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

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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."[1] Curiously enough, however, the Framers did not include a specific provision stating how removal of officials would occur. The Framers, however, did provide Congress in Article I with a great amount of power through the Necessary and Proper Clause. Through the use of this power, Congress has a great amount of discretion in structuring the federal government. The perennial issue that exists is discerning the line between Congress properly structuring the federal government, and impermissibly interfering with the President's ability to carry out the offices' constitutionally assigned functions.

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?"[2] This is to be contrasted with a formalistic analysis, which asks whether a particular branch is exercising a "legislative," "judicial," or "executive" power.[3] Further provided is a *per se* rule that Congress may not take for itself a direct role in deciding when an official is dismissed from office.

Against this interpretive backdrop, constitutional practice has granted Congress powers to enact laws that create for-cause limitations on an official's removal, which were affirmed by the Supreme

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[1] U.S. CONST. art. II, § 2, cl. 2.

[2] Free Enterprise Fund v. Public Company Accounting Oversight Board, 08-861 at 11 (2010) (Breyer, J., dissenting).

[3] Bowsher v. Synar, 478 U.S. 714, 731 (1986).

Court in the early 20th century. The two seminal cases describing the extent of the President's removal power in the 20th century are *Myers v. United States,*[4] and *Humphrey's Executor v. United States.*[5] In *Myers*, the Supreme Court held that principal officers who perform "executive" functions are beyond the scope of congressional regulation. In *Humphrey's Executor*, the Supreme Court permitted for-cause removal restrictions on principal officers, whose functions are "quasi-legislative," or "quasi-judicial."

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"). After the accounting scandals following the collapse of Enron and WorldCom, Congress created the PCAOB to "audit the auditors." Congress, in creating this Board, decided that the Board should be insulated from any potentially corrupting influences. The Board was created within the structure of the Securities and Exchange Commission—which has commissioners who are only removable for cause—and made the members of the Board removable only for-cause. This in effect created a dual for-cause removal restriction, a situation never 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.

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 known as Administrative Law Judges ("ALJs"). These ALJs number over 1,500 in number, and adjudicate cases in over 25 agencies. If *Free Enterprise* applies to these ALJs, any party who has an adverse adjudication presided over by an ALJ will have a here and now claim to assert that the adjudication is unconstitutional. The potential for disruption engendered by *Free Enterprise* is great indeed.

Due to the potential disruptive nature of *Free Enterprise* if applied to ALJs, this Comment will suggest three potential readings of the case that distinguish ALJs from the Board. This Comment will

[4] 47 S.Ct. 21 (1926).
[5] 295 U.S. 602 (1935).

argue the dual for-cause prohibition only applies to extraordinarily protective restrictions on removal, such as those specifically 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." The final argument which this Comment will make is, 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, which was employed by Chief Justice Roberts in the majority opinion to reach its decision in *Free Enterprise*, and will then proceed to look at Justice Breyer's dissent. Section IV will suggest readings for *Free Enterprise Fund*, and will specifically discuss the problems which are associated with applying *Free Enterprise* to Administrative Law Judges.

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 proceed to 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 20th 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."[6] The members of the House considered the removal of executive officers within the context of a bill, which would create the Department of Foreign Affairs.[7] After this debate Congress created three departments.[8] None of the acts, which created these departments spoke directly of a Presidential removal power.[9] Rather, these acts only "discussed who would have custody of department papers when the President removed a secretary."[10] This debate, known as the "Decision of 1789," helped to establish the proposition that the President has a constitutionally granted power of removal. It did not stand for the proposition that that power is beyond regulation by Congress.[11]

In the course of these debates, four principal theories related to the President's removal authority were articulated.[12] 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

[6] *See* Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021, 1021 (2006).
[7] *Id.*
[8] *Id.* at 1023 (after the "Decision of 1789" Congress created the Departments of Foreign Affairs, Treasury, and War).
[9] *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").
[10] *See* Prakash, *supra* note 6, at 1023.
[11] *See Id*. at 1071. *See also Myers v. United States*, 47 S.Ct. 21, 82 n.75 (1926) (Brandeis, J., dissenting).
[12] *See* Prakash, *supra* note 6, 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*, 47 S.Ct. at 28.

theorists"), and those who believed that the President had the power to remove which emanated from the Constitution itself under the text of Article II ("executive-power theorists").[13]

Two competing viewpoints have emerged about the significance of the debate between the congressional-delegation theorists and the executive-power theorists.[14] The view accepted by those who agree with Chief Justice Taft's reading of the Decision, 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."[15] 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."[16] 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 President arguably assumed that the President had a preexisting, constitutionally based removal power."[17]

Opposed to this viewpoint has been the camp represented by Justice Brandeis.[18] 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]."[19] Adherents of the Brandeis camp such as David Currie have written "there was no consensus as to whether [the President] got that [removal] authority from Congress or the Constitution itself."[20] Currie makes the case that "proponents of Article II power

[13] *See* Prakash, *supra* note 6, at 1023.
[14] *Compare Myers v. United States*, 47 S.Ct. 21, 24 (1926) with *Id*. at 82 n.75 (Brandeis, J., dissenting) (debate between Justices Taft and Brandeis over the significance of the "Decision of 1789").
[15] *See* Prakash, *supra* 6, at 1021. *See also Myers*, 47 S.Ct. at 24.
[16] *See* Prakash, *supra* 6, at 1023. *See also* Brief of Petitioner at 28, *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 08-861 (2010).
[17] *See* Prakash, *supra* 6, at 1033. See also *Myers,* 47 S.Ct. at 24.
[18] *See Id.* at 82 n.75 (Brandeis, J., dissenting).
[19] *See Id*.
[20] David P. Currie, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789-1801, 41 (1997).

prevailed only because they were joined by a substantial number of members who had opposed presidential removal altogether."[21]

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."[22] Private letters tend to support the proposition that the President has an *inherent power*, which derives from the text of Article II.[23] Numerous letters authored by James Madison declared that, "the House had endorsed the executive-power theory."[24] Support of a constitutionally derived presidential removal power is also found in contemporary newspapers from the time period.[25] 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.'"[26]

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, "could Congress, by statute, limit or eliminate the Constitution's grant of removal authority?"[27] Scholars and jurists have

[21] Currie, *supra* note 20, at 41.
[22] *See* Prakash, *supra* 6, at 1062.
[23] *Id.* at 1064 (emphasis added).
[24] *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'").
[25] *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'").
[26] *Id.*
[27] *Id*. at 1071.

argued that the Decision of 1789 left this question open.[28] 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.[29] One can have a default removal power, which still can be regulated by Congress.[30] 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."[31] The 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*. 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.[32]

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*.[33] In the case, the Court affirmed Congress' power to regulate the

[28] *See* Prakash, *supra* note 6, at *1071. See also Id.* (discussion that Justices McReynolds, Brandeis, and Corwin believed, "that the Decision of 1789 left this question [unresolved]").
[29] *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*, 47 S.Ct. 21, 24 (1926) (it is possible to read Justice Taft as only referring to situations where Congress is exercising discretion in deciding when to fire individuals).
[30] *See* Prakash, *supra* note 6, 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.").
[31] *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).
[32] *See also* Brief of Petitioner at 28, *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 08-861 (2010).
[33] 116 U.S. 483 (1886).

President's removal power, when dealing with inferior officers. Congress exercised its power when it passed a law that stated that, "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."[34] On June 26, 1883, Perkins "received a letter from the Secretary of the Navy giving him notice that, as he was not required to fill any vacancy in the naval service happening during the preceding year, he was thereby honorably discharged, from the thirtieth of June, 1883."[35] As a result, Perkins sued for his $100 salary as a cadet engineer of the navy, "regarding himself as continuing in the service."[36]

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?"[37]

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."*[38] The Court went onto state, "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."[39]

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

[34] *Id.* at 483.
[35] *Id.*
[36] *Id.*
[37] *Id.* at 484.
[38] *Id.* at 485 (emphasis added).
[39] *Perkins, 116* U.S. at *485.*

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."[40]

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 19th century case affirms congressional power to place removal restrictions on inferior officers, pursuant to the Necessary and Proper Clause.

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*[41] and *Shurtleff v. United States,*[42] however, instruct that if the power to remove is to be made conditional, the limitation must be done explicitly and without ambiguity.

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[40] *Id.*

[41] 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, which 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 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 saying 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.

[42] 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.

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

The 20th century saw a dramatic shift in the role of the American Presidency.[43] The 20th 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.[44] Chief Justice Taft adopts this theory of the Presidency, in the first major case of the 20th century discussing the limits of the Congress's power to regulate principal officers, *Myers v. United States*.[45] Opposed to the unitary executive theorists are those who support the idea that Congress may create independent regulatory commissions, whose principal officers can be protected by removal restrictions limiting the President's discretion to fire; a model which was affirmed in *Humphrey's Executor*.

i. *Myers v. United States*

In *Myers*, the court crystallized the controlling question as, "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."[46] 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."[47] The case arose because "the Senate did not consent to the President's removal of Myers during his term."[48]

[43] *See* Michael Genovese, THE POWER OF THE AMERICAN PRESIDENCY: 1789-2000, 130 ("FDR is credited with creating the 'modern presidency.' Roosevelt transformed the presidency from a rather small, personalized office, into a massive institution.").
[44] *But see* Lawrence Lessig & Cass Sunstien, *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.").
[45] 47 S.Ct. 21 (1926).
[46] *Id*. at 22 (emphasis added).
[47] *Id.* (emphasis added).
[48] *Id.*

On January 20th, 1920, Myers was asked to resign.[49] He refused this demand, and was subsequently removed on February 2, 1920, by the Postmaster General, acting upon the direction of the President.[50] Myers first brought a suit for back pay before the Court of Claims. This claim was denied.

Chief Justice Taft, writing for the majority of the Supreme Court, affirmed the Court of Claims decision, dismissing Myer's claim.[51] In the majority opinion, Justice Taft concluded that Congress is precluded from regulating the President's removal power when it comes to principal officers exercising executive functions.[52] Taft read the Decision of 1789 as supporting a removal power that emanated from Article II itself. He further stated that this understanding was essentially not debated from 1789 to 1863. Taft stated that for "a period of 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 there was, [a] clear, affirmative recognition of [the removal power] by each branch of the government."[53] As has been demonstrated, this reasoning is open to disagreement.[54] 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 Congress sought to inject its own advice and consent into the firing of a principal executive officer.[55] 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.[56]

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.[57] A

[49] *Id*. at *22*.
[50] *Id*. at 22.
[51] *Myers*, 47 S.Ct. at 46.
[52] *Id.* at 30.
[53] *Id.* at 41.
[54] *See* discussion *supra* section II (A).
[55] *Myers*, 47 S.Ct. at 41 ("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.).
[56] *Id.* at 42.
[57] *Id*. at. 30.

dictum in Taft's majority opinion, however, makes an explicit distinction as to offices that are of a "quasi-judicial nature."[58] This language is greatly expounded upon in the Supreme Court's decision in *Humphrey's Executor*, which speaks of certain positions that are "quasi-legislative" and "quasi-judicial" in nature, which are within the scope of Congress' power to regulate.[59]

Writing in dissent, Justice McReynolds sharply criticized Taft's approach prohibiting congressional regulation of the President's removal power. 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."[60] McReynolds observed the obvious problem of allowing the President to dismiss any subordinate at his own whim. He reflected upon the, "serious evils [that] followed the practice of dismissing civil officers as caprice or interest dictated, long permitted under congressional enactments."[61] Echoing the spirit of the times, he wrote that these types of discretionary firings by the President have, "brought the public service to a low estate and caused insistent demand for reform."[62] Taking issue with Taft's assertion that the President can remove at whim, McReynolds wrote that, "Congress has consistently asserted its power to proscribe conditions concerning removal of inferior officers."[63]

Accepting many of Justice McReynold's points, but writing separately, Justice Brandeis attacked Taft's position. Brandeis specifically agreed with 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."[64] Brandeis strenuously argued that "the

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[58] *See Id*. at 31 ("There may be duties of a quasi-judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President can not in a particular case properly influence or control.").
[59] *See* discussion *infra* Section II(B)(ii).
[60] *Myers*, 47 S.Ct. at 46 (MacReynolds, J., dissenting).
[61] *Id.*
[62] *Id.*
[63] *Id.* at 49 (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).
[64] *Id.* at 67-68 (Brandeis, J., dissenting).

legislature is naturally competent to prescribe the tenure of office."[65] Underlying this understanding of congressional competence is a broad reading of the Necessary and Proper Clause.[66] 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."[67] Rather, "it was because the spoils system held sway."[68] Brandeis argued that the majorities' holding has the effect of undercutting the protections that were afforded by civil service reform.

In reading *Myers*, one must not forget that massive transformations that were occurring during the time period the opinion was written. Views about the patronage system, and what the proper role of the civil service system should be, were in flux.[69] This decision can be read as a backlash against the progressive era of reform that characterized American governance at the turn of the century. The decision should also be read in the legal and historical context in which it was written; during a time period when economic substantive due process carried the day, and before the revolution in the role of the federal government after the New Deal. This was an era when *Lochner* was still good law, and the decision must not be read to the exclusion of this fact. *Myers* must be read cautiously because it may stand for the Court's imposition of its own views regarding progressive legislation—an assertion that is supported by the Court's *Lochner* era jurisprudence.[70]

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[65] *Id.* at 68 n.7.
[66] *Myers*, 47 S.Ct. at 86 n.7 (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.").
[67] *Id.* at 81.
[68] *Id.*
[69] *Id.* at 44 ("Reform in the federal civil service was begun by the Civil Service Act of 1883.").
[70] *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).

Furthermore, as described above, if cut back to its facts, this case has an alternative reading that is narrower, than that traditionally attributed to it. *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.[71] 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*"[72] serves to distinguish what Congress was attempting to do. The case may have an alternative reading that 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 the Supreme Court was forced to turn away from economic due process as declared in *Lochner*. Along with these changes in the scope of federal regulation, came the development of independent regulatory agencies. Starting with the Interstate Commerce Commission,[73] and increasingly in the 1930's, Congress began enacting statutes that created a host of independent agencies; whose principal officers were insulated from discretionary firing of the President.[74] The great question with these agencies was whether Congress could insulate them 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 agencies in *Humphrey's Executor v. United States*.[75]

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[71] Myers, 47 S.Ct. at 46 (MacReynolds, J., dissenting).
[72] *Id.*
[73] National Archives, Records of the Interstate Commerce Commission, *available at* http://www.archives.gov/research/guide-fed-records/groups/134.html#134.1.
[74] *See* the Acts creating the United States Employee's Compensation Comission (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).
[75] 295 U.S. 602 (1935).

ii. *Humphrey's Executor v. United States*

The facts of *Humphrey's* are decidedly simple. Humphrey, "on December 10, 1931, was nominated by President Hoover to succeed himself as a member of the Federal Trade Commission, and was confirmed by the United States Senate."[76] Humphrey was commissioned for a term of seven years expiring September 25th, 1938.[77] On the day of "July 25th 1933, President Roosevelt addressed a letter to the commissioner asking for his resignation, on the ground that 'the aims and purposes of the Administration with respect to the work of the Commission can be carried out most effectively with personnel of my own selection.'"[78] After some, "further correspondence upon the subject, the President on August 31, 1933, wrote the commissioner expressing the hope that the resignation would be forth coming."[79] The commissioner "declined to resign;" and on October 7th, 1933 the President fired Humphrey.[80] Humphrey then "brought suit in the Court of Claims against the United States to recover a sum of money alleged to be due the deceased for salary as a Federal Trade Commissioner."[81]

Justice Sutherland writing for a unanimous court granted Humphrey's claim.[82] 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.[83] Picking up on the language of Taft,[84] Sutherland wrote that certain principal officers who perform "quasi-legislative" and "quasi-judicial" functions are beyond the unfettered control of the President's removal power, and as a consequence are within the scope of congressional tenure limitations.[85] Sutherland wrote that these officers perform functions which require insulation from "political

[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.* at 619.
[80] *Id.*
[81] *Humphrey's Executor*, 295 U.S. at 618.
[82] *Id.* at 632.
[83] *Id.* at 628.
[84] *Myers v. United States*, 47 S.Ct. 21, 31 (1926) (describing some offices which are essentially "quasi-judicial" in nature).
[85] *Humphrey's Executor*, 295 U.S. at 629.

domination or control or the probability or possibility of such a thing."[86] The opinion is rather sparse, as compared to its predecessor of nine years, but express support for the growth of independent regulatory agencies.[87]

Humphrey's Executor has been criticized as a blatantly political opinion. The critics argue that the motivation behind the opinion was a judicial backlash against the growing power of the Presidency under Franklin Roosevelt. 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*. Furthermore, if the Congress believes that independent regulatory commissions are not functioning as intended, Congress can always rewrite the statute which prevents presidential removal, as a safeguard of preventing these agencies from drifting away.

The twin seminal cases of *Myers* and *Humphrey's Executor* set the legal analytical 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 regulation. *Humphrey's Executor* instructs that principal officers who perform functions that are "quasi-legislative" or "quasi-judicial" in nature 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.

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

i. *Wiener v. United States*

Further illustrating the frame work that was laid by the Supreme Court in *Myers* and *Humphrey's Executor* is *Wiener v. United States*.[88] The case was brought to collect on back pay, due to the alleged

[86] *Id.* at 625.
[87] *Id.* at 628.
[88] 357 U.S. 349 (1958).

illegal removal of Wiener as a member of the War Claims Commission.[89] After World War II, Congress established the "Commission with 'jurisdiction to receive and adjudicate according to law,' claims for compensating internees, prisoners of war, and religious organizations, who suffered personal injury or property damage at the hands of the enemy in connection with World War II."[90] The Commission was to "wind up its affairs not later than three years after the expiration of the time for filing claims" which ended up being March 31, 1952.[91] This limitation on the Commission's life was the "mode by which the tenure of the Commissioners was defined, and Congress made not provision for removal of a Commissioner."[92] Weiner was nominated by President Truman, and confirmed on June 2, 1950.[93] Upon a refusal to "heed a request for his resignation, he was, on December 10, 1953, removed by President Eisenhower."[94] Wiener petitioned for "recovery of his salary as a War Claims Commissioner from . . . the day of his removal by the President to . . . the last day of the Commission's existence."[95]

Justice Frankfurter, writing for the majority, affirmed the holding of *Humphrey's Executor*.[96] 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."[97] 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."[98]

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[89] *Id.* at 350.
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Weiner*, 357 U.S. at 350.
[95] *Id.* at 351.
[96] *Id.* at 353.
[97] *Id.*
[98] *Id.*

To reach its conclusion that Wiener was not removable at the discretion of the President, the Court adopted a formal interpretive methodology, and asks 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?"[99] Up to this point, the Supreme Court had been applying a formal analysis in removal cases. Applying this analytical 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.[100]

ii. *Bowsher v. Synar*

The question of the President's removal power did not reappear for a number of years after *Weiner*. It arose again under the facts of *Bowsher v. Synar*.[101] 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."[102]

The Act in question, popularly known as the "Gramm-Rudman-Hollings Act," sought to "eliminate the federal budget deficit."[103] The constitutional issue arose due to a conjunction of the Comptroller performing "executive functions,"[104] and a provision which allowed Congress to remove the Comptroller general for "permanent disability," "inefficiency," "neglect of duty," "malfeasance," or "a felony or conduct involving moral turpitude."[105] The Supreme Court affirmed the District Court's

[99] *Id.*
[100] *Wiener*, 295 U.S. at 355.
[101] 478 U.S. 714 (1986).
[102] *Id.* at 717.
[103] *Id.*
[104] *Id.* at 734.
[105] *Id.* at 728.

decision, which held that "that the role of the Comptroller General in the deficit reduction process violated the constitutionally imposed separation of powers."[106] The Court held that "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." [107]

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."[108] 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."[109]

The Court held that in essence, "by placing the responsibility for execution of the Act in the hands of an officer who is subject to removal only by itself, Congress in effect has retained control over the Act's execution and has unconstitutionally intruded into the executive function."[110] Berger stated that once "Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly—by passing new legislation."[111]

In adopting its conclusion, the *Bowsher* majority employed a formalistic analysis to the separation of powers.[112] Since Congress in essence had taken to itself the ability to remove an official who was performing executive duties, it seems that the act is a gross violation of the separation of powers principle, if one is to apply a formal interpretative methodology. Congress may not take for itself an active role in deciding when an official is terminated, under this standard.

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[106] *Id.* at 720.
[107] *Bowsher,* 478 U.S. at 733 (emphasis added).
[108] *Id.* at 722.
[109] *Id.*
[110] *Id.* at 734.
[111] *Id.* at 733-34.
[112] *See Id*. at 731 ("In the long term, structural protections against the abuse of power were critical to preserving liberty.").

Critiques of this approach—which rigidly distinguishes between "executive," "legislative," and "judicial" power—are voiced in Justice White's dissent.[113] The major problem that White has with Berger's 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."[114] This is the question that a functionalist would ask when conducting any separation of powers analysis. White quoted from *Youngstown Sheet & Tube Co*. v. *Sawyer* that "the actual art of 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."[115] The Constitution "diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government."[116]

White spoke of the major changes that have occurred in the federal government since the time that *Myers* and *Humphrey's Executor* were decided.[117] 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."[118] 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

[113] *Bowsher*, 478 U.S. 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.").
[114] *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.").
[115] *Id.* (citing to *Youngstown Sheet & Tube Co*. v. *Sawyer,* 343 U.S. 579, 635 (1952)).
[116] *Id.*
[117] *Id*.
[118] *Id*. at 761.

wholly dependent upon the President."[119] Instead of applying the formalistic approach of the majority, White would set the test for separation of powers analysis as "focus[ing] on the extent to which such a limitation prevents the Executive Branch from accomplishing its constitutionally assigned functions."[120] These is a balancing test—as compared to a formalistic *per se* rule that Congress cannot take upon itself the execution of the laws.[121] Applying this balancing test, White found that the powers that are 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.[122]

Bowsher is important for the overall common law development of the President's removal power, because of its manifestation of the tension between the formalistic approach of Berger's majority opinion, and the functional approach advocated by Justice White. The Court in *Myers*, *Humphrey's Executor*, and *Wiener* applied a formal separation of powers analysis. The question in these cases was about 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 White would adopt in *Bowsher* does not find its source in precedent from the prior removal cases. White's approach does however reflect the untidiness of separation of powers analysis in the post-*Lochner* and *Wickard* era.[123]

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[119] *Bowsher*, 478 U.S. at 761-62.

[120] *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.")

[121] *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)).

[122] *Id*. at 763.

[123] 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).

iii. *Morrison v. Olson*

In *Morrison v. Olson*,[124] the Supreme Court in an eight-to-one decision adopted Justice White's functional approach to the President's removal power. At issue in *Morrison*, were the "independent counsel provisions of the Ethics in Government Act of 1978."[125] 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."[126] Congress passed the Act in response to the abuses of the Nixon Administration.[127] 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."[128]

This was a new situation, because previously, the limitations on removal had related to "the character of the office."[129] This limitation was being placed on an agent who performed a "core executive function"—that of prosecution.[130] However, writing for the majority Chief Justice Rehnquist discarded the formalist analytical framework. Instead of applying the formalist analysis which was used 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.'"[131] Instead, the Court held that the Executive Branch had "sufficient control over the independent counsel

[124] 487 U.S. 654 (1988).
[125] *Id.* at 659.
[126] *Id.* at 660.
[127] Mark Stencel, *The Reforms: Watergate at 25*, THE WASHINGTON POST, June 13, 1997, available at http://www.washingtonpost.com/wp-srv/national/longterm/watergate/legacy.htm
[128] *Morrison*, 487 U.S. at 663.
[129] *Id.* at 687 (indicating that the court was rejecting its former formalistic analytical framework).
[130] *Id.* at 689.
[131] *Id.* at 695.

to ensure that the President is able to perform his constitutionally assigned duties."[132] The analytical framework that is taken from *Morrison* indicates that "the real question is whether the removal restrictions 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."[133] 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."[134]

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."[135] 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.'"[136] The problem with the majority approach according to Scalia is that the President is no longer the sole repository of *all* executive power.[137] Rather, Scalia argued "there are now no lines."[138] 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."[139]

The decision indeed shifted 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 abuses of President Nixon. Congress, by passing

[132] *Id.* at 696.
[133] *Id.* at 691.
[134] *Morrison*, 487 U.S. at 687.
[135] *Id.* at 724.
[136] *Id.* at 725.
[137] *Id.* at 726.
[138] *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.").
[139] *Id.* at 727.

the Ethics in Government Act, was attempting to limit potential abuses in government. 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 its established powers of impeachment and conviction," provide more direct guidance to Congress about what it can and cannot legislate. They do not, however, reflect the current blending of powers in the modern administrative state. Since the revolution in the role of the federal government following the Great Depression and New Deal, current understandings permit Congress to push the outer limits of the Necessary and Proper Clause. In order to accommodate these realities, the Court is prone to accept a balancing test, with a *per se* rule that Congress may not directly participate in the removal of individual officials.

What than is the current state of law regarding the President's removal power if one were to ignore *Free Enterprise Fund*? A few principles can be distilled from this 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. The second principle, which is established by the case law, is that Congress has power to regulate this removal power pursuant to the Necessary and Proper Clause. The third is a rule that Congress may limit removal, but is prevented from direct participation in the removal of specific individuals. *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. The final principle is the tension between formalist views of separation of powers, as seen in *Myers*, *Humphrey's*, and *Bowsher*, and the functional approach applied in *Morrison*. 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 which will be placed upon Congress in enacting laws pursuant to the Necessary and Proper Clause.

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 of 2002 (Act)."[140] One of the specific industries targeted by the Act was the accounting industry.[141] To accomplish this regulation, Congress in enacting Sarbanes-Oxley created the Public Company Accounting Oversight Board (PCAOB).[142] The PCAOB is "composed of five members, appointed to staggered 5-year terms by the Securities and Exchange Commission."[143] The Board was "modeled on private self-regulatory organizations in the securities industry—such as the New York Stock Exchange—that investigate and discipline their own members subject to Commission oversight."[144] Accounting firms, which participate "in auditing public companies under the securities laws must register with the Board, pay it an annual fee, and comply with its rules and oversight."[145]

The Board is granted authority to enforce "the Sarbanes-Oxley Act, the securities laws, the Commission's rules, its own rules, and professional accounting standards."[146] The Board is also able to promulgate "auditing and ethics standards, performs routine inspections of all accounting firms, demands documents and testimony, and initiates formal investigations and disciplinary proceedings."[147] Any willful violation of "any Board rule is treated as a willful violation of the Securities Exchange Act of 1934 . . . a federal crime punishable by up to 20 years' imprisonment or $25 million in fines."[148]

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[140] *Free Enterprise Fund v. Public Company Accounting Oversight Board*, No. 08-861, slip op. at 3 (2010).
[141] *Id.* ("Among other measures, the Act introduced tighter regulations of the accounting industry under a new Public Company Accounting Oversight Board.").
[142] *Id.*
[143] *Id.*
[144] *Id.*
[145] *Id.*
[146] *Free Enterprise Fund*, No. 08-861 at 3.
[147] *Id.* at 3-4.
[148] *Id.* at 4.

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 (both of which are subject to Commission approval and alteration)."[149] Congress decided, however, that it would be advantageous for "the individual members of the Board . . . [to be] substantially insulated from the Commission's control."[150] The Act provides that "the Commission cannot remove Board members at will, but only 'for good cause shown,' 'in accordance with' certain procedures."[151] The Act then proceeds to define what "good cause" for removal is defined as.[152] The process for removing a Board member includes "a formal Commission order and is subject to judicial review."[153] The SEC Commissioners who oversee the members of the PCAOB "cannot themselves be removed by the President except under the *Humphrey's Executor* standard of 'inefficiency, neglect of duty, or malfeasance in office.'"[154]

There are important policy considerations for why Congress established the Board in the manner that it did. First, members of Congress are not experts in the field of accounting. They do not have the expertise or time to legislate in this field. Financial regulation also has "been thought to exhibit a particular need for independence."[155] Furthermore it has been recognized that removal restrictions can be justified on the grounds of "the need for technical expertise."[156] The accountants working for the Board need to be free to develop this expertise, and experts can objectively apply sound accounting principles.

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[149] *Id.*
[150] *Id.*
[151] *Id.* (quoting 15 U.S.C. §7211(e)(6)(2006)).
[152] *See Free Enterprise Fund*, 08-861 at 5. ("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)).
[153] *Id.*
[154] *Id.* (quoting *Humphrey's Executor* 295 U.S. at 620).
[155] *Free Enterprise Fund*, 08-861 at 19 (Breyer, J., dissenting).
[156] *Id.* at 18.

The Plaintiff in the case, Beckstead and Watts, LLP, "is a Nevada accounting firm registered with the Board."[157] The Board "inspected the firm, released a report critical of its auditing procedures, and began a formal investigation."[158] The *Free Enterprise* case arose because Beckstead and Watts, as well as the Free Enterprise Fund, "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."[159]

Plaintiff's argument was that "the Sarbanes-Oxley Act contravened the separation of powers by conferring wide-ranging executive power on Board members without subjecting them to Presidential control."[160] In a 5-4 split, Chief Justice Roberts writing for the Court held that the dual for-cause removal restriction in *Free Enterprise* was unconstitutional.

B. 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 Constitution's separation of powers."[161] In reaching this conclusion, the Court traced the President's removal power back to the Decision of 1789.[162] The Court read the decision in line with adherents of Justice Taft's position and states that "'the requisite responsibility and harmony in the Executive Department' . . . [means that] the executive power included a power to oversee executive officers through removal."[163] After a discussion of *Myers* and *Humphrey's Executor*, the Court upholds the notion that "*Myers* did not prevent Congress from conferring good-cause tenure on the

[157] *Free Enterprise Fund, 08-861 at 5.*
[158] *Id.* at 5-6.
[159] *Id.* at 6.
[160] *Id.*
[161] *Id.*
[162] *Id.* ("The removal of executive officers was discussed extensively in Congress when the first executive departments were created.").
[163] *Free Enterprise Fund*, 08-861 at 8 (quoting Letter from James Madison to Thomas Jefferson (June 30, 1789), 16 Documentary History of the First Federal Congress 893 (2004)).

principal officers of certain independent agencies."[164] The Court in *Free Enterprise* then affirms the removal restrictions at issue in *Morrison v. Olson*.[165]

The Court then shifts its analysis to the question of a dual for-cause limitation on removal.[166] The Court asserts that "the Act before us does something quite different"[167] from other removal restrictions. 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."[168] The Court views 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."[169] By making this assertion, however, the Court mischaracterized the extent of the President's control over the SEC. The President does not have unfettered control over the SEC and one more tenure provision protecting the Board from his removal power does nothing to diminish the President's power.[170] The Court 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.[171] 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.'"[172] What the Court 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.

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[164] *Id*. at 11-12.
[165] *Id*. at 13.
[166] *Id*. at 14.
[167] *Id*.
[168] *Id*. *See also Id*. ("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.").
[169] *Free Enterprise Fund*, 08-861 at 15.
[170] *See Free Enterprise Fund*, 08-861 at 13 (Breyer, J., dissenting).
[171] *Free Enterprise Fund*, 08-861 at 16. *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)).
[172] *Id.* at 17 (quoting Federalist No. 72 at 476).

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.'"[173] 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.'"[174] After finding the double for-cause removal limitation unconstitutional, the Court severed this provision, and allowed the Board to continue its existence.[175]

The Court's analysis rejected the functionalist approach of the *Morrison* Court for a formalistic methodology in line with *Weiner* and *Bowsher* Courts.[176] The Court does not explicitly state that it is turning to this method of interpretation, but because the removal restriction has only limited effect on the President's ability to control an already independent SEC, the Court implicitly adopted a formal interpretive methodology. This is also manifest when the Court quotes *Bowsher* that "'the Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty.'" This is opposition to the precedent of *Morrison* which adoptions a functional analytical approach. The Court 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 implicitly by performing his own functionalist analysis of the statute. Breyer came to the conclusion that "the statute does not significantly interfere with the President's executive power."[177] Breyer also forewarned that the Court's holding "threatens to disrupt severely the fair and efficient administration of the laws."[178]

[173] *Id*. at 23 (quoting *Free Enterprise Fund v. P.C.A.O.B*, 537 F. 3d, at 683).
[174] *Id*. (quoting PCAOB Brief at 15).
[175] *Id.* at 28.
[176] *Id.* at 19
[177] *Free Enterprise Fund*, 08-861 at 1 (Breyer, J., dissenting).
[178] *Id.*

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."[179] 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."[180] By structuring the federal government in this manner the Framers "imply[ed] a structural separation-of-powers principle."[181] Breyer correctly noted that in the case of removal, "neither of these two principles is absolute in its application."[182] This problem arises because in the case of removal, there is no text upon which the Court can rely to make its decisions.[183]

The analytical framework that Breyer would employ is one which would evaluate "how a particular provision, taken in context, is likely to function."[184] The Court in these circumstances has "looked to function and context, and not to bright line rules."[185] This is the functional approach of the *Morrison* Court.[186] Breyer justified this approach as being the intent of the framers,[187] and that it allows Congress and the President to "adopt statutory law to changed circumstances."[188]

Given these considerations, Breyer crystallized 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

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[179] *Id.* at 1-2 (quoting Art. I, §8, cl. 18)
[180] *Id.* at 2.
[181] *Id.*
[182] *Id.* at 3. *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.").
[183] *Free Enterprise Fund*, 08-861 at 3 (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)).
[184] *Id.* at 6.
[185] *Id.*
[186] *Id.* (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'") (quoting *Morrison*, 487 U.S., at 689-90).
[187] *Id*. at 7.
[188] *Id*.

of executive authority?"[189] 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."[190] It is from this fact, that a reader of *Free Enterprise* understands that the Robert's Majority adopted a formal analysis for removal implicitly. Given that the Commission has broad control over the functions of the Board, Breyer would hold that the controls over the Board are sufficiently adequate.[191] Relying upon *Morrison*, Breyer asked whether 'the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty.'"[192] Because of the nature of Presidential control over an already independent SEC, the statute clearly fails this test.[193]

Breyer also convincingly argued that the precedent as described above "strongly supports" the Act's constitutionality.[194] Breyer cited to a statement of Justice Scalia in *Freytag*, that "adjusting the remainder of the Constitution to compensate for *Humphrey's Executor* is a fruitless endeavor."[195] The Justices in *Freytag* agreed that "the Court should not create a separate constitutional jurisprudence for the 'independent agencies.'" [196] This means that independent agencies should be treated as if they were executive agencies, and the law, which has developed for purely "executive agencies," should be applied to independent agencies. This coupled with the restrictions permitted on the President's removal

[189] *Free Enterprise Fund*, 08-861 at 11 (Breyer, J., dissenting).
[190] *Id.*
[191] *Id.* at 16.
[192] *Id*.
[193] *See Id.* ("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.").
[194] *Id*. at 20.
[195] *Free Enterprise Fund*, 08-861 at 22 (Breyer, J., dissenting).
[196] *Id.*

power in *Humphrey's Executor* and inferior officers in *Perkins,* logically compels the constitutionality of the Act.[197]

Breyer is also highly critical of the Majorities' attempt at creating a *per se* rule.[198] 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.[199] 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."[200] This is why a more restrictive reading of *Free Enterprise* is needed.

Justice Breyer ended his discussion by addressing the fact that the enabling statute for the SEC does not have a for cause removal limitation restriction for its commissioners.[201] Breyer observed that "I am 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."[202] This also 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.

IV. Suggested Readings to Avoid *Free Enterprise* Being Applied to Administrative Law Judges

As Justice Breyer noted, if *Free Enterprise* is read broadly, many officials of the federal government may fall within its holding.[203] *Free Enterprise* may wreak havoc with inferior officers and employees if read broadly, particularly Administrative Law Judges (ALJs).

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[197] *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.").
[198] *Id*. at 23.
[199] *Id.* at 24.
[200] *Id.* at 28.
[201] *Free Enterprise Fund*, 08-861 at 33 (Breyer, J., dissenting). ("How can the Court simply assume without deciding that the SEC Commissioners themselves are removable only 'for cause?'").
[202] *Id.*
[203] *Id*. at 28.

This problem arises because courts "have generally tolerated the assignment of adjudications in agency matters, in the first instance, to the agencies themselves."[204] ALJs are the first adjudicators of fact in many of these agencies. 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. Following this train of logic, Peter Strauss has argued that "those who serve as "judges" in hearing administrative adjudications, [should have] maximum protection from political pressure."[205]

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*."[206] 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."[207] Once made, "appointments are permanent."[208] 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."[209] 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."[210] Any "conversations [ALJs] may have with agency employees concerning the outcomes of formal proceedings they are hearing must be on the record—that is there may be no private consultations."[211]

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[204] PETER STRAUSS, AN INTRODUCTION TO ADMINISTRATIVE JUSTICE IN THE UNITED STATES, 95 (1989).
[205] *Id.* at 94-95.
[206] *Id.* (emphasis added).
[207] *Id.*
[208] *Id.*
[209] *Id.*
[210] *See* STRAUSS, *supra* note 204 at 95.
[211] *Id*.

Various sections of the Administrative Procedure Act also supports that ALJs are to be provided with the greatest degree of insulation in their decisional process.[212] Section 556 states that "the functions of presiding employees . . . shall be conducted in an impartial manner."[213] Section 557 indicates that *ex parte* communications are not permissible with regard to ALJs.[214] 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."[215]

ALJs are "each removable 'only for good cause established and determined by the Merit Systems Protection Board.'"[216] The members of the "Merit Systems Protection Board are themselves protected from removal by the President absent good cause."[217] This structure is strikingly similar to that employed by Congress in the creation of the PCAOB. 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 examiner.[218] The federal government "relies on 1,584 ALJs to adjudicate administrative matters in over 25 agencies."[219] The question going forward is whether "every losing party before an ALJ now has grounds to appeal on the basis that the decision

[212] *See* Administrative Procedure Act, 5 U.S.C. §§554–557(2006).
[213] *Id*. §556(b).
[214] *Id*. §557(d)(1)(A).
[215] *Id*. §554(d)(2)
[216] *Free Enterprise Fund*, 08-861 at 30 (Breyer, J., dissenting) (quoting 5 U.S.C. §§7521(a)-(b)).
[217] *Id.* (quoting § 1202(d)).
[218] *See* Appendix.
[219] *Free Enterprise Fund*, 08-861 at 30 (Breyer, J., dissenting) ("These ALJs adjudicate Social Security benefits, employment disputes, and other matters highly important to individuals."). *See also* Appendix.

entered against him is unconstitutional?"[220] Allowing *Free Enterprise* to apply to ALJs would create major problems in the efficient administration of justice.

The Majority acknowledges that the status of ALJs has not been decided by the Court's decision in *Free Enterprise Fund*.[221] It is not settled law whether the *per se* rule against dual for-cause removal restrictions will apply to them. Thus, the question of how to classify ALJs is still open to debate.[222]

If *Free Enterprise* were applied to ALJs the potential disruption is great, and thus a narrow reading of the case would be 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 in the Sarbanes-Oxley Act.

One possibly way to read *Free Enterprise Fund* is that the Court's holding only applies to situations which present "an even more serious threat to executive control than an 'ordinary' dual for-cause standard."[223] Justice Roberts leaves this as a potential way to distinguish other dual for-cause removal limitations from those employed in *Free Enterprise*. This would mean that removal restrictions which are less protective of officials may not come within the scope of *Free Enterprise*. This may be beneficial because it could limit the potentially damaging impact of the Court's *per se* rule.

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

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[220] *Id*.

[221] *See Free Enterprise Fund*, 08-861 at 26 ("Our holding also does not address that subset of independent agency employees who serve as administrative law judges.").

[222] *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)).

[223] *Id.* at 22. *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,* 08-861 at 25 (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").

established and determined by the Merit Systems Protection Board."[224] This is not as protective of a standard as the restrictions that were used in *Free Enterprise* which permitted removal only upon a finding of willful conduct. Perhaps this less protective standard can be distinguished from the more protective removal restrictions in *Free Enterprise Fund*.

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.[225] 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.[226] In *Edmond v. United States*, the Supreme Court held that "the exercise of 'significant authority pursuant to the laws of the United States' marks, not the line between principal and inferior officer for Appointment Clause purposes, but rather, as we said in *Buckley*, the line between officer and [employees]."[227] Furthermore, in *Edmond*, the Court drew the line between principal and inferior officers as "connot[ing] a relationship with some higher ranking officer or officers below the President: whether one is an 'inferior' officer depends on whether he has a superior."[228] Only applying *Free Enterprise* to inferior officers would limit the reach of *Free Enterprise* from encompassing many of the officials who would fall within the civil service.

[224] *Id.* at 30. (quoting 5 U.S.C. §§7521(a)-(b)).

[225] 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).

[226] 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*, 08-861 at 26 (Breyer, J., dissenting) ("Courts and scholars have struggled for more than a century to define the constitutional term 'inferior officers,' without much success.").

[227] *Edmond v. United States*, 520 U.S. 651, 662 (1997) (quoting *Buckley v. Valeo*, 424 U.S., at 126).

[228] *Id.*

If this approach is taken, the Court will have to decide if ALJs are employees or officers of the federal government. Two cases are of particular significance for this question, *Freytag v. Commissioner of Internal Revenue,*[229] and *Landry v. FDIC.*[230]

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.[231] These judges perform many of the same functions as Administrative Law Judges.[232] 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 *a fortiori* from the holding in *Freytag*.

In *Landry v. FDIC*, however, Judge Williams distinguished ALJs from the special trial judges in *Freytag*.[233] In the opinion, Williams noted that the special trial judges in *Freytag* could issue final decisions, which is why these judges are "inferior officers."[234] The difference wrote Judge Williams is that ALJs "can never render the final decision."[235] Because the ALJs are not issuing a final order, the court held that ALJs are "employees," and not "inferior officers."[236]

Furthermore, the Office of Personal Management treats ALJs as "employees" in determination of their pay scale.[237] Congress in enacting 5 U.S.C. 5541(2) dealing with the pay scale for ALJs, explicitly stated ALJs to be "employees" rather than "inferior officers."[238]

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[229] 501 U.S. 868 (1991).
[230] 204 F.3d 1125 (D.C. Cir. 2000).
[231] *Freytag*, 501 U.S. at 882.
[232] *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.").
[233] *Landry*, 204 F.3d at 1134.
[234] *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.").
[235] *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")(emphasis in the original).
[236] *Id*. at 1134.
[237] *Administrative Law Judge Pay System*, U.S. OFFICE OF PERSONNEL MANAGEMENT, *available at* http://www.opm.gov/oca/pay/html/ALJ-PaySystem.asp
[238] *See* 5 U.S.C. 5541(2).

There are criticisms of treating ALJs as employees rather than inferior officers.[239] Judge Randolph writing a separate concurrence in *Landry* did not believe that ALJs can be distinguished from the STJs in *Freytag*.[240] Cass wrote *Landry* is a "strained [attempt] to distinguish *Freytag*." However, these readings can be discounted, because there is a very large difference from issuing binding final orders, versus proposed findings of fact. Thus classifying ALJs as "employees" may in fact be useful in distinguishing the PCAOB from ALJs.

C. *Free Enterprise* only applies to officials who perform "quasi-legislative" and "quasi-executive" functions; it does not apply to officials who solely perform "quasi-judicial" functions

Alternatively *Free Enterprise Fund* could be read to only include those agencies which perform "quasi-legislative" and "quasi-executive" functions, rather than officials who solely perform "quasi-judicial" functions.[241] Administrative Law Judges fall into this later camp.

The functions that the Public Company Accounting Oversight Board performs allows for this distinction to be made. The Board was created with the intention that it would promulgate standards for accounting practices and bring enforcement actions against those who violated the accounting standards it had promulgated.[242] This is very different from the function that ALJs perform, which is solely to adjudicate. Since the Court 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."

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[239] *See* Ronald Cass et al., ADMINISTRATIVE LAW: CASES AND MATERIALS, 91 (Aspen Publishers 5th ed. 2006).
[240] *Landry*, 204 F.3d at 1140.
[241] *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").
[242] *See* Sarbanes-Oxley Act, 15 U.S.C. §7211(c)(1)-(7)(2006).

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.[243] Applying a formal interpretive methodology as required by *Free Enterprise*, it follows *a fortiori* that ALJs exercise "quasi-judicial" powers, since they only adjudicate cases, and therefore are not within the scope of *Free Enterprise*.

Support for distinguishing those who perform "quasi-legislative" and "quasi-executive" functions from those who solely perform "quasi-judicial" functions can be found in the Administrative Procedure Act (APA)."[244] The APA supports the separation of functions principal whereby those who adjudicate cases in agencies are to be kept insulated and apart from those who perform rulemaking and bring enforcement actions.[245] The APA provides the employee who "presides 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."[246] This provision of the APA specifically attempts to insulate ALJs from influences that may prejudice a case. Under the APA those who solely perform "quasi-judicial" functions were intended to be treated differently from those engaged in rulemaking and enforcement actions.

Furthermore, separation of functions is a permissible way of preventing the same type of tyranny which separation of powers was devised to prevent.[247] The very purpose of separation of functions 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 apart from that of adjudicating cases. It

[243] *See supra* section II(D)(i).
[244] *See* Administrative Procedures Act, 5 U.S.C. §554(d).
[245] *Id*. §§ 554, 556–557.
[246] *Id*.
[247] Jacob Gersen, *Unbundled Powers*, 96 VA. L. REV. 301, 332 (2010).

would be impossible for a President's power to be impaired when the President was never granted the power to adjudicate in the first place.

Adopting this reading of *Free Enterprise* would allow for ALJs to be distinguished from the Board members. 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 articulated the position that a power of removal emanates from the language of Article II. 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. Scholars and jurists have argued that the question of whether that power could be regulated by Congress was left open by the Decision.

In *Perkins*, the Supreme Court for the first time decided whether Congress may exercise its power to regulate removal of inferior officers. The Court held that Congress may permissibly restrict the President's discretion in firing these inferior officers. *Parsons* and *Shurtleff* provide further instruction that if Congress does choose to restrict the discretion of the President in firing inferior officers, it must do so in an explicit and unambiguous manner.

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's decision in *Myers* can be read as a conservative backlash against the progressive reform at the turn of the century. *Myers* must also be read in the context when it was written, an era when *Lochner* was still good law, and before the expansion in the scope of the federal

government in the wake of *Wickard*. The alternative reading that this Comment suggests is that the language struck down was specific to the *Myers* case. The argument is that the language that conditioned removal on the advice and consent of the Senate was an impermissible attempt by Congress to inject its discretion into the firing of individual officials.

Following *Myers*, the Court finished articulating the analytical framework for the President's removal power in *Humphrey's Executor*. 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. The case has been criticized as a blatantly political move by the court, but the federal government has developed according to its dictates since the 1930's.

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 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. *Bowsher* stands for the proposition that Congress may not take for itself a direct role in the firing of individual officials. To reach this conclusion *Bowsher* applies a formal interpretative 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, which asks if Congress has impermissibly undermined the President in his ability to carry out his Article II duties and powers. In conducting a functional analysis the court asks as a practical matter whether the actions will impermissibly interfere with a branch carrying out its constitutionally assigned function.

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 pointed out, 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 could fall within the scope of the Court's *per se* rule. This would give any aggrieved party a here and now right to challenge an adverse ruling in a federal district court. The potentially troubling application can only be prevented if *Free Enterprise* is read in a narrow fashion.

Therefore, *Free Enterprise* must be read narrowly to prevent these 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* will not apply to them. This is the only way to prevent the potentially disruptive holding of the Court's decision.

Appendix

The following is a list of administrative agencies that employ Administrative Law Judges in the making of factual determinations.[248]

FEDERAL ADMINISTRATIVE LAW JUDGES
By Agency and Level
CDPF Status Report as of December 2009

AGENCY	AL-3	AL-2	AL-1	Total Numbe 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
TOTAL	1,542	36	6	1,584

[248] *Judge's Corner*, EBA UPDATE, Energy Bar Association at 9, available at http://eba-net.org/docs/newsletters/Fall2010Newsletter.pdf