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Avoiding Independent Agency Armageddon

Kent H. Barnett
University of Georgia School of Law, khbarn@uga.edu

ARTICLES

AVOIDING INDEPENDENT AGENCY ARMAGEDDON

*Kent H. Barnett**

In Free Enterprise Fund v. Public Company Accounting Oversight Board, *the U.S. Supreme Court invalidated Congress's use of two layers of tenure protection to shield Public Company Accounting Oversight Board (PCAOB) members from the President's removal. The SEC could appoint and remove PCAOB members. An implied tenure-protection provision protected the SEC from the President's at-will removal. And a statutory tenure-protection provision protected PCAOB members from the SEC's at-will removal. The Court held that these "tiered" tenure protections between the President and the PCAOB members unconstitutionally impeded the President's removal power because they prevented the President from holding the SEC responsible for PCAOB's actions in the same manner as he could hold the SEC accountable for its other responsibilities. Four justices dissented. They argued that the majority's decision, if applied rationally, would disrupt the independent administrative state by invalidating tiered protections for several independent boards, 1500 ALJs, 210,000 military officers, and numerous civil servants.*

This Article proposes that, contrary to the dissent's position, courts can preserve agency independence and the President's removal power without disturbing Free Enterprise Fund *or the Court's prior, inconsistent removal-power jurisprudence. The courts should distinguish the various tiered tenure-protection provisions, which fall into weak, intermediate, and strong-protection prototypes. Certain prototype combinations permit the President to have federal officers implement his policy choices. When the President can do so, he retains sufficient removal power, and thus certain prototype combinations are constitutional. Indeed, under my proposed analysis, the tiered-tenure protections for most agencies and officials are permissible. Distinguishing tenure-protection provisions (instead of just counting them) permits courts to provide some coher-*

* Visiting Assistant Professor, University of Kentucky College of Law; Assistant Professor of Law, University of Georgia School of Law (beginning Aug. 14, 2012). I sincerely appreciate Michael Healy, Paul Salamanca, Nicole Huberfeld, Neomi Rao, and Mark Schneiderman's helpful comments.

ence to, without disturbing, the Supreme Court's otherwise inconsistent removal-power decisions.

INTRODUCTION

Incoherent.[1] Inconsistent.[2] Ad hoc.[3] Scholars have long derided the United States Supreme Court's jurisprudence concerning the extent of the President's constitutional power to remove officers within independent agencies.[4]

The Court had the opportunity in *Free Enterprise Fund v. Public Co. Accounting Oversight Board* (*FEF*)[5] to overrule its prior presidential-removal decisions or otherwise to clarify this area of constitutional and administrative law. Indeed, D.C. Circuit Judge Brett Kavanaugh described the case as "the most important separation-of-powers case regarding the President's appointment and removal powers to reach the courts in the last 20 years."[6] But *FEF* only complicated matters.

The Court—in an opinion by Chief Justice Roberts and joined by Justices Scalia, Kennedy, Thomas, and Alito—held that the two levels of tenure protection for members of the Public Co. Accounting Oversight Board (PCAOB or the "Board") were unconstitutional. The Court accepted the parties' agreement that Congress had precluded the removal of SEC commissioners except for "inefficiency, neglect of duty, or malfeasance in office."[7] As part of the Sarbanes-Oxley Act of 2002 (SOX), the SEC commissioners, in turn, could appoint Board members and remove them in certain limited instances for willful misconduct or unreasonable failure to enforce certain rules and standards.[8] The Court held that the "two levels of protection from removal for those who . . . exercise significant executive power"

1 *See* Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1517 (1991).

2 *See* Erwin Chemerinsky, *A Paradox Without Principle: A Comment on the Burger Court's Jurisprudence in Separation of Powers Cases*, 60 S. CAL. L. REV. 1083, 1097 (1987) (noting that the Burger Court did not admit to, much less explain, its inconsistent separation-of-powers rationales).

3 *See* David M. Driesen, *Toward a Duty-Based Theory of Executive Power*, 78 FORDHAM L. REV. 71, 113 (2009) (arguing for the adoption of a duty-based theory of executive power).

4 *See* Brown, *supra* note 1, at 1517; Chemerinsky, *supra* note 2, at 1097; Driesen, *supra* note 3, at 113. R R

5 130 S. Ct. 3138 (2010).

6 Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667, 685 (D.C. Cir. 2008) (Kavanaugh, J., dissenting), *rev'd*, 130 S. Ct. 3138 (2010).

7 *Free Enter. Fund*, 130 S. Ct. at 3148 (quoting Humphrey's Ex'r v. United States, 295 U.S. 602, 620 (1935)).

8 *Id.*

unconstitutionally limited the President's removal power[9] and "safely encased [agency officials] within a Matryoshka doll of tenure protections."[10] Through two tiers of tenure protections, the President had lost, according to the Court, the ability to hold the SEC accountable for its supervision of the Board to the same extent as he could hold the SEC accountable for all of its other responsibilities.[11]

Justice Breyer and three other justices dissented. He argued that because the President can remove the SEC Commissioners only for certain reasons, any limitations on the commissioners' authority to remove the Board members did not meaningfully impact the President's authority.[12] Justice Breyer then explained that the Court's reasoning, if applied consistently, threatened the independence of numerous other agency officers—including administrative law judges (ALJs) and military officers—protected by two tiers of tenure protection.[13]

This Article does not seek to follow others' quixotic quests to replace all of the Court's removal-power jurisprudence with more principled rationales or to establish the extent of the President's implied removal power. Instead, this Article seeks to uncover a guiding principle that is congruous with the Court's presidential-removal decisions and prevents Justice Breyer's predicted upheaval to independent agencies.[14] To that end, courts should look to the nature of Congress's limitation on the President's removal power, not merely the number of tenure protections. Considering the provisions' language does no violence to the Court's precedent because the Court has either ignored the distinctions among the provisions or expressly reserved the question of what the provisions mean. Such an inquiry provides a rational, consistent basis for limiting *FEF*'s disruption to the administrative state, comports with key themes running through the Court's removal-power decisions, and brings some much needed coherence to the Court's jurisprudence.

9 *Id.* at 3164.

10 *Id.* at 3154.

11 *Id.*

12 *Id.* at 3171–73 (Breyer, J., dissenting).

13 *Id.* at 3177–82 (Breyer, J., dissenting).

14 It is beyond the scope of this Article to explain the virtues of a limited, independent administrative state. This Article assumes that the Court does not seek to end agency independence or dismantle a large portion of the independent administrative state (because it either thinks that independence is a virtue or a settled matter under principles of stare decisis). *But see* Neomi Rao, *A Modest Proposal: Abolishing Agency Independence in* Free Enterprise Fund v. PCAOB, 79 FORDHAM L. REV. 2541 (2011) (arguing that the majority in *FEF* established the basis for abolishing agency independence).

The justices most often have referred to limitations on the President's removal power as simply "for cause" limitations.[15] But not all "for cause" provisions are the same. Some, such as the provision that had protected the PCAOB members, permit the President to remove an officer for willful dereliction of specific duties. These provisions comprise the "strong" tenure-protection prototype. Others, such as the implied protection for SEC Commissioners, are less specific and generally permit removal for "inefficiency, neglect of duty, or malfeasance in office."[16] These provisions comprise the "intermediate" tenure-protection prototype. Still others, such as the one that protects administrative law judges and numerous civil servants, permit the President to remove an officer "for good cause."[17] The good cause standard has long permitted, in the federal employment context, removal based on insubordination.[18] This good-cause standard is the "weak" tenure-protection prototype. Unlike the strong and intermediate prototypes, the weak prototype is properly understood to permit the President to have officers implement his policy choices and grant him or her broad discretion for removing an officer.

This Article argues that distinguishing among the "strong," "intermediate," and "weak" tenure-protection provisions provides a justifiable manner to avoid Justice Breyer's doomsday scenario.[19] The Court in *FEF* held that one tier of intermediate tenure protection followed by a second tier of strong tenure protection impermissibly impeded the President's control over agency decisionmaking. Under neither level could the removing party (whether the President or the SEC Commissioners) remove an officer for refusing to execute the removing party's instruction. But, for example, if Congress imposed only one tier of intermediate tenure protection followed by one tier of weak tenure protection, the President's power to remove would not be sufficiently impeded. After all, if one accepts *Humphrey's Executor*'s conclusion that one level of "intermediate cause" removal is permissible (as the majority in *FEF* did), then a second-tier, weak tenure pro-

15 *Free Enter. Fund*, 130 S. Ct. at 3154, 3155, 3173; Humphrey's Ex'r v. United States, 295 U.S. 602, 631 (1935); Morrison v. Olson, 487 U.S. 654, 689 (1988) (referring to "'good cause'-type" removal limitations).

16 *Free Enter. Fund*, 130 S. Ct. at 3148; *Humphrey's Ex'r*, 295 U.S. at 620.

17 *Morrison*, 487 U.S. at 663.

18 *Id.* at 724 n.4 (Scalia, J., dissenting); *see infra* Part III.A.1 and accompanying notes.

19 Although this Article examines the Court's opinion and arguments in detail, its purpose is not to justify the rationales provided by the Court or the dissent in *FEF*. Instead, this Article seeks to provide a logical construct for applying *FEF* to future removal-power challenges that is consistent with the Court's jurisprudence.

tection should not change the result. The weak tenure protection allows the first-tier officer to remove the second-tier officer for insubordination and thus does not meaningfully lessen the President's power to hold first-tier officers accountable. The only power that the President loses with a weak tenure protection is the power to arbitrarily remove the officer—a power that, given the Court's decisions, is not entitled to judicial protection. By the same token, the officer still has some tenure protection and very likely discretion, as a practical and political matter, to decide most policy matters. Contrasting the tenure-protection provisions' language permits courts to accept *FEF* as they find it, while preserving much agency independence.

Part I of this Article examines three key, mutating themes throughout the Court's removal-power jurisprudence: its understanding of the President's power, its functional and formal approaches, and its consideration of how Congress has sought to impede the President's removal power. Part II examines *FEF* and its effect on the Court's removal-power themes. Part III examines the three prototypes of tenure protections, suggests how they should be interpreted in light of *FEF* and the Court's understanding of the three key themes, and proposes how courts should rule on the constitutionality of varying prototype combinations. Part IV then applies the analysis from Part III to the independent agencies and officers identified in Justice Breyer's dissenting opinion.

I. KEY THEMES IN REMOVAL-POWER DECISIONS

As numerous justices of the Court have conceded, the Constitution says nothing expressly about the President's removal power.[20] Indeed, the Framers did not discuss the President's removal powers at the Constitutional Convention.[21] Accordingly, judges and scholars continue to debate the Framers' original understanding of the President's removal powers and how the removal power should be understood in light of modern administrative practice and constitutional design.[22]

20 *Free Enter. Fund*, 130 S. Ct. at 3166 (Breyer, J., dissenting) (citing *Ex parte* Hennen, 38 U.S. (13 Pet.) 230, 258 (1839)); *Morrison*, 487 U.S. at 690 n.29.

21 Myers v. United States, 272 U.S. 52, 109–10 (1926).

22 This Article does not explore, as covered in great detail in other sources, the (1) arguments for and against a broad or narrow understanding of the President's removal powers or (2) eighteenth- and nineteenth-century understandings of the removal power. For interested readers, however, the *Myers* decision provides an exhaustive review of the Decision of 1789 (in which the House debated the topic as it considered the power to remove heads of the original departments). *See also* Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021 (2006).

The Court has, however, to varying degrees, developed three themes as part of its removal-power decisions. To understand *FEF*'s significance and how contrasting tenure-protection provisions furthers the Court's current understanding of the key themes, this Article examines each of the three themes separately. The Court's decisions have revealed the Court's discomfort with (1) the unitary theory of presidential power, (2) any single analytical method for determining when Congress has impermissibly impeded the President's removal power, and (3) the method by which Congress can limit the President's removal power. The Court's understanding of these issues appeared relatively settled before *FEF*. Yet *FEF* shifted course on all counts.

A. The Fragmented Executive

The Court's conception of the unitary or fragmented nature of the executive power has significantly changed. In *Myers v. United States*,[23] the Court first appeared to adopt, with notable exceptions, the unitary executive model. According to this model, the Constitution grants the President all executive power (unless the Constitution itself has expressly placed it elsewhere), which, with or without certain exceptions, Congress cannot limit.[24] There, the Court invalidated a provision that required the Senate's consent to the removal of an inferior officer, a postmaster first class, who the President nominated with the Senate's consent.[25] Yet, just nine years later in *Humphrey's Executor* the Court significantly undermined the unitary executive model by permitting Congress to limit the President's power to remove commissioners of the Federal Trade Commission (FTC) only for "inefficiency, neglect of duty, or malfeasance in office."[26]

Larry Lessig and Cass Sunstein provide both an originalist and a modern understanding of the President's removal powers. *See* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994).

23 272 U.S. at 52.

24 *See, e.g.*, Chris M. Amantea & Stephen C. Jones, *The Growth of Environmental Issues in Government Contracting*, 43 AM. U. L. REV. 1585, 1603 (1994); Jonathan L. Entin, *The Removal Power and the Federal Deficit: Form, Substance, and Administrative Independence*, 75 KY. L.J. 699, 732 (1987); Thomas O. Sargentich, *The Contemporary Debate About Legislative-Executive Separation of Powers*, 72 CORNELL L. REV. 430, 461 (1987).

25 *Myers*, 272 U.S. at 106–08.

26 Humphrey's Ex'r v. United States, 295 U.S. 602, 620 (1935). Professor Michael Healy has suggested in conversations with the author that the Court went further. The Court intimated that protections for officials exercising quasi-legislative and quasi-judicial powers are *required* by the Constitution. *See, e.g., id.* at 630 ("The sound application of a [separation-of-powers] principle that makes one master in his own

Morrison v. Olson reaffirmed the Court's rejection of the unitary executive theory, but the theory gained at least one defender on the Court. The Court held that Congress could limit the Attorney General's power to remove an independent counsel appointed to investigate the Executive Branch.[27] The relevant statute, the Ethics in Government Act,[28] permitted the Attorney General to remove the independent counsel for only "good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties."[29] As part of its decision, the Court expressly rejected the unitary executive model that Justice Scalia endorsed in his dissent that would have invalidated the office of independent counsel. The Court referred to Justice Scalia's model as "extrapolation from general constitutional language which we think is more than the text will bear."[30]

In light of *Morrison*, the unitary executive theory—although with the strong support of one justice—had been soundly rejected by the Court over a period of more than fifty years.[31] But changes in the Court's membership and the perception of the independent counsel's office suggested that the theory would be welcomed, if not adopted, in a later decision. By the time *FEF* was decided, only two justices who had decided the *Morrison* case were still members of the Court (Justices Stevens and Scalia),[32] and five justices on the Court for the 2009–2010 Term had indicated at least some support of the unitary executive model.[33] Moreover, the backlash against independent

house precludes him from imposing his control in the house of another who is master there.").

27 Morrison v. Olson, 487 U.S. 654, 692–93 (1988).

28 Pub. L. No. 95-521, 92 Stat. 1824 (1978).

29 *Morrison*, 487 U.S. at 663 (quoting 28 U.S.C. § 596(a)(1) (2006)).

30 *Id.* at 690 n.29.

31 *Cf.* Morton Rosenberg, *Congress's Prerogative Over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration's Theory of the Unitary Executive*, 57 GEO. WASH. L. REV. 627, 696 (1989) ("In *Morrison*, the Court . . . dealt a severe blow to the notion of a unitary executive.").

32 *Morrison*, 487 U.S. at 658. Justice Kennedy did not participate in *Morrison*.

33 Justice Scalia had indicated his support for the theory in *Morrison*, and Justice Thomas had later noted his acceptance of the theory in the national security context. *See, e.g.*, Hamdan v. Rumsfeld, 548 U.S. 557, 679 (2006) (Thomas, J., dissenting); Hamdi v. Rumsfeld, 542 U.S. 507, 580 (2004) (Thomas, J., dissenting). Not only had Chief Justice Roberts and Justice Alito worked in the Reagan Administration, known for its strong support of the unitary executive theory, *see* Jeffrey Rosen, *The Roberts Court & Executive Power*, 35 PEPP. L. REV. 503, 504 (2008); Rosenberg, *supra* note 31, at 628–30, but they had also joined one of Justice Scalia's opinions supporting the unitary executive model. *See* FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1817 (2009) (plurality opinion (Section III.E)); *see also* Erwin Chemerinsky, *The Future of* R

counsel Kenneth Starr's investigation into the Whitewater matter had vindicated much of Justice Scalia's dissenting position in *Morrison*. Starr's investigation had evidenced the dangers of having such a powerful figure with only one objective (and limited oversight) investigating executive officers, including the President.[34] Given the Court's new members and the recent history of the independent counsel's office, five members of the Court appeared poised to convert from catholicism to unitarianism when *FEF* was decided.

B. Fluctuating Functionalism

For as long as the Court has appeared to reject the unitary executive theory, it has accepted some form of functional analysis. But the Court's functional analysis has changed over time. The Court, at first, eschewed functionalism in *Myers*. The *Myers* Court engaged in a formal analysis of whether the postmaster first class was an officer whom the President retained full authority to remove. The Court considered whether the postmaster was an inferior officer and how the postmaster was appointed (by the President with the consent of the Senate, as opposed to by the head of a department).[35] But the Court never even identified the postmaster's duties or discretion.[36]

To the extent that the Court in *Humphrey's Executor* did not overrule *Myers*, it distinguished it by adopting a functional approach. According to the *Humphrey's Executor* Court, *Myers* concerned an officer "occup[ying a] place in the executive department" whose func-

Constitutional Law, 34 CAP. U. L. REV. 647, 662 (2006) (noting that Justice Alito had endorsed the unitary executive mode, in a speech to the Federalist Society in 2001, as "best captur[ing] the meaning of the Constitution's text and structure"). Notably, Justice Kennedy did not join this section of the *Fox Television Stations* opinion, which was otherwise the opinion of the Court. *See Fox Television Stations*, 129 S. Ct. at 1805. Nevertheless, Justice Kennedy joined the Court's opinion in *Printz v. United States*, including the portion of the opinion that states that "[t]he insistence of the Framers upon unity in the Federal Executive—to ensure both vigor and accountability—is well known." 521 U.S. 898, 922–23 (1997).

34 *See, e.g.*, Susan Low Bloch, *Cleaning Up the Legal Debris Left in the Wake of Whitewater*, 43 ST. LOUIS U. L.J. 779, 782 (1999); Jay S. Bybee, Printz*, the Unitary Executive, and the Fire in the Trash Can: Has Justice Scalia Picked the Court's Pocket?*, 77 NOTRE DAME L. REV. 269, 281–82 (2001) (citing Akhil Reed Amar, *Nixon's Shadow*, 83 MINN. L. REV. 1405, 1414–15 (1999)); Robert F. Drinan, *Reflections on Lawyers, Legal Ethics, and the Clinton Impeachment*, 68 FORDHAM L. REV. 559, 561 (1999); *see also* Michael Stokes Paulsen, *Nixon Now: The Courts and the Presidency After Twenty-Five Years*, 83 MINN. L. REV. 1337, 1394 (1999).

35 Myers v. United States, 272 U.S. 52, 158–59, 163–64 (1926).

36 *See generally id.* (focusing on the removal power rather than the specific responsibilities of the position).

tions were "purely executive" in nature.[37] The officer's executive duties contrasted with the FTC officer in *Humphrey's Executor* who performed "quasi-judicial and quasi-legislative" functions as part of an independent agency.[38] The President's power to remove could not be obstructed in the former scenario, but it could be in the latter.

Recognizing the difficulties in attempting to distinguish "quasi-judicial" and "quasi-legislative" actions from "executive" action,[39] the Court in *Morrison* turned from one functional approach to another—from the function of the officer to the function of the Executive Branch.[40] The independent counsel's law-enforcement functions were executive in nature, but the Court, nonetheless, announced that its "present considered view is that the determination of whether . . . the President's power to remove an official cannot be made to turn on whether or not that official is classified as 'purely executive.'"[41] Instead, the Court determined that the limitations on the President's power to remove did not interfere with powers that are central to the "functioning of the Executive Branch."[42]

37 Humphrey's Ex'r v. United States, 295 U.S. 602, 627–28 (1935). Determining whether the officer rests within the Executive Branch could be deemed, at least in part, a formal inquiry. After all, the Court is concerned with the three branches of government and how officers fit within those established branches and the kind of power that the officers exercise. *See* Ronald J. Krotoszynski, Jr., *On the Danger of Wearing Two Hats:* Mistretta *and* Morrison *Revisited*, 38 WM. & MARY L. REV. 417, 417–18 n.4 (1997) ("Formalism emphasizes the structural separation of powers reflected in the division of legislative, executive, and judicial power in Articles I, II, and III of the Constitution.").

38 *Humphrey's Ex'r*, 295 U.S. at 628–29; *see also id.* at 624 ("[The FTC's] duties are neither political nor executive, but predominantly quasi-judicial and quasi-legislative.").

39 *See* Morrison v. Olson, 487 U.S. 654, 689–90 n.28 (1988). The FTC served in a quasi-legislative and quasi-judicial function because, according to the *Humphrey's Executor* Court, it was "carry[ing] into effect legislative policies embodied in the statute," administering the details embodied by the statutory standard, performing investigations on behalf of Congress, and acting as a master in chancery. *Id.* at 687 n.25. The Court's statement is problematic for two key reasons. First, the "carry[ing] into effect legislative policies embodied in the statute" would appear to be the paradigmatic example of executive action. *Id.* Second, when determining the nature of the officer's function, the Court essentially ignored those functions—such as the power to investigate violations of the antitrust laws—that were "executive." The Court, in a conclusory fashion, merely stated that those functions were "obviously collateral to the main design of the act." *Humphrey's Ex'r*, 295 U.S. at 628 n.*.

40 *See* Kimberly N. Brown, *Presidential Control of the Elite "Non-Agency"*, 88 N.C. L. REV. 71, 152 (2009).

41 *Morrison*, 487 U.S. at 689.

42 *Id.* at 691. The *Morrison* brand of functionalism may satisfy a more conventional understanding of "functionalism." As in Justice White's dissent in *INS v.*

Thus, upon *FEF*'s arrival to the Court, the Court had greatly modified its functional analysis. The functions of the officer were relevant,[43] but, apparently, were not a significant factor in determining whether the Executive Branch could function effectively in light of a removal limitation. The Court left unresolved precisely what the President's function was and how tenure-protection provisions could unconstitutionally impede it.[44]

C. How Congress Limits the President's Removal Power

Besides rejecting the unitary executive model and modifying its functional analysis, the Court has also more thoroughly considered how Congress limits the President's power. The Court had appeared to distinguish instances in which Congress had retained a place for itself in the removal process from those in which it had not. But even when Congress has not participated in the removal decision, the Court has increasingly considered the language of relevant tenure-protection provisions.

The Court has indicated that direct congressional participation in the President's removal decision is unconstitutional. *Myers* and *Bowsher v. Synar*[45] were the only two instances before *FEF* in which the Court had invalidated removal provisions. In both cases, the removal provisions required legislative body participation in an officer's removal.[46] Indeed, the *Morrison* Court expressly distinguished *Bowsher* on the ground that Congress had not sought to participate in removing the independent counsel.[47]

Chadha, the Court in *Morrison* is looking to whether the tenure-protection provision sufficiently protects the constitutional policies at issue, as opposed to determining whether the provision's presence offends specific constitutional text. *See* INS v. Chadha, 462 U.S. 919, 973, 979–81 (1983) (White, J., dissenting).

43 *Morrison*, 487 U.S. at 691 ("We do not mean to suggest that an analysis of the functions served by the officials at issue is irrelevant.").

44 Brown, *supra* note 40, at 105. R

45 478 U.S. 714 (1986).

46 *Id.* at 736; Myers v. United States, 272 U.S. 52, 107 (1926). Although the Court in both instances noted that the officers wielded executive power, *see Bowsher*, 478 U.S. at 732–34; *Myers*, 272 U.S. 52 *passim*, the focus on congressional participation in the removal decision would likely support the invalidation of a provision that requires legislative participation in the removal of an officer performing quasi-judicial or quasi-legislative functions. *See Myers*, 272 U.S. at 108.

47 *Morrison*, 487 U.S. at 686. See also *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 856–57 (1986), in which the Court considered whether the ability of an agency to decide state-law counterclaims violated Article III. In its decision, the Court distinguished *Bowsher* (decided the same day as *Schor*): "Unlike *Bowsher*, this

But the Court has considered more than just whether Congress usurped the President's removal power. The Court had increasingly, but hesitantly, turned to the language of the relevant tenure-protection provision to consider how Congress diluted or usurped the removal power. At first, the Court all but ignored the language of the tenure-protection provision. In *Humphrey's Executor* in 1935, aside from noting the text of the tenure-protection provision and determining that it was intended to "limit the executive power of removal to the causes enumerated," the Court did not seek to define the removal provisions.[48]

By 1986, however, the *Bowsher* Court briefly considered the language of the relevant tenure-protection provision when it held that Congress impermissibly interfered with the President's removal power of the Comptroller General. That provision permitted removal by a congressional joint resolution if the Comptroller General suffered from: "(i) permanent disability; (ii) inefficiency; (iii) neglect of duty; (iv) malfeasance; or (v) a felony or conduct involving moral turpitude."[49] The Court stated that the provision's "terms are very broad and, as interpreted by Congress, could sustain removal of a Comptroller General for any number of actual or perceived transgressions of the legislative will."[50] The breadth of the grounds for removal (similar to the grounds in *Humphrey's Executor*) appeared to reinforce the Court's determination that Congress had retained too much control over the Comptroller General.[51]

Likewise, two years later, the Court in *Morrison* briefly considered the nature of the "good cause" provision that limited removal of the independent counsel. But, as in *Bowsher*, the Court failed to explain the contours of the phrase or indicate what role, if any, the provision's language played in the Court's analysis, other than to indicate that the "good cause" standard did not "completely strip[ ]" the President of his power to remove executive officers.[52] In fact, the Court stated that

case raises no question of the aggrandizement of congressional power at the expense of a coordinate branch." *Id.* at 856.

48 Humphrey's Ex'r v. United States, 295 U.S. 602, 626 (1935). The Court in *Myers* had no reason to consider the language of a tenure-protection provision. Later, in *Wiener v. United States*, 357 U.S. 349, 356 (1958), the Court held that the President could not simply remove a War Crimes Commissioner and replace him with a person of the President's choosing. But the Court did not otherwise indicate what standard did, and could, govern the President's removal power.

49 31 U.S.C. § 703(e)(1)B (2006).

50 *Bowsher*, 478 U.S. at 729.

51 *Id.* at 730–31.

52 *Morrison*, 487 U.S. at 692. Justice Scalia, however, obliquely suggested in dissent that a "for cause" removal limitation of inferior officers permitted removal for

it "need not decide in this case exactly what is encompassed within the term 'good cause' under the Act," suggesting that the meaning of "good cause" may be significant in subsequent removal-power litigation.[53] As discussed below, *FEF* is that subsequent litigation that renders the tenure-protection provision's text central to the Court's removal-power jurisprudence.

II. *FREE ENTERPRISE FUND* AND ITS POSSIBLE IMPACT

FEF reveals the Court's altered understanding and analysis of the President's removal power. First, the Court appeared to endorse a unitary executive theory of sorts, without significantly changing the nature of the President's power. Second, the Court created an unwieldy functional/formal analysis. And third, the Court indicated that Congress's dilution of the executive's removal power is as dangerous as usurpation of that power—especially in light of the "unusually high standard" for the removal of PCAOB members.

A. The Court's Decision

Enacted in 2002, the Sarbanes-Oxley Act[54] responded to numerous corporate accounting scandals by, among other things, establishing "a board to oversee firms providing auditing services to public companies . . . ."[55] This board, the PCAOB, had what the Court referred to as "expansive powers to govern an entire industry."[56] The SEC appoints five Board members for staggered, five-year terms.[57] Subject to judicial review,[58] the SEC could remove the Board members after a formal hearing if a member:

> (A) has willfully violated any provision of this Act, the rules of the Board, or the securities laws;

insubordination and thus was permissible. *See id.* at 724 n.4 (Scalia, J., dissenting). Besides failing to resolve the meaning of "good cause," *Morrison* also left unresolved who qualifies as an executive "officer" and the nature and extent of the "strip[ping]" permitted. *See* Brown, *supra* note 40, at 99–100. R

53 *Morrison*, 487 U.S. at 692; *see, e.g.*, Lessig & Sunstein, *supra* note 22, at 110–11; R John F. Manning, *The Independent Counsel Statute: Reading "Good Cause" in Light of Article II*, 83 MINN. L. REV. 1285, 1288–90 (1999); Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 86–87.

54 Pub. L. No. 107-204, 116 Stat. 745 (2002).

55 Niels Schaumann, *The Sarbanes-Oxley Act: A Bird's-Eye View*, 30 WM. MITCHELL L. REV. 1315, 1317 (2004).

56 Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3147 (2010).

57 *Id.*

58 *Id.* at 3148.

> (B) has willfully abused the authority of that member; or
>
> (C) without reasonable justification or excuse, has failed to enforce compliance with any such provision or rule, or any professional standard by any registered public accounting firm or any associated person thereof.[59]

The parties agreed (and the Court decided the case with the understanding) that the SEC Commissioners could not be removed by the President except for "inefficiency, neglect of duty, or malfeasance in office."[60] The D.C. Circuit upheld the tenure-protection provision in a 2-1 decision.[61]

The Supreme Court reversed in a 5-4 decision and held that "the dual for-cause limitations on the removal of Board members contravene the Constitution's separation of powers."[62] The Court, relying upon *Myers*, first established that the President retained the right to remove officers under the Constitution.[63] The Court then determined that SOX limited the President's removal power in a manner which the Court had never upheld.[64] SOX limited the removal of the Board members and placed the decision of whether removal was justified in the SEC commissioners, "none of whom is subject to the President's direct control."[65] The Court determined that "[t]he added layer of tenure protection [i.e., the protection for the SEC and the

59 15 U.S.C. § 7217(d)(3) (2006). This removal standard was based upon a similar standard in the Securities Exchange Act of 1934, as amended, that permits self-regulatory stock exchanges to remove any officer or director of those exchanges for having "willfully violated any provision of this chapter, the rules or regulations thereunder, or the rules of such self-regulatory organization, willfully abused his authority, or without reasonable justification or excuse has failed to enforce compliance [with certain enumerated matters] . . . ." 15 U.S.C. § 78s(h)(4) (2006).

60 *Free Enter. Fund*, 130 S. Ct. at 3148–49. Professor Gary Lawson thoughtfully considers the propriety of the Court's acceptance of the parties' agreement as to the SEC's independence. *See* Gary Lawson, *Stipulating the Law*, 109 MICH. L. REV. 1191 (2011).

61 Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667, 669 (D.C. Cir. 2008), *rev'd*, 130 S. Ct. 3138 (2010); *id.* at 686–87 (Kavanaugh, J., dissenting). The plaintiffs also argued that the manner in which the Board members were appointed violated the Appointments Clause in various ways. *Id.* at 676–78 (majority opinion). This Article does not address the Appointments Clause issues that the Supreme Court's decision raises. Interested readers should see Kent Barnett, *The Consumer Financial Protection Bureau's Appointment with Trouble*, 60 AM. U. L. REV. 1459 (2011).

62 *Free Enter. Fund*, 130 S. Ct. at 3151.

63 *Id.* at 3152–53.

64 *Id.* at 3153.

65 *Id.*

protection for the Board] makes a difference."[66] Because the SEC could not control the Board, the President could not hold the SEC accountable for the Board's decisions to the same extent that he could hold the SEC to account for other decisions.[67]

The Court was troubled that there appeared no logical stopping point to Congress providing additional tiers of tenure protection because those protections diffuse power and accountability.[68] "[T]he Framers sought to ensure that 'those who are employed in the execution of the law . . . will depend, as they ought, on the President . . . .'"[69] Although the Court did not doubt "Congress's power to create a vast and varied federal bureaucracy,"[70] Congress was required to preserve sufficient presidential oversight.[71]

The Court next turned to the text of the tenure-protection provision that limited the SEC's discretion. The government had argued that the SEC's removal power was broad and could be construed more broadly, if necessary, to avoid invalidation of the statute.[72] Yet, the Court noted that the government did not contend that disagreement with the Board members' policies would permit the SEC to remove them.[73] After all, *Humphrey's Executor* indicated that such provisions were intended to provide independence, and the availability of judicial review indicated that the SEC could not decide for itself the meaning of the removal provisions.[74] Indeed, the Court noted that "this case presents an even more serious threat to executive control than an 'ordinary' dual for-cause standard. Congress enacted an unusually high standard [for the removal of Board members] . . . ."[75]

66 *Id.*

67 *Id.* at 3154.

68 *Id.* at 3155 (quoting THE FEDERALIST No. 70, at 476 (Alexander Hamilton) (J. Cooke ed., 1961)).

69 *Id.* (quoting 1 ANNALS OF CONG. 499 (1789) (statement of Rep. James Madison)). *But cf.* Lessig & Sunstien, *supra* note 22, at 40–41 (arguing that the Founders distinguished between two kinds of power that are now commonly referred to collectively as executive: the executive (i.e., political) and the administrative powers). R

70 *Free Enter. Fund*, 130 S. Ct. at 3155.

71 *Id.* at 3156.

72 *Id.* at 3157.

73 *Id.*

74 *Id.* at 3158. The Court's refusal to permit the government to interpret the tenure-protection provision broadly is reminiscent of the Court's refusal to permit agencies to interpret their delegated quasi-legislative powers narrowly to avoid invalidation of those powers under the nondelegation doctrine. *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 473 (2001).

75 *Free Enter. Fund*, 130 S. Ct. at 3158.

Finally, the Court rebuffed arguments that its opinion would put other agency schemes and officers—protected by tiered-tenure-protection provisions—in jeopardy. It held that its opinion did not consider these other scenarios.[76] The Court severed the tenure-protection provision protecting the Board members and otherwise permitted the Board to continue its functions under SOX.[77]

B. The Dissenters' Alarm

Despite the Court's protest that its decision was of limited import, the four dissenting justices—in an opinion by Justice Breyer—predicted the invalidation of removal-power limitations and statutory schemes. Justice Breyer noted the Court's ambivalence as to whether it invalidated all multi-tiered tenure-protection provisions or narrowly limited its holding to the "rigorous" standard at issue.[78] He pointed to similarly situated officers and boards throughout the federal administrative state. For instance, he identified four boards or officers protected within a cocoon of two tiers of tenure protections.[79] His opinion also identified 573 career-appointee officers (in the Senior Executive Service, not a part of the competitive service), the civil service, 1500 ALJs, and 210,000 commissioned military officers as being protected by two tiers of tenure protections.[80] As the dissenters saw it: "To interpret the Court's decision as applicable only in a few circumstances will make the rule less harmful but arbitrary. To interpret the rule more broadly will make the rule more rational, but destructive."[81]

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76 *Id.* at 3159–61.

77 *Id.* at 3161–62.

78 *Id.* at 3177–78 (Breyer, J., dissenting); *see also id.* at 3154 (majority opinion) ("Neither the President, nor anyone directly responsible to him, *nor even an officer whose conduct he may review only for good cause*, has full control over the Board.") (emphasis added).

79 Appendix A at 3184–85, *id.* (Breyer, J., dissenting).

80 *Id.* at 3192–3218.

81 *Id.* at 3182. Justice Breyer's warning probably went largely unnoticed or unappreciated by the public and scholars for two reasons. *See* Rao, *supra* note 14, at 2548–49. First, *Free Enterprise Fund* did not dismantle the PCAOB, as some had hoped or feared. *See id.* at 2548. Second, the Court decided *Free Enterprise Fund* on the same day as other controversial, highly publicized cases—*Christian Legal Society Chapter of University of California, Hastings College of Law v. Martinez*, 130 S. Ct. 2971, 2971 (2010) (upholding university's "all-comers" policy for student groups) and *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3020 (2010) (incorporating Second Amendment right to keep and bear arms into Fourteenth Amendment). *See 2009 Term Opinions of the Court*, SUP. CT. U.S., http://www.supremecourt.gov/opinions/slipopinions.aspx?Term=09 (last visited Mar. 19, 2012). R

C. The Court's Treatment of the Three Removal-Power Themes

Before turning to the solution for Justice Breyer's dilemma, the reader should consider the Court's treatment of the unitary executive, functionalism, and the manner in which Congress limits the President's removal power. Examining these three issues—and thus the Court's current understanding of the President's removal power—permits one to propose how the courts should resolve other challenges to tiered-tenure protections and how the Court can refocus its analysis without undermining its past holdings.

1. The Unitary Executive

The Court has plainly, if not expressly, readopted the unitary executive rhetoric propounded in *Myers*. Yet, it is difficult to see how the Court's decision ultimately validates the unitary executive model. The Court accepted past precedents—including *Morrison* and *Humphrey's Executor*—that appeared to reject the unitary executive. Without overruling these decisions and instilling all removal power in the President, the Court has lauded the unitary executive model while gutting it of its commonly understood meaning. Nevertheless, the Court's shift in rhetoric affects how the Court discusses and thinks about the presidential removal power.

In the opening section of its decision, the Court issued a condensed version of *Myers*. The Court turned to the Vesting Clause of Article II, statements from the Founders, and the Decision of 1789.[82] *Myers*, after wandering the desert for more than eighty years, was no longer a decision to be distinguished, but instead was described as a "landmark case" that "reaffirmed the principle that Article II confers on the President 'the general administrative control of those executing the laws.'"[83] If the Court was too oblique in demonstrating its approval of the unitary executive theory, it stated in the next sentence that "[i]t is *his* [the President's] responsibility to take care that the laws be faithfully executed."[84] Strikingly, after praising *Myers*, the Court discussed *Humphrey's Executor* without noting that *Humphrey's Executor* had significantly narrowed the President's inherent constitutional power to discharge officers and disapproved of *Myers*'s under-

82 *Free Enter. Fund*, 130 S. Ct. at 3151–52. The "Decision of 1789" is jargon for the debate and decision of the First Congress that the President had inherent constitutional authority to remove some or all executive officers. *See* Prakash, *supra* note 22, at 1022–23. R

83 *Free Enter. Fund*, 130 S. Ct. at 3152.

84 *Id.*

standing of the President's removal power.[85] Likewise, when discussing *Morrison*, the Court neglected to mention the Court's rejection of the unitary executive theory and its explanation of how *United States v. Perkins*[86]—a decision in which the Court upheld tenure protections for inferior officers performing executive functions whom department heads had appointed—had sapped the theory's vitality.[87]

In its paean to the unitary executive, the Court focused on one of the theory's underlying tenets: unified power permits unified accountability.[88] The Court relied upon James Madison's statement that all officers executing the laws must rest within the "chain of dependence" on the President.[89] Because the Executive Branch "touches almost every aspect of daily life," the President must be able to control the functionaries below him so that the people rule the functionaries, not vice versa.[90] Agency independence was moved from the spotlight to become merely the backup singer to presidential accountability.[91]

Nevertheless, the Court's acceptance of a strong unitary executive and presidential accountability appears only rhetorical. The Court's holding did little to fuse the fragmented Executive Branch. The Court did not overrule *Humphrey's Executor*. The Court did not overrule *Morrison*. Indeed, the Court did not even limit these decisions. The Executive Branch is still hampered by limitations in removing principal and inferior officers—whether or not performing executive functions.

Equally as important, the executive power that the Court granted the President only highlights how much power still eludes him or her. The only impediment that the second tier of tenure protection created was that the President could not hold the SEC accountable to the same degree for all actions. That is, a tenure-protection provision limited the SEC's discretion to remove Board members, but not the SEC's other decisions.[92] But, of course, the implied limitations on the Commissioners' removal for only "inefficiency, neglect of duty, or malfeasance in office" already substantially curtailed the President's

85 *Id.*

86 116 U.S. 483 (1886).

87 *Free Enter. Fund*, 130 S. Ct. at 3153.

88 *Id.* at 3155, 3157.

89 *Id.* at 3155 (quoting 1 ANNALS OF CONG. 499 (1789)).

90 *Id.* at 3156.

91 *Id.* at 3156–57 (dismissing argument that Congress had created a workable solution to ensure agency independence).

92 *Id.* at 3154.

power over the SEC's policy choices.[93] In light of the Commissioners' tenure protection (and their other supervisory powers over the Board), the SEC's limited ability to remove Board members presents only an infinitesimal slight to the presidential prerogative.[94] But the Court, even if only attempting to establish an outer boundary on Congress's ability to limit the President's removal power, does not sufficiently explain why Congress went too far.

FEF, accordingly, permits the unitary executive to thrive in rhetoric but wilt in substance. Despite its praise for *Myers*, the Court did not address the problems with accepting the unitary executive model. The other branches of government, as well as the lower courts, still do not know why Congress can limit the President's power over employees and certain officers without damage to the unitary model. Likewise, they do not know the contours of Congress's power to limit the President's authority over these officers. Without addressing or acknowledging these questions and without overruling precedent that severely weakens the unitary executive, *FEF* renders it difficult for the unitary executive theory to provide a substantive foundation for future litigation.

This is not to say that the unitary executive theory's reawakening in *FEF* is meaningless. Its renaissance has altered the Court's functional analysis, as applied in *Morrison*, and altered how the Court conceptualizes the removal power. The Court now asks whether impairing the President's power to remove subordinates will significantly hinder not the central functions of the Executive Branch, but the supervisory power and responsibilities of the President.[95] In other

93 *See id.* Accordingly, the Court's statement that "[t]he President is stripped of the power our precedents have preserved, and his ability to execute the laws—by holding his subordinates accountable for their conduct—is impaired" seems to ignore the obvious. *Id.* *Humphrey*'s *Executor*, *Wiener*, and *Morrison* are the precedents that expressly impair the President's power to hold his subordinates fully accountable for their conduct. Referring to these decisions as those that "preserved" the President's power "is somewhat like referring to shackles as an effective means of locomotion." Morrison v. Olson, 487 U.S. 654, 706 (1988) (Scalia, J., dissenting) (criticizing the majority's reference to tenure-protection provisions as granting the President or supervising officers control over other officers).

94 *Free Enter. Fund*, 130 S. Ct. at 3170–72 (Breyer, J., dissenting).

95 *Compare* Morrison v. Olson, 487 U.S. 654, 692 (1988) ("We do not think that this limitation as it presently stands sufficiently deprives the President of control over the independent counsel to interfere impermissibly with his constitutional obligation to ensure the faithful execution of the laws."), *with Free Enter. Fund*, 130 S. Ct. at 3154 ("The President is stripped of the power our precedents have preserved, and his ability to execute the laws—by holding his subordinates accountable for their conduct—is impaired.").

words, the inquiry is focused on a specific power (supervision) and a specific person (the President), not the general executive power (central functions) or the entire Executive Branch. The nature or extent of the President's inherent power has not changed significantly, if it has changed at all. But the Court's manner of discussing and analyzing it has.

2. Functionalism

The Court's treatment of functionalism in *FEF* is as unsettling as its treatment of the unitary executive. The Court essentially applied both the *Humphrey's Executor* and *Morrison* functional analyses and added a dollop of formalism for good measure. By employing two functional approaches and a formal one, the Court has, in essence, turned to a totality of the circumstances test, providing even less certainty than before.

The Court's rationale may at first blush appear somewhat consistent with *Morrison*. As in *Morrison*, the Court's rationale looked to the effect of the tenure-protection provisions on the President's powers: the tiered protections prevented the President from holding the SEC responsible for the actions of the Board to the same, very limited extent that he could for other functions.[96] But, notably, the Court did not say that the ability of the President to hold the SEC accountable to the same limited extent for all of its responsibilities is central to the functioning of the Presidency. Indeed, such a statement would seem risible in light of the Court's holding that the independent prosecutor's powers to stir up trouble within the Executive Branch did not upset the Executive Branch's central functions. Instead, the Court focuses on the President's supervisory powers, not the overall functioning of the Executive Branch.[97] The Court, therefore, employs *Morrison*'s functional method without *Morrison*'s standard.

The Court also considers, to a limited extent, the Board's "executive power,"[98] a determination that is key to pre-*Morrison* decisions and consistent with *Morrison* itself. Likewise, the Court appeared to distinguish the Board's "executive" functions from officers who "perform adjudicative rather than enforcement or policymaking func-

96 *Free Enter. Fund*, 130 S. Ct. at 3154.

97 *See supra* Part II.C.1. But, in the Court's defense, *Morrison*—by refusing to define "good cause"—failed to explain how the "good cause" restriction on the independent counsel's tenure failed to impede the central functions of the President. *See Morrison*, 487 U.S. at 693, 696.

98 *Free Enter. Fund*, 130 S. Ct. at 3155, 3164.

tions."[99] Yet, its consideration differs from the functional analysis in *Morrison*'s predecessors because it focuses on the impact of those functions on those outside the Executive Branch.[100] To the Court, the Board was "the regulator of first resort and the primary law enforcement authority for a vital sector of [the] economy."[101] The Court is no longer focused on only identifying the functions of the Board or their effect on the President. Instead, the Court looks to how broadly those functions affect parties outside of the Executive Branch, such as the accounting industry. This shift does not explain how an officer's power over third parties will affect future decisions and thus only creates more confusion as to the Court's functional analysis.[102]

Besides having a complex functional analysis, the Court also signaled a return to a formal approach when considering tiered-tenure provisions. The Court appeared hostile, at times, to the idea of more than one tier of tenure protection—no matter how those tiers, in combination, affected the President's power.[103] This "elementary arithmetical logic,"[104] as Justice Breyer referred to it, could have provided some certainty, even if the Court's drawn line seemed somewhat arbitrary.[105] But the Court did not say whether all or only some tiered-tenure protections unconstitutionally limited the President's removal power or whether only one tier of tenure protection was constitutional. Thus, the Court's foray into formalism only renders its functional/formal analysis murkier still.

This altered functional/formal analysis would perhaps not be noteworthy in the absence of the unitary executive's rhetorical renaissance. But the Court's functional and formal approaches are often in tension with the unitary executive theory. For instance, the Court appears to have returned to the functional approach of *Humphrey's Executor*, without acknowledging *Morrison*'s realization that the executive power includes executive, judicial, and legislative functions.[106]

99 *Id.* at 3160 n.10. Justice Breyer noted that the Court ignored the Board's adjudicative powers. *Id.* at 3173–74 (Breyer, J., dissenting).

100 *Id.* at 3147–48, 3159, 3161 (majority opinion).

101 *Id.* at 3161.

102 *See* Miller, *supra* note 53, at 73 (rejecting justification of agency independence based on an agency's complete regulation of an industry because "all of the great executive departments carry out comprehensive regulatory programs for particular industries or segments of the economy"). R

103 *See Free Enter. Fund*, 130 S. Ct. at 3152, 3156.

104 *Id.* at 3176 (Breyer, J., dissenting).

105 The Court refers to no authority to suggest why two tiers, as opposed to multiple tiers, are unconstitutional. Its line seems arbitrary, but this may have been forgivable had the Court's standard otherwise provided some certainty.

106 Morrison v. Olson, 487 U.S. 654, 689 n.28 (1988).

Indeed, the Court suggests that the President need not have the full power to administer through adjudication.[107] Yet, adjudication is an important vehicle through which agencies, and therefore the President, make policy.[108] And the Court indicates in *FEF* that policymaking *is* an executive function, presumably over which the President must be able to exercise sufficient control.[109] Similarly, the Court's formal approach of counting tiers continues to permit substantial interference with the President's supervisory powers because one tier of significant tenure protection over heads of independent agencies is acceptable.

By looking everywhere, the Court's multifaceted functional/formal analysis focuses on nothing. This analysis not only leads to uncertain outcomes but also undermines the renewed unitary executive that the Court has just propounded. Without any certain analysis or guideposts, the Court, perhaps unintentionally, could be understood to have adopted *sub rosa* a totality of the circumstances test. Whether the altered *Morrison* standard is met is all but unknowable in future cases. This is not to say that functional/formal analysis cannot be helpful in certain cases.[110] But the method's indeterminate results suggest that it should not be the Court's primary analytical method.

3. How Congress Limits the President's Removal Power

The *FEF* Court's consideration of how Congress limited the President's supervisory power is especially significant and provides the key for making sense of *FEF*. The Court for the first time, without expressly acknowledging it, invalidated a restriction on the President's removal power when Congress had not sought to participate in the removal decision.[111] This decision makes clear that Congress cannot avoid the invalidation of tenure-protection provisions merely by diluting, as opposed to usurping, the President's removal power. The Court's opinion suggests, yet does not hold, that the key to ascertain-

107 *Free Enter. Fund*, 130 S. Ct. at 3160 n.10.

108 SEC v. Chenery Corp., 332 U.S. 194, 202–03 (1947).

109 *Free Enter. Fund*, 130 S. Ct. at 3160 n.10.

110 For example, the function of certain principal officers, such as the Secretary of State, may be highly relevant in determining whether the President has full removal power. *See* Lessig & Sunstein, *supra* note 22, at 30. Similarly, the power of certain officers over third parties, such as the power of an ALJ over litigants, may be highly relevant to determining whether the President has limited power to remove certain officers. *See infra* Part IV.B–C. R

111 *See Free Enter. Fund*, 130 S. Ct. at 3167 (Breyer, J., dissenting) (citing *Morrison*, 487 U.S. at 686).

ing whether Congress's dilution goes too far rests within the text of the tenure-protection at issue.

The Court gave its most extended consideration of a tenure-protection provision's text in *FEF*. In response to the government's position that the tenure-protection provision concerning the Board could be read broadly, the Court determined that the "willful" removal provision for the Board and the implied *Humphrey's Executor* provision for the SEC did not permit the removal of either Board members or the SEC Commissioners for disagreements as to policy or administration of the relevant law.[112] Congress intended to provide the Board and the SEC independence from the President.[113] The Court also noted that the removal of a Board member was subject to judicial review, thereby appropriating the SEC's putative power to provide a more limited interpretation of the willful removal standard.[114] In other words, according to the Court, "[t]he removal restrictions set forth in the statute mean what they say."[115]

Although the Court had perhaps resolved some debate over the breadth of the *Humphrey's Executor* standard,[116] the Court's consideration of the "willful" removal provisions protecting the Board are more important for future challenges because it provides a method for understanding how to apply *FEF* to future cases. The Court noted that "this case presents an even more serious threat to executive control than an 'ordinary' dual for-cause standard. Congress enacted an unusually high standard that must be met before Board members may be removed."[117] The Court then turned to the specific provisions of the removal limitation, noting that it permitted removal for only "willful violations" of the statute to be enforced, "willful abuse of authority," or an "unreasonable failure to enforce compliance . . . ."[118] And removal for these violations was permitted only after a formal adjudication.[119] The Court found it troubling that the SEC could not remove a Board member who violated laws not relevant to the Board's

112 *Id.* at 3157–58 (majority opinion).

113 *Id.*

114 *Id.* at 3158.

115 *Id.*

116 *See* Lessig & Sunstein, *supra* note 22, at 110–11; *see also* Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 166 (1994) (discussing Justice Stevens's opinion in *Bowsher* and noting a similarity with the Court's opinion in *Humphrey's Executor*). R

117 *Free Enter. Fund*, 130 S. Ct. at 3158.

118 *Id.*

119 *Id.*

power, such as one that indicates dishonesty.[120] In determining that the "willful" removal standard was "rigorous," the Court rejected the government's argument that the statute could be construed to permit the removal of Board members for a reason other than those expressly listed in the statute.[121] For the first time in its removal-power jurisprudence, the Court had expressly considered the language of a removal provision, rejected the argument that other grounds would permit removal, indicated its alarm at the narrow grounds upon which removal was permitted, and perhaps indicated that its decision was tied to the nature of the limitation.

Despite the Court's brief interpretation of tenure-protection provisions, the Court has not resolved the meanings of commonly used tenure-protection provisions[122] that have troubled academic commentators for decades.[123] The Court's increasing, yet inchoate, appreciation for the text of the tenure-protection provision may hold the key for subsequent removal-power challenges.

III. Different Tenure-Protection Provisions and Their Effects

Given the Court's refusal to define the reach of its decision, Justice Breyer's fears are understandable. But he may have overstated the destruction to the independent administrative state. His opinion creates a false dichotomy: the Court's opinion must either be broad, fair, and destructive, or narrow, arbitrary, and meaningless.[124] His dissent, as a rhetorical device, assumes the former alternative to empha-

120 *Id.* This quandary over how to remove an officer convicted of a felony may be more theoretical than real. *See* Saikrishna Prakash, *Removal and Tenure in Office*, 92 Va. L. Rev. 1779, 1796 n.59 (2006) ("[D]ozens of provisions in the U.S. Code . . . provide for the removal of officers upon conviction for some offense, or disqualify them from holding federal office.").

121 *Free Enter. Fund*, 130 S. Ct. at 3158, 3158 n.7. The Court, however, had previously permitted the President to remove an official on a ground not expressly listed in a tenure-protection provision. *See* Shurtleff v. United States, 189 U.S. 311, 315–16 (1903).

122 *Free Enter. Fund*, 130 S. Ct. at 3170 (Breyer, J., dissenting) (citing Harold H. Bruff, *Bringing the Independent Agencies in from the Cold*, 62 Vand. L. Rev. En Banc 63, 68 (2009)); Lessig & Sunstein, *supra* note 22, at 110–12. R

123 *See, e.g.*, William K. Kelley, *The Constitutional Dilemma of Litigation Under the Independent Counsel System*, 83 Minn. L. Rev. 1197, 1222 n.117 (1999); Lessig & Sunstein, *supra* note 22, at 110–11; Manning, *supra* note 53, at 1288–90; Miller, *supra* note 53, at 86–87. R

124 *Free Enter. Fund*, 130 S. Ct. at 3182 (Breyer, J., dissenting).

size the potential impact of the Court's opinion.[125] All "for-cause" limitations are treated the same.[126] But he fails to consider sufficiently how the Court's opinion can be narrowed in a rational way that does minimal damage to the administrative state.

To that end, this Article suggests that courts distinguish the tenure protections that Congress typically provides. The Court has appeared to have modified *Morrison*'s standard (if not overruled *sub silentio Morrison* altogether) by asking whether the tenure protection at issue impermissibly affects the President's supervisory powers.[127] But deciding this issue requires more than simply counting the tiers as the Court's opinion, at times, suggests. Instead, it is the nature of the tenure-protection provision—whether strong, intermediate, or weak—that matters.

If the combination of tenure protections permits the first-tier officers (e.g., the SEC) to have the second-tier officers (e.g., the Board) implement the first-tier officers' policy choices, the President can hold first-tier officers accountable for all decisions equally. Such a scenario does not impermissibly affect the President's supervisory powers under the Court's precedent. Evaluating the effect of tenure-protection combinations provides a rational manner by which to limit *FEF* and prevent unnecessary upheaval to the administrative state. Moreover, this proposed analytical method (1) rests comfortably with the Court's unitary executive rhetoric and modified *Morrison* standard, (2) permits the Court to demote functionalism's unwieldy primacy in removal-power jurisprudence, and (3) accepts and promotes the Court's increased interest in the actual text of the relevant tenure-protection provisions.

A. The Different Tenure-Protection Provisions

At least three prominent scholars suggested after *Morrison* and before *FEF* that courts read "good cause" limitations to permit more presidential oversight.[128] They argued that such an interpretation would either permit a more robust executive power[129] or avoid diffi-

125 Justice Breyer's numerous references to other justices' opinions suggest that he was attempting to persuade one or two justices to join his cause by organizing a parade of horribles. *See, e.g.*, *id.* at 3176, 3179, 3182.

126 Appendices A–C at 3184–3214, *id.*

127 *See supra* Part II.C.1.

128 *See, e.g.*, Lessig & Sunstein, *supra* note 22, at 110–11; Manning, *supra* note 53, at 1289; *see also* Miller, *supra* note 53, at 86–87 (arguing, prior to *Morrison*, that removal standards be read to permit removal for failure to follow a President's directive). R R

129 *See, e.g.*, Lessig & Sunstein, *supra* note 22, at 110–11. R

cult constitutional questions.[130] In light of the wide berth that the Court has given Congress to limit the President's removal power, their arguments were intriguing but perhaps merely theoretical. After *FEF*, however, their arguments may serve as the basis for avoiding unnecessary litigation over the independence of agency officers by contrasting the language of the relevant tenure protections.

Removal restrictions run the gamut from vague to detailed, but three prototypes emerge: those that provide weak, intermediate, and strong tenure protection. Congress's use of different prototypes suggests that Congress sought different standards to apply to different officers. Those standards, in turn, may indicate not only the transgressions that warrant removal but also the removing party's discretion. The weaker the standard, the less specific the grounds for removal are and the more room the President has to interpret the standard and thus control the officer.[131] Similarly, the stronger the standard, the more specific the grounds for removal are and the less discretion the President has to interpret the standard broadly.

1. Weak Tenure Protection

The most prevalent weak provision precludes removal absent "good cause" or "cause." Congress has applied this limitation to the removal of numerous officers, including members of the Federal Reverse Board,[132] the members of the Postal Regulatory Commission,[133] members of the United States Sentencing Commission,[134] the Director of the National Appeals Division of the Department of Agriculture,[135] members of the Civilian Board of Contract Appeals under

130 *See, e.g.*, Manning, *supra* note 53, at 1288–90. R

131 It is possible that Congress could have intended each of these prototypes' meanings to change depending on the identity of the removed officer. *See* Lessig & Sunstein, *supra* note 22, at 112; Manning, *supra* note 53, at 1298–99. Indeed, the R Supreme Court's rule of interpreting the same language similarly in the *same* statute may indicate a willingness to interpret the same language differently when found in *different* statutes. *Cf.* Sullivan v. Stroop, 496 U.S. 478, 485 (1990) (allowing different definitions of the term "child support" to be used in different statutory schemes). But it is more likely, in this author's view, that Congress intended the same language to have identical meaning whenever used to limit an officer's removal. When employed in this manner, the words all share the same function and thus share the same context. It is the difference between the language—not any purported difference in the officers or employees—that indicates the type of protections that Congress afforded the officer.

132 12 U.S.C. § 242 (2006).

133 39 U.S.C. § 502(a) (2006).

134 28 U.S.C. § 991(a) (2006).

135 7 U.S.C. § 6992(b)(1)–(2) (2006).

the General Services Administration,[136] the governors of the Postal Service,[137] the Inspector General of the Postal Service,[138] the Chief Actuary of the Social Security Administration,[139] and almost all of the competitive civil service, including ALJs.[140]

This standard is weak in two ways. First, the standard's very indefiniteness likely provides the removing party discretion to define what constitutes "good cause," despite judicial review.[141] Second, aside from its vagueness, the "good cause" standard is also weakened by the accepted understanding that insubordination, i.e., the failure to follow a supervisor's directive on a discretionary matter, constitutes "good cause" for removal. The Supreme Court, individual justices, and lower courts have endorsed this understanding of "good cause" in other employment contexts.[142] And, perhaps more strikingly, insubordination has long been a ground on which the Merit Systems Protection Board and the Federal Circuit have permitted "for cause"

136 41 U.S.C. § 438(b)(2) (2006) (permitting "removal in the same manner as administrative law judges," who may be removed for "good cause established and determined by the Merit Systems Protection Board," *see* 5 U.S.C. § 7521(a)–(b) (2006)).

137 39 U.S.C. § 202.

138 39 U.S.C. § 202(e)(3).

139 42 U.S.C. § 902(c)(1) (2006).

140 5 U.S.C. §§ 7513(a), 7521(a)–(b).

141 *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984); *see also* Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 884 (1930) ("[Congress] can not indulge itself in using large, round, sonorous words and then complain that courts do not treat them as precise, definite, and unreverberant.").

142 *See* NLRB v. Local Union No. 1229, 346 U.S. 464, 475 (1953) ("The legal principle that insubordination, disobedience or disloyalty is adequate cause for discharge is plain enough."); *id.* at 474 ("The courts have refused to reinstate employees discharged for 'cause' consisting of insubordination, disobedience or disloyalty."). A plurality of the Court has indicated that "good cause" exists when an inferior is insubordinate. *See* Elrod v. Burns, 427 U.S. 347, 366 (1976) (plurality opinion). Moreover, Justice Scalia, when dissenting in *Morrison*, noted that "for cause" removal permits the firing of an inferior officer who refuses to follow supervision. Morrison v. Olson, 487 U.S. 654, 724 n.4 (1988) (Scalia, J., dissenting). The Federal Circuit and the Court of Claims have also endorsed this understanding. *See* Nagel v. Dep't of Health & Human Servs., 707 F.2d 1384, 1387 (Fed. Cir. 1983) (quoting Boyle v. United States, 515 F.2d 1397, 1402 (Ct. Cl. 1975)); *see also* May v. U.S. Civil Serv. Comm'n, 230 F. Supp. 659, 661 (W.D. La. 1963) ("Insubordination in itself is cause sufficient to justify discharge."); 82 AM. JUR. 2D *Wrongful Discharge* § 183 (2010) ("Employees are expected to conform to reasonable standards of work performance and behavior to maintain their employment, and a dismissal for misconduct such as insubordination may be treated as good cause for dismissal."). The Court, however, has never defined "good cause" as part of a removal provision concerning a federal officer. *See* Lessig & Sunstein, *supra* note 22, at 110. R

removals under federal civil service laws.[143] Accordingly, federal law uniformly provides that insubordination is a suitable ground for good-cause removal.[144]

143 *See, e.g.*, Bassett v. Dep't of the Navy, 34 M.S.P.R. 66, 69 (M.S.P.B. 1987); Huntley v. Veterans Admin., 18 M.S.P.R. 71, 74 (M.S.P.B. 1983); McPartland v. Dep't of Transp., FAA, 14 M.S.P.R. 506, 511 (M.S.P.B. 1983), *aff'd*, 795 F.2d 1017 (Fed. Cir. 1986); Thompson v. U.S. Postal Serv., 50 M.S.P.R. 41, 46 (M.S.P.B. 1991).

144 Professor Manning correctly points out that for insubordination to be a legitimate basis for removal, one must first presume that the superior officer had the authority to issue the disobeyed order. The weak tenure-protection provision alone does not identify the kinds of directives that the removing party can issue. *See* Manning, *supra* note 53, at 1298 n.46. But I propose that comparing the tenure-protection prototypes suggests that Congress intended to bestow discretionary, policymaking authority to the superior officer. By permitting termination for insubordination, the weak tenure-protection provision plainly permits the superior officer to issue directives of some nature, whereas the intermediate and strong prototypes do not. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3157–58 (2010) (construing the intermediate prototype applicable in *Humphrey's Executor* as precluding removal based on a lack of agreement "on either the policies or the administering of the Federal Trade Commission") (quoting Humphrey's Ex'r v. United States, 295 U.S. 602, 619 (1935)). Permitting a superior officer to issue directives concerning discretionary policy decisions within the protected officer's purview offers a sound basis for distinguishing the prototypes and provides a basis for a subordinate officer to choose to become insubordinate. After all, because all federal officers lack the ability to ignore ministerial duties, permitting superior officers to issue orders concerning only ministerial duties would create a meaningless distinction and bestow a trivial power upon the superior officer. *See* Kendall v. United States *ex rel.* Stokes, 37 U.S. (12 Pet.) 524, 613 (1838); Marbury v. Madison, 5 U.S. (1 Cranch.) 137, 158 (1803); *see also* Miller, *supra* note 53, at 59 n.65 (noting that *Kendall* is often misread to permit Congress to exclude the President's participation altogether in a decision committed to the head of an agency). R R

Interpreting the weak limitation to permit the removing party to issue these directives accomplishes three things. First, it provides the inherent "weakness" of the weak provision by limiting the powers of the subordinate officer and, conversely, provides the strength to the other two prototypes. Second, by entrusting more power in the President or one of his subordinates (and thus accountability and responsibility), it is consistent with and even furthers the *FEF* Court's limited conception of the unitary executive. Third, it helps resolve (or delay answering) the difficult question, at least in part, of what, if any, inherent constitutional power a superior officer has to make policy determinations entrusted to subordinate officers. For officers governed by a "good cause" standard, the matter can be resolved on a statutory basis. *See* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1243–44 (1994); Thomas O. McGarity, *Presidential Control of Regulatory Agency Decisionmaking*, 36 AM. U. L. REV. 443, 465 (1987). Admittedly, however, this construction will not resolve what constitutional powers the President or the superior officer has to issue policy directives on matters expressly committed to an inferior officer protected by one of the other prototype provisions. But given that the issue has not had to be resolved despite decades of independent agency practice, *see* Lawson, *supra*, at 1244,

But permitting insubordination to constitute "good cause" is not without its problems. One could reasonably counter that doing so appears to undermine Congress's intent to grant an officer independence from the President.[145] Perhaps paradoxically, however, including insubordination as "good cause" for removal, in light of *FEF*, does not harm the Court's traditional interpretation of "good cause." Instead, this interpretation ultimately provides as much independence as the Constitution permits.

As a preliminary matter, searching for collateral evidence of congressional intent is unnecessary. Whatever vagueness the term "good cause" or "cause" may have as to certain grounds for removal, insubordination, as indicated above, sits comfortably within those interchangeable terms.[146] Indeed, despite numerous decisions of the federal courts and the Merit Systems Protection Board holding that insubordination qualifies as cause for removal,[147] Congress has not sought to amend any of its "good cause" removal provisions or provide a contrary definition of "cause."[148]

Yet even if one turns to evidence of congressional intent, interpreting "good cause" to include insubordination furthers congressional intent to provide some agency independence (even if that independence, as discussed below, is limited by political realities more

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my proposed construction's failing—especially in light of its partial statutory resolution to this question—would likely be of minimal concern.

145 *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667, 708 (D.C. Cir. 2008) (Kavanaugh, J., dissenting), *rev'd*, 130 S. Ct. 3138 (2010); *accord* Kelley, *supra* note 123, at 1237–41, n.175. R

146 *See* Merritt v. Welsh, 104 U.S. 694, 702 (1881) ("Whatever may have been in the minds of individual members of Congress, the legislative intent is to be sought, first, from the words they have used. If these are clear, we need go no further . . . .").

147 *See supra* note 142 and accompanying text. R

148 Although the Court has indicated that Congress, when using terms of art, is presumed to use the meaning that Courts have given those terms over "centuries of practice," *see* Morissette v. United States, 342 U.S. 246, 263 (1952), that rule may not apply here because "good cause" as a term of art in the employment context has not been developed over centuries of practice. The earliest instance of equating insubordination with "good cause" that I have uncovered is *People ex rel. McCune v. Board of Police*, 19 N.Y. 188 (N.Y. 1859) (identifying insubordination as "good cause" for removal, but holding that removal was improper on the facts of the case). But Congress's acquiescence to the inclusion of "insubordination" in "good cause" provisions governing federal employees perhaps provides a stronger argument for reading "good cause" provisions to include insubordination. *See* McLaren v. Fleischer, 256 U.S. 477, 481 (1921); United States v. Midwest Oil Co., 236 U.S. 459, 473 (1915). This is especially true because such an interpretation would not undermine the plain meaning of "good cause." *See* Leal-Rodriguez v. INS, 990 F.2d 939, 951 n.16 (7th Cir. 1993).

than a legal standard). Congress clearly sought for the weak prototype to provide some agency independence, although the extent of that independence is rarely clear.[149] *FEF* has held that two layers of tenure protection from the President violate separation of powers when those provisions withdraw responsibility and accountability from the President. By permitting removal based on insubordination, the courts allow the removing party to influence policy and thus grant the President more power than he had in *FEF*. In the context of multilayered tenure protection, reading the provision to exclude removal based on insubordination would likely render the provision invalid (by denying the removing party sufficient influence over the subordinate officer) and deprive Congress of at least some of the independence that it sought to provide.[150] In other words, interpreting "good cause" to preclude removal based on insubordination would grant so much discretion as to require the Constitution to take it away, leaving the officer, as the Board in *FEF*, with no protection whatsoever. Courts, by interpreting the phrase in light of its plain meaning, can further—and, in some cases, fully realize—Congress's intent.

In some instances, however, Congress may have intended to provide additional independence when using a "good cause" tenure-protection provision. For instance, legislative history indicates that certain congressional members intended the "good cause" provision in the Ethics in Government Act[151] to prohibit the removal of an independent counsel who refused to do the President (or Attorney Gen-

149 *See, e.g.*, *Bill Summary & Status*—95th Congress (1977–1978)—S.2640, THOMAS, http://thomas.loc.gov/cgi-bin/bdquery/z?d095:SN02640:@@@D&summ2=m& ("Prohibits, generally, taking or influencing personnel actions for political or other nonmerit reasons and nepotism.") (last visited Mar. 19, 2012); *see also, e.g.*, *infra* notes 152, 153, 157 and accompanying text (discussing various formulations of "good cause"). R

150 Perhaps courts could interpret "cause" provisions differently depending on whether they are part of a tiered tenure-protection apparatus or standalone protections. After all, the Court's removal-power precedents suggest, but do not hold, that Congress can insulate officers from the President's policy choices with one tier of tenure protection. *See* Humphrey's Ex'r v. United States, 295 U.S. 602, 625 (1935) (noting the point in dictum). But doing so would cultivate confusion where a reasoned distinction has been sown. The same words should have the same meaning when used in the removal context. *See supra* note 131. Congress is not without a remedy for officers it believes are unprotected. It always has the ability to adopt a stricter removal standard for those officers protected by only one tier of tenure protections.

151 Pub. L. No. 95-521, 92 Stat. 1824 (1978).

eral's) bidding.[152] Yet, to the extent that Congress sought more protection for a particular officer, it should have chosen its words more carefully. Not only has "good cause" been understood to include insubordination, but Congress crafted and routinely used more demanding and specific removal standards—such as the ones in *Humphrey's Executor* and *FEF*—when it found it necessary to do so. Indeed, it is notable that Congress did not use the *Humphrey's Executor* standard to protect the independent counsel. Considering the significant constitutional question that arises from limiting the President's power over a prosecutor, it may well have been that Congress thought that a more demanding standard—such as one that was understood to create an independent officer—would impede upon the President's inherent power to remove officers performing "purely" executive functions.[153]

Likewise, *Morrison* does not undermine interpreting insubordination as a form of "cause." Perhaps contrary to conventional understanding, the *Morrison* Court never held that that the President could not remove the independent counsel for failing to follow a directive to halt a prosecution. *Morrison* expressly declined to define "good cause."[154] And at any rate, even if Congress would not have passed the Ethics in Government Act without ensuring the independent counsel's freedom from the President's control, altering the understanding of "good cause" in the removal context based on one officer in a now-defunct statute would improperly allow an anomaly to dictate the norm.[155]

152 *See* S. REP. NO. 95-170, at 66 (1978); 133 CONG. REC. 33040 (1987) (noting that the joint conference refused to include language in the removal provision stating that "refusal of an independent counsel to obey an order of the President is not good cause for removal if that order would compromise the independence of proceedings under this chapter or otherwise violate the purposes of this chapter" because the conference was confident that courts would understand that the "good cause" provision did not permit removal based on the refusal to follow an order of the President); Manning, *supra* note 53, at 1292 n.30. Permitting legislative history to trump clear statutory text would return courts to the strange world that the Supreme Court appears to have forsaken decades ago. *Compare* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 412 n.29 (1971) ("Because of [the] ambiguity [in the legislative history of the Department of Transportation Act,] it is clear that we must look primarily to the statutes themselves to find the legislative intent."), *with* Ratzlaf v. United States, 510 U.S. 135, 147–48 (1994) ("But we do not resort to legislative history to cloud a statutory text that is clear."). R

153 My review of the legislative history uncovered no indication of whether Congress considered using the intermediate prototype.

154 Morrison v. Olson, 487 U.S. 654, 692 (1988).

155 The Ethics in Government Act expired in 1999. Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. REV. 117, 179 n.249, 180 (2006). When

In response to other possible objections, Congress likely did not think that the three tenure-protection prototypes were identical, and the Court has not come to give them an accepted, synonymous meaning. First, I am unaware of any evidence that indicates that Congress intended all prototypes to have an identical meaning. Indeed, congressional practice suggests otherwise. The prototypes use substantially different language and often govern different kinds of officials. Congress usually applies the intermediate prototype to principal officers and the weak provision to inferior officers,[156] suggesting that Congress understands one standard to be different in kind than the other. Second, the Court has suggested in its latest removal-power decisions that it does not view the standards as interchangeable.[157] The fact that the Court had no need to define the grounds for removal in prior cases (because the President has never attempted to remove an officer based on the text of a tenure-protection provision) cannot suggest that the prototypes have come to have identical meaning. Treating the prototypes as synonymous—and thus ignoring the textual differences—would lead to the invalidation that Justice Breyer fears, despite minimal, if any, evidence that Congress understood the prototypes to have an identical meaning—whether originally or through judicial evolution.

Permitting insubordination to serve as "cause" provides an officer more than illusory independence. Normally, the President or a superior officer may remove an officer at will, i.e., for any or no reason at all. To remove a subordinate officer for insubordination under a "cause" standard, the removing party must clearly detail the officer's refusal to follow a lawful directive.[158] Because the Court has indicated

the Independent Counsel Reform Act of 2003 was proposed, "good cause" "include[d] . . . (i) a knowing and material failure to comply with written Department of Justice policies relevant to the conduct of a criminal investigation; and (ii) an actual personal, financial, or political conflict of interest." 149 CONG. REC. S24190 (daily ed. Oct. 3, 2003). The proposed legislation did not become law. *See S. 1712: Independent Counsel Reform Act of 2003*, GOVTRACK.US, http://www.govtrack.us/congress/bill.xpd?bill=s108-1712 (last visited Mar. 19, 2012).

156 *See infra* Part IV.

157 Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3157–58 (2010); *Morrison*, 487 U.S. at 692.

158 The directive must be legal. For instance, a superior could not permissibly instruct an inferior to violate a clear legal duty, such as a ministerial duty to which Congress has not bestowed any discretion to any officer. *See* Kendall v. United States, 37 U.S. (12 Pet.) 524, 613 (1838). Similarly, a superior officer could not order the subordinate officer to fire employees based on those employees' race or religion. Such a directive would violate the Constitution and thus be unlawful. *Cf.* Gragg v. Dep't of the Air Force, 24 M.S.P.R. 506, 500–10 (M.P.S.B. 1984) (holding that

that subordinate officers removed for cause may seek judicial review,[159] the superior officer must state a reasoned ground for removal or else the courts may conclude that the purported ground is merely pretextual.[160] The President or superior officer loses his or her power to remove the officer merely for being of a different political persuasion, for simply not being the person of the President's choosing, or for any other number of arbitrary reasons.[161] The subordinate officer, in other words, can require the President or superior officer to state (and attempt to defend) the reason for the removal.

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removal on charges of insubordination was improper when the supervisor's direction was unlawful because it contravened the agency's authority, as earlier determined by a federal court).

159 *See Free Enter. Fund*, 130 S. Ct. at 3177 (Breyer, J., dissenting) (citing Reagan v. United States, 182 U.S. 419, 425 (1901)). The presence of an intelligible tenure provision permits judicial review and thereby provides a right to due process from the order removing the subordinate officer—an additional protection against a superior's irrational actions and treatment. *Cf.* Webster v. Doe, 486 U.S. 592, 600 (1988) (holding that a statutory standard for termination "fairly exude[d] deference to the Director [of the CIA], and appear[ed] . . . to foreclose the application of any meaningful judicial standard of review."); Cynthia R. Farina, *Conceiving Due Process*, 3 YALE J.L. & FEMINISM 189, 192 (1991) ("Specifically, this law must contain substantive standards that limit the discretion of the official decisionmaker [to create a right to due process under the Supreme Court's precedent].").

160 *See* Manning, *supra* note 53, at 1301 n.57; *see also* Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 255 (1981) (explaining the employer's burden to articulate a nondiscriminatory reason for firing an employee and the plaintiff's burden of establishing that the articulated nondiscriminatory reason is pretextual). R

161 *See* Miller, *supra* note 53, at 87; *see also Ex parte* Hennen, 38 U.S. (13 Pet.) 230, 256, 262 (1839) (denying mandamus petition of a court clerk whom a district judge removed despite the judge's concession that "the business of the office for the last two years had been conducted promptly, skillfully, and uprightly, and that in appointing [a new court clerk, the judge] had been actuated purely by a sense of duty and feelings of kindness towards one whom he had long known, and between whom and himself the closest friendship had ever subsisted"); Ramspeck v. Fed. Trial Examiners Conf., 345 U.S. 128, 142 (1953) (noting that Congress, by granting ALJs "good cause" tenure protection, intended to protect ALJs from "discharge[ ] at the whim or caprice of the agency or for political reasons"). The Court in *Mistretta* indicated that the "good cause" standards in *Morrison* and *Humphrey's Executor* were "specifically crafted to prevent the President from exercising 'coercive influence' over independent agencies." Mistretta v. United States, 488 U.S. 361, 411 (1989). But, as Professor Manning notes, no party addressed the removal power in *Mistretta*, and thus the Court's statement is dicta. *See* Manning, *supra* note 53, at 1308 n.80. Moreover, not only do those statements not take into account the Court's later ruling in *FEF*, but merely stating that the statutes were intended to do something does not answer whether they were successful in doing so or whether the Court need consider congressional intent in the first place. R R

Because the President must provide and publicly defend a legitimate reason for removal, the subordinate officer would likely retain some discretionary independence. The President or superior officer—to the extent that they are even able to stay informed of all of the subordinate officer's discretionary decisions—likely would be unwilling to incur the political costs associated with removal and judicial review on matters of lesser importance.[162] Such removals would require a diversion of significant resources, could make the removing party look petty, and suggest that the purported reason for removal is merely pretextual. For more pressing matters, the removing party would be required to accept the political fallout that may come from insisting on the implementation of his policy—including, for instance, the halting of a prosecution that the public favors. In other words, the removed officer's ability to make a "federal case" out of the removal under a "good cause" standard significantly limits the *will* to remove an officer (and thus protects the officer's tenure), even if it provides only a modest legal hurdle.[163]

162 *See* Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 30 (2010) (noting that "'removal is a doomsday machine' that is politically costly for presidents") (quoting Paul R. Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943, 957 (1980)); Miller, *supra* note 53, at 87 (noting that President Nixon's actions concerning the "Saturday Night Massacre" highlight the dangerous political implications of removing officers who refuse to do the President's bidding on a matter of policy). In a related context, Professors Bressman and Thompson recently explored Congress's reliance upon "consultation" requirements between independent financial agencies and the President. They queried "whether the President could use the failure or inadequacy of consultation as a ground for removal of the independent actors." Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 633 n.183 (2010). They concluded that "the President would [not] do so lightly because removal, for any reason, attracts considerable political attention and this ground would not only be novel but difficult to substantiate." *Id.*; *see also* 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, 610 (2010) ("It is highly unlikely that any President ever gives serious thought to the presence or absence of a for-cause limit on his removal power in making a decision to remove an officer."). R

163 *See* Nina A. Mendelson, *Another Word on the President's Statutory Authority Over Agency Action*, 79 FORDHAM L. REV. 2455, 2477 (2011) (noting that even officers whom the President can remove at will can impose political costs on the President by resigning in protest or forcing the President to remove them); Miller, *supra* note 53, at 87. On a related note, Professor Entin has concluded that the removal power has limited actual significance, but its rhetoric and the Court's holdings have significant symbolic consequences. *See* Jonathan L. Entin, *Synecdoche and the Presidency: The Removal Power as Symbol*, 47 CASE W. RES. L. REV. 1595, 1602–03 (1997); *see also* Morri- R

Finally, interpreting the "good cause" provision in light of *FEF* to further congressional intent is reminiscent of Professor Manning's argument that the Court should turn to the canon of constitutional avoidance to read "good cause" in the independent counsel statute broadly.[164] Although constitutional avoidance has its virtues, this Article suggests that the courts should adopt the accepted meaning of the statutory language for federal officers' tenure-protection provisions because that reading best furthers (even if not fully realizes) congressional intent by giving Congress all to which it is entitled, according to *FEF*, within a tiered tenure-protection scheme. The proposed method's objective is not necessarily to avoid the constitutional question; it assumes that the constitutional question (of how much tiered agency independence is too much) has largely been answered. The proposed method grants agencies as much independence as possible under the Court's precedents.[165]

The weak standard, therefore, has two benefits. It permits the President and the first-tier officers to implement policy choices and oversee the execution of nondiscretionary duties. But it also protects officers from arbitrary removal and, by requiring articulated grounds for removal, gives the officer real, even if limited, independence.

2. Intermediate Tenure Protection

In contrast to the more open-ended "good cause" standard, the ubiquitous intermediate tenure-protection provision applies to FTC commissioners (and is often referred to as the *Humphrey's Executor* standard[166]): "inefficiency, neglect of duty, or malfeasance in office."[167] Congress has protected numerous officers with this provision, including members of the Chemical Safety Board,[168] members of the Federal Energy Regulatory Commission,[169] members of the Fed-

son v. Olson, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting) ("That is what this suit is about. Power.").

164 *See* Manning, *supra* note 53, at 1294 n.37; *see also Free Enter. Fund*, 130 S. Ct. at 3182–83 (Breyer, J., dissenting) (criticizing the majority for adding a tenure-protection provision to the statutory scheme only to hold the scheme unconstitutional on that ground). R

165 Construing statutes to permit Congress as much leeway as constitutionally permitted would be consistent with the Court's nondelegation-doctrine jurisprudence, *see* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474–75 (2001), and "the Court's heightened preference for the canon of avoidance in structural cases," Manning, *supra* note 53, at 1294 n.37. R

166 *See, e.g.*, *Free Enter. Fund*, 130 S. Ct. at 3148.

167 Humphrey's Ex'r v. United States, 295 U.S. 602 (1935).

168 42 U.S.C. § 7412(r)(6)(B) (2006).

169 42 U.S.C. § 7171(b)(1).

eral Labor Relations Authority,[170] members of the Merit Systems Protection Board,[171] members of the Nuclear Regulatory Commission,[172] and the Special Counsel (who is charged with protecting federal employees from unlawful employment practices).[173] Congress has tinkered with this prototype by slightly increasing[174] or further limiting the President's removal power.[175]

This intermediate protection prototype likely does not permit the President or his proxy to issue policy directives, although the Court's decisions have been equivocal on this point. When the Court first addressed the intermediate prototype in *Humphrey's Executor*, the

170 5 U.S.C. § 7104(b) (2006).

171 5 U.S.C. § 1202(d).

172 42 U.S.C. § 5841(e).

173 5 U.S.C. § 1211(b).

174 Congress appears to permit the President a greater power to remove, as compared to his power under the *Humphrey's Executor* standard, by permitting removal for (1) "ineligibility" to serve as a member of the National Mediation Board, 45 U.S.C. § 154 (2006); (2) "corruption" or "incapacity to perform his or her functions," 22 U.S.C. § 4106(e) (2006) (applying to members of the FLRA's Foreign Service Labor Relations Board), *see* 22 U.S.C. § 4135(d) (applying to members of the State Department's Foreign Service Grievance Board); or (3) "offenses involving moral turpitude," *see, e.g.*, 31 U.S.C. § 703(e)(1)(B) (2006) (quoting the standard governing the removal of the Comptroller General in *Bowsher*); 42 U.S.C. § 2996c(e) (applying to members of the Board of the Legal Services Corporation); 42 U.S.C. § 10703(h) (applying to members of the Board of the State Justice Institute).

175 Sometimes Congress removes "inefficiency" as a ground for removal. *See, e.g.*, 42 U.S.C. § 1975(e) (permitting removal of members of the Commission on Civil Rights only for "neglect of duty or malfeasance in office"); 42 U.S.C. § 902(a)(3) (same for the Social Security Administration commissioner); *see also* 10 U.S.C. § 183(b)(3) (Supp. 2011) (permitting removal of members of the Board of Actuaries in the Department of Defense "only for misconduct or failure to perform functions vested in the Board"). Indeed, sometimes Congress goes out of its way to do so. *See, e.g.*, 15 U.S.C. § 2053(a) (2006) (permitting removal of members of the Consumer Product Safety Commission only for "neglect of duty or malfeasance in office but for no other cause"); 29 U.S.C. § 153(a) (2006) (NLRB members). *But see* Shurtleff v. United States, 189 U.S. 311, 313 (1903) (holding that "inefficiency, neglect of duty, or malfeasance" were not exclusive grounds for removal because Congress would have been clearer had it intended exclusivity). Congress has also created what may be a hybrid between the weak and intermediate standards by permitting the President to remove officers for "neglect of duty or malfeasance in office or for other good cause shown." *See* 25 U.S.C. § 2704(b)(6) (2006) (applying to members of the Department of the Interior's National Indian Gaming Commission); 28 U.S.C. § 991(a) (2006) (applying to members of the Sentencing Commission). Whether "good cause" should assume a different meaning when it becomes "other good cause" is unresolved. *Cf.* Manning, *supra* note 53, at 1292 n.31 (rejecting argument that "good cause" within the independent counsel statute should be interpreted to refer to other forms of disability because the other grounds for removal also refer to disabilities and impairments; treating "good cause" as a catchall renders it surplusage). R

Court suggested, without defining the grounds upon which removal could be based, that the standard provided freedom from the President's policy choices.[176] And the *FEF* Court indicated that it accepted the *Humphrey's Executor* Court's understanding,[177] despite the *Bowsher* Court's indication that this standard was "very broad and, as interpreted by Congress, could sustain removal of [the officer] for any number of actual or perceived transgressions of the legislative will."[178]

FEF's rationale for invalidating the Board's tenure protection appeared to rest on the President's limited ability to have officers institute his policy when they are protected under the intermediate standard. In explaining why the second level of tenure protection made a difference, the Court stated that the SEC could not be fully responsible for the Board because the SEC lacked the ability to remove the Board members at will; the SEC could only remove the Board for causes listed in the applicable removal provision.[179] The Court noted that "even if the President disagrees with [the SEC's] determination, he is powerless to intervene—unless that determination is so unreasonable as to constitute 'inefficiency, neglect of duty, or malfeasance in office.'"[180] The Court's statement suggests that the

176 *See* Humphrey's Ex'r v. United States, 295 U.S. 602, 625 (1935); Greene, *supra* note 116, at 166; Lessig & Sunstein, *supra* note 22, at 110 n.455. R

177 *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3157–58 (2010). In suggesting that an entity protected by the intermediate standard would not be subject to the President's policy choices, the Court agreed with the government's concession that failure to comport with the President's policies would not constitute "good cause" for removal under 15 U.S.C. § 7211(e)(6) (2006). *See id.* The Court, however, was almost certainly not attempting to define "good cause." The removal provision governing the Board members stated that a member of the Board may be removed by the Commission from office, "in accordance with [15 U.S.C § 7217(d)(3)], for good cause shown . . . ." The Court rejected the government's argument that "for good cause shown" could create bases for removal other than those listed in the internally referenced statutory section, § 7217(d)(3), which provides three specific grounds for removal. *Id.* at 3158 n.7. In other words, the Court appears to have determined that the "good cause" standard in *FEF* was—unlike other open ended "good cause" standards—narrowly defined by another statutory section concerning removal.

178 Bowsher v. Synar, 478 U.S. 714, 729 (1986). The standard in *Bowsher* provided the President additional grounds upon which to remove the Comptroller General other than those traditionally listed in the intermediate prototype: disability and conduct involving moral turpitude. *See id.* at 728. Although perhaps one could argue that the Court was merely suggesting that the standard in *Bowsher* was broader than the standard in *Humphrey's Executor*, the Court stated only that "inefficiency," "neglect of duty," or "malfeasance"—not disability and moral turpitude—were "very broad" terms. *See id.* at 729.

179 *See Free Enter. Fund*, 130 S. Ct. at 3154.

180 *Id.* (quoting *Humphrey's Ex'r*, 295 U.S. at 620).

President is unable to make discretionary decisions committed to subordinate officers[181] or to remove the SEC commissioners for their failure to follow his policy preferences.

But the Court's opinion does not foreclose an interpretation that permits the President to have the protected officers implement his policy preferences in certain instances. Professors Lessig and Sunstein have proposed that the President, under this standard, can remove an officer for the officer's failure to abide by the President's policy determination if the President's decisions are "supported by law or by good policy justifications" because the officer could be said to "neglect her duty."[182] Moreover, the Court in *Shurtleff v. United States*[183] held that the Congress's enumerated grounds for removal—"inefficiency, neglect of duty, or malfeasance in office"—did not prevent the President from removing on other grounds officers whose tenure was not limited to a specified number of years.[184] Nevertheless, because whether policy justifications are "good" is often in the eye of the beholder and because reasonable policy justifications can often support different courses of action, the President's power to have officers implement his policy preferences seems narrowly circumscribed even under a slightly broader interpretation. To remove a subordinate officer under this standard, the President's proposed policy would likely have to be the only reasonable one to implement, indicating that the executive officer had little to no discretion on that point. Demonstrating that the President's policy was the only reasonable choice would likely be difficult to establish for purposes of judicial review.

3. Strong Tenure Protection

The breadth of the strong standard, because of its rarity and the Court's statements in *FEF*, is unclear. The Court indicated that the Board's tenure-protection provision presented "an even more serious threat to executive control than an 'ordinary' dual for-cause standard"[185] and referred to it as "an unusually high standard"[186] and a

181 *See supra* note 144.

182 Lessig & Sunstein, *supra* note 22, at 111. R

183 189 U.S. 311 (1903).

184 *See id.* at 313, 315–16 (cited in Miller, *supra* note 53, at 87–88 n.170). Professor Miller noted that the *Bowsher* Court also suggested that "similar principles of interpretation [as those applied in *Shurtleff*] may apply in the case of independent agencies." Miller, *supra* note 53, at 87–88 n.170. R R

185 *Free Enter. Fund*, 130 S. Ct. at 3158.

"rigorous standard."[187] The Court did not explain in detail what it believed the "ordinary dual for-cause standard" was or why the standard protecting the Board was "unusually high" or "rigorous." The Court mostly rephrased the language without indicating which specific portions it found troubling.[188] But the Court did indicate that it was concerned that the President did not have the power to remove Board members for violating laws that do not relate to the Board's authority, such as laws that govern disclosing one's income for tax purposes.[189] The weak and intermediate standards would, in contrast to the standard that protected the Board, have permitted the President to remove officers who have violated other laws. Such violations would likely satisfy removal standards that require "cause," "malfeasance," "misconduct," or "offenses involving moral turpitude."[190]

Despite the Court's failure to distinguish the tenure-protection provisions, whether a tenure-protection provision is strong likely depends on its detail when compared to the two other prototypes. "Good cause" and "cause"—at least without statutory definitions—are open-ended phrases that permit removal based on numerous grounds that essentially ask whether the removal was reasonable. The superior officer or President thus has significant discretion in determining which actions satisfy that standard. More defined are the terms from the intermediate tenure-protection prototype. The supervising officer is limited to more circumscribed grounds for removal. "Inefficiency" suggests that the President must demonstrate pecuniary or temporal waste.[191] "Neglect of duty" indicates that the President must identify

186 *Id.* The Court later stated that "the Sarbanes-Oxley Act is highly unusual in committing substantial executive authority to officers protected by two layers of for-cause removal." *Id.* at 3159.

187 *Id.* at 3158.

188 *See id.* at 3158–59.

189 *See id.* at 3158.

190 *See, e.g.*, *supra* notes 174–175. R

191 *See* THE NEW OXFORD AMERICAN DICTIONARY 867 (2001). Case law establishing "cause as will promote the efficiency of the service" is of limited use in defining "inefficiency." 5 U.S.C. § 7513(a) (2006). The Labor Management Relations Act permits the removal of government employees "for such cause as will promote the efficiency of the service." *Id.* Courts have held that "the efficiency of the service" standard permits removal for insubordination. *See* Meehan v. Macy, 392 F.2d 822, 836 (D.C. Cir. 1968), *reh'g on other grounds*, 425 F.2d 469 (D.C. Cir. 1968), *aff'd en banc*, 425 F.2d 472 (D.C. Cir. 1969); Henkle v. Campbell, 462 F. Supp. 1286, 1300 (D. Kan. 1978), *aff'd*, 626 F.2d 811 (10th Cir. 1980). But establishing that removal will "promote . . . efficiency" is not the same as establishing that an action was inefficient. The officer or employee may be removed to render an entire agency *more* efficient; it would be unnecessary to establish that the agency or official was inefficient.

the officer's specific duty and her dereliction of that duty.[192] And "malfeasance" suggests that the officer must commit an act that is "wholly wrongful and unlawful."[193] The grounds for removing Board members were significantly more defined—willful[194] violations of particular laws, the unjustified nonenforcement of certain rules, statutes, or standards, and the willful abuse of authority. Although the removing party has some discretion to determine which actions meet this high standard, the removing party's opportunity to expand the offenses that permit removal is substantially diminished when compared to the opportunities available under the weak and intermediate standards.[195]

B. Evaluating Tenure Protections Within the Court's Precedent

The differences in tenure-protection language should matter under the Court's rationale in *FEF*. Certain combinations would permit the President to "hold the [first-tier officer] to account for its supervision of the [second-tier official], to the same extent that he may hold the [first-tier officer] to account for everything else."[196] Likewise, comparing and contrasting the language of the three tenure-protection prototypes—although largely inchoate in the Court's removal-power decisions—both fits within and improves the Court's removal-power jurisprudence.

FEF considered one combination of tenure protections. The decision demonstrates that when (1) an intermediate standard protects first-tier officers and (2) a strong standard protects second-tier officers, that combination impermissibly impedes the President's removal powers.[197] Subject to that combination of tenure protections, the President cannot hold the first-tier officers as responsible for their decision to remove (or not to remove) second-tier officers as the President could for all other decisions.[198] He thus loses supervisory power he would have had under a single-tier tenure-protection scheme.[199]

192 *See* THE NEW OXFORD AMERICAN DICTIONARY, *supra* note 191, at 1145. R

193 BLACK'S LAW DICTIONARY 862 (5th ed. 1979).

194 "Willful" is defined as "voluntary" or "intentional." *Id.* at 1434.

195 Tying the superior officer's discretion to the vagueness of the removal provision language is consistent with the Court's precedent that defers to agency interpretations of ambiguous statutory language. *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 843–44 (1984).

196 Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3154 (2010).

197 *See id.*

198 *See id.*

199 *See id.*

Certain combinations of tenure protections, however, avoid this difficulty.[200]

1. The Intermediate and Weak Combination

For instance, an intermediate tenure protection for first-tier officers followed by a weak tenure protection for second-tier officers should not impermissibly weaken the President's power. The President's power over the first-tier officers is no different than it was in *Humphrey's Executor*, and thus that tenure protection, by itself, poses no constitutional difficulty. The weak tenure protection that governs the removal of the second-tier officers does not further weaken the President's powers. The first-tier officers can remove the second-tier officers for the latter's refusal to implement the former's policy choices (i.e., insubordination) or for other forms of "cause" that prevent the execution of the law.[201] The first-tier officers are, thereby, accountable for the second-tier officers' actions, including their policy choices and the execution of the law.

True, the first-tier officers' power is limited because they cannot remove subordinate officers at will. But this minimal limit would likely lack constitutional significance. The second-tier officers could still be removed for their failure to comply with ministerial duties, abide by superior officers' policy choices, or comply with other laws or ethical rules.[202] The only power that the first-tier officers would lack, when compared to the scenario in which no second-tier removal protection exists, is the power to remove second-tier officers without "cause." It is difficult to fathom why the Constitution—in light of the other restrictions that it permits on the President's removal powers and the broad construction that I advocate for "cause"—would require that the President or his subordinate be able to remove second-tier officers without any articulated, legitimate reason. If there is no such reason or "cause" for the removal, the President and the first-tier officers are in no danger of leaving the law unexecuted.[203]

Similarly, the insignificant limit on the first-tier officers' powers would not meaningfully affect the President's ability to hold those

200 Although other tenure-protection provision permutations are possible, I limit my discussion to the following tiered protections that Congress has employed: intermediate plus weak, intermediate plus intermediate, weak plus weak, and weak plus intermediate. *See infra* Part IV.

201 *See supra* Part III.A.1.

202 *See supra* Part III.A.1.

203 *Cf. Free Enter. Fund*, 130 S. Ct. at 3154 (holding that the two-tier restriction at issue denied full control over the second-tier officers and thereby impaired the President's "ability to execute the laws").

officers accountable. At first blush, it would appear that the President cannot hold the first-tier officers accountable for their supervision of the second-tier officers' actions to the same extent as he could hold the first-tier officers accountable for their other actions because of the second-tier tenure protection. But—unlike in *FEF*—the first-tier officers can dictate policy choices and otherwise determine whether cause exists for the removal of a subordinate officer. Because the first-tier officers can have their policy choices implemented and ministerial duties performed, the tenure-protection provision provides no hiding place for them to permit the law to go unexecuted. The President, therefore, can hold the first-tier officers to account for the second-tier officers' actions and thus faithfully execute the laws.[204]

Additional levels of weak tenure protections would similarly not impede the President's removal power. Because the weak tenure-protection provision does not impede policymaking power, the first-tier officers could hold the second-tier accountable for the third-tier officers' actions, and so forth. No matter how many tiers of weak tenure protections exist, the first-tier officers can manage, and be accountable, for the policy choices made by subordinate officers. The President, then, can hold the first-tier officers to account for their subordinates' actions to the same extent that he can do so for all of the first-tier officers' other actions. Accordingly, it is not the number of tiers of removal, without more, as *FEF* suggests, that raises the Constitution's hackles.

204 In essence, if contesting even the applicability of a "good cause" tenure-protection provision, the President would be left arguing that he is constitutionally entitled to arbitrarily remove someone even if that person's performance was not affecting the enforcement of the laws. This argument would perhaps not be troubling to Justice Scalia, *see* Morrison v. Olson, 487 U.S. 654, 710 (1988) (Scalia, J., dissenting) ("A system of separate and coordinate powers necessarily involves an acceptance of exclusive power that can theoretically be abused."), or under a robust unitary executive theory. But the argument would nearly concede that the tenure protection does not impede the execution of the laws—*Morrison*'s guidepost. *See id.* at 692–93 (majority opinion). Moreover, even under *FEF*'s consideration of the President's supervisory powers, it is hard to see why the President, as supervisor, needs the power to remove an officer who implements his policies and otherwise provides no cause for removal. *See Free Enter. Fund*, 130 S. Ct. at 3154; Pierce, *supra* note 162, at 594 ("The real unitary executive theory does not imply that the President has powers greater than the powers of Congress or the Judiciary. It refers to the belief of many scholars that the Vesting Clause of Article II confers on the President plenary power over policy making by all executive branch agencies and officials."). R

2. The Intermediate and Intermediate Combination

The scenario in which the intermediate standard protects both first-tier and second-tier officers presents a closer question. As in the prior scenario, the first tier of protection, in light of *Humphrey's Executor*, does not impermissibly impede the President's removal power. But the second tier, on balance, probably suffers from the same problems as in *FEF*. Because the second-tier intermediate standard most likely does not permit the first-tier officers to have the second-tier officers implement their policy choices,[205] the President cannot hold the first-tier officers to account for the second-tier officers' actions to the same extent as the first-tier officers' other actions. The first-tier officers can remove the second-tier officers only for "inefficiency, neglect of duty, or malfeasance in office." The second-tier officer's implementation of a policy that the first-tier officer disfavors does not necessarily establish any of the intermediate tenure-protection provision's grounds for removal. For instance, a second-tier officer's determination that a certain carcinogen is permissible in amounts up to six parts-per-million (ppm) in drinking water, as opposed to five ppm as the first-tier officer believes, is likely not a determination that constitutes inefficient, neglectful, or malfeasant action. The second-tier officer's actions cannot necessarily, therefore, be attributed to the first-tier officer.

Likewise, the second-tier protection, as in *FEF*, permits the first-tier officers to "shield [their] decision from Presidential review by finding that [the tenure-protection's requirement] is absent."[206] The second-tier officers' failings cannot be attributed to the first-tier officers, whom the President "can oversee."[207] If in the example above, the President believed that five ppm was the only possible amount to impose, the first-tier officers could pretend that they agree with the President yet invoke the second-tier tenure protection to shield the second-tier officer's determination from review. The President, constrained by two tiers of tenure protection and the inability to attribute the second-tier officer's actions to the first-tier officers, would have a difficult time removing the first-tier officers.

Although this conclusion is not inescapable,[208] it is probably preferable. Such an interpretation provides a clear distinction between the weak and intermediate prototypes. It also permits Congress to establish more agency independence with numerous independent

205 *See supra* Part III.A.2.

206 *See Free Enter. Fund*, 130 S. Ct. at 3154 n.4.

207 *Id.* at 3154 (emphasis omitted).

208 *See supra* note 182 and accompanying text.

agency schemes already in place. Congress uses the intermediate tenure protection much more than the weak standard as a standalone protection or as the first-tier protection.[209] The Court has repeatedly upheld the use of the intermediate standard as a standalone or tiered protection.[210] If the Court were to interpret the intermediate standard as permitting the President to have his policies implemented, the heads of most "independent" agencies would not have full policymaking independence at all (despite having some tenure protections) because the President would be able to have the first-tier officers exercise their greater discretion and numerous important policy choices as the President sees fit.[211]

3. The Weak and Weak Combination

A scenario with two tiers of weak tenure protections should not suffer constitutional infirmity because the President's policymaking powers are unaltered. The President can ensure that the first-tier officers implement his policy choices. And the first-tier officers can ensure that the second-tier officers implement the first-tier officers' policy choices, which, of course, the President can control. The President can also hold the first-tier officers to the same account for all of their policy making decisions.[212] If he disagrees with their determination as to whether "good cause" exists to remove second-tier officers, he can, if justified, remove them under the same "good cause" provision.

4. The Weak and Intermediate Combination

Likewise, a scenario with a weak first-tier standard and an intermediate second-tier standard should pose no constitutional problem. The scenario essentially presents the same considerations as a single-tier intermediate standard. The President, despite the weak tenure protection, can control the policy decisions of first-tier officers, including their decision to remove or not remove second-tier officers. The President may not, however, be able to have the second-tier officers, governed by an intermediate tenure protection, do his bid-

209 In contrast, Congress uses the weak protection rarely as a first-tier protection, relying on weak tenure-protection provisions to provide the second-tier officers some independence over their narrower (and usually less important) areas of discretion. *See infra* Part IV.

210 *See Free Enter. Fund*, 130 S. Ct. at 3152–53; Humphrey's Ex'r v. United States, 295 U.S. 602, 632 (1935).

211 *See supra* Part III.A.1.

212 *See supra* Part III.B.1.

ding. This situation is no different—aside from which tier of officers' policy decisions he can control—than that in *Humphrey's Executor*. Indeed, because the first-tier officers generally have more discretionary and supervisory power, the President has *more* policymaking control in this scenario than in the single-tier *Humphrey's Executor* scenario.

In this scenario, too, the President can hold the first-tier officers to account equally for all decisions. The President can have the first-tier officers comply with his policy decisions for all matters, including whether the second-tier officers may be removed under the intermediate provision. If the first-tier officers refuse to remove a second-tier official under the intermediate standard, the President can remove the first-tier officer for "cause." The fact that the first-tier officers, and thus the President, have limited discretion to remove the second-tier officers does not influence the President's ability to hold the first-tier officers accountable in how they implement that discretion.

This proposed understanding of a weak-plus-intermediate tenure-protection combination does have one potential problem. The first-tier officers, unlike the SEC after the Court severed the strong tenure-protection provision for the Board, cannot require the second-tier officers to implement the first-tier officers' policy choices. The Court in *FEF*, however, suggests that the first-tier officers' lack of control is not determinative. The Court was troubled in *FEF* that the President lacked "the ability to oversee the Board, *or* to attribute the Board's failings to those whom he can oversee" and was "not the one who decides whether Board members are abusing their offices or neglecting their duties."[213] Here, the President—even if he or she cannot attribute the second-tier officers' actions to the first-tier officers—can oversee the second-tier officers and ultimately decide whether they are abusing their offices or neglecting their duties. The President, with the policymaking power he or she has under the weak tenure-protection provision, can have the first-tier officers remove second-tier officers who are inefficient, malfeasant, or neglecting their duties and thus sufficiently oversee the second-tier officers' actions.

C. Consistency with the Court's Removal-Power Themes

Focusing on the language of the tenure-protection provision is not only consistent with *FEF*'s rationale that the President must be able to hold officers to account equally for all decisions and supervision. It is also consistent with the Court's current understanding of

213 *See Free Enter. Fund*, 130 S. Ct. at 3154 (emphasis added).

the unitary executive and emphasis on the manner in which Congress has limited the President's removal power. Such focus also permits the Court to make its confusing functional analysis much less important in all but a select few cases.

First, looking to the language of the tenure-protection provision permits courts to focus on and protect the President's ability to supervise within the Court's unitary executive construct. The amount of policymaking authority and removal discretion that a supervising officer (including the President) has over the inferior officer distinguishes the three prototypes. By asking whether the provision permits the superior officer to have his or her policy choices implemented, the inquiry examines whether the superior officer (including the President) can supervise and be held responsible for the subordinate officer's actions. Similarly, the inquiry's examination of the discretion and grounds for removing a subordinate officer protects the President's ability to ensure that the President can remove officers who fail to execute the law. The guidepost remains as *FEF* left it: whether the President has sufficient power to hold subordinates accountable.

This proposed method also permits a more thorough exposition of the Court's current understanding of executive power without upsetting past decisions. By interpreting "good cause" to permit removal on more grounds than conventionally understood, the President and the superior officers gain more supervisory power in numerous agency schemes. Yet, at the same time, the officers enjoy tenure protection, and no precedent concerning the President's constitutional power is called into question. Over time under my proposed analytical framework, the Court's rhetoric will likely shift from the fiction of the unitary executive retaining all executive power to a more forthright examination of the sufficiency of the President's supervisory power—a more honest and coherent way of explaining the Court's concern.

Second, evaluating the tenure-protection language simplifies the analysis that courts must pursue when considering tiered tenure provisions, while still accommodating the Court's various concerns. The proposed analysis accounts for the President's Article II powers by considering how the number of tenure-protection layers affects the President's supervision and accountability and thereby unites the functional inquiry with the Court's unitary executive rhetoric. This proposed analysis is functional because it focuses on the tenure-protection provision's impact on the President's prerogative to decide policy matters and thus to supervise and to be held accountable for the administrative state. Formalism, too, has its limited place because the proposed analysis considers the number of tiered tenure-protec-

tion layers, looking only to the President's removal power to determine presidential control (as the Court in *FEF* did),[214] and using prototypical definitions of the three kinds of tenure-protection provisions.

But, perhaps more importantly, evaluating the tenure-protection language also largely permits the Court to forgo a function-of-the-officer inquiry. In most instances, the tenure-protection provisions, as I have interpreted them, will not impermissibly impede the President's removal power of second-tier officers. The courts need not engage in a function-of-the-officer analysis in those cases. But when the provisions could be thought to impede unconstitutionally on the President's removal power (or other constitutional provision), the Court can then turn to the officers' functions to determine whether the functions performed permit any, or even require additional, tenure protection.[215] In this way, looking at the language of the provisions permits the courts to remove themselves from the unexplored thicket of how competing functional and formal analyses coexist.

Third, looking to the language of a tenure-protection provision at issue is consistent with the direction of current judicial practice. The Court has increasingly indicated that the language of the restriction has some impact on the separation-of-powers determination. The Court, as discussed *supra*, gave at least passing mention to the language of the standard and its breadth (or lack thereof) in *Bowsher*, *Morrison*, and *FEF*. Indeed, the Court's holding in *FEF* demonstrates that the language of the provision has growing significance because Congress can unconstitutionally dilute, as well as usurp, the presidential removal power.[216] The language provides the basis, in many instances, for determining whether the challenged dilution goes too far or, perhaps, not far enough.

Additional consideration of the tenure provision's language would also provide more certainty as to why certain tiered tenure systems are permissible while others are not. The Court in *FEF* did not

214 *See id.* at 3170–73 (Breyer, J., dissenting) (discussing other forms of control over PCAOB aside from the removal power).

215 The courts may need to consider an officer's function, for instance, if Congress sought to protect ALJs under two layers of intermediate or strong tenure protections. The ALJ's adjudicatory functions may permit (or even require) Congress to limit the President's removal power in this manner. *See infra* Part IV.B–C. An officer's function would also likely retain its importance if Congress seeks to protect certain principal officers. For instance, if Congress imposed even a weak removal provision on the President's ability to remove the Secretary of State or the Secretary of Defense, their functions could (and probably would) lead the courts to rule even that minimal limitation unconstitutional.

216 *See Free Enter. Fund*, 130 S. Ct. at 3153–55.

provide much guidance as to if, to what degree, or why particular language affected its decision. Contrasting the tenure-protection prototypes would clarify not only what and how language matters, but also the breadth of the tenure protections' terms themselves. The Court's clarification of at least the ubiquitous weak and intermediate standards could ultimately establish—for the President and agencies—relatively defined bounds of agency independence and a coherent manner in determining when Congress has trampled those boundaries.

IV. Evaluating Current Tiered Tenure Protections

Perhaps the proposed analytical method's greatest virtue is that it provides a reasoned manner in which to maintain much (but not all) of the independent administrative state without needless forays into severance and other remedial measures. Justice Breyer's prediction that the Court would in future cases have to choose between arbitrarily narrowing its decision or destroying the administrative state need not come to pass. Most federal officers' tenure-protection provisions, under the proposed analysis, are constitutional.

A. Boards, Offices, and Bureaus

Justice Breyer identifies four boards, offices, or bureaus that are governed by two tiers of tenure protections.[217] Three of the four scenarios are constitutional under my proposed analysis.

1. The Foreign Service Labor Relations Board of the Federal Labor Relations Authority.

The Authority's and the Board's members (including the Authority's chairman, who may remove members of the Board) are each protected under an intermediate tenure protection.[218]

2. The Civilian Board of Contract Appeals of the General Services Administration.

The members of the Board may be removed under the weak tenure-protection provision by the Merit Systems Protection Board.[219]

217 *See* Appendix A at 3184–92, *id.* (Breyer, J., dissenting).

218 5 U.S.C. § 7104(b) (2006); 22 U.S.C. § 4106(e) (2006).

219 41 U.S.C. § 438(b)(2) (2006) (recodified at 41 U.S.C. § 7105(b)(3)). The removal provision governing the Merit Systems Protection Board members states that they "are subject to removal in the same manner as administrative law judges . . . ." *Id.*

The Merit Systems Protection Board members, in turn, are protected by the intermediate tenure protection.[220]

3. The Inspector General of the Postal Service.

The governors of the Postal Service and the Inspector General are all protected by the weak tenure protection.[221]

4. The Office of the Chief Actuary of the Social Security Administration.

The Social Security Administration is protected by a variation of the intermediate tenure protection.[222] The Chief Actuary is protected by the weak tenure protection.[223]

The tenure protections for three of these four offices, under my proposed analysis, pose no constitutional problem. The Civilian Board of Contract Appeals and the Office of the Chief Actuary both have a first-tier intermediate tenure protection and a second-tier weak tenure protection.[224] The Inspector General of the Postal Service rests under two tiers of weak tenure protections, permitting the President great latitude over the decision to remove the Inspector General and the policies of that office.[225] These tenure-protection combinations are permissible.

But the tenure-protection provisions that govern the removal of the Foreign Services Labor Relations Board members are likely unconstitutional. The combination of tenure protections does not permit the President to hold the Foreign Labor Relations Authority accountable for the actions of the Board. The Authority most likely cannot remove the Board members for failing to implement the Authority's policy decisions. The President is left unable to hold the Authority accountable equally for the actions of the Board and for the Authority's other responsibilities.[226]

An administrative law judge may be removed "only for good cause established and determined by the Merit Systems Protection Board." 5 U.S.C. § 7521(a).

220 5 U.S.C. § 1202(d).

221 39 U.S.C. § 202(a)(1)(e)(3) (2006).

222 42 U.S.C. § 902(a)(3) (2006).

223 *Id.* § 902(c)(1).

224 *See supra* Part III.B.1.

225 *See supra* Part III.B.3.

226 *See supra* Part III.B.2. Perhaps the Foreign Service Labor Relations Board members could argue that, despite the inability of the authority to remove them for failing to implement the authority's policies, the two-tier protections here are permissible. The second-tier protection varies from the intermediate tenure-protection prototype because it permits removal based on "corruption" and "incapacity." 22 U.S.C.

B. Administrative Law Judges

Under my proposed analysis, the tiered protection for ALJs does not infringe the President's removal power. ALJs may be removed by the Merit Systems Protection Board.[227] The Board is protected by a first-tier intermediate tenure protection, and ALJs are protected by a second-tier weak tenure protection.[228] This intermediate-weak tenure-provision combination permits the President to hold the Board accountable for the ALJs' decisions—at least as much as may be permissible under the Due Process Clause—to the same extent as for the Board's other actions and responsibilities.[229]

Although interpreting the "for cause" provision as I suggest could arguably give the President (and the Merit Systems Protection Board) too much control over the ALJs' decisionmaking and thus raise due process concerns,[230] the problem is likely so theoretical as to lack constitutional import.[231] "Insubordination" for failing to follow a superior officer's instruction could remain a ground upon which to

§ 4106(e) (2006). These additional grounds may permit the President, unlike the Board members in *FEF*, to remove an official who cheats on her taxes or will otherwise be unable to execute the laws. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3158 (2010). But "corruption" may not reach all forms of undesirable behavior, and this standard still does not appear to permit the first-tier officers to remove second-tier officers who fail to implement the first-tier officers' policies. Accordingly, the President would still not be able to hold the first-tier officers to account for second-tier officers' actions to the same extent as for the first-tier officers' other responsibilities.

The FSLRB may also be able to argue that it performs *only* adjudicative functions, and therefore is entitled to additional tenure protection, much like ALJs. *See infra* Part IV.B. But this may not be successful. Agencies routinely create policy through adjudication, *see supra* note 108 and accompanying text, and the FSLRB's powers are greater (by, among other things, including the ability to set agency policy) than ALJs' power. R

227 5 U.S.C. § 7521(a) (2006).

228 *Id.* §§ 1202(d), 7521(a).

229 *See supra* Part III.B.1.

230 *See* Criddle, *supra* note 155, at 150; Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 457 (1986); *see also* 5 U.S.C. § 556(b) (requiring impartiality by ALJs). R

231 The due process issues concerning an adjudicator's independence—such as what kind of independence is required and who is an "adjudicator" for purposes of the Due Process Clause—is a topic that is much too complex to tackle in this Article, but I provide a few thoughts. If the theoretical threat of removal due to insubordination is unconstitutional under the Due Process Clause, the President's constitutional removal power is unimpeded. The Due Process Clause would limit the President's inherent removal power under an express constitutional provision just as the Appointments Clause limits the President's inherent power to appoint executive officers. *See* U.S. CONST. art. II, § 2. The President would be able to exercise "[t]he executive

remove ALJs, yet it is hard to see, as a practical matter, why the agency would resort to removal based on this ground.[232] First, the agency can overrule, on its own motion, the ALJs' decision.[233] Second, the political price for removing ALJs who refused to rule in a particular manner would likely be very heavy and lead Congress to consider impeaching the first-tier officer or moving the power to adjudicate to another tribunal (such as an Article III court). The mere fact that the President (or a first-tier officer) finds a power at his or her disposal unnecessary and politically unappetizing does not mean that the power does not exist—even if the power's weaknesses provide ALJs additional independence.[234]

Perhaps, too, one could argue that removal restrictions on ALJs could simply be upheld based on other considerations. For instance, Judge Kavanaugh, in his dissenting opinion in the Court of Appeals, distinguished ALJs as (1) employees—(2) whom the President need not use—(3) who serve in an adjudicatory role that is not "central to the functioning of the Executive Branch."[235] But, as Justice Breyer explained, the case law suggests that the ALJs are "officers," not "employees,"[236] and that adjudicatory functions alone cannot ade-

Power" to the extent that the Constitution has not expressly removed that executive power from his or her grasp. *See id.* § 1.

To remedy the due process problem, the courts could determine that "for cause" should not be permitted to include insubordination. But this would lead to "for cause" or "good cause" having different meanings depending upon those whom the provision protects, despite the language's identical function of seeking to protect officers' tenure. *See supra* note 128. Perhaps the better remedy is for courts to provide Congress the opportunity to provide *additional* protection to the adjudicating officers. *Cf.* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 88 (1982) (staying its decision to provide Congress time to reconstitute the bankruptcy courts to avoid constitutional infirmity). R

232 *See* Soc. Sec. Admin. v. Goodman, 19 M.S.P.R. 321, 327, 331 (M.S.P.B. 1984) (noting that insubordination may be a proper ground upon which an agency may seek the removal of an ALJ as long as the ALJ's "qualified right of decisional independence" is sufficiently protected) (quoting Nash v. Califano, 613 F.2d 10, 15 (2d Cir. 1980)).

233 5 U.S.C. § 557(b); *see also id.* § 556(b) (providing that formal administrative proceedings "shall be conducted in an impartial manner").

234 One may argue that my construct gives what it takes away because the President's power is so weak as to be, for practical purposes, nonexistent. But that paradox does not arise from Congress's or the Constitution's doing. The paradox arises, instead, from political realities. *See supra* Part III.A.1.

235 Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667, 699 n.8 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) (quoting Morrison v. Olson, 487 U.S. 654, 691 (1988)), *rev'd*, 130 S. Ct. 3138 (2010).

236 *Free Enter. Fund*, 130 S. Ct. at 3180 (2010) (Breyer, J., dissenting) (citing Freytag v. Comm'r, 501 U.S. 868, 878 (1991) (Scalia, J., concurring)).

quately distinguish ALJs from the Board members in *FEF* because all have adjudicatory powers.[237] Likewise, the fact that agencies employ more than 1500 ALJs[238]—which exceeds the number of federal judges and justices[239]—strongly suggests that the agencies could not simply decide to do without ALJs. Moreover, saving ALJs' independence on these grounds would not provide a justifiable basis for upholding the same tenure-protection provisions that protect other federal agency officers. The Courts would be left to consider the numerous other tiered tenure provisions without providing a workable framework for resolving those challenges.

C. The Military

Protections for military officers also do not violate the President's removal power. They are protected under essentially a weak tenure-protection standard because they can be removed for insubordination expressly by statute. Commissioned officers—both the accused and those serving on the court-martial[240]—may be removed for offenses listed in the Uniform Code of Military Conduct,[241] which include, among other things, insubordination.[242] An officer guilty of insubordination may be removed upon a court-martial's recommendation.[243] The President, the Secretary of Defense, and other military leaders can convene the court-martial to have the insubordinate military officer removed.[244] Accordingly, the President is able to control commissioned military officers and seek their removal, under two tiers of weak tenure protections, for insubordination or "good cause."

This is not to say that the President has full authority to remove an insubordinate military officer. The President can only convene a court-martial. He cannot preside over it; he cannot remove the insubordinate officer without the recommendation of the court-martial; and he very likely cannot remove members of the court-martial

237 *Id.* at 3177.

238 *Id.* at 3180 (counting 1584 ALJs).

239 *See Federal Judgeships*, U.S. CTS., http://www.uscourts.gov/JudgesAndJudgeships/FederalJudgeships.aspx (last visited Mar. 19, 2012) (listing 874 total Article III judgeships).

240 10 U.S.C. § 825(a) (2006) (stating that commissioned officers may serve on courts-martial).

241 *Id.* §§ 801–946.

242 *Id.* § 892 (permitting court-martial for failure to obey orders or rules, or for dereliction of duty).

243 *Id.* § 1161.

244 *Id.* § 822(a).

for merely failing to vote to remove the allegedly insubordinate officer.[245]

But these limits probably do not offend the presidential removal power because they are permitted (and perhaps required) by other constitutional provisions. The President's likely inability to remove the commissioned officers who comprise the court-martial is almost certainly required under the Due Process Clause, which requires a neutral decisionmaker for a fair trial.[246] Similarly, the President's inability to remove a commissioned officer without the recommendation of a court-martial should not be troubling. The Constitution expressly permits Congress "[t]o provide for . . . disciplining . . . the Militia"[247] and "[t]o make Rules for the Government and Regulation of the land and naval Forces."[248] These constitutional powers likely permit Congress to provide commissioned officers a pre-deprivation hearing that civil servants do not receive.

245 The President lacks the statutory authority to attempt to influence the outcome of a court-martial. *See id.* § 837(a). But it is not entirely clear whether such a statutory restriction violates his or her powers as Commander in Chief. Certain statements by the Supreme Court or its members suggest that Congress's powers over the military or the Due Process Clause act as an express limitation on the Commander in Chief's powers. *See, e.g.*, Weiss v. United States, 510 U.S. 163, 177 (1994) (extending deference to Congress because it "has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military") (quoting Solorio v. United States, 483 U.S. 435, 447 (1987)); *see also Ex parte* Milligan, 71 U.S. 2, 123 (1866) ("[I]n pursuance of the power conferred by the Constitution, *Congress* has declared the kinds of trial, and the manner in which they shall be conducted, for offences committed while the party is in the military or naval service.") (emphasis added); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress."). But military jurisprudence expert Frederick Wiener told a Senate committee considering the then-proposed Uniform Code of Military Justice that the President had constitutional authority to appoint and control courts-martial. *Hearing on S. 557 and H.R. 4080 Before a Subcomm. of the S. Comm. on Armed Servs.*, 81st Cong. 137 (1949) (statement of Frederick Bernays Weiner). He referred to *Swaim v. United States*, 165 U.S. 553 (1897). In *Swaim*, the Supreme Court upheld a military member's conviction although President Arthur returned a member to court-martial proceedings until the court's result satisfied him. *See Swaim*, 165 U.S. at 566; *see also* Luther C. West, *A History of Command Influence on the Military Judicial System*, 18 UCLA L. REV. 1, 80 (1970) (noting *Swaim*'s possible support for the proposition that it is unconstitutional to limit the President's power in appointing or controlling courts-martial).

246 *See Weiss*, 510 U.S. at 178, 179.

247 U.S. CONST. art. I, § 8, cl. 16.

248 *Id.* § 8, cl. 14.

D. The Competitive Civil Service

Federal employees and officers in the competitive service can be removed "only for such cause as will promote the efficiency of the service."[249] The employees or officers may first appeal their removal to the Merit Systems Protection Board and then to the Federal Circuit.[250] The weak tenure protection that governs the employees or officers, as discussed above, has already been held to permit the removal of federal employees and officers based on "insubordination."[251] The Merit Systems Protection Board members are protected by an intermediate tenure protection.[252] Thus, employees or officers within the competitive service are subject to two layers of tenure protections: the first-tier officers (Merit Systems Protection Board members) are subject to an intermediate protection, while the second-tier officers and employees (the competitive service) are subject to a weak protection. This combination of tiered protections does not unconstitutionally impede the President's removal power for individuals within the competitive service.[253]

249 5 U.S.C. § 7513(a) (2006). Although at first blush the tenure-protection provision governing the competitive service appears to reach only "employees," it reaches certain inferior "officers" too. But Congress took a circuitous route when saying so. The "civil service" consists of "all appointive positions in . . . the Government of the United States," including all principal and inferior civil officers. 5 U.S.C. §§ 2101, 2102(a)(1)(B), 2104. Generally speaking, the "competitive service"—a subset of the "civil service"—consists of "all civil service positions in the executive branch," except principal and inferior officers confirmed by the Senate. *Id.* § 2102(a). "Principal officers are selected by the President with the advice and consent of the Senate. Inferior officers Congress may allow to be appointed by the President alone, by the heads of departments, or by the Judiciary." Buckley v. Valeo, 424 U.S. 1, 132 (1976) (per curiam). Because all principal officers and certain inferior officers must be confirmed by the Senate, the competitive service, after the exemption, is left with inferior officers appointed by heads of departments, the President alone, or the courts. Although 5 U.S.C. § 7513(a) speaks of the "cause" provision protecting "employees," the definition of "employee" under that subsection includes, subject to certain limitations, "individual[s] in the competitive service." 5 U.S.C. § 7511(a)(1)(A). These "individuals" would include "officers," as provided in 5 U.S.C. §§ 2101, 2102, 2104. This provision does not apply to the Board members because, although they are inferior officers, they are "not considered Government 'officer[s] or employee[s]' for statutory purposes." Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3147 (2010) (citing 15 U.S.C. § 7211(a), (b) (2006)).

250 *See* Bush v. Lucas, 462 U.S. 367, 387 nn.33, 35 (1983).

251 *See supra* Part III.A.1 and note 142. R

252 5 U.S.C. § 1202(d).

253 *See supra* Part III.B.1. Justice Breyer "assume[s] [arguendo] that the majority categorically excludes the competitive service from the scope of its new rule," *Free Enter. Fund*, 130 S. Ct. at 3178 (Breyer, J., dissenting), but, as just demonstrated, the

By interpreting the weak tenure-protection provision as I propose, the courts can have a justifiable basis for upholding the competitive service. To the extent that the Court would do so,[254] it will be unnecessary for the courts to consider why Congress can limit the President's ability to remove certain inferior officers and not others.[255] Moreover, it will render it unnecessary for the Court to create distinctions among "employees" and "officers" for removal-power purposes (despite no disparate treatment in the statutory language), and it will also avoid numerous factual inquiries into whether an individual qualifies as one or the other.[256] Attempting to distinguish the breadth of the officer's duties and officers from employees would only seem, unnecessarily, to undermine the Court's reestablished appreciation of the unitary executive model and to rely upon the Court's current (dys)functional inquiry.

Under this Article's proposed analysis, the tiered tenure protection for more than 500 officers within the Senior Executive Service (the upper-level management of agencies protected by civil service laws[257]) would likely be invalid. Justice Breyer identifies 572 Senior Executive Service officers whose removal is governed by two tiers of tenure protections.[258] Ten of those officers—all of whom work for

competitive service can be distinguished from *FEF* and upheld for both officers and employees.

254 *See Free Enter. Fund*, 130 S. Ct. at 3160 ("Nothing in our opinion, therefore, should be read to cast doubt on the use of what is colloquially known as the civil service system within independent agencies."); Myers v. United States, 272 U.S. 52, 173–74 (1926).

255 *See Free Enter. Fund*, 130 S. Ct. at 3160 ("We do not decide the status of other Government employees, nor do we decide whether 'lesser functionaries subordinate to officers of the United States' must be subject to the same sort of control as those who exercise 'significant authority pursuant to the laws.'") (quoting Buckley v. Valeo, 424 U.S. 1, 126 & n.162 (1976) (per curiam)).

256 The Court has stated, "'Officers of the United States' does not include all employees of the United States . . . . Employees are lesser functionaries subordinate to officers of the United States . . . subject to the control or direction of any other executive, judicial, or legislative authority." *Buckley*, 424 U.S. at 126 n.162. This definition of "employee" is similar to the Court's definition of "inferior officer" in *FEF*. *See Free Enter. Fund*, 130 S. Ct. at 3162. Determining when an individual is a "lesser functionary" is an intensely fact-bound inquiry. *Compare* Landry v. FDIC, 204 F.3d 1125, 1134 (D.C. Cir. 2000) (holding that an ALJ for the FDIC is not an "officer"), *with* Freytag v. Comm'r, 501 U.S. 868, 910 (1991) (Scalia, J., concurring) ("[ALJs] are all executive officers.") (emphasis omitted).

257 *See* 5 U.S.C. § 3132(a)(2).

258 *See* Appendix B at 3192–3213, *Free Enter. Fund*, 130 S. Ct. 3138 (Breyer, J., dissenting). Justice Breyer lists 573 positions as subject to two tiers of review, including the Vice Chairman on the Board of Veterans Appeals. *Id.* at 3213. But the Vice Chairman "serve[s] . . . at the pleasure of the Secretary [of Veteran Affairs]," 38

the Postal Regulatory Commission—are protected by a first-tier weak tenure-protection provision and a second-tier intermediate tenure-protection provision, a scenario that likely does not impede the President's removal power.[259] The other 562 officers (from eighteen different agencies) are protected under two tiers of intermediate tenure provisions.[260] These tiered-tenure-protection schemes most likely unconstitutionally infringe upon the President's removal power.[261]

Although my proposed analysis would invalidate the tiered tenure protections for 562 officers, the analysis provides a reasonable and consistent method of upholding the tenure protections (and perhaps entire statutory schemes) for three of four offices or boards within independent agencies,[262] more than 1500 ALJs, 210,000 commissioned military officers,[263] the officers (and employees) of the competitive service, and certain Senior Executive Service officers. For those officers whose tiered tenure protection unconstitutionally infringes upon the President's removal power, Congress can simply replace the second-tier intermediate tenure-protection provision with a weak tenure-protection provision and thus bestow as much independence to agencies as the Constitution permits.[264]

U.S.C. § 7101(b)(4) (2006), and thus may be removed at will. He or she is not protected by any tenure-protection provision as Vice Chairman. Although the Vice Chairman may not be removed at will from the civil service entirely, *see* Appendix B at 3192, 3213, *Free Enter. Fund*, 130 S. Ct. 3138 (Breyer, J., dissenting) (noting that reserved positions must be filled by career appointees), the President, through the Secretary of Veteran Affairs, can remove the individual serving as the Vice Chairman from that position.

259 *See supra* Part III.B.4. The Postal Regulatory Commission members may be removed "only for cause." 39 U.S.C. § 502(a) (2006). The Senior Executive Service members within the Postal Regulatory Commission's supervision—like all other members of the Senior Executive Service—may be removed for only "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). Thus, the first-tier officers are protected by a weak tenure provision, while individuals of the Senior Executive Service are protected by a variation of the intermediate tenure-protection provision.

260 The tenure protections for the first-tier officers are identified in Appendix A to Justice Breyer's dissent. *See* Appendix A at 3184–92, *Free Enter. Fund*, 130 S. Ct. 3138 (Breyer, J., dissenting). The second-tier officers identified in Appendix B of the dissent are Senior Executive Service officers protected by the intermediate provision of 5 U.S.C. § 7543(a). Appendix B at 3192–3213, *id.*

261 *See supra* Part III.B.2.

262 *See supra* Part IV.A.

263 *See Free Enter. Fund*, 130 S. Ct. at 3181 (Breyer, J., dissenting).

264 *See supra* Part III.A.1.

CONCLUSION

This Article's title holds its tongue firmly within its cheek. The Article reveals the majority's soaring unitary executive rhetoric and the dissent's false dichotomy. But it does not seek to provide a panacea to permit a fully unitary executive or a fully independent administrative state. Instead, this Article takes the Court's decisions—including *FEF*—as it finds them. It proposes an analytical framework that preserves the independent administrative state while remaining sensitive to the Court's current understanding of, or concern for, the unitary executive and the manner in which Congress actually limits the President's removal power.

Perhaps one could argue that it is unfair to apply my proposed analytical framework to longstanding tenure-protection provisions promulgated with different background assumptions. But this argument fails to recognize, as demonstrated in Part I, that preexisting assumptions have been worth little in this area of the law. The Court has often taken in one decision what it gave in another, eschewing a consistent principle to guide its decisions. And the Court, despite its recent interest in the language of tenure-protection provisions, has never been forced to provide definitive interpretations of the tenure-protection prototypes. By establishing three tenure-protection prototypes and evaluating their effect on the President's removal power, the courts can create a more coherent removal-power jurisprudence to provide future litigants, agencies, Presidents, and Congresses meaningful guidance.