

3-12-2018

## Humphrey's Executor Squared: Free Enterprise Fund v. Public Company Accounting Oversight Board and its Implications for Administrative Law Judges

Robert S. Garrison Jr.

Follow this and additional works at: <https://digitalcommons.pepperdine.edu/naalj>

 Part of the [Administrative Law Commons](#), and the [Judges Commons](#)

---

### Recommended Citation

Robert S. Garrison Jr., *Humphrey's Executor Squared: Free Enterprise Fund v. Public Company Accounting Oversight Board and its Implications for Administrative Law Judges*, 37 J. Nat'l Ass'n Admin. L. Judiciary 558 (2017)

Available at: <https://digitalcommons.pepperdine.edu/naalj/vol37/iss2/3>

This Article is brought to you for free and open access by the School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Journal of the National Association of Administrative Law Judiciary by an authorized editor of Pepperdine Digital Commons. For more information, please contact [josias.bartram@pepperdine.edu](mailto:josias.bartram@pepperdine.edu), [anna.speth@pepperdine.edu](mailto:anna.speth@pepperdine.edu).

# ***Humphrey’s Executor Squared: Free Enterprise Fund v. Public Company Accounting Oversight Board and its Implications for Administrative Law Judges***<sup>Ψ</sup>

**By Robert S. Garrison Jr.\***

I.	INTRODUCTION .....	559
II.	ARTICULATIONS OF THE PRESIDENT’S REMOVAL POWER .....	562
A.	<i>Foundational Understandings of the President’s Removal Power: “The Decision of 1789”</i> .....	563
B.	<i>The Supreme Court Affirms Congressional Restrictions on Inferior Officers: United States v. Perkins</i> .....	567
C.	<i>Restrictions on the President’s Removal of Principal Officers: Myers and Humphrey’s Executor</i> .....	569
1.	<i>Myers v. United States</i> .....	570
2.	<i>Humphrey’s Executor v. United States</i> .....	575
D.	<i>Wiener, Bowsher, and Morrison: Formalism and Functionalism in the President’s Removal Power Analysis</i> .....	577
1.	<i>Wiener v. United States</i> .....	577
2.	<i>Bowsher v. Synar</i> .....	579
3.	<i>Morrison v. Olson</i> .....	582
III.	<i>FREE ENTERPRISE FUND V. PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD: A RETURN TO A FORMAL ANALYSIS IN REMOVAL JURISPRUDENCE</i> .....	586
A.	<i>Facts of the Case</i> .....	586
B.	<i>Chief Justice Robert’s Majority Opinion</i> .....	588
C.	<i>Justice Breyer’s Dissent</i> .....	591
IV.	SUGGESTED READINGS TO DISTINGUISH <i>FREE ENTERPRISE</i> FROM BEING APPLIED TO ADMINISTRATIVE LAW JUDGES .....	594
A.	<i>Free Enterprise Only Applies to the “Extraordinary” Protective Removal Restrictions Like Those Present in the Sarbanes-Oxley Act</i> .....	598
B.	<i>Free Enterprise Only Applies to “Officers” Not to “Employees” of the Federal Government</i> .....	600
C.	<i>Free Enterprise Only Applies to Officials Who Perform “Quasi-Legislative” and “Quasi-Executive” Functions, Not to Officials Who Solely Perform “Quasi-Judicial” Functions</i> .....	606
V.	CONCLUSION .....	608
VI.	APPENDIX .....	610

## I. INTRODUCTION

Article II of the United States Constitution grants specific powers to the President, such as “appoint[ing] Ambassadors, other public Ministers and Consuls, [and] Judges of the Supreme Court.”<sup>1</sup> Curiously enough, however, the Framers did not include a specific provision stating how removal of officials would occur. The

---

<sup>‡</sup> Originally published on the Seton Hall University Law School Student Scholarship eRepository. See Garrison, Robert S. Jr., *Humphrey's Executor Squared: Free Enterprise Fund v. Public Company Accounting Oversight Board and its implications for Administrative Law Judges* (2012). LAW SCHOOL STUDENT SCHOLARSHIP 39. Available at: [http://scholarship.shu.edu/student\\_scholarship/39](http://scholarship.shu.edu/student_scholarship/39). In accordance with Seton Hall University Law School Student Scholarship's policies, the reprint has been reprinted with the permission of the author, Robert S. Garrison Jr.,

Since the 2012 original publication date, the United States Supreme Court granted certiorari on January 12, 2018 in *Lucia v. Securities and Exchange Commission*, 832 F.3d 277 (D.C. Cir. 2017). As *Lucia* speaks to the issues discussed in the original publication, Mr. Garrison has updated it herein to include a discussion of *Lucia*. See *infra* Part IV(B) and accompanying notes 283–321.

\* J.D., *cum laude*, 2012, Seton Hall University School of Law; B.S., *summa cum laude*, 2008, Saint Thomas Aquinas College. Robert S. Garrison, Jr. is an attorney licensed to practice law in the State of New Jersey and New York, with court admission in the U.S. District Court for New Jersey and the Southern District of New York. After clerking for a year under the Honorable Marie P. Simonelli, J.A.D., in New Jersey's Superior Court, Appellate Division, Mr. Garrison served for four years as a Deputy Attorney General for the State. His responsibilities have included advice and counseling for the Department of Treasury, Division of Pensions and Benefits, and he has made numerous appearances before the Office of Administrative Law (OAL) on behalf of the Division of Pensions.

Mr. Garrison would like to thank the following remarkable individuals who he has had the great fortune of having helped in the journey of writing this comment: the late Marc Poirier, Esq. his administrative law professor, and advisor for this article, Judge Marie P. Simonelli, J.A.D. who mentored Mr. Garrison as a young law clerk, and was a role model for diligence and preparedness, George T. Griffith, Esq., who taught Mr. Garrison Constitutional Law as an undergraduate, his mother and late father Robert and Nancy Garrison, who steadfastly were there for Mr. Garrison, his wonderful fiancé Jacqueline Stabnow, Esq., whom he had the luck of meeting at Seton Hall during their first year, John Avery, Esq. and Chris Mount, Esq., who Mr. Garrison knew before they became lawyers, and who he turns now to for advice and counsel, Mr. Garrison's good friend Justin Brinnier, and finally his sisters Sophia, Danielle, and Linda. Mr. Garrison thanks you all for the time and understanding over all these years.

<sup>1</sup> U.S. CONST. art. II, § 2, cl. 2.

Framers, however, did provide Congress in Article I with a great amount of power through the Necessary and Proper Clause.<sup>2</sup> Through the use of this power, Congress has a great amount of discretion in structuring the federal government.<sup>3</sup> A perennial issue is discerning the line between Congress properly structuring the federal government, and impermissibly interfering with the President's ability to carry out the constitutionally assigned functions of the Presidency. It is not clear where the removal power falls in the tension between these two branches.

Two interpretive methodologies exist for investigating when Congress has gone too far in this regard. One is a functional checks-and-balances approach. This approach asks, "to what extent then is the act . . . likely, as a practical matter, to limit the President's exercise of executive authority?"<sup>4</sup> This approach asks whether Congress, by its action, has created a bar to the effective oversight by the President of the executive branch, against the ebb and flow of power between the coordinate branches. This approach is to be contrasted with a formalistic analysis that asks whether a particular branch is exercising a "legislative," "judicial," or "executive" power.<sup>5</sup> A formal approach focuses on whether a branch is exercising power that can properly be attributed to one of the other branches.

Against this interpretive backdrop, constitutional practice has granted Congress powers to enact laws that create for-cause limitations on an official's removal, that were first affirmed by the Supreme Court in the early-twentieth century. The two seminal cases describing the extent of the President's removal power from the 20th century are *Myers v. United States*<sup>6</sup> and *Humphrey's Executor v. United States*.<sup>7</sup> In *Myers*, the Supreme Court held that principal

---

<sup>2</sup> U.S. CONST. art. I, § 8, cl. 18.

<sup>3</sup> See *McCulloch v. Maryland*, 17 U.S. 316 (1819). See also *Lambert v. Yellowley*, 272 U.S. 581 (1926) (law restricting medicinal use of alcohol as a necessary and proper exercise of power under the 18th Amendment; first use of the term "necessary and proper").

<sup>4</sup> *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 130 S. Ct. 3138, 3170 (2010) (Breyer, J., dissenting).

<sup>5</sup> *Bowsher v. Synar*, 478 U.S. 714, 731 (1986).

<sup>6</sup> 272 U.S. 52 (1926).

<sup>7</sup> 295 U.S. 602 (1935).

officers who perform purely “executive” functions cannot have tenure protections against removal.<sup>8</sup> In *Humphrey's Executor*, the Supreme Court permitted for-cause removal restrictions on principal officers, whose functions are “quasi-legislative,” or “quasi-judicial.”<sup>9</sup>

The latest case to deal with the extent of Congress’ power to regulate the President’s removal power is *Free Enterprise Fund v. Public Company Accounting Oversight Board* (herein “PCAOB”).<sup>10</sup> After the accounting scandals following the collapse of Enron and WorldCom in 2002, Congress created the PCAOB to “audit the auditors.”<sup>11</sup> Congress, in creating this Board, decided that the Board should be insulated from any potentially corrupting influences.<sup>12</sup> The Board was created within the structure of the Securities and Exchange Commission (herein “SEC”)—which itself has commissioners who are only removable for cause.<sup>13</sup> Congress also made the members of the Board removable only for-cause.<sup>14</sup> This in effect created a dual for-cause removal restriction, a situation never before directly addressed by the Supreme Court. In *Free Enterprise* the Supreme Court created a *per se* rule that dual for-cause removal restrictions are impermissible.<sup>15</sup>

The problem with this new rule, however, is many administrative officials fall within the scope of the Court’s *per se* rule, and the case threatens to disrupt the orderly administration of justice. This Comment will specifically address the officials, who wield quasi-judicial powers known as Administrative Law Judges (“ALJs”). ALJs number over 1,500 in the federal government, and adjudicate cases in over 25 agencies.<sup>16</sup> If *Free Enterprise* applies to these ALJs,

---

<sup>8</sup> *Myers*, 272 U.S. at 135–136.

<sup>9</sup> *Humphrey's Executor*, 295 U.S. at 629

<sup>10</sup> *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 130 S. Ct. 3138 (2010).

<sup>11</sup> Brief for the CATO Institute and Professors Larry Ribstein and Henry Butler in Support of Petitioner at 5, *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 130 S.Ct. 3138 (2010).

<sup>12</sup> *Free Enterprise Fund*, 130 S. Ct. 3138, 3156 (Breyer, J., dissenting)

<sup>13</sup> *Id.* at 3148–3149.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 3164.

<sup>16</sup> *Judge's Corner*, EBA UPDATE, Energy Bar Association at 9, available at <http://eba-net.org/docs/newsletters/Fall2010Newsletter.pdf>

any party who has an adverse adjudication presided over by an ALJ will have a ripe claim to assert that the adjudication is unconstitutional. The potential for disruption engendered by *Free Enterprise* is great indeed.

Because of the potentially disruptive nature of the *Free Enterprise per se* rule if applied to ALJs, this Comment will suggest three potential readings of the case that would distinguish ALJs from the Board. This Comment will argue that the dual for-cause prohibition only applies to extraordinarily protective restrictions on removal, such as those involved in the *Free Enterprise* case itself. Furthermore, this Comment will argue that *Free Enterprise* only applies to “inferior officers” and should not be applied to “employees” of the federal government. The final argument that this Comment will make is that applying a formal interpretive methodology, *Free Enterprise* should only apply to officials performing “quasi-legislative” and “quasi-executive” functions; it should not be applied to those officials who solely perform “quasi-judicial” functions.

Section II of this Comment will address the background of the jurisprudence regarding the President’s removal power. Section III will specifically look at the language that was employed by Chief Justice Roberts in the majority opinion to reach its decision in *Free Enterprise*, and will then discuss Justice Breyer’s dissent. Section IV will specifically discuss the problems that are associated with applying *Free Enterprise* to Administrative Law Judges, and suggest readings to distinguish the Board from ALJs.

## II. ARTICULATIONS OF THE PRESIDENT’S REMOVAL POWER

Debate over the extent of the President’s removal power finds its roots in the foundational period when the United States Constitution was first adopted. Sub-section A will address early understandings of the President’s removal power, namely the impact of the congressional debate known as “the Decision of 1789.” Sub-section B will discuss judicial interpretations of Congress’s power to regulate the removal of inferior officers. Sub-section C will detail the two seminal cases of the 20<sup>th</sup> century dealing with the President’s removal power, *Myers v. United States* and *Humphrey’s Executor v. United States*. Sub-section D will address the President’s removal power since *Humphrey’s Executor*, and will describe the battle between

formalism and functionalism in the context of the President's removal power.

A. *Foundational Understandings of the President's Removal Power: "The Decision of 1789"*

In the earliest period when the Constitution was adopted, members of the House "engaged in the young nation's first constitutional debate."<sup>17</sup> The members of the House considered the removal of executive officers within the context of a bill that would create the Department of Foreign Affairs.<sup>18</sup> After this debate Congress created three departments.<sup>19</sup> None of the acts that created these departments spoke directly of a Presidential removal power.<sup>20</sup> Rather, these acts only "discussed who would have custody of department papers when the President removed a secretary."<sup>21</sup> This debate, known as the "Decision of 1789," helped to establish the proposition that the President has a constitutionally granted power of removal.<sup>22</sup> It did not stand for the proposition that that power is beyond regulation by Congress.<sup>23</sup>

---

<sup>17</sup> See Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021, 1021 (2006).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 1023 (after the "Decision of 1789," Congress created the Departments of Foreign Affairs, Treasury, and War).

<sup>20</sup> Compare An Act for Establishing an Executive Department, to be Denominated the Department of Foreign Affairs, ch. 4, § 2, 1 Stat. 28, 29 (1789) (stating that whenever the Secretary of Foreign Affairs is removed by the President, the chief Clerk, "shall during such vacancy have the charge and custody of all records, books, and papers appertaining to said department") with An Act to Establish the Treasury Department, ch. 12, § 7, 1 Stat. 65, 67 (1789) (stating that whenever the Secretary is removed by the President, the Assistant, "shall, during the vacancy, have the charge and custody of the records, books, and papers appertaining to the said office"), and An Act to Establish an Executive Department, to be Denominated the Department of War, ch. 7, § 2, 1 Stat. 49, 50 (1789) (stating that whenever the Secretary of War is removed by the President, the chief Clerk, "shall during such vacancy, have the charge and custody of all records, books and papers, appertaining to the said department").

<sup>21</sup> See Prakash, *supra* note 17, at 1023.

<sup>22</sup> *Id.* at 1071; see also *Myers v. United States*, 272 U.S. 52, 112–115 (1926).

<sup>23</sup> See Prakash, *supra* note 17, at 1071; see also *Myers v. United States*, 272 U.S. at 286 n.75 (1926) (Brandeis, J., dissenting).

In the course of these debates, representatives articulated four principal theories related to the President's removal authority.<sup>24</sup> The two most important camps in this debate are those who supported a congressional delegation of authority of the removal power to the President ("congressional-delegation theorists"), and those who believed that the President had the power to remove, that emanated from the Constitution itself under the text of Article II ("executive-power theorists").<sup>25</sup>

During the 20<sup>th</sup> Century two competing viewpoints emerged about the significance of the debate between the congressional-delegation theorists and the executive-power theorists.<sup>26</sup> The view accepted by those who agree with Chief Justice Taft's reading of the Decision in *Myers* assert that "because the Foreign Affairs Act conveyed no removal authority but rather discussed what would happen when the President removed," the act assumed that "the Constitution granted the President a removal power."<sup>27</sup> Many advocates of broad removal power for the President cite this debate as evidence that, "the first Congress concluded that the Constitution's grant of executive power authorized the President to remove executive officers."<sup>28</sup> The final bill did not "grant[] removal authority," and further went on to "discuss[] what would happen when the President removed the Secretary, the final bill signed by the

---

<sup>24</sup> See Prakash, *supra* note 17, at 1071. Some Representatives argued that "Article II's grant of executive power vested the President with a power to remove such officers." *Id.* at 1023. Other members asserted that "because the Senate's consent was necessary to appoint, its consent was necessary to remove." *Id.* Still others stated that, "since the Constitution did not expressly grant removal authority, Congress could vest a removal power with the President." *Id.* A final camp asserted that "impeachment was the only permissible means of removing an officer of the United States." *Id.*; see also *Myers*, 272 U.S. at 124–127 (1926).

<sup>25</sup> See Prakash, *supra* note 17, at 1023.

<sup>26</sup> Compare *Myers v. United States*, 272 U.S. at 112–115 (1926) with *id.* at 286 n.75 (Brandeis, J., dissenting) (debate between Justices Taft and Brandeis over the significance of the "Decision of 1789").

<sup>27</sup> See Prakash, *supra* 17, at 1021. See also *Myers*, 272 U.S. at 112–115 (1926).

<sup>28</sup> See Prakash, *supra* 17, at 1023. See also Brief of Petitioner at 28, *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 130 S. Ct. 3138 (2010).



President arguably assumed that the President had a preexisting, constitutionally based removal power.”<sup>29</sup>

Opposed to this viewpoint has been the camp represented by Justice Brandeis.<sup>30</sup> Brandeis held the view that a majority of members of the House did not hold the view that the Constitution vested sole power of removal in the President.<sup>31</sup> Adherents of the Brandeis camp such as David Currie have argued “there was no consensus as to whether [the President] got that [removal] authority from Congress or the Constitution itself.”<sup>32</sup> Currie makes the case that supporters of Article II power prevailed because they were joined by a substantial number of members who opposed presidential removal power altogether.<sup>33</sup>

In determining whether the Taft or Brandeis reading is correct, one can look to the immediate aftermath of the decision to discern the meaning of the “Decision of 1789.”<sup>34</sup> Private letters of James Madison tend to support the proposition that the President has an *inherent power* that derives from the text of Article II.<sup>35</sup> These letters declared that, “the House had endorsed the executive-power theory.”<sup>36</sup> Support of a constitutionally derived presidential removal power is also found in contemporary newspapers from the time period.<sup>37</sup> The sum of these accounts indicate that the “removal language was generally understood to endorse the ‘construction of the Constitution, which vests the power of removal in the President.’”<sup>38</sup>

---

<sup>29</sup> See Prakash, *supra* 17, at 1033. See also Myers, 272 U.S. 52, 112–115.

<sup>30</sup> See Myers, 272 U.S. at 286 n.75 (Brandeis, J., dissenting).

<sup>31</sup> See *id.*

<sup>32</sup> David P. Currie, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789–1801, 41 (1997).

<sup>33</sup> *Id.*

<sup>34</sup> See Prakash, *supra* note 17, at 1062.

<sup>35</sup> *Id.* at 1064 (emphasis added).

<sup>36</sup> *Id.* at 1065. See also *id.* (statements by Thomas Fitzsimons that “he believed the disagreement turned on the ‘Constitutional power of the President to remove’”).

<sup>37</sup> *Id.* at 1066. See *id.* (the Massachusetts Centinel posting from New York “declaring that the ‘President of the Senate gave the casting vote in favor of the clause as it came from the House, by which the power of the President, to remove from office (as contained in the Constitution) is recognized’”).

<sup>38</sup> *Id.*

If the Decision of 1789 does indeed stand for the proposition that the Constitution grants the President a removal power incident to the text of Article II (notwithstanding the criticisms of the Brandeis and Currie camp), what implications does the decision hold for the current debates surrounding the President's removal power?

Perhaps the most important lesson to be drawn from the Decision, and of importance to the current debate over the extent of the President's removal power, is whether that removal power is within the scope of Congressional regulation. Prakash has posed the question as, "[C]ould Congress, by statute, limit or eliminate the Constitution's grant of removal authority?"<sup>39</sup> Scholars and jurists have argued that the Decision of 1789 left this question open.<sup>40</sup> Even proponents who strongly support the executive-power theory acknowledge that "the reading of the Decision of 1789 advanced by Chief Justice Taft's critics would seem correct," and therefore, the question of whether the President's removal power can be regulated by Congress was not determined by debate.<sup>41</sup> One can have a default removal power that can still be regulated by Congress.<sup>42</sup> Since the executive-power partisans "did not necessarily preclude the idea of a default power, and because there was neither much discussion of the idea nor a decisive vote against it, the "Decision of 1789" did not endorse the view that Congress lacked authority to modify the Constitution's grant of removal power to the President."<sup>43</sup> The

---

<sup>39</sup> *Id.* at 1071.

<sup>40</sup> See Prakash, *supra* note 17, at 1071. See also *id.* (discussion that Justices McReynolds, Brandeis, and Corwin believed, "that the Decision of 1789 left this question [unresolved]").

<sup>41</sup> *Id.* (acknowledging that because "the question of a default removal power was never squarely addressed, it is difficult to conclude that a majority of the House implicitly opposed the idea [of Congressional regulation]). See also *Myers v. United States*, 272 U.S. 52, 112–115 (1926) (it is possible to read Justice Taft as only referring to situations where Congress is exercising discretion in deciding when to fire individuals).

<sup>42</sup> See Prakash, *supra* note 17, at 1073. ("One could conclude that Congress lacked authority to delegate a removal power and still believe that, by statute, Congress could limit or retract the Constitution's grant of removal authority to the President.")

<sup>43</sup> *Id.* ("While there are sound reasons to doubt that Congress has some generic power to treat constitutional grants of power as grants that Congress can modify or abridge, *the Decision of 1789 is not one of them.*") (emphasis added).

Debate was about where the removal power emanated from, not whether it could be regulated.

Even taking the Decision of 1789 as a broad endorsement of executive power, it still does not resolve the issues that are crystallized in cases such as *Myers* and *Humphrey's Executor* about the extent of Congress' power to regulate the President's removal power. It is for this reason that critics of *Humphrey's Executor* are ill advised to rely upon the Decision of 1789 as legal support for their arguments.<sup>44</sup>

B. *The Supreme Court Affirms Congressional Restrictions on Inferior Officers: United States v. Perkins*

The Supreme Court addressed whether Congress can create removal restrictions for inferior officers in *United States v. Perkins*.<sup>45</sup> In the case, the Court affirmed Congress' power to regulate the President's removal power, when dealing with inferior officers.<sup>46</sup> Congress exercised its power when it passed a law that stated "no officer in the military or naval service shall in time of peace be dismissed from service except upon and in pursuance of the sentence of a court-martial to that effect, or in commutation thereof."<sup>47</sup> On June 26, 1883, Perkins was honorably discharged.<sup>48</sup> As a result, Perkins sued for his \$100 salary as a cadet engineer of the navy.<sup>49</sup>

The Supreme Court articulated the central question in the case as whether "the discharge may not be justified by the act of August 5, 1882, [although] the Secretary of the Navy, irrespective of that act, had lawful power to discharge him from the service at will?"<sup>50</sup>

---

<sup>44</sup> See also Brief of Petitioner, *supra* note 28, at 28. The idea that executive power was absolute and wielded in the pre-modern period of presidential history does not stand up to historical scrutiny. In her work on Abraham Lincoln, Doris Kearns Goodwin points out that cabinet members often disagree on major policy points, and it ultimately was the political acumen of that president who kept the Office of the President together.

<sup>45</sup> 116 U.S. 483 (1886).

<sup>46</sup> *Id.* at 485.

<sup>47</sup> *Id.* at 483.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 484.

Rejecting the arguments put forth by the counsel for the United States, the Supreme Court held that, “we have no doubt that when Congress, by law, vests the appointment of inferior officers in the heads of departments, *it may limit and restrict the power of removal as it deems best for the public interest.*”<sup>51</sup> The Court went on to write that, “the constitutional authority in Congress to thus vest the appointment implies authority to limit, restrict, and regulate the removal by such laws as Congress may enact in relation to the officers so appointed.”<sup>52</sup>

The Court in dicta also stated that the question of “whether or not Congress can restrict the power of removal incident to the power of appointment of those [principal] officers who are appointed by the President by and with the advice and consent of the Senate, under the authority of the Constitution . . . does not arise in this case, and need not be considered.”<sup>53</sup>

Even though the case did not specifically address whether Congress could directly restrict the power of the President in removal of principal officers directly appointed by the President with the advice and consent of the Senate, this late-nineteenth century case affirms congressional power to place removal restrictions on inferior officers, pursuant to the Necessary and Proper Clause.<sup>54</sup> Furthermore, even though the language of the case did not crystallize the issue, Congress was not usurping an executive function, in stating conditional requirements that must be satisfied before a removal of an officer could be completed. Congress was not taking an *active role* in deciding who and when an officer would be fired.

In addition to *Perkins*, two other cases illuminate restrictions on the President’s removal power when dealing with inferior officers. *Parsons v. United States*<sup>55</sup> and *Shurtleff v. United States*,<sup>56</sup> however,

---

<sup>51</sup> *Perkins*, 116 U.S. at 485 (emphasis added).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> See *Perkins*, 116 U.S. 483 (1886).

<sup>55</sup> 167 U.S. 324 (1897). In *Parsons*, Parsons was commissioned as a district attorney for the Middle District of Alabama. *Id.* at 324–25. The President wrote Mr. Parsons a letter on May 26th, 1893, that removed Parsons from his position as attorney of the United States. At issue in the case was a provision of the statute dealing with District and Prosecuting Attorneys for the United States. See *id.* at 327. The statute’s language read, “that ‘district attorneys shall be appointed for a

these two cases instruct that if the power to remove is to be made conditional, the limitation must be done explicitly and without ambiguity.

C. *Restrictions on the President's Removal of Principal Officers: Myers and Humphrey's Executor*

The 20<sup>th</sup> century saw a dramatic shift in the role of the American Presidency.<sup>57</sup> The 20<sup>th</sup> century witnessed the birth of what have become known as “unitary executive theorists” who assert that principal officers hold their office completely at the will of the President.<sup>58</sup> Chief Justice Taft adopts this theory of the Presidency, in the first major case of the 20<sup>th</sup> century discussing the limits of the

---

term of four years and their commissions shall cease and expire at the expiration of four years from their respective dates.” *Id.* The Court, in denying Parson's claim for back-pay, read the statute as being one of “limitation, and not of grant.” *Id.* at 339. Congress was simply articulating how long an agent of the executive would hold office; there was no specific limitation on the President's power to remove, and as such, Parsons was not entitled to back-pay. *Id.*

<sup>56</sup> 189 U.S. 311 (1903). The Court continued this trend begun in *Parsons* of requiring explicit language to limit the President's removal power in *Shurtleff*. Mr. Shurtleff was a general appraiser of merchandise. *Id.* at 312. When Congress enacted the statute that created this office, it stated that the general appraisers “shall not be engaged in any other business, avocation, or employment, and may be removed from office at any time by the President for inefficiency, neglect of duty, or malfeasance in office.” *Id.* at 313. The Court held that the statute was ambiguous as to the congressional purpose; since the act could be read as meaning the President could only remove for the enumerated reasons and by implication would allow the general appraisers to have life tenure, the act was ambiguous. *Id.* at 316. The Court cautioned that if Congress wished to limit the removal of executive agent, the Court “require[s] explicit language to that effect before holding the [removal] power of the Presidency to have been taken away by an Act of Congress.” *Id.* at 315.

<sup>57</sup> See Michael Genovese, *THE POWER OF THE AMERICAN PRESIDENCY: 1789–2000*, 130 (2000) (“FDR is credited with creating the ‘modern presidency.’ Roosevelt transformed the presidency from a rather small, personalized office, into a massive institution.”).

<sup>58</sup> Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 CASE W. RES. L. REV. 1451, 1453 (1997). *But see* Lawrence Lessig & Cass Sunstein, *The President and the Administration*, 94 COLUM L. REV. 1, 2 (1994) (“We think that the view that the framers constitutionalized anything like the vision of the [unitary] executive is just plain myth.”).

Congress's power to regulate principal executive officers, *Myers v. United States*.<sup>59</sup> Opposed to the unitary executive theorists are those who support the idea that Congress may create independent agencies, whose principal officers can be protected by removal restrictions thus limiting the President's discretion to fire; a model that was affirmed a mere nine years later in *Humphrey's Executor*.<sup>60</sup>

### 1. *Myers v. United States*

In *Myers*, the Court addressed the question, "whether under the Constitution the President has *the exclusive power* of removing executive officers of the United States whom he has appointed by and with the advice and consent of the Senate."<sup>61</sup> The statute at issue provided that, "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."<sup>62</sup> The case arose because the Senate did not consent to the President's removal of Myers.<sup>63</sup>

On January 20<sup>th</sup>, 1920, Myers, who served as a first-class postmaster, was asked to resign.<sup>64</sup> He refused this demand, and was subsequently removed on February 2, 1920.<sup>65</sup> Myers first brought a suit for back pay before the Court of Claims.<sup>66</sup> This claim was denied.<sup>67</sup>

Chief Justice Taft, writing for the majority of the Supreme Court, affirmed the Court of Claims decision dismissing Myer's claim.<sup>68</sup> In the majority opinion, Justice Taft concluded that Congress is

---

<sup>59</sup> 272 U.S. 52 (1926).

<sup>60</sup> Peter Strauss, *The Place Of Agencies In Government: Separation Of Powers And The Fourth Branch*, 84 COLUM. L. REV. 573, 578 (1984). See also *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

<sup>61</sup> *Myers*, 272 U.S. at 106 (emphasis added).

<sup>62</sup> *Id.* at 107 (emphasis added).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 106.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Myers*, 272 U.S. at 106.

<sup>68</sup> *Id.* at 177.

precluded from regulating the President's removal power when it comes to principal officers exercising executive functions.<sup>69</sup> Justice Taft read the "Decision of 1789" as supporting a removal power that emanated from Article II itself.<sup>70</sup> He further stated that this understanding was not debated from 1789 to 1863.<sup>71</sup> Justice Taft stated that for 74 years, there was no Act of Congress, no executive act, and no decision of this Court at variance with the declaration of the First Congress, but instead, a clear, affirmative recognition of the removal power by each branch of the government existed.<sup>72</sup> As has been demonstrated, this reasoning is open to disagreement.<sup>73</sup> Justice Taft saw the questioning of the "traditional understanding" of the removal power as beginning with the enactment of the Tenure of Office Act of 1867, whereby in the aftermath of Abraham Lincoln's assassination and friction during the Presidency of Andrew Johnson, Congress sought to inject its own advice and consent into the firing of a principal executive officers.<sup>74</sup> In writing the opinion, Justice Taft suggested that the Tenure of Office Act had the effect of severely hampering the power of the Presidency, and because it impermissibly injected Congress' advice and consent into the firing of officials, was therefore unconstitutional.<sup>75</sup>

Justice Taft's majority opinion has come to be understood as supporting the proposition that principal officers who are purely "executive" in nature are beyond the reach of congressional regulation.<sup>76</sup> A dictum in Justice Taft's majority opinion, however, makes an explicit distinction as to offices that are of a "quasi-judicial nature."<sup>77</sup> This language was greatly expounded upon in the

---

<sup>69</sup> *Id.* at 169.

<sup>70</sup> *Id.* at 145.

<sup>71</sup> *Id.* at 163.

<sup>72</sup> *Id.*

<sup>73</sup> See discussion *supra* Part II(A).

<sup>74</sup> *Myers*, 272 U.S. at 164 ("The reversal [dealing with the President's removal power] grew out of the serious political difference between the two houses of Congress and President Johnson.).

<sup>75</sup> *Id.* at 167.

<sup>76</sup> *Id.* at 134.

<sup>77</sup> See *id.* at 135 ("There may be duties of a quasi-judicial character imposed on executive officers and members of executive tribunals whose decisions after

Supreme Court's decision in *Humphrey's Executor*, which speaks of offices that are "quasi-legislative" and "quasi-judicial" in nature, to distinguish its holding in *Myers* from its result in *Humphrey's Executor*, and thus are within Congress' power to regulate.<sup>78</sup>

Writing in dissent, Justice McReynolds sharply criticized Justice Taft's approach prohibiting congressional regulation of the President's removal power. Justice McReynolds stated that he finds a "certain repugnance . . . that the President may ignore any provision of an Act of Congress under which he has proceeded."<sup>79</sup> Justice McReynolds observed the obvious problem of allowing the President to dismiss any subordinate at his own whim.<sup>80</sup> He reflected upon the, "serious evils [that] followed the practice of dismissing civil officers as caprice or interest dictated, long permitted under congressional enactments."<sup>81</sup> Justice McReynolds also wrote these types of discretionary firings by the President have, brought the public service to a low esteem and caused demands for reform.<sup>82</sup> Taking issue with Justice Taft's assertion that the President can remove at whim, Justice McReynolds wrote that, "Congress has consistently asserted its power to proscribe conditions concerning removal of inferior officers."<sup>83</sup>

Accepting many of Justice McReynold's arguments, but writing separately, Justice Brandeis attacked Justice Taft's position. Justice Brandeis specifically agreed with Justice McReynolds on the point that, "in no case, has this Court determined that the President's power of removal is beyond control, limitation, or regulation by Congress. Nor has any lower federal court ever so decided."<sup>84</sup> Justice Brandeis strenuously argued that Congress is naturally competent to prescribe

---

hearing affect interests of individuals, the discharge of which the President can not in a particular case properly influence or control.").

<sup>78</sup> See discussion *infra* Part II(B)(2).

<sup>79</sup> *Myers*, 272 U.S. at 179 (MacReynolds, J., dissenting).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 187. In fact, Congress has great authority pursuant to the Necessary and Proper Clause to structure the federal government as it sees fit for the public interest. *Id.*

<sup>84</sup> *Id.* at 243 (Brandeis, J., dissenting).



the tenure of office.<sup>85</sup> Underlying this understanding of congressional competence is a broad reading of the Necessary and Proper Clause.<sup>86</sup> Justice Brandeis wrote that “the long delay [between the Jackson Administration and the passing of the Pendleton Act] was not because Congress accepted the doctrine that the Constitution had vested in the President uncontrollable power over removal.”<sup>87</sup> Rather, “it was because the spoils system held sway.”<sup>88</sup> Justice Brandeis argued that the majorities’ holding undercuts the protections that were afforded by civil service reform.<sup>89</sup>

In reading *Myers*, one must not forget the transformations that were occurring during the period of American history. Views about the patronage system, and what the proper role of the civil service was in flux.<sup>90</sup> This decision can be read as judicial scrutiny meant to stem the era of reform that characterized American governance at the turn of the century.<sup>91</sup> The decision should also be read in the legal and historical context in which it was written; a time period when economic substantive due process carried the day and before the expansion of the power of the federal government after the New Deal.<sup>92</sup> This was an era when *Lochner* was actively applied. *Myers* must be read cautiously because it may stand for the Court’s imposition of its own views regarding progressive legislation—an

---

<sup>85</sup> *Myers*, 272 U.S. at 246 n.7.

<sup>86</sup> *Id.* (Brandeis, J., dissenting) (“Congress shall have power to make all laws, not only to carry into effect the powers expressly delegated to itself, but those delegated to the Government, or any department or office thereof and of course comprehends the power to pass laws necessary and proper to carry into effect the powers expressly granted to the executive department.”).

<sup>87</sup> *Id.* at 282–283.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 173 (“Reform in the federal civil service was begun by the Civil Service Act of 1883.”).

<sup>91</sup> See PBS, CAPITALISM AND CONFLICT, LANDMARK CASES, *Lochner v. New York*, available at [http://www.pbs.org/wnet/supremecourt/capitalism/landmark\\_lochner.html](http://www.pbs.org/wnet/supremecourt/capitalism/landmark_lochner.html).

<sup>92</sup> See The New Deal, ENCYCLOPEDIA BRITANNICA, available at <http://www.britannica.com/EBchecked/topic/411331/New-Deal>

assertion that is consistent with the Court's *Lochner* era jurisprudence.<sup>93</sup>

Furthermore, as described above, if read for its facts, this case has an alternative reading that is narrower than that traditionally attributed to it.<sup>94</sup> *Myers* may be read as the Court striking down an attempt by Congress to not simply place a restriction on the ability to remove, but attempting to require that the advice and consent of the Senate be given to permit any removal.<sup>95</sup> The key language that "postmasters . . . shall be appointed and *may be removed by the President by and with the advice and consent of the Senate*"<sup>96</sup> serves to distinguish the statute in question. This language may be read to indicate that *Myers* only applies to the limited circumstance in which Congress has taken for itself an active role in determining when a principal "executive" officer will be fired.

The debate over restrictions on the President's ability to remove principal officers did not end with the Supreme Court's decision in *Myers*. The 1930's saw a broadening in the scope of Congress' power to regulate interstate commerce, and due in large part to the Great Depression, the Supreme Court turned away from economic substantive due process as enunciated in *Lochner*.<sup>97</sup> Along with these changes in the scope of federal power and regulation, came the development of the concept of independent regulatory agencies.

Starting with the Interstate Commerce Commission,<sup>98</sup> and increasingly throughout the 1930's, Congress began exercising its legislative power by enacting statutes that created a host of independent agencies; whose principal officers were insulated from

---

<sup>93</sup> *Lochner v. New York*, 198 U.S. 45 (1905). In *Lochner*, the United States Supreme Court struck down a New York law regulating the number of hours a baker could work. *Id.* at 65. The Court based its holding in part on economic substantive due process. *Id.* at 63. In 1955, the Supreme Court reversed *Lochner* when it decided *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483 (1955).

<sup>94</sup> See *Myers*, 272 U.S. at 107.

<sup>95</sup> *Id.* at 178 (MacReynolds, J., dissenting).

<sup>96</sup> *Id.*

<sup>97</sup> See *Nebbia v. New York*, 291 U.S. 502 (1934); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

<sup>98</sup> National Archives, Records of the Interstate Commerce Commission, available at <http://www.archives.gov/research/guide-fed-records/groups/134.html#134.1>.

discretionary firing by the President.<sup>99</sup> The great question posed by these agencies was whether Congress could insulate the agency's heads from presidential removal because they had commissioners who were appointed by the President with the advice and consent of the Senate. The Supreme Court affirmed congressional power to create and insulate these independent agencies in *Humphrey's Executor v. United States*.<sup>100</sup>

## 2. *Humphrey's Executor v. United States*

Humphrey was nominated by President Hoover on December 10, 1931, as a member of the Federal Trade Commission, and was confirmed by the United States Senate.<sup>101</sup> Humphrey was commissioned for a term of seven years expiring September 25th, 1938.<sup>102</sup> Following his assumption of office, on July 25th, 1933, President Roosevelt addressed a letter to the commissioner asking for his resignation.<sup>103</sup> Humphrey declined to resign, and on October 7th, 1933, the President fired him.<sup>104</sup> Humphrey then brought suit in the Court of Claims to recover money alleged to be due the deceased for salary as a Federal Trade Commissioner.<sup>105</sup>

Justice Sutherland writing for a unanimous court granted Humphrey's claim.<sup>106</sup> Given that *Myers* was decided only nine years prior, Justice Sutherland sought to carefully limit the holding of *Myers*. He accomplished this by stating that *Myers* was limited to an office that was purely "executive" in nature.<sup>107</sup> Relying upon

---

<sup>99</sup> See the Acts creating the United States Employee's Compensation Commission (c. 458, 39 Stat. 742); the Federal Radio Commission (c. 169, 44 Stat. 1162); the Federal Power Commission (c. 572, 46 Stat. 797); the Federal Home Loan Bank Board (c. 522, §17, 47 Stat. 725, 736); the Securities and Exchange Commission (c. 404, §4, 48 Stat. 885); and the Federal Communications Commission (c. 652, §4, 48 Stat. 1066).

<sup>100</sup> 295 U.S. 602 (1935).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Humphrey's Executor*, 295 U.S. at 618.

<sup>106</sup> *Id.* at 632.

<sup>107</sup> *Id.* at 628.

language of Justice Taft in *Myers*,<sup>108</sup> Justice Sutherland wrote that certain principal officers who perform “quasi-legislative” and “quasi-judicial” functions are beyond the unfettered discretion of the President’s removal power, and as a consequence are within the scope of congressional tenure limitations.<sup>109</sup> Justice Sutherland indicated that these officers perform functions that require insulation from political control or possibility of such a thing.<sup>110</sup> The opinion is rather sparse, as compared to *Myers*, but provides express support for the growth of independent regulatory agencies.<sup>111</sup>

*Humphrey’s Executor* has been criticized as a blatantly political opinion.<sup>112</sup> The critics argue that the motivation behind the opinion was a judicial backlash against the growing power of the Presidency of the United States under Franklin Roosevelt.<sup>113</sup> While this criticism carries a great deal of merit, the federal system has developed since the 1930’s following the holding of *Humphrey’s Executor*.<sup>114</sup> Furthermore, if the Congress believes that independent regulatory commissions are not functioning as intended, Congress may rewrite the statute that prevents presidential removal, as a safeguard of preventing these agencies from drifting away from presidential oversight.

*Myers* and *Humphrey’s Executor* set the framework for congressional restrictions on the President’s removal power. *Myers* instructs that principal officers who perform functions that are purely “executive” in nature are beyond the scope of congressional regulation.<sup>115</sup> *Humphrey’s Executor* instructs that principal officers

---

<sup>108</sup> *Myers v. United States*, 272 U.S. 52, 135 (1926) (describing some offices which are essentially “quasi-judicial” in nature).

<sup>109</sup> *Humphrey’s Executor*, 295 U.S. at 629.

<sup>110</sup> *Id.* at 625.

<sup>111</sup> *Id.* at 628.

<sup>112</sup> William Fox, UNDERSTANDING ADMINISTRATIVE LAW, 65 (4<sup>th</sup> Edition Lexis Nexis) (2000).

<sup>113</sup> *Id.*

<sup>114</sup> New York Institute of Technology: Independent Regulatory Commissions, available at <http://iris.nyit.edu/~shartman/mba0101/agency.htm#TOP%20OF%20FORM>. Provides a list and description of the most important independent regulatory commissions that currently operate at the federal level. *Id.*

<sup>115</sup> See *supra* Part II(C)(1).

who perform functions that are “quasi-legislative” or “quasi-judicial” are within the scope of Congress’ power to regulate, thus allowing for restrictions on the president’s power to remove and the creation of independent regulatory commissions.<sup>116</sup>

D. Wiener, Bowsher, and Morrison: *Formalism and Functionalism in the President’s Removal Power Analysis*

1. *Wiener v. United States*

Further illustrating the framework that was laid by the Supreme Court in *Myers* and *Humphrey’s Executor* is *Wiener v. United States*.<sup>117</sup> The case was brought to collect on back pay, due to the alleged illegal removal of Wiener as a member of the War Claims Commission.<sup>118</sup> After World War II, Congress established the War Claims Commission to have jurisdiction to receive and adjudicate according to law any claims for compensating internees, prisoners of war, and religious organizations, who suffered any personal injury or property damage at the hands of the enemy combatants during World War II.<sup>119</sup> The Commission was to finish its affairs no later than three years following the expiration of the time for filing claims.<sup>120</sup> The date for winding up its affairs was March 31, 1952.<sup>121</sup> Congress made no provision for removal of a Commissioner by the President.<sup>122</sup> Wiener was nominated by President Truman, and confirmed on June 2, 1950.<sup>123</sup> Upon a refusal to resignation, Wiener was removed by President Eisenhower.<sup>124</sup> Wiener petitioned for “recovery of his salary as a War Claims Commissioner from . . . the

---

<sup>116</sup> See *supra* Part II(C)(2).

<sup>117</sup> 357 U.S. 349 (1958).

<sup>118</sup> *Id.* at 350.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Weiner*, 357 U.S. at 350.

<sup>124</sup> *Id.*

day of his removal by the President to . . . the last day of the Commission's existence."<sup>125</sup>

Justice Frankfurter, writing for the majority, affirmed the holding of *Humphrey's Executor*.<sup>126</sup> Justice Frankfurter reiterated that *Humphrey's Executor*, "drew a sharp line of cleavage between officials who were part of the Executive establishment and were thus removable by virtue of the President's constitutional powers, and those who are members of a body 'to exercise its judgment without the leave or hindrance of any other official or any department of government,' as to whom a power of removal exists only if Congress may fairly be said to have conferred it."<sup>127</sup> Justice Frankfurter stated that, "this sharp differentiation derives from the differences in functions between those who are part of the Executive establishment and those whose task require absolute freedom from Executive interference."<sup>128</sup>

To reach its conclusion that Wiener was not removable at the sole discretion of the President the Court employed a formal interpretive methodology, and asked what "is the nature of the function that Congress vested in the War Claims Commission. What were the duties that Congress confided to this Commission?"<sup>129</sup> In *Myers* and *Humphrey's Executor*, the Supreme Court had applied a formal analysis in removal cases.<sup>130</sup> Applying this framework, the Court found that "the Commission was established as an adjudicating body with all the paraphernalia by which legal claims are put to the test of proof, with finality of determination 'not subject to review by any other official of the United States or by any court by mandamus or otherwise,'" and as such was within the scope of Congress' power to regulate.<sup>131</sup>

---

<sup>125</sup> *Id.* at 351.

<sup>126</sup> *Id.* at 353.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Weiner*, 357 U.S. at 353.

<sup>130</sup> See discussion *supra* *Myers v. United States* 272 U.S. 52 (1926); *Humphrey's Executor*, 295 U.S. 602 (1935).

<sup>131</sup> *Wiener*, 295 U.S. at 355.

## 2. *Bowsher v. Synar*

Questions regarding the scope of the President's removal power did not surface for a number of years following the Court's decision in *Weiner*. The issue arose again under the facts of *Bowsher v. Synar*.<sup>132</sup> The question presented in *Bowsher* was "whether the assignment by Congress to the Comptroller General of the United States of certain functions under the Balanced Budget and Emergency Deficit Act of 1985 violates the doctrine of separation of powers."<sup>133</sup>

The Act in question, known as the Gramm-Rudman-Hollings Act, sought to eliminate the federal budget deficit.<sup>134</sup> The constitutional issue arose due to a conjunction of the Comptroller performing "executive functions,"<sup>135</sup> and a provision that allowed Congress to remove the Comptroller general for "permanent disability," "inefficiency," "neglect of duty," "malfeasance," or "a felony or conduct involving moral turpitude."<sup>136</sup> The Supreme Court affirmed the District Court's decision that held "the role of the Comptroller General in the deficit reduction process violated the constitutionally imposed separation of powers."<sup>137</sup> The Court held "the *executive nature* of the Comptroller General's functions under the Act is revealed in § 252(a)(3) which gives the Comptroller General the ultimate authority to determine the budget cuts to be made."<sup>138</sup>

Chief Justice Burger writing for the majority stated the "Constitution does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts."<sup>139</sup> The Court noted that, "a direct congressional role in the removal of officers charged with the execution of the laws beyond this limited one is inconsistent with separation of powers."<sup>140</sup>

---

<sup>132</sup> 478 U.S. 714 (1986).

<sup>133</sup> *Id.* at 717.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 734.

<sup>136</sup> *Id.* at 728.

<sup>137</sup> *Id.* at 720.

<sup>138</sup> *Bowsher*, 478 U.S. at 733 (emphasis added).

<sup>139</sup> *Id.* at 722.

<sup>140</sup> *Id.*

The Court held that in essence, by placing the responsibility for execution of the Act into the hands of an officer who is subject to removal only by the Congress itself, Congress had in effect retained control over the Act's execution and thus unconstitutionally intruded upon the executive function of the Presidency.<sup>141</sup> Chief Justice Berger noted that once Congress has made its choice in enacting legislation, its participation ends.<sup>142</sup> Once this act is done, Congress can thereafter control the execution of its enactment only indirectly, by passing new legislation.<sup>143</sup>

In reaching its conclusion, the *Bowsher* majority employed a formalistic analysis to the separation of powers.<sup>144</sup> Since Congress had taken to itself the ability to remove an official who was performing fundamentally executive duties, it seems that the act was a gross violation of the separation of powers principle applying a formal interpretative lens. From this standard, Congress may not take for itself an active role in deciding when an official is terminated.

Critiques of this approach—which rigidly distinguishes between “executive,” “legislative,” and “judicial” power—are raised in Justice White’s dissent.<sup>145</sup> The problem according to Justice White with the majority approach rests upon “a feature of the legislative scheme that is of minimal practical significance and that presents no substantial threat to the basic scheme of separation of powers.”<sup>146</sup> This is how a functionalist would present the question when conducting a separation of powers analysis. Justice White quoted from *Youngstown Sheet & Tube Co. v. Sawyer* that “the actual art of

---

<sup>141</sup> *Id.* at 734.

<sup>142</sup> *Id.* at 733–34.

<sup>143</sup> *Id.*

<sup>144</sup> See *Bowsher*, 478 U.S. at 731 (“In the long term, structural protections against the abuse of power were critical to preserving liberty.”).

<sup>145</sup> *Id.* at 759 (“I will, however, address the wisdom of the Court’s unwillingness to interpose its distressingly formalistic view of separation of powers as a bar to the attainment of governmental objectives through the means chosen by Congress and the President in the legislative process established by the Constitution.”).

<sup>146</sup> *Id.* See also *id.* at 760 (“In attaching dispositive significance to what should be regarded as a triviality, the Court neglects what has in the past been recognized as a fundamental principle governing consideration of disputes over separation of powers.”).



governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on the isolated clauses or even single Articles torn from context.”<sup>147</sup> In his view, the Constitution “diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government.”<sup>148</sup>

Justice White spoke of the major growth and changes that have occurred in the federal government since the time that *Myers* and *Humphrey's Executor* were decided by the Court.<sup>149</sup> Justice White indicated that “in an earlier day, in which simpler notions of the role of government in society prevailed, it was perhaps plausible to insist that all ‘executive’ officers be subject to an unqualified Presidential removal power.”<sup>150</sup> However, “with the advent and triumph of the administrative state and the accompanying multiplication of the tasks undertaken by the federal government, the Court has been virtually compelled to recognize that Congress may reasonably deem it ‘necessary and proper’ to vest some among the broad new array of governmental functions in officers who are free from the partisanship that may be expected of agents wholly dependent upon the President.”<sup>151</sup> Instead of applying a formalistic approach employed by the majority, Justice White would set the test for separation of powers analysis as focusing on the extent to which such a limitation prevents the executive from completing its constitutionally assigned functions.<sup>152</sup> This is a flexible balancing test, that questions whether Congress has interfered within the scope of the executive rather than a ridged and formalistic *per se* rule that Congress cannot take upon itself the execution of the laws, that does not question whether the

---

<sup>147</sup> *Id.* (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952)).

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Bowsher*, 478 U.S. at 761.

<sup>151</sup> *Id.* at 761–62.

<sup>152</sup> *Id.* at 762. *See also id.* at 772 (“the test for a violation of separation of powers should be whether an asserted congressional power to remove would constitute a real and substantial aggrandizement of congressional authority at the expense of executive power.”).

function of a branch has been impeded.<sup>153</sup> Applying this balancing test, Justice White found that the powers exercised by the Comptroller General were not so essential to the President, as to impermissibly interfere with the President's ability to execute the laws.<sup>154</sup>

*Bowsher* is important for the Court's articulation of the President's removal power, because of its crystallization of the tension between the formalistic approach of Chief Justice Berger's majority opinion, and the functional approach advocated by Justice White.<sup>155</sup> The Court in *Myers*, *Humphrey's Executor*, and *Wiener* applied a formal separation of powers analysis. The Court's analysis in these cases was how to characterize the powers that were being wielded by independent regulatory agencies. This explains the importance of the "quasi-judicial" and "quasi-legislative" language in *Myers* and *Humphrey's Executor*. The functionalist approach that Justice White would adopt in *Bowsher* does not find its source in precedent from the prior removal cases. Justice White's approach does however reflect the untidiness of separation of powers analysis in the post-*Lochner* era.<sup>156</sup>

### 3. *Morrison v. Olson*

In *Morrison v. Olson*, the Supreme Court in an eight-to-one decision adopted Justice White's functional approach to the President's removal power.<sup>157</sup> At issue in *Morrison* were the independent counsel provisions of the Ethics in Government Act of

---

<sup>153</sup> *Id.* at 763 (Justice White argues that this approach is necessitated because of "recognition that 'formalistic and unbending rules' in the area of separation of powers may 'unduly constrict Congress' ability to take needed and innovative action pursuant to its Article I powers'") (quoting *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 883, 851 (1986)).

<sup>154</sup> *Id.* at 763.

<sup>155</sup> M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1129 (2000).

<sup>156</sup> See *FTC v. Ruberoid Co.*, 343 U.S. 470, 487–488 (1952) ("[T]he mere retreat to the qualifying 'quasi' is a smooth cover which we draw over out confusion as we might use a counterpane to conceal a disordered bed.") (Jackson, J., dissenting).

<sup>157</sup> 487 U.S. 654 (1988).

1978.<sup>158</sup> The Act in question “allows for the appointment of an ‘independent counsel’ to investigate and if appropriate, prosecute certain high-ranking Government officials for violations of federal criminal laws.”<sup>159</sup> Congress passed the Act in response to the abuses of the Nixon Administration.<sup>160</sup> The Act detailed the procedure for removal of the independent counsel and stated that “an independent counsel appointed under this chapter may be removed from office, other than by impeachment and conviction, only by the personal action of the Attorney General and only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel’s duties.”<sup>161</sup>

This was a new situation, because previously, the limitations on removal had related to “the character of the office.”<sup>162</sup> This limitation in the Ethics in Government Act of 1978 was being placed on an agent who performed a “core executive function”—that of prosecution.<sup>163</sup> However, writing for the majority in *Morrison*, Chief Justice Rehnquist discarded the formalist analytical framework that was used in *Myers* and *Humphrey’s Executor*. Instead of applying the formalist analysis that was employed pre-*Morrison*, Rehnquist wrote, “we do not think that the Act ‘impermissibly undermine[s]’ the powers of the Executive Branch . . . or ‘disrupts the proper balance between the coordinate branches [by] prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions.’”<sup>164</sup> Instead, the Court held that the Executive Branch had still had sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned functions.<sup>165</sup> The analytical framework that is taken from *Morrison* indicates that “the real question is whether the removal restrictions

---

<sup>158</sup> *Id.* at 659.

<sup>159</sup> *Id.* at 660.

<sup>160</sup> Mark Stencel, *The Reforms: Watergate at 25*, WASHINGTON POST.COM, June 13, 1997, available at <http://www.washingtonpost.com/wp-srv/national/longterm/watergate/legacy.htm>

<sup>161</sup> *Morrison*, 487 U.S. at 663.

<sup>162</sup> *Id.* at 687 (indicating that the court was rejecting its former formalistic analytical framework).

<sup>163</sup> *Id.* at 689.

<sup>164</sup> *Id.* at 695.

<sup>165</sup> *Id.* at 696.

are of such a nature that they impede the President's ability to perform his constitutional duty, and the functions of the officials in question must be analyzed in that light."<sup>166</sup> The Court did however retain the *per se* rule, "that the Constitution prevents Congress from 'draw[ing] to itself . . . the power to remove or the right to participate in the exercise of that power.'"<sup>167</sup>

In a lone dissent, Justice Scalia lambasted the majority's rejection of the formalist analytical framework. Justice Scalia argued that the "President must have control over all exercises of executive power."<sup>168</sup> Justice Scalia wrote that the *Morrison* majority's test stands for the proposition that there are not, "rigid categories of those officials who may or may not be removed at will by the President," but rather "Congress cannot 'interfere with the President's exercise of the executive power and his constitutionally appointed duty to take care that the laws be faithfully executed.'"<sup>169</sup> The problem with the majority approach in Justice Scalia's view is that the President is no longer the sole repository of *all* executive power.<sup>170</sup> Rather Justice Scalia argued, "there are now no lines."<sup>171</sup> Justice Scalia closes his critique of the interpretive methodology by writing, "it is now open season upon the President's removal power for all executive officers, with not even the superficially principled restriction of *Humphrey's Executor* as cover."<sup>172</sup>

The decision did indeed shift the analytical framework to be applied to the President's removal power. Both *Humphrey's Executor* and *Morrison* were written during a charged political climate. *Morrison* followed the Watergate investigation and the controversies of the Nixon Administration. Congress, by passing the Ethics in Government Act of 1978, was attempting to limit potential

---

<sup>166</sup> *Id.* at 691.

<sup>167</sup> *Morrison*, 487 U.S. at 687.

<sup>168</sup> *Id.* at 724.

<sup>169</sup> *Id.* at 725.

<sup>170</sup> *Id.* at 726.

<sup>171</sup> *Id. See id.* ("If the removal of a prosecutor, virtual embodiment of the power to 'take care that the laws be faithfully executed,' can be restricted, what officer's removal cannot?"). *See also id.* ("This is an open invitation for Congress to experiment.").

<sup>172</sup> *Id.* at 727.

abuses in government.<sup>173</sup> The decision to adopt a functional approach for the President's removal power does not provide the clearest of guidance. Bright-line rules, such as the *per se* restriction on Congress attempting to gain a role in the removal of executive officials other than firmly established powers of impeachment and conviction, provide more direct guidance to Congress about what it can and cannot legislate, but they do not provide much needed flexibility in governance. Furthermore, they do not, accurately reflect the current blending of powers in the modern administrative state. Since the revolution and growth of the federal government following the Great Depression and New Deal, current understandings permit Congress to make use of the outer bounds of the Necessary and Proper Clause to achieve needed flexibility in governance. In order to accommodate these realities, the Court has accepted a balancing test, with a *per se* rule that Congress may not directly participate in the removal of individual officials.

The question then becomes what is the current state of law regarding the President's removal power prior to *Free Enterprise Fund*? A few principles can be distilled from this well-developed body of law. The first principle is that the President has a constitutionally granted power of removal that is incident to the powers articulated in Article II.<sup>174</sup> A second principle, established by the case law, is that Congress has power to regulate this removal power pursuant to the Necessary and Proper Clause.<sup>175</sup> A third principle is that Congress may limit removal, but is prevented from direct participation in the removal of specific officials.<sup>176</sup> *Myers* and *Humphrey's* provide the framework that principal officers who perform "quasi-legislative" and "quasi-judicial" functions may have removal restrictions insulating them from discretionary firing by the President.<sup>177</sup> A final principle is the tension between formalist views

---

<sup>173</sup> Alexander I. Tachmes, *Independent Counsels Under The Ethics In Government Act of 1978: A Violation of The Separation of Powers Doctrine or An Essential Check on Executive Power?*, 42 U. MIAMI L. REV. 735, 736 (1988).

<sup>174</sup> See *supra* Part II(A) (discussion about the "Decision of 1789").

<sup>175</sup> See *supra* Part II(B) (discussion of *Perkins*, and removal restrictions for inferior officers).

<sup>176</sup> See *supra* Part II(C)(1) (discussion of *Myers v. United States*).

<sup>177</sup> See *supra* Part II(C)(1)–(2) (discussion of the principal cases *Myers v. United States* and *Humphrey's Executor*).

of separation of powers, as seen in *Myers*, *Humphrey's*, and *Bowsher* and the functional approach applied in *Morrison*.<sup>178</sup> The question of which interpretive methodology is to be applied to the removal power has great implications for the separation of powers, and the limits that will be placed upon Congress in enacting laws pursuant to the Necessary and Proper Clause. This issue was addressed by the Court in *Free Enterprise Fund v. Public Company Accounting Oversight Board*.

III. *FREE ENTERPRISE FUND V. PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD*: A RETURN TO A FORMAL ANALYSIS IN REMOVAL JURISPRUDENCE

A. *Facts of the Case*

Following a series of “celebrated accounting debacles,” Congress enacted the Sarbanes-Oxley Act of 2002.<sup>179</sup> One of the specific industries targeted by the Act was the accounting industry.<sup>180</sup> To accomplish this oversight, Congress in enacting Sarbanes-Oxley created the Public Company Accounting Oversight Board (PCAOB).<sup>181</sup> The PCAOB is made of five members, appointed to staggered 5-year terms by the Securities and Exchange Commission.<sup>182</sup> The Board is based upon private self-regulatory organizations in the securities industry—such as the New York Stock Exchange—that investigate and punish their own members subject to the Commission’s oversight.<sup>183</sup> Accounting firms, that audit public companies under the securities laws must register with the Board and comply with its rules and oversight.<sup>184</sup>

---

<sup>178</sup> See *supra* Part II(D) (discussion of formalism and functionalism with regard to the President’s removal power).

<sup>179</sup> *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 130 S. Ct. 3138, 3147 (2010).

<sup>180</sup> *Id.* (“Among other measures, the Act introduced tighter regulations of the accounting industry under a new Public Company Accounting Oversight Board.”).

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

The Board is granted authority to enforce the Sarbanes-Oxley Act, the securities laws, the Commission's rules, its own rules, as well as professional accounting standards.<sup>185</sup> The Board is also able to promulgate auditing and ethics standards, perform routine inspections of all accounting firms, demand documents and testimony, and initiates any investigations and disciplinary proceedings.<sup>186</sup> Any willful violation of "any Board rule is treated as a willful violation of the Securities Exchange Act of 1934 . . . is a federal crime punishable by up to 20 years' imprisonment or \$25 million in fines."<sup>187</sup>

The Sarbanes-Oxley Act places the Board under the SEC's oversight, particularly with respect to the issuance of rules or the imposition of sanctions that are subject to Commission approval and alteration.<sup>188</sup> Congress decided, however, that it would be advantageous for "the individual members of the Board . . . [to be] substantially insulated from the Commission's control."<sup>189</sup> The Act provides that "the Commission cannot remove Board members at will, but only 'for good cause shown,' 'in accordance with' certain procedures."<sup>190</sup> The Act then proceeds to define what "good cause" for removal is.<sup>191</sup> The process for removing a Board member includes a formal Commission finding and is subject to judicial review.<sup>192</sup> The SEC Commissioners who oversee the members of the PCAOB themselves "cannot be removed by the President except

---

<sup>185</sup> *Free Enterprise Fund*, 130 S. Ct. at 3147.

<sup>186</sup> *Id.* at 3147–3148.

<sup>187</sup> *Id.* at 3148.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* (quoting 15 U.S.C. § 7211(e)(6) (2006)).

<sup>191</sup> *See Free Enterprise Fund*, 130 S. Ct. at 3148. ("Those procedures require a Commission finding, 'on the record' and 'after notice and opportunity for a hearing,' that the Board member '(a) has willfully violated any provision of th[e] Act, the rules of the Board, or the securities laws'; (b) 'has willfully abused the authority of the member'; or '(c) without reasonable justification or excuse, has failed to enforce compliance with any such provision or rule, or any professional standard by any registered public accounting firm or any associated person thereof.'") (quoting 15 U.S.C. § 7217(d)(3)).

<sup>192</sup> *Id.*

under the *Humphrey's Executor* standard of 'inefficiency, neglect of duty, or malfeasance in office.'"193

There are important policy considerations for why Congress established the Board in the manner that it did. First, members of Congress are not all experts in the field of accounting. Financial regulation has also been thought to require a particular need for independence.<sup>194</sup> Furthermore, it has been recognized that removal restrictions can be justified on the grounds of "the need for technical expertise."<sup>195</sup> The accountants working for the Board need to be free to develop this expertise, and experts can objectively apply sound accounting principles.

The Plaintiff in *Free Enterprise Fund*, Beckstead and Watts, LLP, is a Nevada accounting firm.<sup>196</sup> The Board inspected the firm, and released a report that was critical of its auditing procedures, and began a formal investigation.<sup>197</sup> The *Free Enterprise* decision arose because Beckstead and Watts, as well as the Free Enterprise Fund, which is "a nonprofit organization of which the firm is a member . . . sued the Board and its members, seeking . . . a declaratory judgment that the Board is unconstitutional and an injunction preventing the Board from exercising its powers."<sup>198</sup>

Plaintiff's argument was that the Sarbanes-Oxley Act contravened separation of powers by granting wide-ranging executive power on Board members without subjecting them to Presidential control.<sup>199</sup> In a 5-4 split, with Chief Justice Roberts writing for the majority, held that dual for-cause removal restriction in *Free Enterprise* were unconstitutional.

### *B. Chief Justice Robert's Majority Opinion*

In deciding the merits, the Court held "that the dual for-cause limitations on the removal of Board members contravene the

---

<sup>193</sup> *Id.* (quoting *Humphrey's Executor*, 295 U.S. at 620).

<sup>194</sup> *Free Enterprise Fund*, 130 S. Ct. at 3174 (Breyer, J., dissenting).

<sup>195</sup> *Id.* at 3174.

<sup>196</sup> *Free Enterprise Fund*, 130 S. Ct. at 3149.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*



Constitution's separation of powers."<sup>200</sup> In reaching this conclusion, the Court traced the President's removal power back to the "Decision of 1789."<sup>201</sup> The majority read the decision in line with adherents of Justice Taft's position and stated that "the requisite responsibility and harmony in the Executive Department' . . . [means that] the executive power included a power to oversee executive officers through removal."<sup>202</sup> After a discussion of *Myers* and *Humphrey's Executor*, the majority upheld the notion that *Myers* "did not prevent Congress from conferring good-cause tenure on the principal officers of certain independent agencies."<sup>203</sup> The Court in *Free Enterprise* then affirmed the removal restrictions at issue in *Morrison v. Olson*.<sup>204</sup>

The majority then shifted its analysis to the question of a dual for-cause limitation on removal.<sup>205</sup> The Court asserted that "the Act before us does something quite different"<sup>206</sup> from other removal restrictions.<sup>207</sup> According to the majority, the result is "a Board that is not accountable to the President, and a President who is not responsible for the Board."<sup>208</sup> The Court viewed the structure as creating a situation where "neither the President, nor anyone directly responsible to him, nor even an officer whose conduct he may review only for good cause, has full control over the Board."<sup>209</sup> By making this assertion, however, the Court mischaracterized the extent of the President's control over the SEC. The President does not have

---

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* ("The removal of executive officers was discussed extensively in Congress when the first executive departments were created.")

<sup>202</sup> *Free Enterprise Fund*, 130 S. Ct. at 3152 (quoting Letter from James Madison to Thomas Jefferson (June 30, 1789), 16 Documentary History of the First Federal Congress 893 (2004)).

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at 3153.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> See discussion *supra* on *Perkins*, *Myers*, and *Humphrey's Executor*.

<sup>208</sup> *Id.* See also *id.* at 3153–3154 ("The added layer of tenure protection makes a difference. Without a layer of insulation between the Commission and the Board, the Commission could remove a Board member at any time, and therefore would be fully responsible for what the Board does.")

<sup>209</sup> *Free Enterprise Fund*, 130 S. Ct. at 3154.

unlimited control over the removal of the heads of the SEC. It follows then that one more tenure provision protecting the Board from Presidential removal power does nothing to diminish the President's executive power.<sup>210</sup> Chief Justice Roberts then implied that the President is directly accountable for the actions of independent regulatory commissions such as the SEC, even though he cannot directly remove these officials.<sup>211</sup> The Court stated that "without a clear and effective chain of command, the public cannot 'determine on whom the blame or the punishment of a pernicious measure, or serious of pernicious measures ought really to fall.'"<sup>212</sup> What the majority failed to address, however, is the fact that the President does not have plenary power over independent regulatory commissions such as the SEC in the first place.<sup>213</sup>

The Court also rejected the government's argument that "the Act's limitations on removal are irrelevant, because . . . the Commission wields 'at will removal power over Board *functions* if not Board members.'"<sup>214</sup> The Court failed to credit the fact that the Board's structure "leave[s] the President no worse off than 'if Congress had lodged the Board's functions in the SEC's own staff.'"<sup>215</sup> After finding the double for-cause removal limitation unconstitutional, the majority severed this provision, and allowed the Board to continue its existence.<sup>216</sup>

The majorities' analysis rejected the functionalist approach of the *Morrison* Court for a formalistic methodology in line with *Weiner* and *Bowsher* Courts.<sup>217</sup> The Court does not explicitly state that it is turning to this method of interpretation, but because the removal

---

<sup>210</sup> See *Free Enterprise Fund*, 130 S. Ct. at 3170 (Breyer, J., dissenting).

<sup>211</sup> *Free Enterprise Fund*, 130 S. Ct. at 3155. See also *id.* ("This diffusion of power carries with it a diffusion of accountability. The people do not vote for the 'Officers of the United States.' Art. II, §2, cl. 2. They instead look to the President to guide the 'assistants or deputies . . . subject to his superintendence.'" The Federalist No. 72, p. 487 (J. Cooke ed. 1961) (A. Hamilton)).

<sup>212</sup> *Id.* (quoting Federalist No. 72 at 476).

<sup>213</sup> See *Humphrey's Executor*, 295 U.S. 602 (1935).

<sup>214</sup> *Free Enterprise Fund*, 130 S. Ct. at 3158 (quoting *Free Enterprise Fund v. P.C.A.O.B.*, 537 F. 3d 667, 683 (D.C. Cir. 2008)).

<sup>215</sup> *Id.* (quoting *PCAOB* Brief at 15).

<sup>216</sup> *Id.* at 3161.

<sup>217</sup> *Id.* at 3144.

restriction has only limited effect on the President's ability to control an already independent SEC, suggesting that the Court has implicitly adopted a formal interpretive methodology. This is apparent when Chief Justice Roberts quotes *Bowsher* that "the Framers recognized that, in the long term, structural protections against abuse of power are critical to preserving liberty."<sup>218</sup> This contravenes the precedent of *Morrison* that adopted a functional analytical approach.<sup>219</sup> The majority has abandoned its brief application of a functional analysis in removal jurisprudence.

### C. Justice Breyer's Dissent

Writing in dissent, Justice Breyer criticized this change in interpretive methodology by performing his own functionalist analysis of the statute. Justice Breyer came to the conclusion that "the statute does not significantly interfere with the President's executive power."<sup>220</sup> The dissent also forewarned that the Court's holding "threatens to disrupt severely the fair and efficient administration of the laws."<sup>221</sup>

Justice Breyer framed the issues in the case as "the intersection of two general constitutional principles." On one hand "Congress has broad power to enact statutes 'necessary and proper' to the exercise of its specifically enumerated constitutional authority."<sup>222</sup> On the other, "the opening sections of Article I, II, and III of the Constitution separately and respectively vest 'all legislative Powers in Congress,' the 'executive Power' in the President, and the 'judicial Power' in the Supreme Court."<sup>223</sup> By structuring the federal government in this manner the Framers "impl[ied] a structural separation-of-powers principle."<sup>224</sup> The dissent argues persuasively that in the case of removal, "neither of these two principles is

---

<sup>218</sup> *Id.*

<sup>219</sup> See *supra* note 157 (discussing the Court's adoption in *Morrison v. Olson* of a functional approach to separation of powers analysis).

<sup>220</sup> *Free Enterprise Fund*, 130 S. Ct. at 3164 (Breyer, J., dissenting).

<sup>221</sup> *Id.*

<sup>222</sup> *Id.* at 3165 (quoting Art. I, §8, cl. 18).

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

absolute in its application.”<sup>225</sup> This problem arises because in the case of removal, there is no text upon which the Court can rely to make its decisions.<sup>226</sup>

The framework that Justice Breyer would employ is one that would evaluate “how a particular provision, taken in context, is likely to function.”<sup>227</sup> The Court in these circumstances has “looked to function and context, and not to bright line rules.”<sup>228</sup> This is the functional approach of the *Morrison* Court.<sup>229</sup> Justice Breyer justified this approach as being the intent of the framers,<sup>230</sup> and because it allows Congress and the President to “adopt statutory law to changed circumstances.”<sup>231</sup>

Given these considerations, the dissent characterizes the main issue in the case as being “to what extent then is the Act’s ‘for cause’ provision likely, as a practical matter, to limit the President’s exercise of executive authority?”<sup>232</sup> As a practical matter, the President’s executive authority is not infringed any more than it is under the *Humphrey’s Executor* standard. The restrictions “directly limit, not the President’s power, but the power of an already independent agency.”<sup>233</sup> It is from this fact, that a reader of *Free Enterprise*

---

<sup>225</sup> *Id.*; see also *id.* (“The necessary and proper clause does not grant Congress power to free all executive branch officials from dismissal at the will of the President. Nor does the separation-of-powers principle grant the President an absolute authority to remove any and all executive branch officials at will.”).

<sup>226</sup> *Free Enterprise Fund*, 130 S. Ct. at 3166 (Breyer, J., dissenting) (“We cannot look to more specific constitutional text . . . because, with the exception of the general ‘vesting’ and ‘take care’ language, the Constitution is completely ‘silent with respect to the power of removal from office.’”) (quoting *Ex Parte Hennen*, 13 Pet. 230, 258 (1839)).

<sup>227</sup> *Id.* at 3167.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* Justice Breyer specifically cites to *Morrison* when he states “‘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 rather asks whether, given the ‘functions of the officials in question,’ a removal provision ‘interfere[s] with the President’s exercise of the ‘executive power’”) *Id.* (quoting *Morrison*, 487 U.S., at 689–90).

<sup>230</sup> *Id.* at 3167–3168.

<sup>231</sup> *Id.* at 3168.

<sup>232</sup> *Free Enterprise Fund*, 130 S. Ct. at 3170 (Breyer, J., dissenting).

<sup>233</sup> *Id.*

understands that the majority adopted a formal analysis for removal implicitly. Given that the Commission has broad control over the functions of the Board, Justice Breyer would hold that the controls over the Board are sufficiently adequate.<sup>234</sup> Relying upon *Morrison*, the dissent asked whether “the removal restrictions are of such a nature that they impede the President’s ability to perform his constitutional duty.”<sup>235</sup> Because of the nature of Presidential control over an already independent SEC, the statute clearly fails this test.<sup>236</sup>

The dissent also convincingly argued that the precedent as described above “strongly supports” the Act’s constitutionality.<sup>237</sup> Justice Breyer cited to a statement of Justice Scalia in *Freytag v. Commissioner of Internal Revenue*,<sup>238</sup> that “adjusting the remainder of the Constitution to compensate for *Humphrey’s Executor* is a fruitless endeavor.”<sup>239</sup> The Justices in *Freytag* agreed that the Court “should not create a separate constitutional jurisprudence for the ‘independent agencies.’”<sup>240</sup> This means that independent agencies should be treated as if they were executive agencies, and the law that has developed for purely “executive agencies” should be applied to independent agencies. This coupled with the restrictions permitted on the President’s removal power in *Humphrey’s Executor* and inferior officers in *Perkins*, logically compels the constitutionality of the Act.<sup>241</sup>

---

<sup>234</sup> *Id.* at 3173.

<sup>235</sup> *Id.*

<sup>236</sup> *See id.* at 3175. (“Here, the removal restriction may somewhat diminish the Commission’s ability to control the Board, but it will have little, if any, negative effect in respect to the President’s ability to control the Board, let alone to coordinate the Executive Branch.”).

<sup>237</sup> *Id.*

<sup>238</sup> *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 921 (1991).

<sup>239</sup> *Free Enterprise Fund*, 130 S. Ct. at 3176 (Breyer, J., dissenting) (citing *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 921 (1991)).

<sup>240</sup> *Id.* (citing *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 920–921 (1991)).

<sup>241</sup> *Id.* *See id.* (“The law should treat [independent agencies heads] as it treats other Executive Branch heads of departments. Consequentially, as the Court held in *Perkins*, Congress may constitutionally ‘limit and restrict’ the Commission’s power to remove those whom they appoint.”).

The dissent is also highly critical of the majorities' attempt at creating a *per se* rule.<sup>242</sup> Justice Breyer argued that the scope of the Court's holding is potentially troubling, because the Court is not explicit about how far the decision will reach.<sup>243</sup> Justice Breyer stated that "reading the criteria above as stringently as possible, I still see no way to avoid sweeping hundreds, perhaps thousands of high level government officials within the scope of the Court's holding, putting their job security and their administrative actions and decisions constitutionally at risk."<sup>244</sup> This is why this note suggests a narrow reading of the decision.

Justice Breyer ends his discussion by addressing the fact that the enabling statute for the SEC does not have a for cause-removal limitation for its commissioners.<sup>245</sup> In dissent, Justice Breyer, observes that he was "not aware of any other instance in which the Court has similarly (on its own or through stipulation) created a constitutional defect in a statute and then relied on that defect to strike a statute down as unconstitutional."<sup>246</sup> This would also seem to be contrary to the plain language of the statute as drafted by Congress. In addition, this violates the dictates of *Parsons* and *Shurtleff* that if Congress wishes to limit the President's removal power, it must do so in an explicit and unambiguous manner, and that implicit restrictions of the President's removal power will not be read into the statute.

#### IV. SUGGESTED READINGS TO DISTINGUISH *FREE ENTERPRISE* BEING APPLIED TO ADMINISTRATIVE LAW JUDGES

As Justice Breyer noted, if *Free Enterprise* is read broadly, many officials of the federal government potentially fall within its holding.<sup>247</sup> *Free Enterprise*, if read broadly, may create uncertainty over the constitutionality of removal restrictions that protect inferior

---

<sup>242</sup> *Id.* at 3176.

<sup>243</sup> *Id.* at 3177.

<sup>244</sup> *Id.* at 3179.

<sup>245</sup> *Free Enterprise Fund*, 130 S. Ct. at 3182 (Breyer, J., dissenting) ("How can the Court simply assume without deciding that the SEC Commissioners themselves are removable only 'for cause?'").

<sup>246</sup> *Id.*

<sup>247</sup> *Id.* at 28.

officers and employees, particularly with respect to Administrative Law Judges (ALJs).

This problem arises because courts have generally tolerated the assignment of adjudications in agency matters, during the first instance, to the agencies themselves.<sup>248</sup> ALJs are the first adjudicators of fact in many of these agencies.<sup>249</sup> Because the functions performed by ALJs are analogous to those performed by federal district judges, ALJs should have the same degree of insulation as granted in the Constitution to the Article III judiciary.<sup>250</sup> Following this train of logic, distinguished scholar Peter Strauss has argued that “those who serve as “judges” in hearing administrative adjudications, [should have] maximum protection from political pressure.”<sup>251</sup>

To accomplish this insulation, Administrative Law Judges “are paid at the level of the senior executive service, but—although formally located within the particular agencies they serve—are *virtually beyond agency control*.”<sup>252</sup> The application process for becoming an ALJ is rigorous: “appointments must be made on a competitive basis, from the top few names on a list supplied by civil service authorities.”<sup>253</sup> Once made, “appointments are

---

<sup>248</sup> PETER STRAUSS, AN INTRODUCTION TO ADMINISTRATIVE JUSTICE IN THE UNITED STATES, 95 (1989).

<sup>249</sup> *Judge's Corner*, EBA UPDATE, Energy Bar Association at 9, available at <http://eba-net.org/docs/newsletters/Fall2010Newsletter.pdf>. See also *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

<sup>250</sup> See U.S. CONST. art. III, §1, cl. 2. (“The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.”). See also 5 U.S.C. § 3105 (2006) (Administrative law judges shall be assigned to cases in rotation so far as practicable, and may not perform duties inconsistent with their duties and responsibilities as administrative law judges.”).

<sup>251</sup> Strauss, *supra* note 247, at 94–95.

<sup>252</sup> *Id.* (emphasis added). See also Administrative Procedure Act, 5 U.S.C. § 554 (2006) (“An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings.”).

<sup>253</sup> *Id.*

permanent.”<sup>254</sup> Furthermore, “within the agency structure, [ALJs] must be free of supervision or direction from agency employees responsible for the cases that may come before them.”<sup>255</sup> They may not perform functions that are inconsistent with their duties as impartial finders of fact.<sup>256</sup> Neither “salary nor assignments nor any disciplinary measure can be controlled from within the agency, but [if adverse] must be the subject of formal proceedings before the Merit Systems Protection Board.”<sup>257</sup> Any conversations ALJs “may have with agency employees concerning the outcomes of formal proceedings they are hearing must be on the record—there may be no private consultations.”<sup>258</sup>

Various sections of the Administrative Procedure Act (APA) support the notion that ALJs are to be provided with the greatest degree of insulation in their decisional process.<sup>259</sup> Section 556 of the APA states that, “the functions of presiding employees . . . shall be conducted in an impartial manner.”<sup>260</sup> Section 557 further indicates

---

<sup>254</sup> *Id.*

<sup>255</sup> *Id.* See also Administrative Procedure Act, 5 U.S.C. § 554 (2006). Administrative Law Judges have resisted attempts at agency oversight. In the 1980’s litigation erupted within the Department of Health and Human Welfare over the department’s attempt to impose standards of productivity and competence. The department’s administrative law judges perceived the department’s actions as a direct threat to their independence. *Nash v. Califano*, 613 F.2d 10 (2d Cir. 1980); *Association of Administrative Law Judges v. Heckler*, 594 F. Supp 1132 (D.D.C. 1984); Gellhorn, Byse, Strauss, Rakoff, and Schotland, *ADMINISTRATIVE LAW, CASES AND COMMENTS* 862–79 (1986).

<sup>256</sup> See also 5 U.S.C. § 3105 (2006) (“Each agency shall appoint as many administrative law judges as are necessary for proceedings required to be conducted in accordance with sections 556 and 557 of this title. Administrative law judges shall be assigned to cases in rotation so far as practicable, and may not perform duties inconsistent with their duties and responsibilities as administrative law judges.”).

<sup>257</sup> See STRAUSS, *supra* note 247, at 95.

<sup>258</sup> *Id.* See also Administrative Procedure Act, 5 U.S.C. § 554 (2006) (“Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not (1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or (2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.”).

<sup>259</sup> See Administrative Procedure Act, 5 U.S.C. §§ 554–557(2006).

<sup>260</sup> *Id.* § 556(b).



that *ex parte* communications are not permissible when dealing with an ALJ.<sup>261</sup> Section 554 indicates that ALJs are “not to be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.”<sup>262</sup>

ALJs are “each removable ‘only for good cause established and determined by the Merit Systems Protection Board.’”<sup>263</sup> The members of the “Merit Systems Protection Board themselves are protected from removal by the President absent good cause.”<sup>264</sup> This structure is strikingly similar to that employed by Congress in the creation of the PCAOB.<sup>265</sup> At first blush it would seem there is little way to distinguish the Board in *Free Enterprise* from ALJs. Both the SEC and the Merit Systems Protection Board are insulated by the President by for-cause removal restrictions. Both the PCAOB and the ALJs serve under these commissions and are removal only for cause. It would seem to follow *a fortiori* that *Free Enterprise Fund* should bring ALJs within its *per se* rule.

This is extremely problematic because of the number of agency adjudications that are performed with an ALJ as the presiding hearing examiners are staggering.<sup>266</sup> The federal government relies upon 1,584 ALJs to adjudicate administrative matters in over 25 agencies.<sup>267</sup> The question going forward is whether “every losing party before an ALJ now has grounds to appeal on the basis that the decision entered against him is unconstitutional?”<sup>268</sup> Reading *Free Enterprise* to apply to ALJs would create major problems in the efficient administration of justice.

---

<sup>261</sup> *Id.* § 557(d)(1)(A).

<sup>262</sup> *Id.* § 554(d)(2)

<sup>263</sup> *Free Enterprise Fund*, 130 S. Ct. at 3180 (Breyer, J., dissenting) (quoting 5 U.S.C. §§ 7521(a)-(b)).

<sup>264</sup> *Id.* (quoting § 1202(d)). *See also* 5 U.S.C. § 1202 (2006) (“Any member [of the Merit Protection Board] may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office.”).

<sup>265</sup> *See supra* Part III(A).

<sup>266</sup> *See* Appendix.

<sup>267</sup> *Free Enterprise Fund*, 130 S. Ct. at 3181 (Breyer, J., dissenting) (“These ALJs adjudicate Social Security benefits, employment disputes, and other matters highly important to individuals.”). *See also* Appendix.

<sup>268</sup> *Id.*

The majority acknowledges that the status of ALJs has not been decided by the Court's decision in *Free Enterprise Fund*.<sup>269</sup> It is not yet settled whether the *per se* rule against dual for-cause removal restrictions will apply to them. Thus, the question of how to classify ALJs is open to debate.<sup>270</sup>

If *Free Enterprise* were applied to ALJs the potential disruption is great, thus distinguishing ALJs from the PCAOB is prudent. The next section suggests possible ways of limiting the scope of *Free Enterprise*, so that ALJs are not included within the scope of the case's holding.

*A. Free Enterprise Only Applies to the "Extraordinary"  
Protective Removal Restrictions Like Those Present in the  
Sarbanes-Oxley Act*

One possibly way to read *Free Enterprise Fund* is that the Court's holding only applies to situations that present "an even more serious threat to executive control than an 'ordinary' dual for-cause standard."<sup>271</sup> Chief Justice Roberts leaves this as a potential way to distinguish other dual for-cause removal limitations from those employed in *Free Enterprise*.<sup>272</sup> This would mean that removal restrictions that are less protective of officials may not come within the scope of *Free Enterprise*. This may be beneficial because it

---

<sup>269</sup> See *Free Enterprise Fund*, 130 S. Ct. at 3161 n.10 ("Our holding also does not address that subset of independent agency employees who serve as administrative law judges."). It should be noted that ALJs not only perform functions in independent agencies, but also perform functions in executive agencies. See Appendix, including, the Department of Education, Department of Homeland Security, Department of the Interior, Department of Labor, and the Environmental Protection Agency.

<sup>270</sup> *Id.* ("Whether administrative law judges are necessarily 'Officers of the United States' is disputed." (citing *Landry v. FDIC*, 204 F. 3d 1125 (D.C. Cir. 2000))).

<sup>271</sup> *Id.* at 3158. See also *Id.* (statements that "Congress enacted an unusually high standard that must be met before Board members may be removed"). See also *Free Enterprise Fund*, 130 S. Ct. at 3178 (Breyer, J., dissenting) (that this would be a more desirable reading of the case. "If the Court means to state that its holding in fact applies only where Congress has 'enacted an unusually high standard' of for-cause removal—and does not otherwise render two layers of 'ordinary' for-cause removal unconstitutional—I should welcome the statement").

<sup>272</sup> *Id.*

could limit the potentially damaging impact of the Court's *per se* rule, to only those statutes that provide for willful and knowing conduct before a removal may occur.

Administrative Law Judges have been insulated by removal restrictions with less protection than what was afforded to the Board members in *Free Enterprise*. ALJs are removable "only for good cause established and determined by the Merit Systems Protection Board."<sup>273</sup> This is a weaker form of tenure protection than the strong form tenure protections used in *Free Enterprise* that permitted removal only upon a finding of willful conduct.<sup>274</sup> Perhaps this less protective standard can be distinguished from the more protective removal restrictions in *Free Enterprise Fund*.

Following language of Chief Justice Roberts, Kent Barnett argues that the tenure protections in *Free Enterprise* fall into one of three categories, "strong tenure protections," "intermediate tenure protections," and "weak tenure protections."<sup>275</sup> Barnett argues that the provisions in *Free Enterprise* were found unconstitutional because weaker tenure protections were granted to the SEC commissioners, who hold a superior rank in the agency, than were afforded to the members of PCAOB, who hold an inferior position.<sup>276</sup> The articulation that Barnett makes for tenure protections is that a higher-ranking official may not have less tenure protection than their subordinates.<sup>277</sup> The structure suggested by Barnett implies that tenure protections for lower level personnel must be weaker than the tenure protections that are afforded to their superiors.

Applying this legal analytical framework, Barnett argues the structure that has been created for the Merit Protection Board and ALJs is constitutional.<sup>278</sup> Barnett argues that the Merit Protection Board is protected by an "intermediate" form of tenure protection, and ALJs are protected by a "weak" form of tenure protection.<sup>279</sup>

---

<sup>273</sup> *Id.* at 3180 (quoting 5 U.S.C. §§ 7521(a)-(b)).

<sup>274</sup> *See supra*, note 191 and accompanying text.

<sup>275</sup> Kent Barnett, *Avoiding Independent Agency Armageddon* 4–5, 2011, ExpressO, available at [http://works.bepress.com/kent\\_barnett/1](http://works.bepress.com/kent_barnett/1).

<sup>276</sup> *Id.* at 49.

<sup>277</sup> *Id.*

<sup>278</sup> *Id.* at 61–64.

<sup>279</sup> *Id.* at 61.

Because ALJs, who have “weak tenure” protection, are subordinated to members of the Merit Protection Board, who have “intermediate tenure” protection, the structure is constitutional.<sup>280</sup> This is an eminently reasonable way of limiting the potentially disruptive impact of *Free Enterprise*, beyond the context of Administrative Law Judges.

*B. Free Enterprise Only Applies to “Officers” Not to “Employees” of the Federal Government*

*Free Enterprise* may also be read as simply applying to “officers,” rather than “employees” of the United States.<sup>281</sup> This reading would prevent many of the problems alluded to by Justice Breyer in his dissent. It will also force the Court to further refine the test for distinguishing between officers and employees.<sup>282</sup>

Within the federal framework, there are different categories of personnel,<sup>283</sup> both “officers”<sup>284</sup> and “employees.”<sup>285</sup> This distinction is an important in federal administrative law. Whether a particular individual is an “officer” or an “employee” will bring differing legal consequences because an “officer” has different rights, duties, powers, and liabilities than an “employee.”<sup>286</sup>

---

<sup>280</sup> *Id.* at 61–64

<sup>281</sup> This reading has support by statements of Robert’s majority opinion that “many civil servants within independent agencies would not qualify as ‘Officers of the United States’” (quoting *Buckley v. Valeo*, 424 U.S. at 126).

<sup>282</sup> The Court shows that this may be a significant factor in the application of *Free Enterprise* because “one ‘may be an agent or employee working for the government and paid by it, as nine-tenths of the persons rendering service to the government undoubtedly are, without thereby becoming its office[r].’” *United States v. Germaine*, 99 U.S. 508, 509 (1879). *See also Free Enterprise Fund*, 130 S. Ct. at 3178 (Breyer, J., dissenting) (“Courts and scholars have struggled for more than a century to define the constitutional term ‘inferior officers,’ without much success.”).

<sup>283</sup> By statute, members of Congress (5 U.S.C. § 2106), Congressional employees (as defined in 5 U.S.C. § 2107), and members of the uniformed services (5 U.S.C. § 2101(3)), are also distinct classes of personnel.

<sup>284</sup> 5 U.S.C. § 2104 (defining “officer”).

<sup>285</sup> 5 U.S.C. § 2105 (defining “employee”).

<sup>286</sup> *See Buckley v. Valeo*, 424 U.S. 1, 126 n.162 (1976) (“Officers of the United States do not include all employees of the United States. Employees are lesser functionaries subordinate to officers of the United States.”).

The term "officer" is expressly defined by statute<sup>287</sup> to mean, except as otherwise provided by the section, a Justice or judge of the United States, or an individual who meets three mandatory statutory conditions.<sup>288</sup> The statute provides these three prerequisites must be met before an official is considered to be an officer.<sup>289</sup> Furthermore, the term "employee" is also defined by statute.<sup>290</sup> Only applying *Free Enterprise* to inferior officers would limit the reach of *Free Enterprise* from encompassing many of the officials who potentially would fall within the *per se* rule of *Free Enterprise*.

If this approach is taken, the Court will have to decide if ALJs are employees or officers of the federal government. The plain reading of the statutes in question is not clear on this question. An analysis of the first factor that is required by 5 U.S.C. § 2104 indicates that ALJs do not fall within the statutory definition of an "officer."<sup>291</sup> The provision indicates that for an official to be considered an officer, they must "be appointed in the Civil Service by the President, a United States court, the head of an executive agency, or the Secretary of a military department, acting in an official capacity."<sup>292</sup>

---

<sup>287</sup> 5 U.S.C. § 2104.

<sup>288</sup> The statute specifically excludes from the category of officer an officer of the Postal Service or Postal Rate Commission. 5 U.S.C. § 2104(b). *See also* International Primate Protection League v. Administrators of Tulane Educ. Fund, 500 U.S. 72, 79 (1991) (The Court construed the statutory language of 28 U.S.C. § 1442(a)(1) ("[a]ny officer of the United States or any agency thereof, or person acting under him") to mean an officer of the United States, an officer of any agency, and a person acting under such an officer; thus, the Court held that an agency may not be considered a "person acting under" such an officer).

<sup>289</sup> 5 U.S.C. § 2104 ((1) the law must require that the individual be appointed in the Civil Service by the President, a United States court, the head of an executive agency, or the Secretary of a military department, acting in an official capacity; (2) he or she must be engaged in the performance of a federal function under authority of law or an Executive act; and (3) he or she must be subject to the supervision of an authority listed in paragraph (1), or the Judicial Conference of the United States, while engaged in the performance of his or her official duties).

<sup>290</sup> 5 U.S.C. § 2105 ((1) is appointed in the civil service by certain specified individuals acting in their official capacities; (2) is engaged in the performance of a federal function under authority of law or an Executive act; and (3) is subject to the supervision of an individual listed in (1) while engaged in the performance of his or her duties).

<sup>291</sup> 5 U.S.C. § 2104.

<sup>292</sup> *Id.*

However, members of the Merit Systems Protection Board fall into none of these categories. The members of the Merit Systems Protection Board are not the head of an executive agency. Rather they are the head of an independent agency, and therefore, they do not meet the statutory conditions required by 5 U.S.C. § 2104. Therefore, a plain reading of the statute indicates that ALJs should not be treated as “officers” of the federal government.

Conversely ALJs do not meet the definition of “employees” under the applicable statute either.<sup>293</sup> ALJs are not directly supervised by others in the way that is contemplated by the statute.<sup>294</sup> In fact, the intention of Congress when it enacted the Administrative Procedures Act was to insulate the ALJs from any potential partiality. Therefore, case law determining whether ALJs are “officers” or “employees” will be particularly important.

Four cases are of particular significance to this question of whether ALJs are “inferior officers” or “employees” of the federal government are *Freytag v. Commissioner of Internal Revenue*,<sup>295</sup> *Landry v. FDIC*,<sup>296</sup> *Lucia v. Securities and Exchange Commission*,<sup>297</sup> and *Bandimere v. Securities and Exchange Commission*.<sup>298</sup> These cases provide insight post-*Free Enterprise* whether ALJs fit within the definition of an “officer” or “employee” as defined by Congress.

In *Freytag v. Commissioner of Internal Revenue*, the Court unanimously decided that special trial judges who work under a Chief Judge of the Tax Court to be “inferior officers” within the meaning of the appointments clause.<sup>299</sup> These judges perform many

---

<sup>293</sup> 5 U.S.C. § 2105 ((1) is appointed in the civil service by certain specified individuals acting in their official capacities; (2) is engaged in the performance of a federal function under authority of law or an Executive act; and (3) is subject to the supervision of an individual listed in (1) while engaged in the performance of his or her duties.).

<sup>294</sup> *Id.*

<sup>295</sup> 501 U.S. 868 (1991).

<sup>296</sup> 204 F.3d 1125 (D.C. Cir. 2000).

<sup>297</sup> No. 15-1345 (D.C. Cir. 2016).

<sup>298</sup> No. 15-9586 (10th Cir. 2017).

<sup>299</sup> *Freytag*, 501 U.S. at 882.

of the same functions as Administrative Law Judges.<sup>300</sup> Both are Article I judges. They both are finders of fact. It would seem at first glance that a holding that ALJs are inferior officers would follow from the holding in *Freytag*.

In *Landry v. FDIC*,<sup>301</sup> however, Judge Williams of the United States Court of Appeals for the District of Columbia Circuit distinguished ALJs from the special trial judges in *Freytag*. In the opinion, Judge Williams noted that the special trial judges in *Freytag* could issue final decisions, supporting his conclusion that these judges are “inferior officers.”<sup>302</sup> The difference, wrote Judge Williams, is that ALJs “can never render [a] final decision.”<sup>303</sup> Because ALJs are not issuing a final order, that would be directly appealable, the held that ALJs are “employees,” and not “inferior officers.”<sup>304</sup>

Following its prior decision in *Landry*, In *Lucia v. SEC*, the United States Court of Appeals for the D.C. Circuit again held that ALJ's are not inferior officers and therefore are not subject to the Appointments Clause. Finding the decision in *Landry* indistinguishable Judge Rogers held for the Court that ALJs were not inferior officers because they could not issue final decisions for the agency.<sup>305</sup> The court held that the main criteria for drawing the line between inferior officers and employees are (1) the significance of the matters resolved by the officials, (2) the discretion they exercise in reaching their decisions, and (3) the finality of those decisions.<sup>306</sup> The D.C. Circuit noted that ALJs are not inferior officers, because ALJs do not have delegated power to act independently of the

---

<sup>300</sup> *Id.* at 882–83 (“They take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders.”).

<sup>301</sup> *Landry*, 204 F.3d at 1134.

<sup>302</sup> *Id.* (“In particular, the Court noted that STJs have the authority to render the *final* decision of the Tax Court in declaratory judgment proceedings and in certain small-amount tax cases.”).

<sup>303</sup> *Id.* (Williams further goes on to not that “ALJs must file a *recommended* decision, *recommended* findings of fact, *recommended* conclusions of law, and [a] *proposed* order”).

<sup>304</sup> *Id.* at 1134.

<sup>305</sup> *Lucia*, Slip op at 17–18.

<sup>306</sup> *Id.* at 10.

agency's final decision, nor do they have the power to bind third parties or the government for the public's benefit.<sup>307</sup> The Court additionally found that members of the Commission who are politically accountable make the final determination whether to adopt, reject, or modify the initial decision of the ALJ as evidence that they do not exercise the discretion of a constitutional officer.<sup>308</sup>

By contrast, in *Bandimere v. SEC*, the Court of Appeals for the Tenth Circuit held that ALJs are inferior officers, and thus are subject to the requirements of the Appointments clause.<sup>309</sup> The Court held that ALJs exercise significant discretion in performing important functions similar to the STJ's responsibilities and duties described in *Freytag*.<sup>310</sup> The Court noted that the ALJs have responsibilities which include shaping the record during an administrative proceeding by taking testimony, regulation document production and depositions, ruling on the admissibility of evidence, receiving evidence, ruling on dispositive and procedural motions, issuing subpoenas and presiding over trial-like hearings.<sup>311</sup> When the ALJs make credibility findings based upon the record after a hearing, the agency affords considerable weight during the review of the ALJ's recommended decision.<sup>312</sup> In sum, the Court found that because ALJs closely resemble the STJs described in *Freytag*, they are inferior officers, rather than employees who must be appointed consistent with the Appointments Clause.<sup>313</sup>

*Freytag* is inapplicable to ALJs because the tax judges in *Freytag* could issue findings of fact and conclusions of law that were binding and non-reviewable.<sup>314</sup> The *Landry-Lucia* line of cases is well-reasoned in their findings that ALJs are employees rather than inferior officers, because ALJs cannot bind the agencies' final decision and are subject to review.<sup>315</sup> Following the D.C. Circuit's

---

<sup>307</sup> *Id.* at 13.

<sup>308</sup> *Id.* at 13.

<sup>309</sup> *Bandimere*, Slip op at 17.

<sup>310</sup> *Id.* at 19.

<sup>311</sup> *Id.* at 19–20.

<sup>312</sup> *Id.* at 20.

<sup>313</sup> *Id.* at 22.

<sup>314</sup> *Id.* at 13.

<sup>315</sup> *Lucia* Slip op at 15.



holding in *Landry* and *Lucia* that ALJ's are not inferior officers would limit the potentially wide ranging application of *Free Enterprise* to proceedings that make use of an ALJ, and would disfavor the use of the decision as a procedural weapon to an aggrieved litigant. There is a marked difference between issuing binding final orders that functions like judgments, and proposed findings of fact. Binding final orders are a final agency action, that are not subject any further review within the administrative agency.<sup>316</sup> Furthermore, if Congress wished to give binding authority to the ALJ, it could explicitly do so by the act granting the ALJ jurisdiction to hear the case. Proposed findings of fact by contrast are made by an ALJ, which are advisory in nature, and can be disregarded by the agency head.<sup>317</sup> Proposed findings require an aggrieved party to continue moving forward before final agency action exists, appealing the decision of the ALJ to an agency head.<sup>318</sup> Because the agency action under consideration when dealing with a "binding final order" is a final agency action, and would not require further process inside the agency, the STJ's actions fulfill the APA's finality requirement. Classifying ALJs, who never perform a final agency action, as "employees" rather than "officers," is a logical way to distinguish the PCAOB from ALJs, because there are further steps that are required for a final agency action to be made, and exhaustion of administrative remedies has not been had. The D.C. Circuit, when

---

<sup>316</sup> See Administrative Procedure Act, 5 U.S.C. § 704 ("[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority).

<sup>317</sup> See discussion *supra* note 287. The action of administrative law judges would fall into the category of "a preliminary . . . agency action or ruling not directly reviewable." *Id.*

<sup>318</sup> See Jason Fowler, *Finality: What Constitutes Final Agency Action? The Practical Implications of the D.C. Circuit's Ruling in Reliable Automatic Sprinkler Co. v. Consumer Product Safety Commission*, 24 J. NAALJ 311, 311 (2004) (discussion requirement of finality before obtaining judicial review of an agency decision).

presented with a litigant challenging the constitutionality of the proceeding brought against him which employed an ALJ to hear the matter, rightly abstained from issuing an order that unnecessarily raised an issue of constitutional import.<sup>319</sup>

In addition to the decisional law addressing this question, the Office of Personal Management treats ALJs as “employees” in determination of their pay scale.<sup>320</sup> In enacting 5 U.S.C. 5541(2), a statute that deals with the pay scale for ALJs, Congress explicitly stated ALJs are considered “employees” rather than “inferior officers.”<sup>321</sup> This further indicates that Congress has intended ALJs to fall within the definition of “employee” as described in 5 U.S.C. § 2105, rather than being an “officer” as defined in 5 U.S.C. § 2104.

*C. Free Enterprise Only Applies to Officials Who Perform “Quasi-Legislative” and “Quasi-Executive” Functions, Not to Officials Who Solely Perform “Quasi-Judicial” Functions*

Alternatively, *Free Enterprise Fund* can be read to only include those agencies that perform “quasi-legislative” and “quasi-executive” functions, rather than officials who solely perform “quasi-judicial” functions.<sup>322</sup> Administrative Law Judges fall into this latter category.

The functions that the Public Company Accounting Oversight Board performs allows for this distinction to be drawn. The Board was created with the intention that it would promulgate standards for accounting practices and prosecute actions against those who violated the accounting standards it had promulgated, thereby rendering its function fundamentally executive in nature.<sup>323</sup> This is very different

---

<sup>319</sup> *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (“The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.”).

<sup>320</sup> *Administrative Law Judge Pay System*, U.S. OFFICE OF PERSONNEL MANAGEMENT, available at <http://www.opm.gov/oca/pay/html/ALJ-PaySystem.asp>.

<sup>321</sup> See 5 U.S.C. § 5541(2).

<sup>322</sup> *Id.* at 891. (The Court draws a distinction in *Freytag* that “the tax court exercises judicial power to the exclusion of any other function. It is neither advocate nor rule maker”).

<sup>323</sup> See Sarbanes-Oxley Act, 15 U.S.C. § 7211(c)(1)-(7)(2006).

from the function that ALJs perform who solely to adjudicate and find facts, and act as judges writing advisory opinions. Since the Court in *Free Enterprise* has implicitly adopted a formal interpretive methodology a future Court will ask “what is the nature of the power being exercised?” Applying a formal interpretive methodology, we can see that ALJs perform “quasi-judicial functions” whereas the Board in *Free Enterprise* performed functions that are “quasi-executive” and “quasi-legislative.”

The Court’s decision in *Weiner* also lends support for distinguishing ALJs from the PCAOB in this manner. *Wiener* states that officials who solely adjudicate cases, like those in the War Claims Commission may be insulated by removal restrictions.<sup>324</sup> Applying a formal interpretive methodology as required by *Free Enterprise*, it follows that ALJs exercise “quasi-judicial” powers, since they only adjudicate cases, and therefore are not within the scope of *Free Enterprise*, with the function they are performing falling entirely within the scope of being “quasi-judicial in nature.”

Support for distinguishing those who perform “quasi-legislative” and “quasi-executive” functions from those who solely perform “quasi-judicial” functions can be found in Congress’ enactment of the APA.<sup>325</sup> The APA supports the separation-of-functions principle whereby those who adjudicate cases in agencies are to be insulated from those who perform administrative rulemaking and bring enforcement actions.<sup>326</sup> The APA provides that employee who “preside at the reception of evidence . . . may not (1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or (2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for the agency.”<sup>327</sup> This provision of the APA specifically attempts to insulate ALJs from influences that may prejudice a case. Under the statutory scheme of the APA those who solely perform “quasi-judicial” functions were intended to be treated differently from those engaged in rulemaking and enforcement actions.

---

<sup>324</sup> See *supra* Part II(D)(i).

<sup>325</sup> See Administrative Procedures Act, 5 U.S.C. § 554(d).

<sup>326</sup> *Id.* §§ 554, 556–557.

<sup>327</sup> *Id.*

Furthermore, separation of functions is a permissible way of preventing the same type of tyranny which separation of powers was devised to prevent.<sup>328</sup> The very purpose behind the separation of powers imbued within the United States Constitution is that one employee will not be collectively exercising the power to create, exercise and adjudicate the laws. There is a very strong functional argument for permitting ALJs to continue in their present manner so long as they do not exercise any power beyond that of adjudicating cases. It would be impossible for a President's power to be impaired when the President was not granted "quasi-judicial" power in the first place for adjudicating the very matters that are being heard by ALJs.

Adopting this reading of *Free Enterprise* would allow ALJs to be distinguished from the Board members wielding prosecutorial functions in *Free Enterprise*. This reading would also support the idea of separation of functions in administrative agencies.

## V. CONCLUSION

Any discussion of the President's removal power must begin with the Decision of 1789. From this congressional debate, Justice Taft in *Myers* articulated the position that a power of removal emanates from the language of Article II of the United States Constitution. Justice Brandeis in dissent challenged Taft's position and claims that the Decision of 1789 did not decide any question of the President's removal power definitively.

*Myers* and *Humphrey's Executor* set the modern legal analytical framework for the President's removal power. The current understanding from *Myers* is that there are certain purely "executive" officials who must be removable at the will of the President in order that he may carry out his duties pursuant to Article II. The Court in *Humphrey's* permitted for-cause tenure protections for those agencies that perform "quasi-legislative" and "quasi-judicial" functions. The holding of *Humphrey's Executor* confirmed the constitutionality of independent-regulatory agencies.

Affirming the holding of *Humphrey's*, the Court explicitly held in *Weiner* that tenure protections may be extended to agencies which adjudicate cases. Civil service protection is particularly important

---

<sup>328</sup> Jacob Gersen, *Unbundled Powers*, 96 VA. L. REV. 301, 332 (2010).

with officials who adjudicate cases, because any stain of partiality must not be permitted to exist. This is the same reasoning for insulating the Article III judiciary from the political process.

The *Bowsher* and *Morrison* Courts both examine the question of what the proper interpretive methodology to apply in situations where Congress has regulated the President's removal power should be. *Bowsher* applies a formal interpretive methodology. This interpretive methodology asks whether a particular branch is exercising a "legislative," "executive," or "judicial" power. By contrast in *Morrison*, the Court explicitly adopted a functional approach asking whether Congress has impermissibly undermined the President in his ability to carry out his Article II duties and powers.

The latest decision to address the removal power—*Free Enterprise Fund*—is a troubling decision. The Court implicitly rejected its functional interpretive methodology as applied in *Morrison*. The Court has attempted to create a *per se* rule which prohibits dual-for cause removal restrictions in federal administrative agencies.

The problem with this *per se* rule, as Justice Breyer noted, is that it has the potential to disrupt the orderly administration of justice in the federal government. Administrative Law Judges, the impartial hears of cases in administrative agencies, such as the Social Security Administration, could fall within the scope of the Court's *per se* rule. This would give any aggrieved party present right to challenge an adverse ruling in federal district court. The potentially troubling application can only be prevented if *Free Enterprise* is read in a narrow fashion.

Therefore, *Free Enterprise* should be read narrowly to prevent Administrative Law Judges from coming within the scope of the Court's *per se* rule. This comment has suggested ways to distinguish Administrative Law Judges so that *Free Enterprise* may not apply to them.

## V. APPENDIX

The following is a list of administrative agencies that employ Administrative Law Judges in the making of factual determinations.<sup>329</sup>

FEDERAL ADMINISTRATIVE LAW JUDGES				
By Agency and Level				
<i>CDFE Status Report as of December 2009.</i>				
AGENCY	AL-3	AL-2	AL-1	Total Number ALJs on Board
Commodity Futures Trading Commission	2	0	0	2
Department of Agriculture	2	2	0	4
Department of Education	1	0	0	1
Department of Health and Human Services/Departmental Appeals Board	7	0	0	7
Department of Health and Human Services/Food and Drug Administration	1	0	0	1
Department of Health and Human Services/Office of Medicare Hearings and Appeals	61	4	0	65
Department of Homeland Security/United States Coast Guard	5	0	1	6
Department of Housing and Urban Development	2	0	0	2
Department of the Interior	8	1	0	9
Department of Justice/Drug Enforcement Administration	3	0	0	3
Department of Justice/Executive Office for Immigration Review	1	0	0	1
Department of Labor	34	9	1	44
Department of Transportation/Office of the Secretary	2	1	0	3
Environmental Protection Agency	3	1	0	4
Federal Communications Commission	1	0	0	1
Federal Energy Regulatory Commission	12	1	1	14
Federal Labor Relations Authority	2	1	0	3
Federal Maritime Commission	1	0	0	1
Federal Mine Safety and Health Review Commission	10	1	0	11
Federal Trade Commission	1	0	0	1
International Trade Commission	6	0	0	6
Merit Systems Protection Board	0	0	0	0
National Labor Relations Board	34	4	1	39
National Transportation Safety Board	4	0	0	4
Occupational Safety and Health Review Commission	11	0	1	12
Office of Financial Institution Adjudication	1	0	0	1
Securities and Exchange Commission	3	1	0	4
Small Business Administration	0	0	0	0
Social Security Administration	1,323	10	1	1,334
United States Postal Service	1	0	0	1
<b>TOTAL</b>	<b>1,542</b>	<b>36</b>	<b>6</b>	<b>1,584</b>

<sup>329</sup> *Judge's Corner*, EBA UPDATE, Energy Bar Association at 9, available at <http://eba-net.org/docs/newsletters/Fall2010Newsletter.pdf>.