IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

SHARON HELMAN, *Petitioner*, v. U.S. DEPARTMENT OF VETERANS AFFAIRS, *Respondent*.	Case No. 15-3086

OPPOSITION TO MOTION TO DISMISS FOR LACK OF JURISDICTION

Petitioner Sharon Helman respectfully submits this opposition to the Department of Veterans Affairs' (VA's) motion to dismiss her appeal for lack of jurisdiction. Doc. 13. The VA urges that 38 U.S.C. § 713(e)(2) bars this Court from hearing the appeal. But the VA ignores this Court's precedents, which make clear that the language Congress used in § 713(e)(2) is insufficient to overcome the strong presumption of judicial review—much less the even-higher bar for precluding review of constitutional claims like those Ms. Helman raises. If § 713(e)(2) *did* purport to bar judicial review of the agency adjudication here, moreover, it would unconstitutionally vest judicial power in a non-Article III tribunal. The VA also claims that Ms. Helman's petition for review was untimely. But the VA simply gets the petition's filing date wrong. The motion to dismiss should be denied.

Given the complexity, importance, and novelty of the statutory and constitutional issues that bear on this Court's jurisdiction, however, the Court may wish

to defer the motion for consideration by a merits panel. *See* Fed. Cir. IOP #2.4(a)(i). That would allow the parties and the Court to address those weighty issues—which intersect with the merits of Ms. Helman's appeal in various ways—with the benefit of full briefing and argument on a non-compressed schedule.

STATUTORY AND PROCEDURAL BACKGROUND

I. THE VETERANS ACCESS, CHOICE, AND ACCOUNTABILITY ACT OF 2014

Both the jurisdictional and merits issues in this case stem primarily from the Veterans Access, Choice, and Accountability Act of 2014, Pub. L. No. 113-146, 128 Stat. 1754 (VACAA), codified in relevant part at 38 U.S.C. § 713. The VACAA, through 38 U.S.C. § 713, purports to rescind, for specific VA positions, protections previously provided by the Civil Service Reform Act of 1978, Pub. L. 95-454, 92 Stat. 1111 (CSRA), codified in relevant part at 5 U.S.C. § 7543.

A. Under the CSRA, senior executives at the VA (like those at other agencies) could be removed only for cause—specifically, for "misconduct, neglect of duty, malfeasance, or failure to accept a directed reassignment or to accompany a position in a transfer of function." 5 U.S.C. § 7543(a). An employee was entitled to 30 days' notice of her proposed removal and an opportunity to respond. *Id.* § 7543(b).

A removed senior executive could seek review before the Merit Systems Protection Board (MSPB or Board), a three-member board "appointed by the Pres-

ident, by and with the advice and consent of the Senate." 5 U.S.C. § 1201. Under the CRSA, the review process begins with an appeal to an administrative judge appointed by the Board. *Id.* § 7701(b)(1), *see id.* § 3105. That administrative judge's decision is subject to review by the three-member MSPB. *Id.* § 7701(e)(1)(A). Adverse MSPB decisions in turn are subject to judicial review in this Court if the employee files a petition for review within 60 days of "notice of the final order or decision of the Board." *Id.* § 7703(b)(1)(A).

B. In response to the alleged "wait list scandal" at the Phoenix VA Health Care System (Phoenix VA), Congress enacted the VACAA on July 31, 2014, to rescind many of the protections and appeal rights the CSRA guaranteed VA senior executives. It states that the VA Secretary may remove a senior executive "if the Secretary determines the performance or misconduct of the individual warrants such removal." 38 U.S.C. § 713(a)(1). The CRSA's procedures for notice and an opportunity to respond do not apply. *Id.* § 713(d)(1). And a senior executive may challenge her removal only through a severely truncated review process.

First, any appeal to the MSPB must be filed within seven days. 38 U.S.C. § 713(d)(2)(B). The case then must be decided by a single administrative judge within just 21 days. *Id.* § 713(e)(1). If the administrative judge does *not* issue a decision within 21 days, "the removal . . . is final." *Id.* § 713(e)(3). Neither the

MSPB nor the administrative judge may stay removal pending appeal. *Id.* § 713(e)(4). The senior executive, moreover, is forbidden from receiving any pay or benefits "beginning on the date on which [the] individual appeals" through the date of the administrative judge's decision. *Id.* § 713(e)(5).

There is no provision for review by the MSPB itself—the final decision comes from the administrative judge. "Notwithstanding any other provision of law, including [5 U.S.C. § 7703], the decision of [the] administrative judge . . . shall be final and shall not be subject to any further appeal." *Id.* § 713(e)(2).

II. PROCEEDINGS BELOW

Ms. Helman was employed as Director of the Phoenix VA—a senior executive position—starting in 2006. The VA removed her from that position on November 24, 2014, citing the enhanced removal authority provided by § 713. This petition for review arises from Ms. Helman's challenge to her removal and subsequent proceedings under § 713.

A. Ms. Helman's Removal

The VA initially proposed to remove Ms. Helman on May 30, 2014, alleging a "failure to provide oversight" in connection with the purported "wait list scandal." Decision 8.[1] At that time, the VACAA had not been enacted. Ms. Helman

[1] "Decision" citations refer to the Chief Administrative Judge's December 22, 2014 decision affirming Ms. Helman's removal, filed as Exhibit B to Ms. Helman's peti-

thus exercised her rights under the CSRA and responded to the proposed removal in writing on June 13 and in-person on July 11.

Numerous Members of Congress demanded that Ms. Helman be fired. Decision 52. On July 31, 2014, Congress enacted the VACAA. *See* pp. 3-4, *supra*. In August 2014, Ms. Helman learned that the VA's Office of Inspector General and the Federal Bureau of Investigation had, at Congress's behest, opened a criminal inquiry into her conduct as Director of the Phoenix VA.

On November 10, the VA rescinded its May 30 removal proposal. The same day, Deputy VA Secretary Sloan Gibson issued a "pending action" memorandum notifying Ms. Helman of her proposed removal under the new VACAA regime. That memorandum asserted three charges comprising eight total specifications. The primary charge was again "Lack of Oversight," which the memorandum identified as "making [Ms. Helman] unsuitable for the civil service." Decision 13, 58. The other two charges were "Conduct Unbecoming a Senior Executive" and "Failure to Report Gifts." Decision 32, 42. Ms. Helman responded to the accusations in writing on November 17. But on November 24, Deputy Secretary Gibson removed Ms. Helman from her position and from the federal civil service.

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tion for review (Doc. 1-2). Pinpoint citations are to the Decision's native page numbers, not the page numbers on the document's ECF header.

B. Ms. Helman's Appeal to the MSPB

Ms. Helman timely appealed her removal to the MSPB on December 1, 2014. She raised constitutional and statutory defenses, as well as factual defenses on the merits of the charges against her. The Chief Administrative Judge of the MSPB's Denver Field Office adjudicated the appeal. During the appeal, he informed Ms. Helman he could not stay or extend the proceedings in light of the pending criminal investigation. In view of the congressionally demanded criminal inquiry, Ms. Helman asserted her Fifth Amendment right against self-incrimination as to three of the specifications against her.

The Chief Administrative Judge issued a decision affirming Ms. Helman's removal on December 22, 2014. He rejected in its entirety the "Lack of Oversight" charge that had caused the Deputy Secretary to deem Ms. Helman "unsuitable for the civil service." Decision 13-32, 58. He ultimately sustained only four of the eight specifications offered to support the VA's removal decision. Three were the specifications against which Ms. Helman had asserted her Fifth Amendment right to remain silent. The fourth sustained specification was an allegation that Ms. Helman had placed a subordinate suspected of violating patient privacy on administrative leave even though it "could be perceived as retaliation." With respect to that, the Chief Administrative Judge stated that he likely would not have found that it "constitutes actual misconduct" but for the VA's "broad discretion in determin-

ing what constitutes misconduct" under the new VACAA regime. Decision 32, 36.[2] The Chief Administrative Judge refused to consider Ms. Helman's argument that § 713's abbreviated adjudicatory process denied her due process by allowing no meaningful opportunity to conduct discovery and develop the record, stating that he "lack[ed] the power to rule on the constitutionality of the enabling statute." Decision 55-56.

On January 22, 2015, Ms. Helman requested an extension of time to file a petition for review with the full MSPB, stating that her petition would raise constitutional and statutory claims. In a letter dated January 26, 2015, the MPSB informed Ms. Helman that it would not entertain any petition for review. Citing § 713, it stated that the Chief Administrative Judge's decision was final and that the MSPB "will take no further action on this appeal and will not consider any further submissions by the parties." Doc. 1-2 at 2.

C. Ms. Helman's Petition for Review to this Court

Ms. Helman filed her petition for review with this Court on February 20, 2015. Doc. 1-2 at 1. The petition chiefly raises three constitutional arguments.[3]

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[2] The Chief Administrative Judge thus concluded that, given "the tenuous nature of this misconduct, such as it is, . . . this charge, although proven, merits little weight" with respect to the reasonableness of Ms. Helman's removal. Decision 36 n.11.

[3] These points merely recite the outlines of the constitutional claims Ms. Helman intends to develop in her merits briefs to give context for the jurisdictional arguments below.

1. Ms. Helman will argue that § 713, facially and as applied here, violates her Fifth Amendment right to due process by severely limiting the pre- and post-removal process she received. Among other things, the statute rescinded her civil service tenure protections and pre-removal notice-and-response rights, and required her to challenge her removal in a severely truncated proceeding with no meaningful opportunity for discovery or development of a record. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 539 (1985); *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 578 (1972) (holding tenured government employees have a property interest in continued employment); *King v. Alston*, 75 F.3d 657, 661 (Fed. Cir. 1996), *see also Senra v. Town of Smithfield*, 715 F.3d 34, 39 (1st Cir. 2013) (requiring evaluation of the totality of the process to access sufficiency of pre- and post-termination process afforded to a discharged public employee).

2. Ms. Helman also intends to challenge § 713 because, facially and as applied here, it violates the Appointments Clause, U.S. Const., art. II, § 2, cl. 2. Under the Appointments Clause, principal officers must be appointed by the President and confirmed by the Senate. Inferior officers and employees need not be, but an inferior officer must be "directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." *Edmond v. United States*, 520 U.S. 651, 663, 665 (1997); *see Buckley v. Valeo*, 424 U.S. 1, 126 (1976); *Free Enterprise Fund v. Pub. Co. Accounting*

Oversight Bd., 561 U.S. 477, 513-14 (2010). Section 713 violates those requirements because it allows a regional administrative judge—who is not appointed by the President or confirmed by the Senate—to "render a final decision on behalf of the United States" without any review by the MSPB or "other Executive officers." *Edmond*, 520 U.S. at 665.

3. Finally, facially and as applied here, § 713 violated Ms. Helman's Fifth Amendment right against self-incrimination and her due process rights. It forced the immediate adjudication of Ms. Helman's appeal of her removal—forbidding any stay and providing that the removal would be automatically final if the appeal was not decided within 21 days—despite a pending criminal investigation into the same underlying conduct. The Chief Administrative Judge was given no authority to accommodate Ms. Helman's Fifth Amendment rights by deferring civil proceedings. And the Administrative Judge then affirmed Ms. Helman's removal based on three specifications against which she invoked her right against self-incrimination. The process afforded was too abbreviated to be meaningful. And Ms. Helman believes she can show the VA officer who removed her was improperly influenced by congressional pressure (which is why so many of the challenged grounds were found to be unsupported by sufficient evidence).

On April 27, 2015, the VA moved to dismiss Ms. Helman's appeal for lack of jurisdiction. Doc. 13. This opposition follows.

ARGUMENT

The VA urges that 38 U.S.C. § 713(e)(2) strips this Court of jurisdiction to review Ms. Helman's constitutional challenges to § 713 and removal proceedings under that statute. But it fails to overcome the strong presumption in favor of judicial review. Under this Court's precedents, § 713(3)(2) *limits* this Court's review, but does not *obliterate* it. Nor does the VA surmount the heightened standard for precluding judicial review of *constitutional* claims in particular. And if § 713(e)(2) *did* purport to bar all judicial review of the adjudication below, it would unconstitutionally vest judicial power—adjudicatory authority—in a non-Article III tribunal with no judicial oversight, violating the separation of powers. This Court cannot dismiss this appeal without passing on those substantial statutory questions, as well as substantial constitutional issue (and associated severability issues). Summary adjudication on a motion to dismiss that fails to confront those issues is unwarranted.

The VA's secondary argument that Ms. Helman's petition is untimely is frivolous. It rests on the erroneous premise that the petition was filed on February 23, 2015, when the deadline was February 20, 2015. In fact, the petition was received by the Clerk's office—and thus filed—on February 20. The petition may not have been formally *docketed* until the following Monday. But the Federal Rules distinguish between "filing" and "docketing," even if the VA does not.

I. THIS COURT HAS JURISDICTION TO HEAR MS. HELMAN'S APPEAL

This Court ordinarily has jurisdiction to hear an appeal from a final MSPB decision, including an administrative judge's decision, under 5 U.S.C. § 7703(b)(1) and 28 U.S.C. § 1295(a)(9). The VA maintains that 38 U.S.C. § 713(e)(2) strips this Court of jurisdiction here. That argument fails for several reasons.

A. Section 713(e)(2) Does Not Bar Judicial Review of Ms. Helman's Constitutional or Statutory Claims

1. *The VA Has Not Overcome the "Strong Presumption" in Favor of Judicial Review*

There is a "strong presumption that Congress intends judicial review of administrative action." *Bowen v. Mich. Academy of Family Physicians*, 476 U.S. 667, 670 (1986). As Chief Justice Marshall noted long ago: "'It would excite some surprise if, in a government of laws and of principle, furnished with a department whose appropriate duty it is to decide questions of right, not only between individuals, but between the government and individuals,'" the law gave an individual "'no remedy, no appeal to the laws of his country, if he should believe [executive action against him] to be unjust. But this anomaly does not exist; this imputation cannot be cast on the legislature of the United States.'" *Bowen*, 476 U.S. at 670 (quoting *United States v. Nourse*, 34 U.S. 8, 28-29 (1835)).

The VA tries to "cast" onto Congress precisely such an "imputation," largely by invoking draft bills that never became law. *See* Doc. 13 at 6-7. It omits mention of the strong presumption in favor of judicial review, or the VA's correspond-

ingly "heavy burden" to show by "clear and convincing evidence" that Congress intended to insulate an administrative decision from judicial oversight. *Bowen*, 476 U.S. at 672. There is a reason for that: The VA cannot carry its burden here.

The VA points to §713(e)(2)'s statement that the Chief Administrative Judge's decision "is final and shall not be subject to any further appeal." Doc. 13 at 5. But this Court, citing the strong presumption of judicial review, has held that even "seemingly unequivocal language" restricting review will not be read to "entirely deprive [this Court] of jurisdiction to review" administrative decisions. *Reilly v. Office of Personnel Mgmt.*, 571 F.3d 1372, 1377 (Fed. Cir. 2009) (citing *Lindahl v. Office of Personnel Mgmt.*, 470 U.S. 768 (1985) (addressing same statute)).

In *Reilly*, for example, the relevant statute provided that "'the decisions of the Office [of Personnel Management] concerning [certain] matters *are final and conclusive and are not subject to review*.'" 571 F.3d at 1377 (additional emphasis omitted). While that language concededly "impose[d] a special and unusual restriction on judicial examination," this Court held that it did not bar all judicial review. *Id.* (quotation marks omitted). The statute merely prevented the Court from "review[ing] issues related to *evidentiary sufficiency* or to *minor legal errors*." *Id.* (emphasis added). It did not bar the Court from "review[ing] claims of *serious legal error* in the course of the proceedings." *Id.* at 1378 (emphasis added); *see id.*

at 1377 ("where the petitioner alleges that the agency committed legal errors of sufficient gravity, we have jurisdiction to review the Board's decision").[4]

The same result is warranted here. Section 713(e)(2)'s "final and . . . not . . . subject to any further appeal" language is not meaningfully different from the "final and conclusive and . . . not subject to review" language this Court held insufficient to foreclose review in *Reilly*. Congress, moreover, enacted § 713(e)(2) five years after *Reilly* and was presumably aware of how this Court interprets such language. Its use of text parallel to that in *Reilly* shows it intended a parallel result. Had Congress meant to cut off all review entirely, it would have "employ[ed] language far more unambiguous and comprehensive than" what it chose here and in *Reilly*. *Lindahl*, 470 U.S. at 779-80.[5]

Contrary to the VA's suggestion (at 5), § 713(e)(2)'s reference to 5 U.S.C. § 7703 does not show that Congress precluded all review by this Court. As the Supreme Court recognized in *Lindahl*, § 7703 provides for "the full measure of judicial review," including "a substantial-evidence standard of review of the factual bases" of agency decisions. 470 U.S. at 781-82. That contrasts with the "much

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[4] *See also Reilly*, 571 F.3d at 1378, 1379, 1383 (Court has jurisdiction to review "critical legal errors," a "substantial departure from important procedural rights," or an error that "goes to the heart of the administrative determination").

[5] *See Lindahl*, 470 U.S. at 780 n.13 (citing statute that declared decision "final and conclusive for all purposes and with respect to all questions of law and fact" and "not subject to review by another official of the United States or by a court by mandamus or otherwise").

more deferential" review required under final-and-not-subject-to-appeal language like that at issue here (and in *Lindahl* and *Reilly*). *Id.* at 782. Congress's withholding of review under § 7703 thus simply confirms that only limited *Reilly*-type review is available here, and not the full-fledged review usually available under § 7703. *See id.* at 781-82 (holding that Congress's provision of § 7703 review for some claims but not others did not bar limited review for the other claims).

2. *The VA Has Not Made the "Heightened Showing" Needed To Deny Judicial Review of Ms. Helman's Constitutional Claims*

Here, moreover, the VA seeks to foreclose judicial review of Ms. Helman's claims of *constitutional* error, *see* pp. 8-9, *supra*. It thus argues that Ms. Helman can be deprived of her position in violation of the Constitution with no judicial redress at all. Where an agency seeks to avoid judicial review of *constitutional* claims, however, the Supreme Court requires a "heightened showing" that Congress intended to cut off all review. *Webster v. Doe*, 486 U.S. 592, 603 (1988). That demanding standard is designed "to avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny a judicial forum for a colorable constitutional claim." *Id.* Thus, if a construction of § 713 that allows judicial review of constitutional claims is "fairly possible," the Court must adopt that construction. *Johnson v. Robison*, 415 U.S. 361, 367 (1974).[6]

[6] The rule for constitutional claims requires greater clarity than the ordinary rule. For example, *Lindahl* identified 38 U.S.C. § 211(a) as "unambiguous[ly]" over-

Such a construction is plainly possible, as the above discussion makes clear. That is particularly true given the special solicitude for review of constitutional claims. There is "no explicit provision" of § 713 that "bars judicial consideration of . . . *constitutional* claims." *Johnson*, 415 U.S. at 367 (emphasis added). And even assuming legislative history matters, the VA points to nothing in the VA-CAA's legislative history indicating that Congress specifically intended to preclude judicial review of *constitutional* claims—and certainly nothing sufficient to create questions regarding the statute's constitutionality that the text itself avoids.

Nor does anything in the statute imply such a bar. The statute at most precludes further review of the VA's grounds for removal—*i.e.*, the basis for finding that performance or misconduct warrant removal. Following the chain of statutory cross-references makes that clear:

- Section 713(e)(2)—the provision the VA invokes here—states that an administrative judge's decision "*under paragraph (1)*" of § 713(e) is final and not subject to further appeal.
- Section 713(e)(1) in turn states that an "appeal *under subsection (d)(2)(A)*" must be referred to an administrative judge for decision.
- Section 713(d)(2)(A) provides for an appeal to the MSPB challenging "any removal . . . *under subsection (a)*."
- And § 713(a) allows the VA Secretary to remove a senior executive if he "determines the performance or misconduct of the individual warrants such removal."

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coming the usual presumption of judicial review, 470 U.S. 780 at n.13, but *Johnson* held § 211(a) did not bar review of *constitutional* claims, 415 U.S. at 367-74.

Section 713(e)(2) thus at most addresses review of legal or factual questions in the VA's exercise of removal power under § 713(a). *Johnson*, 415 U.S. at 367. Ms. Helman's constitutional challenges, however, "'arise under the Constitution, not under the statute whose validity is challenged.'" *Id.* As a result, the statute does not bar review of Ms. Helman's claims that § 713, and all removal proceedings under it, violate the Constitution. *Cf. Webster*, 486 U.S. at 603 (while employee could not "complain that his termination was not 'necessary or advisable in the interests of the United States'" under relevant removal statute, he could raise "colorable constitutional claims arising out of the [agency's] actions" under the statute).

* * *

The VA has taken the "extreme position" that Congress "intended no review at all of substantial statutory and constitutional challenges" to § 713's novel regime. *Bowen*, 476 U.S. at 680. The statute dramatically abridges longstanding civil service protections and vests in a single administrative judge final say over whether employees will lose their jobs, with no supervision by executive officers nominated by the President and confirmed by the Senate. *See* pp. 8-9, *supra*. To that the government wishes to add a denial of judicial review, even for constitutional claims. But the government does not address—much less overcome—the strong presumption of judicial review generally, and the even stronger presumption of judicial review for constitutional claims. At the very least, there is "substantial

doubt" whether Congress intended to cut off judicial review. *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 351 (1984). Judicial review thus must be allowed. *Id.*

B. To the Extent §713(e)(2) Purports To Preclude Judicial Review of the Chief Administrative Judge's Decision, It Violates Article III

If the VA's construction of §713 were correct, it would render the statute unconstitutional. Article III vests the "judicial Power of the United States" in courts "staffed by judges who hold office during good behavior, and whose compensation shall not be diminished during tenure in office." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 847 (1986). That does not *categorically* prohibit Congress from assigning "powers normally vested only in Article III courts" to quasi-judicial entities like the MSPB and its administrative judges. *Id.* at 851. But any "congressional delegation of adjudicative functions to a non-Article III body" must comport with Article III's purposes. *Id.* at 847. Giving an administrative judge unreviewable adjudicatory authority here does not.

The Supreme Court looks at "the extent to which the 'essential attributes of judicial power' are reserved to Article III courts, and conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts." *Schor*, 478 at at 851. The Chief Administrative Judge's adjudication here—sustaining the VA's removal of Ms. Helman—was plainly an exercise of judicial power like that normally exercised by Article III courts. As Marshall observed, it is the judiciary's "appropriate duty to de-

cide questions of right . . . between the government and individuals." *Nourse*, 34 U.S. at 28-29. Indeed, aside from § 713(e)(2), there is no question this Court could resolve the dispute between Ms. Helman and the VA, just as in other MSPB cases.

It is equally clear that, in the VA's view, § 713(e)(2) entirely "withdraw[s] from judicial cognizance" the legal controversy between Ms. Helman and the VA. *Schor*, 478 U.S. at 855. The VA does not claim that this Court's review is limited to certain questions or constrained by a deferential standard. It maintains Article III courts have no power to adjudicate at all. *See* Doc. 13 at 5, 9. Where the Supreme Court has *upheld* exercises of judicial power by Executive Branch bodies, it has regularly emphasized that Article III courts retained broad authority to review agency adjudications. *See Schor*, 478 U.S. at 853 (noting court's *de novo* review of legal questions and "weight of the evidence" review of factual questions); *Crowell v. Benson*, 285 U.S. 22, 62 (1932). Here, however, "the degree of judicial control saved to the federal courts" would be *zero*. *Schor*, 478 U.S. at 855. That arrogates the judicial role to an Executive Officer. "In cases brought to enforce constitutional rights," moreover, "the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function." *Crowell*, 285 U.S. at 60. The VA would do away with that too.

Indeed, in the VA's view, Congress did not even stop at taking core constitu-

tional questions away from the courts and "[re]allocat[ing] the decision of those matters to a non-Article III forum of its own creation." *Schor*, 478 U.S. at 854. The VA does not dispute that the Chief Administrative Judge "lack[ed] the power to rule on the constitutionality" of § 713. Decision 55-56. The VA thus urges that *no* adjudicator could *ever* consider whether Ms. Helman's constitutional rights have been violated. Even if Congress "sought to give VA the tools to streamline the process for removing VA Senior Executives," Doc. 13 at 5, there is no reason to think it intended such a stark departure from our constitutional tradition.

II. MS. HELMAN'S APPEAL IS TIMELY

The VA concedes that Ms. Helman's petition for review to this Court would be timely if filed by February 20, 2015. Doc. 13 at 8. The VA contends, however, that the petition was filed on February 23. *Id.* But the clerk's date stamp makes clear that Ms. Helman's petition was received—and thus filed—on February 20:

UNITED STATES COURT OF APPEALS
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Sharon M. Helman,
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v.

U.S. Department of Veterans Affairs,
Respondent.

Case No. _____

2015 FEB 20 PM

FEDERAL CIRCUIT

PETITION FOR REVIEW

Petitioner Sharon M. Helman hereby petitions the court for review of the Decision of the Merit Systems Protection Board in MSPB Docket No. DE-0707-15-0091-J-1, issued by the Clerk of the Board by letter dated January 26, 2015, enclosed as Exhibit A, and all underlying decisions, orders, and rulings, including, but not limited to the Decision issued by Chief Administrative Judge Stephen C. Mish and received by Ms. Helman on December 22, 2014, affirming Respondent U.S. Department of Veterans Affairs' decision to remove Ms. Helman from her position as Director of the Phoenix VA Health Care System and from the federal civil service, enclosed as Exhibit B.

Doc. 1-2 at 1 (highlighting added). The electronic docket is also clear. *See* ECF Entry for Doc. 1 ("Appeal docketed. Received: 02/20/2015."). The timeliness of a filing is determined by whether "the clerk *receives* the papers within the time fixed for filing." Fed. Cir. R. 25(a)(2)(A) (emphasis added). Because the Clerk's office received Ms. Helman's petition on February 20, it was timely filed.

The VA appears to rely on the fact that, on this Court's electronic docket, the petition's ECF header reads "Filed: 02/23/2015." Doc. 1-2 at 1. But that notation refers to the filing date of the Court's *Notice of Docketing*, which *attached* the electronic version of the petition originally filed in hard copy. *See* Doc. 1-1 (Notice of Docketing); Doc. 1-2 (petition for review). Because filing depends on receipt—not later docketing—the VA's claim of untimeliness fails.[7]

CONCLUSION

The motion to dismiss should be denied. Alternatively, the Court should refer consideration of jurisdictional issues to the merits panel.

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[7] Because Ms. Helman's petition was timely in any event, this Court need not decide whether the petition is also timely because it was filed within 60 days of the MSPB's January 26, 2015 decision refusing, in light of § 713, to entertain a petition for review or "consider any further submissions by the parties." Doc. 1-2 at 2. This Court, however, may independently review a MSPB decision refusing to entertain a petition for review where an employee petitions within 60 days of that decision. *See Olivares v. MSPB*, 17 F.3d 386, 388 (Fed. Cir. 1994) (addressing former 30-day deadline). Because § 713 violates the Appointments Clause to the extent it permits the Chief Administrative Judge to make a final decision without any review by an executive officer appointed by the President with the consent of the Senate, *see* pp.8-9, *supra*, the MSPB's refusal to entertain any petition for review was contrary to law and should be reversed.

May 11, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on the 11th day of May 2015, I electronically filed the foregoing Opposition to Motion to Dismiss for Lack of Jurisdiction using the CM/ECF system, which will send a notice of electronic filing to all ECF registered participants.

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