FREE ENTERPRISE FUND v. PUBLIC COMPANY

ACCOUNTING OVERSIGHT BOARD

130 S. Ct. 3138 (2010)

*As a part of the Sarbanes-Oxley Act, Congress created*

*the Public Company Accounting Oversight Board*

*(PCAOB or Board). This Board consists of five members*

*who are appointed by the Securities and Exchange*

*Commissioners. Board members serve 5-year, staggered*

*terms and are not considered Government officers*

*or employers. This allows the recruitment from*

*the private sector since the Board members’ salaries*

*are not subject to governmental limitations. These*

*members can be removed by the SEC Commissioners*

*only “for good cause” if the Board member:*

*“(A) has willfully violated any provision of the*

*Act, the rules of the Board, or the securities laws; (B)*

*has willfully abused the authority of that 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.”*

*This arrangement concerning the appointment and*

*potential removal of Board members makes the PCAOB*

*a Government-created, Government-appointed entity*

*with expansive powers to govern an entire industry*

*(public accounting firms). It further makes the Board*

*members insulated from the direct supervision of the*

*SEC Commissioners.*

*Following the Board’s release of a negative report*

*about Beckstead and Watts, LLP, a public accounting*

*firm, this lawsuit was filed by that firm and The*

*Free Enterprise Fund challenging the constitutionality*

*of the Sarbanes-Oxley Act at least as far as the*

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*creation and operation of the PCAOB. The basis of*

*this challenge is the Board members are not subject to*

*the appointed powers of the President of the United*

*States. The United States Government joined the suit*

*to defend the Sarbanes-Oxley Act and the PCAOB.*

*The District Judge granted summary judgment in*

*favor of the United States, and the D.C. Circuit Court*

*of Appeals affirmed. Certiorari was granted to review*

*the constitutional issue.*

**ROBERTS, C.J.:** . . . We hold that the dual for-cause

limitations on the removal of Board members contravene

the Constitution’s separation of powers.

The Constitution provides that “[t]he executive

Power shall be vested in a President of the United

States of America.” Art. II, §1, cl. 1. As Madison stated

on the floor of the First Congress, “if any power

whatsoever is in its nature Executive, it is the power

of appointing, overseeing, and controlling those who

execute the laws.”

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.” . . .

The landmark case of *Myers* v. *United States*

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 Truman’s famous phrase.

As we explained in *Myers,* the President therefore

must have some “power of removing those for whom

he cannot continue to be responsible.”

Nearly a decade later in *Humphrey’s Executor,*

this Court held that *Myers* did not prevent Congress

from conferring good-cause tenure on the principal

officers of certain independent agencies. That case

concerned the members of the Federal Trade Commission,

who held 7-year terms and could not be removed

by the President except for “inefficiency, neglect of

duty, or malfeasance in office.” The Court distinguished

*Myers* on the ground that *Myers* concerned

“an officer [who] is merely one of the units in the

executive department and, hence, inherently subject to

the exclusive and illimitable power of removal by the

Chief Executive, whose subordinate and aid he is.” By

contrast, the Court characterized the FTC as “quasilegislative

and quasi-judicial” rather than “purely

executive,” and held that Congress could require it “to

act . . . independently of executive control.” Because

“one who holds his office only during the pleasure

of another, cannot be depended upon to maintain an

attitude of independence against the latter’s will,” the

Court held that Congress had power to “fix the period

during which [the Commissioners] shall continue in

office, and to forbid their removal except for cause in

the meantime.”

*Humphrey’s Executor* did not address the

removal of inferior officers, whose appointment Congress

may vest in heads of departments. If Congress

does so, it is ordinarily the department head, rather

than the President, who enjoys the power of removal.

This Court has upheld for-cause limitations on that

power as well. . . .

We have previously upheld limited restrictions

on the President’s removal power. In those cases,

however, only one level of protected tenure separated

the President from an officer exercising executive

power. It was the President—or a subordinate he

could remove at will—who decided whether the officer’s

conduct merited removal under the good-cause

standard. 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. That decision is vested instead in other tenured

officers—the Commissioners—none of whom is subject

to the President’s direct control. The result is a

Board that is not accountable to the President, and a

President who is not responsible for the Board. 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. The President

could then hold the Commission to account for

its supervision of the Board, to the same extent that

he may hold the Commission to account for everything

else it does. A second level of tenure protection

changes the nature of the President’s review. Now the

Commission cannot remove a Board member at will.

The President therefore cannot hold the Commission

fully accountable for the Board’s conduct, to the same

extent that he may hold the Commission accountable

for everything else that it does. The Commissioners are

not responsible for the Board’s actions. They are only

responsible for their own determination of whether the

Act’s rigorous good-cause standard is met. And even if

the President disagrees with their determination, he is

powerless to intervene—unless that determination is

so unreasonable as to constitute inefficiency, neglect of

duty, or malfeasance in office.

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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.

That arrangement is contrary to Article II’s vesting

of the executive power in the President. Without the

ability to oversee the Board, or to attribute the Board’s

failings to those whom he *can* oversee, the President

is no longer the judge of the Board’s conduct. He is

not the one who decides whether Board members are

abusing their offices or neglecting their duties. He can

neither ensure that the laws are faithfully executed,

nor be held responsible for a Board member’s breach

of faith. 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.

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? At oral argument, the Government

was unwilling to concede that even *five* layers

between the President and the Board would be too

many. The officers of such an agency—safely encased

within a Matryoshka doll of tenure protections—

would be immune from Presidential oversight, even as

they exercised power in the people’s name.

Perhaps an individual President might find advantages

in tying his own hands. But the separation of

powers does not depend on the views of individual

Presidents, nor on whether the encroached-upon

branch approves the encroachment. The President can

always choose to restrain himself in his dealings with

subordinates. He cannot, however, choose to bind his

successors by diminishing their powers, nor can he

escape responsibility for his choices by pretending that

they are not his own.

The diffusion of power carries with it a diffusion

of accountability. The people do not vote for the

Officers of the United States. They instead look to the

President to guide the assistants or deputies . . . subject

to his superintendence. 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. That is why the Framers sought to ensure that

those who are employed in the execution of the law

will be in their proper situation, and the chain of

dependence be preserved; the lowest officers, the middle

grade, and the highest, will depend, as they ought,

on the President, and the President on the community.

By granting the Board executive power without the

Executive’s oversight, this Act subverts the President’s

ability to ensure that the laws are faithfully executed—

as well as the public’s ability to pass judgment on his

efforts. The Act’s restrictions are incompatible with the

Constitution’s separation of powers. . . .

This case presents an even more serious threat to

executive control than an “ordinary” dual for-cause

standard. Congress enacted an unusually high standard

that must be met before Board members may be

removed. A Board member cannot be removed except

for willful violations of the Act, Board rules, or the

securities laws; willful abuse of authority; or unreasonable

failure to enforce compliance—as determined

in a formal Commission order, rendered on the record

and after notice and an opportunity for a hearing.

The Act does not even give the Commission power to

fire Board members for violations of *other* laws that

do not relate to the Act, the securities laws, or the

Board’s authority. The President might have less than

full confidence in, say, a Board member who cheats on

his taxes; but that discovery is not listed among the

grounds for removal. . . .

The rigorous standard that must be met before a

Board member may be removed was drawn from statutes

concerning private organizations like the New

York Stock Exchange. While we need not decide the

question here, a removal standard appropriate for

limiting Government control over private bodies may

be inappropriate for officers wielding the executive

power of the United States. . . .

Petitioners’ complaint argued that the Board’s

“freedom from Presidential oversight and control”

rendered it “and all power and authority exercised by

it” in violation of Constitution. We reject such a broad

holding. Instead, we agree with the Government that

the unconstitutional tenure provisions are severable

from the remainder of the statute.

Generally speaking, when confronting a constitutional

flaw in a statute, we try to limit the solution to the

problem, severing any problematic portions while leaving

the remainder intact. . . . Concluding that the removal

restrictions are invalid leaves the Board removable by the

Commission at will, and leaves the President separated

from Board members by only a single level of good-cause

tenure. The Commission is then fully responsible for the

Board’s actions, which are no less subject than the Commission’s

own functions to Presidential oversight.

The Sarbanes-Oxley Act remains fully operative

as a law with these tenure restrictions excised.

We therefore must sustain its remaining provisions

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“[u]nless it is evident that the Legislature would not

have enacted those provisions . . . independently of that

which is [invalid].” Though this inquiry can sometimes

be elusive, the answer here seems clear: The remaining

provisions are not incapable of functioning independently,

and nothing in the statute’s text or historical

context makes it evident that Congress, faced with the

limitations imposed by the Constitution, would have

preferred no Board at all to a Board whose members are

removable at will.

It is true that the language providing for goodcause

removal is only one of a number of statutory provisions

that, working together, produce a constitutional

violation. In theory, perhaps, the Court might bluepencil

a sufficient number of the Board’s responsibilities

so that its members would no longer be “Officers

of the United States.” Or we could restrict the Board’s

enforcement powers, so that it would be a purely recommendatory

panel. Or the Board members could in

future be made removable by the President, for good

cause or at will. But such editorial freedom—far more

extensive than our holding today—belongs to the Legislature,

not the Judiciary. Congress of course remains

free to pursue any of these options going forward. . . .

**It is so ordered.**

The Legal and Regulatory Environment of Business, 16e

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