Essay

Lying in Wait: How a Court Should Handle the First Pretextual For-Cause Removal

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Abstract

The legal limits of for-cause removal protections for executive officials have barely been defined, even as the current presidential administration considers removing protected officials. Open questions include whether and how courts will choose to define "cause," as well as whether courts will inquire into the authenticity of a President's stated justification for removal. This Essay suggests that while courts should *define "cause" and determine whether an alleged action meets that standard, courts should* not *allow inquiry into the factual support comprising a President's removal justification, no matter how obviously false or incorrect that factual assertion might be. This approach would balance Congress's legitimate right to structure the federal government in the way it sees fit against the President's legitimate right to operate that government. Other options, including litigating the case in full or dismissing it outright, fail to account for the valid competing rights. Deciding the legal definition and application of for-cause removal provisions would not unduly disrupt the President's administration of government, and Congress has adequate*

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September 2018 Vol. 86 No. 5

tools to investigate the President's asserted factual basis, should it believe that the professed reason for termination was invalid.

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INTRODUCTION

You're fired!

—Donald J. Trump[1]

I have received the attached letters . . . recommending your dismissal as the Director of the Federal Bureau of Investigation. I have accepted their recommendation and you are hereby terminated and removed from office, effective immediately. While I greatly appreciate you informing me, on three separate occasions, that I am not under investigation, I nevertheless concur with the judgment of the Department of Justice that you are not able to effectively lead the Bureau. . . . I wish you the best of luck in your future endeavors.

—President Donald J. Trump[2]

What would happen if President Trump woke up tomorrow and tweeted that all five Commissioners of the Federal Trade Commission ("FTC"), who can only be removed for inefficiency, neglect of duty, or malfeasance in office,[3] were fired—with no explanation given?[4] Would

1 *The Apprentice: Meet the Billionaire* (NBC television broadcast Jan. 8, 2004).

2 Letter from President Donald J. Trump to James Comey, Dir., Fed. Bureau of Investigation (May 9, 2017), http://www.cnn.com/2017/05/09/politics/fbi-james-comey-fired-letter/index.html [https://perma.cc/Y3A2-TVRY].

3 15 U.S.C. § 41 (2012).

4 As implausible as this might appear, President Trump fired Secretary of State Rex Til-

the Commissioners have any recourse? What if President Trump had instead ordered them to stop policing false advertising on the internet, and they refused to do so and were then fired? Would that constitute neglect of duty? Or what if the President said they were fired because they did not follow his order to publish their reports in Comic Sans?[5] And, even more bizarrely, what if there was evidence that the Commissioners had, in fact, followed his command? Incredibly, the outcome of each of these hypotheticals is unclear. Although Congress has regularly used for-cause removal provisions to attempt to limit the President's power to control agency heads, there has never been a complete adjudication of a for-cause removal.[6] Accordingly, no court has determined what, exactly, "cause" means, or what the President might have to do to validate a removal action.[7]

As a practical example, in November 2017, Leandra English sued President Trump, asserting that she was the rightful Acting Director of the Consumer Financial Protection Bureau ("CFPB").[8] Why did Pres-

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lerson in a tweet announcing that a new person would be taking on the role. *See* Dan Mangan, *Rex Tillerson Found Out He Was Fired as Secretary of State from President Donald Trump's Tweet*, CNBC (Mar. 13, 2018, 2:07 PM), https://www.cnbc.com/2018/03/13/tillerson-learned-he-was-fired-from-trumps-tweet.html [https://perma.cc/34G6-CTR3].

5 There has been at least one instance in which the President's personal lawyer communicated with the press in a font that appeared to be Comic Sans. *See* Sahil Kapur (@sahilkapur), TWITTER (Dec. 1, 2017, 2:37 PM), https://twitter.com/sahilkapur/status/936726050133995521 [https://perma.cc/E79M-N7XY].

6 There has been at least one attempted removal of an individual protected by a for-cause statute that was resolved by the Supreme Court, but no "cause" was alleged by the President. *See* Humphrey's Ex'r v. United States, 295 U.S. 602, 626 (1935). There have also been a very small number of for-cause removals, but none were challenged in court. *See generally* Aditya Bamzai, *Taft, Frankfurter, and the First Presidential For-Cause Removal*, 52 U. RICH. L. REV. 691 (2018) (detailing the removal by President Taft of two members of the Board of General Appraisers and the removal by President Nixon of the President of the Federal National Mortgage Association). Thus, the Court has never been presented with an opportunity to define the conduct that would qualify as cause.

7 *See* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 110 (1994).

8 *See* Stacy Cowley, *Battle for Control of Consumer Agency Heads to Court*, N.Y. TIMES (Nov. 26, 2017), https://www.nytimes.com/2017/11/26/business/trump-cfpb-consumer-agency.html [https://perma.cc/M4MJ-L23H]. On Friday, November 24, 2017, CFPB Director Cordray resigned and appointed Deputy Director Leandra English to serve as Acting Director of the agency. *Id.* A few hours later, President Trump appointed his budget director, Mick Mulvaney, to the same position. *Id.* English sued in federal district court on Sunday, November 26, seeking an emergency injunction to prevent Mulvaney from taking the position, and both arrived for work on the following Monday morning. *See id.*; Lorraine Woellert, *Confusion and Chaos Engulf Consumer Agency*, POLITICO (Nov. 27, 2017, 2:12 PM), https://www.politico.com/story/2017/11/27/consumer-financial-protection-bureau-fight-mulvaney-english-190862 [https://perma.cc/T68X-6UU4]. The preliminary injunction was denied, and an appeal is ongoing. Barbara S. Mishkin, *DOJ Files Opposition Brief in English Preliminary Injunction Appeal*, CONSUMER FIN. MONITOR

ident Trump allow the lawsuit to go forward, rather than simply firing her? Even if the President believed that he had the better legal position, i.e., that English was not in fact the Acting Director, he did not need to wait for a court to confirm it. He could have simply fired her, rendering her suit practically (and possibly legally) moot.[9]

Perhaps he refrained because he "had long chafed at the idea that he could only fire the bureau's politically appointed director for good cause."[10] Like many federal statutes that create positions heading independent agencies—such as commissioners or board members—the CFPB's organic statute protects its director from being removed for anything except good cause.[11] But the possibility of exactly such a lawsuit is now perhaps much higher than in times past, with some actively encouraging President Trump to open the door to such litigation.[12] Or perhaps he refrained because nobody—including the President—knows for sure what constitutes good cause.[13]

Beyond its definition, an even more fundamental question looms regarding for-cause removal: would a court even hear the case? Precedent and scholarship are inconclusive on this issue and usually only address it cursorily.[14] In this Essay, we propose that courts should hear challenges to for-cause removals—up to a point. Courts should inter-

(Feb. 26, 2018), https://www.consumerfinancemonitor.com/2018/02/26/doj-files-opposition-brief-in-english-preliminary-injunction-appeal [https://perma.cc/LR8Y-M3R3]; *see also* Alan S. Kaplinsky, *President Trump's Expected Nomination of Kathy Kraninger as CFPB Director Extends Mick Mulvaney's Acting Director Tenure*, CONSUMER FIN. MONITOR (June 18, 2018), https://www.consumerfinancemonitor.com/2018/06/18/president-trumps-expected-nomination-of-kathy-kraninger-as-cfpb-director-extends-mick-mulvaneys-acting-director-tenure [https://perma.cc/29YC-LLHC] ("One possible outcome is that the D.C. Circuit could find that Ms. English is entitled to serve as Acting Director.").

9 *Cf.* Nicole LaFond, *Tom Cotton: Trump Should Fire Leandra English, Anyone Who Disobeys Mulvaney*, TALKING POINTS MEMO (Nov. 27, 2017, 10:38 AM), http://talkingpointsmemo.com/livewire/cotton-trump-should-fire-english-anyone-disobeys-mulvaney [https://perma.cc/YA3Q-TKTR] (quoting Senator Tom Cotton as stating that the law "prevail[s] against the supposed resistance").

10 Noah Feldman, *The Constitution Is on Trump's Side in CFPB Fight*, BLOOMBERG (Nov. 27, 2017, 6:14 AM), https://www.bloomberg.com/view/articles/2017-11-27/the-constitution-is-on-trump-s-side-in-cfpb-fight [https://perma.cc/U22E-J59V].

11 *See infra* note 32 and accompanying text. The CFPB's statute raises a unique issue—giving rise to litigation—because it is led by a single agency head instead of a multimember board. *See infra* notes 33–37 and accompanying text.

12 For example, one conservative commentator suggested that not only should President Trump fire the former Director of the CFPB, but he should "[l]et [Director Cordray] sue. It will be an exciting battle." Matt Egan, *Trump Should Fire CFPB Director Richard Cordray: GOP*, CNN: MONEY (Jan. 10, 2017 3:49 PM), http://money.cnn.com/2017/01/10/investing/trump-fire-cfpb-cordray/index.html [https://perma.cc/ZRC5-BHYN].

13 *See infra* Section I.C.1.

14 One recent article did confront the question directly, arguing that the entire case should

pret a statute's for-cause provision to define the relevant standard, as well as to determine whether the President's stated justification for removal, on its face, meets that standard. They should not, however, allow inquiry into the factual support for a President's removal justification, no matter how obviously incorrect the asserted justification might be, because such a determination is a political question to be appropriately declined by the judicial branch.

This two-part approach balances Congress's legitimate right to structure the federal government in the way it sees fit with the President's legitimate right to operate that government, as compared to the options at either end of the spectrum—litigating the case in full or dismissing it outright. Deciding the legal definition and application of for-cause removal provisions would not unduly disrupt the President's administration of government, and Congress would retain adequate tools to investigate the President's factual basis, should it choose to do so. Although a court is competent to adjudicate the issue of whether the President's firing rationale is pretextual, the resolution of that question should lie with Congress, because of the degree of disruption such litigation would cause to the Executive.

This Essay discusses the origins of, development of, and challenges to for-cause removal provisions; explores the open questions regarding their legality; and proposes a framework by which courts should decide whether to assess these challenging questions.

I. The Development of For-Cause Removal

For-cause removal provisions, which Congress uses to insulate certain federal officials from political pressure, occur in two primary contexts. First, they are found in the statutory language creating independent administrative agencies as a restriction on presidential removal of agency heads.[15] Second, they are found in statutory schemes insulating individuals who have been tasked with investigating executive wrongdoing.[16] Even with their prevalence throughout the U.S. Code, the President has only removed an individual with for-cause protection *for cause* a small number of times, none of which resulted in a judicial opinion.[17] Therefore, open questions remain as to what, precisely, "good cause" constitutes and whether such a challenge

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be dismissed as a political question. *See generally* Aziz Z. Huq, *Removal as a Political Question*, 65 Stan. L. Rev. 1 (2013); *infra* Section I.C.

15 *See infra* Section I.A.

16 *See infra* Section I.A.

17 *See supra* note 6 and accompanying text.

would qualify as a political question and thus be unreviewable by the courts.

A. *Uses of For-Cause Removal: Administrative Agencies and Executive Investigation*

For-cause removal provisions are most commonly found in the statutory language creating independent administrative agencies. One of the first uses of for-cause removal within an administrative agency can be traced to the Interstate Commerce Act of 1887,[18] which created the Interstate Commerce Commission and limited removal of its appointed commissioners to "inefficiency, neglect of duty, or malfeasance in office."[19] The addition of this provision may have signaled an attempt by Congress to retain a degree of control over the delegation of power it was providing to the executive branch. However, there was certainly some opposition to placing agency action outside of a direct line of executive reporting and some debate over whether the clause in fact made the agency independent from presidential control.[20]

Today, similar restrictions on removal can be found in at least seventeen other administrative agencies,[21] including the National Labor Relations Board,[22] the Consumer Product Safety Commission,[23] and the Federal Reserve Board.[24] While agencies currently operate in a wide variety of structural forms, the existence of for-cause removal limitations for the head (or heads) of an agency is considered a defin-

18 Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379 (codified as amended in scattered sections of 49 U.S.C.).

19 *Id.* § 11; MARSHALL J. BREGER & GARY J. EDLES, INDEPENDENT AGENCIES IN THE UNITED STATES 19 (2015). The Interstate Commerce Commission was "the first modern independent regulatory agency." Jack Beermann, *The Surprising Origins of the Interstate Commerce Commission*, JOTWELL (Mar. 20, 2017), https://adlaw.jotwell.com/the-surprising-origins-of-the-interstate-commerce-commission [https://perma.cc/3LXW-6TW6].

20 *See* BREGER & EDLES, *supra* note 19, at 32. Some commentators suggest that the ICC was not intended to be independent in the sense that it was outside the control of the executive branch, but rather that it was independent from political maneuvering (i.e., bipartisan in function). *Id.* at 30, 33. Regardless, we have come to see the ICC and similarly structured agencies as independent, and the constitutionality of such agencies has thus far been upheld. *See, e.g.*, Humphrey's Ex'r v. United States, 295 U.S. 602, 629 (1935); *infra* Section I.B.

21 BREGER & EDLES, *supra* note 19, app. B.

22 *See* 29 U.S.C. § 153 (2012) ("Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.").

23 *See* 15 U.S.C. § 2053 (2012) ("Any member of the Commission may be removed by the President for neglect of duty or malfeasance in office but for no other cause.").

24 *See* 12 U.S.C. § 242 (2012) ("[E]ach member shall hold office for a term of fourteen years from the expiration of the term of his predecessor, unless sooner removed for cause by the President.").

ing feature of "independent" agencies.[25] This structure is distinct from that of "executive" agencies, where removal occurs purely at the discretion of the President.[26] The details of for-cause removal provisions differ between agencies, including the degree of specifics provided about what constitutes "cause" and whether specific procedural steps (such as notice or a hearing) are required when a removal is effectuated.[27] Some provisions include the potential for removal on grounds of "inefficiency," while others limit removal to "neglect of duty or malfeasance in office."[28] Provisions vary in whether they include an additional catchall clause, indicating that agency heads cannot be removed for any "other cause" than those specifically enumerated.[29] These variations may, in effect, represent the desire of Congress to "accord[] a president greater or lesser control over agency decisions."[30]

As a recent example, in 2010 Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act,[31] which created the CFPB and included a provision restricting the range of acceptable justifications for removal of the CFPB Director to "inefficiency, neglect of duty, or malfeasance in office."[32] The tenure of the first CFPB Director, Richard Cordray, was challenged in *PHH Corp. v. Con-*

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25 BREGER & EDLES, *supra* note 19, at 4–5.

26 Emily Hammond Meazell, *Presidential Control, Expertise, and the Deference Dilemma*, 61 DUKE L.J. 1763, 1777–78 (2012).

27 *Compare* 29 U.S.C. § 153, *with* 12 U.S.C. § 242. Other examples include the Independent Payment Advisory Board, 42 U.S.C. § 1395kkk (2012) ("Any appointed member may be removed by the President for neglect of duty or malfeasance in office, but for no other cause."), the Federal Energy Regulatory Commission, 42 U.S.C. § 7171 (2012) ("Members shall hold office for a term of 5 years and may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office."), and the Federal Mine Safety and Health Review Commission, 30 U.S.C. § 823 (2012) ("Any member of the Commission may be removed by the President for inefficiency, neglect of duty, or malfeasance in office.").

28 *Compare* 42 U.S.C. § 7171 *with id.* § 1395kkk.

29 *Compare* 42 U.S.C. § 1395kkk *with* 30 U.S.C. § 823.

30 BREGER & EDLES, *supra* note 19, at 17. Additionally, Congress uses a variety of other statutory restrictions to stop presidential removals, such as extended terms of office. For example, the seven members of the Board of Governors of the Federal Reserve System serve for fourteen-year terms. 12 U.S.C. § 242 (2012). These provisions have proven effective at limiting presidential power over independent agency action, such as in the recent conflict between the Federal Energy Regulatory Commission and the Department of Energy over energy subsidies. *See* Order Terminating Rulemaking Proceeding, Initiating New Proceeding, and Establishing Additional Procedures, 162 FERC ¶ 61,012 (Jan. 8, 2018).

31 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

32 *Id.* § 1011(c)(3).

sumer Financial Protection Bureau,[33] where a panel of D.C. Circuit judges held that the for-cause protection included in the Act rendered the CFBP unconstitutionally structured because it made it "an independent agency headed by a single Director."[34] The panel's decision was later vacated by an en banc decision of the Circuit to review the case.[35] After a rehearing, the full court determined that the CFPB structure was constitutional, explaining that neither "precedent, historical practice, constitutional principle, or the logic of presidential removal power" support the position that independent agencies with a single head are distinguishable from independent agencies with multiple leaders.[36] Thus, as the law in at least the D.C. Circuit currently stands, independent agency heads continue to have at least the on-paper protection provided by for-cause removal provisions.[37]

The second common use of for-cause removal statutes is congressional insulation of individuals tasked with investigating wrongdoing in the executive branch. The classic example is the independent counsel statute enacted in the wake of President Nixon's Saturday Night Massacre. At President Nixon's request, Acting Attorney General Robert Bork fired Special Prosecutor Archibald Cox, who had been investigating the Watergate burglary and related crimes, after two of Bork's superiors resigned in protest of Nixon's request to fire Cox.[38] The independent counsel statute became law a few years later, with the hope that it would "remove politics from the prosecution of executive branch officials and . . . foster public confidence in the prosecutorial process."[39]

As enacted, the statute provided that the special prosecutor (later independent counsel) could be removed only by "impeachment and conviction" or "the personal action of the Attorney General and only

33 839 F.3d 1 (D.C. Cir. 2016) (holding the CFPB unconstitutionally structured and striking the for-cause removal provision), *rev'd en banc*, 881 F.3d 75 (D.C. Cir. 2018).

34 *Id.* at 37.

35 PHH Corp. v. Consumer Fin. Prot. Bureau, No. 15-1177, 2017 U.S. App. LEXIS 2733 (D.C. Cir. Feb. 16, 2017).

36 *PHH Corp.*, 881 F.3d at 79–80.

37 Unless and until the Supreme Court takes up this issue, the D.C. Circuit decision is essentially national law. However, a New York federal district court recently ruled that the CFPB was unconstitutionally structured, so the issue may be far from settled. Consumer Fin. Prot. Bureau v. RD Legal Funding, LLC, 2018 U.S. Dist. LEXIS 104132 (S.D.N.Y. June 21, 2018).

38 *See* Julian A. Cook, III, *Mend It or End It? What to Do with the Independent Counsel Statute*, 22 HARV. J.L. & PUB. POL'Y 279, 292 (1998); John F. Manning, *The Independent Counsel Statute: Reading "Good Cause" in Light of Article II*, 83 MINN. L. REV. 1285, 1291 (1999).

39 Cook, *supra* note 38, at 280.

for extraordinary impropriety, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such special prosecutor's duties."[40] "Extraordinary impropriety" was eventually replaced with "good cause."[41] The statute specified that such a removal could be reviewed by the U.S. District Court for the District of Columbia and that reinstatement was a possible remedy.[42]

The independent counsel statute is inactive today, as Congress declined to reauthorize it in the wake of Kenneth Starr's wide-ranging investigation of President Clinton.[43] There are still federal regulations, however, that allow for the appointment of special counsels who, according to those regulations, may be removed only "for misconduct, dereliction of duty, incapacity, conflict of interest, or for other good cause, including violation of Departmental policies."[44] At the time of this writing, Robert Mueller is conducting an investigation under this authority after being appointed as Special Counsel for the Department of Justice by Acting Attorney General Rod Rosenstein.[45] As with independent agency heads, no President has ever attempted to remove a special prosecutor for cause, and thus the practical scope of the protections remains unclear.[46]

Although none of these provisions have ever been directly applied and challenged, a few court opinions shed light on the constitutionality of the provisions as well as how the judiciary might view an attempted for-cause removal today.

B. Past Legal Challenges to For-Cause Removal

In *Morrison v. Olson*,[47] the Supreme Court set out the modern framework for analyzing congressional restrictions on removing those investigating the executive branch.[48] The Court performed "a func-

[40] Ethics in Government Act of 1978, Pub. L. No. 95-521, § 601, 92 Stat. 1824, 1872 (codified as amended in scattered sections of 2, 5, and 28 U.S.C.).

[41] 28 U.S.C. § 596(a)(2) (2012).

[42] Ethics in Government Act § 601, 92 Stat. at 1872.

[43] *See* 28 U.S.C. § 599; Carol Elder Bruce, Opinion, *An Independent Counsel Law Needs to Be Restored*, N.Y. Times (June 13, 2012), https://www.nytimes.com/roomfordebate/2012/06/13/did-any-good-come-of-watergate/an-independent-counsel-law-needs-to-be-restored [https://perma.cc/88XX-YZ83].

[44] 28 C.F.R. § 600.7(d) (2017).

[45] *See* Office of the Deputy Attorney Gen., Order No. 3915-2017, Appointment of Special Counsel to Investigate Russian Interference with the 2016 Presidential Election and Related Matters (May 17, 2017), https://www.justice.gov/opa/press-release/file/967231/download [https://perma.cc/WX4A-6DB5].

[46] *See supra* note 6 and accompanying text.

[47] 487 U.S. 654 (1988).

[48] *See id.* at 691–93.

tional inquiry," concluding that Congress's removal restrictions did not "unduly trammel[] on executive authority."[49] Although the Court had justified its decision in *Humphrey's Executor v. United States*[50]—the case that declared for-cause protections constitutional—on the distinction between exercising "'purely' executive" powers as opposed to "quasi-legislative" or "quasi-judicial" powers, *Morrison* moved away from this distinction.[51] The Court admitted in *Morrison* that the independent counsel exercised executive power but held that the removal restriction was nevertheless acceptable because the President's need to control the independent counsel's limited discretion and authority was not "so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the President."[52] Further, the statute did not "interfere impermissibly with [the President's] constitutional obligation to ensure the faithful execution of the laws" because the statute still allowed termination of the independent counsel by the President (through the Attorney General) for good cause.[53] This gave the Attorney General "substantial ability to ensure that the laws are 'faithfully executed.'"[54] For good measure, the Court raised no issue about Congress's goal of "establish[ing] the necessary independence of the office."[55]

Free Enterprise Fund v. Public Co. Accounting Oversight Board ("*PCAOB*")[56] illustrates the Supreme Court's most recent thinking on for-cause protection. The question presented in *PCAOB* was, according to Chief Justice Roberts's opinion for the Court, "May the President be restricted in his ability to remove a principal officer, who is in turn restricted in his ability to remove an inferior officer, even though that inferior officer determines the policy and enforces the laws of the United States?"[57] Each of these layers of protection had been held to

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49 Huq, *supra* note 14, at 13 (quoting *Morrison*, 487 U.S. at 690–91).

50 295 U.S. 602 (1935).

51 *Morrison*, 487 U.S. at 689; *Humphrey's Executor*, 295 U.S. at 629–32.

52 *Morrison*, 487 U.S. at 691–92.

53 *Id.* at 693.

54 *Id.* at 696.

55 *Id.* at 693.

56 561 U.S. 477 (2010).

57 *Id.* at 483–84. The Court assumed there was double-layer protection, though it was not expressly required by statute. *See id.* at 487 ("The parties agree that the Commissioners cannot themselves be removed by the President except under the *Humphrey's Executor* standard of 'inefficiency, neglect of duty, or malfeasance in office,' and we decide the case with that understanding." (citations omitted)); *id.* at 546 (Breyer, J., dissenting) ("[T]he statute that established the Commission says nothing about removal.").

be acceptable on its own, but the Court determined that they violated "the Constitution's separation of powers"[58] when they were used in combination:

> [S]uch multilevel protection from removal is contrary to Article II's vesting of the executive power in the President. The President cannot "take Care that the Laws be faithfully executed" if he cannot oversee the faithfulness of the officers who execute them. Here the President cannot remove an officer who enjoys more than one level of good-cause protection, even if the President determines that the officer is neglecting his duties or discharging them improperly. That judgment is instead committed to another officer, who may or may not agree with the President's determination, and whom the President cannot remove simply because that officer disagrees with him. This contravenes the President's "constitutional obligation to ensure the faithful execution of the laws."[59]

PCAOB created new doubt about the constitutionality of many for-cause protections. Although that case only held multilevel for-cause protection unconstitutional, some scholars and judges believe the reasoning behind it appears applicable to previously valid single-level for-cause protection as well.[60] The Court noted that the Founders believed that "the executive power included a power to oversee executive officers through removal."[61] Although the Court did say that "[t]he added layer of tenure protection makes a difference" because a single layer kept ultimate accountability and responsibility with the President,[62] and that the Court did not "take issue with for-cause limitations in general,"[63] there is debate as to whether the Court's distinction sufficiently justifies why two layers of protection violate the Constitution but one alone does not.

Between the Court's rejection of the *Humphrey's Executor* rationale and its broad reasoning in *PCAOB*, the constitutionality of single-level for-cause protection is uncertain.[64] Although the *Morrison*

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58 *Id.* at 492 (majority opinion).

59 *Id.* at 484 (quoting *Morrison*, 487 U.S. at 693).

60 *See, e.g.*, *id.* at 525 (Breyer, J., dissenting) ("[T]he Court fails to show why *two* layers of 'for cause' protection—layer 1 insulating the Commissioners from the President, and layer 2 insulating the Board from the Commissioners—impose any more serious limitation upon the *President's* powers than *one* layer."); Huq, *supra* note 14, at 3–4.

61 *PCAOB*, 561 U.S. at 492.

62 *Id.* at 495.

63 *Id.* at 501.

64 The Court in *PCAOB* explicitly disclaimed reviewing *Humphrey's* because the parties

rationale upheld the independent counsel statute after the Court acknowledged the *Humphrey's* rationale as unworkable, *Morrison* dealt with executive investigation, not independent agencies, so its facts are arguably distinguishable.[65] Therefore, it is not certain that the Court would come to the same conclusion about independent agencies if it were to reexamine the holding of *Humphrey's*. Nor is it certain that the Court would avoid reviewing *Morrison* itself, in light of *PCAOB*, if the issue was squarely presented in the future.

C. Open Questions Beyond Constitutionality

Given how extensively for-cause removal protection has been used, litigated, and disputed, some might find the paltry number of for-cause removals surprising.[66] In fact, it is widely believed that no President has ever attempted to remove an official for cause.[67] There remains considerable uncertainty about how a for-cause removal would proceed because past cases have only addressed the permissibility of the protection generally, not the validity of a specific removal. The first question is what good cause itself might mean in the context of a removal, and the second is whether the judiciary should consider a challenge to such a removal at all.

1. What Is "Good Cause"?

Professors Lawrence Lessig and Cass Sunstein have said it best:

> [T]he Court has not said what "good cause" means. The Court has also failed to define "inefficiency, neglect of duty, or malfeasance in office"—the ordinary standards for presidential removal of members of the independent commissions. Nor does anything in *Humphrey's Executor* speak to the particular issue, notwithstanding some casual dicta suggesting a high degree of independence.

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did not request its review, leaving uncertain whether it is likely to do so in the future. *See PCAOB*, 561 U.S. at 483.

65 *See Morrison v. Olson*, 487 U.S. 654, 689, 691 (1988).

66 *See supra* note 6.

67 *See* Bamzai, *supra* note 6, at 693 (noting that "it is widely, but mistakenly, assumed that no President has ever removed an officer for cause"); *see also, e.g.*, *PCAOB*, 561 U.S. at 524 (Breyer, J., dissenting) ("[I]t appears that no President has ever actually sought to exercise [the removal] power by testing the scope of a 'for cause' provision."); Brian Simmonds Marshall, *No One Has Been Fired by the President for Cause. Richard Cordray Should Not Be the First.*, AM. CONST. SOC'Y (Dec. 21, 2016), https://www.acslaw.org/acsblog/no-one-has-been-fired-by-the-president-for-cause-richard-cordray-should-not-be-the-first [https://perma.cc/UBT5-AECJ].

> This is an extremely important matter. There is no controlling judicial decision on how "independent" the independent agencies and officers can legitimately claim to be.[68]

They further hypothesized that a possible—and perhaps the best—reading of good cause still leaves the President with substantial removal discretion. As support, Professors Lessig and Sunstein pointed to *Bowsher v. Synar*,[69] in which "[t]he Court said that [the removal statute] conferred on Congress 'very broad' removal power and would authorize Congress to remove the Comptroller for 'any number of actual or perceived transgressions of legislative will.'"[70] Because similar statutory language exists in most for-cause removal statutes, it is plausible that these terms also follow the *Bowsher* rationale and are therefore broader than would be expected from the common understanding that independent agencies in fact have significant independence.[71] This reasoning might, for example, give Presidents authority to remove a protected subordinate who "consistently ignores what the President has said, at least if what the President has said is supported by law or by good policy justifications" for neglect of duty.[72] All that would be outside of the President's capacity is the ability to fire protected subordinates for *no* reason or solely for *bad* reasons (e.g., being of the opposite political party).

However, as many commentators admit, this is not consistent with the common understanding of good cause.[73] For-cause protection is generally thought to immunize independent agency heads or independent prosecutors from presidential influence (hence, "independent").[74] In the wake of former FBI Director James Comey's firing

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68 Lessig & Sunstein, *supra* note 7, at 110. Lessig and Sunstein wrote this in 1994, but it is still true today. *See* Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 787 (2013); Richard J. Pierce, Jr., *Saving the Unitary Executive Theory from Those Who Would Distort and Abuse It: A Review of* The Unitary Executive *by Steven G. Calabresi and Christopher S. Yoo*, 12 U. PA. J. CONST. L. 593, 604 (2010).

69 478 U.S. 714 (1986).

70 Lessig & Sunstein, *supra* note 7, at 111 (quoting *Bowsher*, 478 U.S. at 729).

71 *See id.* at 112.

72 *Id.* at 111; *see* Pierce, *supra* note 68, at 604 (predicting that "refusal to comply with a President's stated policies" would constitute good cause for removal); Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 ALA. L. REV. 1205, 1250 (2014) (suggesting that "good cause for removal could include insubordination, as a number of cases have held in the civil service context [because] . . . [a] subordinate's failure to follow direction, i.e.[,] insubordination, is outside the scope of an inferior officer's role"). However, even under this standard, the scope of "good policy justifications" is open to interpretation.

73 *See, e.g.*, Lessig & Sunstein, *supra* note 7, at 111.

74 *See, e.g.*, GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 7 (7th ed. 2016) ("'Cause' or

and Robert Mueller's appointment, several members of Congress looked into for-cause protection options to limit President Trump's actions.[75] This effort has included a Senate Judiciary Committee hearing on "Special Counsels and the Separation of Powers" (though it focused mostly on the constitutionality of for-cause protection, not what constitutes good cause)[76] and suggests that Congress, at least, views these protections as substantial and worth its time, its effort, and the potential conflict with the Executive. Two bills under consideration would explicitly grant federal judges the power to review the firing of a special counsel and determine whether there was, in fact, good cause.[77] Of course, Congress, if it happens to believe the scholars who suggest that courts would read good cause broadly (or overrule *Morrison* outright), may be attempting to assert power with the belief that such power does not constitutionally exist, and gambling that no one with the political will or legal standing will call its bluff.[78]

If good cause (or inefficiency, neglect of duty, etc.) is as broad as some have argued, the question of its precise contours becomes somewhat less consequential. Under the broad definition, all firings would almost certainly be justified by a refusal to follow a President's general policy direction. With this practically unlimited font of fireable offenses, there would be no reason for a President to resort to pretext,

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'misconduct' in these contexts typically encompasses things like criminal dishonesty or gross incompetence but is *not* ordinarily understood to include making policy decisions with which the President disagrees."); Peter H. Schuck, Opinion, *Trump's Bureaucratic Showdown*, N.Y. TIMES (Nov. 27, 2017), https://www.nytimes.com/2017/11/27/opinion/trump-cfpb-appointment-independence.html [https://perma.cc/F343-YBSU] ("Ms. English can run the agency until the Senate confirms a successor to start in July when the term ends, or the president removes her 'for cause,' which means more than mere political or policy disagreement.").

75 *See, e.g.*, Special Counsel Integrity Act, H.R. 3771, 115th Cong. (2017); H.R. 3664, 115th Cong. (2017) (FBI Director); Special Counsel Independence Protection Act, H.R. 3654, 115th Cong. (2017); Special Counsel Integrity Act, S. 1741, 115th Cong. (2017); Special Counsel Independence Protection Act, S. 1735, 115th Cong. (2017); Office of Government Ethics Independence Act of 2017, H.R. 3462, 115th Cong. (2017) (Office of Gov't Ethics Director); Fighting for Intelligent, Rational, and Ethical Dismissal Act, H.R. 2446 115th Cong. (2017) (FBI Director).

76 *Special Counsels and the Separation of Powers: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. (2017).

77 *See* H.R. 3771; H.R. 3654; S. 1741; S. 1735. The *New York Times* editorial board has called on Congress to pass for-cause protection legislation to protect Robert Mueller. Editorial, *The Wrong People Are Criticizing Donald Trump*, N.Y. TIMES (Mar. 19, 2018), https://www.nytimes.com/2018/03/19/opinion/trump-mccabe-republicans.html [https://perma.cc/LF2W-JMB5].

78 *Cf.* LOUIS FISHER, CONG. RESEARCH SERV., RS22132, LEGISLATIVE VETOES AFTER *CHADHA* 5 (2005) ("Although Presidents have treated committee vetoes after *Chadha* as having no legally binding value, agencies often adopt a different attitude. They have to work closely with their review committees, year after year, and have a much greater need to devise practical accommodations and honor them.").

and the most a court would likely ever have to decide is whether a President's stated reason for removal met that low standard.

In contrast, if the definition of good cause is closer to the common understanding of the phrase, the answer to this question is more consequential because challenges to for-cause removals will be more likely—and a President may be more likely to resort to pretextual reasons to justify a firing. Regardless of how good cause is ultimately defined, the procedural question of whether a court should evaluate the truthfulness of a President's asserted rationale remains unanswered.

Furthermore, a broad interpretation of good cause also conflicts with the reasoning underlying the Supreme Court's decisions striking down some for-cause protections. In *PCAOB*, the Court struck down multilevel for-cause protection because the President's "ability to execute the laws—by holding his subordinates accountable for their conduct—is impaired" when there are two levels of for-cause protection.[79] If the President could remove protected individuals for simply making decisions contrary to policy preferences, it seems unlikely anyone would consider the President to have an "impaired" ability to execute the laws, no matter how many levels of for-cause protection. If the Public Company Accounting Oversight Board ("PCAOB") was not doing what the President wanted, and the Securities and Exchange Commission ("SEC") was not removing the members of the PCAOB, the SEC would be acting out of line with the President's policy preferences, establishing good cause to remove the SEC Commissioners. The broad interpretation of good cause would only impair the President's ability to remove individuals for "bad" reasons, which would not be much of an impairment at all, considering that even simple policy disagreement would fall in the "good" category. For example, few would feel bad for a President complaining that he could no longer fire someone purely because they were members of a different political party (presumably, a bad reason) if that officer was nonetheless acting in line with the President's policy preferences. Therefore, the reasoning in *PCAOB* suggests that the broad interpretation is incorrect. The Court also explicitly stated that its precedents do not support the view that simple policy disagreements constitute good cause, although these precedents may be open to future modification.[80]

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79 Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 496 (2010).

80 *Id.* at 502 ("But the Government does not contend that simple disagreement with the Board's policies or priorities could constitute 'good cause' for its removal. Nor do our precedents

2. *Is For-Cause Removal a Political Question?*

At least a few scholars, including Professor Aziz Huq, have argued that courts should treat for-cause removals as a political question.[81] This doctrine is "a tool for sorting constitutional disputes between the judiciary and the political branches"[82]—in other words, when a court feels that the dispute should be resolved by one of the political branches, rather than judiciary.

Professor Jonathan Siegel's explanation of the doctrine helpfully separates cases that could be dismissed for failing to state a claim even without invoking the political question doctrine ("bogus" political questions) from ones that indeed state a claim, but are otherwise deemed nonjusticiable ("real" political questions).[83] A classic example of a bogus political question is a suit against a President for vetoing bills that an individual citizen thought should have been signed.[84] There is no legal limit on a President's decision to veto[85] (unless perhaps it violates another constitutional provision or results in impeachment, e.g., being bribed to veto), so the case can be summarily dismissed simply for failure to state a claim, without need to resort to the political question doctrine. Conversely, using the political question doctrine for a for-cause removal issue would be an honest usage of the doctrine,[86] as the statutes are clearly intended to create a limit on the President's ability to fire individuals—that was the entire point of such provisions.

Professor Huq suggests treating for-cause removal cases as real political questions.[87] In other words, even though there is a constitutionally sound restriction, courts should choose not to decide such cases for some good reason, leaving resolution to the political branches. The good reason, he argues, is that there is no "judicially manageable standard because [deciding removal cases] does not relia-

suggest as much." (citation omitted)). At least one past presidential administration has been advised by the Attorney General that removal of a protected individual requires more than a "disagreement with administration policies." BREGER & EDLES, *supra* note 19, at 14.

81 *E.g.*, Huq, *supra* note 14; *cf.* Pierce, *supra* note 68, at 604 ("I doubt that a court would be willing to review a President's decision to remove an officer for cause.").

82 Huq, *supra* note 14, at 5.

83 Jonathan R. Siegel, *Political Questions and Political Remedies*, *in* THE POLITICAL QUESTION DOCTRINE AND THE SUPREME COURT OF THE UNITED STATES 243, 245 (Nada Mourtada-Sabbah & Bruce E. Cain eds., 2007).

84 *See id.* at 249.

85 *See* ROBERT J. SPITZER, THE PRESIDENTIAL VETO 59 (1988) (explaining that by the end of the Civil War, the President's power to veto had become unquestioned).

86 Siegel, *supra* note 83, at 250–51.

87 *See* Huq, *supra* note 14, at 5–6.

bly produce the constitutional good identified by the Court [in *PCAOB*]—democratic accountability."[88] The thinking goes that if some decisions support the constitutional good of democratic accountability and others hinder it, the standard used cannot in fact be manageable. Therefore, courts should "leave[] the matter subject to interbranch negotiation and compromise" instead of judicial resolution.[89]

We feel this conclusion is too bold. First, it would be a striking example of judicial activism to refuse enforcement of *constitutionally permissible* for-cause restrictions simply because the Court felt the restrictions were *not efficient enough* at producing what the *Court* believed was their goal.[90] These judicial decisions sound like policy judgments, and Congress already decided that these statutes were good policy. Second, unlike some other cases where it is unclear whether the Court was *intended* to be the final arbiter,[91] here, many for-cause statutes explicitly mandate judicial review of specific removal decisions.[92] Congress clearly felt that courts could manage these standards. Third, Professor Huq does not argue that courts *could not* decide these cases consistently and with reason due to difficult standards—the traditional understanding of that prong of the political question test—but instead argues that the *results* would not reliably support a "constitutional good."[93] This seems to be an uncommon understanding of the political question test.

Below is our proposed compromise between fully adjudicating and fully dismissing a for-cause removal challenge. Although it suffers from some of the criticisms directed at Professor Huq's proposal above, it aims to better respect Congress's intent on the matter without permitting excessive disruption of the Executive.

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88 *Id.*

89 *Id.* at 7.

90 *See generally* Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109, 2112 (2015) (explaining that judicial restraint leads to "major departures from settled doctrine" and "sloppy and cursory constitutional reasoning").

91 *See, e.g.*, Nixon v. United States, 506 U.S. 224, 229–30 (1993).

92 *See, e.g.*, 28 U.S.C. § 596(a)(3) (2012) (original provision protecting the independent counsel from removal); Special Counsel Integrity Act, S. 1741, 115th Cong. (2017); Special Counsel Independence Protection Act, S. 1735, 115th Cong. (2017).

93 Huq, *supra* note 14, at 5–6.

II. How Should a Court Decide a Challenge to For-Cause Removal?

In the absence of separation-of-powers concerns, a merits challenge to a for-cause removal should be adjudicated by the courts like any other challenge to a violation of a statutory employee protection, e.g., challenging a firing based on sex or religion. However, given the separation-of-powers concerns—acknowledging the important differences between congressional acts to protect individuals and congressional acts to protect society and the functioning of government from a co-equal branch—courts should interpret legal definitions based on the applicable statutes and apply those statutes to the facts but based only on the facts as asserted by the President. This differs from how a sex-discrimination claim would ordinarily be adjudicated because there a court would evaluate the veracity of the factual assertions of the employer. Here, a court should not entertain such a question and should instead accept the President's stated removal reason on its face.

Ultimately, for-cause protection is not intended to protect individual officeholders. It is intended to insulate certain executive officers from presidential influence for the good of society.[94] Congress is better situated to decide which removals are important enough to contest, is more directly accountable to the electorate, and has the same compulsory powers for "production of documents and testimony" as the courts.[95] Thus, Congress should be the actor charged with determining whether protracted investigation regarding a President's sub-

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94 *See* David E. Lewis & Jennifer L. Selin, *Political Control and the Forms of Agency Independence*, 83 Geo. Wash. L. Rev. 1487, 1490 (2015) ("In a less rosy version of the politics of agency design, opponents of a new proposed policy insist on provisions in the new law that privilege some interests over others and limit the ability of political actors to intervene."); *see also, e.g.*, William E. Kovacic & Marc Winerman, *The Federal Trade Commission as an Independent Agency: Autonomy, Legitimacy, and Effectiveness*, 100 Iowa L. Rev. 2085, 2088 (2015) ("The suggestion that competition agencies be independent reflects a desire to enable enforcement officials to make decisions without destructive intervention by elected officials or by political appointees who head other government departments. One method of providing the desired independence from these forms of interference is for the law to state that competition agency leaders can be removed by elected officials only for good cause.").

95 Todd David Peterson, *Contempt of Congress v. Executive Privilege*, 14 U. Pa. J. Const. L. 77, 81–82 (2011) ("Congress derives its authority to compel the production of documents and testimony not from any provision of the Constitution that expressly authorizes congressional investigations, but rather from the general grant of legislative authority in Article I, section 1 of the Constitution . . . . Congress's implied power to investigate is based upon the understanding that, in order to legislate effectively, Congress must be able to investigate and examine the subjects of potential legislation."); *see* Peter M. Shane & Harold H. Bruff, Separation of Powers Law 311–35 (3d ed. 2011).

jective intent in firing officers—which would introduce significant uncertainty into the government's operation—is worth it. Logistically, this would entail Congress conducting compulsory oversight hearings to gather information and then, if appropriate, impeaching and removing the President. Therefore, it is wise for courts to declare such investigations political questions at that point.

The questions to answer are (1) whether a court should define the appropriate standard, (2) whether a court should decide whether the standard was met by the President's factual allegations, and (3) whether a court should hear evidence and make factual determinations. We believe that courts should define the legal standard themselves and determine whether a President's factual assertions meet this standard, but the courts should stop there and accept the President's factual findings because this provides the appropriate degree of respect to Congress's laws and the Executive's duty to exercise that office's constitutional authority. A neutral determination of whether the President's rationale meets the statutory requirements is achieved while also avoiding the practical problems of challenging a President's factual findings with extensive litigation and discovery.

If a court finds a for-cause restriction constitutional, there is no good reason it should not define the legal standard for its exercise. The judiciary is the branch best suited to interpret statutes,[96] and doing so would not inherently disrupt executive branch functions at all. The same rationale is appropriate for applying the law to the facts presented. Up to this point, the court proceedings require no discovery or presentation of evidence. Rulings can be made on legal questions and court filings only, allowing a relatively quick resolution process that would not significantly disrupt executive functions. Of course, if a court rules that the President failed to supply a satisfactory reason for removal, it would order the appropriate remedy—perhaps even reinstatement of the official. This outcome would be quite disruptive to the President's plans, but following valid statutes often is. A President could guarantee avoiding judicial interference with executive administration (i.e., an adverse judgment) by articulating a valid justification—with nothing more required.[97]

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96 *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

97 In *Humphrey's Executor*, for example, President Roosevelt could have won his case under our proposal by putting forth a prima facie case of sufficient cause. 295 U.S. 602, 626 (1935) ("We conclude that the intent of the act is to limit the executive power of removal to the causes enumerated, the existence of none of which is claimed here.").

Though a typical statutory protection case for wrongful termination would also allow a full trial on the factual merits, due to the practical separation-of-powers concerns, courts should refuse to engage in such an exercise, essentially deferring to presidential fact-finding. Congress has oversight and subpoena power to perform fact-finding on its own if it were inclined to protect the nation's interests by enforcing the statute.[98] The fired employee's interests are far less important to society here than Congress's interest in designing and performing oversight of the executive branch.[99] For that reason, it is appropriate to put the burden of action on Congress, which has similar tools to compel evidence as the courts, as opposed to the typical fired individual, who has no independent tools.

This approach would force Presidents to use a commonly accepted legal standard for firings and to present a sufficient factual basis to meet that standard. Deferring to presidential fact-finding at this point can avoid unnecessary litigation from stubborn fired individuals, while ensuring that Congress (and the public) have the information necessary to decide whether it is an issue worth pursuing further. Essentially, allowing a case to proceed to this point ensures that Congress does not have to fight with the President about the relevant legal standard or which facts meet that standard. Defining the legal standard and applying it to facts are not political questions. However, deciding whether to marshal resources for an investigation to protect the public interest is highly political and therefore better handled by the politically accountable Congress. This should be the point of declaring a political question.

No deference should be afforded if a President simply parrots the legislative standard, perhaps by simply stating, "You are fired for good cause," or even, "You are removed for inefficiency."[100] A statement in this form would not even meet some statutes' requirements to specify the factual basis for removal.[101] However, even this bare-bones recital

98 *See* Peterson, *supra* note 95, at 81–82.

99 *Cf.* Jonathan R. Siegel, *What If the Universal Injury-in-Fact Test Already Is Normative?*, 65 ALA. L. REV. 403, 415 (2013) ("[O]ur system regards Congress as the ultimate exponent of democratic desires.").

100 President Nixon did exactly this. *See* Bamzai, *supra* note 6, at 747 ("Nixon sent [the President of the Federal National Mortgage Association] a letter saying: 'You are hereby removed for good cause.'"). But the removed official ultimately declined to challenge his removal in court. *Id.*

101 *See, e.g.*, 28 U.S.C. § 596(a)(2) (2012) ("If an independent counsel is removed from office, the Attorney General shall promptly submit to the division of the court and the Committees on the Judiciary of the Senate and the House of Representatives a report specifying the facts found and the ultimate grounds for such removal.").

evinces a mild restriction on the President. Without this protection, no justification is required or expected, so the political cost of removal is lower.[102]

Similarly, no deference should be afforded if a President asserts a factual basis that does not meet the standard. For example, "You are fired for inefficiency because your handwriting is slightly larger than average, so you use more paper than others," would be insufficient, as would be, "You are fired for good cause because I do not like you."

Allowing cases to proceed up to this point forces the President to state a legally sufficient reason for removal. That reason, however, may be pretextual. For example, a President may declare, "You are fired for good cause because you made unwise decisions in administering your agency." A court may well conclude that this factual assertion—that the individual made unwise decisions—taken as true, constitutes good cause. Under our proposal, a court would not, however, decide whether the officer indeed made unwise decisions. The President would maintain significant leeway to remove officers, even by lying, because it would take concerted congressional effort to conduct an investigation, instead of allowing a single wronged employee to litigate the question. Congress would decide which removals are worth the political capital to act on.[103] On the other hand, this remains a meaningful restriction, both because it limits the President more than if these provisions were unconstitutional altogether (allowing the President to simply state, "You're fired!"), and because there is likely to be significant political fallout if a President chooses to lie to Congress.

The following sections explain why gathering evidence to prove that the firing of a for-cause-protected individual was pretextual constitutes a political question and draws an analogy to another type of firing affected by separation-of-powers concerns.

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102 *See* Kent H. Barnett, *Avoiding Independent Agency Armageddon*, 87 NOTRE DAME L. REV. 1349, 1380–81 (2012) (explaining that the requirement to "provide and publicly defend a legitimate reason for removal" makes it less likely that Presidents would be willing "to incur the political costs associated with removal and judicial review on matters of lesser importance").

103 *See* Datla & Revesz, *supra* note 68 ("A President will therefore remove an agency head only when the political benefits exceed the political costs. Insulation from presidential removal significantly increases the political costs of a decision to remove an agency head for a President because invoking a for-cause provision will make the removal more politically salient and susceptible to judicial challenge."). The political costs may be minimized if a President makes a bare-bones factual assertion, like the example above ("unwise decision").

A. This Would Be a "Real" Political Question

The negative consequences of a challenge to a President's factual determinations should justify declaring the fact-finding stage of a for-cause challenge a political question. This would be a textbook example of a real political question because the courts would be able to determine a clear legal standard (in fact, our proposed solution requires courts to define that standard). Despite admitting that there is a discernible, manageable standard, however, courts would still dismiss cases challenging pretextual rationales.

The case of *Morgan v. United States*,[104] authored by then-Judge Scalia, provides a helpful analogy. In that case, the U.S. House of Representatives voted along party lines to hand a contested House election to the candidate of the majority party.[105] The court held that the House's decision was not reviewable because it was textually committed to that political branch: "[E]ach House shall be *the* Judge of the Elections, Returns and Qualifications of its own Members."[106] Though Justice Scalia denied applying the political question doctrine, this seems to fall squarely within the *Baker v. Carr*[107] category of textual commitment to a coordinate political branch.[108] This is a perfect example of a real political question because there was a clear legal constraint that the Court would not enforce.[109]

That textual-commitment aspect of the case is less analogous to for-cause removal compared to what followed. After explaining that the text and history of the Constitution supported a lack of judicial review, Justice Scalia explained the "practical sense" behind such a decision:

> The pressing legislative demands of contemporary government have if anything increased the need for quick, decisive resolution of election controversies. Adding a layer of judicial review, which would undoubtedly be resorted to on a regular basis, would frustrate this end. What is involved, it should be borne in mind, is not judicial resolution of a narrow issue of law, but review of an election recount, with all the fact-finding that that entails. . . . The major evil of interference by other branches of government is entirely avoided, while a substantial degree of responsibility is still provided

104 801 F.2d 445 (D.C. Cir. 1986).

105 *Id.* at 445–46.

106 *Id.* at 447 (emphasis added) (quoting U.S. Const. art. I, § 5, cl. 1).

107 369 U.S. 186 (1962).

108 *Morgan*, 801 F.2d at 447; *see* Siegel, *supra* note 83, at 250 n.31.

109 Siegel, *supra* note 83, at 250.

> by regular elections, the interim demands of public opinion, and the desire of each House to preserve its standing in relation to the other institutions of government.[110]

These practical realities reveal Justice Scalia's reliance on several underused *Baker* factors, including "an unusual need for unquestioning adherence to a political decision already made[] or the potentiality of embarrassment from multifarious pronouncements by various departments on one question."[111] Although his opinion relied primarily on textual and historical evidence, the textual evidence is questionable. Is giving *the* power to judge elections different than giving *the* executive power to the President? The answer is seemingly no, yet executive action is often declared unconstitutional, robbing the Executive of the full power to execute the laws.

These same practical arguments can be made against allowing for-cause removal challenges. There is a "need for quick, decisive resolution" because otherwise top government posts might be left vacant or with conflicting leadership while cases are adjudicated (several statutes provide for reinstatement as a remedy), or leadership disputes could significantly disrupt agency functioning and cause confusion for executive employees.[112] Substantial fact-finding would be required to determine whether the President's assertions are true, which would be incredibly intrusive, disruptive, and time-consuming. It could require deposing the President and other White House officials and discovery of White House documents. Finally, like election results themselves, regular elections can rectify for-cause removal violations by replacing a President who violated the law or a Congress complicit in his doing so.

B. Analogy: Speech or Debate Clause

Judicial interpretation of the Speech or Debate Clause can serve as a model in the context of unlawful firings. The Clause protects members of Congress from being questioned "for any Speech or Debate in either House."[113] "[T]he Clause must be applied 'in such a way as to insure the independence of the legislature without altering the historic balance of the three co-equal branches of Government.'"[114]

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110 *Morgan*, 801 F.2d at 450.

111 *Baker*, 369 U.S. at 217.

112 *Morgan*, 801 F.2d at 450; *see also supra* notes 6–11 and accompanying text.

113 U.S. Const. art. I, § 6, cl. 1.

114 Fields v. Office of Eddie Bernice Johnson, 459 F.3d 1, 9 (D.C. Cir. 2006) (plurality opinion) (quoting United States v. Brewster, 408 U.S. 501, 508 (1972)).

This reasoning is applicable in the context of for-cause removal because fully adjudicating such a removal might indeed invade the independence of the Executive by allowing unprecedented disruption in that branch's operation. There is an obvious difference between the two because one is a constitutional provision specifically designed to protect one branch from its counterparts while the other is a statute passed by one branch trying to limit another. But the rationale nonetheless seems applicable because the Speech or Debate Clause is intended in part to prevent the Executive and courts from interfering in the discretionary activities of Congress, and here Congress is intending to interfere in what some would consider the Executive's inherent discretionary control of the executive branch, as vested by the Constitution.[115]

The Speech or Debate Clause extends protection to "all activities within the 'sphere of legitimate legislative activity,' including all activities that are 'an integral part of the deliberative and communicative processes by which Members participate in . . . matters which the Constitution places within the jurisdiction of either House.'"[116] Analogously, the political question protection proposed in this Essay would extend to a core executive branch function: removal of officers.

In the pretextual-removal context for Speech or Debate Clause defenses (e.g., a legislator's recently fired employee sues for wrongful termination), "[i]f the lawsuit does not inquire into *legislative motives* or question conduct part of or integral to the legislative process, . . . then the case can go forward."[117] In other words, some suits by terminated employees could proceed if they were sufficiently unrelated to the legislator's legislative duties. For executive for-cause removals, however, *all* suits would inquire into *executive motives* because firing officers is one of the President's core executive functions. Conversely, firing employees is not inherently a core legislative function. Therefore, the Speech or Debate Clause analogy supports preventing binding judgments against the Executive for all for-cause removals. The courts should only address those questions that do not inquire into executive motives, including the questions of the scope of good cause and whether the President's proffered justification falls within that but

115 *See* U.S. CONST. art. II, § 1, cl. 1 (vesting the executive power in the President).

116 Howard v. Office of Chief Admin. Officer of U.S. House of Representatives, 720 F.3d 939, 945–46 (D.C. Cir. 2013) (citation omitted) (first quoting Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 503 (1975); then quoting Gravel v. United States, 408 U.S. 606, 625 (1972)).

117 *Id.* at 949 (emphasis added) (quoting *Fields*, 459 F.3d at 16).

not including whether the President's proffered justification was pretextual.

Conclusion

If President Trump fired the FTC Commissioners over Twitter, with no explanation given, a court should take up the case. If Trump said the Commissioners were fired for an utterly superficial reason that consequently does not meet the statutory criteria, a court should so conclude and order an appropriate remedy. But if the President instead fired them for a reason that a court determined qualified as good cause—even if there was specific and overwhelming evidence that such a cause was based on a lie—a court should accept the President's stated rationale and leave the political fallout to Congress to address. Congress is where the power to severely disrupt the functioning of the Executive should lie, whether through oversight, impeachment, or onerous statutory responsibilities. Out of respect for the functioning of the Executive, courts should not allow full trials regarding a law that places the full weight of that power into a single citizen. This Essay's approach balances these competing interests.