



## THE IMPORTANCE OF REMOVAL RESTRICTIONS IN A SCHEDULE F WORLD

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With the 2024 presidential election a few months away, the possibility of a second Trump presidency has raised concerns about plans to establish control over government employees by creating a new federal employment category that would make as many as 50,000 federal civil servants subject to political retaliation.<sup>1</sup>

These concerns arise from the likely reinstatement of a Trump-era executive order creating a “Schedule F of the Excepted Service,” effectively making the career officials who serve in certain important positions at-will employees instead of those who enjoy civil service protection.<sup>2</sup>

President Joseph Biden revoked the Schedule F executive order during the first week of his Administration.<sup>3</sup> And in April of this year, the Office

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<sup>1</sup> See Isaac Chotiner, *Donald Trump’s Plan to Make the Presidency More Like a Kingship*, NEW YORKER, July 18, 2023 (referencing a report by the *New York Times* stating that Donald Trump’s team is planning to expand presidential power); Joe Davidson, *Trump’s Plan to Gut Civil Service Protections Was Harsher Than Estimated*, WASH. POST, Feb. 28, 2024 (noting Donald Trump’s promises to reinstate an executive order that would make federal jobs vulnerable to political changes); Ian Ward, *‘A Very Large Earthquake’: How Trump Could Decimate the Civil Service*, POLITICO, Dec. 20, 2023 (predicting that if Donald Trump is able to reinstate the executive order then roughly 50,000 federal civil servants could be at risk of losing their jobs).

<sup>2</sup> Exec. Order No. 13957, 85 Fed. Reg. 67631 (Oct. 21, 2020); see also Erich Wagner, *‘Stunning’ Executive Order Would Politicize Civil Service*, GOV’T EXEC. Oct. 22, 2020 (“Positions in the new Schedule F would effectively constitute at-will employment, without any of the protections against adverse personnel actions that most federal workers currently enjoy . . .”).

<sup>3</sup> Exec. Order No. 14003, 86 Fed. Reg. 7231 (Jan. 22, 2021); see also Exec. Order No. 14029 § 3, 86 Fed. Reg. 27025 (May 14, 2021) (explaining that Executive Order 14003 of January 22, 2021, revoked Executive Order 13957 of October 21, 2020, thereby eliminating Schedule F in the excepted service).

of Personnel Management issued a final rule that clarifies and reinforces the importance of protecting civil servants from political threats to their jobs so that they can carry out their duties on the basis of expertise and experience.<sup>4</sup>

While much of the debate over Schedule F centers on federal civil service protections that apply across the executive branch, comparatively little attention has been given to position-specific provisions in agencies' authorizing statutes that protect certain officials from removal. But efforts by a future Trump Administration to assert presidential control over executive officials will confront more than just the general civil service protections. They will also come into conflict with laws that protect from political interference hundreds of agency officials who perform vital, nonpartisan functions—such as the collection of data and information.

Terms of service and protections from removal for political reasons are important tools to promote nonpartisan, expert administration informed by experience. Most discussions about restrictions on removal of government officials center on agency heads or quasi-adjudicative administrative officials, such as administrative law judges, where removal protections serve compelling due process functions by promoting objectivity in decision-making.

But protections from political influence extend beyond adjudicative positions and far into the hierarchy of federal agencies. By our estimation, Congress has used statutory law to specify the terms of appointment and removal for at least 339 federal administrative officials below the level of agency head.<sup>5</sup> These officials include those who project future agency workloads, conduct benefit-cost analyses of federal programs, and help regulate the nation's election, health, military and transportation systems. They all serve under statutory provisions that specify their terms of office or protect them from removal for political reasons.

#### THE LEGAL LANDSCAPE

In 1933, President Franklin D. Roosevelt asked William R. Humphrey, a member of the Federal Trade Commission (FTC), for his resignation because Roosevelt felt that the work of the FTC could be “carried out most effectively” with Roosevelt-appointed administrators as opposed to those who worked under the previous administration.<sup>6</sup> The statute creating the

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<sup>4</sup> Upholding Civil Service Protections and Merit System Principles, 89 Fed. Reg. 24982 (Apr. 9, 2024); *see also*, OPM News Release, *Release: OPM Issues Final Rule to Reinforce and Clarify Protections for Nonpartisan Career Civil Service*, OFF. PERS. MGMT., (Apr. 4, 2024) (to be codified at 5 C.F.R. pt. 210, 212, 213, 302, 432, 451, and 752) (“This final rule honors our 2.2 million career civil servants, helping ensure that people are hired and fired based on merit and that they can carry out their duties based on their expertise. . .”).

<sup>5</sup> *See infra* text accompanying notes 11-12.

<sup>6</sup> *Humphrey's Executor v. United States*, 295 U.S. 602, 618 (1935) (quoting the letter Roosevelt sent to Humphrey).

FTC had given its commissioners, like Humphrey, “for cause” protections from removal, meaning that a President could not remove them merely for political reasons or differences of opinion. In 1935, after hearing a challenge to a presidential order removing Humphrey from his position at the FTC, the Supreme Court held that appointees at the head of quasi-judicial agencies structured like the FTC can be protected from at-will removal by the President.

Fast forward almost 90 years, in *Seila Law v. Consumer Financial Protection Bureau*, the Supreme Court again confronted the importance of for-cause removal protections for agencies like the FTC, emphasizing the role of these protections in promoting nonpartisan expertise.<sup>7</sup> In *Seila Law*, however, the Court held that independent agencies that wield significant executive power, if run by a single person (as opposed to a multi-member commission like the FTC), cannot be protected from at-will presidential removal.

The *Seila Law* Court acknowledged that such protections could still be used “for inferior officers with limited duties and no policymaking or administrative authority.”<sup>8</sup> Yet which officials qualify under this definition is unclear. Even in *Humphrey’s*, the Court recognized that a range of government officials fall within a “field of doubt” over whether they can be protected from at-will presidential removal.<sup>9</sup> Put in terms underlying the Supreme Court’s famous decision in *Marbury v. Madison*, it can be asked: Where does a purely administrative duty end and policymaking begin?<sup>10</sup>

#### THE “FIELD OF DOUBT”: PROTECTED OFFICIALS BELOW THE LEVEL OF AGENCY HEAD

Despite the importance of considering statutory provisions that specify fixed terms or for-cause protections for federal administrative officials below the level of agency heads, there currently exists no comprehensive source that shows how many officials operate under these protections. We embarked upon a project to fill that void.

Using the *Sourcebook of United States Executive Agencies*<sup>11</sup> published by the Administrative Conference of the United States, coupled with two discrete searches of the United States Code, we identified statutory provi-

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<sup>7</sup> *Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S.Ct. 2183, 2199 (2020)

<sup>8</sup> *Id.* (citing *United States v. Perkins* 116 U.S. 483 (1886) and *Morrison v. Olson* 487 U.S. 654 (1988)).

<sup>9</sup> *Humphrey’s Executor*, *supra* note 6, at 632 (“[B]etween the decision in the *Myers* Case, which sustains the unrestrictable power of the President to remove purely executive officers, and our present decision that such power does not extend to an officer such as that here involved, there shall remain a field of doubt, we leave such cases as may fall within it for future consideration and determination as they may arise.”).

<sup>10</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 158 (1803).

<sup>11</sup> ADMIN. CONF. OF THE U.S., *SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES* (2d. ed. 2018).

sions related to the appointment of officials below the level of agency head that created a fixed term or restricted an official's removal from office.<sup>12</sup>

Our preliminary research found over 300 such positions that have fixed terms nestled within larger agencies. Although a term of appointment does not alone imply restrictions on removal,<sup>13</sup> by specifying terms of service through statute, Congress creates expectations for continued service and that may influence the susceptibility of the appointee to presidential influence.

Above and beyond fixed terms, 39 such positions have explicit removal protections. Interestingly, Congress has paired over 90 percent of these positions with specific language requiring that officials who serve in those positions have policy expertise.

#### THE IMPORTANCE OF EXPERTISE

Over one half of the positions we identified (179) have expertise requirements, such as mandates that an official have specific scientific, financial, or mathematical skills.

To highlight how administrative expertise informs congressional decision-making and general statutory assumptions about fixed terms and for-cause protections, we provide some compelling examples of officials who must possess statutorily specified professional backgrounds or expertise:

- The Commissioner for Patents and the Commissioner for Trademarks within the U.S. Patent and Trademark Office;<sup>14</sup>
- The Chief Actuaries of the Centers for Medicare and Medicaid Services (CMS) and the Social Security Administration (SSA);<sup>15</sup>
- The Administrator, Chief Operating Officer for the air traffic control system, and Director of Whistleblowers at the Federal Aviation Administration;<sup>16</sup>
- The Commissioner of Labor Statistics;<sup>17</sup>

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<sup>12</sup> Information about how we coded positions, complete with documentation of statutory citations and language, can be obtained from us upon request and will be made publicly available upon publication of a longer academic article on this subject.

<sup>13</sup> *Severino v. Biden*, 71 F.4th 1038, 1049 (2023) (“These [Council] members naturally represent their home agencies and, by proxy, the President—and most will be subject to at-will removal in their day jobs. At the same time, Congress gave all members of the Council only three-year terms, ensuring that no member could outlast a President.”).

<sup>14</sup> 35 U.S.C. § 3(b)(2).

<sup>15</sup> 42 U.S.C. § 1317(b)(1); 42 U.S.C. § 902(c)(1).

<sup>16</sup> 49 U.S.C. § 106(c); (r); (t).

<sup>17</sup> 29 U.S.C. § 3.

- Various officials within the Department of Treasury, including the heads of the Internal Revenue Service,<sup>18</sup> Comptroller of the Currency,<sup>19</sup> and United States Mint,<sup>20</sup> as well as
  - Members of the Financial Stability Oversight Council;<sup>21</sup> and
  - Members of the Internal Revenue Service Oversight Board.<sup>22</sup>

These examples are informative for at least two reasons. First, they represent a range of appointments. Some are officials who are nominated by the President and confirmed by the Senate, while others are appointed by the head of their agencies or departmental subunits. Second, they highlight distinct congressional decision-making to prioritize expertise and continuity within federal agencies.

For some of these positions, such as the Commissioner for Patents and Commissioner for Trademarks, Congress explicitly has specified a term of years and clarified that these officials may only be removed for misconduct or non-satisfactory performance.<sup>23</sup> Statutory provisions about other officials, such as the Chief Actuaries at CMS<sup>24</sup> and SSA,<sup>25</sup> do not specify a term of office but state that the official may only be removed for cause. For other officials, such as the Chief Operating Officer for the air traffic control system, Congress has mandated a term of years and clarified that “every effort” shall be made “to ensure stability and continuity in . . . leadership” within the agency.<sup>26</sup> In still other instances, such as with the Comptroller of the Currency, statutory provisions require the President to notify Congress of a desire to remove the official before the official’s term of office has ended.<sup>27</sup> Provisions that protect officials such as the Comptroller reinforce the idea that fixed terms create expectations of independent judgment and continuity of service.

Furthermore, while these are all political appointments, some are made outside of the President’s purview. For example, the Directors of the Office of Whistleblower Protection and the Office of Aviation Safety Investigations at the Federal Aviation Administration are appointed by the Secretary of Transportation.<sup>28</sup>

We highlight these examples because they clearly require skills, competencies, and independent judgment. Nothing they do should be made

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<sup>18</sup> 26 U.S.C. § 7803.

<sup>19</sup> 12 U.S.C. § 2.

<sup>20</sup> 31 U.S.C. § 304.

<sup>21</sup> 12 U.S.C. § 5321.

<sup>22</sup> 26 U.S.C. § 7802.

<sup>23</sup> 35 U.S.C. § 3(b)(2)(c).

<sup>24</sup> 42 U.S.C. § 1317(b)(1).

<sup>25</sup> 42 U.S.C. § 902(c)(1).

<sup>26</sup> 49 U.S.C. § 106(r)(1)(D).

<sup>27</sup> 12 U.S.C. § 2.

<sup>28</sup> 49 U.S.C. § 106(t)(2)(A).

political in a partisan sense. Indeed, the policy authority they exert would be worthless if compromised politically.

#### FORECASTING THE FUTURE OF CIVIL SERVICE

In preparation for a potential second presidency, Trump's advisors have a vetted list of replacements for non-adjudicative administrative officials, waiting to be called into action. This plan for removal of key government officials is part of the Trump "playbook."<sup>29</sup> This playbook is silent on qualifications, expertise, or competence. Remember that in 2019 during the Trump Administration, officials at the National Oceanic and Atmospheric Administration were pressured to apologize for accurately reporting National Weather Service forecasts contested by Trump's "Sharpie."<sup>30</sup> In cases such as that one, politics made a fool of expertise.

Were this playbook to be employed at the outset of a second Trump Administration, there would be a raft of litigation in the courts and reviews of dismissed officials by the Merit Systems Protection Board, which adjudicates employee appeals against partisan political and other prohibited personnel practices. Clearly, the courts would be tested on the due process issues that could be raised.

Yet the damage would still be done because, even if reinstatement in principle could be ultimately ordered, injunctions to reinstate removal of key officials would not likely be granted. And practically, reinstated officials would face an uphill battle in continuing their jobs.

If rigged weather reports were a problem in a first Trump Administration, wait to see what rigged data from the Bureau of Labor Statistics or U.S. Census Bureau might lead to. Independent expert advice is as important to government, the business community, and the public as fair hearings are. Indeed, perhaps more so. At stake in this tug of war between the unitary executive and the so-called deep state are the interests of continuity of leadership, independent decision-making, and expertise—the essentials of effective governance.<sup>31</sup>

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<sup>29</sup> Walter M. Shaub Jr., *The Corruption Playbook*, NEW YORK REV., Apr. 18, 2024.

<sup>30</sup> NOAA, FINAL REP. NO. OIG-20-032-1, EVALUATION OF NOAA'S SEPT. 6, 2019, STATEMENT ABOUT HURRICANE DORIAN FORECASTS (June 26, 2020), <https://www.oig.doc.gov/OIGPublications/OIG-20-032-1.pdf>; Eugene Kiely & Lori Robertson, *Trump Doubles Down on Inaccurate Hurricane Forecast*, FACTCHECK.ORG, <https://www.factcheck.org/2019/09/trump-doubles-down-on-inaccurate-hurricane-forecast/>, (Sept. 9, 2019) (comparing the forecast released by NOAA and the statements made by Donald Trump).

<sup>31</sup> STEPHEN SKOWRONEK ET AL., PHANTOMS OF A BELEAGUERED REPUBLIC: THE DEEP STATE AND THE UNITARY EXECUTIVE (2021).