NOTE

THE RETURN OF SCHEDULE F AND THE PERILS OF MANDATING LOYALTY IN THE CIVIL SERVICE

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ABSTRACT

Toward the end of his first term in office, President Donald Trump issued an executive order introducing a new federal employee classification called Schedule F, which would have converted certain civil service employees to the excepted service. Ostensibly framed as a measure to enhance "effective performance management" and ensure "good administration," this order concealed Trump's more insidious intentions. Beneath the veil of bureaucratic terminology lay a scheme aimed at circumventing the legal protections afforded to civil service employees and granting Trump the power to dismiss hundreds of thousands of federal workers deemed disloyal to him and his administration. If brought to fruition, Schedule F will turn back the clock to the days of the spoils system of the nineteenth century.

Trump did not succeed in his plans the first time around. Shortly after issuing the order, Trump lost the 2020 presidential election to Joe Biden, who swiftly revoked the order upon assuming office. However, with Trump returning to the presidency in 2025, he has made clear that one of his priorities will be to reinstate Schedule F. Other Republican leaders have also expressed an interest in implementing policies similar to Schedule F. The civil service protections that have existed for nearly 150 years have never been in a more precarious position. This Note analyzes the features of Schedule F and the inherent danger posed by mandating loyalty in the civil service, which would undermine key principles of American democracy. Furthermore, this Note proposes three frameworks that courts may adopt to declare Schedule F unconstitutional, thereby preserving the civil service protections of hundreds of thousands of federal employees.

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INTRODUCTION

On October 21, 2020, then-President Donald Trump issued Executive Order 13957, *Creating Schedule F in the Excepted Service*.[1] The Trump administration characterized the order as merely providing federal agencies with the flexibility to expedite hiring of essential policy personnel and fire underperforming employees from their positions.[2] However, the order's underlying objective would be more far-reaching: it aimed to subject a wide range of traditionally non-partisan civil service employees to political loyalty tests.

The executive order introduced Schedule F, a type of employment classification that removes due process rights and statutory protections that prevent federal workers from being fired at will. In essence, the classification established a new category of political appointee, and experts estimate hundreds of thousands of federal workers could potentially be subject to its reach.[3] Many anticipated the order would be used to fire federal employees critical of the administration and its agenda and to quickly install individuals viewed as loyal to Trump.

Executive Order 13957 was short-lived; President Joe Biden rescinded it with an executive order of his own immediately after assuming office in January 2021.[4] Yet Schedule F is likely to make a return in the not-too-distant future, as Trump is set to return to the White House in 2025 and has insisted that he will reinstitute Schedule F.[5] Other conservative leaders, including JD Vance, Ron DeSantis, and Vivek Ramaswamy, have pledged their support for Schedule F, and with the Republican Party in control of the House and Senate, the reinstatement of Trump's executive order seems all the more likely.[6] Likewise, the Heritage Foundation stands ready to help Trump accomplish his policy goal; the organization has rolled out Project 2025, which provides a carefully crafted

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[1] Exec. Order No. 13,957, 3 C.F.R. 466, 466 (2021) [hereinafter E.O. 13,957].

[2] *Id.*

[3] *See* Allan Smith, *Trump Zeroes in on a Key Target of His 'Retribution' Agenda: Government Workers*, NBC NEWS (Apr. 26, 2023, 7:00 AM), https://www.nbcnews.com/politics/donald-trump/trump-retribution-agenda-government-workers-schedule-f-rcna78785; U.S. GOV'T ACCOUNTABILITY OFF., GAO-22-105504, CIVIL SERVICE: AGENCY RESPONSES AND PERSPECTIVES ON FORMER EXECUTIVE ORDER TO CREATE A NEW SCHEDULE F CATEGORY OF FEDERAL POSITIONS 25 (2022) [hereinafter AGENCY RESPONSES AND PERSPECTIVES].

[4] Exec. Order No. 14,003, 3 C.F.R. 464, 464 (2022) [hereinafter E.O. 14,003].

[5] *Agenda47: President Trump's Plan to Dismantle the Deep State and Return Power to the American People*, TRUMP VANCE 2024 (Mar. 21, 2023), https://www.donaldjtrump.com/agenda47/agenda47-president-trumps-plan-to-dismantle-the-deep-state-and-return-power-to-the-american-people [https://perma.cc/FV9B-ZDM2] ("On Day One, [Trump will] re-issue 2020 executive order restoring the president's authority to fire rogue bureaucrats. . . . [Trump will] [o]verhaul federal departments and agencies, firing all of the corrupt actors in our National Security and Intelligence apparatus.").

[6] *See infra* Part I.B.

blueprint for reinstituting Schedule F.[7] Should it be fully implemented in Trump's second term, Schedule F has the potential to dismantle the civil service as we know it today.[8]

This Note delves into the perils of substituting impartiality and expertise in the civil service with partisanship and loyalty mandates. Additionally, it examines measures that may be taken to prevent such drastic actions. In Part I, I provide an overview and brief history of the civil service in the United States. In Part II, I expand on the ramifications of Schedule F and underscore the policy's potentially catastrophic impact on the functioning of our government. Finally, in Part III, I analyze legislative, executive, and judicial safeguards to counteract this radical effort. I determine that the judiciary is best suited to address this issue, because the courts are uniquely empowered to check executive authority. I then propose three frameworks that courts may adopt to preserve the guiding principles and key characteristics of the civil service.

I. BACKGROUND ON THE CIVIL SERVICE

A. *An Overview and Brief History of the Civil Service*

To adopt the popular slogan of Dunkin', America runs on the civil service. Civil servants play a myriad of important roles—from managing our national parks and administering Social Security benefits to keeping our air and water clean and protecting consumers from exploitation. The civil servants who make up our administrative agencies "are dedicated and talented professionals who provide the continuity of expertise and experience necessary for the Federal Government to function optimally."[9] Without them, the wheels of our government would almost certainly grind to a halt.

The civil service also constitutes a substantial portion of the workforce. According to the Office of Personnel Management ("OPM"), which oversees

[7] Julian Borger, *Trump Win Could See Mass Purge of State Department, US Diplomats Fear*, GUARDIAN (June 14, 2024, 6:30 AM), https://www.theguardian.com/us-news/article/2024/jun/13/trump-state-department-project-2025-purge [https://perma.cc/CY6Z-N3FF] (detailing how Heritage Foundation's Project 2025 "flesh[es] out the Schedule F approach").

[8] *See* H.J. Mai & Steve Inskeep, *If Trump Is Reelected, the Independence of Federal Agencies Could Be at Risk*, NPR (Aug. 16, 2023, 6:41 AM), https://www.npr.org/2023/08/07/1192432628/conservatives-mull-how-2nd-trump-presidency-could-reshape-the-federal-government [https://perma.cc/LC5C-5RR8]; Zeeshan Aleem, *If Trump Wins in 2024, He Has a Dangerous Tool for Wrecking the Government*, MSNBC (Nov. 15, 2023, 6:00 AM), https://www.msnbc.com/opinion/msnbc-opinion/trump-project-2025-hire-government-loyal-rcna125137 [https://perma.cc/RK6N-A2CU]; Jonathan Swan, *A Radical Plan for Trump's Second Term*, AXIOS (July 22, 2022), https://www.axios.com/2022/07/22/trump-2025-radical-plan-second-term [https://perma.cc/2KFD-QTTS].

[9] Upholding Civil Service Protections and Merit System Principles, 89 Fed. Reg. 24982, 24982 (Apr. 9, 2024).

the civil service, the federal government employs more than two million people, making Uncle Sam the largest employer in the United States.[10] To put it in perspective, the next biggest employers are Walmart, with approximately 1.6 million employees,[11] and Amazon, with nearly one million.[12]

An essential aspect of the civil service is its nonpartisan nature. Under federal law, civil servants are to be appointed on the basis of merit as opposed to political affiliation,[13] and they are protected against partisan dismissal and retaliation.[14] However, this was not always the case.

In the early days of the republic, civil service control rested almost exclusively with the executive branch.[15] Such control invited cronyism, as it was common for newly elected presidents to reward their supporters with positions

[10] *See* BEN LEUBSDORF & CAROL WILSON, CONG. RSCH. SERV., R47716, CURRENT FEDERAL CIVILIAN EMPLOYMENT BY STATE AND CONGRESSIONAL DISTRICT 1 (2023).

[11] Brooke DiPalma, *Walmart's Pay Change for Entry-Level Employees Another Signal of Easing Labor Market*, YAHOO! FIN. (Sept. 8, 2023), https://finance.yahoo.com/news/walmarts-pay-change-for-entry-level-employees-another-signal-of-easing-labor-market-190220265.html [https://perma.cc/MQB6-9ZT7].

[12] April Glaser, *Amazon Now Employs Almost 1 Million People in the U.S. — or 1 in Every 169 Workers*, NBC NEWS (July 30, 2021, 4:23 PM), https://www.nbcnews.com/business/business-news/amazon-now-employs-almost-1-million-people-u-s-or-n1275539.

[13] *See* Pendleton Civil Service Reform Act, ch. 27, 22 Stat. 403, 403-04 (1883) (stating that hiring should be based on "open, competitive examination[]" of the employee's "relative capacity and fitness . . . to discharge the duties of the service into which they seek to be appointed").

[14] *See* Civil Service Reform Act of 1978, § 2301(b)(8)(A), Pub. L. No. 95-454, 92 Stat. 1111, 1114 (codifying employee protection against "arbitrary action, personal favoritism, or coercion for partisan political purposes").

[15] Notably, it is unclear from the Constitution exactly which branch of government carries out the function of regulating the civil service. On the one hand, the Supreme Court has interpreted the Constitution to grant Congress the authority to create federal agencies and to confer power upon such agencies. *See* Buckley v. Valeo, 424 U.S. 1, 138-39 (1976) (per curiam) ("Congress may undoubtedly under the Necessary and Proper Clause create 'offices' in the generic sense . . . ."); La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act . . . unless and until Congress confers power upon it."). On the other hand, the Court has also recognized the President's power to appoint and to remove certain individuals from their federal posts. *See* Myers v. United States, 272 U.S. 52, 163-64 (1926) ("[A]rticle 2 grants to the President . . . the power of appointment and removal of executive officers--a conclusion confirmed by his obligation to take care that the laws be faithfully executed . . . ."). As such, there exists today a delicate balance between "congressional creation and control of agencies and the President's authority to supervise executive officials." TODD GARVEY & DANIEL J. SHEFFNER, CONG. RSCH. SERV., R45442, CONGRESS'S AUTHORITY TO INFLUENCE AND CONTROL EXECUTIVE BRANCH AGENCIES 2 (2018).

in their administrations.[16] This practice was epitomized during Andrew Jackson's inauguration, when a horde of his political supporters overran the White House in search of jobs that the new President had promised them.[17] Senator William L. Marcy of New York famously defended Jackson's actions by stating: "[T]o the victor belong the spoils of the enemy."[18] And so the practice of reserving positions for those loyal to the President came to be known as the "spoils system."

Rewarding political supporters with public office was not without its consequences. During this period, incompetence, corruption, and outright theft within the civil service were common.[19] The spoils system seemed to reach its breaking point in 1881. Charles Guiteau, a fervent supporter of then-President James A. Garfield, camped outside the White House for months, waiting for the civil service job that he assumed Garfield would offer him.[20] The job never came, and Guiteau grew disgruntled. Eventually, Guiteau acquired a gun, tracked down Garfield as he entered a Washington, D.C., railroad station, and assassinated him.[21] This grisly incident sparked the push for reform to the civil service.[22]

Shortly after Garfield's assassination, Congress passed the Pendleton Act, which put an end to the rampant spoils system and instead required civil service candidates to undergo competitive examinations.[23] The law also included protections for federal employees from removal by the President or Congress for political reasons.[24] Thus, a new tradition of hiring civil servants on the basis of their merit as opposed to their political leanings was born.

More than a century later, the Supreme Court recognized that civil servants possess "property rights in continued employment" and that government

[16] *See* OFF. OF PUB. AFFS., U.S. CIV. SERV. COMM'N, BIOGRAPHY OF AN IDEAL: A HISTORY OF THE FEDERAL CIVIL SERVICE 15 (rev. 2d ed. 1973) [hereinafter BIOGRAPHY OF AN IDEAL].

[17] DANIEL WALKER HOWE, WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815-1848, at 331 (2007).

[18] 8 REG. DEB. 1325 (1832).

[19] BIOGRAPHY OF AN IDEAL, *supra* note 16, at 16.

[20] Allan Peskin, *Charles Guiteau of Illinois: President Garfield's Assassin*, 70 J. ILL. STATE HIST. SOC'Y 130, 134 (1977).

[21] *Id.* at 136, 138-39.

[22] *See* H. Manley Case, *Federal Employee Job Rights: The Pendleton Act of 1883 to the Civil Service Reform Act of 1978*, 29 HOW. L.J. 283, 287 (1986) (noting that President Garfield's assassination "mobilize[d] the public opinion to the need for civil service reform legislation").

[23] Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 YALE L.J. 1362, 1390 (2010).

[24] *See* Ronald N. Johnson & Gary D. Libecap, *Replacing Political Patronage with Merit: The Roles of the President and the Congress in the Origins of the Federal Civil Service System*, *in* THE FEDERAL CIVIL SERVICE SYSTEM AND THE PROBLEM OF BUREAUCRACY 12, 12 (1994).

employers may not "deprive them of this property without due process."[25] Around the same time, Congress passed the Civil Service Reform Act ("CSRA"), which codified into law the due process right of civil servants to not be removed from their positions except for cause.[26] Specifically, the CSRA provides employees confronted with the prospect of removal the right to: (1) receive notice of the charges lodged against them; (2) be provided with a reasonable opportunity to respond to the deciding official; and (3) appeal to the Merit Systems Protection Board ("MSPB") after the removal takes effect.[27] The law also grants whistleblower protections for civil servants, shielding them from adverse actions for bringing wrongdoing to light.[28] In all, the CSRA serves as an additional safeguard against the politicization of the civil service.

Of course, such protections from removal can become obstacles for presidents to follow through on the very plans they were elected to enact. So, like many parts of the American system, balance is crucial. For example, the CSRA's protections against removal do not extend to positions "determined to be of a confidential, policy-determining, policy-making or policy-advocating character by . . . the President for a position that the President has excepted from the competitive service."[29] The protections do not apply, for instance, to the roughly 4,000 federal employees who are presidential appointees (also known as "principal officers").[30] Executive control over these positions enables presidents to effectuate their policies.

In addition to these principal officers, there are two other types of federal employees: competitive service employees and excepted service employees.[31] Competitive service employees apply for jobs that are open to all applicants,

[25] Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538-39 (1985); *see also* LaChance v. Erickson, 522 U.S. 262, 266 (1998) (holding that due process protections recognized in *Loudermill* apply to federal civil servants).

[26] *See* JARED P. COLE, CONG. RSCH. SERV., R44803, THE CIVIL SERVICE REFORM ACT: DUE PROCESS AND MISCONDUCT-RELATED ADVERSE ACTIONS 3 (2017).

[27] *See* U.S. MERIT SYS. PROT. BD. ("MSPB"), WHAT IS DUE PROCESS IN FEDERAL CIVIL SERVICE EMPLOYMENT? 10 (2015), https://www.mspb.gov/studies/studies/What_is_Due_Process_in_Federal_Civil_Service_Employment_1166935.pdf [https://perma.cc/6NQ8-6P43] (citing 5 U.S.C. §§ 7503, 7513, 7701-03).

[28] *See* MSPB, WHISTLEBLOWER PROTECTIONS FOR FEDERAL EMPLOYEES 1 (2010), https://www.mspb.gov/studies/studies/Whistleblower_Protections_for_Federal_Employees_557972.pdf [https://perma.cc/57DP-PMY2] (citing 5 U.S.C. § 2302(a)(2)(A)).

[29] 5 U.S.C. § 7511(b)(2).

[30] *See* United States v. Arthrex, Inc., 594 U.S. 1, 12 (2021) ("Only the President, with the advice and consent of the Senate, can appoint noninferior officers, called 'principal' officers as shorthand in our cases."); Seila Law LLC v. CFPB, 591 U.S. 197, 204 (2020) ("The President's power to remove—and thus supervise—those who wield executive power on his behalf follows from the text of Article II . . . .").

[31] *See* JON O. SHIMABUKURO & JENNIFER A. STAMAN, CONG. RSCH. SERV., R45635, CATEGORIES OF FEDERAL CIVIL SERVICE EMPLOYMENT: A SNAPSHOT 1 (2019).

compete with others via an examination administered by OPM, and are ultimately selected for their positions based on the merits of their applications.[32]

The excepted service, like the competitive service, requires that individuals be selected for their positions "solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures that all receive equal opportunity."[33] However, these employees are "excepted" from certain competitive service requirements (such as taking a competitive examination), and agencies are permitted to use their own hiring methods and evaluation criteria.[34] Certain excepted service employees are further classified into lettered categories, or "schedules," of workers.[35] These excepted service positions must be authorized by statute, by regulations issued by OPM, or by executive orders promulgated by the President.[36]

Both competitive and excepted service employees enjoy CSRA protections.[37] This means that agencies that wish to fire individuals in these positions need to prove either that they engaged in some type of misconduct or that their performance is unacceptable.[38]

B. *Attacks on the Civil Service*

In recent years, the Republican Party has attempted to undermine the Pendleton Act and the CSRA, both of which uphold the political neutrality and

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[32] *See id.* at 1-2.

[33] 5 U.S.C. § 2301(b)(1); *see also id.* 5 U.S.C. § 3320 (requiring that agencies "shall select for appointment to each vacancy in the excepted service in the executive branch . . . in the same manner and under the same conditions required for the competitive service").

[34] *See* U.S. GEN. ACCOUNTING OFF., GAO/GGD-97-72, THE EXCEPTED SERVICE: A RESEARCH PROFILE 2-3 (1997) [hereinafter A RESEARCH PROFILE], https://www.gao.gov/assets/ggd-97-72.pdf [https://perma.cc/C48U-JLKY] ("For excepted service positions, each agency develops, within basic requirements prescribed by law or regulation, its own hiring system, which establishes the evaluation criteria to be used in filling these excepted positions.").

[35] *See* 5 C.F.R. § 6.2 (2024). Schedule A includes "[a]ttorneys, chaplains, and short-term positions for which there is a critical hiring need." SHIMABUKURO & STAMAN, *supra* note 31, at 4. Schedule B includes positions that involve "policy analysis, teaching, and technical assistance." *Id.* Schedule C includes "most political appointees below the cabinet and subcabinet levels," including agencies' senior advisor and special assistant positions. *Id.* at 5. Schedule D applies mainly to student interns and recent graduates. *See id.*; *infra* note 118 (describing executive order establishing schedule D programs and internships specifically geared towards students and recent graduates). Schedule E applies to administrative law judges. *See infra* note 118.

[36] *See* A RESEARCH PROFILE, *supra* note 34, at 3 n.3 (explaining that positions created by OPM regulations or presidential executive orders must still be authorized pursuant to statute).

[37] *See* AGENCY RESPONSES AND PERSPECTIVES, *supra* note 3, at 24 tbl.2.

[38] Jim Eisenmann, *Trump's Plan to Gut the Civil Service*, LAWFARE (Dec. 8, 2020, 10:28 AM), https://www.lawfaremedia.org/article/trumps-plan-gut-civil-service [https://perma.cc/5YHM-YMWZ].

impartiality of federal employees. During his 2016 campaign and presidency, Donald Trump frequently promised to "drain the swamp"[39] and characterized civil servants as part of a "deep state"[40] working against him.[41]

Trump and his politically appointed officials also took actions to delegitimize and politicize civil servants. One Trump-appointed official accused civil servants of being "Obama holdovers," "traitors," and "disloyal" based on their perceived ideological views, and then subsequently retaliated against them.[42] For instance, Trump officials have done the following: disbanded and cut funding for climate research agencies;[43] repeatedly transferred, demoted, or fired employees involved in investigating his ties to Russia and his efforts to extort

[39] Peter Overby, *Trump's Efforts to 'Drain the Swamp' Lagging Behind His Campaign Rhetoric*, NPR (Apr. 26, 2017, 5:00 AM), https://www.npr.org/2017/04/26/525551816/trumps-efforts-to-drain-the-swamp-lagging-behind-his-campaign-rhetoric [https://perma.cc/2875-J8TU].

[40] *See* Z. Byron Wolf, *Trump Embraces Deep State Conspiracy Theory*, CNN (Nov. 29, 2017, 11:15 AM), https://www.cnn.com/2017/11/29/politics/donald-trump-deep-state/index.html [https://perma.cc/7QXZ-CQMG] (reporting Trump's claims that government employees were secretly working against the interests of his administration); Stephen Collinson & Jeremy Diamond, *Trump Again at War with 'Deep State' Justice Department*, CNN (Jan. 2, 2018, 3:30 PM), https://edition.cnn.com/2018/01/02/politics/president-donald-trump-deep-state/index.html [https://perma.cc/HBF7-FJYG] (covering Trump's criticism of Justice Department officials investigating him for alleged collusion with Russia during his presidential campaign); *see also* Donald Moynihan & Alasdair Roberts, *Dysfunction by Design: Trumpism as Administrative Doctrine*, 81 PUB. ADMIN. REV. 152, 153 (2021) (identifying Trump's "deep state" conspiracy theory as one tenet of his larger philosophy of administrative power).

[41] Donald Moynihan, *Populism and the Deep State: The Attack on Public Service Under Trump*, *in* DEMOCRATIC BACKSLIDING AND PUBLIC ADMINISTRATION 151, 159-60 (Michael W. Bauer et al. eds., 2020) (recounting Trump's characterization of federal employees as "partisan opponents" of his administration).

[42] OFF. OF INSPECTOR GEN., U.S. DEP'T OF STATE, REVIEW OF ALLEGATIONS OF POLITICIZED AND OTHER IMPROPER PERSONNEL PRACTICES IN THE BUREAU OF INTERNATIONAL ORGANIZATION AFFAIRS 8-9 (2019) (outlining Senior Advisor of Bureau of International Organization Affairs Mari Stull's retaliatory actions against civil servant after accusing civil servant of "trying to 'thwart' President Trump and undermine his agenda").

[43] Brad Plumer & Coral Davenport, *Science Under Attack: How Trump is Sidelining Researchers and Their Work*, N.Y. TIMES (Dec. 28, 2019), https://www.nytimes.com/2019/12/28/climate/trump-administration-war-on-science.html (describing Trump administration's decisions to disband Commerce Department committee that studied risks of climate change and to cut funding for agency that researched effects of pollution on child development).

Ukraine for political gain;[44] and sowed distrust in public health officials charged with developing and distributing the COVID-19 vaccine.[45]

Trump is not alone in his criticism of the civil service. JD Vance, Trump's second-term Vice President, has advocated for the removal of "every single mid-level bureaucrat, every civil servant in the administrative state" and their replacement with loyalists.[46] Elon Musk and Vivek Ramaswamy, who Trump has tapped to lead the newly announced Department of Government Efficiency ("DOGE"), have pledged to eliminate federal agencies they deem to be redundant and wasteful.[47]

Conservative attacks on the civil service reached their extreme during the last few months of Trump's first term when he issued Schedule F, which amounted to a direct assault on administrative agencies.

II. THE RAMIFICATIONS OF SCHEDULE F

A. *The Features of Schedule F Explained*

With Executive Order 13957, Trump added a sixth category of worker—Schedule F—within the excepted service.[48] This order aimed to reclassify certain civil servants into Schedule F to purportedly enhance the executive branch's ability to "effectively carry out [its] broad array of activities."[49] The order stated that such action was rooted in the need for agency heads to have "greater ability and discretion to assess critical qualities in applicants to fill [excepted service] positions."[50] In essence, the order sought to streamline hiring

[44] *See* Donald P. Moynihan, *Public Management for Populists: Trump's Schedule F Executive Order and the Future of the Civil Service*, 82 PUB. ADMIN. REV. 174, 175 (2021); Michael D. Shear & Maggie Haberman, *Trump Removes State Dept. Inspector General*, N.Y. TIMES, https://www.nytimes.com/2020/05/16/us/politics/trump-state-dept-inspector-general.html (last updated May 19, 2020).

[45] Laurie McGinley, Carolyn Y. Johnson & Josh Dawsey, *Trump Without Evidence Accuses 'Deep State' at FDA of Slow-Walking Coronavirus Vaccines and Treatments*, WASH. POST (Aug. 22, 2020, 4:35 PM), https://www.washingtonpost.com/health/2020/08/22/trump-without-evidence-accuses-deep-state-fda-slow-walking-coronavirus-vaccines-treatments ("President Trump on Saturday baselessly accused the Food and Drug Administration of impeding enrollment in clinical trials for coronavirus vaccines and therapeutics for political reasons, as he broadened and escalated his attacks on administration scientists.").

[46] Seamus Webster, *Trump Wants to Distance Himself from Project 2025, but His New VP Pick Says Every Civil Servant in the Federal Government Should Be Fired*, FORTUNE (July 16, 2024, 4:47 PM), https://fortune.com/2024/07/16/trump-project-2025-jd-vance-federal-workers-heritage-foundation.

[47] T. Woods, *How Elon Musk's Department of Government Efficiency May Impact Your Wallet*, YAHOO! FIN., https://finance.yahoo.com/news/elon-musk-department-government-efficiency-170025025.html (last updated Dec. 5, 2024).

[48] E.O. 13,957, *supra* note 1, at 468-69.

[49] *Id.* at 466.

[50] *Id.* at 467.

because, like other excepted service positions, Schedule F positions would be excepted from competitive service requirements, such as the need to take examinations.[51]

The order would have also made it easier to fire employees reclassified into Schedule F. Another stated rationale for the order was to give the President "the flexibility to expeditiously remove poorly performing employees from [their] positions without facing extensive delays or litigation."[52] It is clear that the Trump administration closely read the provisions of 5 U.S.C. § 7511(b)(2). As if quoting the statute, Schedule F's reach extended to "positions of a confidential, policy-determining, policy-making, or policy-advocating character."[53] By design, this carveout would specifically deny Schedule F employees the due process protections afforded by the CSRA.[54]

Additionally, the number of federal employees falling under the purview of this order would be substantial. Among those subject to reclassification—and thereby more easily fired at will—were those who: (1) substantively participate in developing or drafting regulations and guidelines; (2) supervise attorneys; (3) wield substantial discretion in agency legal functions; (4) work with nonpublic policy deliberations; or (5) conduct agency-level collective bargaining negotiations.[55] Experts estimate that anywhere from tens of thousands to hundreds of thousands of federal employees could potentially fall under this reclassification.[56]

To be sure, presidents are entitled to appoint personnel who share their views. After all, presidents view their having been elected as a mandate to implement their chosen policy agendas.[57] Is Schedule F no more than a way of ensuring that the President has a team that faithfully supports their agenda? Some contend that the federal government would operate more efficiently if civil servants were treated as private-sector employees, who are more directly accountable to their

[51] AGENCY RESPONSES AND PERSPECTIVES, *supra* note 3, at 7 fig.2.

[52] E.O. 13,957, *supra* note 1, at 468.

[53] *Id.* at 469.

[54] *See* AGENCY RESPONSES AND PERSPECTIVES, *supra* note 3, at 7 fig.2.

[55] *Id.*

[56] *See* Smith, *supra* note 3; AGENCY RESPONSES AND PERSPECTIVES, *supra* note 3, at 25 ("Many stakeholders said that agencies could have identified positions affecting hundreds of thousands of federal employees across government because Schedule F criteria could be broadly interpreted."); *see also* Philip Wegmann, *OMB Lists Positions Stripped of Job Protection Under Trump Order*, REALCLEARPOLITICS (Nov. 21, 2020), https://www.realclearpolitics.com/articles/2020/11/21/omb_lists_workers_stripped_of_job_protection_under_trump_order_144708.html (reporting that OMB determined that 88% of its workforce would fall within scope of Schedule F and estimating that similarly high percentage of employees across all federal agencies would potentially be reclassified under executive order).

[57] *See* Loren DeJonge Schulman, *Schedule F: An Unwelcome Resurgence*, LAWFARE (Aug. 12, 2022, 8:01 AM), https://www.lawfaremedia.org/article/schedule-f-unwelcome-resurgence [https://perma.cc/5959-YC4J].

managers' decisions.[58] The argument goes that the civil service is generally resistant to change and that civil service laws "slow down progress and hamper American innovation,"[59] so granting the executive the flexibility of a private employer could more easily "translate election results into policy."[60] Additionally, in recent years, several states have converted some of their own workers into at-will employees.[61] Why should the federal civil service not simply follow the direction of private companies and some state governments?

The answer is because the President *already* possesses significant influence over their administration through the approximately 4,000 political appointees they can appoint or remove at will.[62] Extending more influence over a broader swath of federal employees through Schedule F constitutes an unnecessary and problematic overreach, as discussed further below.

B. *Reading Between the Lines: Trump's True Intentions with Schedule F*

At the time Trump issued the order, his administration downplayed the significance of Schedule F, deceitfully portraying its implementation as a means to streamline the removal of poorly performing federal employees.[63] Yet one specific episode should sound the alarm about Trump's true intentions for the civil service. A leaked 2017 memo revealed that James Sherk, a senior Trump aide, urged White House Counsel to explore whether the President had the constitutional authority to dismiss any federal employee at will.[64] If this were

[58] *See* Donald F. Kettl, *Is Government Better When Anyone Can Be Fired Anytime?*, GOVERNING (Aug. 12, 2021), https://www.governing.com/work/is-government-better-when-anyone-can-be-fired-anytime [https://perma.cc/JG3M-BJDB] (stating that right-wing reformers have argued that "government would work far better if it followed the flexibility that private-sector managers have").

[59] Molly Weisner, *Republicans Bring Back Bill to Make Firing Federal Workers Easier*, FED. TIMES (May 10, 2023), https://www.federaltimes.com/federal-oversight/congress/2023/05/10/republicans-bring-back-bill-to-make-firing-federal-workers-easier/ [https://perma.cc/FN2X-PBYJ] (quoting Senator Rick Scott of Florida).

[60] Kettl, *supra* note 58 (citing Philip K. Howard, *Democracy vs. Bureaucracy: The Most Important Battle in Washington over the Next Four Years*, RIPON F., July 2021, at 4, 4).

[61] *Id.* (noting that Georgia, Indiana, and other states have converted some state employees to at-will status).

[62] *Id.*

[63] Eric Lipton, *Trump Issues Order Giving Him More Leeway to Hire and Fire Federal Workers*, N.Y. TIMES, https://www.nytimes.com/2020/10/22/us/politics/trump-executive-order-federal-workers.html (last updated Sept. 9, 2021) ("The White House, in a statement that accompanied the executive order, said the new employee classification was justified because under current rules 'removing poor performers, even from these critical positions, is time-consuming and difficult.'").

[64] Erich Wagner, *White House Advisor Sought Legal Opinion to Allow Trump to Fire Anyone in Government*, GOV'T EXEC. (June 25, 2020), https://www.govexec.com/management/2020/06/white-house-advisor-sought-legal-opinion-trump-can-fire-anyone-government/166445/ [https://perma.cc/YQX8-USDA].

the case, Sherk reasoned, then "civil service legislation and union contracts impeding that authority [would be] unconstitutional."[65] This was not an insignificant document, and it was clear that Sherk had the ear of the President. Many of the suggestions outlined in the memo were later enacted by Trump through a variety of executive orders.[66] The Sherk memo thus underpinned the issuance of Schedule F.

In the end, Schedule F was never fully implemented. Trump introduced the policy in October 2020, and President Biden swiftly revoked it upon assuming office in January 2021.[67] Nevertheless, the idea of fundamentally reshaping the civil service endures. Trump has pledged to reintroduce Schedule F.[68] During a campaign rally, he boldly stated his intention to make "every executive branch employee fireable by the President of the United States."[69] Trump has the enthusiastic backing of conservative organizations, such as the Heritage Foundation, which is advancing "Project 2025," an initiative aimed at "replacing existing government employees with new, more conservative alternatives" in positions newly reclassified by Schedule F.[70] Indeed, Trump has selected Russell Vought, a co-author of Project 2025, to serve in his second administration.[71] During Trump's first term, Vought was a key architect of Schedule F, and he remains the "lead advocate" of reinstating the initiative.[72]

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[65] *Id.*; Memorandum from James Sherk, Lab. Pol'y Advisor, Domestic Pol'y Council to White House Couns., at 12-13 (2017) [hereinafter Sherk Memorandum].

[66] *See* Exec. Order No. 13,836, 3 C.F.R. 819, 819 (2019) (order limiting collective bargaining); Exec. Order No. 13,839, 3 C.F.R. 833, 833 (2019) (order encouraging agencies to fire poor performers); Exec. Order No. 13,837, 3 C.F.R. 825, 825 (2019) (order restricting union workers' ability to use official time to perform union duties).

[67] *See* E.O. 14,003, *supra* note 4.

[68] *See* Tim Reid & Nathan Layne, *Trump Plan to Gut Civil Service Triggers Pushback*, REUTERS (Dec. 22, 2023, 12:12 PM), https://www.reuters.com/world/us/trump-plan-gut-civil-service-triggers-pushback-by-unions-democrats-2023-12-22.

[69] Erich Wagner, *Trump Is Threatening the Return and Expansion of Schedule F*, GOV'T EXEC. (Mar. 14, 2022), https://www.govexec.com/workforce/2022/03/trump-threatening-return-and-expansion-schedule-f/363145 [https://perma.cc/FG9L-A6H6].

[70] Will Weissert, *New Rule Strengthening Federal Job Protections Could Counter Trump Promises to Remake the Government*, PBS (Apr. 4, 2024, 9:03 PM), https://www.pbs.org/newshour/politics/new-rule-strengthening-federal-job-protections-could-counter-trump-promises-to-remake-the-government [https://perma.cc/N6D6-VE2P]; Erich Wagner, *Trump's Civil Service Plans Unsettle Labor Leaders at Start of Campaign Season*, GOV'T EXEC. (Feb. 12, 2024), https://www.govexec.com/workforce/2024/02/trumps-civil-service-plans-unsettle-labor-leaders-start-campaign-season/394120 [https://perma.cc/Z8G4-LEAD].

[71] Eric Katz, *Trump Expected to Tap Schedule F Architect Promising Widespread Federal Layoffs to Head OMB*, GOV'T EXEC. (Nov. 21, 2024), https://www.govexec.com/workforce/2024/11/trump-tap-schedule-f-architect-promising-widespread-federal-layoffs-head-omb/401228 [https://perma.cc/L7JG-9NTW].

[72] *Id.*

These developments all but guarantee the revival of the spoils system of the nineteenth century in Trump's second term.

C. *The Problems Inherent in the Reinstatement of Schedule F*

The widespread dismissal of career civil servants in favor of political loyalists poses several critical problems, including: the loss of expertise and continuity; the politicization of scientific research; compromised regulatory standards; diminished government quality; reduced effectiveness and morale; and threats to democratic values.

First, the loss of expertise and continuity is a significant concern. Many federal employees work in highly specialized roles involving complex laws, regulations, policies, and scientific theories. Unlike presidential appointees, most civil servants stay on from administration to administration, ensuring continuity in governmental knowledge and reducing the likelihood of repeated mistakes.[73] New political hires, lacking this institutional experience, would likely struggle to match the depth of understanding and stability provided by seasoned civil servants.[74]

Second, injecting politics into scientific agencies can undermine their effectiveness. Consider the Department of Energy, which provides grants for small businesses to develop innovative projects, such as sustainable aviation fuels and energy-efficient residential heating and cooling systems.[75] If suddenly politicized, these research grants "will go not to the most promising ideas, but to the closest allies."[76] Similarly, consider the Environmental Protection Agency ("EPA"), which protects the public from climate pollutants. In such a politicized scenario, officials could argue that there is "tremendous disagreement" about the science behind climate change, as Trump's EPA Administrator did in 2017.[77]

Third, compromising regulatory standards can endanger public health. Take, for instance, a poultry slaughter line. There are regulations put in place to prevent meat from harming consumers, such as rules governing the speed at which inspectors in the U.S. Department of Agriculture ("USDA") must

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[73] *See* John Pavlus, *Civil Servants Often Work for Administrations They Disagree with Politically. How Does This Affect Their Job Performance?*, KELLOGG INSIGHT (June 1, 2021), https://insight.kellogg.northwestern.edu/article/civil-servants-political-ideology [https://perma.cc/CP3Q-5GX5].

[74] *See id.* (noting that insulating lower-level bureaucrats from politics allows "federal departments to hire and promote people based on their expertise, not their ideology").

[75] *See e.g.*, Lauren Zola, *DOE Awards $52M in Grants to Support Clean Energy Projects*, WELL NEWS (July 19, 2024), https://www.thewellnews.com/renewable-energy/doe-awards-52m-in-grants-to-support-clean-energy-projects.

[76] *See* MICHAEL LEWIS, THE FIFTH RISK 114 (2018).

[77] *See* Tomas Carbonell, *Scott Pruitt Peddles Junk Science to Serve Trump's Anti-Climate Agenda*, ENV'T DEF. FUND (Mar. 10, 2017), https://blogs.edf.org/climate411/2017/03/10/scott-pruitt-peddles-junk-science-to-serve-trumps-anti-climate-agenda [https://perma.cc/2VHV-DMS5].

physically examine chickens for defects.[78] However, a poultry company, seeking to maximize its profits by selling more chicken, may have an interest in rushing through food regulation processes. Installing individuals at the USDA who are more amenable to corporate interests could lead to these regulations being disregarded. Consequently, caution and safety would be sacrificed in favor of speed and efficiency. This could compromise food safety and public health,[79] illustrating the dangers of politicizing regulatory processes.

Fourth, replacing moderate civil servants with extremists undermines the quality of government. Whereas the ideologies of agency leadership regularly swing from left to right depending on who occupies the Oval Office, civil servants tend to be more moderate.[80] This contrast serves as a checking function on the other's power and thus serves as an "administrative separation of powers."[81] Therefore, civil servants act as bulwarks, positioned to resist the efforts of political appointees to push forward hyper-partisan agendas and instead "promote the rule of law, advance reasoned approaches to decisionmaking, and provide intergenerational stability."[82] To witness this in practice, consider Trump's attempt to install Jeffrey Clark as his acting Attorney General to wield the powers of the Justice Department and overturn the results of the 2020 presidential election.[83] In a maneuver that would have brought the department's operations to a standstill, hundreds of civil servants threatened to resign en masse, prompting Trump to backpedal on his actions.[84]

Fifth, a politicized civil service results in decreased effectiveness and morale. The theory of neutral competence suggests that nonpartisan civil servants are "more apt to possess specialized policy expertise, meaningful experience, public management skills, and relationships with key stakeholders. . . . and also serve

[78] *See* LEWIS, *supra* note 76, at 114-15.

[79] *Id.*

[80] *See* Brian D. Feinstein & Abby K. Wood, *Divided Agencies*, 95 S. CAL. L. REV. 731, 737, 776 (2022) (describing the "relatively moderate" civil servants who "serve as a counterweight to more extreme agency heads").

[81] Jon D. Michaels, *Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers*, 91 N.Y.U. L. REV. 227, 235-39 (2016); *see* Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 425 (2009).

[82] Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 556-57 (2015).

[83] *See* Barbara Sprunt, *Former DOJ Officials Detail Threatening to Resign En Masse in Meeting with Trump*, NPR (June 23, 2022, 8:05 PM), https://www.npr.org/2022/06/23/1107217243/former-doj-officials-detail-threatening-resign-en-masse-trump-meeting [https://perma.cc/6WHT-ZHBH].

[84] *Id.* ("[T]op Justice Department officials banded together to prevent Jeffrey Clark, an environmental lawyer at the DOJ, from replacing acting Attorney General Jeffrey Rosen.").

as 'honest brokers' in a world of partisan and ideological divisions."[85] Politicized civil service systems, on the other hand, result in shorter tenures, greater turnover, reduced morale, and barriers to recruitment of highly qualified individuals.[86]

Lastly, politicizing the civil service threatens democratic principles. Such a system fosters public cynicism and distrust of administrative agencies.[87] Additionally, a government of sycophants cannot "check authoritarianism or protect the public interest from exploitation for private gain."[88] Federal employees play a crucial role in reporting illegal or unethical activities and misconduct.[89] They also release essential information, such as election data, unemployment rates, and government spending figures, so as to ensure transparency and accountability.[90] Such information is meant to be unbiased and untainted by partisanship and is a sign of a healthy democracy. By contrast, the concentration of bureaucratic power in the executive is a common strategy used by autocrats to limit oversight, silence opponents, and deny citizens certain rights and liberties.[91] A civil service influenced by partisanship would almost certainly result in a decline in democratic values.

III. RESPONSES TO SCHEDULE F

A. *Responses to Schedule F that Miss the Mark*

Following its passage, Schedule F was met with widespread condemnation from both sides of the political aisle. Representative Gerry Connolly (D-VA)

[85] George A. Krause, David E. Lewis & James W. Douglas, *Political Appointments, Civil Service Systems, and Bureaucratic Competence: Organizational Balancing and Executive Branch Revenue Forecasts in the American States*, 50 AM. J. POL. SCI. 770, 771 (2006).

[86] *See id.* (citing EZRA SULEIMAN, DISMANTLING DEMOCRATIC STATES (2003)).

[87] *See* B. Guy Peters, Hassan Danaeefard, Abdolali Ahmadzahi Torshab, Masoumeh Mostafazadeh & Mortaza Hashemi, *Consequences of a Politicized Public Service System: Perspectives of Politicians, Public Servants, and Political Experts*, 50 POL. & POL'Y 33, 40 (2022).

[88] Landon R. Y. Storrs, *The Ugly History Behind Trump's Attacks on Civil Servants*, POLITICO (Mar. 26, 2017), https://www.politico.com/magazine/story/2017/03/history-trump-attacks-civil-service-federal-workers-mccarthy-214951.

[89] *See* Cissy Jackson, *Congress Must Pass the Preventing a Patronage System Act to Protect Federal Civil Servants' Impartiality*, CAP20 (Dec. 2, 2022), https://www.americanprogress.org/article/congress-must-pass-the-preventing-a-patronage-system-act-to-protect-federal-civil-servants-impartiality.

[90] *See* Vanessa Williamson, *Understanding Democratic Decline in the United States*, BROOKINGS (Oct. 17, 2023), https://www.brookings.edu/articles/understanding-democratic-decline-in-the-united-states [https://perma.cc/44XV-WBJT].

[91] *See* Stephan Haggard & Robert Kaufman, *The Anatomy of Democratic Backsliding*, 32 J. DEMOCRACY 27, 37 (2021) ("Aspiring autocrats deploy the power of appointment and bureaucratic reorganization to undermine a range of institutions that normally serve to limit executive discretion and provide oversight . . . .").

said the order "undermine[d] our 140 year professional civil service."[92] Representative Brian Fitzpatrick (R-PA) suggested that it would "allow the hiring of political cronies and allies at the expense of expertise."[93] Dr. Ronald Sanders—a lifelong Republican and Trump's appointed Chair to the Federal Salary Council—resigned in disgust, stating that he could not "be part of an Administration that seeks . . . to replace apolitical expertise with political obeisance."[94] President Biden, in revoking Schedule F, expressed that the policy "not only was unnecessary to the conditions of good administration, but also undermined the foundations of the civil service and its merit system principles, which were essential to the Pendleton Civil Service Reform Act of 1883's repudiation of the spoils system."[95]

For better or worse, Schedule F has exposed a significant vulnerability in the civil service that will likely be exploited by Trump in his second term. Since 2020, both the legislative and executive branches have made efforts to prevent subsequent administrations from reviving this policy. The success of these initiatives, however, has been decidedly mixed. Before proposing new, perhaps more effective solutions, it is important to understand why current responses have failed to adequately address the problem.

1. The Legislative Response

In 2021, Representatives Connolly and Fitzpatrick introduced the Preventing a Patronage System Act ("PPSA").[96] The PPSA aimed to limit the number of civil service positions that could be moved from the competitive service to the excepted service.[97] The bill also sought to prevent the President from placing federal employees under new schedule classifications without congressional authorization.[98] The bill managed to pass the House, but despite being characterized as a bipartisan effort, the PPSA only garnered the support of six

[92] Press Release, Gerry Connolly, Chairman, House Subcomm. on Gov't Operations, Connolly Statement on GOP Refusal to Reverse Schedule F Executive Order (Dec. 21, 2020), https://connolly.house.gov/news/documentsingle.aspx?DocumentID=4160 [https://perma.cc/E3KJ-KH6Z].

[93] Press Release, Brian Fitzpatrick, Congressman, House of Representatives, Fitzpatrick & Connolly Introduce the Preventing a Patronage System Act (Jan. 14, 2021), https://fitzpatrick.house.gov/2021/1/fitzpatrick-connolly-introduce-the-preventing-a-patronage-system-act [https://perma.cc/N2AN-KZ5X].

[94] Letter from Ronald Sanders, Member/Chair, Fed. Salary Council, to John McEntee, Dir., Presidential Pers. (Oct. 26, 2020), https://www.politico.com/f/?id=00000175-65e6-dd19-a175-6de70cc80000.

[95] *See* Exec. Order 14,003, *supra* note 4, at 464-65.

[96] Preventing a Patronage System Act, H.R. 302, 117th Cong. (2021).

[97] H.R. REP. NO. 117-455, at 9 (2022).

[98] *Id.* at 3.

Republicans.[99] Ultimately, the measure stalled in the Senate and failed to become law.[100]

The legislative approach reveals two critical challenges. The first is the simple reality that, with the GOP gaining control of both the House and Senate, the likelihood of passing any meaningful civil service reform has diminished significantly.[101]

The second challenge stems from Democrats' reticence to make civil service protections "a big enough priority to warrant fighting for its inclusion in must-pass bills thus far."[102] As Professor Don Kettl notes: "The Democrats have been focused for the most part not on the operations of government but larger policy issues . . . . [They] simply have not paid as much attention to government's internal management functions as perhaps the Republicans have . . . ."[103] Prior to the 2024 election, Professor Donald Moynihan also pointed out that many Democrats believed that if Trump failed to win the presidency a second time, then the danger of Schedule F would disappear with him.[104] This, of course, did not come to pass.

These challenges underscore the necessity for a more strategic approach from Democrats—one that involves fighting for civil service protections as part of critical legislation, rather than treating them as secondary concerns.

2. The Executive Response

As easy as it was for Biden to revoke Schedule F with an executive order, Trump, in his second term, could just as easily reimplement the policy with an executive order of his own. To mitigate this risk, OPM—under Biden's direction—issued a rule to protect against the reimplementation of Schedule

[99] *See* Catie Edmondson, *House Passes Bill to Insulate Federal Workers, Addressing a Trump Threat*, N.Y. TIMES (Sept. 15, 2022), https://www.nytimes.com/2022/09/15/us/politics/house-federal-workers-trump.html.

[100] Erich Wagner, *Lawmakers Left Anti-Schedule F Legislation Out of the Compromise Defense Policy Bill*, GOV'T EXEC. (Dec. 7, 2022), https://www.govexec.com/workforce/2022/12/lawmakers-left-anti-schedule-f-legislation-out-compromise-defense-policy-bill/380575 [https://perma.cc/6WG2-ACVZ] (explaining PPSA passed House both as standalone bill and as part of its initial version of 2023 National Defense Authorization Act but was not ultimately included in final defense bill).

[101] For example, Representative James Comer (R-KY) has framed Schedule F not as a return to the spoils system, but as a means of reigning in an "insubordinate" workforce that showed "defiance" to Trump's agenda. H.R. REP. NO. 117-455, at 11 (2022). Representative Chip Roy (R-TX) introduced the Public Service Reform Act, which would convert "all Federal employees in the executive branch" into "at-will employees." Public Service Reform Act, H.R. 3115, 118th Cong. (2023).

[102] Wagner, *supra* note 100.

[103] *Id.* (internal quotations omitted).

[104] *Id.*

F.[105] The rule provides that individuals retain their CSRA protections even "if they are moved involuntarily from the competitive service to the excepted service."[106] The rule also clarifies that "confidential, policy-determining, policy-making, or policy-advocating" positions specifically refer to "noncareer political appointees" and *not* career civil servants.[107]

The executive response benefits from offering a far more robust protection of the civil service than the legislative response. The rule is firmly rooted in caselaw and legislative history,[108] and it is indeed helpful in developing latter portions of this Note.[109] Nevertheless, it remains vulnerable to reversal by Trump in his second term.[110] Indeed, Project 2025, the same organization recruiting Trump loyalists to replace career civil servants, is also working on what it calls "the Playbook," which is a "secret compilation of executive orders and initiatives for the first 180 days of the [Trump] administration."[111] Presumably, an executive order overruling OPM's rule and revitalizing Schedule F is within Project 2025's arsenal.[112] Thus, OPM's rule may only serve as "a speed bump, rather than a full block, of Schedule F."[113]

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[105] Upholding Civil Service Protections and Merit System Principles, 89 Fed. Reg. 24982 (Apr. 9, 2024) (issuing final regulation to reinforce and clarify longstanding civil service protections and merit system principles).

[106] *Id.* at 25017.

[107] *Id.* at 24983.

[108] Erica Newland, Genevieve Nadeau & William Ford, *How a Proposed Regulation Protects the Civil Service from Politicized Attacks: A Look at the Biden Administration's Response to Schedule F*, PROTECT DEMOCRACY (Sept. 28, 2023), https://protectdemocracy.org/work/biden-admin-response-schedule-f [https://perma.cc/78D4-WQWF].

[109] *See infra* Part III.B.2 (discussing judiciary's ability to prevent Schedule F's reimplementation because of its power to invalidate executive orders that violate Constitution and acts of Congress).

[110] Nick Niedzwiadek, *Biden Moves to Defang Political Assaults on Federal Workforce*, POLITICO (Apr. 4, 2024, 5:01 AM), https://www.politico.com/news/2024/04/04/biden-moves-to-defang-political-assaults-on-federal-workforce-00150446 ("[A] future president could take steps to squelch the new [OPM] directive . . . .").

[111] Robert L. Borosage, *Will the Heritage Foundation's Project 2025 Turn Trumpism into a Governing Agenda?*, NATION (Feb. 8, 2024), https://www.thenation.com/article/politics/will-the-heritage-foundations-project-2025-turn-trumpism-into-a-governing-agenda [https://perma.cc/G84E-4VH5].

[112] *See* Donald Devine, Dennis Dean Kirk & Paul Dans, *Central Personnel Agencies: Managing the Bureaucracy*, *in* MANDATE FOR LEADERSHIP: THE CONSERVATIVE PROMISE 69, 81-82 (Paul Dans & Steven Groves eds., 2023) (asserting that Schedule F "should be reinstated").

[113] Drew Friedman, *Heading into 2024, OPM 'Fundamentally Rethinking' Federal Hiring*, FED. NEWS NETWORK (Dec. 28, 2023, 4:06 PM), https://federalnewsnetwork.com/hiring-retention/2023/12/heading-into-2024-opm-fundamentally-rethinking-federal-hiring [https://perma.cc/99YZ-2HEG].

B. *The Most Effective Response: The Judicial Response*

For the reasons outlined above, the executive and legislative responses are ineffective to prevent the reimplementation of Schedule F. Both approaches seem to assume that Trump's actions are legal, and they aim to block the order from going into effect by changing the law or writing new regulations. However, I do not believe that the legality point should be so readily conceded. Here, I explore whether the presidency actually possesses the power to strip civil service employees of due process protections. I present three reasons why Schedule F may in fact be invalid, concluding that the judicial branch is the appropriate avenue to strike down Schedule F and protect the rights of civil service employees.

There has been very little scholarship devoted to examining the legality of Schedule F. The United States District Court for the District of Columbia briefly considered the issue when the National Treasury Employees Union ("NTEU") sued the Trump administration in October 2020, seeking to enjoin Schedule F's implementation.[114] However, the NTEU voluntarily dismissed the suit once Biden rescinded the order.[115] Therefore, the judicial response to the reimplementation of Schedule F by a future administration is a live issue. The remainder of this Note suggests three frameworks that uniquely empower courts to invalidate Schedule F.

1. Courts Ought to Impose a "Reasonableness" Test on Executive Actions Aimed at Stripping Individuals of Due Process Rights

Before delving into the first framework, we must begin by exploring the presidential power to issue executive orders. This power "must stem either from an act of Congress or from the Constitution itself."[116] When Trump first promulgated Schedule F, he invoked 5 U.S.C. §§ 3301, 3302, and 7511 as the statutes enabling his action.[117] These laws specifically authorize the President to regulate the civil service.[118]

There is an important caveat embedded in this particular congressional grant of authority to the President. Section 3302 expressly provides that the President

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[114] Complaint for Declaratory and Injunctive Relief at 2, Nat'l Treasury Emps. Union ("NTEU") v. Trump, No. 20-3078 (D.D.C. Oct. 26, 2020) (asserting E.O. 13,957 violates law because it is contrary to Congress's delegation of authority to President).

[115] Notice of Dismissal Pursuant to Note 41, NTEU v. Trump, No. 20-3078 (D.D.C. Jan. 25, 2021).

[116] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952).

[117] *See generally* E.O. 13,957, *supra* note 1.

[118] *See, e.g.*, Exec. Order No. 13,562, 3 C.F.R. 291, 291 (2011) [hereinafter E.O. 13,562] (citing §§ 3301-02 in creation of Schedule D to ease civil service hiring requirements for student interns and recent graduates); Exec. Order No. 13,843, 3 C.F.R. 844, 844 (2019) [hereinafter E.O. 13,843] (citing §§ 3301-02 in creation of Schedule E to exempt administrative law judges from undergoing civil service examination and rating requirements).

may only except positions from the competitive service when "necessary" and "as conditions of good administration warrant."[119] Presumably, the President should have to offer a rationale that accompanies the issuance of an executive order amending the competitive service. That way, it is clear to the public that the President is not arbitrarily imposing rules on civil servants. Indeed, previous executive orders invoking these laws have typically been followed by clear-cut reasoning underlying their promulgation.[120] Trump's Schedule F order provided such a rationale, which was to rid the federal workforce of "poor performers" by removing the application of civil service rules and regulations from individuals in "confidential, policy-determining, policy-making, and policy-advocating positions."[121]

Whether this rationale is reasonable is a separate issue. Schedule F was never just about dismissing underperforming employees; it aimed to ensure civil servants' loyalty to Trump.[122] Nonetheless, one may struggle to see how removing protections from a broad swath of employees meets the criteria of what "conditions of good administration warrant." Could these poor performers not be rehabilitated or subjected to alternative forms of discipline rather than resorting to the extreme option of termination? Is undermining over a century and a half of administrative law precedent really "necessary"? When only 0.4% of the federal workforce is rated as "minimally successful" or "unacceptable," while the vast majority of employees are rated as "outstanding" or "fully successful,"[123] is such an effort not patently unreasonable?

As it turns out, Trump was not required to adhere to a reasonableness standard when he issued Schedule F. However, if OPM had issued Schedule F, which it is statutorily authorized to do,[124] that decision would have been subject to reasonableness review.[125] Understanding how the law arrived at this strange juncture requires a brief explanation. The Administrative Procedure Act

[119] 5 U.S.C. § 3302.

[120] Schedule D, for example, established programs and internships specifically geared towards students and recent graduates in an effort to "infuse the workplace with their enthusiasm, talents, and unique perspectives" and "achieve a workforce that represents all segments of society." E.O. 13,562, *supra* note 118, at 291. Schedule E clarified that agency heads possess extensive discretionary power in their hiring of administrative law judges. This order was passed to resolve recurrent litigation that raised questions over the manner in which these judges were to be appointed. E.O. 13,843, *supra* note 118, 845.

[121] E.O. 13,957, *supra* note 1, at 467.

[122] *See supra* Part II.B (discussing Sherk Memorandum, *supra* note 65).

[123] *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-520R, FEDERAL EMPLOYEE PERFORMANCE RATINGS 6 (2016), https://www.gao.gov/assets/gao-16-520r.pdf [https://perma.cc/2TF2-CBGQ] (explaining federal agency workforce data shows 99% of employees are rated as successful at their jobs).

[124] *See* 5 U.S.C. § 7511(b)(2)(B).

[125] NTEU v. Horner, 854 F.2d 490, 498-99 (D.C. Cir. 1988) (holding that OPM's decision to place job categories, which were formerly governed by competitive service requirements, in excepted service was arbitrary and capricious and thus, unreasonable).

("APA") regulates administrative agencies' exercise of congressionally delegated authority.[126] The APA "requires that agency action be reasonable and reasonably explained."[127] As Professor Kathryn Kovacs notes, the plain text of the statute seems to indicate that the APA also applies to administrative actions taken by the President:

> Section 2(a) of the APA defines "agency" broadly as "each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, the courts or the governments of the possessions, Territories, or the District of Columbia." The President is an "authority . . . of the Government of the United States," and is not expressly excluded from the definition, as are Congress and the federal courts. . . . "The President is certainly an 'authority' of government and is not specifically excluded, so based on the APA's text alone, the President would appear to be subject to its provisions."[128]

Moreover, ample evidence within the APA's legislative history suggests that it encompasses the presidency. When the APA was passed, definitions of "agency" in federal legislation either expressly included[129] or did not expressly exclude[130] the President.

In the past, the Supreme Court has struck down administrative agency actions that are "arbitrary" and "capricious," and thus unreasonable under the APA, for all sorts of reasons.[131] Trump's order was an administrative action: he directed administrative agencies to place certain segments of their workforce in Schedule

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[126] *See* Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified at 5 U.S.C. §§ 551-59, 701-06) (outlining, inter alia, rulemaking, adjudication, and judicial review procedures for administrative agencies).

[127] FCC v. Prometheus Radio Project, 592 U.S. 414, 423 (2021).

[128] Kathryn E. Kovacs, *Constraining the Statutory President*, 98 WASH. U. L. REV. 63, 83-84 (2020) (footnotes omitted).

[129] *Id.* at 87-88 (first citing Federal Register Act of 1935, Pub. L. No. 74-220, § 4, 49 Stat. 500, 501; and then citing 1 C.F.R. § 2.1(c)(1) (Supp. 1946)) ("The definition of 'agency' in the Federal Register Act expressly included 'the President of the United States,' as did the Federal Register regulations." (footnotes omitted)).

[130] *Id.* at 88 (citing Federal Reports Act of 1942, Pub. L. No. 77-831, § 7(a), 56 Stat. 1078, 1079-80) ("While [Congress, in the Federal Reports Act,] did not expressly include the President, it did not expressly exclude the President either, as it did the General Accounting Office and the governments of the District of Columbia and U.S. territories.").

[131] *See, e.g.*, Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 34, 46 (1983) (holding National Highway Traffic Safety Administration acted arbitrarily and capriciously in revoking requirement that new vehicles be equipped with passive restraints because agency failed to present adequate basis and explanation for rescinding said requirement); Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 591 U.S. 1, 29-30 (2020) (holding that rescission of Deferred Action for Childhood Arrivals ("DACA") by DHS was arbitrary and capricious where DHS changed course without cognizance of longstanding policies that may have engendered serious reliance interests that required consideration).

F so that these employees could be more easily removed.[132] Such a directive was arguably unreasonable: Trump neither provided an "adequate basis and explanation for rescinding"[133] civil service protections for these employees nor did he take into account "that longstanding policies may have 'engendered serious reliance interests'"[134] in these protections. Nonetheless, the Court has held that the President's actions are not subject to the APA's requirements.[135] Therefore, courts will not check for reasonableness when the President exercises a congressional delegation of authority.

Several scholars have argued that the Court should revisit its APA jurisprudence.[136] I agree and contend that, when it comes to a matter as high stakes as the President's removal of due process rights for tens of thousands of workers, courts should be obligated to check for reasonableness. There is a constitutional argument for such a requirement: the Fifth Amendment states that the federal government may not deprive citizens of "life, liberty, or property, without due process of law."[137] The Court has previously held that civil servants possess "property rights in continued employment."[138] It follows that presidential actions seeking to deprive individuals of property rights ought to be accompanied by a reasonable basis for their promulgation.[139]

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[132] E.O. 13,957, *supra* note 1, at 469 (directing agency heads to conduct review of agency positions to identify positions of "confidential, policy-determining, policy-making, or policy-advocating character and that are not normally subject to change as a result of a Presidential transition" for placement in Schedule F).

[133] *State Farm*, 463 U.S. at 34.

[134] *Regents*, 591 U.S. at 30 (quoting Encino Motorcars, LLC v. Navarro, 579 U.S. 211, 222 (2016)).

[135] *See* Franklin v. Massachusetts, 505 U.S. 788, 801 (1992) ("As the APA does not expressly allow review of the President's actions, we must presume that his actions are not subject to its requirements."); Dalton v. Specter, 511 U.S. 462, 470 (1994) ("The actions of the President . . . are not reviewable under the APA because, as we concluded in *Franklin*, the President is not an 'agency.'" (citing *Franklin*, 505 U.S. at 800-01)).

[136] *See, e.g.*, Kevin M. Stack, *The Reviewability of the President's Statutory Powers*, 62 VAND. L. REV. 1171, 1175 (2009) (arguing barrier to judicial review of President's statutory actions should be abandoned); Kovacs, *supra* note 128, at 68 (arguing *Franklin* was wrongly decided and President who exercises "congressional delegation of authority should be subject to the same constraints as any other statutory delegate").

[137] U.S. CONST. amend. V, cl. 3.

[138] Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 539 (1985); *see also* Gilbert v. Homar, 520 U.S. 924, 928 (1997) ("The protections of the Due Process Clause apply to government deprivation of those perquisites of government employment in which the employee has a constitutionally protected 'property' interest.").

[139] *See* David M. Driesen, *Judicial Review of Executive Orders' Rationality*, 98 B.U. L. REV. 1013, 1019 (2018) (noting "[*Panama Refining*] Court affirmed that due process of law require[s] a stated rationale and factual findings when the President implement[s] a statute" depriving citizens of life, liberty, or property).

In fact, before the APA's passage, the Supreme Court applied a reasonableness standard to presidential executive orders. In *Panama Refining Co. v. Ryan*,[140] the Court struck down President Franklin D. Roosevelt's executive order prohibiting the transportation of excess oil petroleum in interstate and foreign commerce because the order lacked findings supporting the President's actions; authorizing the President to act without such findings would effectively "invest him with an uncontrolled legislative power."[141] The Court went even further in *Highland v. Russell Car & Snowplow Co.*,[142] suggesting that executive orders shown to be "unreasonable and arbitrary" would be required "to be held repugnant to the due process clause of the Fifth Amendment" and therefore unconstitutional.[143]

This reasoning supports a narrow form of judicial review for reasonableness under the APA for administrative actions taken by presidents. If the administrative action appears to delegate uncontrolled legislative power to the President or is deemed repugnant to the Due Process Clause of the Fifth Amendment, the action should be deemed unreasonable and thus unconstitutional. Trump's Schedule F order, which seems to usurp the authority of Congress to pass civil service protections[144] and deprive employees of their property interests in continued federal employment without due process, could be struck down under such a framework.

2. Presidential Administrative Actions that Conflict with the Will of Congress Ought to Be Struck Down

The second proposed framework centers on the notion that Trump may have acted in contrast to the will of Congress when issuing Schedule F. As a starting point, it is generally accepted that executive orders that conflict with the Constitution or the intent of Congress are invalid.[145] This principle stems from *Youngstown Sheet & Tube Co. v. Sawyer*,[146] a 1952 case where the Supreme Court invalidated President Harry S. Truman's executive order authorizing the

[140] 293 U.S. 388 (1935).

[141] *Id.* at 431-32.

[142] 279 U.S. 253 (1929).

[143] *Id.* at 262.

[144] *See infra* Part III.B.2 (explaining how Trump's attempt to remove civil service protections through Schedule F is entirely incompatible with plain text, legislative history, and legislative intent of CSRA).

[145] *See* KENNETH R. MAYER, WITH THE STROKE OF A PEN: EXECUTIVE ORDERS AND PRESIDENTIAL POWER 54 (2001) (asserting that executive orders "must be tied to a grant of executive authority, and . . . may not contradict a statute"); John C. Duncan, Jr., *A Critical Consideration of Executive Orders: Glimmerings of Autopoiesis in the Executive Role*, 35 VT. L. REV. 333, 376 (2010) ("[T]he President's actions are inherently in line with the intent of Congress unless contradicted by clear statutory language . . . .").

[146] 343 U.S. 579 (1952).

seizure of the nation's steel mills during the Korean War.[147] *Youngstown* stands for the idea that "when an executive order conflicts with a statute, the statute preempts the order."[148] In a concurring opinion, Justice Jackson wrote: "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb . . . . Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject."[149]

How might a court disable Congress from acting? Simply by holding a particular act of Congress unconstitutional.[150] It follows from Justice Jackson's reasoning that, if a statute and executive order are in conflict with one another, the executive order would prevail only if the statute were found unconstitutional.[151] If the statute is deemed invalid, then "Courts can sustain exclusive Presidential control."[152]

As applied here, Schedule F and the CSRA are directly at odds. The former stipulates that federal employees are removable at will, while the latter provides that federal employees are protected from such removals. James Sherk has argued that all civil service legislation, including the CSRA, may be unconstitutional.[153] According to Sherk, Schedule F would have to prevail over the CSRA. This point can be easily dismissed, however, given the numerous times that the Supreme Court has recognized the legality of the CSRA.[154]

Given its unequivocal constitutionality, courts should adhere to the principle that the CSRA takes precedence over Trump's incompatible Schedule F order. An illustrative case is *Chamber of Commerce v. Reich*,[155] where the United States Court of Appeals for the D.C. Circuit directly applied this principle.[156] In that case, the court overturned President Bill Clinton's executive order that

[147] *Id.* at 589.

[148] Duncan, *supra* note 145, at 365.

[149] *Youngstown*, 343 U.S. at 637-38 (Jackson, J., concurring).

[150] *See generally* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-78 (1803) (recognizing Supreme Court's power to void acts of Congress "repugnant" to U.S. Constitution).

[151] *See Youngstown*, 343 U.S. at 637-38 (Jackson, J., concurring) (explaining how Court can uphold presidential actions "incompatible with the expressed or implied will of Congress").

[152] *Id.* at 637.

[153] Wagner, *supra* note 64 (citing Sherk Memorandum, *supra* note 65, at 12-13) ("In the memo, Sherk suggested that the White House should examine a so-called 'Constitutional option,' a legal theory that the President has power through Article II to dismiss any federal employee for any reason. 'This implies civil service legislation and union contracts impeding that authority are unconstitutional,' he wrote.").

[154] *See, e.g.*, Lindahl v. OPM, 470 U.S. 768, 792 (1985) (recognizing and adopting "jurisdictional framework established by the CSRA"); Elgin v. Dep't of Treasury, 567 U.S. 1, 5 (2012) (holding CSRA governs review over certain adverse actions taken against federal employees).

[155] 74 F.3d 1322 (D.C. Cir. 1996).

[156] *Id.* at 1339.

disqualified employers from certain federal contracts if they hired permanent replacement workers during lawful strikes.[157] Clinton implemented the order pursuant to the Procurement Act, claiming that the law bestowed on the President the power to "set procurement policy for the entire government."[158] However, the court ruled that Clinton's action conflicted with—and was therefore preempted by—the National Labor Relations Act, which guarantees employers the right to hire permanent replacement workers as an offset to the employees' right to strike.[159] This case underscores the principle that an executive order cannot supersede statutory protections established by Congress.

Returning to Schedule F, it is important to note that Trump appeared to quote directly from 5 U.S.C. § 7511(b)(2) when attempting to remove civil service protections from individuals in "confidential, policy-determining, policy-making, or policy-advocating positions."[160] However, to issue such an order would be to separate this phrase from its historical context.[161] The plain text and legislative history of the CSRA indicate that the "confidential, policy-determining, policy-making, or policy-advocating positions" provision refers *exclusively* to noncareer, political appointees. As previously discussed, political appointees serve at the pleasure of the President and may be dismissed at any time; they are therefore excluded from the CSRA's removal protections.[162] However, Congress intended the phrase "confidential, policy-determining, policy-making, or policy-advocating" to explicitly exclude career civil servants from its ambit, and these individuals *are* protected by the CSRA.[163]

The circumstances surrounding the enactment of the CSRA lend further support to this interpretation. To provide context, we must first go back two years prior to the CSRA's passage, when the Supreme Court deliberated on the constitutionality of politically motivated dismissals of public employees in *Elrod v. Bruns*.[164] In his concurrence, Justice Stewart explained that "*nonpolicymaking, nonconfidential* government employee[s]" cannot be "discharged or threatened with discharge from a job that [they are] satisfactorily performing upon the sole ground of [their] political beliefs."[165] With this background in mind, the CSRA's legislative history indicates that civil service protections do *not* apply to "positions which require Senate confirmation" and "positions of a confidential, policy-determining, policy-making or policy

[157] *Id.* at 1324.

[158] *Id.* at 1332.

[159] *Id.*

[160] *See supra* Part II.A (comparing Schedule F to 5 U.S.C. § 7511(b)(2)(A)).

[161] Upholding Civil Service Protections and Merit System Principles, 89 Fed. Reg. 24982, 24993 (Apr. 9, 2024).

[162] *See supra* Part I.A.

[163] Upholding Civil Service Protections and Merit System Principles. 89 Fed. Reg. 24982, 25026 (Apr. 9, 2024).

[164] 427 U.S. 347, 350-51 (1976).

[165] *Id.* at 375 (Stewart, J., concurring) (emphasis added).

advocating character . . . [which are] extension[s] of the exception for appointments confirmed by the Senate."[166] This language suggests that Congress meant to equate that particular term to Senate-confirmed political appointees. The Merit Systems Protection Board has regularly adopted this interpretation as well.[167]

Congress made some changes to the CSRA through the Civil Service Due Process Amendments Act of 1990, which expanded removal protections to excepted service employees.[168] The legislative history of this new law also acted to "retain the exclusion for political appointees."[169] Specifically, the history notes:

> [T]he key to the distinction between those to whom appeal rights are extended and those to whom such rights are not extended is the expectation of continuing employment with the Federal Government. Lawyers, teachers, chaplains, and scientists have such expectations; presidential appointees and temporary workers do not. . . . Schedule C, positions of a confidential or policy-determining character. . . . are political appointees who are specifically excluded from coverage under section 7511(b) of title 5. H.R. 3086 does not change the fact that these individuals do not have appeal rights.[170]

With this language, Congress reaffirmed that the "confidential, policy-determining, policy-making or policy-advocating" terminology applied *exclusively* to political appointees, as well as temporary workers (who are also *not* career civil service employees).

Viewed through this lens, Trump's improper application of the term "confidential, policy-determining, policy-making or policy-advocating" to describe positions held by career civil service employees "would be contrary to congressional intent and decades of applicable case law and practice."[171] Such a move undermines Congress's careful balance of "the need for long-term employees who have knowledge of the history, mission, and operations of their

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[166] S. REP. NO. 95-969, at 48 (1978).

[167] *See* Special Couns. v. Peace Corps, 31 M.S.P.R. 225, 231 (1986) (explaining that "confidential," "policy-making," and "policy-advocating" are all terms that serve as "shorthand way[s] of describing positions to be filled by so-called 'political appointees'"); *see also* O'Brien v. Off. of Indep. Couns., 74 M.S.P.R. 192, 206 (1997) (quoting *Peace Corps*, 31 M.S.P.R. at 206).

[168] Civil Service Due Process Amendments Act of 1990, Pub. L. No. 101-376, 104 Stat. 461.

[169] Upholding Civil Service Protections and Merit System Principles, 88 Fed. Reg. 63862, 63872 (proposed Sept. 18, 2023).

[170] H.R. REP. NO. 101-328, at 4-5 (1989), *as reprinted in* 1990 U.S.C.C.A.N. 695, 698-99.

[171] Upholding Civil Service Protections and Merit System Principles, 88 Fed. Reg. 63862, 63873 (proposed Sept. 18, 2023).

agencies with the need of the President for individuals in positions who will ensure that the specific policies of the Administration will be pursued."[172]

Additionally, the enabling statutes cited by Trump in his order—5 U.S.C. §§ 3301, 3302, and 7511—do not explicitly grant him the power to eliminate civil service protections for employees or to terminate them at will.[173] Section 3301 permits the President to "prescribe such regulations for the admission of individuals into the civil service in the executive branch" and to "ascertain the fitness of applicants as to age, health, character, knowledge, and ability for the employment sought."[174] Section 3302 relates to allowing the President to except "positions from the competitive service" when "conditions of good administration warrant" it.[175] This language alone does not "purport to confer authority on the President to except positions from the scope of [civil service protections]."[176]

Likewise, nothing in the text of Section 7511 grants this authority to the President.[177] A thorough examination of the legislative history related to Section 7511 also reveals no mention of such an authority.[178] Supreme Court precedent dictates that where a statute is silent as to conferring the President with the power to remove a certain class of federal employee, the President cannot claim such action.[179] Accordingly, based on the frameworks established in *Youngstown* and *Reich*, and as a matter of statutory interpretation, Schedule F would have to be struck down as a violation of the will of Congress by the President.

3. Implementing Schedule F May Violate the Presidential "Faithful Execution" Duties

The third and final framework pertains to the President's "Faithful Execution" duties. These responsibilities are found in Article II of the Constitution, which requires the President to "take Care that the Laws be faithfully executed."[180]

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[172] *Id.*

[173] 5 U.S.C. §§ 3301, 3302.

[174] 5 U.S.C. § 3301.

[175] 5 U.S.C. § 3302.

[176] Upholding Civil Service Protections and Merit System Principles, 89 Fed. Reg. 24892, 24990 n.107 (Apr. 9, 2024).

[177] *See* 5 U.S.C. § 7511.

[178] *See* S. REP. NO. 95-969, at 48-62 (1978).

[179] In *Wiener v. United States*, President Dwight D. Eisenhower removed a member of the War Claims Commission because he wanted "personnel of [his] own selection." 357 U.S. 349, 350 (1958). The Supreme Court held the member's position was one "'entirely free from the control or coercive influence'" of the President. *Id.* at 355 (quoting Humphrey's Ex'r v. United States, 295 U.S. 602, 629 (1935)). Thus, the Court concluded that no such removal power was granted to the President "simply because Congress said nothing about it." *Id.* at 356.

[180] U.S. CONST. art. II, § 3.

Article II also requires the President to take an oath or affirmation to "faithfully execute the Office of President."[181] Over the years, the Supreme Court has interpreted the Faithful Execution Clauses to serve many ends simultaneously: to define the limits of Article III standing;[182] to serve as the source of the President's prosecutorial discretion;[183] and to compel the President to respect legislative supremacy.[184]

In addition to these interpretations, there is an ongoing debate over the application of the Faithful Execution Clauses to the President's removal power. On the one hand, scholars in the "unitary executive theory" camp read these clauses as a source of vast presidential authority that vest the President with the absolute power to remove executive branch employees at will.[185] They argue that, because the Constitution makes the President chiefly responsible for faithfully executing the laws, the President must also have "the ability to control inferior executive officers to prevent them from enforcing or interpreting federal law at odds with his views."[186] They also rely heavily on the words of James Madison, the Father of the Constitution and lead advocate for a strong grant of presidential power:

> The danger to liberty, the danger of mal-administration, has not yet been found to lie so much in the facility of introducing improper persons into office, as in the difficulty of displacing those who are unworthy of the public trust. . . . [I]f anything in its nature is executive, it must be that [removal] power which is employed in superintending and seeing that the laws are faithfully executed.[187]

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[181] U.S. CONST. art. II, § 1.

[182] Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1835, 1837 (2016) (first citing Lujan v. Defs. of Wildlife, 504 U.S. 555, 577 (1992); and then Allen v. Wright, 468 U.S. 737, 761 (1984)).

[183] *Id.* (first citing United States v. Armstrong, 517 U.S. 456, 464 (1996); and then Heckler v. Chaney, 470 U.S. 821, 832 (1985)).

[184] *Id.* (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952)).

[185] *See* STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 418-20 (2008) (arguing that the Constitution grants President the power to remove executive branch subordinates, thereby providing office with "an unlimited presidential removal power"); PHILIP K. HOWARD, NOT ACCOUNTABLE: RETHINKING THE CONSTITUTIONALITY OF PUBLIC EMPLOYEE UNIONS 140 (2023) ("[T]he president and federal supervisory officials must have authority to manage personnel . . . . This requires, among other remedies, invalidating specific provisions of the Civil Service Reform Act of 1978 that . . . disempower the president and his appointees from removing officers . . . .").

[186] John Yoo, *Unitary, Executive, or Both?*, 76 U. CHI. L. REV. 1935, 1947 (2009).

[187] Gerald E. Frug, *Does the Constitution Prevent the Discharge of Civil Service Employees?*, 124 U. PA. L. REV. 942, 949 (1976) (quoting 1 ANNALS OF CONG. 496, 515-16, 518-19 (1789) (Joseph Gales ed., 1834)).

Finally, with a focus on history and tradition, unitary theorists assert that every President, in one form or another, has favored a broad interpretation of the presidential removal power.[188]

On the other hand, there are scholars who take a more limited view of the Faithful Execution Clauses, and they contend that the Constitution does not vest presidents with an absolute removal power.[189] In support of their assertion, these scholars often make a textualist argument that the Constitution cannot be read to grant an absolute removal authority to presidents because, unlike other clauses of the Constitution conveying entirety,[190] the Framers did not include the word "all" when vesting the executive power in the President.[191]

Another textualist argument is that the Constitution is notably silent as to granting the President an explicit removal power.[192] To explain this silence, unitary theorists often suggest that the power of presidential removal "was so widely assumed, it could go unstated."[193] In response, their opponents make their own originalist arguments, citing Alexander Hamilton[194] and speeches made by members of the First Congress[195] for the idea that such an expansive

[188] CALABRESI & YOO, *supra* note 185, at 16 (noting that every President has believed in unitary executive theory and defended it from congressional incursions, thus construing Article II as "giving the president power to control the execution of the laws through removals, directions, or nullifications").

[189] *See* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 26-27 (1994) (arguing against unitary executive theory due to lack of consensus among Framers as to whether president is constitutionally vested with removal power); Jed Handelsman Shugerman, *Presidential Removal: The* Marbury *Problem and the Madison Solutions*, 89 FORDHAM L. REV. 2085, 2090 (2021) (arguing that Framers intended removal powers to be "mixed and shared between the legislature and the executive").

[190] Shugerman, *supra* note 189, at 2087 ("The Framers used the word 'all' elsewhere to convey entirety, such as in Article I's Vesting Clause and in Article III on jurisdiction but not in Article II.").

[191] *Id.* at 2085-87.

[192] Jed Handelsman Shugerman, Freehold Offices vs. 'Despotic Displacement': Why Article II 'Executive Power' Did Not Include Removal 3 (July 31, 2023) (unpublished manuscript), https://scholarship.law.bu.edu/cgi/viewcontent.cgi?article=4588&context=faculty_scholarship ("Article II is silent on removal.").

[193] *Id.* at 3-4, 40 (observing how Chief Justice Taft in *Myers v. United States*, 272 U.S. 52, 118 (1926), and Chief Justice Roberts in *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 492 (2010), implied presidential removal powers on basis of history and tradition).

[194] Lessig & Sunstein, *supra* note 189, at 25 n.114 (quoting THE FEDERALIST NO. 77, at 459-62 (Alexander Hamilton) (Clinton Rossiter ed., 1961)) ("The consent of [the Senate] would be necessary to displace as well as to appoint.").

[195] Frug, *supra* note 187, at 948 (quoting Representative William Smith in 1 ANNALS OF CONG. 474, 476 (1789) (Joseph Gales ed., 1834)) ("If we give this power [of removal] to the President, he may, from caprice, remove the most worthy men from office. His will and pleasure will be the slight tenure by which an office is to be held . . . .").

interpretation of the President's removal power was not so "widely assumed" by the Founders.

The debate over the unitary executive theory remains contentious, and I do not claim to possess a definitive answer as to which perspective is correct. However, I am inclined to find the arguments for a restrained executive branch to be more persuasive, particularly with regard to the President's limited power to remove civil service employees. Taking care that the laws be "faithfully executed" should not mean that the President possesses the power to fire any civil servant "for any reason — even personal reasons unrelated to the public interest or even for no reason at all."[196] Yet the text of Schedule F itself states: "*Faithful execution* of the law requires that the President have appropriate management oversight regarding this select cadre of professionals."[197]

I agree with the non-unitary theorist camp that "faithful execution" seems more likely to be "a legal limitation on executive discretion" rather than an unfettered grant of executive authority.[198] There are originalist arguments to support this point. "Faithful execution," as it was applied to other officeholders at the time of the Founding, was understood to "convey an affirmative duty to act diligently, honestly, skillfully, and impartially in the best interest of the public" and in "good faith."[199] There is also a common law understanding that an officer's failure to faithfully execute their duties connoted a "neglect of duty" and "malfeasance in office."[200] "Neglect of duty" indicated "a failure to perform one's duties in a way that caused injury to others," and it was grounds for removal of clerks, judges, and other officers in England.[201] "Malfeasance in office" referred to "a wrongful act committed in the execution of one's duties that caused injury to others."[202]

Moreover, there is a strong link between the original public meaning of "faithful execution" and the modern fiduciary duty to avoid *ultra vires* actions.[203] *Ultra vires* means "beyond the scope of power allowed or granted

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[196] Jed Handelsman Shugerman & Ethan J. Leib, *Will the Supreme Court Hand Trump Even More Power?*, N.Y. TIMES (Oct. 8, 2019), https://www.nytimes.com/2019/10/08/opinion/trump-supreme-court-fed.html.

[197] E.O. 13,957, *supra* note 1 (emphasis added).

[198] Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2131 (2019).

[199] *Id.* at 2141, 2178-79.

[200] Jane Manners & Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 COLUM. L. REV. 1, 6 (2021).

[201] *Id.*

[202] *Id.*

[203] *See* Kent et al., *supra* note 198, at 2178-81. *But see* Samuel L. Bray & Paul B. Miller, *Against Fiduciary Constitutionalism*, 106 VA. L. REV. 1479, 1525-27 (2020) (criticizing Kent, Leib, and Shugerman's suggestion that President acts as "fiduciary" and claiming instead that "fiduciary constitutionalism" contains "recurring distortions of constitutional law").

by . . . law."[204] Applied to government officials, *ultra vires* review gives courts the authority to "assess whether the official acted with statutory authority."[205] Although the Supreme Court has declined to review presidential actions under this doctrine,[206] some academics[207] and litigants[208] argue that, in accordance with the original public meaning of the President's faithful execution duties, the President should not be exempt from such scrutiny. Lower court judges also seem to be increasingly receptive to this idea.[209]

In implementing Schedule F to remove disloyal employees, the President would arguably fail to carry out their "Faithful Execution" duties by acting in a way that is neither "impartially in the best interest of the public" nor in "good faith."[210] Further, the President would simultaneously be acting in "neglect of duty" to Congress to uphold its carefully constructed civil service regime and committing "malfeasance in office" by stripping civil servants of their due process rights to their offices.[211] Finally, these actions could be subject to *ultra vires* review given that, in promulgating Schedule F, the President would be acting beyond the scope of their statutory authority[212] and beyond their responsibility to faithfully execute the duties of their office.[213]

CONCLUSION

Civil servants form the backbone of this country, contributing the knowledge and expertise necessary to ensure the smooth operation of government. As implied by their title, they enter the workplace every day, ready to serve the

[204] *Ultra Vires*, BLACK'S LAW DICTIONARY (12th ed. 2024).

[205] Stack, *supra* note 136, at 1177.

[206] *See* Dalton v. Specter, 511 U.S. 462, 474 (1994) (declining to review President George H.W. Bush's allegedly *ultra vires* act in deciding to close Philadelphia Naval Shipyard due to action being "beyond the reach of judicial power").

[207] *See* Stack, *supra* note 136, at 1177 ("[I]t makes sense . . . to conceive of review of [the President's] claims of statutory powers as a branch of *ultra vires* review.").

[208] Complaint for Declaratory and Injunctive Relief at 14, NTEU v. Trump, No. 20-3078 (D.D.C. Oct. 26, 2020) ("The President's [Schedule F] Executive Order is unlawful and ultra vires because it is not necessary for good administration.").

[209] *See, e.g.*, Mountain States Legal Found. v. Bush, 306 F.3d 1132, 1133-34, 1138 (D.C. Cir. 2002) (acknowledging jurisdiction over *ultra vires* claims brought against President Clinton, but ultimately concluding that claims failed due to insufficient factual allegations); Murphy Co. v. Biden, 65 F.4th 1122, 1129-30 (9th Cir. 2023) (holding claim that President Barack Obama acted *ultra vires* in expanding national monument to detriment of timber company was justiciable but finding that President validly exercised his authority).

[210] Kent et al., *supra* note 198, at 2141, 2178.

[211] Manners & Menand, *supra* note 200, at 6.

[212] *See supra* Part III.B.2; *see also* Stack, *supra* note 136, at 1177.

[213] *See* Kent et al., *supra* note 198, at 2178-83 (asserting that oath of faithful execution constrains executive power and discretion through "limitation, subordination, and proscription").

American people. And while different presidents and their administrations rotate in and out of Washington, D.C., these dedicated employees remain on the job, providing a steady hand on the tiller.

As this Note has articulated, the return of Schedule F presents a clear and present danger to the civil service, its political neutrality, and the job security of tens of thousands of federal employees. Moreover, the notion of an unchecked President, possessing the power to shape the civil service in any way he pleases, undermines democratic principles.

Nevertheless, as this Note demonstrates, there are several legal arguments against the reimplementation of Schedule F: (1) it is repugnant to the due process rights enshrined in the Constitution; (2) it contradicts the will of Congress, which prevails over executive orders; and (3) it violates the President's constitutional responsibility to faithfully execute the duties of their office. For these reasons, Schedule F is likely unconstitutional, and future courts tasked with adjudicating its legality should strike it down as such.