Qualified Tenure: Presidential Removal of the FBI Director

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In 1976, Congress passed a bill instituting a ten-year term for the FBI director, ostensibly to provide the head of the nation's foremost law enforcement agency some measure of independence from political pressure that could improperly influence investigations. This note explores the impact of the tenured term on the president's power to remove the director at will for a personal reason, a political reason, or no reason at all. Although the Supreme Court has never directly addressed the president's power with respect to the FBI director, this note concludes that a statutory term alone does not restrict the president's ability to remove the head of the FBI. Moreover, any attempt by Congress to restrict that power with a for-cause removal standard would be an unconstitutional violation of separation of powers principles because of the FBI director's importance as an executive actor.

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INTRODUCTION

The Federal Bureau of Investigation (FBI) was founded in 1908[1] and its first director, J. Edgar Hoover, became a household name during his forty-eight-year service. He affected a tremendous expansion of the influence, size, and power of his nascent agency.[2] One year after Hoover's death, Senator Robert Byrd concluded, "I doubt that any office in our Government can have such a great effect on the lives of individual citizens as that of the FBI Director."[3] In 1968, Congress sought to reassert some control over the sprawling, powerful executive agency by amending the enacting statute to provide for Senate approval of future FBI directors.[4] Eight years later, in 1976, Congress went a step further and set the director's term at ten years.[5]

The congressional hearings on the tenure bill focused on the need for the director to be politically independent so that he could conduct investigations impartially.[6] A fixed term ensured both that the director would have some political insulation from the president and that at least every ten years the Senate would get a say in who would head this critically important agency.[7] It also ensured that the director's service spanned the administrations of at least two presidents, and therefore, would "prevent future administrations from either party from employing the vast powers of the Nation's foremost law enforcement agency for political needs and/or ideological proclivities."[8] However, at least on its face, the language of the bill did not address whether the term was intended to affect how or for what reasons the director could be removed.[9] The Supreme Court has never addressed this question because no director has ever been removed before the expiration of his term without cause.[10]

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1. *A Brief History*, FBI (last visited Mar. 13, 2017), https://www.fbi.gov/history/brief-history.

2. HENRY B. HOGUE, CONG. RESEARCH SERV., RS20963, NOMINATION AND CONFIRMATION OF THE FBI DIR.: PROCESS AND RECENT HISTORY 2 (2005).

3. 114 CONG. REC. 13182 (1968) (statement of Sen. Byrd).

4. HOGUE, *supra* note 2, at 2 n.4 (noting that the 1968 amendment did not apply to the incumbent Hoover, but only to his successors).

5. 28 U.S.C. § 532 note (1976) (Confirmation and Compensation of Director; Term of Service).

6. *See* 122 CONG. REC. 23809 (1976) (statement of Sen. Byrd).

7. *Id.*

8. *Ten-Year Term for FBI Director: Hearing on S.2106 Before the Subcomm. on FBI, Oversight of the S. Comm. on the Judiciary*, 93rd Cong. 1 (1974) (statement of Sen. Byrd).

9. *See generally* Amend. to Title I of the Omnibus Crime Control & Safe Streets Act of 1968, Pub. L. No. 90-503, 90 Stat. 2407, 2427 (1976) (demonstrating that the bill did not include any terms relating to the removal of the director of the FBI).

10. *See* HOGUE, *supra* note 2, at 4 (indicating the only FBI director to ever be removed within the term period was William Sessions in 1993, when President Clinton fired him for ethical indiscretions); *see also* VIVIAN CHU & HENRY HOGUE, CONG. RESEARCH SERV., R41850, FBI DIR. APPOINTMENT & TENURE 14 (2014) (pinpointing that this decision was apparently motivated by good cause, rather than politics; it was relatively uncontroversial and was never challenged in court).

However, the question of whether the ten-year term limits the president's ability to remove an FBI director became ripe for a definitive answer on May 9, 2017, when President Trump removed FBI Director James Comey.[11] Comey was nominated by President Obama in 2013.[12] However, during the 2016 presidential campaign, Comey thrust himself into the center of a political battle that made apparent the serious tension between his loyalty as an executive agent and his duty as an impartial investigator.[13]

First, Comey suspended an investigation into Democratic candidate Hillary Clinton's use of a private server to allegedly send confidential emails, re-opened it on the eve of the election, and then, once again, closed it upon a lack of conclusive findings.[14] Although President Obama officially declared neutrality,[15] he criticized his appointee's handling of the investigation for "violat[ing] investigative guidelines and traffick[ing] in innuendo."[16] Obama did not discuss the potential for removal of Director Comey, but the handling of the investigation inflicted significant damage on the Democratic party at the polls in November.[17]

Nevertheless, Comey's real political battles began when President Donald Trump took office as the winner of the 2016 election.[18] In March of 2017, after Trump made Twitter accusations that Comey had ordered his phones to be illegally wiretapped, Comey testified before the House Permanent Select Committee on Intelligence.[19] Comey stated that there was "no information" to support the president's accusations.[20] More

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11. Michael D. Shear & Matt Apuzzo, *F.B.I. Director. James Comey Is Fired by Trump*, N.Y. TIMES (May 9, 2017), https://www.nytimes.com/2017/05/09/us/politics/james-comey-fired-fbi.html?action=click&contentCollection=Politics&module=RelatedCoverage&region=EndOfArticle&pgtype=article.

12. Robert Delahunty & John Yoo, *A Memo for Attorney General Jeff Sessions*, NAT. REV. (Nov. 28, 2016), http://www.nationalreview.com/article/442493/jeff-sessions-and-donald-trump-restore-public-confidence-law.

13. *Id.*

14. *Id.*

15. Gregory Korte, *Obama Won't Criticize FBI Director Over Clinton Email Investigation*, USA TODAY (Oct. 31, 2016), https://www.usatoday.com/story/news/politics/2016/10/31/obama-wont-criticize-fbi-director-over-clinton-email-investigation/93064856/.

16. Jonathan Martin et al., *Obama Faults F.B.I. on Emails, Citing 'Incomplete Information'*, N.Y. TIMES (Nov. 2, 2016), https://www.nytimes.com/2016/11/03/us/politics/obama-james-comey-fbi-hillary-clinton.html.

17. Noland D. McCaskill et al., *Obama Criticizes FBI's Comey on Clinton Email Probe*, POLITICO (Nov. 2, 2016), http://www.politico.com/story/2016/11/obama-on-clinton-mistakes-230630.

18. *See generally* Margaret Hartmann, *The History of President Trump and James Comey's Tumultuous Relationship*, N.Y. (June 7, 2017), http://nymag.com/daily/intelligencer/article/trump-comey-relationship-history.html (detailing one political battle Comey handled with Trump in office).

19. Matthew Rosenberg et al., *Comey Confirms F.B.I. Inquiry on Russia; Sees No Evidence of Wiretapping*, N.Y. TIMES (Mar. 20, 2017), https://www.nytimes.com/2017/03/20/us/politics/intelligence-committee-russia-donald-trump.html.

20. *Id.*

importantly, Comey confirmed that the FBI was continuing to conduct an investigation into whether Russia had interfered with the outcome of the 2016 election and was specifically probing into whether associates of President Trump's campaign were in contact with Moscow.[21] Following this testimony, on May 9, 2017, President Trump terminated Comey's employment as FBI Director.[22] The White House cited Comey's botched handling of the Clinton email investigation, but critics immediately decried the removal as a clear move to derail the FBI's Russia investigation.[23]

Different versions of the events that preceded Comey's firing have emerged in the aftermath.[24] Comey documented conversations that he had with President Trump over the course of their contentious relationship.[25] According to one memo, Comey and Trump met at a private dinner in January 2017, and Trump requested that Comey take an oath of loyalty to his administration, which Comey refused to do.[26] The following month, in a private meeting in the Oval Office, Comey claimed that Trump requested he drop the investigation into Michael Flynn, Trump's former national security advisor, who was forced to resign after misrepresenting contacts he had with Russian officials.[27] According to Comey, Trump stated in reference to Flynn, "[h]e is a good guy. I hope you can let this go."[28] Again, Comey refused.[29] Months later and days before his firing, Comey asked deputy attorney general, Rod Rosenstein, for more resources to deepen his Russian probe.[30] Instead, Rosenstein penned a memo that was used to support Comey's removal as director.[31]

Trump's removal of Comey sparked an immediate political outcry, so significant that the Justice Department appointed special counsel, Robert Mueller, a former FBI director, to take over the Russia investigation.[32]

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21. *Id.*

22. Shear & Apuzzo, *supra* note 11.

23. *Id.*

24. *See generally* Michael S. Schmidt, *Comey Memo Says Trump Asked Him to End Flynn Investigation*, N.Y. TIMES (May 16, 2017), https://www.nytimes.com/2017/05/16/us/politics/james-comey-trump-flynn-russia-investigation.html (highlighting the differing versions of what occurred before Comey was fired by President Trump).

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. Schmidt, *supra* note 24.

30. Matthew Rosenburg & Matt Apuzzo, *Days Before Firing, Comey Asked for More Resources for Russia Inquiry*, N.Y. TIMES (May 10, 2017), https://www.nytimes.com/2017/05/10/us/politics/comey-russia-investigation-fbi.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=span-ab-top-region&region=top-news&WT.nav=top-news&_r=0.

31. *Id.*

32. Jeremy Diamond & Laura Jarrett, *Special Counsel Appointed in Russia Probe*, CNN POLITICS (May 18, 2017), http://www.cnn.com/2017/05/17/politics/special-counsel-robert-mueller/index.html.

Though Trump dismissed the probe as a "total fabrication,"[33] many are convinced that Comey's deepening commitment to the investigation of Trump played a significant part in his removal.[34] The question becomes, then, whether it is constitutionally permissible for President Trump to remove an FBI director in order to influence, or even halt, a politically damaging criminal investigation.[35] This is an unsettled question of law.[36]

Part of the uncertainty around removal arises because the Appointments Clause of the Constitution, which prescribes the process of appointment of executive officers, is silent on removal.[37] It provides the following:

> [The President] shall have the Power, by and with the Advice and Consent of the Senate, to . . . nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the [S]upreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.[38]

Thus, the Appointments Clause specifically governs the balance of power between the legislature and the president in the appointment of executive officers,[39] but it does not authorize the power of removal, address who can exercise it, or delineate any limitations on how it is to be used.[40]

Unsurprisingly, Constitutional scholars disagree on the answers to these questions.[41] As to the legal source of the removal power, some locate it in the Appointments Clause as a necessary corollary of the president's power

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33. Kelsey Snell & John Wagner, *Rosenstein: Special Counsel Mueller Can Investigate Any Crimes He Uncovers in Russia Probe*, WASH. POST (Aug. 6, 2017), https://www.washingtonpost.com/powerpost/rosenstein-special-counsel-mueller-can-investigate-any-crimes-he-uncovers-in-russia-probe/2017/08/06/2209365a-7aae-11e7-83c7-5bd5460f0d7e_story.html?utm_term=.7703f7fcc74b.

34. Diamond & Jarrett, *supra* note 32.

35. Saikrishna Prakash, *Removal and Tenure in Office*, 92 VA. L. REV. 1779, 1782 (2006).

36. *See id.* (questioning the president's power of removal).

37. *See generally* U.S. CONST. art. II, § 2, cl. 2 (illustrating that the Appointments Clause is silent on the removal power of the president).

38. *Id.*

39. *See* Prakash, *supra* note 35, at 1838-39 (illustrating that the Senate has a check on who the president may appoint).

40. *See id.* at 1840 (demonstrating that the Vesting Clause does not expressly state who has removal power or the limitations on that power).

41. *See* Nathan D. Grundstein, *Presidential Power Administration and Administrative Law Part I – Theoretical Beginnings*, 18 GEO. WASH. L. REV. 285, 300 (1950) (illustrating two scholars who disagree on who may exercise removal power).

to appoint.[42] Other scholars locate it in the inherent power of the executive.[43] Some disagree that the removal power belongs to any one branch at all.[44] Scholars also disagree on the original intent of the Founders as to which executive officers, if any, should be subject to at will removal.[45] Finally, they debate the normative question of the importance of an unfettered removal power to the president's ability to fulfill his Constitutional obligations[46] in accordance with the Article II mandate that, "[the president] shall take care that the laws be faithfully executed."[47]

The Supreme Court has not added much clarity to these debates.[48] All of the removal cases recognize that the president's removal power, and Congress's ability to limit it, implicates important separation of powers principles.[49] However, the Court's opinions have been confusing and "hopelessly contradictory," announcing and then later abandoning several different analytical frameworks.[50]

The removal question is an important one in an era of increasing executive power and political uncertainty. It is especially important with respect to the FBI director in light of the power and discretion that the agency has over individual rights and its responsibilities for internal government oversight. This article will discuss the effect of tenure on the power of the president to remove the FBI director at will and the normative considerations that should shape the discussion around this power.[51] It seeks to answer two questions. First, does the ten-year term provision limit the president's ability to remove the FBI director at will?[52] If not, then second, could Congress constitutionally limit the president's ability to remove the director if it so wished?[53]

In this paper, Part I discusses the principles arising from the removal case law, focusing on the cases that provide analysis relevant to removal of

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42. *See* Prakash, *supra* note 35, at 1783 (indicating that some believe that the removal power arises from the Appointments Clause).

43. *See id.* at 1815-16 (showing some believe that removal power is inherent).

44. *See id.* at 1783 (indicating that Congress may also have removal power).

45. *See id.* at 1781 (illustrating that there is a lack of original intent by the founders, causing dispute among scholars).

46. *Compare, e.g.*, STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 4 (2008), *with* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 2 (1994).

47. U.S. CONST. art. II, § 3.

48. *See* A. Michael Froomkin, *The Imperial Presidency's New Vestments*, 88 NW. U. L. REV. 1346, 1366 (1994) (demonstrating that the Supreme Court has not provided clarity on the issue).

49. *Id*. at 1368.

50. *Id*. at 1366-67.

51. *See infra* Part III.

52. *See id.*

53. *See id.*

the FBI director.[54] Part II lays out the normative, academic debates around the president's removal power.[55] Part III will answer the twin questions of, first, what the law *is* with respect to removing the FBI director, and, second, what are the limits of the law on this question.[56] Ultimately, I conclude that the ten-year term does not limit the president's ability to remove the director at will, and that, given the importance of the FBI director to the effective functioning of a unitary executive, Congress may not limit the president's removal power without infringing on the separation of powers limits laid out in case law.[57]

PART I: THE REMOVAL CASES

The Supreme Court first addressed the removal power in 1897 in *Parsons v. United States*.[58] At that time, a federal statute provided that U.S. attorneys were to be appointed for a term of four years.[59] Upon taking office, President Grover Cleveland sought to remove United States Attorney Parsons before the end of his term, and subsequently, Parsons sued to retain his post.[60] The Court held that the four-year term did not "grant an unconditional term of office for that period," but rather, was "an act of limitation and not of grant."[61] The Court made three arguments to support its holding.[62] First, as a matter of statutory construction, it found that Congress's silence on removal indicated that it did not intend to fetter the inherent power of the president to remove his officers.[63] Second, the Court disposed of contrary language in *Marbury v. Madison*,[64] which suggested that an executive officer might have a right to an office created by Congress, dismissing it as inapposite dicta.[65] Finally, the Court cited longstanding governmental practice for the proposition that the executive

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54. *See infra* Part I.
55. *See infra* Part II.
56. *See infra* Part III.
57. *See infra* Conclusion.
58. 167 U.S. 324 (1897).
59. An Act to Establish the Judicial Courts of the United States, ch. 20, 35, 1 Stat 73, 92 (1789) (repealed 1948); An Act to limit the Term of Office of Certain Officers Therein Names and for Other Purposes, ch. 102, 1, 1 stat 582, 582 (1820).
60. *Parsons*, 167 U.S. at 324.
61. *Id.* at 338.
62. *Id*. at 338-40.
63. *Id.* at 339 ("The provision for a removal from office at pleasure was not necessary for the exercise of that power by the President, because of the fact that he was then regarded as being clothed with such power in any event.").
64. 5 U.S. 137 (1803).
65. *Parsons*, 167 U.S. at 335-36 (discussing the seminal case that established the concept of judicial review); *see Marbury*, 5 U.S. at 137 (stating "what the law is," Chief Justice John Marshall discussed whether the sitting President may withhold a commission to an officer appointed by the previous president).

had an inherent, exclusive removal power: "the power of removal [is] constitutionally vested in the president of the United States—a power which had been uniformly exercised by the Executive Department of the Government from its foundation."[66]

The Court again addressed the question of whether Congress could impede the removal power in 1926 in *Myers v. United States*,[67] where a federal statute prevented the president from removing first-class postmasters without Senate approval.[68] The Court held that the president's removal power with respect to superior officers was exclusive as a matter of Constitutional law, and thus Congress could not involve itself in the removal process.[69] Chief Justice Taft located the power of removal in the executive's power of appointment.[70] Because the appointment of superior officers belonged to the president alone, he reasoned, the removal of superior officers must also belong to the president.[71] Thus, the Court held that "[b]y the plainest implication [the Constitution] excludes congressional dealing with appointments or removals of executive officers not falling within the exception [for inferior officers] and leaves unaffected the executive power of the President to appoint and remove them."[72] Justice Taft supported this holding with a long, winding historical analysis that culminated in the conclusion that the Framers "could never have intended to leave to Congress unlimited discretion to vary fundamentally the operation of the great independent executive branch of government and thus most seriously to weaken it."[73]

Less than a decade later, the Court revisited the removal question in *Humphrey's Executor v. United States*,[74] which significantly limited the reach of *Myers*.[75] In that case, President Franklin Roosevelt sought to remove William Humphrey from his position as the Federal Trade Commissioner before the expiration of his seven-year term.[76] The enacting statute for the Federal Trade Commission (FTC) provided that commissioners could be removed before the expiration of their term only for good cause, thus limiting the president's ability to remove the

66. *Parsons*, 167 U.S. at 340.
67. 272 U.S. 52 (1926).
68. *Id.* at 176.
69. *Id.*
70. *Id.* at 164.
71. *Id.* at 163.
72. *Myers*, 272 U.S. at 127.
73. *Id.*
74. 295 U.S. 602 (1935).
75. *See Humphrey's Ex'r*, 295 U.S. at 629 (limiting the president's removal powers).
76. *Id.* at 618.

Commissioner at will.[77] The Court announced a new rule that the qualitative character of the agency at issue would determine whether such a limitation on removal was constitutional.[78] Justice Sutherland distinguished *Myers* by arguing that the position of first-class postmaster was "purely executive" in nature and thus the *Myers* reasoning extended only to offices that could be similarly characterized.[79] The Court determined that the "illimitable power of removal is not possessed by the President in respect of officers of . . ." quasi-legislative or quasi-judicial agencies.[80] Thus, Congress was Constitutionally authorized to create agencies that were independent of executive control by giving them legislative and adjudicative responsibilities.[81] As an incident to this power, the Court noted, Congress could, if it wished, "fix the period during which the[] [officers of such agencies] shall continue in office, and to forbid their removal except for cause in the meantime."[82]

The Court did not address the removal issue for fifty years, until it granted certiorari in *Morrison v. Olson*.[83] ,At that time, a federal statute required the attorney general to appoint an independent counsel to investigate allegations against the government in certain circumstances.[84] Independent counsel, like the FTC Commissioners, could be removed by the attorney general only for good cause.[85] The Court conceded that the functions of the independent counsel were "'executive' in the sense that they are law enforcement functions that typically have been undertaken by officials within the Executive Branch."[86] However, the Court rejected the categorical test applied in *Humphrey's Executor*:[87]

> The analysis contained in our removal cases is designed not to define rigid categories of those officials who may or may not be

77. *Id.* at 619-20 (citing 15 U.S.C. § 41 (1914)). "Any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office." 15 U.S.C. § 41.

78. *Humphrey's Ex'r*, 295 U.S. at 631.

79. *Id.* at 627-28.

80. *Id.* at 629.

81. *Id.*

82. *Id.*

83. 487 U.S. 654 (1988).

84. *Id.* at 660.

85. *Id.* at 663(citing 28 U.S.C. § 596(a)(1)(1982)).

> An independent counsel appointed under this chapter may be removed from office, other than by impeachment and conviction, only by the personal action of the Attorney General and only for good cause, physical or mental disability . . . or any other condition that substantially impairs the performance of such independent counsel's duties.

28 U.S.C. § 596(a)(1).

86. *Morrison*, 487 U.S. at 691.

87. *Id.* at 689-90.

> removed at will by the President, but to ensure that Congress does not interfere with the President's exercise of the 'executive power' and his constitutionally appointed duty to 'take care that the laws be faithfully executed' under Article II.[88]

Thus, in *Morrison*, the Court introduced a functional analysis, which balanced the importance of the independence of the office in carrying out its duties with the impact of such independence on the president's ability to faithfully execute the laws.[89] The Court determined that the importance of the counsel's independence to its internal investigations outweighed the president's need to remove the counsel at will.[90] To support its finding that the independent counsel was not critical enough to the executive to require unfettered removability, the Court pointed to its limited jurisdiction, tenure, duties, and the existence of some oversight by the attorney general.[91]

After *Morrison*, the Court handed down additional separation-of-powers opinions.[92] However, it did not add directly to its removal jurisprudence until 2010 when it ruled on the for-cause removal restrictions of members of the Public Company Accounting Oversight Board (PCAOB) in *Free Enterprise Fund v. PCAOB*.[93] PCAOB is a subordinate arm of the Securities and Exchange Commission (SEC) that regulates public accounting practices.[94] Although members of PCAOB are explicitly protected by a for-cause provision like the one in *Humphrey's Executor*, the SEC commissioners themselves do not have express for-cause removal protection, but do have a tenured term of five years.[95] In *PCAOB*, the majority, with little explanation, presumed that the commissioners are

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88. *Id.*

89. *Id.* at 691; *see* Steven Breker-Cooper, *The Appointments Clause and the Removal Power: Theory and Seance*, 60 TENN. L. REV. 841, 878 (1993); *see also*, Peter L. Strauss, *On the Difficulties of Generalization- PCAOB in the Footsteps of Myers, Humphrey's Executor, Morrison and Freytag*, 32 CARDOZO L. REV. 2255, 2265 (2011) (describing the *Morrison* test as a "totality of the circumstances analysis").

90. *Morrison*, 487 U.S. at 696.

91. *Id.* at 672.

92. *See, e.g.*, Edmond v. United States, 520 U.S. 651, 666 (determining that judges of the Coast Guard Court of Criminal Appeals could be appointed by the Secretary of Transportation since they were inferior officers, "by reason of the supervision over their work exercised by the General Counsel of the Department of Transportation . . . and the Court of Appeals for the Armed Forces."*)*; *see also* Metro. Washington Airports Auth. v. Citizens United for Abatement of Aircraft Noise, 501 U.S. 252, 274 (holding that Congress may not vest itself with executive powers, such as the veto of executive decisions).

93. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 484 (2010) [hereinafter *PCAOB*].

94. *Id.*

95. 15 U.S.C. § 78d(a). In fact, the for-cause limitation on removal of SEC commissioners was deliberately left out of the SEC statute because the post-*Myers*, pre-*Humphrey's Executor*, Congress feared that any removal limitation would be struck down as unconstitutional. *See* Strauss, *supra* note 89, at 2275.

protected by a for-cause standard given the nature of the SEC's bipartisan structure and regulatory work.[96] The question that the Court addressed was whether these two layers of removal restrictions (one express, one implied) were constitutional.[97] The Court's holding in *PCAOB* was purportedly narrow because it prohibited this double-insulation structure, but the implications of the analysis were broader.[98] The Court reaffirmed the functional test of *Morrison* by disavowing any statutory structure that would impermissibly impede the president's ability to faithfully execute the laws.[99] The Court was especially troubled by removal limitations that interfered too much with democratic accountability.[100] Two levels of for-cause removal protection, for example, would risk that no one could be blamed, or held accountable for, "pernicious measure[s]" that agencies might institute.[101] The Court's focus on the importance of executive oversight and democratic accountability signaled a shift toward embracing the importance of a unitary executive, and a concomitant rejection of a "headless Fourth Branch" that promulgates its own rules and policies with little democratic involvement.[102] Even though the members of PCAOB seem to fit clearly within the "inferior officers" exception of the Appointments Clause, which would ordinarily allow limitations on removal, the Court found that the "'preservation of political accountability' – that is, preservation of the effectiveness of the president's constitutional position at the head of executive government—precluded this protection."[103]

The most recent relevant case law arises from the United States Court of Appeals for the D.C. Circuit. In 2016, in *PHH Corp. v. CFPB*,[104] the court affirmed the president's absolute power to remove the FBI director before the expiration of his term, citing *Parsons*.[105] The court held that it violated Article II for the CFPB, an independent agency under the Dodd-Frank Act, to be headed by a single director who is removable only for cause.[106] It found that independent agencies must be headed by a multimember

96. *PCAOB*, 561 U.S. at 487.

97. *Id.* at 483-84.

98. Strauss, *supra* note 89, at 2275.

99. *PCAOB*, 561 U.S. at 496 ("That arrangement is contrary to Article II's vesting of the executive power in the President . . . He can neither ensure that the laws are faithfully executed, nor be held responsible for a Board member's breach of faith.").

100. *See id.* at 497-98 (noting that the Framers' intent was for those who are employed within the law should be held accountable).

101. *Id.*

102. *See* F.C.C. v. Fox Television Stations, 556 U.S. 502, 525-26 (2009).

103. Strauss, *supra* note 89, at 2274.

104. 839 F.3d 1 (D.C. Cir. 2016), *reh'g granted, order vacated*, 2017 U.S. App. LEXIS 2733 (D.C. Cir. 2017).

105. *Id*. at 39 n.18 ("[U]nder Supreme Court precedent, such tenure provisions do not prevent the President from removing at will a Director at any time during the Director's tenure.").

106. *Id.* at 12.

commission; if an agency is headed by a single director, then it must serve as a traditional executive agency in which the lone director is removable at will.[107] The *PHH Corp.* court then severed the for-cause removal restriction.[108] In a footnote, the court nonetheless upheld the statutory five-year term for the director by comparing it to the ten-year tenure of the FBI director; the court concluded that neither tenure provision purported to restrict the president's at will removal ability.[109] It noted, "[i]f such a provision did impair the President's ability to remove the Director at will, then it too would be unconstitutional, and it would be invalidated and severed."[110] However, the decision was later vacated and ordered for rehearing en banc, so it is unclear whether the holding, or its reasoning, will ultimately stand.[111]

In sum, the case law is an inconsistent, often contradictory, mess in its analytical underpinnings. Early on, the Court was protective of the president's unfettered removal power.[112] In *Parsons* and *Myers*, the Court found the removal power inherent in the power of the executive, deeming it a constitutional power of the president that is unconditionally protected from interference by the other branches.[113] In *Humphreys Executor*, the Court changed direction and found the extent of presidential removal is contingent on the qualitative character of the office that he seeks to replace.[114] In *Morrison*, the court moved away from the *Humphrey's* approach, introducing a balancing test that weighed the importance of independence for a particular office against its importance to the president in executing the laws.[115] *PCAOB* seemingly reaffirmed *Morrison*, but emphasized that the scale is tipped heavily in favor of the president's power to remove, noting the importance of democratic accountability and executive unity.[116]

Thus, the most recent cases indicate that the Court determines the extent of the president's removal power based on its normative sense of how an effective government functions.[117] Though this approach leads to less-than-

107. *Id.*
108. *Id.* at 38.
109. *PHH Corp.*, 839 F.3d at 68 n.18.
110. *Id.*
111. *See PHH Corp.*, 2017 U.S. App. LEXIS 2733, at *4-5.
112. *See* John L. Gedid, *History and Executive Removal Power: Morrison v. Olson and Separation of Powers*, 11 CAMPBELL L. REV. 175, 175-77 (noting that Chief Justice John Marshall found that the president had absolute removal powers in some instances).
113. *Parsons*, 167 U.S. at 343; *see Myers*, 272 U.S. at 176.
114. *Humphrey's Ex'r*, 295 U.S. at 631.
115. *Morrison*, 487 U.S. at 696.
116. *See PCAOB*, 561 U.S. at 513-14 (without such power, the president's role would be greatly diminished).
117. *See* Gedid, *supra* note 112, at 242 (finding that some mixed functions between the branches may exist).

sound doctrine, it provides a defensible rationale for the puzzling outcomes of these cases. Accordingly, it is to these normative considerations that we now turn.

PART II: NORMATIVE DEBATES

Legal scholars are generally divided into two camps regarding the administrative state.[118] One is comprised of adherents to the "unitary executive" thesis, who believe that the Constitution, principles of good governance, and political accountability require executive power to be concentrated in a unified executive body that answers to the president alone.[119] The second is comprised of those who advocate for an administrative state that is relatively independent from the president's political control.[120] They argue instead that the Constitution allows Congress significant flexibility in determining how much political influence the executive can exert over the officers of his vast administration, and believe that independent executive agencies are an effective and important check against presidential power.[121]

With respect to the removal power specifically, "unitarians" believe that an exclusive, unfettered removal power is required by the constitutional principle of separation of powers.[122] The other camp, the "flexitarians," believe that Congress has the power to limit the removability of officers where it sees fit, so long as the president has some general control over high level administrative policy.[123] They argue that the removal power is not necessary for, inherent in, nor exclusive to the executive branch.[124] I will consider the arguments on removal from each of these camps in turn.

The Unitarian Case for an Unfettered Removal Power

Professors Steven Calabresi, Christopher Yoo, and Saikrishna Prakash are among the leading legal scholars that make the constitutional and prudential case for an exclusive, unlimited removal power for an effective, accountable executive.[125]

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118. Froomkin, *supra* note 48 at 1347-48.

119. CALABRESI & YOO, *supra* note 46, at 3.

120. Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 547 (1994).

121. *See id.* (noting that Congress was originally empowered to make the execution of these administrative laws entirely independent of the president).

122. *Id.* at 597, 608.

123. Lessig & Sunstein, *supra* note 46, at 5.

124. *See id*. at 26 (Justice Brandeis pointed out in *Meyers* that the final vote did not express the conviction that the power to remove even a purely executive officer was constitutionally vested in the president).

125. *See generally* Calabresi & Prakash, *supra* note 120; CALABRESI AND YOO, *supra* note 46.

Using both textual and historical arguments, they conclude that Article II mandates a unitary executive because it "allocates the power of law execution and administration to the President alone."[126] This power of execution, *the* executive power, contains with it the natural corollaries of what execution requires and vests those corollaries exclusively in the president: "the Executive Power Clause actually does what it says it does, i.e., it vests (or grants) a power over law execution in the President, and it vests that power in him alone."[127] This grant of executive power, which gives the president the exclusive right to all powers inherent in executive functioning, thereby excludes Congress from exercising any such powers or trying to limit the president in his use of them.[128]

The removal power is one of these inherent executive powers, they argue.[129] This argument has been supported through both the longstanding practice of the executive branch in removing officers at will, and is also reinforced by normative considerations that make it legally and practically preferable.[130] First, longstanding practice is important because "a foundational principle of law is that, to some degree, what the law is on the books is determined by what it actually is in practice."[131] Calabresi and Yoo point out that every single president has interpreted, claimed, and practiced the Article II power to include the unlimited power to remove executive officials.[132] Thus, over time, congressional and judicial acquiescence to the president's claim of the removal power accords it legal force.[133]

Second, they argue that from a normative perspective, an unfettered removal power is necessary for good, accountable governance.[134] Specifically, the removal power is critical to the president's ability to ensure that the laws are faithfully executed.[135] Executive officers are appointed to assist the president in the execution of his constitutional and statutory powers.[136] The removal power ensures that the president can maintain control over the executive branch by removing, "federal officers who he feels are not executing federal law in a manner consistent with his

126. Calabresi & Prakash, *supra* note 120, at 549.
127. *Id.*
128. *Id*. at 663.
129. *Id.* at 563.
130. *See* CALABRESI & YOO, *supra* note 46, at 4 ("The presidential interpretation of Article II as a grant to the president of the removal power and the power to direct executive branch subordinates is an interpretation that is long settled and followed in the executive branch.").
131. *Id.*
132. *Id.*
133. *Id.*
134. Calabresi & Prakash, *supra* note 120, at 597.
135. *Id.* at 617.
136. *Id*. at 597.

administrative agenda."[137] If they do not conform to the president's vision of how the delegated executive powers should be implemented, he must be able to replace them at will.[138] As Calabresi and Prakash put it, "[i]t would make little sense to force the President to deal with officers who fundamentally disagree with his administrative or political philosophy."[139] The removal power thus is part and parcel to the constitutional "grant of 'executive [p]ower' that allows [the president] to superintend the execution of federal law."[140]

Finally, in their view, allowing the president alone to wield the removal power enhances democratic accountability .[141] The president's power to remove officers who are not faithful to his administration ensures that he will be accountable for the actions of the administrative state.[142] Thus, the removal power is critical not only to the president's ability to faithfully execute the laws according to his vision, but also to the people's ability to praise or punish this execution at the polls.[143] Because administrative agencies today wield a tremendous amount of power that can affect the rights of many Americans, it is more important than ever that presidents retain control over agencies so that they can be held to count for policies implemented by their officers.[144]

Professor Prakash has specifically argued that statutory terms for executive officers cannot limit the president's exercise of the removal power.[145] According to Prakash, Congress cannot regulate the president in his exercise of constitutional powers,[146] because the executive and the legislature are co-equal in the exercise of their respective constitutional powers.[147] Therefore, Congress cannot use its power of legislation to prevent the president from using his power of removal. According to Prakash, history bears this out: "[D]uring the drafting and ratification of the Constitution no one ever claimed that Congress could tame the Executive by resorting to regulatory legislation."[148] Because Congress cannot impede the president's ability to remove executive officers, "no executive officer may

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137. *Id.*
138. *Id.*
139. Calabresi & Prakash, *supra* note 120, at 598.
140. *Id.*
141. *See id.* at 603 (establishing that the President should hold the administration of federal law accountable).
142. CALABRESI & YOO, *supra* note 46, at 6.
143. *Id*.
144. *Id.*
145. *See* Prakash, *supra* note 35, at 1842.
146. *Id*. at 1842.
147. Letter from Thomas Jefferson to William Charles Jarvis (Sept. 28, 1820), *in* 7 THE WRITINGS OF THOMAS JEFFERSON 178 (H. A. Washington 2011).
148. Prakash, *supra* note 35, at 1842.

remain in office after the President removes her," even if Congress established a longer term of office by statute.[149] In other words, even if the Congress establishes a five-year term for some executive officer, the President may remove that officer sooner."[150]

In conclusion, executive "unitarians" believe that unfettered removal is necessary to the president's ability to fulfill his constitutional mandate to faithfully execute the laws.[151] Congress can therefore not limit, impinge, or reserve for itself the removal power with respect to executive officers.[152] Any powers held by subordinate executive officers derive from delegation by the president, so every such officer must therefore be subject to the president's ultimate control.[153] Thus, these scholars agree that efforts by Congress to constrain the presidential removal power, at least with respect to executive officers, are unconstitutional.[154] To the extent that legislation purports to limit the president's ability to remove an executive officer before the expiration of a tenured term, it is not Constitutionally cognizable.

The Case for Limitations on the Removal Power

Professors Lawrence Lessig and Cass Sunstein are among the Constitutional scholars who argue in favor of the constitutionality of limitations on the presidential removal power.[155] They refute the idea that the Constitution requires a rigid conception of the executive as being entirely unitary, dismissing this as a "myth" of the twentieth century.[156] Instead, Lessig and Sunstein argue that the framers envisioned a wide berth of "congressional power to structure the administration as it thought proper"[157] They state, "[w]e believe that the framers wanted to constitutionalize just some of the array of power a constitution-maker must allocate, and as for the rest, the framers intended Congress (and posterity) to control as it saw fit."[158] They point out that the framers' aversion to broad executive power makes it unlikely that they would have entrusted to the president alone control of the sprawl that is the modern bureaucracy:

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149. *Id*. at 1844.
150. *Id.*
151. Calabresi & Prakash, *supra* note 120, at 597 ("[A] host of historical and textual arguments persuade us that the President must also have a removal power so that he will be able to maintain control over the personnel of the executive branch.").
152. *Id.* at 617.
153. CALABRESI & YOO, *supra* note 46, at 4.
154. *Id.*
155. Lessig & Sunstein, *supra* note 46, at 2.
156. *Id.*
157. *Id.*
158. *Id.* at 41.

> It is an important truism that the framers were quite skeptical of broad executive authority, a notion that they associated with the tyrannical power of the King. Their skepticism about executive authority—their rejection of the monarchical legacy—at least raises doubts about the idea that the President was to be entrusted with control over all of what we now consider administration.[159]

Professor Michael Froomkin agrees with this analysis.[160] He argues that a proper structural conception of the Constitution "undermines the constitutional case for an executive branch with a chain of command organized along military lines and instead emphasizes the existence of a discernible balance between Congress's role in structuring the executive and the President's inherent and default powers."[161]

Thus, these scholars conclude that independent agencies, in which officers are protected from removal for political reasons, are both constitutional and critical.[162] While they acknowledge that there are some benefits and values promoted by a unitary executive, they believe that there is no constitutional requirement that even purely executive officers, such as law enforcement or prosecutors, are directly answerable to the president.[163] Instead, a translation of the original design of the Constitution into one that accommodates modern government allows significant flexibility for Congress in assigning power to an administrative state that is independent of the president.[164] Some officers who exercise enumerated presidential authority, for example, could serve at the pleasure of the president.[165] But others, such as those who have unique roles that require political independence, like the chair of the Federal Reserve Board or the independent counsel in *Morrison*, adjudicative or ministerial officers, or even other domestic officials without such "conflicts of interest," may all be protected by a good cause standard as Congress sees fit.[166]

PART III: THE FBI DIRECTOR'S LIMITED INDEPENDENCE

This section will answer the two questions set forth in the beginning of this paper.[167] First, I will consider what the positive law *is* regarding the

159. *Id.* at 13.
160. *See* Froomkin, *supra* note 48, at 1347-48.
161. *Id.* at 1347.
162. Lessig & Sunstein, *supra* note 46, at 107.
163. *Id.* at 16-20.
164. *Id*. at 3.
165. *Id*. at 117.
166. *Id.* at 118.
167. *See infra* Part III.

effect of the FBI director's ten-year tenure.[168] I will approach this question by looking at canons of statutory construction to determine the meaning of the tenure statute, precedent in analogous cases, and past practice of the executive.[169] Second, I will discuss whether Congress can constitutionally limit the president's power to remove the FBI director using the principles from governing case law and the relevant normative and legal arguments discussed above.[170]

Does the Tenured Term Limit the President's Removal Power?

It is unlikely that a court would read the statutory ten-year term of the FBI director as imposing a restriction on the president's ability to remove the director at will. General principles of statutory construction, legal precedent interpreting tenure terms for executive officers, and past practice all indicate that tenure does not limit the president's ability to remove an officer for any reason or no reason.

Statutory Construction

The first principle of statutory construction is to look at the plain language of the statute itself to determine what the law is.[171] The text of the tenure bill provides only that "the term of service of the Director of the Federal Bureau of Investigation shall be ten years."[172] It does not provide a for-cause removal standard.[173] Its silence is unambiguous; there is no restriction on removal.[174] When the tenure bill was enacted in 1976, Congress clearly knew what language it could use to provide for-cause protection to heads of independent agencies because it had done so in the past.[175] Further, the tenure bill was passed post-*Humphrey's Executor*, so Congress also knew that for-cause removal provisions were constitutionally permissible in certain circumstances.[176] Thus, facially the language of the bill does not provide protection from removal,[177] and given the knowledge

168. *See infra* Part III.

169. *See* LARRY M. EIG, CONG. RESEARCH SERV., 97-589, STATUTORY INTERPRETATION: GENERAL AND RECENT TRENDS 1 (2011).

170. *See infra* Part III.

171. *See* EIG, *supra* note 169, at 3.

172. 28 U.S.C. § 532 note (1966) (Confirmation and compensation of Director; term of service (b)).

173. *See id.*

174. *See id.*

175. *See, e.g.*, 15 U.S.C. § 41 (1914) (using language to provide for-cause protections in legislation prior to the statute referring to the FBI director).

176. *See* 28 U.S.C. § 532; *See generally Humphrey's Ex'r*, 295 U.S. 602 (discussing the president's for-cause removal power).

177. *See* 28 U.S.C. § 532.

imputed to Congress at the time of enactment,[178] if it had intended to create such insulation, it would have explicitly done so.[179]

Moreover, the second principle of statutory construction, constitutional avoidance, dictates that the Court will not create a constitutional issue where the statute can be fairly read to avoid one.[180] Statutes are to be construed "'if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.'"[181] Limitations on presidential removal of the FBI director, with his "broad investigative, administrative, and policymaking responsibilities," would almost certainly raise a constitutional question about the separation of powers and the boundaries of congressional power.[182] Thus, the Court will not assume that Congress intended to write a statute that raised such serious constitutional concerns if it was not explicit in its intent to do so.[183]

The counter argument to the textual points made above is that the Court as recently as 2010, in *PCAOB*, implied a for-cause provision for SEC commissioners in the face of congressional silence.[184] Like the FBI director, the statute for SEC commissioners expressly provides a five-year term without a for-cause removal standard.[185] Nonetheless, the majority, without providing any analysis, matter-of-factly decided that the *Humphrey's Executor* standard of "'inefficiency, neglect of duty, or malfeasance in office'" (i.e. for cause) applied to restrict removal of SEC commissioners.[186] Presumably, then, the Court could infer a for-cause limitation for the FBI director even though the tenure statute does not discuss removal; however, this is highly unlikely for several reasons.

First, as noted above, the tenure term for the FBI director was set in 1976, after *Humphrey's Executor*.[187] Congress thus knew that for-cause provisions were constitutional for independent agencies, but still did not

178. *See* EIG, *supra* note 169, at 17 (analyzing Congress' silence).

179. *Id.* (citing Whitman v. American Trucking Ass'n., 531 U.S. 457, 468 (2001)) ("[Congress] does not . . . hide elephants in mouseholes.").

180. *See* EIG, *supra* note 169, at 23.

181. *Id.* (citing United States v. Jin Fuey Moy, 241 U.S. 394, 401 (1916)).

182. Constitutionality of Legislation Extending the Term of the FBI Dir., 35 Op. O.L.C 3 (2011).

183. EIG, *supra* note 169, at 23 (citing DeBartolo Corp. v. Florida Gulf Coast Trades Council, 485 U.S. 568, 575 (1988)). "[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress . . . 'the elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.'" *DeBartolo*, 485 U.S. at 575.

184. *PCAOB*, 561 U.S. at 487.

185. 15 U.S.C. §78d(a).

186. *PCAOB*, 561 U.S. at 487(citing *Humphrey's Ex'r*, 295 U.S. at 620).

187. 122 CONG. REC. 23809 (statement of Sen. Byrd).

include the for-cause language to insulate the FBI director.[188] Conversely, the SEC statute was written prior to *Humphrey's Executor* , so Congress at the time was concerned that the for-cause removal provisions were unconstitutional, and thus likely did not include such a provision for fear of putting the entire statutory scheme at risk of being struck down.[189] Thus, the timing difference informs the meaning of Congressional silence in each respective statute.

Second, the SEC is structured as a prototypical independent agency, whereas the FBI is structured as a purely executive agency with direct reporting requirements to the president's cabinet.[190] The SEC is headed by a five-member commission that is made up of bipartisan heads.[191] It also engages in many quasi-legislative and quasi-adjudicative functions that take it out of the "purely executive" realm.[192] Specifically, it can promulgate rules and regulations, and can make adjudications.[193] Conversely, the FBI is an organization headed by a single director.[194] The director reports directly to the attorney general.[195] It exclusively conducts law enforcement and investigative functions.[196] These functions are typically associated only with the executive branch.[197] Thus, the regulatory character of the SEC versus the executive character of the FBI would discourage the Court from inferring an implied for-cause removal restriction.

Finally, legislative history clearly indicates that the senators who proposed the tenure bill did not intend for it to limit the president's removal power.[198] Although the Court does not always agree on the relevance of legislative history to statutory interpretation, it is especially useful when it can be used to "confirm [the] plain meaning, or to refute arguments that a contrary interpretation was 'intended.'"[199] Here, the statute states only that

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188. *See id.* (noting that there was no limit on the president removing the FBI director within his ten-year term).

189. Strauss, *supra* note 89, at 2276.

190. 15 U.S.C. § 78d(a); *see also* 28 U.S.C. § 531 (1966).

191. 15 U.S.C. § 78d(a).

192. 15 U.S.C. § 78w(c) (2011) (for example, it is involved in adjudication hearings).

193. 15 U.S.C. § 78w(a)(1), (c).

194. 28 U.S.C. § 532. The United States Court of Appeals, District of Columbia Circuit finds this distinction extremely compelling in determining whether an agency is independent or purely executive. *See PHH Corp*., 839 F.3d at 12. The court held that agencies that are headed by single directors are purely executive, and therefore, the director must be removable by the president at will as a constitutional matter. *Id.* This case, however, is currently slated for rehearing, so it is unclear whether this holding will stand. *See PHH Corp.*, 2017 U.S. App. LEXIS 2733.

195. 28 U.S.C. § 532.

196. *What is the FBI?*, FBI, https://www.fbi.gov/about/faqs/what-is-the-fbi (last visited Mar. 10, 2017).

197. *See Morrison*, 487 U.S. at 691 (stating that law enforcement functions are located within the executive branch).

198. 122 CONG. REC. 23809 (statement of Sen. Byrd).

199. EIG, *supra* note 169, at 41-42 (citing Darby v. Cisneros, 509 U.S. 137, 147 (1993)).

the FBI director has a ten-year term.[200] The legislative history confirms that the plain meaning—that is, that Congress intended only to set a term but not to limit removal—should control and refutes any inference to another "intended" meaning. Senator Robert Byrd, when he introduced the tenure bill as a member of the Subcommittee on FBI Oversight, explicitly stated,

> [T]here is no limitation on the constitutional power of the President to remove the FBI Director from office within the 10-year term . . . . However, the setting of a 10-year term of office by Congress would, as a practical matter, preclude — or at least inhibit — a President from arbitrarily dismissing an FBI Director for political reasons, since a successor would have to be confirmed by the Senate.[201]

This is especially compelling coming from a subcommittee member, who is generally regarded as a specialist with particular expertise to help uninformed members of Congress gain a better understanding of the impacts of the bills on which they are voting.[202] Thus, this statement of Senator Byrd's understanding of the bill provides significant insight into what members of Congress believed they were enacting.

Thus, principles of statutory construction compel the conclusion that the tenure for the FBI director does not limit the president's removal power. In a challenge to the early removal of an FBI director, the Court would be unlikely to infer such a restriction given the timing of the statute, the structure of the FBI, and the legislative history on the tenure bill.

Precedent

Although there is no prior case that is directly on point, precedent that deals with statutory term limits indicates that such a term does not, on its face, restrict the president's ability to remove the FBI director.[203] The most closely analogous case is *Parsons*, where the Court held that a four-year term for attorneys general did not restrict the president's removal power.[204] Two of the main arguments that persuaded the Court in *Parsons*, statutory silence on removal and past practice, are directly applicable in the case of the FBI director.[205] The tenure statute for the FBI director looks just like the tenure statute for attorneys general in *Parsons*, providing only a term,

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200. 122 CONG. REC. 23809 (statement of Sen. Byrd).

201. *Id.*

202. EIG, *supra* note 169, at 48 (discussing the importance of legislative history under the conception of the "busy Congress" model).

203. *See Parsons*, 167 U.S. at 343 (discussing only the length of the term).

204. *Id.* at 338-39.

205. *See generally id.* (allowing presidential removal where there is a history of removal power and an absence of law prohibiting it).

but no for-cause protection.[206] Longstanding governmental practice with respect to FBI directors is discussed further *infra*, and it also supports the conclusion that statutory terms do not impact at will removal.[207] The D.C. Circuit in *PHH Corp.* also cited *Parsons* for support for the proposition that tenure provisions standing alone "do not prevent the President from removing at will a Director at any time during the Director's tenure."[208]

The counter argument here is that it is not clear how much precedential value either *Parsons or PHH Corp.* actually has. The holding of the *PHH* case has since been vacated.[209] *Parsons*, though never expressly limited, has not played a role in any of the Court's removal cases since *Myers*.[210] *Humphrey's Executor*, *Morrison*, and *PCAOB* all completely ignored the reasoning of *Parsons*.[211]

Perhaps, too, a distinction could be made between the role of attorneys general and the role of the FBI director that would render *Parsons* inapplicable. The attorney general is a member of the president's cabinet acting as the chief law enforcement officer and lawyer for the United States government.[212] The president sets the enforcement priorities for the Department of Justice and supervises it directly.[213] Thus, it seems clear that the attorney general, and his subordinates, serve at the pleasure of the president as agents who are critical in helping him faithfully execute the laws.[214] The FBI director, on the other hand, is responsible for investigations, including sometimes investigating the government, or the president himself. [215] This conflict of interest could necessitate a greater degree of independence than attorneys general enjoy, which would not only provide a basis for distinguishing the FBI director from attorney general, but may also support an analogy to the independent counsel in *Morrison*, who was also technically executive in nature, but nonetheless required independence.[216]

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206. *Id.* at 327-28.

207. *See infra* Part III.

208. *PHH Corp.*, 839 F.3d at 68 n.18 (citing *Parsons*, 167 U.S. at 343).

209. *See PHH Corp.*, 2017 U.S. App. LEXIS 2733 at *4-5.

210. *See generally Myers*, 272 U.S. 52 (following the Court's reasoning in *Parsons*).

211. *See generally Humphrey's Ex'r.*, 839 F.3d 1; *Morrison*, 487 U.S. 654; *PCAOB*, 561 U.S. 477 (all imposing a four-cause requirement even with congressional silence on the issue).

212. 28 U.S.C. § 503.

213. *Id.*

214. *See* DOJ, U.S. DEPARTMENT OF JUSTICE OVERVIEW (2014) (led by the Attorney General, the Department of Justice oversees a variety of responsibilities).

215. *See, e.g.*, 119 CONG. REC. 4349 (1973) (statement of Sen. Byrd). The Senate refused to confirm President Nixon's FBI Director-nominee L. Patrick Gray because it questioned whether he could fairly discharge the Watergate investigation given his close political relationship with President Nixon. *Id.*

216. *See Morrison*, 487 U.S. at 710 (describing the Court's test).

Accordingly, there are strong counterarguments that the limited precedent on the issue is inapplicable. However, to the extent that the reasoning in *Parsons* is still viable, this case seems to support that the FBI director's tenure does not impact the possibility of removal.

Practice

Historical practice around the removability of the FBI director is important because, as Professors Calabresi and Yoo have pointed out, the law often follows practice.[217]

The removal debates can be traced back to the founding, and as discussed *supra*, scholars disagree on how far the Founders believed the removal power to extend.[218] However, the Court in *Parsons* regarded governmental practice on the general removability of executive officers as well-settled by 1897.[219] It discussed at length a 1789 bill in which Congress had authorized the office of the secretary of the Department of Foreign Affairs and, in doing so made, the momentous "Decision of 1789."[220] This decision to forego language in that bill stating that the secretary was removable at the president's will because such language was, "itself susceptible to the objection of undertaking to confer upon the president a power which before he had not."[221] The Court acknowledged that the Decision of 1789 was exhaustively debated by "[m]any distinguished lawyers [who] originally had very different opinions in regard to [the removal] power from the one arrived at . . . in 1789."[222] However, it concluded that "when the question was alluded to in after years[,] the[] [lawyers] recognized that the decision of Congress in 1789, and the universal practice of the government under it, had settled the question beyond any power of alteration."[223]

Modern practice and analysis bear out the *Parsons* Court's characterization of accepted practice with respect to the FBI director specifically. As noted above, only one FBI director, namely William Sessions, has ever been removed before the expiration of his term.[224] President Clinton, in removing Sessions, cited, "'serious questions . . . about the conduct and the leadership of the Director,' and a report on 'certain

217. CALABRESI & YOO, *supra* note 46, at 4.
218. *See supra* Part II.
219. *Parsons*, 167 U.S. at 330.
220. *Id.* at 329.
221. *Id*.
222. *Id.* at 330.
223. *Id.* Many modern scholars agree with the Court's characterization of the meaning of the Decision of 1789. *See generally* Prakash, *supra* note 35 ("At least since the Decision of 1789, it has been well understood that the President unilaterally may remove executive officers.").
224. CHUE & HOGUE, *supra* note 10, at 5.

conduct' issued by the Office of Professional Responsibility at the Department of Justice."[225] Although Senator Hatch criticized the President's reasons for removing Sessions as "vague,"[226] there was "no significant outcry about the politicization of the FBI."[227] Professors Saikrishna Prakash and Aditya Bamzai argue that congressional acquiescence to President Clinton's decision "reflected an acknowledgement that the law gives the president removal authority over subordinate executive branch officers. . . [as] a central, not incidental, constitutional principle."[228]

Moreover, the Office of Legal Counsel (OLC) has long held the position that the FBI director is removable at the president's will.[229] Though courts grant only limited deference, if any, to the litigating positions of agencies,[230] the consistency of the OLC's interpretation of the tenure statute counsels in favor of its persuasiveness.[231] The OLC first took this position in 1993 in an unpublished memorandum.[232] It reaffirmed it in 2011 in a report to the Senate Committee on the Judiciary during debates on a bill to extend the term of Director Robert Mueller.[233] The OLC Opinion stated that under *Parsons*, "[s]pecification of a term of office does not create. . . [a removal] restriction."[234] The Committee, for its part, also seemed to accept the position of the OLC on the removal issue.[235] In its report on the same bill, the Committee recommended that the term extension be granted, noting several times that such an extension would not diminish the president's ability to remove the FBI director at will.[236] In the congressional hearings preceding this report, Mueller himself acknowledged that he understood his position to be subject to removal for any reason or no reason.[237]

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225. *Id*. at 8.

226. *Id*. (citing 103 CONG. REC. 309 (1993) (statement of Sen. Hatch)).

227. Saikrishna Prakash & Aditya Bamzai, *The Somewhat Independent FBI Director*, LA TIMES (Nov. 2, 2016), http://www.latimes.com/opinion/op-ed/la-oe-prakash-bamzai-how-independent-is-the-fbi-director-20161102-story.html.

228. *Id.*

229. 35 Op. Off. Legal Counsel, *supra* note 181, at 3.

230. *See* Bradley G. Hubbard, *Deference to Agency Statutory Interpretations First Advanced in Litigation? The Chevron Two-Step and the Skidmore Shuffle*, 80 U. CHI. L. R. 447, 447 (2013) (discussing the circuit split as to whether to afford *Skidmore* deference or no deference at all to agency positions taken for the first time in litigation).

231. EIG, *supra* note 169, at 28.

232. 35 Op. O.L.C., at 3.

233. S. REP. No. 112-23, at 9 (2011) (stating that "the FBI Director is unquestionably serving the President at will. . . .").

234. 35 Op. O.L.C., at 3.

235. *See* S. REP. NO. 112-23.

236. *Id.*

237. *See generally The President's Request to Extend the Service of Director Mueller of the FBI until 2013: Hearing before the S. Comm. on the Judiciary*, 112th Cong. (2011) (Statement of Robert S. Mueller, III, Dir., FBI) (noting that is term is not definite).

Conclusion

Canons of statutory interpretation combined with the Court's precedent and long-standing governmental practice indicate that the tenure of the FBI director does not limit the president's power to remove him at will.[238] The only meaningful limitation, at least under current law, is the political cost that might be incurred by removing a director based on partisan ideology.[239] Some scholars have argued that this cost is increased by the mere existence of the tenure term, which "reinforce[s] a culture of independence and impl[ies] a sort of presumption against removal during the term."[240] Congress seems satisfied that its role in confirming a nominee will constrain the president from arbitrarily removing a director.[241] However, the president is not bound by any legal directive to allow the director to remain in his position for the entirety of the term and may remove him for any reason or no reason at all, presumably even to disrupt an investigation against him.[242]

Could Congress Limit the President's Power to Remove the FBI Director?

The question of whether Congress could constitutionally limit the president's power to remove the FBI director at will is much closer than the question of how the current law operates. In this section, I identify and apply the analytical principles that the Court has used to determine the limits of Congressional power in other removal contexts.[243] I also address the persuasiveness of the normative arguments in this context.[244] Although there are undoubtedly normative considerations that favor political insulation for the FBI director, I conclude that the president's ability to faithfully execute the laws necessitates that an officer with such broad

238. *See supra* Part III.

239. *See, e.g.*, Prakash & Bramzai, *supra* note 227 ("Wise presidents understand the awful optics of meddling in law enforcement decisions and thus make no move to politicize the FBI."); *see also* Lyle Denniston, *How Independent is the FBI Director?*, CONST. DAILY (Oct. 31, 2016), http://blog.constitutioncenter.org/2016/10/how-independent-is-the-fbis-director/ ("Even though a director is subject to being dismissed at the President's choice, it has always been apparent that there are political risks in doing so."); 35 Op. O.L.C., at 4 ("[I]n practice the political costs of undoing the extension through removal of the incumbent may be prohibitive.").

240. Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 ALA. L. REV. 1205, 1253 (2014).

241. 122 CONG. REC. 23809 (statement of Sen. Byrd) ("However, the setting of a 10-year term of office by Congress would, as a practical matter, preclude — or at least inhibit — a President from arbitrarily dismissing an FBI Director for political reasons, since a successor would have to be confirmed by the Senate.").

242. 35 Op. O.L.C., at 3.

243. *See infra* Part III.

244. *See infra* Part III.

policy-making and law enforcement responsibilities as the FBI director must be accountable to the president so that he can fulfill his constitutional mandate of faithful execution of the law.

Morrison announced the Court's most recent and relevant test on whether Congress could limit the president's ability to remove a particular officer.[245] It created a balancing test that weighed the practical need for the president to have control over a particular officer through at will removal against the normative need for independence of that officer given his responsibilities.[246] *PCAOB* later added a gloss, emphasizing democratic accountability and executive unity on one side of the scale.[247] In applying this test, the Court incorporated many of the factors and principles of earlier cases to determine the importance of the particular office to effective presidential execution.[248] Accordingly, I will use the *Morrison* balancing test as my overarching analytical framework in approaching this question, and I will also incorporate principles of earlier cases that are instructive in determining how the scale ultimately balances. [249]

The President's Need for Control

The first side of the scale weighs the president's need for control of a particular officer by asking whether the duties of that officer are so critical to the president in his ability to faithfully execute the laws that at will removal is constitutionally required.[250] There are a number of factors, informed by precedent, that aid in this determination.

First, the characterization of whether an officer is inferior or superior is instructive in determining how important the officer is to the execution of the laws.[251] *Myers* took a formalist approach to distinguishing between the two types of officers by looking at the method of appointment.[252] Using the *Myers* approach, the FBI director is *ipso facto* a superior officer under the

245. *Morrison*, 487 U.S. at 689-90.

246. *Id.*

247. *PCOAB*, 561 U.S. at 479.

248. *See id.* (referencing back to a number of cases such as *Meyers* and *Morrison*).

249. *See Morrison*, 487 U.S. at 654 (indicating that the Court does not utilize a "rigid" analysis).

250. *Id.* at 690; s*ee Humphrey's Ex'r*, 295 U.S. at 632 (stating that removal may occur for purely executive officers); *see also PCAOB*, 561 U.S. at 498 (stating that executive oversight of executive power is necessary to ensure that the laws are faithfully executed).

251. *See Myers*, 272 U.S. at 163 (indicating that officers appointed by the President with consent of the Senate are essential to public welfare).

252. *See id.* at 163 (defining superior officers as those who are appointed by the President with the advice and consent of the Senate); *see also Edmond*, 520 U.S. at 663 for an alternative formalist approach. Defining inferior officers as those whose "work is directed and supervised at some level" by other officers appointed by the president with the Senate's consent. *Id.*

Appointments Clause simply because he is appointed by the president alone with the advice and consent of the Senate. [253]

A functionalist approach also bears out the principal, superior nature of the FBI director's duties.[254] In *Morrison*, the Court was persuaded that the independent counsel was inferior because her limited tenure (which lasted only the duration of the investigation), jurisdiction (appointed *ad hoc* when the attorney general determined necessary), and duties (limited to a single internal investigation) made her an inferior officer that was not critical to the president's faithful execution of the laws.[255] The FBI director is like the independent counsel at issue in *Morrison* insofar as he answers to the attorney general, but his responsibilities, tenure, and jurisdiction far exceed the counsel in every other way.[256] As the OLC has pointed out, the FBI Director has significant policymaking duties and discretion in his investigative responsibilities that undeniably implicate the president's Article II powers.[257] Congress itself also discussed the indisputable importance and reach of the FBI director as head of the nation's "foremost law enforcement agency"[258] when it passed the 1968 statute to involve the Senate in the confirmation of nominees.[259] Thus, the FBI director is a superior officer in both a formalist and functionalist sense.

Another factor useful in determining whether an officer's accountability to the president is constitutionally critical is the qualitative character of the responsibilities of the director's office, as announced in *Humphrey's Executor*.[260] The FBI has no apparent adjudicative or legislative responsibilities the way that other independent regulatory agencies typically do; during debates over the tenure bill, Senator Byrd explicitly characterized the FBI director as fulfilling "purely executive" functions.[261] The FBI director reports to both the attorney general and the Director of National Intelligence, both of whom serve on the president's cabinet.[262] As discussed

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253. *See generally Myers*, 272 U.S. 52 (1926) (holding that officers appointed by president are superior officers).

254. *See Morrison*, 487 U.S. at 671 (questioning whether the duties are classified as "inferior" or "principal").

255. *Id.* at 671-72.

256. *Compare id.* (arguing independent counsel had limited duties, tenure, and jurisdiction) *with* 35 Op. O.L.C., at 3 (stating that the FBI director has "broad investigative, administrative, and policymaking" authority).

257. 35 Op. O.L.C., at 3.

258. 122 CONG. REC. 23809 (statement of Sen. Byrd).

259. 114 CONG. REC. 13181 (1968) (statement of Sen. Murphy) ("Logically, therefore the Director of the FBI should also fall into this category [of major officers], for it is much too important a position to be included in the [inferior] classification where the Congress has no voice in his selection.").

260. *Humphrey's Ex'r*, 295 U.S. at 629.

261. 122 CONG. REC. 23809 (statement of Sen. Byrd).

262. Jessica Estepa, *Trump Suggests the FBI Director Reports Directly to the President. Here's How it Really Works*, USA TODAY (July 20, 2017, 12:37 PM),

in the section on the impact of tenure *supra*, practice and precedent both favor the president's ability to remove "purely executive" officers since the president is exclusively responsible for the actions of the executive branch under Article II.[263]

The Normative Need for Independence

Turning to the other side of the scale, the *Morrison* Court weighed normative arguments for the need for a particular officer's independence.[264] In the context of the independent counsel, which was charged with internal government investigations, the Court was persuaded that the importance of the counsel's function and its independence in performing that function outweighed the president's need for control.[265] Now that the independent counsel statute has expired, the FBI has been charged with internal investigations of the executive branch, and indeed is heading one up presently on President Trump's campaign ties to Russia.[266] In light of this, there are undoubtedly strong arguments in favor of freeing the FBI director from the political predilections of the president he serves, just like there were in *Morrison*.

Many of these normative arguments originally surfaced during debates over President Nixon's nominee for FBI director, L. Patrick Gray, who was an agent involved in investigating the Watergate scandal.[267] Gray was accused of trying to intentionally prevent the discovery of President Nixon's role in originating the plot to break into the Democratic National Convention's headquarters while he was interim FBI director pending Senate consent.[268] During Gray's nomination hearing, senators discussed the importance of having an independent FBI director to ensure that it conducted its intelligence gathering in a moral, professional, nonpartisan way, especially where an internal investigation was concerned.[269] They also argued that integrity and high standards required of law enforcement officials necessitated political independence.[270] Indeed, many would argue today that Comey should have been able to conduct his investigation into Russia, despite President Trump's objections, to ensure that it is as vigorous

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https://www.usatoday.com/story/news/politics/onpolitics/2017/07/20/fbi-director-reports-justice-department-not-president/495094001/.

263. *PCAOB*, 561 U.S. at 496-97.

264. *See Morrison*, 487 U.S. at 693-94 (questioning whether an actor of each of the three branches of government can operate independently).

265. *Id.* at 693.

266. Diamond & Jarrett, *supra* note 32.

267. 119 CONG. REC. 4349 (1973) (statement of Sen. Byrd).

268. *Id.*

269. 119 CONG. REC. 8353 (1973) (statement of Sen. Byrd).

270. 119 CONG. REC. 4349 (statement of Sen. Byrd).

as necessary to protect the integrity of American election processes.[271] Although the Senate could seek to prevent Trump from replacing Comey with a nominee who would pledge to drop the investigation, Comey's sudden removal has undoubtedly cast doubt upon the legitimacy of the investigation going forward.[272]

Nonetheless, there are also normative reasons for why the FBI director should be closely tied to the president, or at least, subject to his oversight. Foremost among these is political accountability, as discussed in *PCAOB*.[273] Some Congressmen have argued that the FBI's vast investigative reach, which could surely endanger the individual liberties of citizens, is reason enough to free the director from political control by a partisan president.[274] However, this conclusion does not follow from that premise. Where an agency has tremendous power to affect the lives of citizens, it becomes increasingly important that the people retain control over the limits of that agency's behavior. If the FBI director can operate entirely independently of political pressure, the risk of investigative impunity that allowed J. Edgar Hoover to target political enemies will surely increase, especially in an era where technology enables unfettered government surveillance.[275]

Conclusion

The normative considerations for insulating the FBI director cut equally strongly in both directions, but the qualitative and quantitative nature of the FBI director's duties indicate that he is a purely executive, superior officer that is a critical member of the president's administration. Therefore, in order to preserve the president's ability to faithfully execute the laws and to ensure that he is held accountable for the domestic policies of the FBI, Congress cannot constitutionally limit the president's ability to remove the FBI director at will.

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271. Rosenberg et al., *supra* note 19.
272. Shear & Apuzzo, *supra* note 11.
273. *PCAOB*, 561 U.S. at 479.
274. 119 CONG. REC. 4349 (statement of Sen. Byrd).
275. *The History of the FBI's Secret 'Enemies' List*, NPR (Feb. 14, 2012), http://www.npr.org/2012/02/14/146862081/the-history-of-the-fbis-secret-enemies-list.

> If he was going to attack the enemies of the United States, better that it be done in secret and not under law. Because to convict people in court, you have to reveal your evidence, but when you're doing secret intelligence operations, you just have to sabotage and subvert them and steal their secrets — you don't have to produce evidence capable of discovery by the other side. That could embarrass you or get the case thrown out — because you had gone outside the law to enforce the law.

Id.

CONCLUSION

In conclusion, I have argued that the ten-year tenure for the FBI director does not constrain the president's ability to remove him at will.[276] Moreover, separation of powers principles, combined with normative considerations of prudent and accountable governance, mandate that Congress cannot constitutionally limit the president's ability to remove the FBI director before the expiration of his term.[277] If these questions about the impact of tenure and the ability of Congress to limit presidential removal reach the Court within the next four (or eight) years, they should be answered according to the analysis above.[278] As unprecedented as the era of President Trump is, and as politically unconstrained as he appears to be, the Court should resist the temptation to create precedent that is Trump-specific. It must be guided by a disciplined adherence to Constitutional principles that will far outlast the current political climate.

276. *See supra* Part III.
277. *See Morrison*, 487 U.S. at 689-90; *see also PCAOB*, 561 U.S. at 479.
278. *See supra* Part III.