NOTES

FREE ENTERPRISE FUND V. PCAOB: IN WHICH A GREAT CASE MAKES BAD LAW

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INTRODUCTION

On June 28, 2010, the Supreme Court handed down its opinion in *Free Enterprise Fund v. Public Company Accounting Oversight Board*.[1] It was supposed to be, or so some had hoped, one of the most consequential cases in administrative law of the last decade.[2] The Court systematically scrutinized the constitutionality of the Public Company Accounting Oversight Board (PCAOB[3] or Board), the major administrative body created by the Sarbanes-Oxley Act (SOX)[4] to regulate good accounting practices after the collapses of Enron and WorldCom.[5] The Court's opinion traversed fundamental principles of two pillars of administrative law: appointments and removal of government officers. After approving the Board's appointment procedure, the Court directed harsher scrutiny at the removal procedure for the Board. Board members, who answered only to the Securities Exchange Commission (SEC or Commission), were statutorily protected from removal except for good cause (such as failure to perform their statutory duties); the SEC commissioners in turn enjoyed similar protection from presidential removal.[6] The Court ruled that this double-layered for-cause protection impermissibly hindered the President's oversight of the Board.[7]

The Court's ruling in *Free Enterprise Fund* was the first time in eighty-four years that a court had found a removal limitation unconstitutional.[8] Despite the outcome, opponents of the Board, such as the Cato Institute, remain sorely disappointed.[9] The Court's opinion left the PCAOB intact, minus its removal

[1] 130 S. Ct. 3138 (2010).

[2] *See, e.g.*, Jack M. Beermann, *Essay: An Inductive Understanding of Separation of Powers or Why the* PCAOB *Opinion Doesn't Change Anything Yet* 1 (Boston Univ. Sch. of Law, Working Paper No. 10-24, 2010), *available at* http://bu.edu/law/faculty/scholarship/workingpapers/documents/BeermannJ083110.pdf ("Chief Justice Roberts's opinion in [*Free Enterprise Fund*] came in like a lion and went out like a lamb.").

[3] David G. Leitch, *Is There a Constitution in (the) House?*, 12 GREEN BAG 2D 23, 28 (2008) ("[T]he PCAOB – some call it 'peekaboo' which only makes sense if F-A-V-R-E is pronounced 'Farve.'").

[4] Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 15 and 18 U.S.C.).

[5] *See infra* note 11.

[6] *Free Enter. Fund*, 130 S. Ct. at 3148 ("[SOX] places the Board under the SEC's oversight . . . . But the individual members of the Board . . . are substantially insulated from the Commission's control. The Commission cannot remove Board members at will, but only for good cause shown, in accordance with certain procedures." (internal quotation marks omitted)).

[7] *Id.* at 3162; *see also infra* notes 189-199 and accompanying text.

[8] Hans Bader, Free Enterprise Fund v. PCAOB*: Narrow Separation-of-Powers Ruling Illustrates that the Supreme Court Is Not "Pro-Business,"* 2009-2010 CATO SUP. CT. REV. 269, 278.

[9] *See id.* at 269-70 ("Chief Justice John Roberts has often been depicted as an advocate of narrow rulings and a judicial philosophy of minimalism. In his opinion for the Court in

protection. The Board continues to investigate, regulate, and sanction public accounting firms across the country. From that point of view, it is not clear whether the Court's remedy has actually provided any relief for the Board's regulated constituents. But, as this Note contends, the holding may be even more ineffective than the Cato Institute fears, for the Court has also done nothing to solve the basic constitutional problem. The Court has not changed the supposedly problematic relationship between the Board and the President. If that is true, then the Court has either sanctioned a constitutional violation or wasted its time "fixing" one that never existed.

This Note begins by reviewing the relevant structure and functions of the PCAOB as it was created by SOX. It then rehearses the histories of appointments and removals jurisprudence and how they were applied in the case at hand. Finally, this Note explains why the judicial remedy was conceptually ineffectual and why it created bad constitutional doctrine going forward.[10]

I. THE SARBANES-OXLEY ACT AND THE STRUCTURE AND FUNCTION OF THE PCAOB

In 2002, a bipartisan Congress passed SOX in the wake of the Enron and WorldCom scandals.[11] SOX was designed to curb the worst of the accounting abuses through new federal regulations and oversight.[12] Many of the tasks were assigned to the SEC, but SOX also created the PCAOB, a separate agency, which had broad powers to regulate, investigate, and sanction all accounting firms that audited public companies.[13]

[*Free Enterprise Fund*], he took this philosophy to an extreme, refusing to invalidate much of [SOX] despite the fact that its central provisions violated the Constitution's separation of powers. . . . The Supreme Court's decision to leave the law largely intact despite its constitutional infirmities is one more illustration that it does not have a pro-business tilt." (footnotes omitted)).

[10] *Cf.* N. Sec. Co. v. United States, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting) ("[A]lthough I think it useless and undesirable, as a rule, to express dissent, I feel bound to do so in this case and to give my reasons for it.").

[11] Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667, 669 (D.C. Cir. 2008) (citing S. REP. NO. 107-205, at 2 (2002); H.R. REP. NO. 107-414, at 18-19 (2002)), *aff'g* No. 06-0217, 2007 U.S. Dist. LEXIS 24310 (D.D.C. Mar. 21, 2007), *rev'd in part*, 130 S. Ct. 3138 (2010); Brief for Petitioner at 1, Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138 (2010) (No. 08-861).

[12] Brief for Petitioner, *supra* note 11, at 2 ("The Act permanently vests the Board with broad regulatory and enforcement authority over all accounting firms that audit publicly traded companies, including broad powers to inspect [those firms], set rules and standards for such audits, and impose meaningful sanctions if warranted." (internal quotation marks omitted)).

[13] 15 U.S.C. § 7211(a) (2006); *see also id.* § 7201(11) (defining "public accounting firm").

First, the Board managed the mandatory registration of all public accounting firms.[14] Next, the Board promulgated rules regarding "auditing, quality control, ethics, independence, and other standards"[15] for the firms, including a long list of mandatory rules found in SOX.[16] The Board retained a residual power to make any other rules[17] "as may be necessary or appropriate in the public interest."[18] Registered firms were required to submit annual reports and other disclosures pursuant to the rules.[19] Finally, the Board conducted annual inspections of all large accounting firms with more than one hundred issuers.[20] The Board sought compliance with its own rules as well as SEC rules, the firm's own policies, and general "professional standards."[21] All violations of Board or SEC rules were treated as violations of the Securities Exchange Act of 1934, punishable by heavy fines, suspension, or Justice Department action.[22]

Crucially, all functions of the Board were subject to oversight by the SEC.[23] The Commission reserved the right of prior approval of all rules,[24] and it would grant approval of rules consistent with SOX or the Securities Exchange Act or rules appropriate for the public interest in the Commission's discretion.[25] The Commission might also add to or revoke Board rules as it deemed necessary to "further the purposes of [SOX]."[26] The Board could make available to the SEC the documents it received from regulated firms;[27] it also had to provide reports to the SEC of all inspections and sanctions it carried out.[28] The SEC then had the right to a final review of all disciplinary

[14] *Id.* § 7212(a). As of January 31, 2012, there were 2371 firms registered. *Registered Public Accounting Firms*, PUB. COMPANY ACCT. OVERSIGHT BOARD (Jan. 31, 2011), http://pcaobus.org/Registration/Firms/Documents/Registered_Firms.pdf.

[15] § 7211(c)(2).

[16] Mandatory rules are listed at § 7213(a)(2).

[17] Rulemaking procedures are outlined by the Administrative Procedure Act at 5 U.S.C. § 553 (2006).

[18] 15 U.S.C. § 7213(b).

[19] *Id.* § 7212(d).

[20] *Id.* § 7214(b)(1) (providing also for inspection every three years of firms with fewer than one hundred issuers).

[21] *Id.* § 7211(c)(5).

[22] *Id.* § 7215(c)(4)(D) (mandating fines for intentional violations up to $750,000 for natural persons or $15,000,000 for other persons, and $100,000 or $2,000,000, respectively, for all other violations).

[23] *Id.* § 7217(a).

[24] *Id.* § 7217(b)(2).

[25] *Id.* § 7217(b)(3).

[26] *Id.* § 7217(b)(5).

[27] *Id.* § 7215(b)(5)(B) ("Without the loss of its status as confidential and privileged in the hands of the Board, all information [prepared, received by, or specifically for the Board] may . . . be made available to the Commission . . . .").

[28] *Id.* § 7214(c) ("The Board shall . . . report any [violation of rules], if appropriate, to the Commission and each appropriate State regulatory authority . . . .").

sanctions.[29] The SEC could "censure or impose limitations upon the activities, functions, and operations of the Board" if the Board failed to fulfill its obligations under SOX.[30] Finally, the SEC approved the Board's budget.[31] Because of this wide oversight, the power of the SEC over the Board has been described by some observers as "plenary."[32]

The Board was designed to be independent from political influence. In fact, SOX stated that the Board was "not an agency or establishment of the United States Government . . . . No member [of] the Board shall be deemed to be an officer . . . for the Federal Government by reason of such service."[33] Poor drafting aside,[34] the strong design for autonomy was clear.[35] For example, the Board did not receive money from Congress but instead funded itself through "accounting support fees" levied on the firms.[36] These were explicitly "not [to] be considered public monies of the United States."[37] The SEC, meanwhile, is itself an independent agency that is supposed to be politically isolated.[38] Commissioners are protected from arbitrary presidential removal.[39] They appointed the five Board members, including the Chairman, to staggered terms of five years.[40] Board members, in turn, enjoyed removal protections: only the SEC could remove them, and only for willful violations of law, willful abuse of authority, or failure to enforce the law.[41]

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[29] *Id.* § 7217(c)(2).

[30] *Id.* § 7217(d)(2).

[31] *Id.* § 7219(b), (d)(1).

[32] Bader, *supra* note 8, at 271.

[33] 15 U.S.C. § 7211(b).

[34] Though the statute declares that the Board members are not officers, the assertion is so plainly preposterous that no lawyer has tried to defend it in court. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 2007 U.S. Dist. LEXIS 24310, at *11 (D.D.C. Mar. 21, 2007), *aff'd*, 537 F.3d 667 (D.C. Cir. 2008), *rev'd in part*, 130 S. Ct. 3138 (2010) ("The parties agree that, at least for purposes of these motions, PCAOB should be considered a governmental entity, and so it shall be."). The provision could not possibly be valid for constitutional purposes. See *infra* Part II.A.1 for background on what makes someone an officer. Actually, the purpose of the language seemed to be to exempt Board members from the civil servant pay scale. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3147 & n.1 (2010) (citing Brief for Petitioner, *supra* note 11, at 3) (stating that Board members received private-sector-competitive wages of $547,000, while the Chairman received $673,000).

[35] *See Free Enter. Fund*, 537 F.3d at 703 (Kavanaugh, J., dissenting) (quoting legislative history that trumpets a "strong independent board").

[36] 15 U.S.C. § 7219(c)(1), (g) (establishing the fee proportional to firm size).

[37] *Id.* § 7219(c)(1).

[38] It is generally the goal of Congress to make independent agencies free from political pressures. *See* Beermann, *supra* note 2, at 4.

[39] *See infra* Part IV.A.

[40] 15 U.S.C. § 7211(e)(1), (4)-(5).

[41] *Id.* § 7217(d)(3); *see also* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537

These last two provisions – establishing appointment and removal by the SEC – were challenged in *Free Enterprise Fund*. First, Plaintiffs claimed that the SEC commissioners collectively lacked constitutional authority to appoint Board members.[42] Second, Plaintiffs claimed that the two layers of for-cause removal, from President to SEC and from SEC to PCAOB, unconstitutionally hindered the President's power to control the Board as a part of the executive branch.[43] The Supreme Court rejected the first claim and accepted the second.[44] To better understand the Court's decision, summaries of the histories of appointment and removal jurisprudence are in order.

II. HISTORY OF APPOINTMENT AND REMOVAL JURISPRUDENCE

A. *Appointments*

Appointments jurisprudence is rooted in the Constitution's Appointments Clause:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and *all other Officers of the United States* . . . : but the Congress may by Law vest the *Appointment of such inferior Officers*, as they think proper, in the President alone, in the Courts of Law, or *in the Heads of Departments*.[45]

Notice that Congress may delegate power to the "heads of departments" to appoint a certain class of "inferior officers."[46] That raises four questions of interpretation: (1) who is an officer; (2) specifically, who is an inferior officer; (3) what is a department; and (4) within a department, who is its head?

1. Who is an officer?

Running the federal government is a huge undertaking.[47] The Framers of the Constitution realized that the executive power was too big for one person to

F.3d 667, 703 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) ("[T]he for-cause removal restriction establishes, just as the congressional sponsors intended, that the PCAOB has an extra guarantee of its independence and its plenary authority to deal with this important situation." (internal quotation marks omitted)).

[42] Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3149 (2010) (stating that "Petitioners also challenged [SOX] under the Appointments Clause" because the SEC did not satisfy requirements under the clause).

[43] *Id.*

[44] *Id.* at 3138.

[45] U.S. CONST. art. II, § 2, cl. 2 (emphasis added).

[46] *See id.*

[47] In 2010, there were 1.36 million employees of the civilian agencies of the executive branch. *Historical Federal Workforce Tables*, U.S. OFFICE PERSONNEL MGMT. (Sept. 30, 2010), http://opm.gov/feddata/HistoricalTables/ExecutiveBranchSince1940.asp.

carry out alone, so they established a system of delegation.[48] Though one President is vested with the executive power, he is assisted by a variety of principal and inferior officers.[49] Some, such as ambassadors, are explicitly named in the Constitution.[50] Other officers are contemplated ("all other Officers of the United States"[51]) but not defined.

One of the earliest cases construing the term "officer" as it appears in the Constitution, *United States v. Germaine*,[52] arose from a dispute over an appointment by the Commissioner of Pensions.[53] Germaine was a surgeon[54] indicted under a statute for "extortion under color of his office" as an "officer of the United States."[55] He argued that because he had not been appointed by a relevant constitutional process, he was not an officer of the United States.[56] The Supreme Court pronounced first, as a preliminary matter, that all constitutional officers – whomever they may be – should be appointed in accordance with one of the methods in the Appointments Clause.[57] The Court then defined the common law term "officer" as someone who holds office of a certain "tenure, duration, emolument, and duties . . . not occasional or temporary."[58] Therefore, every government office should be endowed with

[48] *See* United States v. Germaine, 99 U.S. 508, 510 (1878) ("That instrument was intended to inaugurate a new system of government, and the departments to which it referred were not then in existence. The [Appointments Clause] is to be found in the article relating to the Executive, and the word as there used has reference to the subdivision of the power of the Executive into departments, for the more convenient exercise of that power.").

[49] *See id.*

[50] *See supra* note 45 and accompanying text.

[51] U.S. CONST. art. II, § 2, cl. 2.

[52] 99 U.S. 508 (1878). For the first eighty years of its existence, the federal government remained relatively small. It experienced its first major expansion after the Civil War, paying the military pensions of veterans, widows, and dependents. Theda Skocpol, *America's First Social Security System*, *in* THE CIVIL WAR VETERAN: A HISTORICAL READER 179, 179 (Larry M. Logue & Michael Barton eds., 2007). As laws were made ever more permissive and hundreds of thousands of claimants were added to the rolls, pension expenditures increased from just over $8.3 million in 1865 to more than $104.5 million in 1891. *See* WILLIAM H. GLASSON, FEDERAL MILITARY PENSIONS IN THE UNITED STATES 144 (1918). It is an interesting coincidence that the first critical analysis of the Appointments Clause occurred at this time. For a short historical overview of the Civil War pension system, see Skocpol, *supra*, at 179.

[53] *Germaine*, 99 U.S. at 509.

[54] Surgeons were employed by the Bureau of Pensions to examine applications for military pensions. *See* Skocpol, *supra* note 52, at 182. The value of pensions was dependent on the types and severities of injuries sustained during war. *See id.*

[55] *Germaine*, 99 U.S. at 509.

[56] *Id.*

[57] *Id.* at 510.

[58] *Id.* at 511-12 (adopting, as a matter of constitutional interpretation, a previous definition of "officer" from United States v. Hartwell, 73 U.S. (6 Wall.) 385, 393 (1867)).

these conditions by statute. As for Germaine, he was called only for "occasional and intermittent" tasks, so he was not an officer.[59]

Nearly a hundred years later, in *Buckley v. Valeo*,[60] the Supreme Court shed more light on the definition of "officer." Plaintiffs attacked the Federal Election Commission (FEC), which was created by the Federal Election Campaign Act (FECA) after Watergate to tighten campaign finance controls.[61] The FEC was composed of six members, evenly appointed by the President, Speaker of the House, and President pro tempore of the Senate.[62] Neither the Speaker nor the President pro tempore, however, is authorized by the Constitution to appoint officers, whether principal or inferior. If the FEC members were officers, then the appointment provision of FECA was therefore unconstitutional. The Supreme Court added a helpful gloss to the vague definition offered in *Germaine*: An officer was "any appointee *exercising significant authority pursuant to the laws* of the United States."[63] That would include, among many others, "members of a typical administrative agency."[64] "Insofar as the powers confided in [the FEC] are . . . in the same general category as those powers which Congress might delegate to one of its own committees," the FEC was free to exercise them even as non-officers, for nothing prevented Congress from working in its own sphere.[65] But "enforcement power," which is inherently non-legislative, is only exercisable by properly appointed officers.[66] Therefore, though the FEC was left intact, its four congressionally appointed members were stripped of their officer powers.[67] And thus, the Supreme Court articulated the constitutional definition of officer that has endured to this day: an appointee exercising significant authority pursuant to the law.

2. Who is an inferior officer?

If an officer is essentially anyone with powers delegated by an act of Congress, only a subset among all officers is "inferior." Interestingly, the

[59] *Id.* at 512.

[60] 424 U.S. 1 (1976).

[61] *See* RONALD A. CASS ET AL., ADMINISTRATIVE LAW: CASES AND MATERIALS 68 (5th ed. 2006).

[62] *Buckley*, 424 U.S. at 126 ("[T]wo members of the Commission are initially selected by the President . . . . The remaining four voting members of the Commission are appointed by the President *pro tempore* of the Senate and by the Speaker of the House.").

[63] *Id.* (emphasis added).

[64] *Id.* at 133.

[65] *Id.* at 137.

[66] *Id.* at 138.

[67] *Id.* at 143. This approach was also followed in *Freytag v. Commissioner*, 501 U.S. 868, 883 (1991) ("[U]nless the method [of appointment Congress] provides comports with [Article II], the holders of those offices will not be Officers of the United States." (quoting *Buckley*, 424 U.S. at 138-39) (internal quotation marks omitted)).

Constitution does not refer to "superior" or "principal" officers, yet logically, such officers must exist in relation to their inferiors. And in fact, that is precisely the framework that the Supreme Court has established. *Germaine* held that all officers fell into one of two classes: the principal, who can be appointed by the President with advice and consent of the Senate, and the inferior, who can be appointed by the President alone, by heads of departments, and by the courts of law.[68] *Buckley* supported the same distinction.[69] But frustratingly, neither case defined the line between principal and inferior. The Supreme Court punted the issue again in *Morrison v. Olson*[70] because the officer in that case was "clearly" inferior.[71] The Court did, however, articulate a few reasons for this assertion. Alexia Morrison was appointed by a court as an Independent Counsel to investigate a complaint from the House Judiciary Committee.[72] She was removable by the Attorney General, a higher executive branch official, and was therefore "inferior in rank and authority."[73] Her office was also limited in duty, jurisdiction, and tenure.[74] She could not, for example, make policy for the government or the executive branch, and her office terminated when her investigation was done.[75]

Finally, in 1997, in *Edmond v. United States*,[76] the Court drew the line that seemed most intuitive: "[T]he term 'inferior officer' connotes a relationship with some higher ranking officer . . . . '[I]nferior officers' are officers whose work is directed and supervised at some level by others who were appointed [as principal officers]."[77] The Court supposed that principal officers are

[68] United States v. Germaine, 99 U.S. 508, 509 (1878).

[69] *Buckley*, 424 U.S. at 132 ("Principal officers are selected by the President with the advice and consent of the Senate. Inferior officers Congress may allow to be appointed by the President alone, by the heads of departments, or by the Judiciary. No class or type of officer is excluded because of its special functions.").

[70] 487 U.S. 654 (1988).

[71] *Id.* at 671; *see also* CASS ET AL., *supra* note 61, at 90 ("[T]he matter has received surprisingly little attention from the Supreme Court throughout our nation's history. The Court was thus painting on an almost clean canvas when it decided that the IC is an 'inferior' officer . . . .").

[72] *Morrison*, 487 U.S. at 666-67.

[73] *Id.* at 671 (internal quotation marks omitted).

[74] *Id.* at 672 (quoting United States v. Germaine, 99 U.S. 508, 511 (1878)).

[75] *Id.* at 671-72.

[76] 520 U.S. 651 (1997). Judges of the Coast Guard Court of Criminal Appeals were appointed by the General Counsel of the Department of Transportation. *Id.* at 653-54. The Secretary of Transportation adopted the appointments as his own. *Id.* at 654. Military judges were previously held to be officers under the Appointments Clause in *Weiss v. United States*, 510 U.S. 163 (1994). The question before the Court in *Weiss* was whether the judges were inferior officers. *Id.* at 170. The judges were found to be inferior by virtue of their subordinate relationship to a principal officer, the Secretary. *Id.* at 172.

[77] *Edmond*, 520 U.S. at 662-63.

readily identifiable by their unique appointment process.[78] The Secretary of Transportation in *Edmond* was clearly a principal officer, and his subordinates were surely inferior officers.[79] With this distinction, the Court found a more or less complete understanding of the term "officers" in the Appointments Clause.

3. What is a department?

Only certain authorities may appoint inferior officers under the Constitution. The ability to appoint officers has much to do with separation of powers and checks and balances. As Justice Scalia pointed out in his dissent in *Morrison*, all officers with executive responsibilities are, at base, members of the executive branch.[80] And except as otherwise provided in the Constitution, the President has the power to deal with his own branch, free from undue interference from other branches – the legislature especially.[81] The Constitution provides, for example, the Incompatibility Clause: "[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."[82] The Clause ensures that the legislative and executive branches have no members in common and that no one working for the President is formally beholden to Congress.[83] At the same time, the Constitution contains exceptions that act in the interest of checks and balances. The first portion of the Appointments Clause is but one example: it allows the

[78] *Id.* at 663 (equating principal officers with those "who were appointed by Presidential nomination with the advice and consent of the Senate").

[79] *Id.* at 666.

[80] *Morrison*, 487 U.S. at 706 (Scalia, J., dissenting) (explaining that officers like Morrison, with powers to investigate and prosecute under the law, served "quintessentially executive function[s]" and that the President should have exclusive control over such activity). This logic would not extend to judicial officers.

[81] *See* Freytag v. Comm'r, 501 U.S. 868, 885 (1991) ("The [Appointments] Clause reflects our Framers' conclusion that widely distributed appointment power subverts democratic government."); *Morrison*, 487 U.S. at 698 (Scalia, J., dissenting) ("'[T]he great security,' wrote Madison, 'against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.'" (quoting THE FEDERALIST No. 51, at 321-22 (James Madison) (Clinton Rossiter ed., 1961))); Buckley v. Valeo, 424 U.S. 1, 122 (1976) (pointing to checks and balances "as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other"); Myers v. United States, 272 U.S. 52, 138-39 (1926) ("The general doctrine of our Constitution then is, that the executive power of the nation is vested in the President; subject only to the exceptions and qualifications, which are expressed in the instrument." (quoting 7 THE WORKS OF ALEXANDER HAMILTON 81 (John C. Hamilton ed., 1851))); *cf.* CASS ET AL., *supra* note 61, at 93-97 (explaining the balance of power between the President and administrative bodies); Beermann, *supra* note 2, at 7-9 (discussing separation of powers).

[82] U.S. CONST. art. I, § 6, cl. 2.

[83] *See, e.g.*, Reservists Comm. to Stop the War v. Laird, 323 F. Supp. 833, 835 (D.D.C. 1971).

Senate (though not the entire Congress) to have a voice in major presidential appointments – a legislative encroachment on the executive power by explicit constitutional permission.

Perhaps recognizing the inconvenience of having to get advice and consent of the Senate, the Framers of the Constitution provided an alternative appointment process for inferior officers. Two parts of this alternative appointment process are important: first, these officers are relatively minor; and second, although Congress has substantial choice in whom it vests appointment power,[84] none of its choices may be legislators.[85] In other words, Congress cannot neglect the appointment of very important officers, nor can it ever have sole power to appoint any officers. Their range of discretion is balanced somewhere between the prevailing constitutional policies of efficiency and separation of powers.[86]

Members of many independent agencies, including the PCAOB, are appointed by heads of departments. Departments are neither legislative (as explained above) nor judicial (judicial appointments fall under "the Courts of Law" language of the Appointments Clause); they are necessarily instruments of executive power.[87] For more than a hundred years, the term encompassed only Cabinet departments.[88] The Court in *Burnap v. United States*[89] held, "The term head of a Department means . . . the Secretary in charge of a great division of the executive branch of the Government, like the State, Treasury, and War, who is a member of the Cabinet."[90] In 1991, *Freytag v. Commissioner*,[91] in dicta, expanded the set to include all "executive divisions

[84] *See* Silver v. U.S. Postal Serv., 951 F.2d 1033, 1037 (9th Cir. 1991) (observing that "the Constitution affords Congress substantial discretion to fashion appointments within the specified constraints" of the Appointments Clause).

[85] *Id.* ("Congress may not delegate itself a role in the appointment process . . . ." (citing *Buckley*, 424 U.S. at 127)).

[86] *Freytag*, 501 U.S. at 878 ("The roots of the separation-of-powers concept embedded in the Appointments Clause are structural and political. Our separation-of-powers jurisprudence generally focuses on the danger of one branch's aggrandizing its power at the expense of another branch. *See* Mistretta v. United States, 488 U.S. 361, 382 (1989). The Appointments Clause not only guards against this encroachment but also preserves another aspect of the Constitution's structural integrity by preventing the diffusion of the appointment power.").

[87] *See Buckley*, 424 U.S. at 127 (suggesting that "Departments" are "in the Executive Branch or at least have some connection with that branch"); United States v. Germaine, 99 U.S. 508, 510 (1878).

[88] *Freytag*, 501 U.S. at 886; United States v. Mouat, 124 U.S. 303, 307 (1888) ("[T]he heads of the Departments were defined in [*Germaine*] to be what are now called the members of the Cabinet.").

[89] 252 U.S. 512 (1920).

[90] *Id.* at 515 (citing *Germaine*, 99 U.S. at 510).

[91] 501 U.S. 868 (1991). The United States Tax Court appointed "special trial judges" to hear certain special proceedings, as directed by the court's chief judge. *Id.* at 873. The

like the Cabinet-level departments."[92] Thus, in *Silver v. U.S. Postal Service*,[93] decided just months after *Freytag*, the Ninth Circuit found that the Postal Service was a Department.[94] Four concurring Justices in *Freytag* urged that the heads of departments should be carefully limited to those who are "direct lieutenants" or alter egos of the President.[95] Such individuals, like Cabinet secretaries, are "directly answerable to the President," so they are just as accountable for their decisions as the President would be if he made them himself.[96] Although, admittedly, the extent of "cabinet-like" offices is rather vague, *Freytag* has received no further gloss in the twenty years thence.[97]

4. Who is the head of a department?

Only the heads of cabinet-like departments may appoint officers. In most cases, the identity of the head should be fairly obvious. The Secretary of

special trial judges were found to be inferior officers because their offices were "established by Law" and their duties were defined by statute. *Id.* at 881 (quoting U.S. CONST. art. II, § 2, cl. 2). Thus, the Court was asked to decide whether the chief judge of the Tax Court could make appointments under the Appointments Clause. The Court was divided as to how to characterize the Tax Court, but a majority held that the Tax Court was not a department because Congress created it as an Article I court and not as a part of the executive b. *Id.* at 887-88. Even if it were part of the executive branch, it could not be a department, because departments were only cabinet-level entities, and "[not] every part of the Executive Branch is a department." *Id.* at 885. Instead, the Court found that the Tax Court exercised appointment power as a "Court of Law" because that designation in the Appointments Clause was not limited to Article III courts. *Id.* at 890. See further discussion of the case *infra* in note 252.

[92] *Id.* at 886.

[93] 951 F.2d 1033 (9th Cir. 1991). Bernard Silver and his company, Cartwright-Mitchell, Inc., sent advertisements through the post for a breast enlargement drug. *Id.* at 1034. Finding that the drugs did not work, the Postal Service issued a cease and desist order for making false representations, pursuant to 39 U.S.C. § 3005. *Id.* at 1034-35. Silver argued that the Board of Governors of the Postal Service, made up of nine governors and the Postmaster General, was unconstitutional because the Postmaster General was not appointed in accordance with the Appointments Clause. *Id.* at 1035.

[94] *Id.* at 1038. The Postal Service was in fact a cabinet-level department until 1971. After reorganization, it remained cabinet-like. *See infra* notes 98-99 and accompanying text.

[95] *Freytag*, 501 U.S. at 907 (Scalia, J., concurring in part and concurring in the judgment) ("Like the President, [department heads] possess a reputational stake in the quality of the individuals they appoint; and though they are not themselves able to resist congressional encroachment, they are directly answerable to the President, who is responsible to *his* constituency for their appointments and has the motive and means to assure faithful actions by his direct lieutenants.").

[96] *Id.*

[97] The four concurring Justices in *Freytag* did suggest that departments should include "all agencies immediately below the President in the organizational structure of the Executive Branch," including "all independent executive establishments." *Id.* at 918-19.

Transportation in *Edmond*, for example, is clearly the head of the Department of Transportation. Likewise, the case for all true Cabinet departments should be clear. Identifying the head of cabinet-like departments, however, is less straightforward. In *Silver*, the Ninth Circuit considered that the governors of the Postal Service were able to appoint the Postmaster General. Before the Postal Reorganization Act of 1970,[98] the Postal Service was the Post Office Department, whose Postmaster General was a Cabinet member appointed by the President with advice and consent of the Senate.[99] Following the reorganization, the Postmaster General was appointed by the nine governors of the Postal Service.[100] Under that arrangement, the Postmaster General could not be the head, since he served at the pleasure of the governors.[101] Since the governors themselves were co-equals, no single governor could be considered the "head."[102] The Court's solution was to characterize the body of governors as the collective head. They had "ultimate control and authority" to modify and revoke all actions of the department; they alone held "the reins of power."[103] Thus, the head should be identified not by its title but by the function it serves in the context of the department's organizational structure.[104] Without regard to how many members formed the collective head, the court seemed to treat them as a singular head of a singular department.[105] Therefore, any department in which ultimate power is vested in a multi-member body may find itself with a multi-person head, and such a collective head may appoint officers of the United States.

Against this background of law, the Court assessed the constitutionality of PCAOB appointments in *Free Enterprise Fund*. The Court decided (1) whether Board members were inferior officers who exercised significant authority pursuant to the law, overseen by principal officers; and (2) whether the commissioners of the SEC who appointed Board members were the collective head of a department. Having summarized the Appointments Clause jurisprudence, we now consider the second major element, removal jurisprudence.

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[98] Postal Reorganization Act of 1970, Pub. L. No. 91-375, 84 Stat. 719 (codified as amended at 18 U.S.C. §§ 1535-1537, 39 U.S.C. §§ 101-606 (2006)).

[99] *Silver*, 951 F.2d at 1038.

[100] *Id.* at 1037. The governors were appointed by the President and confirmed by the Senate. *Id.*

[101] *Id.* at 1038-39.

[102] *Id.* at 1039.

[103] *Id.* at 1038.

[104] *Id.*

[105] *See id.* at 1043 (O'Scannlain, J., dissenting) ("The Appointments Clause permits inferior officers to be appointed by 'Heads of Departments.' Hence the constitutionality of the [Postmaster General's] appointment turns on whether the Governors alone, as opposed to the full Board, can be considered a Head of Department.").

B. *Removal Powers*

Unlike the Appointments Clause, an express constitutional provision, there is no express "Removals Clause" in the Constitution.[106] The authority governing the removal of officers must be found in the general theory of separation of powers.

1. The President has broad power to remove officers

The Constitution generally protects the President's oversight of his own branch.[107] *Myers v. United States*[108] was the first major case to address this issue.[109] Frank Myers was a postmaster of the first class.[110] According to statute, he should have been appointed and removed by the President with advice and consent of the Senate.[111] Before his term expired, however, he was fired by the Postmaster General, with approval from the President. The action was not referred to the Senate. Thus, Myers sued under the statute for $8838.71 in back pay.[112] The Court ruled that the statute was unconstitutional, crediting the government's argument that "under Article II of the Constitution the President's power of removal of executive officers appointed by him with the advice and consent of the Senate is full and complete without consent of the Senate."[113] In a lengthy opinion bulwarked with extensive historical support, the Supreme Court appeared to give the President almost "plenary power" to remove officers.[114]

The policy arguments to support this view, still as pertinent today as they were in 1926, fall into three main categories: separation of powers,

[106] Morrison v. Olson, 487 U.S. 654, 723 (1988) (Scalia, J., dissenting).

[107] *See supra* Part II.A.3.

[108] 272 U.S. 52 (1926).

[109] *Id.* at 106.

[110] *Id.*

[111] Act of July 12, 1876, ch. 179, § 6, 19 Stat. 78, 80 ("Postmasters of the first, second and third classes shall be appointed and may be removed by the President by and with the advice and consent of the Senate, and shall hold their offices for four years unless sooner removed or suspended according to law . . . ."). The 1876 Act was just one in a succession of similar acts requiring Senate concurrence for removal of officers. Political appointments were a powerful means of favoring supporters, and the Senate was jealous of that power. *See* Herbert Kaufman, *The Growth of the Federal Personnel System*, *in* THE FEDERAL GOVERNMENT SERVICE 7, 26-27 (Wallace S. Sayre ed., 2d ed. 1965). For much of the nineteenth century, positions in the civil service were used as trading horses for a President or political party in power. Andrew Jackson unabashedly brought the "patronage" or "spoils" system to Washington. *Id.* at 27-29. Presidents after him were all but expected to wipe out the previous administration and install their own appointees. The practice gradually declined after Lincoln's second term, reaching its nadir at the passage of the Civil Service Act in 1883. *See id.* at 20-23.

[112] *Myers*, 272 U.S. at 106.

[113] *Id.* at 108.

[114] Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2322 (2001).

accountability, and efficiency.[115] At the root of separation of powers is the Vesting Clause of Article II, which vests the President as sole executive.[116] In general, the President's power within the scope of the branch is unbounded. The President, whose powers are unenumerated, does not suffer interference from the limited powers of Congress unless the Constitution specifically says otherwise.[117] The constitutional Framers and the Court have been concerned about Congress's tendency to increase its power and aggrandize itself at the expense of other branches.[118] For example, Congress might try to do so by placing its own agents into administrative positions and forbidding their removal. The Court has resisted this tendency by curtailing grants of authority by Congress to itself.[119] While the Vesting Clause gives Congress a limited hand in deciding appointments, no equivalent provision exists with respect to removals.[120] Therefore, the Court in *Myers* concluded that the Constitution did not permit any such role, legislative enactments notwithstanding.[121]

The doctrine of accountability flows from the Take Care Clause, which entrusts solely to the President the responsibility to "take Care that the Laws be

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[115] *See id.* at 2319-46 (examining the interaction of congressional and presidential powers and the resulting effect on accountable and efficient administration of government).

[116] U.S. CONST. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America."); *see also* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667, 678 (D.C. Cir. 2008) ("Although not expressly included in the Constitution itself, the principle of separation of powers is implicit in the first three articles of the Constitution that define separate roles for the [three] branches."); CASS ET AL., *supra* note 61, at 88.

[117] *Myers*, 272 U.S. at 128 ("It is reasonable to suppose . . . that, had it been intended to give to Congress power to regulate or control removals in the manner suggested, it would have been included among the specifically enumerated legislative powers in Article I, or in the specified limitations on the executive power in Article II. The difference between the grant of legislative power under Article I to Congress, which is limited to powers therein enumerated, and the more general grant of the executive power to the President under Article II, is significant."); *see generally* Beermann, *supra* note 2, at 7-9.

[118] The word "aggrandize" is also used to explain the same concept in *Freytag*, *Buckley*, and *Morrison*. *See also* Mistretta v. United States, 488 U.S. 361, 382 (1989).

[119] *See, e.g.*, Bowsher v. Synar, 478 U.S. 714, 736 (1986) (holding the power vested by Congress in the Comptroller General unconstitutional as a usurpation of executive power by the legislature).

[120] *Myers*, 272 U.S. at 122-23 ("The advice of the Senate does not make the appointment. The President appoints. There are certain restrictions in certain cases, but the restriction is as to the appointment and not as to the removal." (quoting 2 GEORGE BANCROFT, HISTORY OF THE FORMATION OF THE CONSTITUTION OF THE UNITED STATES 192 (6th ed. 1889))).

[121] *Bowsher*, 478 U.S. at 736 ("We conclude that . . . the powers vested in the Comptroller General . . . violate the command of the Constitution that the Congress play no direct role in the execution of the laws."); *Myers*, 272 U.S. at 176 ("[T]he Tenure of Office Act of 1867, in so far as it attempted to prevent the President from removing executive officers . . . was invalid, and . . . subsequent legislation of the same effect was equally so.").

faithfully executed."[122] As the reasoning goes, the President is the only person in the federal government who is elected by the nation as a whole; he alone is accountable to the citizenry for the uniform execution of the laws.[123] Likewise, he is responsible for the actions of all officers who carry out his policy. The public needs one person who shares in the full reputational stake of his agents and who is motivated to monitor the obedience of the agents.[124] The Court agreed with the government in *Myers* that "[i]t would be a cruel injustice to the President . . . to hold him responsible for the faithful execution of the laws, if he has no control over the human agencies whom he must, of necessity, employ for this purpose."[125]

In addition, the policy of efficiency demands that the President be able to command forcefully[126] and remove unruly subordinates quickly.[127] The President, and not officers, will respond to the public sentiment.[128] A credible threat of swift and summary removal is the President's most powerful tool for control.[129] By interpreting the President's removal power as near plenary, the Court in *Myers* saw the President as the immediate master of every executive agency decision.[130]

2. Congress may place limits on the President's power to remove

Although *Myers* appeared to give the President near plenary power to remove officers, one should not be deceived by its absolutist tone. The Supreme Court has always held, as far back as *Marbury v. Madison*,[131] that Congress could restrict the President's removal authority.[132] The *Myers* opinion itself reserved a caveat for Congress to protect officers who had very

[122] U.S. CONST. art. II, § 3, cl. 4.

[123] *Myers*, 272 U.S. at 123; *id.* at 135 (observing that the President has power "to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone").

[124] *See* Brief for Respondent at 33, Myers v. United States, 272 U.S. 52 (1926) (No. 77).

[125] *Id.*

[126] *See* Kagan, *supra* note 114, at 2343 (positing that the Constitution wishes to "concentrat[e] certain powers in an executive capable of resolute action").

[127] *See Myers*, 272 U.S. at 135 ("Finding such officers to be negligent and inefficient, the President should have the power to remove them.").

[128] *See id.* at 134.

[129] *See* Bowsher v. Synar, 478 U.S. 714, 726 (1986) ("[The officer] must fear [the President's removal authority] and, in the performance of his functions, obey." (internal quotation marks omitted)); Silver v. U.S. Postal Serv., 951 F.2d 1033, 1039 (9th Cir. 1991) ("The power to remove is the power to control. . . . [R]emoval power need not be exercised to exert effective control . . . .").

[130] *See* Kagan, *supra* note 114, at 2329; *see generally id.* at 2331-46 (discussing policies of accountability, separation of powers, and efficiency).

[131] 5 U.S. (1 Cranch) 137 (1803).

[132] *Id.* at 162; *see also* CASS ET AL., *supra* note 61, at 72.

specialized functions.[133] The additional refinements in the 1935 case of *Humphrey's Executor v. United States*[134] announced the controlling jurisprudence that has more or less persisted until the present day.

William Humphrey was appointed by President Hoover as a member of the Federal Trade Commission (FTC).[135] Later, President Roosevelt felt that Humphrey was not a good advocate for New Deal policies and asked him to resign.[136] When Humphrey refused, Roosevelt fired him.[137] The Federal Trade Commission Act (FTCA), which created the office, said that the President could remove commissioners only for "inefficiency, neglect of duty, or malfeasance in office."[138] Since the President had not made such a claim, the Court considered whether the Act impermissibly limited the President's power under *Myers*.[139] After some indirect chastisement of the *Myers* Court for extensive use of dicta,[140] the *Humphrey's Executor* Court limited *Myers* to its facts. The problem in *Myers* was very straightforward: the postmaster was "an executive officer restricted to the performance of executive functions"; he served the President only.[141] Indeed, within the bounds of the executive branch, no one could second-guess the President.[142]

But Humphrey was a totally different kind of officer. The FTC was specifically designed to replace the old Bureau of Corporations, which had

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[133] *Myers*, 272 U.S. at 135 ("The ordinary duties of officers prescribed by statute come under the general administrative control of the President by virtue of the general grant to him of the executive power . . . . Of course there may be duties so peculiarly and specifically committed to the discretion of a particular officer as to raise a question whether the President may overrule or revise the officer's interpretation of his statutory duty in a particular instance. Then there may be duties of a quasi-judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President can not in a particular case properly influence or control.").

[134] 295 U.S. 602, 632 (1935).

[135] *Id.* at 618.

[136] *Id.* at 618-19.

[137] *Id.* at 619.

[138] Federal Trade Commission Act of 1914 § 1, 15 U.S.C. § 41 (2006). Notice the analogous language in SOX. 15 U.S.C. § 7217(d)(3) (providing for removal of Board members who "willfully violate[]" SOX, "willfully abuse[]" authority, or "fail[] to enforce compliance" with SOX).

[139] *Humphrey's Executor*, 295 U.S. at 627-28.

[140] *Id.* at 627 ("It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision." (quoting Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 399 (1821))).

[141] *Id.* at 627.

[142] *Id.* at 627-28 ("[T]he necessary reach of [*Myers*] goes far enough to include all purely executive officers. It goes no farther . . . .").

been an executive subdivision of the Department of Commerce.[143] In contrast, the FTC was an independent agency, "not to be subject to anybody in the government but . . . only to the people of the United States."[144] It had broader powers "to carry into effect legislative policies embodied in the statute" and "administer[] the provisions of the statute."[145] Therefore, the Court found that the FTC was a "quasi-legislative" and "quasi-judicial" body.[146] The FTC and other independent administrative bodies, such as the Interstate Commerce Commission and the Court of Claims, "perform[] without executive leave and, in the contemplation of the statute, must be free from executive control."[147]

As the Court would later explain in *Morrison v. Olson*,[148] *Humphrey's Executor* did not reject the constitutional policies expressed in *Myers*. Instead, it balanced the interests of executive power on one hand and Congress's expressed desire to create independent agencies on the other.[149] Just as the Constitution does not allow Congress to meddle in the affairs of the executive, it does not give the President a unilateral right to remove officers who were partly agents of the other branches.[150] Officers who are independent according to explicit enactment of Congress, and not "purely executive," might enjoy good-cause removal protections like the one under the FTCA.[151] In any case, the President was still able "to ensure the faithful execution of the laws" by verifying that independent officers "competently perform[ed their] statutory responsibilities."[152]

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[143] *Id.* at 625 ("[O]ne advantage which the commission possessed over the Bureau of Corporations (an executive subdivision in the Department of Commerce which was abolished by the act) lay in the fact of its independence, and that it was essential that the commission should not be open to the suspicion of partisan direction.").

[144] *Id.* (internal quotation marks omitted).

[145] *Id.* at 628.

[146] *Id.*

[147] *Id.*

[148] 487 U.S. 654, 685-86 (1988).

[149] *Id.* at 689-90 (clarifying that although *Myers* spoke to "purely executive" officers whereas *Humphrey's Executor* spoke to "quasi-legislative" and "quasi-judicial" officers, they stood for the same proposition that Congress could not unduly interfere with the President's executive power).

[150] *See id.* at 690-91 ("[T]he characterization of the agencies in *Humphrey's Executor* and [*Wiener v. United States*, 357 U.S. 349 (1958),] as quasi-legislative or quasi-judicial in large part reflected our judgment that it was not essential to the President's proper execution of his Article II powers that these agencies be headed up by individuals who were removable at will." (internal quotation marks omitted)); *id.* at 689 n.28 (repudiating, though noting as informative, the understanding in *Humphrey's Executor* that the FTC's powers "'occupie[d] no place in the executive department'" (quoting *Humphrey's Executor*, 295 U.S. at 628)).

[151] *Id.* at 690.

[152] *Id.* at 692 (internal quotation marks omitted).

Myers, *Humphrey's Executor*, and subsequent cases did agree on one thing: the constitutional test for undue interference[153] did not have to do with abstract actions of Congress per se but had to do with the relationship between President and officer. If Congress interfered, its action was unconstitutional only insofar as the action detracted from the President's control.[154] Therefore, when assessing the validity of a removal restriction, the relevant inquiry will be directed not towards the face of any statute but towards the practical effects on the President.[155]

Using these principles, the Court decided whether the PCAOB was adequately within the President's control. The next Part reviews in detail how the Court applied both appointment and removal jurisprudence in *Free Enterprise Fund v. PCAOB*.

III. *FREE ENTERPRISE FUND V. PCAOB*: PRIOR HISTORY AND APPLICATION OF THE LAW

In 2004, the PCAOB undertook an inspection of a small Nevada accounting firm called Beckstead and Watts (B&W).[156] The Board looked at sixteen of the firm's audits and found eight of them to be deficient.[157] In the Board's view, B&W had not solicited the necessary statements from its audit clients to make an adequate accounting of revenue, the value of securities, and other relevant information.[158] The inspection seemed to go amicably, although B&W complained in its response to the Board that it was being held to an

[153] This terminology comes from *Morrison*. *See* Kagan, *supra* note 114, at 2322 n.305.

[154] *See Morrison*, 487 U.S. at 689-91 ("The analysis contained in our removal cases is designed not to define rigid categories of those officials who may or may not be removed at will by the President, but to ensure that Congress does not interfere with the President's exercise of the executive power . . . . [T]he real question is whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty . . . ." (footnote omitted) (internal quotation marks omitted)).

[155] *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3167 (2010) (Breyer, J., dissenting) ("In short, the question [of removal] presented lies at the intersection of two sets of conflicting, broadly framed constitutional principles [i.e. separation of powers and checks and balances]. And no text, no history, perhaps no precedent provides any clear answer. When previously deciding this kind of nontextual question, the Court has emphasized the importance of examining how a particular provision, taken in context, is likely to function. . . . It is not surprising that the Court in these circumstances has looked to function and context, and not to bright-line rules." (citation omitted)).

[156] According to the Board's inspection report, B&W had only one partner and two professional staff at the time of the inspection. Inspection of Beckstead & Watts, LLP, PCAOB Release No. 104-2005-082, pt. I, at 2 (Sept. 28, 2005), *available at* http://media.complianceweek.com/documents/22/becksteadwatts2005_5309.pdf.

[157] *Id.* pt. I, at 3.

[158] *Id.* pt. I, at 3-4.

unnecessarily high standard.[159] B&W politely disagreed with the Board's findings and agreed to implement changes.[160] The Free Enterprise Fund (FEF), a non-profit organization dedicated to opposing SOX,[161] took up the B&W inspection as a test case to challenge the authority of the Board.[162] The FEF claimed standing based on the theory that its members, including B&W, suffered because of the Board's heightened auditing standards, which "substantially increased the time and expense of its public company audits and reduced . . . overall profits."[163] Thus, FEF sought an injunction against the Board in 2005, and the United States intervened as a defendant.[164]

The plaintiffs brought a facial challenge[165] to the construction of the Board because of both its appointment and removal provisions.[166] The plaintiffs first argued, regarding appointments, that the Board members were principal officers because they were not "supervised on a day-to-day basis" by superior officers.[167] Therefore, Board members had to be appointed by the President directly.[168] In the alternative, the plaintiffs claimed that even if the Board members were inferior officers, their appointment by the SEC would be unconstitutional: the SEC was not a department, and the SEC commissioners who appointed the Board members were not collectively a "department head" for constitutional purposes.[169]

The U.S. District Court for the District of Columbia rejected all of these arguments on summary judgment. According to the court, the Board members were "subject to administrative oversight and removal authority by the Commission" and were therefore inferior officers.[170] The court also found that

[159] *Id.* pt. IV, at 2.

[160] *Id.* pt. IV, at 4. The Board again inspected B&W in 2009 and found no problems at that time. Inspection of Beckstead & Watts, LLP, PCAOB Release No. 104-2009-098A, at 3 (June 29, 2005), *available at* http://pcaobus.org/Inspections/Reports/Documents/2009_Beckstead_Watts.pdf.

[161] Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., No. 06-0217, 2007 U.S. Dist. LEXIS 24310, at *7 (D.D.C. Mar. 21, 2007).

[162] Using the Appointments Clause to challenge the validity of a statute is a neat little trick that appeals to litigants, I think, because it employs a small technicality with constitutional force. See Matthew Hunter, Note, *Legislating Around the Appointments Clause*, 91 B.U. L. REV. 753, 756 n.12 (2011), for examples of how the Appointments Clause could be used to challenge actions under the Troubled Assets Relief Program or the Dodd-Frank Act.

[163] *Free Enter. Fund*, 2007 U.S. Dist. LEXIS 24310, at *8.

[164] *Id.* at *2.

[165] *Id.* at *16.

[166] *Id.* at *2.

[167] *Id.* at *11.

[168] *Id.*

[169] *Id.* at *12-13.

[170] *Id.* at *12 (analogizing the PCAOB to the judges of the Coast Guard Court of Criminal Appeals, who likewise "have no power to render a final decision" and thus are not

the SEC was a department, *Freytag* having settled the issue.[171] Although the SEC as a whole could not be its own head, according to the court, the plaintiffs lacked standing to contest that point.[172] The plaintiffs further alleged, regarding removals, that the Board's double for-cause protections were unconstitutional because they precluded effective presidential control, even in cases of negligent misconduct.[173] This being a facial challenge, however, the court rejected the argument because the protections were not "unduly severe in all circumstances."[174]

The D.C. Circuit Court of Appeals affirmed the summary judgment.[175] The court reemphasized that the Board was inferior to the Commission because it could have its rules and decisions abrogated or amended at any time by the Commission.[176] Ultimately, the Commission could even limit the authority of the Board[177] and promulgate its own rules in furtherance of SOX.[178] The court of appeals also expanded on the district court's opinion by explaining that the SEC was a cabinet-like department: "[I]t exercises executive authority over a major aspect of government policy, and its principal officers are appointed by the President with the advice and consent of the Senate and subject to removal by the President."[179] The court credited opinions of the Attorney General and Office of Legal Counsel that contended independent agencies were eligible to appoint inferior officers.[180] Furthermore, contrary to the assertion of the lower court, the court of appeals found that the SEC as a whole was its own multi-member head because it collectively exercised "final authority as is vested in a single head of an executive department."[181]

The court of appeals was the first to address directly the facial acceptability of double for-cause removal.[182] The court explained that the "real question"

principal officers (quoting Edmond v. United States, 520 U.S. 651, 665 (1997))).

[171] *Id.* at *13 ("The four concurring justices in *Freytag* who reached the question of the SEC's constitutional status all agreed that it is, in fact, a department, and the defendants are likely to succeed on this point." (citation omitted)).

[172] *Id.* at *14.

[173] *Id.* at *16.

[174] *Id.* at *16.

[175] Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667, 685 (D.C. Cir. 2008).

[176] *Id.* at 672.

[177] *Id.* at 675.

[178] Therefore, the Board does not receive "*Chevron*-like deference" from the Commission. *Id.* at 673.

[179] *Id.* at 677 (citations omitted).

[180] *Id.* (citing The Constitutional Separation of Powers Between the President and Congress, 20 Op. O.L.C. 124, 152 (1996); Auth. of Civ. Serv. Comm'n. to Appoint a Chief Exam'r, 37 Op. Att'y Gen. 227, 231 (1933)).

[181] *Id.*

[182] For ease of discussion, let us call the protection shielding the SEC's officers from the President the "upper layer" and the protection shielding the PCAOB's officers from the SEC

under removals jurisprudence was whether the President could "perform his constitutional duty to take Care that the Laws be faithfully executed."[183] In other words, the relevant inquiry was whether the President could adequately control the PCAOB through the SEC as agent. While removing SEC officers was one form of oversight, the actual methods used in government were often much more subtle. For example, the President could dictate which SEC officers directed PCAOB business.[184] Or the President could exercise great influence over how the Commission managed the Board by offering (or threatening to withdraw) "budgetary and legislative support."[185] Therefore, the mere existence of the upper layer of protection did not prevent the President from overseeing Board affairs. Moreover, the Commission exercised such "sweeping mechanisms to guarantee substantive control . . . of the Board[]" that the court questioned whether the Board should be seen in this constitutional analysis to have a separate existence at all.[186] If the Board was so thoroughly under the thumb of the Commission, then the lower level of protection was completely ineffective.[187] In any case, two layers of removal protection in this case did not seem to be too onerous.[188]

Finally, the Supreme Court affirmed in part[189] and reversed in part, in an opinion by Chief Justice Roberts. The Court differed significantly from the lower courts on the removals issue.[190] The Commission did not hold plenary power over the Board, said the Court: "[A]ltering the budget or powers of [the Board] as a whole is a problematic way to control an inferior officer."[191]

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the "lower layer."

[183] *Id.* at 679 (citations omitted) (internal quotation marks omitted).

[184] *Id.* at 680.

[185] *Id.*

[186] *Id.*

[187] *Id.* at 683 (stating that Congress "provide[d] the Commission with the authority to abolish Board powers . . . essentially granting at-will removal power over Board functions if not Board members").

[188] *Id.* at 682-83 ("Although the level of Presidential control over the Board reflects Congress's intention to insulate the Board from partisan forces, this statutory scheme preserves sufficient Executive influence over the Board through the Commission . . . .").

[189] The Court fully agreed with the court of appeals regarding the constitutionality of Board appointments. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3162 (2010).

[190] *Id.* at 3151-61.

[191] *Id.* at 3158-59; *see also id.* at 3159 ("Even if Commission power over Board activities could substitute for authority over its members, we would still reject respondents' premise that the Commission's power in this regard is plenary."). *But cf.* Freytag v. Comm'r, 501 U.S. 868, 907 (1991) (Scalia, J., concurring in part and concurring in the judgment) ("The legislature, with a discretionary power over the salary and emoluments of the Chief Magistrate, could render him as obsequious to their will as they might think proper to make him." (citing THE FEDERALIST No. 73, at 441 (Alexander Hamilton) (Clinton Rossiter ed., 1961))).

Rather, complete control over a subordinate can only be achieved with the power to remove.[192] A double layer of protection for officers is therefore problematic.[193] The second layer "does not merely add to the Board's independence, but transforms it."[194] The Court supposed that

> [a] second level of tenure protection changes the nature of the President's review. Now the Commission cannot remove a Board member at will. The President therefore cannot hold the Commission fully accountable for the Board's conduct, to the same extent that he may hold the Commission accountable for everything else that it does.[195]

At every level of protection, there is an additional buffer of discretion, so that the combined protection between the Board and the President exceeds the protection of any single layer and of the sort sanctioned in *Humphrey's Executor*.[196] Thus, the Court ruled in favor of the plaintiffs, finding two layers of for-cause removal protection unconstitutional per se because they so interfered with the President's control of officers.[197]

As a remedy, the Court found "that the unconstitutional tenure provisions are severable from the remainder of the statute."[198] The Board and its regulatory powers therefore remained intact, while its members became removable by the SEC at-will.[199] It thus appears acceptable in the eyes of the Court to have one layer of removal protection attended by at least one more layer of at-will tenure.

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[192] *Free Enter. Fund*, 130 S. Ct. at 3158 ("Broad power over Board functions is not equivalent to the power to remove Board members.").

[193] Although the Court was eager to differentiate PCAOB members from non-officer employees who also had double-layer removal protection, a comparison is instructive. The old civil service program protected eighty percent of civilian employees in 1940, and managers complained about the difficulty of motivating or disciplining these workers. CASS ET AL., *supra* note 61, at 105. The difficulty, however, seemed to arise from the strength of the employee protections, not particularly from higher-layer protections of their managers. *See id.*

[194] *Free Enter. Fund*, 130 S. Ct. at 3154.

[195] *Id.*

[196] *Id.* ("[E]ven if the President disagrees with their determination, he is powerless to intervene – unless that determination is so unreasonable as to constitute 'inefficiency, neglect of duty, or malfeasance in office.'" (quoting Humphrey's Executor v. United States, 295 U.S. 602, 620 (1935))). At least a few of the Justices were eager not to expand the scope of *Humphrey*. Justice Scalia was most vocal about this during oral arguments. Transcript of Oral Argument at 43, 44, Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138 (2010) (No. 08-861).

[197] *Free Enter. Fund*, 130 S. Ct. at 3153 ("The result is a Board that is not accountable to the President, and a President who is not responsible for the Board.").

[198] *Id.* at 3161.

[199] *Id.* ("The Sarbanes-Oxley Act remains fully operative as a law with these tenure restrictions excised." (internal quotation marks omitted)).

IV. A CRITICISM OF THE *FREE ENTERPRISE FUND* DOCTRINE

Substantial criticism has been leveled at the Supreme Court following the *Free Enterprise Fund* opinion. Some, such as the Cato Institute and the Free Enterprise Fund itself, who oppose the existence of the PCAOB, are disappointed that the result did not strip the Board of its powers.[200] The Board will continue to audit public accounting firms as long as politics will allow. On another side, there are people, including the four dissenting Justices, who argue that the Court's simplistic and formalistic remedy is at once over-inclusive and under-inclusive.[201] As explained in Part II of this Note, no constitutional provision explicitly limits removal protections. Instead, the constitutionality is based on the control relationship between President and officer. Not all double-layer protections, few as they are,[202] will bear the same relationship.[203] One can imagine that some doubly protected officers may fear the President's tight control while some singly protected officers may not.[204] The Court's remedy makes no such distinction but simply declares that one layer of protection is permissible while two are not. This Note argues something still different: it does not matter how many layers of protection there are because the problems lie entirely elsewhere. Instead, the Court has effectively seen nothing, done nothing, and fixed nothing. And its holding, other than constraining independent agency structures, will have no practical effect going forward.

From one point of view, the Court's reasoning in *Free Enterprise Fund* is fairly compelling. To use a judicial analogy, one might say that for-cause removal protection is like judicial review for abuse of discretion. Even if the higher court (or President) does not like the lower court's (or SEC's) finding, it is ultimately forced to abdicate judgment. But is this an accurate analogy? Does the protection of the SEC really behave like abuse of discretion review, or is it something quite different? This problem raises the curious question of why the SEC is protected at all. As it turns out, the answer is not obvious.

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[200] *See supra* note 9 and accompanying text.

[201] *See, e.g.*, Leading Cases, *Separation of Powers*, 124 HARV. L. REV. 289, 289-99 (2010).

[202] The Justices were hard pressed to think of precedent for this kind of administrative structure; the best analogy they considered was the New York Stock Exchange, which is a corporation under SEC oversight. Transcript of Oral Argument, *supra* note 196, at 30, 67. Indeed, the question was one of first impression before the court. *Free Enter. Fund*, 130 S. Ct. at 3153.

[203] *See Free Enter. Fund*, 130 S. Ct. at 3167 (Breyer, J., dissenting) ("[T]he Court has emphasized the importance of examining how a particular provision, taken in context, is likely to function.").

[204] *See* Transcript of Oral Argument, *supra* note 196, at 49 ("[Solicitor] General Kagan: [The government is] not saying that a double for-cause provision is always constitutional, just as [it is] not saying that a single for-cause provision is always constitutional."); Leading Cases, *supra* note 201, at 295 n.70.

A. *Why Does the SEC Enjoy Removal Protection?*

At various times in the oral argument of *Free Enterprise Fund*, Justices Breyer, Ginsburg, Kennedy, and Sotomayor all raised an interesting question: if there is no removal protection provision in the SEC's enacting statute, why are SEC commissioners protected from removal?[205] Solicitor General Kagan told the Court that protection had long been assumed by the government, and no party contested that fact in the case.[206] Chief Justice Roberts and Justice Scalia seemed to accept the assumption, albeit reluctantly.[207] The lawyer for the plaintiffs, Michael A. Carvin, came closest to giving a reasoned answer,[208] but the opinion did not incorporate his suggestions.

Carvin's answer begins with *Wiener v. United States*.[209] The petitioner in that case was a member of the War Claims Commission, dealing with compensation for personal injury and property damage in connection with the Second World War.[210] When President Eisenhower took over the White House from President Truman, Eisenhower wanted to replace the War Claims Commissioners with people of his own choosing.[211] Since the commissioners had no explicit statutory protection, the President thought that he could remove

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[205] *See* Transcript of Oral Argument, *supra* note 196, at 17-18 ("Justice Breyer: [I]nterestingly enough, my law clerks have been unable to find any statutory provision that says that the President of the United States can remove an SEC commissioner only for cause. . . . Would you refer me to that citation? Because we couldn't find it."); *id.* at 19 ("Justice Ginsburg: I thought that both sides agreed that there is no statute, everybody agrees to that. But I thought that the government, just as your side, agreed that the President could dismiss an SEC commissioner for cause."); *id.* at 51 ("Justice Kennedy: [W]hat is the authority for us to find that there is an implication in the statute to remove just for cause?"); *id.* at 52 ("Justice Sotomayor: But that's because the statute required it [for the FTC in *Humphrey*]."); *see also id.* at 17 ("Justice Scalia: I don't think the government will think it has achieved a great victory if it comes out of this with the proposition that the SEC is not an independent regulatory agency. And I don't think the government is arguing that position.").

[206] *Id.* at 52 ("General Kagan: [I]t's a perplexity of this law, but for many, many decades, everybody has assumed that the SEC commissioners are subject to the same for-cause removal provision, and the government has not contested that in this case, nor has [Petitioner].").

[207] *Id.* at 21 ("Mr. Carvin: If this Court wants to say that [*Humphrey* was wrong] . . . . Justice Scalia: I'd love to say that. That would be wonderful.").

[208] *Id.* at 18-19 ("Mr. Carvin: [T]hey're given 5-year terms . . . . Under this Court's precedent in Wiener, if there is a term, you need to look at the function of the agency. . . . The reason we infer 'for cause' is because it was modeled after the FTC, and under Wiener, you need to look at function of the agency to determine the President's removal authority . . . .").

[209] 357 U.S. 349 (1958).

[210] *Id.* at 350.

[211] *Id.*

them at will.[212] The Court, however, inferred from the legislative history that Congress did not intend this to be the case.[213] The War Claims Commission was an adjudicatory body with power to disburse funds without "review by any other official of the United States or by any court."[214] Thus, it was meant to be "entirely free from the control or coercive influence . . . of either the Executive or the Congress."[215] In the spirit of *Humphrey's Executor*, such independent bodies could be judicially assumed to have removal protection.[216]

The SEC was brought into the fold by *SEC v. Blinder, Robinson & Co.*[217] The Tenth Circuit agreed that the determination of removal protections, if not explicitly legislated, "will depend upon the character of the office."[218] By analogy to the FTC in *Humphrey's Executor*, since the SEC was an "administrative bod[y] created by Congress to carry into effect legislative policies embodied in the statute," it should enjoy the same protection as the FTC.[219] FTC or SEC commissioners could not be removed except for "inefficiency, neglect of duty, or malfeasance in office."[220] This appears to be the same assumption that the Supreme Court made in *Free Enterprise Fund*.[221]

The preservation of this assumption may be partly to blame for the odd remedy in *Free Enterprise Fund*. Historically, as in *Bowsher v. Synar*[222] – where the Comptroller General was found to be an unconstitutional officer – the remedy has been to strip the officer of all significant authority pursuant to law.[223] It has not been to change the terms of the officer's administration.[224] But to halt the PCAOB's work could be highly disruptive, and it would have invited Congress to choose, in short order, which layer of protection it wanted to eliminate. The Court, respecting the long-standing assumption and not

[212] *Id.* at 352.

[213] *Id.* at 354.

[214] *Id.* at 355.

[215] *Id.* at 355-56 (internal quotation marks omitted).

[216] *Id.* at 356 ("[N]o such power [to remove] is given to the President . . . simply because Congress said nothing about it. The philosophy of *Humphrey's Executor* . . . precludes such a claim.").

[217] 855 F.2d 677 (10th Cir. 1988).

[218] *Id.* at 682.

[219] *Id. But see* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3182-83 (Breyer, J., dissenting) (questioning the understanding of congressional intent regarding the SEC).

[220] *Blinder, Robinson & Co.*, 855 F.2d at 682.

[221] *See Free Enter. Fund*, 130 S. Ct. at 3147.

[222] 478 U.S. 714 (1986).

[223] *Id.* at 736 n.10 (concluding that the Comptroller General "may not exercise the powers conferred upon him by [statute]").

[224] *Id.* at 735 (refusing to sever the removal provision of the enacting statute because doing so "would require th[e] Court to undertake a weighing of the importance Congress attached to the removal provisions in the [enacting law]"). "[S]triking the removal provisions would lead to a statute that Congress would probably have refused to adopt." *Id.*

wanting to throw all independent agencies into turmoil, may have taken the decision upon itself.[225]

B. *The Court Establishes the Wrong Test in* Free Enterprise Fund

The Court should be applauded for its defense of separation of powers. It has been an important cause for the Supreme Court throughout this country's history, since the time of the first Congress.[226] Important as the cause may be, however, the conclusion of *Free Enterprise Fund* is quite misplaced. The Court is right to notice that the President has relatively weak control over the PCAOB, compared to his more direct influence over the SEC. But the differences are not caused by a surfeit of removal protections per se. The Court, in fact, achieves nothing by adjusting the removal protections, for it preserves the real problem: the structure and delegation of power, whereby the Commission has the exclusive power to fire the Board. The *Free Enterprise Fund* opinion is defective because it does not resolve the instant controversy and because it creates bad law going forward. Justice Breyer, dissenting, began to explain this fact,[227] but having so many other points of dissent, he did not pursue it to its logical end. This Note attempts to complete Justice Breyer's idea.

1. The President is not constrained by the PCAOB's removal protection

The President's influence over the PCAOB is not diminished by the existence of Board's removal protections. The only difference between the present structure and a structure of direct control is the fact that the President must always act upon the Board through the instrument of the Commission. Insofar as the President and the SEC commissioners agree, they behave as one;[228] the distinction between them collapses and the President effectively exercises direct removal of Board members. Now, as long as Board members maintain good behavior within the bounds of their statutory protection, no one can touch them.[229] Conflicts arise only in the narrow set of cases when the Board misbehaves but the President and commissioners disagree about what to do with them.[230] What happens when the President wants to remove but the

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[225] For reasons why Congress prefers to insulate independent agencies, see generally Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15 (2010).

[226] *See, e.g.*, Leading Cases, *supra* note 201, at 298 n.85.

[227] *See infra* note 238 and accompanying text.

[228] Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3171 (2010) (Breyer, J., dissenting) (proposing four scenarios for removal, the first two stating that when the President and commissioners agree, the upper layer of protection is irrelevant).

[229] *See id.*

[230] Another difference of opinion exists if the President wants to retain the Board, misbehavior notwithstanding, but the Commission removes. I do not address this scenario in this Note because I am focused on the President's constitutional right to remove, not to

Commission refuses? The answer depends upon the exact nature of the Commission's own protection, which is apparently quite obscure.[231] Nevertheless, this Note will proceed based on analysis earlier in this Part.[232]

The Board is protected from removal absent "inefficiency, neglect of duty, or malfeasance in office."[233] This in itself, the Court seems to agree, is constitutional, consistent with the law in *Humphrey's Executor*.[234] The difference here is that the Commission, not the President, has sole power to make determinations under the standard. Even so, can the President remove commissioners for refusing to charge the Board with "inefficiency, neglect of duty, or malfeasance in office" where appropriate? The majority in *Free Enterprise Fund* supposed that the commissioners had wide latitude for discretion.[235] But this is not necessarily true.[236] The commissioners are protected by the very same "inefficiency, neglect of duty, or malfeasance in office" standard.[237] It amounts to a simple mandate to ensure that statutes like the Securities Exchange Act and SOX are faithfully carried out.

The Commission's mandate does not depend on the job protections of inferior officers. It does not matter, for example, whether the Board has little protection or no protection; if Board malfeasance does not reach a definite severity, the Commission will not be accountable for it.[238] As long as statutory law is upheld, the Commission is not forced to remove. In that case, the Board is not protected by its own standard but only by that of the Commission. Only when Board malfeasance rises even higher can the Commission be adjudged inefficient or negligent for ignoring it. On the other hand, if the Board's protection is more robust than the Commission's protection, then the Board is

retain.

[231] *See supra* notes 205-208 and accompanying text.

[232] *Supra* Part IV.A.

[233] *Free Enter. Fund*, 130 S. Ct. at 3148 (quoting Humphrey's Executor v. United States, 295 U.S. 602, 620 (1935)).

[234] Justice Scalia makes fun of *Humphrey's Executor* but still concedes its authority. *See supra* note 207.

[235] *Free Enter. Fund*, 130 S. Ct. at 3154 ("The Commissioners are not responsible for the Board's actions. They are only responsible for their own determination of whether the Act's rigorous good-cause standard is met. And even if the President disagrees with their determination, he is powerless to intervene . . . . This novel structure does not merely add to the Board's independence, but transforms it.").

[236] Yet the Court's fears are not totally unfounded. It has only misjudged the source of these fears. *See infra* Part IV.B.2.

[237] *See supra* Part IV.A.

[238] See Breyer's third of four removal scenarios in his dissent. *Free Enter. Fund*, 130 S. Ct. at 3171 (Breyer, J., dissenting) ("3. The President wants to dismiss a Board member, but the Commission wants to keep the member. Layer One [the Commission's protection] allows the Commission to make that determination notwithstanding the President's contrary view. Layer Two [the Board's protection] is irrelevant because the Commission does not seek to remove the Board member.")

protected only by its own standard. As soon as the Board oversteps its standard in that scenario, the Commission would be forced to remove.

From these examples, it is apparent that the Board must mind only one protective standard at a time. Two layers of protection, therefore, are not equal to the sum of their parts. Since the Board and the Commission stand or fall together, the only removal protection that matters is the stronger of the two. As long as each layer is constitutional, the pairing of them should be equally so.

For that matter, any number of layers of protection should be no stronger than the largest one. At this point, the astute reader will realize that this assertion is extremely problematic. Surely, the President could have no meaningful control over a minor officer buried under ten or twenty layers of protection. But what common sense detects here is in fact the real *Free Enterprise Fund* problem: not a surfeit of protection but too much delegation of removal authority.

2. The President is constrained by delegation of removal authority

Had the President designed the PCAOB himself, he probably would have chosen to handle removals directly, because he imagines that he would have more control that way. In fact, though, the Board was put under the SEC as part of Congress's conscious scheme to make it politically independent.[239] So long as the President has no direct removal authority, he is forced to deal with someone other than the intended target. And as the President deals with more officers, he must juggle more political consequences.

To make the problem perfectly clear, imagine that an at-will agent is buried under five administrative layers of agents, each removable at will but only by the agency immediately above. One doubts whether the President would have the political stomach to turn over four separate agencies just to punish a minor officer.[240] Such an administrative structure could well be unconstitutional for making the President's control impracticable.[241] If the *Free Enterprise Fund* opinion can be read thus to implicitly and unconditionally sanction two or more layers of at-will officers,[242] then the holding, in *reductio ad absurdum*, is surely wrong.

It would be incorrect to think of at-will removal as something like de novo review, where the highest court has total authority; unlike judicial reviews,

[239] *See supra* notes 33-41 and accompanying text.

[240] Apparently, presidents have very little appetite for removals at all. No President has ever tried to remove a protected officer for cause, though it would be a constitutionally valid action. *Free Enter. Fund*, 130 S. Ct. at 3170 (Breyer, J., dissenting).

[241] *See supra* note 204.

[242] The Court seems to assume that at-will removal is the equivalent of total control. By that logic, layers of at-will removal could continue, constitutionally, *ad infinitum*. *Cf.* Beermann, *supra* note 2, at 1 ("[T]he Court appears to have embraced the independence of independent agencies more strongly than ever before.").

firing someone from a job is not so easily done.[243] Removal has damaging consequences, both personal and political, and these problems only multiply at every administrative level. The complexity of independent agency structure may be a far greater threat to presidential power than officer removal protections.

3. The Court's test is flawed; it should develop a new test based on scrutiny of the delegation of removal authority

Based on the controversy in *Free Enterprise Fund*, the Court has dictated a per se rule that two or more layers of for-cause removal are unconstitutional. According to the analysis above, this result was unwarranted. The rule is flawed because it is at once too broad and too narrow. It is too broad because two layers of for-cause protection need not be more onerous than one.[244] It is too narrow because it does not limit (and may even encourage) multiple layers of at-will removal, which may well be unconstitutional.[245] Perhaps this problem will be addressed in future cases. For now, the *Free Enterprise Fund* opinion, whatever its value, should properly be confined to its facts, for it will prove unworkable if left to develop towards its logical conclusion.[246]

I am sympathetic to the difficulty of the Court's job. It is very challenging for the Court to formulate the right test, especially since removal controversies do not arise very often. Even if the Court could more closely scrutinize removals, the test would probably be multi-factored and hard to apply fairly. It is understandable, then, for the Court to fashion a "second-best" test that is both easy to administer and relatively protective of constitutional principles.[247] But any proxy test, however convenient, must also be faithful to its underlying doctrinal motivation.[248] The big problem with the *Free Enterprise Fund* test,

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[243] *See Free Enter. Fund*, 130 S. Ct. at 3158-59 ("But altering the budget or powers of an agency as a whole is a problematic way to control an inferior officer. The Commission cannot wield a free hand to supervise individual members if it must destroy the Board in order to fix it."); Paul R. Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943, 957 (1980) ("[R]emoval is a doomsday machine; it can be both an overwhelming and an inadequate device for controlling or formulating policy.").

[244] *See supra* Part IV.B.1.

[245] *See supra* Part IV.B.2.

[246] *Cf.* Richard H. Pildes, Free Enterprise Fund, *Boundary-Enforcing Decisions, and the Unitary Executive Branch Theory of Government Administration*, 6 DUKE J. CONST. L. & PUB. POL'Y 1, 5 (2010) ("The most conventional way to read a Supreme Court decision . . . assumes that future courts in subsequent cases will apply the immanent legal logic of a decision in a consistent way and will follow the relevant legal principles to their logical limit.").

[247] *See* Peter J. Smith, *Federalism,* Lochner*, and the Individual Mandate*, 91 B.U. L. REV. 1723, 1741 (2011) ("[T]here is often good justification for such second-best strategies.").

[248] *See id.* ("[W]e expect the limitations imposed as second-best strategies to bear at least

therefore, is that it fails to correlate with the President's actual control over his officers.

Instead of focusing on removal protections, the Court should look at the actual ability of the President to review the performance of officers. Currently, the President's inability to remove Board members unilaterally is the root of the constitutional evil. The President should be able to assess the performance of all officers of the United States and raise a more robust threat than just the removal of a superior officer.[249] It is up to the Court to then determine what sort of threat would satisfy separation of powers. Perhaps the President should have limited powers to remove officers directly or to suspend officer powers temporarily. Any such solution would hurt the independence of an independent agency, but if the motivations behind *Free Enterprise Fund* are true, it would be an appropriate step towards constitutionality.

CONCLUSION

Free Enterprise Fund is a noteworthy decision for businesspeople, lobbyists, and law scholars alike. Not only does it speak in daring language,[250] it acts in daring motions, invalidating a legislatively created removal provision for the first time since *Humphrey's Executor*. It is symptomatic of an increasing desire to control administrative agencies on the parts of both the President[251] and the Court.[252]

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some relationship to the values that the underlying doctrine . . . is designed to serve.").

[249] Some argue that the Court should have designed a test that considered the Board's actual level of independent discretion. *See, e.g.*, Leading Cases, *supra* note 191, at 295 ("Rather than adopting a rule that two layers of for-cause removal protection are impermissible, a better formalist decision would have focused its rule on the most salient and broadly applicable element in this case: whether the Commission's broad and pervasive oversight authority over the Board gave the Commission the power to review and overturn every significant decision the Board could make."). The disadvantage of this proposal is that instead of directly addressing the question of presidential control, it creates a question of whether the officer in question is really an officer. If the Commission has plenary review over the Board, then the Board is nothing more than an agent of the Commission, and the President should have no concern for it. While clever, the suggestion does not advance separation of powers jurisprudence in the way that the Court was probably hoping to do. It also does not tell us how to successfully make multi-level hierarchies of officers, if that is what Congress wishes to do.

[250] Beermann, *supra* note 2, at 2 ("The opening paragraph of [*Free Enterprise Fund*] should have struck terror into the hearts of those concerned that the Supreme Court might embrace a strict view of separation of powers.").

[251] CASS ET AL., *supra* note 61, at 97 ("One of the most important developments in administrative law over the past generation has been the tightening of presidential supervision over agency rulemaking. As Congress has steadily expanded the scope of agency policymaking powers, presidents have sought to exercise greater control and coordination over the exercise of those powers.") (citation omitted).

[252] Justice Scalia hates *Humphrey's Executor* and *Freytag*. *See, e.g.*, Transcript of Oral

Whatever its policy merits, however, the opinion is critically deficient as it relates to the case itself and to the precedent it creates going forward. The constitutional question of whether the President has adequate control over his subordinates is a highly fact-dependent inquiry. Multiple layers of for-cause removal are not inherently damaging to separation of powers, just as multiple layers of at-will removal are not inherently innocuous. Rather, the Court should have examined the delegation of removal powers, as that is far more likely to be a source of constitutional problems. In its haste, the Court has committed a triumvirate of legal follies: it misidentified the proper question; it failed to solve the problem it defined on its own terms; and it invited bad constitutional doctrine going forward.

Still, *Free Enterprise Fund* is the law of the land. The lesson for the astute observer is to avoid taking the *Free Enterprise Fund* opinion at face value, deceptive as it is in its absolutist simplicity.[253] The reader should remember the historical case law and its fundamental goals and justifications, which flow directly from the Constitution. *Free Enterprise Fund* should be interpreted under that authority.

Argument, *supra* note 196, at 23-24 ("Justice Scalia: I hope your case doesn't rest on Freytag. (Laughter.) Mr. Carvin: So do I. I want to take an opportunity to focus on the real point of Freytag, which was made very eloquently in the Freytag dissenting opinion, which was [written by Justice Scalia]. (Laughter.)"); *supra* note 207. In *Freytag*, in what was actually a concurring opinion but only as to the result, Justice Scalia wrote that the Appointments Clause embodied a strong separation of powers, with the heads of departments under Article II and courts of law under Article III. Freytag v. Comm'r, 501 U.S. 868, 906-07 (1991) (Scalia, J., concurring in part and concurring in the judgment). Since the Tax Court was closer to an Article II body, he argued it should be considered a department. *Id.* at 911-12. By the same token, he argued that no one with appointment power ought to be considered to be under Article I. *Id.* at 907 ("[Separation of power strictures] also render the Judiciary a potential repository of appointment power free of congressional (as well as Presidential) influence. In the same way that depositing appointment power in a fortified President and his lieutenants ensures an *actual* exclusion of the legislature from appointment, so too does reposing such power in an Article III court.").

[253] "Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment." N. Sec. Co. v. United States, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).