AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 11: The Contemporary Era—Separation of Powers

Free Enterprise Fund v. Public Fund Company Accounting Oversight Board, 561 U.S. _ (2010)

Responding to a series of corporate accounting scandals, Congress in 2002 adopted the Sarbanes–Oxley Act, which imposed new regulations on the accounting industry. One provision of the statute created the Public Company Accounting Oversight Board, a five-member board that was to regulate and discipline accountants and enforce the provisions of Sarbanes–Oxley. The Board was situated under the Securities and Exchange Commission, which appointed the members of the Board, and the members of both the Board and the Commission could only be removed "for good cause." In practice, for-cause provisions significantly insulate executive officers from removal by their superiors.

The Board investigated a Nevada accounting firm, Beckstead and Watts, and an associated nonprofit, the Free Enterprise Fund. Those entities responded by filing suit in federal district court seeking a declaration that the structure of the Board violated the U.S. Constitution. The district court and a (divided) circuit court both upheld the statutory provision establishing the Board. In a 5–4 ruling, the U.S. Supreme Court reversed, concluding that the provision for removing the members of the Board violated the presidential power to oversee the executive branch.

Must the president be able to remove all officers of the executive branch? Why do for-cause removal provisions impinge on the constitutional authority of the president? Why are for-cause provisions acceptable in some circumstances but not in this case? Does it matter if the president has other tools for influencing the conduct of the Board? Should the limitation on presidential power in this case be balanced against the benefits of having such an insulated agency?

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Our Constitution divided the "powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial." Article II vests "[t]he executive Power . . . in a President of the United States of America," who must "take Care that the Laws be faithfully executed." In light of "[t]he impossibility that one man should be able to perform all the great business of the State," the Constitution provides for executive officers to "assist the supreme Magistrate in discharging the duties of his trust."

Since 1789, the Constitution has been understood to empower the President to keep these officers accountable—by removing them from office, if necessary. This Court has determined, however, that this authority is not without limit. . . .

. . . . May the President be restricted in his ability to remove a principal officer, who is in turn restricted in his ability to remove an inferior officer, even though that inferior officer determines the policy and enforces the laws of the United States?

We hold that such multilevel protection from removal is contrary to Article II's vesting of the executive power in the President. The President cannot "take Care that the Laws be faithfully executed" if he cannot oversee the faithfulness of the officers who execute them. Here the President cannot remove an officer who enjoys more than one level of good-cause protection, even if the President determines that the officer is neglecting his duties or discharging them improperly. That judgment is instead committed to another officer, who may or may not agree with the President's determination, and whom the President cannot remove simply because that officer disagrees with him. This contravenes the President's "constitutional obligation to ensure the faithful execution of the laws."

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The removal of executive officers was discussed extensively in Congress when the first executive departments were created. The view that "prevailed, as most consonant to the text of the Constitution" and "to the requisite responsibility and harmony in the Executive Department," was that the executive power included a power to oversee executive officers through removal; because that traditional executive power was not "expressly taken away, it remained with the President." Letter from James Madison to Thomas Jefferson (June 30, 1789). . . .

The landmark case of *Myers v. United States* (1926) reaffirmed the principle that Article II confers on the President "the general administrative control of those executing the laws." It is his responsibility to take care that the laws be faithfully executed. The buck stops with the President, in Harry's Truman's famous phrase. . . .

Nearly a decade later in *Humphrey's Executor v. United States* (1935), this Court held that Myers did not prevent Congress from conferring good-cause tenure on the principal officers of certain independent agencies. . . .

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The Act before us does something quite different. It not only protects Board members from removal except for good cause, but withdraws from the President any decision on whether that good cause exists. . . .

This novel structure does not merely add to the Board's independence, but transforms it. 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. The President is stripped of the power our precedents have preserved, and his ability to execute the laws—by holding his subordinates accountable for their conduct—is impaired.

. . . . This violates the basic principle that the President "cannot delegate ultimate responsibility or the active obligation to supervise that goes with it," because Article II "makes a single President responsible for the actions of the Executive Branch." *Clinton v. Jones* (1997).

Indeed, if allowed to stand, this dispersion of responsibility could be multiplied. If Congress can shelter the bureaucracy behind two layers of good-cause tenure, why not a third? . . .

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The diffusion of power carries with it a diffusion of accountability. The people do not vote for the "Officers of the United States." . . . Without a clear and effective chain of command, the public cannot "determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall." . . .

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One can have a government that functions without being ruled by functionaries, and a government that benefits from expertise without being ruled by experts. Our Constitution was adopted to enable the people to govern themselves, through their elected leaders. The growth of the Executive

Branch, which now wields vast power and touches almost every aspect of daily life, heightens the concern that it may slip from the Executive's control, and thus from that of the people. . . .

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In fact, the multilevel protection that the dissent endorses "provides a blueprint for extensive expansion of the legislative power." . . . Congress has plenary control over the salary, duties, and even existence of executive offices. Only Presidential oversight can counter its influence. That is why the Constitution vests certain powers in the President that "the Legislature has no right to diminish or modify."

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Reversed in part.

JUSTICE BREYER, with whom JUSTICE STEVENS, JUSTICE GINSBURG, and JUSTICE SOTOMAYOR join, dissenting.

. . . . I agree that the Accounting Board members are inferior officers. But in my view the statute does not significantly interfere with the President's "executive Power." It violates no separation-of-powers principle. And the Court's contrary holding threatens to disrupt severely the fair and efficient administration of the laws. I consequently dissent.

The legal question before us arises at the intersection of two general constitutional principles. On the one hand, Congress has broad power to enact statutes "necessary and proper" to the exercise of its specifically enumerated constitutional authority. . . . [T]he Necessary and Proper Clause affords Congress broad authority to "create" governmental "'offices'" and to structure those offices "as it chooses. . . .

On the other hand, the opening sections of Articles 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 (and such "inferior Courts as Congress may from time to time ordain and establish"). In doing so, these provisions imply a structural separation-of-powers principle. . . . And that principle . . . limits Congress' power to structure the Federal Government. . . .

. . . . [D]epending on, say, the nature of the office, its function, or its subject matter, Congress sometimes may, consistent with the Constitution, limit the President's authority to remove an officer from his post. . . .

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In short, the question presented lies at the intersection of two sets of conflicting, broadly framed constitutional principles. And no text, no history, perhaps no precedent provides any clear answer. . . .

When previously deciding this kind of nontextual question, the Court has emphasized the importance of examining how a particular provision, taken in context, is likely to function. . . . The Court has thereby written into law Justice Jackson's wise perception that "the Constitution . . . contemplates that practice will integrate the dispersed powers into a workable government."

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There is no indication that the two comparatively more expert branches were divided in their support for the "for cause" provision at issue here. . . .

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To what extent then is the Act's "for cause" provision likely, as a practical matter, to limit the President's exercise of executive authority? In practical terms no "for cause" provision can, in isolation, define the full measure of executive power. . . .

Indeed, notwithstanding the majority's assertion that the removal authority is "the key" mechanism by which the President oversees inferior officers in the independent agencies, it appears that no President has ever actually sought to exercise that power by testing the scope of a "for cause" provision. . . .

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[T]he Court fails to show why two layers of "for cause" protection—Layer One insulating the Commissioners from the President, and Layer Two insulating the Board from the Commissioners—impose any more serious limitation upon the President's powers than one layer. . . .

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. . . . If the President confronts a Commission that seeks to resist his policy preferences . . . the restriction on the Commission's ability to remove a Board member is either irrelevant [because the refusal to remove a Board member does not give the president a for-cause reason to remove a Commissioner] or may actually help the President [because the Commission may not remove a Board member the president favors]. . . .

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But once we leave the realm of hypothetical logic and view the removal provision at issue in the context of the entire Act, its lack of practical effect becomes readily apparent. That is because the statute provides the Commission with full authority and virtually comprehensive control over all of the Board's functions. . . .

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. . . . [T]he Commission's control over the Board's investigatory and legal functions is virtually absolute. Moreover, the Commission has general supervisory powers over the Accounting Board itself. . . .

What is left? The Commission's inability to remove a Board member whose perfectly reasonable actions cause the Commission to overrule him with great frequency? What is the practical likelihood of that occurring, or, if it does, of the President's serious concern about such a matter? . . . [I]f the President's control over the Commission is sufficient, and the Commission's control over the Board is virtually absolute, then, as a practical matter, the President's control over the Board should prove sufficient as well.

At the same time, Congress and the President had good reason for enacting the challenged "for cause" provision. First and foremost, the Board adjudicates cases. This Court has long recognized the appropriateness of using "for cause" provisions to protect the personal independence of those who even only sometimes engage in adjudicatory functions. . . .

Moreover, in addition to their adjudicative functions, the Accounting Board members supervise, and are themselves, technical professional experts. . . .

Here, the justification for insulating the "technical experts" on the Board from fear of losing their jobs due to political influence is particularly strong. Congress deliberately sought to provide that kind of protection. . . .

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