction pursuant to 28 U.S.C. § 1331.

STATUTORY PROVISIONS INVOLVED

10 U.S.C. § 9455, which is essentially identical to other relevant statutory sections involved in this case, states in relevant part:

> (a) A Board of Visitors to the Academy is constituted annually. The Board consists of the following members:
>
> (1) Six persons designated by the President.
>
> (2) The chairman of the Committee on Armed Services of the House of Representatives, or his designee.
>
> (3) Four persons designated by the Speaker of the House of Representatives, three of

> whom shall be members of the House of Representatives and the fourth of whom may not be a member of the House of Representatives.
>
> (4) The chairman of the Committee on Armed Services of the Senate, or his designee.
>
> (5) Three other members of the Senate designated by the Vice President or the President pro tempore of the Senate, two of whom are members of the Committee on Appropriations of the Senate.

(b)(1) The persons designated by the President serve for three years each except that any member whose term of office has expired shall continue to serve until his successor is designated by the President. The President shall designate persons each year to succeed the members designated by the President whose terms expire that year. . . .

(c)(1) If a member of the Board dies or resigns or is terminated as a member of the Board under paragraph (2), a successor shall be designated for the unexpired portion of the term by the official who designated the member.

(2)(A) If a member of the Board fails to attend two successive Board meetings, except in a case in which an absence is approved in advance,

> for good cause, by the Board chairman, such failure shall be grounds for termination from membership on the Board. A person designated for membership on the Board shall be provided notice of the provisions of this paragraph at the time of such designation.

The statutes that are identical in most relevant respects are set out in the Appendix at App. 48a–50a and 51a–54a, respectively.

The Federal Advisory Committees Act, 5 U.S.C. § 1004, set out in App. 43a–44a, states in relevant part:

> [L]egislation establishing, or authorizing the establishment of any advisory committee . . . shall:
>
> (2) require the membership of the advisory committee to be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee;
>
> (3) contain appropriate provisions to assure that the advice and recommendations of the advisory committee will not be inappropriately influenced by the appointing authority or by any special interest, but will instead be the result of the advisory committee's independent judgment.

STATEMENT OF THE CASE AND SUMMARY OF REASONS FOR GRANTING THE PETITION

On September 8, 2021, President Biden purported to unilaterally fire all the presidential appointees on the Boards of Visitors of the three United States military service academies who had been appointed to three-year terms by President Trump. President Biden is the first and only President ever to peremptorily remove members from advisory boards—not just these Boards of Visitors, but advisory boards that function in many other contexts.[2] His stated reason—to staff them with people who share his values—compromises their independence by undermining the statutory system of checks and balances that has always governed their operation. By taking these actions, the President and his chief officers have disrupted important, well-established practices and exceeded the bounds of the law.

The function of the Boards is to advise about the proper operations of the military academies, and help preserve civilian, non-partisan control over the military. In 1961, President Eisenhower famously urged the country to find ways to "mold . . . , balance, and . . . integrate" the

2. He removed appointees from many other advisory boards, as well, including the National Capital Planning Commission, the Commission on Fine Arts, and the Advisory Council on Historic Preservation, among perhaps 50 others. *See* McGlone, *Biden Removes Trump Appointees from Boards That Shape the District*, Wash. Post (Feb. 10, 2021), https://www.washingtonpost.com/entertainment/biden-removes-trump-appointees/2021/02/10/6b449a90-6ba9-11eb-9f80-3d7646ce1bc0_story.html.

post-World War II military "within the principles of our democratic system," so as to ensure that the military did not "become the captive of a scientific-technological elite." *Public Papers of the Presidents: Dwight D. Eisenhower 1960-61* at 1039 (1999). The Board of Visitors system is designed to help accomplish that. For decades, the Boards have been known for their independence, excellence, and diversity of views.

Thus the Boards' presidential appointees serve statutorily specified three-year terms, with no provision for removal (except for one not applicable here). This independence is not unique to these Boards, however; it is well-nigh universal for federal advisory entities, thanks to the Federal Advisory Committees Act (FACA), which requires that members of these Boards, and of countless other official advisory groups, exercise their "independent judgment," 5 U.S.C. § 1004(b)(3), and that they not be "inappropriately influenced by the appointing authority." 41 C.F.R. § 102-3.105(i). Further, these Boards are required to be "fairly balanced in terms of the points of view represented," 5 U.S.C. § 1004(b)(2), and their terms are staggered in such a way that two members' terms expire each year. This structure is devised to ensure that while the Boards are publicly accountable, they are nonetheless non-partisan, politically balanced, and not confined within the Executive or Legislative Branch. They provide advice and recommendations to both.

To emphasize: the Boards are not Executive (or Legislative) Branch entities. They exercise no enforcement or rulemaking power. Their job is to visit the service academies and to prepare written recommendations and reports to Congress, the President, and the Defense

Department, regarding their functioning and ways they could improve.

Yet the Biden Administration has shown no respect for this independence. On February 4, 2021, Petitioners Stirrup, Lengenfelder, and Gleason, as well as other Presidential (but not congressional) appointees to the Air Force Academy Board learned by email that the Secretary of Defense had suspended the operations of all Defense Department advisory committees pending a "Zero-Based Review"—meaning a total review of their operations—to be completed by April 30, 2021. App. 13a. The Secretary cited no statutory authority for doing this, because none exists.

Then on September 8, President Biden fired the Petitioners (who had been appointed by President Trump between 2018 and 2020) without notice, explanation, or statutory authority, for the express purpose of purging those Boards of distinguished, highly-qualified Americans whom the previous Administration had appointed. A White House spokesman explained that this action was taken because they were not "aligned" with the President's views, and had allegedly "stood by silently" while the former President who appointed them led an insurrection against the Capitol.[3] Yet there is not and has never been any suggestion that these removals were due to malfeasance, incompetence, fraud, or other good cause.

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3. Caralle & Crilly, *"They Stood Silent While Their Boss Supported an Insurrection": Psaki Insists It's Biden's Right to Purge Trump Picks from Military Boards,* Daily Mail (Sep. 8, 2021), https://www.dailymail.co.uk/news/article-9973659/Jen-Psaki-insists-Joe-Biden-right-kick-Trump-picks-military-academy-advisory-boards.html.

In addition, on September 17, 2021, the Secretary of Defense authorized the establishment of so-called "subcommittees"—which are not true subcommittees, because their members are not members of the Boards—who would be vested with such authority as to dilute or even effectively supersede the existing Board structure. App. 57a–59a. Again, no statutory authority exists for these "subcommittees." Yet the Secretary issued an internal memorandum authorizing establishment of "subcommittees" with personnel "separate and distinct" from those of the Boards, *id.* 58a—in other words, a group of outsiders who can and likely will be given power to effectively displace all functions assigned to Board members by statute. *See id.*

This Court recently warned of the dangers of the "instability" of administrative law, which enables the government to "change positions as much as it likes"—particularly with every change of the Presidency—leaving citizens "in an eternal fog of uncertainty" about what the law actually is. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2272 (2024). Those fears are fully realized here, for the consequence of the unauthorized suspension of Board activities, the unauthorized removal of Petitioners from the Boards, and the unauthorized green-light to create and appoint non-Board members to the "subcommittees," have all radically changed the structure of the nation's military academies. These actions transform the position of Board member from (a) independent advisor to the White House and Congress into (b) at-will employee of the President.

Yet when Petitioners brought suit, the Court of Appeals held that the fact that the terms of the Trump-appointed Board members had expired meant their case was moot; the court therefore never reached the merits, but dismissed. In so doing, it brushed aside the long-standing rule that a case rendered moot by incidents occurring "before the usual appellate process is complete" will not be dismissed when the injury is "capable of repetition, yet evading review." *Roe v. Wade*, 410 U.S. 113, 125 (1973) (citation omitted).

The Court of Appeals said that the "capable of repetition" rule did not apply because these *specific* Petitioners are not likely to be appointed to the Boards again. This limitation, however, misreads the "capable of repetition" rule, which does not require that level of particularity. What's more, the Petitioners were suing not only on their own behalf, but in their official capacities—that is, on behalf of those Board seats which the Respondents claim are subject to at-will removal. Absent their participation, the lawsuit will die for want of a champion. And that's precisely what the "capable of repetition" exception was created for: situations in which crucially important legal issues could escape the attention of the courts due to delays inherent in litigation, rather than through any genuine change in the factual circumstances or legal issues.

Given the extraordinary importance of the questions presented here, the Court should grant certiorari to address the lower courts' confusion regarding the "capable of repetition" rule, and to resolve the important merits questions relating to the distinction between employees and independent officials on the one hand, and the scope of the Appointments Clause on the other.

REASONS FOR GRANTING THE PETITION

I. Members of the Boards cannot be removed during their period of office.

A. The Boards of Visitors are not executive agencies, but advisory boards established by Congress serving statutorily limited terms.

By Congressional mandate, the Boards of Visitors of the Army, Navy, and Air Force academies act as oversight advisory committees, whose mandate is to investigate how they are operating and make recommendations about how they could improve. The Boards wield no executive power (nor any "quasi-legislative" or "quasi-judicial" powers[4]). They simply "inquire into the morale and discipline, the curriculum, instruction, physical equipment, fiscal affairs, academic methods," of the academies, "and other matters." 10 U.S.C. §§ 7455(e), 8468(e), 9455(e)(1).[5] Then they prepare and submit reports to the Senate Armed Services Committee, the House Armed Services Committee, the President, and the Secretaries of Defense, the Air Force, the Army, and the Navy, regarding how the academies could be improved.

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4. What branch are they in? They are "branchless." *See Mistretta v. United States*, 488 U.S. 361, 423 (1989) (Scalia, J., dissenting) ("Where no governmental power is at issue, there is no strict constitutional impediment to a 'branchless' agency, since it is only '[a]ll legislative Powers,' '[t]he executive Power,' and '[t]he judicial Power,' which the Constitution divides into three departments." (internal citations omitted)).

5. The language of these sections contains some slight differences in wording not significant here.

Each of the three Boards has 15 members, six appointed by the President, the rest by members of Congress.[6] The length of the Presidential appointees' terms is set by statute at three years. 10 U.S.C. §§ 7455(b), 8468(b), 9455(b)(1). These statutes make no provision for the *removal* of any Board members—with one exception: members of the Air Force Academy Board of Visitors who are not members of Congress can be removed by the Chair if they fail to attend two meetings in a row without good cause. *Id.* § 9455(c)(2)(A). The statutes *do* contemplate and provide for the possibility of the death or resignation of members, *see id.* §§ 9455(c)(1), 8468(c), § 7455(c), but *not* for their removal—and in fact, they specify that if the President fails to designate a successor to fill a Board seat when the three-year term ends, the holder of that seat shall remain in office until the President nominates a successor. *Id.* §§ 9455(b)(1), 8468(b), 7455(b).

Because these Boards are subject to FACA, each Board member is expected—in the words of the Charter of the U.S. Military Academy Board of Visitors—"to provide advice on the basis of his or her best judgment on behalf of the Government without representing any particular point of view and in a manner that is free from

6. Four members from the Senate and five from the House: the Chairman of the Senate Armed Services Committee or his/her designee, the Chairman of the House Armed Services Committee or his/her designee, four other Members of the House designated by the Speaker of the House, and three other Members of the Senate designated by the Vice President or President Pro Tempore of the Senate. 10 U.S.C. §§ 9455(a)(1-5); 7455(a)(1-5); 8468(a)(1-5).

conflict of interest."[7] Specifically, FACA requires that the Boards' membership "be fairly balanced in terms of the points of view represented," 5 U.S.C. § 1004(b)(2), and that any legislation relating to the Boards be designed to ensure "that the advice and recommendations of the advisory committee will not be inappropriately influenced *by the appointing authority* or by any special interest, but will instead be the result of the advisory committee's independent judgment." *Id.* § 1004(b)(3) (emphasis added). FACA's implementing regulations echo these precise requirements. 29 C.F.R. § 1430.3(a)(3), (4). The Secretary of Defense, as agency head of the Department of Defense, must also "[d]evelop procedures to assure that the advice or recommendations of advisory committees will not be inappropriately influenced *by the appointing authority* or by any special interest, but will instead be the result of the advisory committee's independent judgment." 41 C.F.R. § 102-3.105(i) (emphasis added).

No President has ever attempted to remove a Board member. Nor does anything in the statutes or regulations contemplate "subcommittees" of the Boards—or authorize the Secretary of Defense or any deputy of the Secretary to appoint anyone to a Board committee or sub-committee. On the contrary, the Department previously determined that no such subcommittees exercised lawful authority, as Defendant Austin acknowledged in three memoranda issued in September 2021.[8]

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7. Charter, U.S. Military Academy Bd. of Visitors at 3, https://s3.amazonaws.com/usma-media/inline-images/about/board_of_visitors/board_of_visitors_charter.pdf.

8. In these memoranda (one sent to each of the three Boards on September 17, 2021, *see* App. 57a–63a), the Secretary

B. The unlawful suspensions and terminations.

On February 4, 2021, the Secretary of Defense informed Petitioners that he was "suspending" the Boards' operations pending a "Zero-Base Review" by the Department. App. 3a–4a. That announcement provided no statutory authorization for these suspensions, and no statute or regulation provides for suspensions. Nor did that announcement explain why the Boards could not remain in operation during the review; presumably, they could be helpful in such a review. The Boards, however, ceased to meet at that point.

Then, in September 2021, Petitioners Stirrup, Lengenfelder, Spicer, and Gleason received communications from the White House requesting that they resign from their positions within a day or face termination. App. 4a, 14a. They all received materially identical e-mails from Catherine M. Russell, Director of the White House Presidential Personnel Office, that concluded, "Should we not receive your resignation, your position with the Board will be terminated effective 6:00 p.m. tonight. Thank you."

Petitioners refused in writing to resign, noting that the President has no statutory authority to terminate Board members from their memberships. In reply, they

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wrote: "[the Department of Defense] previously determined that subcommittees are not authorized for the [Air Force Academy] [Board]. . . . I support this earlier decision." App. 58a. Yet the Secretary went on to state "you are delegated authority to establish . . . subcommittees" and to require that the membership of these subcommittees be "separate and distinct" from membership on the Boards. *Id.*

were informed that they were no longer members of the Boards. Days afterward, the Defense Department and Secretary Austin wrote to the Secretaries of the Air Force, Army, and Navy, purporting to reinstate the Boards and subsequently asserting power unilaterally to create "subcommittees" of the Boards—which could be staffed by *non-members* of the Boards. App. 57a–63a. Again, no statutory authority was provided.

The Petitioners sued, seeking declaratory and injunctive relief holding the suspensions of the Boards, their terminations as members, and the authorization of these "subcommittees," to be unlawful.

II. The Court of Appeals' erroneous application of the mootness doctrine bars the courts from reviewing a vitally important question relating to authority over the military academies.

This case presents an important opportunity for this Court to correct a major, and persistent, confusion regarding the requirements of standing and mootness, by offering a coherent account of "capable of repetition" principles. The point of conflict below relates to the degree to which a plaintiff must prove that *she specifically* will experience the injury again, as the Court of Appeals held, or whether, as this Court has held, she only need prove a likely recurrence of the *same kind* of injury—as well as of ripeness, addressing the key question of whether a court should move now or wait until later (or, as when mootness is applied to this case, never).

A. The Court of Appeals' muddled "capable of repetition" analysis.

The Court of Appeals concluded that the case was moot because the three-year term of Petitioners' offices had expired by the time it ruled on the case. App. 6a. Although Petitioners argued that the "capable of repetition but evading review" exception applies, the court rejected that argument on the grounds that these particular Petitioners were unlikely to be appointed to a Board again, and therefore could not claim a likely future injury. *Id.* Not only was that an erroneous application of the rule, but it was one that, if left unresolved by this Court, will block virtually *any* review of the unlawful actions taken by Respondents here—actions that will have troubling implications for the future.

The "capable of repetition" exception was established because there are some claims that are inherently transitory, such that courts cannot adjudicate them in time. The classic examples are pregnancy, as in *Roe, supra,* or election cycles, as in *Dunn v. Blumstein*, 405 U.S. 330, 333 n.2 (1972). Given the short period of Board members' statutorily specified terms, the same exception should easily have applied here. Yet the Court of Appeals held otherwise on the theory that a party can claim this exception only if *he or she specifically* is likely to experience the *same* injury again in the future. App. 7a. That was wrong. No such limitation appears in *Roe* itself, and in practice the rule has never been that strict. Moreover, the Petitioners here sued not just in their own personal capacities, but also in their capacities as Board members—that is, asserting the rights of any holder of the office—and it is obviously likely that holders of those Board seats will experience the same harm in the future.

If left uncorrected by this Court, the D.C. Circuit's miserly application of the "capable of repetition" rule will block virtually *any* review of *any* unlawful and dangerously precedent-setting actions that parallel those taken by these Respondents, not only with respect to the military academy oversight advisors, but in connection with the many other advisory boards whose members were also illegally dismissed. Such arbitrary behavior will invite similar actions of retaliation against future advisory board members, given that the sole justification offered by the Biden administration for its action was a partisan one. And that will obliterate the independence that FACA was designed to secure for these entities. Every incoming administration will enjoy power to replace their members—but because the statutory terms of office will lapse "before the usual appellate process is complete," *Roe*, 410 U.S. at 125, no redress will be available.

That should not be the law. It never has been the law. In *Dunn*, this Court reviewed the constitutionality of certain Tennessee statutes requiring a duration of residency before voting. The election had already been held by the time the Court reviewed the case—and the petitioner had been allowed to vote in that election—yet the Court found that the case was subject to the "capable of repetition" exception because "[a]lthough appellee now can vote, the problem *to voters* posed by the Tennessee residence requirements is 'capable of repetition, yet evading review.'" 405 U.S. at 333 n.2 (emphasis added). Similarly, in *Moore v. Ogilvie,* 394 U.S. 814 (1969), the Court allowed a case challenging Illinois election restrictions to proceed despite the fact that the election had passed, because "the burden which [the law] allowed to be placed on the nomination of candidates for

statewide offices remains and controls future elections," and consequently "[t]he need for [the issue's] resolution thus reflects a continuing controversy." *Id.* at 816. And *Storer v. Brown*, 415 U.S. 724 (1974), allowed an election challenge to proceed although the election was "long over, and no effective relief [could] be provided," because "the issues properly presented . . . will persist as the [challenged] statutes are applied in future elections." *Id.* at 737 n.8. *Storer* made no reference to the possibility of those statutes being applied against those specific plaintiffs again, but said that the "capable of repetition" exception was applicable because "[t]he construction of the statute, an understanding of its operation, and possible constitutional limits on its application, will have the effect of simplifying future challenges, thus increasing the likelihood that timely filed cases can be adjudicated before an election is held." *Id.* The same rule applied in *Rosario v. Rockefeller*, 410 U.S. 752, 756 n.5 (1973), and *American Party of Texas v. White*, 415 U.S. 767, 770 n.1 (1974), neither of which inquired whether the particular plaintiffs would suffer the identical harm again. *See also Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 662 (5th Cir. 2006) ("even if it were doubtful that the [plaintiff] would again attempt to engage in [actions prohibited by the challenged law] . . . this case is not moot, because other individuals certainly will be affected by the continuing existence of [that law].").

In none of those cases was the "capable of repetition" rule limited to those situations in which *the particular plaintiff* can prove that she specifically will suffer the same exact harm again.

Nor does such a constricted version of the rule appear even in non-election law cases. In *Honig v. Doe*, 484 U.S. 305 (1988), the Court reviewed a challenge to a state law regarding the education of children below a certain age, even though they had exceeded that age by the time the Court ruled. It held that the "capable of repetition" exception applied, *id.* at 318, and Chief Justice Rehnquist explained why in a concurrence: "[the Court's] unwillingness to decide moot cases . . . may be overridden where there are strong reasons to override it. The 'capable of repetition, yet evading review' exception is an example." *Id.* at 331 (Rehnquist, C.J., concurring).

It was for that reason that the Court invoked the rule in *Roe*, saying "pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied," unless the mootness exception applies—and that "[o]ur law should not be that rigid." 410 U.S. at 125. The Court made no serious inquiry into whether Roe *herself* would become pregnant again, mentioning only that "[p]regnancy often comes more than once to the same woman." *Id.* Notably, the *Roe* Court *declined* to review the case involving Petitioner Hallford, who had been prosecuted for performing abortions, because it found that he could raise his constitutional arguments as part of "his defenses in the state criminal proceedings against him." *Id.* at 127. In other words, the "capable of repetition" rule works as Chief Justice Rehnquist said in *Honig*: the reluctance to address moot controversies "may be overridden where there are strong reasons to override it." 484 U.S. at 331 (Rehnquist, C.J., concurring).

Moreover, Petitioners brought this case not only in their individual capacities, but also in their capacities as holders of the seats on the Boards. *Cf. Coleman v. Miller*, 307 U.S. 433, 438 (1939) (legislators had standing to challenge abrogation of their official voting rights); *Goldwater v. Carter*, 617 F.2d 697, 702 (D.C. Cir. 1979), *vacated*, 444 U.S. 996 (1979) (Senator challenging executive action depriving Senate of opportunity to vote). Absent this Court's intervention, the action below sets a precedent that these Board seats will be subject in the future to the challenged power of removal. *Cf. Carmouche*, 449 F.3d at 662. That's all the "capable of repetition" rule requires—not proof that the exact same plaintiff will suffer the same harm again.

In addition, once the time for reinstatement passed, Petitioners insisted that the case continue in a second phase, in order to protect future holders of these seats who aren't yet known, but who will be subject to the challenged power of removal. That systemic risk is all the "capable of repetition" rule requires—not proof that the exact same person will suffer exactly the same harm in the future. In *Kingdomware Technologies v. United States*, 579 U.S. 162 (2016), for example, the Court let a challenge to certain procurement procedures proceed even though the procurements generating the litigation had been completed. It said that the "capable of repetition" exception applied because "it [was] reasonable to expect that the [defendant] will refuse to apply the [rules] in a future procurement *for the kind of services provided by* Kingdomware." *Id.* at 170 (emphasis added). In short, the "capable of repetition" exception depends "*[not]* on whether the precise historical facts that spawned the plaintiff's claims are likely to recur, [but on] whether the

legal wrong complained of by the plaintiff is reasonably likely to recur." *Del Monte Fresh Produce Co. v. United States*, 570 F.3d 316, 324 (D.C. Cir. 2009).

Thus the Court of Appeals' ruling that Petitioners were required to prove "that *they themselves* are likely to be subjected to the same action again" App. 7a, went beyond well-established mootness principles,[9] and in a manner that would render it effectively impossible for a Board member in Petitioners' place to challenge the legality of the asserted removal power, or similar power of interference with the Boards. To require a member of a Board or another federal advisory committee to meet *that* high standard would effectively bar such people from raising the crucially important legal issues at stake in a case like this, through the mere delay of adjudication. That was the concern giving rise to the "capable of repetition" rule in the first place. *Ogilvie,* 394 U.S. at 816.

The inability of the next generation of appointees to defend themselves, in turn, raises the type of concerns

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9. There's also no doubt that relief can be afforded to Petitioners, because even where a court cannot command that a person be reinstated to office, it can order the government to extend to the wrongly removed official the substantive powers of her position. Thus in *Swan v. Clinton,* 100 F.3d 973 (D.C. Cir. 1996), in which the plaintiff alleged that President Clinton wrongly replaced him (Swan) with another person (Wheat) on a board overseeing credit unions, the court acknowledged that "these officials cannot officially remove Wheat and reinstate Swan, [but] they can accomplish these deeds *de facto* by treating Swan as a member of the . . . Board and allowing him to exercise the privileges of that office . . . and by denying any such treatment to Wheat." *Id.* at 980.

regarding "readily foreseeable outcomes and the stability that comes with them" that were at issue in *Loper Bright*, 144 S. Ct. at 2272. The whole point of the independence of these Boards is to render them relatively immune to political trends, thus to ensure a degree of autonomy, objectivity, and stability. To forestall the resolution of this case due to the passage of time is to fall prey to precisely the instability that the statutory structure was designed to prevent. In other words, it rewards the Executive Branch for violating the statute, as long as it takes its illegal actions quickly enough. It was that risk that motivated creation of the "capable of repetition" rule.

That points up the importance of reviewing this case and setting the "capable of repetition" doctrine straight.

B. The Court of Appeals confused the ripeness requirement in relation to "future injury" analysis.

The Court of Appeals' ripeness analysis was, if anything, even more confused, and calls out even more strongly for this Court's review and clarification. It held that because the Secretary had not yet established the "subcommittees," the case challenging their legality is unripe. But all the information necessary to resolve the legality of these "subcommittees" is already available, and all that remains is the resolution of a pure question of law. This case presents a clean opportunity for the Court to correct widespread confusion regarding whether a court should move now or wait until later.

Ripeness deals with the *timing* of judicial intervention, and thus asks whether there is any reason to delay legal

proceedings: it asks, for example, whether during the interim, the court will acquire new information that will improve its grasp of a contested case. *Abbott Labs v. Gardner,* 387 U.S. 136, 149 (1967). Thus in takings cases, where ripeness has exerted considerable influence, the Court has explained that "it is the interest in informed decision-making that underlies our decisions imposing a strict ripeness requirement on landowners asserting regulatory takings claims." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 339 (2002). Given that the takings analysis, on the merits, "is characterized by 'essentially ad hoc, factual inquiries,' designed to allow 'careful examination and weighing of all the relevant circumstances,'" *id.* at 322 (internal citations omitted), it makes sense to require a plaintiff to wait until the injury of a potential taking has concretized in some measurable way. That prudent delay allows a court to grasp "all the relevant circumstances." *Id.*

But there's no comparable reason to delay deciding a pure question of law where all relevant legal information is already known from the outset—as is true here. There are no contingencies lurking in the future that could complicate the analysis of the purely legal dispute. In such a situation, delay supplies no new information, but only creates additional uncertainty, which benefits nobody. The doctrine of ripeness thus has no application. *Abbott Labs*, 387 U.S. at 149; *see also Braidwood Mgmt., Inc. v. EEOC*, 70 F.4th 914, 930 (5th Cir. 2023) ("a claim is 'fit for judicial decision' if it presents a pure question of law that needs no further factual development").

Here, the relevant legal materials all establish the Petitioners' illegal removal, the illegality of the suspension

of the Boards, and the illegal authorization of the ersatz subcommittees containing no Board members. There's no reason to wait; the Secretary has clearly authorized the creation of these "subcommittees" and specified that their membership is "separate and distinct" from the membership on the Boards. Thus the question is simply whether this decision is lawful.

There is no need to await the actual formation of these "subcommittees," because nothing about this lawsuit hinges on any particular facts or circumstances relating to their operation, or time of creation, etc. Rather, this lawsuit challenges the legality of the *authorization*, which has *already* happened. As this Court said in the *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 143 (1974), "[w]here the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect." *See also Pennsylvania v. W. Va.*, 262 U.S. 553, 593 (1923) ("One does not have to await the consummation of threatened injury to obtain preventive relief.").

Indeed, in *Seila Law LLC v. CFPB*, 591 U.S. 197 (2020), which, like this case, concerned the president's removal power, the Court said the plaintiffs could challenge the legality of an official's actions, on the grounds that the presidential removal authority (or lack thereof) rendered the official's actions void, even absent an unlawful removal from office: "we have expressly 'reject[ed]' the 'argument that consideration of the effect of a removal provision is not "ripe" until that provision is actually used,' because when such a provision violates the separation of powers it inflicts a 'here-and-now' injury." *Id.* at 212 (citation omitted).

Nevertheless, confusion regarding ripeness persists. *See, e.g., Pennsylvania Fam. Inst., Inc. v. Black*, 489 F.3d 156, 165 (3d Cir. 2007) ("Few doctrines of constitutional law have engendered as much discussion, and confusion, as those of standing and ripeness."); *S. Pac. Transp. Co. v. City of L.A.*, 922 F.2d 498, 505 (9th Cir. 1990) (remarking on "the ample confusion" in the law of ripeness). In fact, it bears asking whether ripeness is merely a restatement of standing, and thus adds nothing helpful, while contributing only delay and confusion. In *Susan B. Anthony List v. Driehaus*, 573 U.S. 149 (2014), the plaintiffs brought a pre-enforcement challenge to a restriction on campaign speech. The Court of Appeals found the case unripe, 525 F. App'x 415, 418–23 (6th Cir. 2013), finding among other things that future injury was unlikely. *Id.* at 420, 422. This Court reversed, however, finding the case ripe because "the Article III standing and ripeness issues in this case 'boil down to the same question.'" 573 U.S. at 157 n.5 (citation omitted).[10] Rather than requiring the plaintiff to wait to be injured to establish the specifics, this Court said that all that was required was that she be prepared to act in a proscribed way, and faced a "credible threat" of punishment for doing so. *Id.* at 159.

What's more, ripeness has long been "in some tension with our recent reaffirmation of the principle that 'a federal court's obligation to hear and decide' cases within its jurisdiction 'is virtually unflagging.'" *Id.* at 167 (citations omitted). And that's certainly true in the courts of appeals that have been confused by the ripeness doctrine. As the Seventh Circuit once remarked, "[i]t is unclear to what

10. In fact, the Court used the single term "standing" to cover both. *Id.*

extent the ripeness doctrine is derived from the 'case or controversy' requirement of Article III and to what extent it is a judicially created tool for avoiding decisions in cases which a particular court may feel lack an 'optimal' factual setting." *Peick v. Pension Benefit Guar. Corp.*, 724 F.2d 1247, 1261 n.15 (7th Cir. 1983).

Forty years later, that question resurfaces here. By holding that although the challenged removal and challenged authorization of "subcommittees" have *already* occurred, Petitioners cannot sue until full implementation or manifestation of that authorization, the lower court doubled down on the "prudential ripeness" doctrine upon which *Driehaus* cast so much doubt. And it did so unnecessarily, because the question here is simply whether the removal from the Boards, the suspension of their operations, and the authorization of the subcommittees whose members aren't Board members—*all of which have already occurred*—are lawful. The questions are therefore wholly legal.

In light of these circumstances, the decisive inquiry is only whether the full set of threats posed by Respondents' actions should be remedied in a single order issued immediately, or whether two or more orders should be required later. The former approach dominates existing doctrine. But, as with *Roe*, *Honig*, and other cases, it's imperative that government officials not be able to avoid answering in court for their actions by running out the clock.

III. The illegality of the Board members' removal and the creation of the subcommittees are important issues that this Court should resolve.

The question of whether the President and his deputies can ignore statutory limits on the removal of Board members is important not just because of the inherent significance of the question of whether the President is "above the law," *Trump v. United States*, 144 S. Ct. 2312, 2346 (2024), but because of the role these Boards play in ensuring the politically balanced, democratic oversight of the military.

A. The removal of Board members is carefully cabined by statutes which the Respondents ignored.

As noted above, the statutes creating the Boards specify a three-year term of office. There's no statutory ambiguity; Petitioners' terms run for three years, and no language, express or implied, in the statutes or elsewhere, gives the President power to cut those terms short.

It was therefore astonishing that the District Court claimed the statute so clearly called for at-will appointment that it refused to examine the history and structure of the provision. App. 37a. "Plaintiffs," it said, "must point to a specific statutory provision that prevented their firing." *Id.* 32a. Yet Sections 9455(b)(1), 7455(b), 8468(b), expressly establish a *specific* term of office, and limit the President's replacement authority to certain *specific* instances. Nevertheless, the court read the text which speaks of a three-year term as calling for at-will appointment at the pleasure of the President—the opposite of what it says.

In fact, the statutes implicitly say the opposite. First, the statute governing the Air Force's Board specifies that members who aren't members of Congress *can* be removed for cause—but *only* by the Board chair. *Id.* § 9455(c)(2)(A). Second, the statute specifies that the President can *only* name a successor to a member whose term has expired by passage of time—and even that a member whose term expires remains in office if the President does not name a successor. *Id.* §§ 9455 (b)(1); 7455(b); 8468(b). Third, the statutes specify what happens if a member dies or resigns, but make *no* provision for presidential removal. *Id.* § 7455(c), 9455(c)(1), 8468(c). By an *exclusio alterius* reading, all of this militates against the proposition that the President can remove members, let alone at will. Perhaps most importantly, Board members are *not* administrative or Executive Branch officers wielding enforcement authority subordinate to the President. They're federal advisory committees subject to FACA, with its statutory mandates of independence and balanced membership. These mandates are designed to ensure independence—and that requires the fixed terms established by the statutes.

When Congress wants to reserve a removal power, it knows how to. Thus in *Humphrey's Executor v. United States*, 295 U.S. 602, 620 (1935), Congress gave the President power to remove FTC commissioners for "inefficiency, neglect of duty, or malfeasance in office." No such language appears here, however, and certainly none that allows for the removal *without* cause. Nor have Petitioners been accused of any neglect, malfeasance, etc.

Historical practice is to the same effect: no previous President has attempted to fire Board members; instead,

there's been a bi-partisan consensus that it's best for the Boards to remain apolitical as Congress intended. As Professor Vermeule observes in *Conventions of Agency Independence*, 113 Colum. L. Rev. 1163 (2013), historical practice regarding boards, agencies, and commissions is a helpful indicator of their intended autonomy. Thus, for example, President Reagan sought to remove members of the Civil Rights Commission, without success; the holdover members refused to resign, and the Senate refused to confirm Reagan's new appointees. "The long-run effect of [that] episode was to cause Congress to transform the convention of Commission independence into a formal legal rule." *Id.* at 1201.

It's therefore unsurprising that no similar effort has ever been attempted with an entity governed by FACA, which shows that at-will removal is contrary not only to the text and purpose, but also the unbroken history of Sections 9455, 7455, and 8468.

B. Certiorari is warranted to clarify the limits of the *Carlucci* rule.

The District Court cited the presumption that the power to remove from office is incident to the power to appoint, a proposition derived from *Carlucci v. Doe*, 488 U.S. 93 (1988). App. 31a. But this case is entirely different, because the Boards are *not* Executive Branch officers or employees, as the plaintiff in *Carlucci* was.[11] Unlike officers and employees who are subject to the *Carlucci* presumption, Board members like Petitioners do *not* serve

11. He was cryptographic control technician employed by the National Security Agency. *Id.* at 95.

as presidential employees, deputies, or under executive branch employment contracts, any more than do federal judges. They are not inferior officers.

The District Court sought to justify the contrary conclusion by insisting that the phrase "[the] President shall designate persons each year to succeed the members designated by the President whose terms expire that year," 10 U.S.C. § 9455(b)(1),[12] is "consistent with unfettered presidential removal power." App. 33a. It also rejected reliance on historical practice by citing the Uniform Commercial Code for the proposition that "express terms" in a contract take precedence over the course of dealing. *Id.* 37a–38a. But the *express terms* of Board membership are spelled out in the statutes and regulations, and they establish that the members do *not* serve under employment contracts, any more than judicial appointees do. Obviously, this case involves no request for specific performance of the sort addressed by the U.C.C., which is irrelevant to the question of whether the Boards are independent of the President. That's a statutory-interpretation question.

And the answer to that question is yes. Not only do the Boards' empowering statutes give members three-year terms, provide only for death and resignation (but not replacement), and give the President appointment power only after expiration of the three-year term, but FACA intentionally places the Boards *outside* the President's authority. It does so precisely so they will exercise "independent judgment," 5 U.S.C. § 1004(b)(3), and not be "inappropriately influenced by the appointing authority."

12. Sections 7455(b) and 8468(b) contain the same phrase.

41 C.F.R. § 102-3.105(i). Moreover, these positions are statutorily designed to be as immune as reasonably possible from partisan influence, because FACA requires that the Boards be "fairly balanced in terms of the points of view represented," 5 U.S.C. § 1004(b)(2), something that is incompatible with the at-will employee status the Respondents contemplate.

It's perverse to say the President has "plenary" power to remove people whose advice he doesn't like, App. 35a, when balanced, independent advice is meant to force the President, Congress, cabinet members, and others, to consider opinions and respond to comments—including those they may not want to hear—from members exercising their "independent judgment." The President (and Congress and others) may certainly disregard the Boards' advice, and seek advice outside the Board of Visitors' structure. But the President cannot fire the Board because he dislikes the public advice they give.

The District Court's reliance on *Carlucci* demonstrates the need for this Court to clarify the so-called *Carlucci* presumption. *Carlucci* is limited to employment contracts; it doesn't extend to members of independent boards governed by FACA. *Cf. Hurtado v. Barr*, 817 F. App'x 310, 313 (9th Cir. 2020) (Justice Department officials were subject to removal under *Carlucci*). Thus *Richman v. Straley*, 48 F.3d 1139 (10th Cir. 1995), paraphrased the *Carlucci* presumption as holding that "the power of removal is implicit in the power of appointment *unless the appointment carries with it a definite term of office* or a constitutional or statutory provision limits the removal power." *Id.* at 1143 (emphasis added).

The presidential removal power for Executive Branch employees was addressed in *Parsons v. United States*, 167 U.S. 324 (1897), which held that the President could fire at will district attorneys appointed by him or his predecessor—employees with specific duties—under an unexpired three-year term contract. These attorneys unambiguously work as officers *within* the Executive Branch, and the only way the President can effectively control subordinates, here or in *Carlucci*, is to have power to fire any them within their terms. Likewise, in *Severino v. Biden*, 71 F.4th 1038 (D.C. Cir. 2023), the court said members of the Administrative Conference of the United States were removable by the President because the Conference exists "within the Executive Branch," and works "to produce research on the Executive Branch." *Id.* at 1040.

But the Boards of Visitors are entirely different. Their members are *not* in the Executive Branch, and that is for a reason: they can only discharge their functions if they enjoy the kind of independence to which FACA entitles them. That's why they are given a "definite term of office," *Richman*, 48 F.3d at 1143, and why the President is given no power to remove them. They are *not* chosen by the President, as in *Severino,* but by both the President and Congress, and they advise, *not* just the Executive Branch, as in *Severino,* but both the President and Congress—in order to enable *Congress* to fulfill *its* constitutional duty to "make Rules for the Government and Regulation of the land and naval Forces," U.S. Const. art. I, § 8, as much as to enable the President to exercise his commander-in-chief responsibilities.

The service academies must receive Board input to better govern their internal operations. They can

discharge none of these functions if the President can sack the appointments of his predecessor on a whim. Their constellation of duties makes Board members more like the commissioners in *Humphrey's Executor, supra,* and the claims tribunal members in *Wiener v. United States*, 357 U.S. 349 (1958), who were vested with independent powers that insulated them from presidential removal.

In *Humphrey's Executor,* members of the Federal Trade Commission were purposely established with a degree of independence such that they could not be removed by the President at will. They exercised powers that were "neither political nor executive, but predominantly quasi judicial and quasi legislative," and thus did not belong subject to the Chief Executive. 295 U.S. at 624. Consequently, "illimitable power of removal [was] *not* possessed by the President." *Id.* at 629 (emphasis added).

Wiener is even more on point. There, the Court held that President Eisenhower could not remove President Truman's appointees to a War Claims Tribunal. It said *Humphrey's Executor* "drew a sharp line . . . between officials who [are] part of the Executive establishment and [are] thus removable by virtue of the President's constitutional powers, and those who are *members of a body 'to exercise its judgment without the leave or hindrance of any other official* or any department of the government,' as to whom a power of removal exists only if Congress may fairly be said to have conferred it." 357 U.S. at 353 (emphasis added, citation omitted). The Boards here fall within this second category; the italicized phrase describes them to a "T."

C. Certiorari is warranted because the courts below failed to address the Appointment Clause limitation on the structure of the Boards.

It has been hornbook law since *Buckley v. Valeo*, 424 U.S. 1 (1976), that any officer of the United States (i.e., any "appointee exercising significant authority pursuant to the laws of the United States," *id.* at 126) must, pursuant to the Appointments Clause, U.S. Const. art. II, § 2, cl. 2, be placed in office by a member of the Executive Branch—the President, the heads of departments or members of the judiciary.

That constraint does not apply here, because these Boards aren't Executive Branch agencies. They exercise no "authority," and hence cannot be officers of the United States, *cf. id.* at 126; like other FACA entities, they are *not* the President's personal advisors; they advise not just the Executive but also the Legislative Branch. FACA entities, in fact, "are not part of the formal structure of our government"—and thus "have no authority to bind the government." Bybee, *Advising the President: Separation of Powers and the Federal Advisory Committee Act*, 104 Yale L.J. 51, 56 (1994). They usually aren't entitled even to office space in government buildings. *Id.*

But if the President *does* have "inherent removal authority" over FACA entities (as the District Court claimed, App. 30a), then not only the Boards but all FACA advisory committees would be Executive Branch entities. And that would mean that they're *per se* unconstitutional, because their mode of appointment would be invalid. After all, the appointment methods set out in the Appointments Clause are "exclusive," *Buckley*, 424 U.S. at 188, which in

Buckley meant that the members of the FEC, some of whom were appointed by the President Pro Tem of the Senate and the Speaker of the House (just as Board members are) could not hold their positions. *Id.* at 127. The same result must follow if the President has unilateral removal power over these Boards pursuant to *Carlucci*. *See also Morrison v. Olson*, 487 U.S. 654, 704 (1988) (Scalia, J., dissenting) ("it is the principle of separation of powers, and the inseparable corollary that each department's 'defense must . . . be made commensurate to the danger of attack,' which gives comprehensible content to the Appointments Clause, and determines the appropriate scope of the removal power." (citation omitted)).

Yet this argument was ignored by the District Court, and the Court of Appeals never reached it, because it erroneously dismissed the case on standing grounds. By waving away the distinction between Executive Branch entities subject to the *Carlucci* rule, and FACA entities that are outside its purview, the lower courts established precedent that dangerously undermines the principles by which advisory entities operate—and that raises the specter that a scheme that has worked well for 70 years is now unconstitutional.

D. Certiorari is needed to clarify the nature of FACA entities and their work.

Unless corrected by this Court, the decisions below will have unfortunate ramifications far beyond even the important consequences of this case.

For example, FACA and the Freedom of Information and Sunshine Acts interact in a carefully orchestrated way:

while FACA incorporates the transparency requirements of those other two statutes, it does so "in such a way that the protections afforded the executive [in FOIA] do not survive." Bybee, *supra* at 112.

Specifically, while intra-agency and interagency communications fall within exemption 5 of FOIA, that exemption does not apply to FACA advisory committees because they are not "agencies." *See, e.g., Washington Legal Found. v. U.S. Sentencing Comm'n*, 17 F.3d 1446 (D.C. Cir. 1994). Likewise, advisory committees cannot rely on exemption 9(B) of the Sunshine Act, again because they are not "agencies." Bybee, *supra* at 112. But if members of advisory entities such as the Board are subordinate to the President, and removable by him at will, that would affect and perhaps eliminate these transparency requirements, by enabling these entities to lay claim to such exemptions on the grounds that they *are* Executive Branch agencies.

Their status is important because much litigation takes place regarding whether purported government-advisory entities are subject to FACA—and consequently to FOIA and the Sunshine Act—or whether they are Executive Branch entities that can assert various exemptions to those laws. *See, e.g., Pub. Citizen v. U.S. Dep't of Just.*, 491 U.S. 440 (1989); *Pub. Citizen v. Nat'l Advisory Comm. on Microbiological Criteria for Foods*, 886 F.2d 419 (D.C. Cir. 1989); *Nat'l Nutritional Foods Ass'n v. Califano*, 603 F.2d 327 (2d Cir. 1979); *Nw. Forest Res. Council v. Espy*, 846 F. Supp. 1009 (D.D.C. 1994). Many of these cases have held that advisory entities are subject to FACA and consequently must open their meetings and records to

the public. *See, e.g., Califano, supra; Espy, supra*. But if the President can remove members of these entities at will, on the theory of his inherent executive power, then they are *not* independent advisory entities, but are actually subordinate, Executive Branch agencies, and their records and meetings should be kept private in order not "to suppress the 'candid, objective, and even blunt or harsh opinions,' that [he] [is] entitled to receive from [his] advisors." *Ass'n of Am. Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 925 (D.C. Cir. 1993) (Buckley, J., concurring) (internal citation omitted).

This structural question is crucial to the substantive law. FACA was designed out of a recognition that advisory boards cannot perform their functions unless they enjoy a degree of independence. They aren't the President's personal advisors; they also advise the Legislative Branch. And they cannot be officers of the United States, let alone Executive officers, because they exercise no "authority" at all. *Cf. Buckley*, 424 U.S. at 126 (defining officer as an "appointee exercising significant authority pursuant to the laws of the United States.").

In short, if the President has unilateral removal power over FACA entities, that must make them Executive Branch agencies, not independent advisory entities—and that, in turn, would mean they are not only unconstitutional because their members are not chosen in compliance with the Appointments Clause, but that their meetings and records may be exempted from statutory transparency requirements in a way never contemplated by their creators.

CONCLUSION

Because Petitioners' case is ripe, and qualifies for the properly understood exception to the mootness doctrine, the petition should be *granted* so this Court can address the legality of these actions.

Respectfully submitted:

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September, 2024

APPENDIX

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APPENDIX A — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, FILED JUNE 7, 2024

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23-5094

HEIDI STIRRUP, PERSONALLY AND IN HER CAPACITY AS A MEMBER OF THE UNITED STATES AIR FORCE ACADEMY BOARD OF VISITORS, *et al.*,

Appellants,

v.

UNITED STATES DEPARTMENT OF DEFENSE, *et al.*,

Appellees.

Appeal from the United States District Court
for the District of Columbia
(No. 1:21-cv-01893)

June 7, 2024, Filed

Before: PILLARD, KATSAS, and GARCIA, *Circuit Judges*.

Appendix A

JUDGMENT

This case was considered on the record from the United States District Court for the District of Columbia and on the briefs and oral arguments of the parties. The Court has afforded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. CIR. R. 36(d). It is

ORDERED and **ADJUDGED** that the judgment of the District Court be **AFFIRMED** in part and **VACATED** in part.

* * *

The United States Military Academy, Naval Academy, and Air Force Academy each has a Board of Visitors staffed with appointees selected by Congress for some seats and the President for others. 10 U.S.C. §§ 7455(a), 8468(a), 9455(a). A Board performs advisory functions by visiting its respective academy, evaluating its functioning, and producing recommendations and reports. *Id.* §§ 7455(d)-(f), 8468(d)-(f), 9455(d)-(f). The Military Academy and Naval Academy Boards submit reports to the President, *id.* §§ 7455(f), 8468(f); the Air Force Board submits reports to Department of Defense officials and Congress, *id.* § 9455(f).

Appellants are six individuals with a range of connections to the Boards. They claim that the Biden Administration violated the Constitution, the Administrative Procedure Act ("APA"), and contracts by

suspending the Boards' operations for several months in 2021, issuing memoranda authorizing the creation of subcommittees, and removing certain of the appellants from their Board positions before their terms of service expired.

We do not reach the merits of these claims. The district court properly determined that appellants lack standing to challenge the temporary suspension and the subcommittee authorization. And appellants' removal claims—which request reinstatement to now-expired terms—are moot.

I

Per the operative complaint, three appellants are former members of the Air Force Academy's Board, appointed by President Trump and removed by President Biden. One appellant is a member of Congress who presently sits on the Military Academy's Board. Another appellant is a member of Congress who does not claim to sit on any service academy advisory board. And one appellant is a former member of the Naval Academy's Board, whose removal is not challenged in this appeal. Appellees are nineteen government entities and officials, including President Biden, Secretary of Defense Lloyd J. Austin, III, and the designated federal officers for the Boards.

Appellants' claims focus on three Biden Administration actions concerning the Boards in 2021. First, in early February 2021, Secretary Austin suspended the Boards'

operations to perform a "'zero-based review' grounded in a 'cost study.'" Fourth Am. Compl. ¶ 17 (J.A. 71). That suspension ended on September 17, 2021, and the Boards resumed operations.

Second, also on September 17, 2021, Secretary Austin issued memoranda authorizing the "Army, Navy, and Air Force service secretaries to create 'subcommittees' to the [Boards]." Fourth Am. Compl. ¶ 5 (J.A. 68). The announcement stated that the subcommittees would be staffed through a "separate and distinct" appointment process at the discretion of the Secretary or his deputy. *Id.* Importantly, however, the complaint does not allege that any such subcommittee has ever been created or staffed.

Third, in September 2021, President Biden removed three appellants from their appointments to the Air Force Board after they refused his request that they resign. By the end of 2023, all of the terms of service to which those appellants were originally appointed had expired.

Appellants claim that these actions violate the Constitution, the APA, and contracts. As described by the district court, they sought three forms of relief: "a judgment declaring the 'suspensions' illegal and enjoining [appellees] from 'further suspending or otherwise interfering with' the Boards"; "a similar judgment directed at the authorization of subcommittees"; and a "judgment that would restore three [appellants] to their positions on the Air Force Board." *Stirrup v. Biden*, 662 F. Supp. 3d 12, 18 (D.D.C. 2023) (quoting Fourth Am. Compl. ¶ 4 (J.A. 68)) (internal citations omitted).

On March 21, 2023, the district court concluded that appellants lack standing to bring claims based on the temporary suspension and authorization of subcommittees "because they identify no concrete harm that the relief would redress." *Id.* The district court held that the appellants challenging their removal had standing because, even though the court held that it likely could not enjoin the President to restore those appellants to their prior appointments, the court could, in theory, order the non-President defendants to treat those appellants as if they had been restored to the Board. *Id.* at 21-22 (citing *Swan v. Clinton*, 100 F.3d 973, 978, 321 U.S. App. D.C. 359 (D.C. Cir. 1996)). But the court rejected those claims on the merits "because the President has statutory power to fire presidentially appointed Board members" and because appellants had not sufficiently pled "the elements of a breach-of-contract or First Amendment claim." *Id.* at 18.

II

The district court correctly concluded that appellants lack standing for their claims related to the temporary suspension and the subcommittee authorization. As explained above, appellants seek prospective relief that would enjoin appellees from carrying out future suspensions or creating subcommittees. But appellants fail to meet their burden to show a "sufficient likelihood of future injury" to support their standing to seek prospective relief as to either set of claims. *Dearth v. Holder*, 641 F.3d 499, 502, 395 U.S. App. D.C. 133 (D.C. Cir. 2011) (quotation omitted).

Appellants have failed to show any likelihood that they will suffer a future injury stemming from a suspension similar to the temporary suspension of Board activities, which ended in 2021. As the district court observed, appellants make no concrete allegations to show that a similar suspension of Board activities is likely to occur in the future. Indeed, appellants concede that "[t]here is, of course, as the District Court noted, no imminent danger of a repetition of this precise event." Appellants' Brief 28.

Appellants likewise fail to allege any threatened injury resulting from Secretary Austin's decision to permit the creation of subcommittees. The memoranda merely authorize the military secretaries to create subcommittees. Appellants do not allege that any subcommittees were ever staffed or convened in any form. Nor do they plead facts showing that subcommittees are sufficiently likely to be created in the future.

III

Appellants' removal claims have become moot since the district court ruled. The terminated appellants concede that the relief that supported their standing below—the possibility of reinstatement—is no longer available because the three-year terms to which they were appointed have now "expired." Appellants' Brief 19. As they put it, "[i]ndividual redress is beyond the power of this Court," *id.* at 54, because "the time for restoration of these [appellants] to their proper offices has passed," Reply Brief 11. The government agrees. Appellees' Brief 23-27.

Even though personal relief is not available, appellants urge us to conclude that their claims are not moot because they target harms that are "capable of repetition, yet evading review." Appellants' Brief 29, 53. That exception to mootness applies if two conditions are met: "(1) [T]he challenged action is too short to be fully litigated prior to its cessation or expiration; and (2) there is a reasonable expectation that *the same complaining party* would be subjected to the same action again." *In re Sealed Case*, 77 F.4th 815, 826 (D.C. Cir. 2023) (emphasis added) (alterations, ellipses, and quotations omitted); *see Murphy v. Hunt*, 455 U.S. 478, 482, 102 S. Ct. 1181, 71 L. Ed. 2d 353 (1982).

Appellants cannot show that the second condition is met here, and we therefore need not address the first. *See Honeywell Int'l, Inc. v. Nuclear Regul. Comm'n*, 628 F.3d 568, 576, 393 U.S. App. D.C. 340 (D.C. Cir. 2010) (party opposing mootness bears the burden of showing an exception applies). They do not establish any expectation that *they themselves* are likely to be subjected to the same action again because, as explained, there is no indication that these appellants are likely to serve on a Board again, much less be removed during their hypothetical term of appointment.

Finally, appellants do not save their removal claims by seeking "a permanent injunction that bars all future presidents from firing sitting members of the Boards during the term of appointment." Appellants' Brief 52. That relief, even if available, would not redress appellants' individual past injuries, nor would it have

any non-speculative chance of preventing a future injury to appellants. Again, the terminated appellants do not contend that they are likely to again serve on the Air Force Board. As a result, a permanent injunction preventing all future presidents from removing the appellants during the term of a hypothetical future appointment would not affect them in any non-speculative way.

* * *

For the foregoing reasons, we affirm the district court's dismissal of the temporary suspension and subcommittee claims for lack of subject-matter jurisdiction. We dismiss as moot the portion of the appeal seeking review of the district court's merits-based dismissal of the removal claims, vacate that portion of the district court's judgment, and remand for the claims to be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate until seven days after resolution of any timely petition for rehearing or rehearing *en banc*. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41(a)(1).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, FILED MARCH 21, 2023

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 21-1893 (TJK)

HEIDI STIRRUP *et al.*,

Plaintiffs,

v.

JOSEPH R. BIDEN, JR.,
IN HIS OFFICIAL CAPACITY AS PRESIDENT
OF THE UNITED STATES, *et al.*,

Defendants.

MEMORANDUM OPINION

This case challenges the Biden administration's management of advisory committees to the United States service academies. Four Plaintiffs were presidential appointees to those committees that President Biden fired after taking office. All Plaintiffs dislike other decisions made by the President and the Defense Department. But Plaintiffs identify no concrete harms caused by the other decisions. And Plaintiffs have not stated claims based on the firings because the President has statutory authority

to fire presidential appointees. So the Court will dismiss the case in part for lack of standing, and in part for failure to state a claim.

I. Background

Central to this dispute are the Boards of Visitors for the United States Military Academy, Naval Academy, and Air Force Academy.[1] Each of the Boards is authorized by statute and governed by levels of regulation, so the Court begins with a brief explanation of that framework. Because this case is at the pleading stage, the Court assumes Plaintiffs' allegations are true and draws all reasonable inferences in their favor.

A. Legal Background

Congress created each of the Boards in the 1950s. Each has substantially similar structure and authority. They each have fifteen members, six of whom are appointed by the President. 10 U.S.C. §§ 7455(a), 8468(a), 9455(a). The remaining nine members come from Congress, whether by appointment or by membership on armed-services committees. *Id.* §§ 7455(a)(1)-(4), 8468(a)(1)-(4), 9455(a)(2)-(5).[2] The Boards' duties are to visit their respective academies, evaluate their functioning, and produce recommendations and reports to Defense Department

1. The Court refers to them as the Army Board, the Navy Board, and the Air Force Board.

2. One congressionally appointed member of the Air Force Board cannot be a "member of the House of Representatives." 10 U.S.C. § 9455(a)(3).

officials and the President. *See id.* §§ 7455(d)-(f), 8468(d)-(f), 9455(d)-(f).

Presidentially appointed Board members "serve for three years." 10 U.S.C. §§ 7455(b), 8468(b), 9455(b)(1). They may exceed that term, however, if the President has not yet designated a successor. *Id.* §§ 7455(b), 8468(b), 9455(b)(1). Their terms are staggered so that two members' terms expire each year. *See id.* §§ 7455(b), 8468(b). With one exception that the Court will address momentarily, the statutes contain no explicit instructions about firing members.

Three differences between the Boards are relevant to Plaintiffs' arguments. First, Air Force Board members who are not members of Congress can be removed by the Board's chair for failing "to attend two successive Board meetings" without good cause. *Compare* 10 U.S.C. § 9455(c)(2) *with id.* §§ 7455(c), 8468(c). Second, the Air Force Board prepares more reports and sends those to more recipients. *Compare id.* § 9455(f) *with id.* §§ 7455(f), 8468(f). Third, the provision providing for presidential appointment to the Air Force Board contains slightly different language, the thrust of which is that there is no explicit number of appointments that the "President shall designate" in a given year. *Compare id.* § 9455(b)(1) *with id.* §§ 7455(b), 8468(b).[3]

3. Presidentially appointed Board members serve beyond their three-year terms if no successor has yet been designated. *See* 10 U.S.C. §§ 7455(b), 8468(b), 9455(b)(1). Because their terms are staggered, the Army and Navy Boards' statutes direct the President to "designate two persons each year to succeed the

Appendix B

The Boards are subject to the Federal Advisory Committee Act ("FACA"). *See generally* 5 U.S.C. app. 2 §§ 4(a), 3(2) ("The term 'advisory committee' means any . . . board" that is "established by statute. . . ."). FACA establishes guidelines that require, among other things, the Boards' membership to be "fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee," *id.* § 5(b)(2), and that their "advice and recommendations" will "be the result of [their] independent judgment," *id.* § 5(b)(3). Regulations implementing FACA are codified at 41 C.F.R. § 102-3.5 *et seq.*

One of those regulations instructs agency heads to "assure that the advice or recommendations of advisory committees will not be inappropriately influenced by the appointing authority or by any special interest." 41 C.F.R. § 102-3.105(g). Thus, the Secretary of Defense has issued an "[i]nstruction" that governs, among other committees, these Boards. *See* ECF No. 42-6 at 1-2. Moreover, each of the Boards has established its own charter. *See* ECF Nos. 42-3-42-5.

B. Factual Background

Shortly after Defendant Austin, the Secretary of Defense, took office, he began a "zero-based review" of Defense Department advisory committees. ECF No. 37

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members whose terms expire that year." *Id.* §§ 7455(b), 8468(b). The Air Force Board's statute says simply that the President "shall designate persons each year" without specifying a number. *Id.* § 9455(b)(1).

("Compl.") at 63-64. In other words, the review would require each committee to justify its existence from scratch. During that review, Defendant Austin directed "the immediate suspension of all advisory committee operations." *Id.* at 63. That suspension included the Boards. *See id.* at 65-72.

Four plaintiffs were then presidentially appointed Board members.[4] They learned that Defendant Austin had suspended the Boards' operations a few days later by email from their Boards' designated federal officers. *See* Compl. ¶ 53; *id.* at 57-60.[5] That email explained that the Boards would "not hold any meetings . . . or otherwise undertake official board business" during the review. *Id.* at 57. It claimed, however, that Plaintiffs' "membership [would] not be impacted." *Id.*

The review lasted over seven months. *See* Compl. at 44-46. During that time, none of the Boards met. Compl. ¶¶ 56, 99-100, 117. After the review, Defendant Austin authorized the Boards to "resume operations." Compl. at 44-46.

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4. Plaintiffs Stirrup, Lengenfelder, and Gleason were presidential appointees to the Air Force Board. Compl. ¶¶ 14-16. Plaintiff Spicer was a presidential appointee to the Navy Board. Compl. ¶ 33. Plaintiff Green was a non-presidential appointee to the Army Board, and Plaintiff Norman was not a member of any Board. *See* Compl. ¶¶ 31-32.

5. Under FACA, each federal advisory committee must have a designated federal officer "to chair or attend each meeting." 5 U.S.C. app. 2 § 10(e). That officer can adjourn any meeting, and the committee can hold no meeting "in the absence of that officer." *Id.*

But that resumption came with two changes relevant here. First, President Biden demanded resignations from the four presidentially appointed plaintiffs. *See* Compl. ¶¶ 61-62, 101, 116. They refused, so he fired them. Compl. ¶ 63. Second, Defendant Austin explained that he would authorize, for the first time, subcommittees of the Boards. Compl. at 44-46. His announcement described subcommittees with membership "separate and distinct" from that of the Boards. *Id.* Plaintiffs have not alleged, however, that any such subcommittees have been created.

C. Procedural History

This case began when Plaintiff Heidi Stirrup sued to challenge the suspension before it was lifted—and before she had been fired. *See generally* ECF No. 1. Shortly after that, she amended her complaint to add more plaintiffs, including Plaintiff Mark Green and Plaintiff Ralph Norman. *See generally* ECF No. 5. Those plaintiffs amended the complaint a second time to add Plaintiff Sean Spicer. *See* ECF Nos. 11-12. That group amended the complaint a third time, settling on the current six plaintiffs and asserting claims based on their removals from the Boards. *See generally* ECF No. 16.

Defendants moved to dismiss, both for lack of subject-matter jurisdiction and for failure to state a claim. *See generally* ECF No. 29. Plaintiffs opposed that motion, ECF No. 31, but they also asked for leave to amend a fourth time, ECF No. 32. Plaintiffs wished to add as defendants the designated federal officers for each of the Boards. ECF No. 32 at 1. The Court granted leave

to amend, Minute Order of Apr. 7, 2022, and Plaintiffs' fourth-amended complaint became operative, ECF No. 37. Defendants then reasserted their motion to dismiss. ECF No. 39.

II. Legal Standards

Under Rule 12(b)(1), Plaintiffs have the burden to establish standing. *Little v. Fenty*, 689 F. Supp. 2d 163, 166-67 (D.D.C. 2010). That burden "grows heavier at each stage of the litigation." *Osborn v. Visa Inc.*, 797 F.3d 1057, 1063, 418 U.S. App. D.C. 193 (D.C. Cir. 2015). To survive a motion to dismiss, Plaintiffs need only allege a qualifying "injury resulting from [Defendants'] conduct." *Id.* (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)). The Court must "assume the truth of all material factual allegations in the complaint and . . . grant[] [Plaintiffs] the benefit of all inferences that can be derived from the facts alleged." *Am. Nat'l Ins. Co. v. FDIC*, 642 F.3d 1137, 1139, 395 U.S. App. D.C. 316 (D.C. Cir. 2011) (quotation omitted).

Under Rule 12(b)(6), Plaintiffs' complaint must "contain sufficient factual matter . . . to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quotation omitted). A claim is plausible if "it contains factual allegations that, if proved, would allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Hurd v. District of Columbia*, 864 F.3d 671, 678, 431 U.S. App. D.C. 83 (D.C. Cir. 2017) (quotation omitted). Again, the Court must "accept all the

well-pleaded factual allegations of the complaint as true and draw all reasonable inferences from those allegations in [Plaintiffs'] favor." *Id.* (quotation omitted). But it must disregard "a legal conclusion couched as a factual allegation." *Cason v. NFL Players Ass'n*, 538 F. Supp. 3d 100, 109 (D.D.C. 2021) (quotation omitted).

III. Analysis

Plaintiffs bring four claims. The first is for breach of contract. Compl. ¶¶ 132-35. The second is for violating the Administrative Procedure Act ("APA"). Compl. ¶¶ 136-40. The third is for viewpoint discrimination. Compl. ¶¶ 141-144. The fourth and final claim is for offending "the Separation of Powers Doctrine," a claim given its most specific content[6] by reference to Article I, Section 8, Clause 14 of the Constitution. *See* Compl. ¶¶ 145-50.[7]

They ask the Court for "three distinct forms of relief." Compl. ¶ 3. The first is a judgment declaring the "suspensions" illegal and enjoining Defendants from "further suspending or other-wise interfering with" the Boards. Compl. ¶ 4. The second is a similar judgment

6. There is no "separation of powers clause" in the Constitution, so a claim that a branch of government has exercised a power that belongs to another branch must be "evident from the Constitution's vesting of certain powers in certain bodies." *See Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2205, 207 L. Ed. 2d 494 (2020).

7. "The Congress shall have Power . . . To make Rules for the Government and Regulation of the land and naval Forces." U.S. Const. art. I, § 8, cl. 14.

directed at the authorization of subcommittees. Compl. ¶ 5. The third is another similar judgment that would restore three plaintiffs to their positions on the Air Force Board. Compl. ¶ 6.[8]

Plaintiffs do not have standing to seek the first two forms of relief because they identify no concrete harm that the relief would redress. So the Court will dismiss their complaint for lack of subject-matter jurisdiction in those respects. The Court has the power to order the third form of relief, and it would substantially redress a concrete harm, so Plaintiffs have standing in that respect. But they have not stated claims entitling them to that relief because the President has statutory power to fire presidentially appointed Board members and because Plaintiffs have not stated the elements of a breach-of-contract or First Amendment claim. Thus, the Court will dismiss their complaint in remaining part for failure to state a claim.

A. Plaintiffs Have Standing to Challenge Only Their Removals from the Boards

Before the Court can address Plaintiff's claims, it must ensure Plaintiffs have standing. *See Freedom Watch, Inc. v. McAleenan*, 442 F. Supp. 3d 180, 186 (D.D.C. 2020); *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998). That is, it must ensure that Plaintiffs have "clearly allege[d] facts demonstrating" they have "(1) suffered an injury in fact,

8. Plaintiffs seeking reinstatement to other Boards have elected to do so via other lawsuits. *See* Compl. at 7 n.5.

(2) that is fairly traceable to the challenged conduct of the defendant[s], and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016) (alteration adopted). The alleged injury must be particular to Plaintiffs; they may not raise a "generally available grievance." *Lance v. Coffman*, 549 U.S. 437, 439, 127 S. Ct. 1194, 167 L. Ed. 2d 29 (2007) (per curiam). And Plaintiffs "must demonstrate standing for each claim that they press and for each form of relief that they seek." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208, 210 L. Ed. 2d 568 (2021).

At the outset of their response to Defendants' motion, Plaintiffs suggest that standing doctrine is somehow inapposite to this case. ECF No. 42 at 20-21. They express concern that "[t]he rule of law cannot long survive if there is no redress from any quarter for deliberate breaches of the President's constitutional and statutory duties." *Id.* at 20. "[S]omeone must have standing" to sue, they say, or else the President will "be placed beyond the law." *Id.* (emphasis deleted).

Plaintiffs are mistaken. Standing doctrine is not an exception to the rule of law—it is the law. The federal judicial power extends only to the cases and controversies listed in Article III. In other words, the Constitution "limits federal courts to resolving concrete disputes between adverse parties." *Sweeney v. Raoul*, 990 F.3d 555, 559 (7th Cir. 2021). One court's inability to provide a desired form of relief in one case should not be conflated with an abdication of the responsibility to "say what

the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L. Ed. 60 (1803). The President has "independent obligation to get the law right," *Common Cause v. Trump*, 506 F. Supp. 3d 39, 46 n.4 (D.D.C. 2020) (three-judge court), because the Constitution charges him to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3. Interbranch conflict is best avoided, *cf. Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2036, 207 L. Ed. 2d 951 (2020), and so courts will not risk a contrary interpretation unless doing so is necessary to vindicate the rights of individuals concretely interested in the dispute more than the general public, *see Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471-76, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982).

As for whether *someone* must—or does—have standing to seek the relief Plaintiffs request, the Court cannot say. "[A] federal court cannot adjudicate the rights of [those] who are not parties before it." *Tardan v. Cal. Oil Co.*, 323 F.2d 717, 722 (5th Cir. 1963). Plaintiffs here, however, have standing only to contest their own removals.

1. Plaintiffs Have Not Alleged Facts Implying that Another Suspension of the Boards is Certainly Impending

Plaintiffs ask the Court to declare the Boards' "suspensions" during the zero-based review illegal and to enjoin Defendants from "further suspending or otherwise interfering with" the Boards. Compl. ¶ 4. For standing purpose, those requests are indistinct. Federal courts do not have independent jurisdiction to render declaratory

judgments; those require the same showing to overcome "Article III's case-or-controversy requirement" as "every other type of remedy." *California v. Texas*, 141 S. Ct. 2104, 2115, 210 L. Ed. 2d 230 (2021). Plaintiffs seek prospective relief, so they must allege "ongoing or imminent future injury." *Silver v. IRS*, 569 F. Supp. 3d 5, 9 (D.D.C. 2021).

Defendants point out that the Boards' suspension has ended. ECF No. 39 at 48. So, they say, any injuries "occurred in the past." *Id.* And "past wrongs do not in themselves amount to . . . real and immediate threat of injury necessary to make out a case or controversy." *Id.* at 49 (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 103, 103 S. Ct. 1660, 75 L. Ed. 2d 675 (1983)). Alternatively, they assert that the dispute is now moot for similar reasons. *Id.* at 50-53.[9]

Plaintiffs say the dispute is not moot because it falls under the mootness exception called "capable of repetition, yet evading review." ECF No. 42 at 48-49. This issue is "sure to occur in future cases," they explain. *Id.* at 49. They also point to their request for a declaratory judgment, which they characterize as "live." *Id.* at 48.

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9. Although standing and mootness are similar doctrines, they are not identical. *See generally Friends of the Earth v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 190-92, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000). Because the suspensions had been lifted when Plaintiffs filed their operative complaint, this issue was present at the "outset" of this litigation, which makes standing the correct lens through which to analyze the cognizability of relief. *See Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 796, 209 L. Ed. 2d 94 (2021).

Plaintiffs' framing of the issue effectively concedes that they lack standing. Anyway, the Court agrees with Defendants. Harms that have yet to materialize are cognizable only when the "threatened injury" is "certainly impending," rather than merely "possible." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409, 133 S. Ct. 1138, 185 L. Ed. 2d 264 (2013) (quotations and emphasis omitted). Based solely on the prior suspension, Plaintiffs surmise "what is now shown to be a real and present danger that, at any time, Defendants . . . will again illegally suspend, terminate or dilute the operations of the [Boards]." Compl. ¶ 144. That is a prototypical "threadbare recital[ ] of [an] element[ ] of standing, supported by mere conclusory statements." *Kareem v. Haspel*, 986 F.3d 859, 865-66, 451 U.S. App. D.C. 1 (D.C. Cir. 2021) (quotation omitted and alterations adopted). Without "facts to make plausible . . . an allegation that such harm is certainly impending," Plaintiffs lack standing to challenge the suspensions. *In re Sci. Applications Int'l Corp. (SAIC) Backup Tape Data Theft Litig.*, 45 F. Supp. 3d 14, 28 (D.D.C. 2014) (quotations omitted).

2. Plaintiffs Have Alleged No Injury Caused by the Authorization of Subcommittees

Plaintiffs' second request fares no better. They "ask the Court to [declare] that Defendant Austin's authorization of subcommittees to the Boards was "unlawful" and to enjoin Defendants from "creating or staffing" any such subcommittees. Compl. ¶ 5. That request again seeks prospective relief, so Plaintiffs again must allege "ongoing or imminent future injury." *Silver*, 569 F. Supp. 3d at 9.

Appendix B

Defendants say Plaintiffs have not been harmed by the authorization of subcommittees. ECF No. 39 at 57-58. They observe that Plaintiffs have not alleged that any subcommittees have actually been brought into being. ECF No. 39 at 58; *see also* Compl. at 44-46. They argue that any future creation is "speculative." ECF No. 39 at 58 And even if it happens, they contend, it will not affect Plaintiffs, who "do not . . . currently serve on any Board." *Id.* Finally, they explain that the size of each Board is "fixed by statute," which they think dispels any inference that the Secretary of Defense effectively "pack[ed]" the Boards. *Id.* (quoting Compl. ¶ 23).

Plaintiffs again resist identifying an injury. They say Defendants misunderstand the nature of the harm because "the suspensions, the terminations," and the creation of subcommittees, "are all of a piece." ECF No. 42 at 53. To the extent they acknowledge the need for an injury from the authorization of subcommittees, it is in their comparing this case to *Elrod v. Burns*, 427 U.S. 347, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976), a case in which, by Plaintiffs' description, state "noncivil service employees . . . were fired or threatened with dismissal." ECF No. 42 at 53. They also state that Boards will be "stripped at the very least of a substantial fraction of their statutory duties." *Id.* at 55.

Plaintiffs' resistance is unavailing. No characterization of their claims can absolve them of the need to show standing for each form of relief they seek. *See TransUnion*, 141 S. Ct. at 2208. So they must allege a certainly impending future injury attributable to the authorization

of subcommittees. *See Owner-Operator Indep. Drivers Ass'n v. U.S. Dep't of Transp.*, 879 F.3d 339, 346, 434 U.S. App. D.C. 1 (D.C. Cir. 2018). And *Elrod*—by their own characterization—has nothing to do with this claim for relief. Its relevance, if any, concerns their removals from the Boards.

Defendants, though, miss the mark by pointing out that Plaintiffs do not now serve on the Boards. Three plaintiffs seek an ordering restoring their terms of service to the Air Force Board. *See* Compl. ¶ 6 & n.5. Without adjudicating that request, the Court cannot assume it will be denied, and so it will treat Plaintiffs as Board members for purposes of this form of relief.[10]

But even assuming subcommittees will eventually be created, Plaintiffs allege no facts to suggest that subcommittees would harm Board members. Their statement that subcommittees will "strip[ ]" Boards of statutory duties is unsupported by factual allegations. ECF No. 42 at 53. And their characterization of the subcommittees as constituting Board "packing" are hard to square with the pleaded facts. *Id.* at 53. Given that any subcommittees will be "separate and distinct" from the Boards, Compl. at 44-46, there appears to be no risk that Board members' influence over work product will be diluted. As Defendants point out, the Boards' sizes are

10. Standing requires only that at least one plaintiff may seek each form of relief, not that all plaintiffs must be able to seek each form of relief. *See J.D. v. Azar*, 925 F.3d 1291, 1323-24, 441 U.S. App. D.C. 224 (D.C. Cir. 2019). Thus, it does not matter that some plaintiffs have not requested reinstatement.

fixed by statute. 10 U.S.C. §§ 7455(a), 8468(a), 9455(a). If Plaintiffs' conclusions about the potential impact of subcommittees are based on anything more than speculation, the basis has not been shared with the Court. If a court "can only speculate" about whether and how an injury will occur, that is "ordinarily fatal to standing." See *Elec. Priv. Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity*, 878 F.3d 371, 379, 433 U.S. App. D.C. 394 (D.C. Cir. 2017).

Moreover, the Boards' duties are nonrivalrous—another person's performing them need not prevent the Board from performing them too. Congress has tasked the Board with visiting the academies, writing reports, making recommendations, and speaking with advisers. *See generally* 10 U.S.C. §§ 7455(d)-(g), 8468(d)-(g), 9455(d)-(g). So even if the Court were to assume that subcommittees will be created and that those subcommittees will be given roles that overlap with the Boards, there still appears to be no harm to the Boards' members. They could still perform their statutory duties.

Because Plaintiffs' assertion of injury relies on speculation, and because even that speculation fails to reveal concrete harm, Plaintiffs lack standing to challenge Defendant Austin's authorization of subcommittees.

3. The Court Could Redress Plaintiffs' Removals by Ordering Defendants Austin and McDonald to Treat Them As Board Members

That leaves Plaintiffs' request for reinstatement to the Air Force Board. Compl. ¶ 6 & n.5. Here, they have alleged

harm. No doubt, "removal from a federal office is an actual and concrete injury." *Spicer v. Biden*, 575 F. Supp. 3d 93, 96 (D.D.C. 2021); *accord Severino v. Biden*, 581 F. Supp. 3d 110, 115-16 (D.D.C. 2022).

But Defendants, for their part, challenge the redressability of these injuries. ECF No. 39 at 25-33. They contend that reinstating Plaintiffs to their positions would require the Court to enjoin the President, relief they argue is outside the bounds of this Court's power. *Id.* at 26-29.

Plaintiffs reply that courts in this circuit have confronted this problem before and found solutions. *See* ECF No. 42 at 21-24. In other cases, they say, courts have ordered non-president defendants to treat the injured party as having been restored to her position without ordering the president formally to reinstate her. *Id.* at 21. Whether or not they have named each potentially relevant party as a defendant is irrelevant, they argue, because the Court can construe Plaintiffs' naming of high-level, non-presidential executive-branch officials to "encompass subordinate branch officials" too. *Id.* at 23 (quoting *Spicer*, 575 F. Supp. 3d at 97) (emphasis deleted). And they point out that the Secretary of Defense and the designated federal officer of the Air Force Board are named defendants. *Id.* at 23-24; *see also* Compl. ¶¶ 37, 51.

Defendants say an injunction against non-presidential defendants will not do. ECF No. 39 at 29-33. The Secretary of Defense, they claim, has no "specific oversight duties as to the Board, such as responsibility for coordinating its activities." ECF No. 44 at 13 (quotation omitted and

alteration adopted). And the Board's designated federal officer, in their view, is a merely "administrative" official whose role "primarily involves calling and attending each meeting." ECF No. 39 at 32. Thus, they think enjoining those defendants would not give Plaintiffs relief.

Defendants likely are right that the Court cannot enjoin the President or subject him to declaratory relief. *See Newdow v. Roberts*, 603 F.3d 1002, 1013, 390 U.S. App. D.C. 273 (D.C. Cir. 2010). But the D.C. Circuit has explained that any difficulties created by that void can often be "bypassed[ ] because the injury at issue can be rectified by injunctive relief against subordinate officials." *Swan v. Clinton*, 100 F.3d 973, 978, 321 U.S. App. D.C. 359 (1996). And even if the named defendants could not alone provide all the desired relief, courts may construe the complaint to include other officials who collectively can "substantially redress" the injury. *See id.* at 979-80. To do otherwise would be to "elevate form over substance." *Id.* at 980. Applying those principles, two courts in this district have held that similar injuries—including Plaintiff Spicer's injury in having been removed from the Navy Board—were redressable. *See Spicer*, 575 F. Supp. 3d at 97; *Severino*, 581 F. Supp. 3d at 115-16.

The Court agrees with the holdings of the *Spicer* and *Severino* courts. Defendants try to distinguish *Spicer* by pointing out that the chair of the Navy Board was a defendant in that case, not just the designated federal officer. ECF No. 39 at 32-33. But that makes no difference. If the designated federal officer has been ordered to treat some plaintiffs as members of the Air Force Board, he can

ensure that the Board holds no meetings without them. *See* 5 U.S.C. app. 2 § 10(3); *supra* note 5. That relief plus a declaratory judgment establishing that some plaintiffs are members of the Air Force Board can "substantially redress [Plaintiffs'] injury." *Swan*, 100 F.3d at 980. Besides, under *Swan*, the Court can construe Plaintiffs' complaint to include the chair and other Board members in their official capacities anyway. *See id.* at 980 & n.3.

At bottom, even if the Court cannot provide Plaintiffs with "as complete a remedy" as conceivably possible, it can provide substantial enough relief "for standing purposes." *Swan*, 100 F.3d at 980-81. Thus, Plaintiffs have alleged facts that establish standing to challenge their removals from the Air Force Board.

B. Plaintiffs Have Not Stated a Claim for Their Removal from the Air Force Board

Plaintiffs' four claims related to their removals from the Air Force Board each present reasons why those removals might entitle them to relief. Understood that way, Count II[11] and Count IV[12] amount to the same thing. The APA directs courts to "hold unlawful and set aside agency action" that is "not in accordance with law" or "contrary to constitutional . . . power." 5 U.S.C. § 706. In doing so, it "supplies a generic cause of action" to bring

11. Plaintiffs' second claim is that the removals violated the APA. Compl. ¶¶ 136-40.

12. Plaintiffs' fourth claim is that the removals violated the "the Separation of Powers Doctrine." *See* Compl. ¶¶ 145-50.

claims based on substantive law found elsewhere. *See Trudeau v. FTC*, 456 F.3d 178, 188-89, 372 U.S. App. D.C. 335 (D.C. Cir. 2006) (quotation omitted and alteration adopted). Thus, to state a claim under the APA—for contravention of the separation of powers or for any other reason—Plaintiffs must establish that the action they challenge was illegal. *See Rempfer v. Dep't of the Air Force*, 538 F. Supp. 2d 200, 207-08 (D.D.C. 2008). That is a "question of law," and so it is reviewable on a motion to dismiss under Rule 12(b)(6). *Marshall Cnty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1226, 300 U.S. App. D.C. 263 (D.C. Cir. 1993). Counts I and III purport to assert breach-of-contract and viewpoint-discrimination First Amendment claims, respectively.

So the Court must address three questions to determine whether Plaintiffs have stated claims for their removals from the Air Force Board. First, with respect to Counts II and IV, did the President violate the law by firing them? Second, with respect to Count I, have Plaintiffs plausibly alleged the elements of a breach-of-contract claim? Third, with respect to Count III, have Plaintiffs plausibly alleged the elements of a viewpoint-discrimination First Amendment claim? The answer to all three questions is no.

1. The Statute Permitted the President to Fire Plaintiffs

Defendants claim that the President enjoys complete discretion to remove presidentially appointed Board members. ECF No. 39 at 33-44. They construe the

statutory terms of office as limitations, not irrevocable grants. *Id.* at 34. Accordingly, they contend that the statute contains no explicit removal protection. *Id.* at 36-42. They conclude that the President has removal power incident to his appointment power. *Id.* at 34-36. They also argue that, even if ambiguity were present in the statute, the Court should choose their construction to avoid constitutional questions about the scope of the President's removal power. *Id.* at 42-44.

Plaintiffs say Defendants have omitted a crucial aspect of the statute. The six presidential appointments, they observe, are staggered such that a president can make only "*two* appointments in each particular year." ECF No. 42 at 26 (citing 10 U.S.C. §§ 9455(b), 7455(b), 8468(b)). If the President could fire all six presidentially appointed Board members at will, they reason, it would create an untenable "hole in the[ir] membership." *Id.* They also suggest that at-will presidential removal conflicts with the Boards' purpose to "provide independent advice and recommendations." *Id.* (quotation omitted). And they point out that, although the statute contains no explicit removal protections, neither does it contain an explicit grant of presidential removal authority. *Id.* at 27. By contrast, the Air Force Board's chair is explicitly empowered to fire Board members for truancy. *Id.* (citing 10 U.S.C. § 9455(c)(2)).

More broadly, Plaintiffs argue that the many cases about inherent presidential removal authority are inapposite here because Board members are not officers of the United States. ECF No. 42 at 27-32. That is, Plaintiffs

say Board members have an advisory function only and so do not hold "significant authority pursuant to the law of the United States." *Id.* at 27 (quoting *Buckley v. Valeo*, 424 U.S. 1, 126, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976)). That must be true, they explain, or else the statute's provision of congressional appointments to the Boards would violate the Appointments Clause of Article II, Section 2. *Id.* at 28-29; *see also Buckley*, 424 U.S. at 136. Implicit in that contention is the idea that a President's inherent removal authority does not extend beyond officers of the United States. *See generally* ECF No. 42 at 32-38. And Plaintiffs observe that no prior president has tried to fire a Board member. *Id.* at 32.

Plaintiffs' mélange of constitutional and statutory arguments lacks analytical rigor. The Court cannot leap to decide the scope of the President's constitutional removal authority without first asking "whether there is a nonconstitutional ground for deciding the case." *Kalka v. Hawk*, 215 F.3d 90, 97, 342 U.S. App. D.C. 90 (D.C. Cir. 2000). Courts must define that scope if, for example, a statute provides that an individual "cannot be removed by the President unless certain statutory criteria are met." *Seila Law*, 140 S. Ct. at 2192. But that formulation presupposes a statutory interpretation.

To follow the principle that courts should decide cases on statutory grounds whenever possible, the Court must first address whether the statute authorized the President to remove Plaintiffs. If it did, the inquiry is over; there is no separation-of-powers problem because Congress and the President effectively agree on whether the individual

can be removed.[13] If it did not, then—and only then—must the Court consider whether the President still has constitutional removal authority over Plaintiffs. As explained below, the statute creating the Air Force Board empowered the President to fire presidential appointees, so this inquiry ends at part one.

Plaintiffs inadequately grapple with a key principle: "absent a specific provision to the contrary, the power of removal from office is incident to the power of appointment." *Carlucci v. Doe*, 488 U.S. 93, 99, 109 S. Ct. 407, 102 L. Ed. 2d 395 (1988) (quotation omitted). That is not a constitutional rule, but a "matter of statutory interpretation." *Id.* And it has a long pedigree. *See In re Hennen*, 38 U.S. (13 Pet.) 230, 259, 10 L. Ed. 138 (1839). That rule and its pedigree are especially significant here because courts "assume that, when Congress enacts statutes, it is aware of relevant judicial precedent." *Ryan v. Valencia Gonzales*, 568 U.S. 57, 66, 133 S. Ct. 696, 184 L. Ed. 2d 528 (2013).

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13. The Court does not suggest that agreements between the executive and legislative branches can *never* contravene the separation of powers. But violations in that context require an independent constitutional limitation, for example, the Presentment Clause. *See Clinton v. City of New York*, 524 U.S. 417, 442-447, 118 S. Ct. 2091, 141 L. Ed. 2d 393 (1998) (holding unconstitutional a statute that gave the President power to cancel spending authorized by law). The only specific constitutional provision Plaintiffs identify is Congress's authority to make rules regulating the armed forces. *See* Compl. ¶¶ 145-50; U.S. Const. art. 1, § 8, cl. 14. Even assuming that congressional power is relevant here, if a statute permits the President to fire an individual and the President does so, he has complied with Congress's rule, so no constitutional problem exists.

Under that rule, Plaintiffs, former presidential appointees, must point to a specific statutory provision that prevented their firing. They cannot. They point only to three collateral statutory features—the term of office, limitations on the presidential appointment power, and the ability for the chair to remove absentee members—and their perception of the statute's purpose. But Congress knows how to codify an explicit removal protection. For instance, when it created the Consumer Financial Protection Bureau, it provided that the agency's director was removable only for "inefficiency, neglect of duty, or malfeasance in office." *Seila Law*, 140 S. Ct. at 2193 (quoting 12 U.S.C. § 5491(c)(3)). Its decision to say almost nothing about removal in the Air Force Board's statute is strong evidence that it did not wish for the statute to foreclose presidential at-will presidential removal. *Cf. Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 826, 200 L. Ed. 2d 58 (2018). Thus, it is doubtful that anything less than an explicit removal protection could constitute a "specific provision" under *Carlucci*, 488 U.S. at 99. Still, the Court will explain why each of the attributes Plaintiffs identify do not advance their position.

Start with the term-of-office provision. It says that presidential appointees "serve for three years each except that any member whose term of office has expired shall continue to serve until his successor is designated by the President." 10 U.S.C. § 9455(b)(1). For one thing, courts have rejected the suggestion that a fixed term limit alone implies a limit on removal authority. *See Spicer*, 575 F. Supp. 3d at 99; *Pievsky v. Ridge*, 98 F.3d 730, 734 (3d Cir. 1996) ("[A] fixed term merely provides a time for

the term to end."). But this statute helps Plaintiffs even less than a generic term-of-office provision. It explicitly recognizes that the President has a role in deciding when a Board member's term ends. Plaintiffs fail to explain why a member's "term of office" has not "expired" if the President fires her. *See* 10 U.S.C. § 9455(b)(1). Even if that is not the most natural reading of "expired," that possibility means that the term-of-office provision cannot defeat the longstanding presumption recognized by *Carlucci*.

As for limits on the President's appointment power, it is Plaintiffs who omit a crucial aspect of the statute, not Defendants. Plaintiffs say the President can appoint only two members in any year, ECF No. 42 at 26, but that limitation is not found in the text of the Air Force Board's statute. *See supra* note 3. It *is* found in the other two Boards' statutes, *id.*, but Plaintiffs have not pressed an unlawful-removal claim over those Boards, Compl. ¶ 6 & n.5. The relevant statute says only that the "President shall designate persons each year to succeed the members designated by the President whose terms expire that year." 10 U.S.C. § 9455(b)(1). That language is consistent with unfettered presidential removal power, so it cannot defeat the *Carlucci* presumption.

The termination-by-chair provision is ultimately no different. It allows the chair to remove a member—any member who is not also a member of Congress, not just presidential appointees—if she "fails to attend two successive Board meetings, except in a case in which an absence is approved in advance, for good cause, by the

Board chairman." 10 U.S.C. § 9455(c)(2)(A). In construing that provision to imply that the President may not *also* remove Board members, Plaintiffs invoke the negative-implication canon.[14] But "the force of any negative implication . . . depends on context." *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 381, 133 S. Ct. 1166, 185 L. Ed. 2d 242 (2013). So the negative-implication canon is "overcome by contrary indications that adopting a particular rule or statute was probably not meant to signal any exclusion," *id.* (quotation omitted), and any interpretation based on the canon must be "sensible," *see NLRB v. Sw. General, Inc.*, 580 U.S. 288, 302, 137 S. Ct. 929, 197 L. Ed. 2d 263 (2017) (quotation omitted).

Plaintiffs' interpretation is insensible, so context defeats the negative implication. If empowering the chair to fire members is construed as an implicit exclusion of any other means or grounds for removing Board members, the result is that members could be fired only for truancy and not for, say, corruption or crimes of moral turpitude. That would be a strange result. Oddity is no reason to avoid applying a statute as-written, *see Cochise Consultancy, Inc v. United States ex rel. Hunt*, 139 S. Ct. 1507, 1513, 203 L. Ed. 2d 791 (2019), but it counsels against the use of an interpretive canon that is highly sensitive to context, *see United States v. Polanco*, 451 F.3d 308, 311, 47 V.I. 762 (3d Cir. 2006). Because it is unlikely that Congress intended to protect Board members from removal for

14. Another name for that canon is *expressio unius est exclusio alterius*. It holds that things not mentioned are excluded. *See Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 80, 122 S. Ct. 2045, 153 L. Ed. 2d 82 (2002).

all affronts except absenteeism, the Court finds that the termination-by-chair provision is just an addition to the removal-by-appointer background rule. And even if that were not the best interpretation of the statute's text, the question is at least close enough that any uncertainty on that score does not outweigh the *Carlucci* presumption.

Finally, Plaintiffs' assertion that the statute's purpose is to provide "independent advice and recommendations" lacks support. ECF No. 42 at 26. They cite only the requirements of FACA, which apply to all advisory committees. *See id.* at 26-27. But "vague notions of a statute's basic purpose" are entitled to little weight in statutory interpretation. *See Stovic v. R.R. Ret. Bd.*, 826 F.3d 500, 505, 423 U.S. App. D.C. 336 (D.C. Cir. 2016) (quotation omitted and alteration adopted). And even if Plaintiffs are right about the statute's purpose, their interpretation does not follow. The Board's job is to provide advice, and advice is only as useful as its recipient believes it to be. One could just as easily posit that fulfilling the statute's purpose requires plenary presidential removal power so that the President is guaranteed to have confidence in those dispensing recommendations, making him more likely to heed their advice. In any event, an unsupported, ill-defined notion of the statute's purpose that does not necessarily support Plaintiffs' interpretation cannot defeat the *Carlucci* presumption any more than the three textual arguments.

For those reasons, the Court reaches the same conclusion as the *Spicer* and *Severino* courts. *See Spicer*, 575 F. Supp. 3d at 98-100; *Severino*, 581 F. Supp. 3d

at 118-19. The statute empowers the President to fire presidentially appointed Air Force Board members, so there is no reason to consider the scope of his constitutional removal authority. Thus, the Court will dismiss Count II and Count IV.

2. Plaintiffs Fail to Allege that Any Contract's Terms Prevented Removal

On Plaintiffs' breach-of-contract claim, Defendants argue that Plaintiffs have failed to allege the basic elements of a contract. ECF No. 39 at 44-45. In their view, the operative complaint contains no "facts supporting the existence of a contract," and merely repackages the fact that Plaintiffs were appointed to the Air Force Board. *See id.* And even if there were contracts, they contend that no pleaded facts would entitle Plaintiffs to the extraordinary remedy of specific performance. *Id.* at 45.

Plaintiffs reply that an appointment to a Board "has to be a contract." ECF No. 42 at 38. To support that conclusion, they say an appointment is offered and accepted for consideration—the promise to serve and the benefits of the office—and that Plaintiffs were harmed when the president fired them. *Id.* And they state without further explanation that the contract was "breached when the President summarily removed the Plaintiffs." *Id.* (emphasis deleted). They respond to Defendants' assertion that specific performance is unavailable by arguing that the "statutory independence" of the Boards makes this situation suitable for specific performance, contrary to the general rule. *Id.* at 39-43.

Even assuming Plaintiffs had employment contracts, they say little about their *terms*. But under federal law, Plaintiffs must allege "an obligation or duty arising out of the contract[s]" and "a breach of that duty." *Red Lake Band of Chippewa Indians v. U.S. Dep't of the Interior*, 624 F. Supp. 2d 1, 12 (D.D.C. 2009).[15] Implicitly, they argue that the government had a duty to allow them to serve three-year terms, no matter the President's wishes. Yet the only two candidates for having supplied that term are the statute and the fact that no president had ever before fired Board members. *See* ECF No. 42 at 41 (arguing that "long-term convention and the statutes point to the inability of the President to remove [Board] members").

Neither of those candidates can help Plaintiffs. The Court agrees that, if Plaintiffs' appointments were protected by a contract, the contracts' terms must have come from the statute. *Cf. Roedler v. Dep't of Energy*, 255 F.3d 1347, 1352 (Fed. Cir. 2001) ("[W]hen . . . the contract implements a statutory enactment, it is appropriate to inquire into the governing statute and its purpose."). But the statute cannot have guaranteed them three-year terms because, as the Court has already held, it permits the President to fire presidentially appointed Board members at will. For the same reason, no amount of historical practice can compel a contrary conclusion. *Cf.* U.C.C. § 2-208 (Unif. L. Comm'n 1977) ("[E]xpress terms shall control course of performance and course

15. The Court applies federal common law to this claim because Plaintiffs claim to be the beneficiary of "obligations . . . of the United States under its contracts." *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504, 108 S. Ct. 2510, 101 L. Ed. 2d 442 (1988).

of performance shall control both course of dealing and usage of trade.").[16]

Thus, Plaintiffs have not stated a breach-of-contract claim even if there were a contract to breach. So the Court will dismiss Count I.

3. Plaintiffs Allege Neither Speech Nor Regulation of Speech

On Plaintiffs' First Amendment claim, Defendants say Plaintiffs have identified no "specific instances" of protected speech. ECF No. 39 at 46. And even if they had, Defendants argue, it would not be protected speech because the only conceivably relevant statements would be those made in Plaintiffs' official capacities. *Id.* In Defendants' view, the President may remove political appointees because of policy disagreements without violating the First Amendment. *Id.* at 47-48. For good measure, they point out that Plaintiffs have not pleaded a First Amendment retaliation claim. *Id.* at 46 n.13.

Plaintiffs acknowledge that they have neither identified nor "made any statements." ECF No. 42 at 43. Instead, they claim to have been "attacked for what is presumed to be their unexpressed views." *Id.* Based on the comments of President Biden's then press secretary, Plaintiffs explain that this claim is based on an "improper

16. "The Uniform Commercial Code is a source of federal common law and may be relied upon in interpreting a contract to which the federal government is a party." *O'Neill v. United States*, 50 F.3d 677, 684 (9th Cir. 1995).

motive" behind their firing, the desire to purge those who are not "aligned" with the president's "values." *Id.* at 45-46 (quotation omitted).

Viewpoint discrimination is "presumptively unconstitutional." *Reed v. Town of Gilbert*, 576 U.S. 155, 163, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015). But that is because it is "an egregious form of content discrimination," a "regulation of speech." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995). Thus, a viewpoint-discrimination claim requires that the government "has impermissibly interfered with the free exchange of ideas by imposing trade barriers on certain viewpoints but not on others." *See Connection Distrib. Co. v. Holder*, 557 F.3d 321, 329 (6th Cir. 2009).

Plaintiffs allege neither speech nor regulation. Their complaint contains no suggestion that they have faced impediments to saying anything they wish, and it concedes that they have not tried to speak on any particular topic. So they have not stated a viewpoint-discrimination claim.

Moreover, although Defendants are right that Plaintiffs have not pleaded a First Amendment retaliation claim, it would not matter if they had. The first element of such a claim is that a plaintiff has "engaged in conduct protected under the First Amendment." *Black Lives Matter D.C. v. Trump*, 544 F. Supp. 3d 15, 46 (D.D.C. 2021) (quotation omitted). Plaintiffs have not satisfied that element for the same reason: They have not "made any statements." ECF No. 42 at 43.

Given that Plaintiffs seek to vindicate the "freedom of speech," U.S. Const. amend. I, it should come as no surprise that they must allege at least a specific desire to speak. Because they have not, they have failed to state a claim. So the Court will dismiss Count III.

* * *

Thus, none of Plaintiffs' claims can survive Defendants' motion to dismiss. That conclusion depends mostly on statutory interpretation and the nature of Plaintiffs' claims, so further allegations consistent with those already pled could not cure the deficiency. *See Firestone v. Firestone*, 76 F.3d 1205, 1209, 316 U.S. App. D.C. 152 (D.C. Cir. 1996) (per curiam). Moreover, Plaintiffs have already amended their complaint four times, and the Court has explained that, "absent extraordinary circumstances, [it would] not grant Plaintiffs further leave to amend the complaint." Min. Order of Apr. 7, 2022. So the Court will dismiss Plaintiffs' claims with prejudice.

IV. Conclusion

For all the above reasons, the Court will grant Defendants' motion to dismiss. A separate order will issue.

/s/ Timothy J. Kelly
TIMOTHY J. KELLY
United States District Judge

Date: March 21, 2023

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, FILED MARCH 21, 2023

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 21-1893 (TJK)

HEIDI STIRRUP *et al.*,

Plaintiffs,

v.

JOSEPH R. BIDEN, JR.,
IN HIS OFFICIAL CAPACITY AS PRESIDENT
OF THE UNITED STATES, *et al.*,

Defendants.

ORDER

For the reasons set forth in the Court's accompanying Memorandum Opinion, it is hereby **ORDERED** that Defendants' Motion to Dismiss, ECF No. 39, is **GRANTED**. This case is **DISMISSED IN PART** for lack of subject-matter jurisdiction and **DISMISSED IN PART** for failure to state a claim. This is a final, appealable Order. The Clerk of Court is directed to close the case.

SO ORDERED.

/s/ Timothy J. Kelly
TIMOTHY J. KELLY
United States District Judge

Date: March 21, 2023

APPENDIX D — RELEVANT STATUTORY PROVISIONS

5 U.S.C. § 1004. Responsibilities of congressional committees

Effective: December 27, 2022

(a) Review of activities.--In the exercise of its legislative review function, each standing committee of the Senate and the House of Representatives shall make a continuing review of the activities of each advisory committee under its jurisdiction to determine whether such advisory committee should be abolished or merged with any other advisory committee, whether the responsibilities of such advisory committee should be revised, and whether such advisory committee performs a necessary function not already being performed. Each such standing committee shall take appropriate action to obtain the enactment of legislation necessary to carry out the purpose of this subsection.

(b) Consideration of legislation.--In considering legislation establishing, or authorizing the establishment of any advisory committee, each standing committee of the Senate and of the House of Representatives shall determine, and report such determination to the Senate or to the House of Representatives, as the case may be, whether the functions of the proposed advisory committee are being or could be performed by one or more agencies or by an advisory committee already in existence, or by enlarging the mandate of an existing advisory committee. Any such legislation shall--

(1) contain a clearly defined purpose for the advisory committee;

(2) require the membership of the advisory committee to be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee;

(3) contain appropriate provisions to assure that the advice and recommendations of the advisory committee will not be inappropriately influenced by the appointing authority or by any special interest, but will instead be the result of the advisory committee's independent judgment;

(4) contain provisions dealing with authorization of appropriations, the date for submission of reports (if any), the duration of the advisory committee, and the publication of reports and other materials, to the extent that the standing committee determines the provisions of section 1009 of this chapter to be inadequate; and

(5) contain provisions which will assure that the advisory committee will have adequate staff (either supplied by an agency or employed by it), will be provided adequate quarters, and will have funds available to meet its other necessary expenses.

(c) Adherence to guidelines.--To the extent they are applicable, the guidelines set out in subsection (b) shall be followed by the President, agency heads, or other Federal officials in creating an advisory committee.

Appendix D

10 U.S.C. § 7455. Board of Visitors

Effective: December 27, 2021

(a) A Board of Visitors to the Academy is constituted annually of--

(1) the chairman of the Committee on Armed Services of the Senate, or his designee;

(2) three other members of the Senate designated by the Vice President or the President pro tempore of the Senate, two of whom are members of the Committee on Appropriations of the Senate;

(3) the chairman of the Committee on Armed Services of the House of Representatives, or his designee;

(4) four other members of the House of Representatives designated by the Speaker of the House of Representatives, two of whom are members of the Committee on Appropriations of the House of Representatives; and

(5) six persons designated by the President.

(b) The persons designated by the President serve for three years each except that any member whose term of office has expired shall continue to serve until his successor is appointed by the President. The President shall designate two persons each year to succeed the members whose terms expire that year.

(c) If a member of the Board dies or resigns, a successor shall be designated for the unexpired portion of the term by the official who designated the member.

(d) The Board shall visit the Academy annually. With the approval of the Secretary of the Army, the Board or its members may make other visits to the Academy in connection with the duties of the Board or to consult with the Superintendent of the Academy.

(e) The Board shall inquire into the morale and discipline, the curriculum, instruction, physical equipment, fiscal affairs, academic methods and other matters relating to the Academy that the Board decides to consider.

(f) Within 60 days after its annual visit, the Board shall submit a written report to the President of its action, and of its views and recommendations pertaining to the Academy. Any report of a visit, other than the annual visit, shall, if approved by a majority of the members of the Board, be submitted to the President within 60 days after the approval.

(g) Upon approval by the Secretary, the Board may call in advisers for consultation.

(h) While performing his duties, each member of the Board and each adviser shall be reimbursed under Government travel regulations for his travel expenses.

Appendix D

(i)(1) A majority of the members of the Board may call an official meeting of the Board once per year.

(2) A member may attend such meeting--

(A) in person, at the Academy; or

(B) remotely, at the election of such member.

Appendix D

10 U.S.C. § 8468. Board of Visitors

Effective: December 27, 2021

(a) A Board of Visitors to the Naval Academy is constituted annually of--

(1) the chairman of the Committee on Armed Services of the Senate, or his designee;

(2) three other members of the Senate designated by the Vice President or the President pro tempore of the Senate, two of whom are members of the Committee on Appropriations of the Senate;

(3) the chairman of the Committee on Armed Services of the House of Representatives, or his designee;

(4) four other members of the House of Representatives designated by the Speaker of the House of Representatives, two of whom are members of the Committee on Appropriations of the House of Representatives; and

(5) six persons designated by the President.

(b) The persons designated by the President serve for three years each except that any member whose term of office has expired shall continue to serve until his successor is appointed by the President. The President shall designate two persons each year to succeed the members whose terms expire that year.

(c) If a member of the Board dies or resigns, a successor shall be designated for the unexpired portion of the term by the official who designated the member.

(d) The Board shall visit the Academy annually. With the approval of the Secretary of the Navy, the Board or its members may make other visits to the Academy in connection with the duties of the Board or to consult with the Superintendent of the Academy.

(e) The Board shall inquire into the state of morale and discipline, the curriculum, instruction, physical equipment, fiscal affairs, academic methods and other matters relating to the Academy that the Board decides to consider.

(f) Within 60 days after its annual visit, the Board shall submit a written report to the President of its action and of its views and recommendations pertaining to the Academy. Any report of a visit, other than the annual visit, shall, if approved by a majority of the members of the Board, be submitted to the President within 60 days after the approval.

(g) Upon approval by the Secretary, the Board may call in advisers for consultation.

(h) While performing his duties, each member of the Board and each adviser shall be reimbursed under Government travel regulations for his travel expenses.

Appendix D

(i)(1) A majority of the members of the Board may call an official meeting of the Board once per year.

(2) A member may attend such meeting--

(A) in person, at the Academy; or

(B) remotely, at the election of such member.

Appendix D

10 U.S.C. § 9455. Board of Visitors

Effective: December 27, 2021

(a) A Board of Visitors to the Academy is constituted annually. The Board consists of the following members:

(1) Six persons designated by the President.

(2) The chairman of the Committee on Armed Services of the House of Representatives, or his designee.

(3) Four persons designated by the Speaker of the House of Representatives, three of whom shall be members of the House of Representatives and the fourth of whom may not be a member of the House of Representatives.

(4) The chairman of the Committee on Armed Services of the Senate, or his designee.

(5) Three other members of the Senate designated by the Vice President or the President pro tempore of the Senate, two of whom are members of the Committee on Appropriations of the Senate.

(b)(1) The persons designated by the President serve for three years each except that any member whose term of office has expired shall continue to serve until his successor is designated by the President. The President

shall designate persons each year to succeed the members designated by the President whose terms expire that year.

(2) At least two of the members designated by the President shall be graduates of the Academy.

(c)(1) If a member of the Board dies or resigns or is terminated as a member of the Board under paragraph (2), a successor shall be designated for the unexpired portion of the term by the official who designated the member.

(2)(A) If a member of the Board fails to attend two successive Board meetings, except in a case in which an absence is approved in advance, for good cause, by the Board chairman, such failure shall be grounds for termination from membership on the Board. A person designated for membership on the Board shall be provided notice of the provisions of this paragraph at the time of such designation.

(B) Termination of membership on the Board under subparagraph (A)--

(i) in the case of a member of the Board who is not a member of Congress, may be made by the Board chairman; and

(ii) in the case of a member of the Board who is a member of Congress, may be made only by the official who designated the member.

(C) When a member of the Board is subject to termination from membership on the Board under subparagraph (A), the Board chairman shall notify the official who designated the member. Upon receipt of such a notification with respect to a member of the Board who is a member of Congress, the official who designated the member shall take such action as that official considers appropriate.

(d) The Board shall visit the Academy annually. With the approval of the Secretary of the Air Force, the Board or its members may make other visits to the Academy in connection with the duties of the Board or to consult with the Superintendent of the Academy. Board members shall have access to the Academy grounds and the cadets, faculty, staff, and other personnel of the Academy for the purposes of the duties of the Board.

(e)(1) The Board shall inquire into the morale, discipline, and social climate, the curriculum, instruction, physical equipment, fiscal affairs, academic methods, and other matters relating to the Academy that the Board decides to consider.

(2) The Secretary of the Air Force and the Superintendent of the Academy shall provide the Board candid and complete disclosure, consistent with applicable laws concerning disclosure of information, with respect to institutional problems.

(3) The Board shall recommend appropriate action.

(f) The Board shall prepare a semiannual report containing its views and recommendations pertaining to the Academy, based on its meeting since the last such report and any other considerations it determines relevant. Each such report shall be submitted concurrently to the Secretary of Defense, through the Secretary of the Air Force, and to the Committee on Armed Services of the Senate and the Committee on Armed Services of the House of Representatives.

(g) Upon approval by the Secretary, the Board may call in advisers for consultation.

(h) While performing duties as a member of the Board, each member of the Board and each adviser shall be reimbursed under Government travel regulations for travel expenses.

(i)(1) A majority of the members of the Board may call an official meeting of the Board once per year.

(2) A member may attend such meeting--

(A) in person, at the Academy; or

(B) remotely, at the election of such member.

Appendix D

41 CFR 102-3.105

(Aug. 7, 2024)

§ 102-3.105 What are the responsibilities of an agency head?

When a committee is utilized by or established by an agency, the agency head must:

(a) Comply with the Act, this part, and other applicable laws and regulations;

(b) Issue administrative guidelines and management controls providing the details that advisory committee staff need to implement during the creation, operation, and termination of their Federal advisory committees;

(c) Designate a CMO;

(d) Designate a DFO for each advisory committee and its subcommittees;

(e) Approve the advisory committee charters for establishments, renewals, re-establishments, or mergers;

(f) Provide a written determination stating the reasons for closing any advisory committee meeting to the public, in whole or in part, in accordance with the exemptions set forth in the Government in the Sunshine Act, 5 U.S.C. 552b(c);

(g) Review, at least annually, the need to continue each existing advisory committee, consistent with the public interest and the purpose or functions of each advisory committee;

(h) Determine that rates of compensation for members (if they are paid for their services) and staff of, and experts and consultants to advisory committees are justified and that levels of agency support are adequate;

(i) Develop procedures to assure that the advice or recommendations of advisory committees will not be inappropriately influenced by the appointing authority or by any special interest, but will instead be the result of the advisory committee's independent judgment;

(j) Assure that the interests and affiliations of committee members are reviewed for conformance with applicable conflict of interest statutes, regulations issued by the U.S. Office of Government Ethics including any supplemental agency requirements, and other Federal ethics rules;

(k) Appoint or invite individuals to serve on committees, unless otherwise provided for by a specific statute or Presidential directive; and

(l) Provide the opportunity for reasonable participation, including accessibility considerations, by the public in advisory committee activities, subject to § 102-3.140 and the agency's guidelines.

APPENDIX E — LETTERS

SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

SEP 17 2021

MEMORANDUM FOR SECRETARY OF THE AIR FORCE

SUBJECT: Board of Visitors of the U.S. Air Force Academy

I appreciate your personal support of the 2021 Zero-Based Review of DoD advisory committees. Based on the recommendations of the Zero-Based Review Board chaired by the then-Interim Director of Administration and Management, I authorize the Board of Visitors of the U.S. Air Force Academy (USAFA BoV) to immediately resume operations. The USAFA BoV will comply with Deputy Secretary of Defense Memorandum, "Advisory Committee Management," November 26, 2018, or, if updated in the future, the current version. Key requirements of this memorandum are summarized below.

As a Federal advisory committee, the USAFA BoV is subject to the Federal Advisory Committee Act (5 U.S.C., Appendix) and other Federal statutes and regulations, including DoD policy and procedures. The Designated Federal Officer for the USAFA BoV, who is designated by the Secretary of the Air Force, serves as DoD's

representative to the USAFA BoV and is responsible for ensuring it complies with Federal statutes and regulations, including DoD policy and procedures.

Although membership size for DoD Federal advisory committees is prescribed by Secretary of Defense established policy, membership size and appointment authority for the USAFA BoV is set forth in statute. DoD previously determined that subcommittees are not authorized for the USAFA BoV. While I support this earlier decision, you are delegated authority to establish USAFA BoV subcommittees if you determine such action is essential to USAFA BoV operations. However, parent and subcommittee member appointments are separate and distinct. Therefore, authority to invite or appoint USAFA BoV subcommittee members rests solely with the Secretary of Defense or the Deputy Secretary of Defense. Subcommittee members are appointed for a term of service of one-to-four years, with annual renewals, and subcommittee leadership terms of service are limited to one-to-two years, with annual renewal.

Written terms of references (ToR) are not required for USAFA BoV parent level work. However, if you approve the establishment and utilization of a USAFA BoV subcommittee, then that work will be in response to written ToR approved by you, and the work cannot proceed until the subcommittee members are appointed in accordance with DoD policy and procedures. All

subcommittee ToR must be continuously reviewed, updated as priorities change, and coordinated with the appropriate Department of the Air Force counsel.

/s/ Lloyd J. Austin

Appendix E

SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

SEP 17 2021

MEMORANDUM FOR SECRETARY OF THE ARMY

SUBJECT: U.S. Military Academy Board of Visitors

I appreciate your personal support of the 2021 Zero-Based Review of DoD advisory committees. Based on the recommendations of the Zero-Based Review Board chaired by the then-Interim Director of Administration and Management, I authorize the U.S. Military Academy Board of Visitors (USMA BoV) to immediately resume operations. The USMA BoV will comply with Deputy Secretary of Defense Memorandum, "Advisory Committee Management," November 26, 2018, or, if updated in the future, the current version. Key requirements of this memorandum are summarized below.

As a Federal advisory committee, the USMA BoV is subject to the Federal Advisory Committee Act (5 U.S.C., Appendix) and other Federal statutes and regulations, including DoD policy and procedures. The Designated Federal Officer for the USMA BoV, who is designated by the Secretary of the Army, serves as DoD's representative to the USMA BoV and is responsible for ensuring it complies with Federal statutes and regulations, including DoD policy and procedures.

Appendix E

Although membership size for DoD Federal advisory committees is prescribed by Secretary of Defense established policy, membership size and appointment authority for the USMA BoV is set forth in statute. DoD previously determined that subcommittees are not authorized for the USMA BoV. While I support this earlier decision, you are delegated authority to establish USMA BoV subcommittees if you determine such action is essential to USMA BoV operations. However, parent and subcommittee member appointments are separate and distinct. Therefore, authority to invite or appoint USMA BoV subcommittee members rests solely with the Secretary of Defense or the Deputy Secretary of Defense. Subcommittee members are appointed for a term of service of one-to-four years, with annual renewals, and subcommittee leadership terms of service are limited to one-to-two years, with annual renewal.

Written terms of references (ToR) are not required for USMA BoV parent level work. However, if you approve the establishment and utilization of a USMA BoV subcommittee, then that work will be in response to written ToR approved by you, and the work cannot proceed until the subcommittee members are appointed in accordance with DoD policy and procedures. All subcommittee ToR must be continuously reviewed, updated as priorities change, and coordinated with the appropriate Department of the Army counsel.

/s/ Lloyd J. Austin

Appendix E

SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

SEP 17 2021

MEMORANDUM FOR SECRETARY OF THE NAVY

SUBJECT: U.S. Naval Academy Board of Visitors

I appreciate your personal support of the 2021 Zero-Based Review of DoD advisory committees. Based on the recommendations of the Zero-Based Review Board chaired by the then-Interim Director of Administration and Management, I authorize the U.S. Naval Academy Board of Visitors (USNA BoV) to immediately resume operations. The USNA BoV will comply with Deputy Secretary of Defense Memorandum, "Advisory Committee Management," November 26, 2018, or, if updated in the future, the current version. Key requirements of this memorandum are summarized below.

As a Federal advisory committee, the USNA BoV is subject to the Federal Advisory Committee Act (5 U.S.C., Appendix) and other Federal statutes and regulations, including DoD policy and procedures. The Designated Federal Officer for the USNA BoV, who is designated by the Secretary of the Navy, serves as DoD's representative to the USNA BoV and is responsible for ensuring it complies with Federal statutes and regulations, including DoD policy and procedures.

Appendix E

Although membership size for DoD Federal advisory committees is prescribed by Secretary of Defense established policy, membership size and appointment authority for the USNA BoV is set forth in statute. DoD previously determined that subcommittees are not authorized for the USNA BoV. While I support this earlier decision, you are delegated authority to establish USNA BoV subcommittees if you determine such action is essential to USNA BoV operations. However, parent and subcommittee member appointments are separate and distinct. Therefore, authority to invite or appoint USNA BoV subcommittee members rests solely with the Secretary of Defense or the Deputy Secretary of Defense. Subcommittee members are appointed for a term of service of one-to-four years, with annual renewals, and subcommittee leadership terms of service are limited to one-to-two years, with annual renewal.

Written terms of references (ToR) are not required for USNA BoV parent level work. However, if you approve the establishment and utilization of a USNA BoV subcommittee, then that work will be in response to written ToR approved by you, and the work cannot proceed until the subcommittee members are appointed in accordance with DoD policy and procedures. All subcommittee ToR must be continuously reviewed, updated as priorities change, and coordinated with the appropriate Department of the Navy counsel.

/s/ Lloyd J. Austin