

## NOTE

### **WHEN DOES DUAL FOR-CAUSE REMOVAL PROTECTION BECOME UNCONSTITUTIONAL? EXPLORING THE SCOPE OF *FREE ENTERPRISE FUND* V. *PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD***

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At first glance, the Supreme Court’s holding in *Free Enterprise Fund v. Public Company Accounting Oversight Board* appears straightforward: executive officers cannot be insulated from presidential removal by two or more layers of for-cause employment protection. But as Justice Stephen Breyer’s dissent notes, a holding this broad would encompass thousands of government officials, including administrative law judges (ALJs) and commissioned military officers. In response to Justice Breyer’s doomsday prophecies, the majority opinion characterized the Public Company Accounting Oversight Board’s (PCAOB) removal structure as “highly unusual,” and made a point of distinguishing it from the removal structures for ALJs and commissioned military officers. Any proper investigation of the scope of *Free Enterprise Fund* must therefore involve a careful analysis of these administrative officers’ removal structures. If the removal structures of ALJs and commissioned military officers can be meaningfully distinguished from that of PCAOB members, then an examination of their differences will help determine *Free Enterprise Fund*’s reach. Surprisingly, no such analysis currently exists.

This Note fills that gap. It compares the pre-*Free Enterprise Fund* employment removal protections of PCAOB members with those of ALJs and commissioned military officers. It argues that there are important differences between these structures. The Note uses these differences to construct a general model for evaluating the constitutionality of administrative officers’ employment removal provisions. It concludes by using this model to draft statutory provisions that recapture the perceived benefits of the PCAOB’s initial dual for-cause removal structure without violating *Free Enterprise Fund*’s holding.

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## INTRODUCTION

There is currently a robust cultural debate underway regarding normative questions about the size and scope of the federal government. Large-scale catastrophes such as the 2008 financial crisis and the British Petroleum oil spill have many calling for increased government regulation of various private sectors.<sup>1</sup> Meanwhile, exit polls in the 2010 midterm elections revealed that four in ten voters support the vociferously anti-large-government, anti-administrative-agency Tea Party movement.<sup>2</sup>

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1. See, e.g., Floyd Norris, *F.D.R.'s Safety Net Gets a Big Stretch*, N.Y. TIMES, Mar. 15, 2008, <http://www.nytimes.com/2008/03/15/business/15regulate.html?ref=financialregulatoryreform> (quoting Federal Reserve Bank of New York President Timothy Geithner as saying that private financial institutions “need to be subject to a stronger form of consolidated supervision than our current framework provides”).

2. *Tea Party Movement*, N.Y. TIMES, [http://topics.nytimes.com/top/reference/timestopics/subjects/t/tea\\_party\\_movement/index.html?scp=1-spot&sq=tea%20party&st=cse](http://topics.nytimes.com/top/reference/timestopics/subjects/t/tea_party_movement/index.html?scp=1-spot&sq=tea%20party&st=cse) (last updated Dec. 26, 2012).

The Supreme Court's recent decision in *Free Enterprise Fund v. Public Company Accounting Oversight Board*<sup>3</sup> fits within this wider zeitgeist. The *Free Enterprise Fund* majority struck down a portion of the Sarbanes-Oxley Act of 2002<sup>4</sup> on the grounds that two levels of for-cause employment protection for administrative officers impermissibly limited the President's constitutional removal power.<sup>5</sup> The Act created a Public Company Accounting Oversight Board (PCAOB) whose members, in contrast to "at-will" employees,<sup>6</sup> could only be removed by the Securities and Exchange Commission (SEC) "for good cause shown."<sup>7</sup> In turn, according to the majority in *Free Enterprise Fund*, SEC members are themselves removable by the President only for "inefficiency, neglect of duty, or malfeasance in office."<sup>8</sup> The Court held that this dual for-cause removal structure unconstitutionally limited the President's removal power.<sup>9</sup>

Legal scholars on each side of the political spectrum disagree about the potential scope of *Free Enterprise Fund*. Some conservative commentators assert that *Free Enterprise Fund* is a moratorium on the current administrative state. For example, Professor Neomi Rao argues that the majority's decision "sets the foundation for a wider assault on agency independence."<sup>10</sup> Rao argues that under the Court's reasoning

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3. 130 S. Ct. 3138 (2010).

4. Pub. L. No. 107-204, 116 Stat. 745. The Sarbanes-Oxley Act was enacted to create closer government oversight of accounting firms that audit public companies. See 15 U.S.C. §§ 7211(a), 7213(a)(1) (2006).

5. *Free Enter. Fund*, 130 S. Ct. at 3147, 3164.

6. Almost all American workers are "at-will" employees. David C. Yamada, Essay, *Human Dignity and American Employment Law*, 43 U. RICH. L. REV. 523, 534 (2009) ("The low union density in America means that most workers . . . are at-will employees."). "At-will" employees may, as a general rule, be removed by their employer at any time and for any reason without employer liability. 82 AM. JUR. 2D *Wrongful Discharge* § 1 (2003); William M. Howard, Annotation, *Common-Law Retaliatory Discharge of Employee for Disclosing Unlawful Acts or Other Misconduct of Employer or Fellow Employees*, 105 A.L.R. 5th 351 (2003). There are, however, exceptions to this general rule. In a number of contexts, "the right of an employer to discharge an at-will employee without cause is limited by either public policy considerations or an implied covenant of good faith and fair dealing." Francis M. Dougherty, Annotation, *Damages Recoverable for Wrongful Discharge of At-Will Employee*, 44 A.L.R. 4th 1131, 1136 (1986); see also Michael A. DiSabatino, Annotation, *Modern Status of Rule That Employer May Discharge At-Will Employee for Any Reason*, 12 A.L.R. 4th 544, 552-59 (1982) (providing annotated bibliographies of cases where courts held that employers wrongfully discharged their at-will employees); Howard, *supra*.

7. § 7211(e)(6).

8. *Free Enter. Fund*, 130 S. Ct. at 3148-49 (quoting *Humphrey's Ex'r v. United States*, 295 U.S. 602, 620 (1935)).

9. *Id.* at 3147, 3164.

10. Neomi Rao, *A Modest Proposal: Abolishing Agency Independence in Free Enterprise Fund v. PCAOB*, 79 FORDHAM L. REV. 2541, 2543 (2011). For a similar view from a judicial perspective, see *In re Aiken Cnty.*, 645 F.3d 428, 446 (D.C. Cir. 2011).

even a single layer of for-cause removal protection is unconstitutional.<sup>11</sup> According to Rao, the Court's decision logically entails this consequence, such that there can no longer be any such thing as a constitutional independent administrative agency.<sup>12</sup>

In contrast, Supreme Court advocate John Elwood argues that *Free Enterprise Fund*'s scope is limited and that the case will have minimal impact.<sup>13</sup> He compares *Free Enterprise Fund* to *United States v. Lopez*,<sup>14</sup> in which the Court struck down the Gun Free School Zones Act of 1990<sup>15</sup> on the grounds that it exceeded Congress's Commerce Clause authority.<sup>16</sup> According to Elwood, "[t]he offense at question in *Lopez* was charged fairly infrequently, and thus the Court could warn Congress of the limitations on its power in a case yielding a minimum of immediate disruption."<sup>17</sup> Similarly, Elwood argues, the dual layers of for-cause removal protection at issue in *Free Enterprise Fund* are a rare occurrence.<sup>18</sup> Thus, the Court can send an ideological separation-of-powers message to Congress "[without having] much immediate effect outside the PCAOB."<sup>19</sup> In sum, Elwood argues that *Free Enterprise Fund* is to presidential removal power what *United States v. Lopez* was to Commerce Clause jurisprudence: smoke without fire.

Fundamental disagreement regarding the scope of *Free Enterprise Fund* is further apparent within the decision itself. Writing for the majority, Chief Justice John Roberts stated that the Sarbanes-Oxley Act was "*highly unusual* in committing substantial executive authority to officers protected by two layers of for-cause removal."<sup>20</sup> Additionally, Chief Justice Roberts took pains to distinguish the Act's employment

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("[T]he *Free Enterprise* Court's wording and reasoning are in tension with *Humphrey's Executor*," 295 U.S. at 631–32, which upheld restrictions on removal of administrative officers, "and are more in line with Chief Justice Taft's majority opinion in *Myers* [*v. United States*, 272 U.S. 52, 176 (1926)]," which held that the President has the authority to remove executive administrative officers.).

11. Rao, *supra* note 10, at 2544, 2559–66.

12. *Id.*

13. John Elwood, *Free Enterprise Fund: The Lopez of Separation of Powers Doctrine*, THE VOLOKH CONSPIRACY (June 28, 2010, 12:31 PM), <http://volokh.com/2010/06/28/free-enterprise-fund-the-lopez-of-separation-of-powers-doctrine/>.

14. 514 U.S. 549 (1995).

15. 18 U.S.C. §§ 922, 924 (1994).

16. *Lopez*, 514 U.S. at 567–68.

17. Elwood, *supra* note 13.

18. *Id.*

19. *Id.*

20. *Free Enter. Fund v. PCAOB*, 130 S. Ct. 3138, 3144–45 (2010) (emphasis added).

removal structure from “‘ordinary’ dual for-cause standard[s].”<sup>21</sup> According to the Chief Justice, the narrow purpose of the Court’s decision was to strike down this peculiarly unconstitutional provision<sup>22</sup> and to send Congress a message that the PCAOB’s removal structure represents an outer limit on how attenuated a statutory scheme can render presidential removal power without becoming unconstitutional.<sup>23</sup>

In contrast, Justice Stephen Breyer listed in his dissent a “conservative estimate” of 573 government officials in forty-eight government agencies, all of whom putatively have employee removal structures directly analogous to those of the PCAOB members addressed in this case.<sup>24</sup> According to Justice Breyer, the majority “must either narrow its rule arbitrarily . . . or it will have to leave in place a broader rule of decision applicable to many other ‘inferior officers’ as well.”<sup>25</sup> In particular, Justice Breyer compared the PCAOB members to administrative law judges (ALJs) and commissioned military officers, and reasoned that the majority would be hard-pressed to distinguish these administrative officers’ removal structures from that of the PCAOB members.<sup>26</sup> In response to Justice Breyer’s doomsday prophecies, the majority opinion made a brief point of distinguishing PCAOB removal structure from the removal structures for ALJs and commissioned military officers.<sup>27</sup>

This Note starts from the premise that any proper investigation of the scope of *Free Enterprise Fund* must involve a careful analysis of these administrative officers’ removal structures.<sup>28</sup> The *Free Enterprise*

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21. *Id.* at 3158.

22. *See, e.g., id.* at 3161 (“The only issue in this case is whether Congress may deprive the President of adequate control over the [Public Accounting Oversight] Board . . .”).

23. *See id.* at 3154 (“[I]f 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.”).

24. *Id.* at 3179–80, 3185–3218 (Breyer, J., dissenting).

25. *Id.* at 3184 (Breyer, J., dissenting).

26. *Id.* at 3179–81 (Breyer, J., dissenting).

27. *See id.* at 3160–61.

28. There is an argument that ALJs are not “officers” at all, but merely “employees.” Because Article II constraints on agency personnel structures only apply to “[o]fficers of the United States,” employees (or “lesser functionaries”) need not be subject to presidential removal. *See Freytag v. Comm’r*, 501 U.S. 868, 880–82 (1991). Whether ALJs are officers is not a settled question. In a concurring opinion, Justice Antonin Scalia—joined by Justices Sandra Day O’Connor, Anthony Kennedy, and David Souter—has reasoned that they are. *See id.* at 910 (Scalia, J., concurring). Justice Breyer agrees. *See Free Enter. Fund*, 130 S. Ct. at 3180 (Breyer, J., dissenting). The D.C.

*Fund* majority reasons (albeit in dicta) that the removal structures of ALJs and commissioned military officers can be meaningfully distinguished from the removal structure for PCAOB members. If this is true, an examination of these structures' salient features will help construct a working model for determining whether other administrative officers' removal structures are constitutional. Moreover, the resulting model could also cast light on how Congress might modify the Sarbanes-Oxley Act in the wake of *Free Enterprise Fund* to recapture the perceived benefits of the Act's initial dual for-cause removal structure without violating *Free Enterprise Fund*'s holding.

To that end, Part I begins by outlining relevant legal and factual background information, along with some perfunctory analysis of the Court's holding in *Free Enterprise Fund*. Part II compares the removal structures of PCAOB members with those of ALJs and commissioned military officers, respectively. Next, Part III synthesizes these findings into an analytical model for evaluating the constitutionality of administrative officers' removal structures generally. Finally, Part IV uses this model to propose a way in which Congress might repass the Sarbanes-Oxley Act to comply with *Free Enterprise Fund*'s holding while avoiding the negative consequences of the Court's statutory severance. This Part proposes model provisions that (1) allow the SEC to remove PCAOB members for misconduct not directly related to their employment and (2) authorize the President to convene—but not participate in—PCAOB members' removal hearings.

#### I. BACKGROUND: *FREE ENTERPRISE FUND* AND PRESIDENTIAL REMOVAL CASE LAW

*Free Enterprise Fund* is a new addition to the relatively small body of Supreme Court case law addressing presidential removal power. Section A of this Part outlines the applicable legal authorities that informed the *Free Enterprise Fund* decision. Section B then provides a brief synopsis of *Free Enterprise Fund* itself.

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Circuit, in contrast, has held that at least some ALJs—namely, those who can only issue recommended decisions—are mere employees. *Landry v. FDIC*, 204 F.3d 1125, 1133–34 (D.C. Cir. 2000). This admittedly scant evidence suggests that the Supreme Court, but not the D.C. Circuit, favors treating ALJs as officers. Given my desire to focus on structural comparisons, this Note will proceed on the assumption that ALJs are “officers of the United States.” Those who deny this premise—and it is reasonable to do so—are welcome to convert the overall thesis into a conditional form.

*A. Pre-Free Enterprise Fund Limitations on Presidential Removal Power*

The Constitution grants the President power to appoint “[o]fficers of the United States” “by and with the . . . Consent of the Senate.”<sup>29</sup> The Constitution further grants the President the power to appoint “inferior officers,” but stipulates that Congress may choose whether to vest inferior officers’ appointment “in the President alone, in the Courts of Law, or in the Heads of Departments.”<sup>30</sup> Although the Constitution does not expressly grant a reciprocal presidential power to remove those officers,<sup>31</sup> the Supreme Court has long recognized an implicit presidential removal power.<sup>32</sup> Like the appointment power, presidential removal power applies to both principal and inferior officers.<sup>33</sup> For each type of officer, Supreme Court precedent places certain limits on executive removal power.<sup>34</sup>

1. REMOVAL PROTECTIONS FOR PRINCIPAL OFFICERS OF INDEPENDENT AGENCIES

Although the President has the power to remove principal officers of independent administrative agencies, Congress may insulate some principal officers from removal. In *Myers v. United States*,<sup>35</sup> Chief Justice (and former President) William Taft, writing for the majority, held that the President must have the authority to remove executive department officers, without any constitutional need for Senate consent.<sup>36</sup> Reasoning primarily from legislative history of the First Congress of 1789, Taft concluded that the power to remove appointed principal officers—specifically, postmasters—vested in the President alone.<sup>37</sup>

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29. U.S. CONST. art. II, § 2, cl. 2.

30. *Id.*

31. *Morrison v. Olson*, 487 U.S. 654, 723 (1988) (Scalia, J., dissenting) (“There is, of course, no provision in the Constitution stating who may remove executive officers, except the provisions for removal by impeachment.”).

32. See, e.g., *Myers v. United States*, 272 U.S. 52, 161 (1926) (“The [presidential] power to remove . . . executive officers . . . is an incident of the power to appoint them . . .”). Despite what the preceding quote might suggest, articulating the exact constitutional source of presidential removal power is contentious. For a discussion of three different theories, see Patricia L. Bellia, *PCAOB and the Persistence of the Removal Puzzle*, 80 GEO. WASH. L. REV. 1371, 1377–89 (2012). Professor Patricia Bellia concludes that *Free Enterprise Fund* “reflects the Court’s continuing ambivalence about the source of constraints on Congress’s power to limit the President’s removal authority.” *Id.* at 1376.

33. *Myers*, 272 U.S. at 161.

34. See *infra* Part II.A.1–2.

35. 272 U.S. 52 (1926).

36. *Id.* at 145–56.

37. *Id.* at 176.

This unrestrained presidential removal power was subsequently limited to apply only to purely executive officers. In *Humphrey's Executor v. United States*,<sup>38</sup> the Court held that the Constitution permits Congress to place limits on presidential removal of principal officers in administrative agencies that exercise “quasi-legislative or quasi-judicial powers.”<sup>39</sup> Specifically, Congress may stipulate that the presidentially appointed principal officers who run agencies with these powers be removable from office only for “inefficiency, neglect of duty, or malfeasance in office.”<sup>40</sup> In short, the Court held that it is constitutionally permissible for principal officers of independent administrative agencies (i.e., agencies exercising legislative and judicial powers, as opposed to purely executive powers) to enjoy for-cause removal protection.

## 2. REMOVAL PROTECTIONS FOR INFERIOR OFFICERS

Like principal officers, inferior officers of independent administrative agencies may also enjoy removal protections. For the purposes of evaluating the constitutionality of appointments and removals, an “inferior officer” is defined as an officer “whose work is directed and supervised at some level by others who were appointed by presidential nomination with the advice and consent of the Senate.”<sup>41</sup> That is, an inferior officer is someone who is accountable in some sense to a principal officer. Precedential limitations on removal of inferior officers by principal officers are similar to those guiding removal of principal officers. In *Morrison v. Olson*,<sup>42</sup> the Court held that Congress can impose “good cause” limitations on a principal officer’s ability to remove an inferior officer when Congress determines that the inferior officer’s independence is necessary.<sup>43</sup>

### B. Free Enterprise Fund v. PCAOB: *The Case in Brief*

Congress enacted the Sarbanes-Oxley Act (“the Act”) in 2002, following several high-profile corporate accounting scandals—most notably, the Enron and WorldCom scandals.<sup>44</sup> The Act created the

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38. 295 U.S. 602 (1935).

39. *Id.* at 628–32.

40. *Id.* at 621–22.

41. *Edmond v. United States*, 520 U.S. 651, 663 (1997).

42. 487 U.S. 654 (1988).

43. *Id.* at 691–93.

44. S. REP. NO. 107-205, at 2, 29 n.59 (2002). For an explanation of the major changes brought about by the Act and the policies underlying those changes, see John Paul Lucci, *Enron—The Bankruptcy Heard around the World and the International Ricochet of Sarbanes-Oxley*, 67 ALB. L. REV. 211, 221–33 (2003).

PCAOB to audit, inspect, and sanction public accounting firms.<sup>45</sup> Members of the PCAOB serve on a full-time basis and are appointed by members of the SEC.<sup>46</sup> The PCAOB is a nonprofit organization, rather than a government agency.<sup>47</sup> The purpose of this is to allow the PCAOB to recruit members from the private sector “by paying salaries far above the standard Government pay scale.”<sup>48</sup>

The Act provided that PCAOB members could only be removed from office by SEC members “for good cause shown”<sup>49</sup> “after notice and opportunity for a hearing.”<sup>50</sup> “Good cause” included willfully violating a provision of the Act, rules of the Board, or securities laws; willfully abusing authority; or failure to enforce public accounting firms’ compliance with the Act.<sup>51</sup> In turn, according to the majority opinion in *Free Enterprise Fund*, SEC members “cannot themselves be removed by the President except under the *Humphrey’s Executor* standard of ‘inefficiency, neglect of duty, or malfeasance in office.’”<sup>52</sup>

Beckstead and Watts, LLP (a public accounting firm that the PCAOB was investigating) and Free Enterprise Fund (a nonprofit organization of which Beckstead was a member) sued the PCAOB claiming, inter alia, that the PCAOB was unconstitutional.<sup>53</sup> The Court characterized the case as a question of first impression as to whether for-cause removal protections for both principal and inferior officers<sup>54</sup> may be combined: “[m]ay 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?”<sup>55</sup>

Chief Justice Roberts, writing for the majority, held that the PCAOB and SEC’s dual layers of for-cause removal limitations contravened the Constitution’s separation of powers by impermissibly insulating PCAOB officers from the President’s control.<sup>56</sup> Chief Justice Roberts cited the vesting and take care clauses as bases of presidential

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45. 15 U.S.C. § 7211(a), (c) (2006). A “public accounting firm” is statutorily defined as any “legal entity that is engaged in the practice of public accounting or preparing or issuing audit reports.” § 7201(11)(A).

46. § 7211(e)(3)-(4).

47. § 7211(b).

48. *Free Enter. Fund v. PCAOB*, 130 S. Ct. 3138, 3147 (2010).

49. § 7211(e)(6).

50. § 7217(d)(3).

51. *Id.*

52. *Free Enter. Fund*, 130 S. Ct. at 3148 (quoting *Humphrey’s Ex’r*, 295 U.S. 602, 620 (1935)).

53. *Id.* at 3149.

54. *See supra* Part I.A.

55. *Free Enter. Fund*, 130 S. Ct. at 3147.

56. *Id.* at 3151–61.

executive power, and noted that in previous cases upholding restrictions on the President's removal power "only one level of protected tenure separated the President from an officer exercising executive power."<sup>57</sup> Furthermore, Chief Justice Roberts reasoned, the PCAOB's removal limitations were "an even more serious threat to executive control than an 'ordinary' dual for-cause standard" and amounted to an "unusually high standard."<sup>58</sup> Chief Justice Roberts rejected the government's argument that broad SEC control over PCAOB functions could serve as a sufficient control on PCAOB members.<sup>59</sup> The Chief Justice concluded that the statutory provisions granting for-cause removal limitations to PCAOB members could be severed from the remainder of the Act and held that "[t]he Sarbanes-Oxley Act remains fully operative as a law with these tenure restrictions excised."<sup>60</sup>

Justice Breyer, dissenting, argued that the majority's reasoning threatened to "sweep[] hundreds, perhaps thousands of high level government officials within the scope of the Court's holding, putting their job security and their administrative actions and decisions constitutionally at risk."<sup>61</sup> In addition to specifically mentioning ALJs and commissioned military officers as being implicated in the Court's holding, Justice Breyer attached an appendix listing 573 officials subject to dual layers of for-cause removal restrictions.<sup>62</sup> All of these agents, according to Justice Breyer, fall within the majority's reasoning.<sup>63</sup>

## II. IMPORTANT DIFFERENCES BETWEEN PCAOB, ALJ, AND COMMISSIONED MILITARY OFFICER REMOVAL STRUCTURES

This Note undertakes a comparative analysis of removal structures for PCAOB members, ALJs, and commissioned military officers. Comparing the former—which *Free Enterprise Fund* held was unconstitutional—with the latter two—which the majority took pains to distinguish from its holding—provides insight into what sorts of removal structures are likely to be upheld as constitutional in the future. These insights are then applied to the Sarbanes-Oxley Act to formulate model provisions that restore some measure of removal protections for PCAOB members, while avoiding the constitutional problems noted by the *Free Enterprise Fund* majority.

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57. *Id.* at 3153.

58. *Id.* at 3158.

59. *Id.* at 3158–59.

60. *Id.* at 3161–62.

61. *Id.* at 3179 (Breyer, J., dissenting).

62. *See id.* at 3180–81, 3192–3213 (Breyer, J., dissenting).

63. *Id.* at 3192 (Breyer, J., dissenting).

The Court reasoned in *Free Enterprise Fund* that the Sarbanes-Oxley Act was “highly unusual in committing *substantial executive authority* to officers protected by *two layers of for-cause removal*.”<sup>64</sup> The majority opinion focused almost exclusively on the unconstitutionality of the dual layers of for-cause removal.<sup>65</sup> The PCAOB’s exercise of “substantial executive authority,” though, is also crucially important to the majority’s reasoning if the Court intends to distinguish PCAOB members from, for example, ALJs. So, in addition to comparing removal structures, this Note also compares job duties (analyzed as executive, legislative, or adjudicative functions).

Section A of this Part analyzes the pre-*Free Enterprise Fund* removal structures of PCAOB members and SEC officers, and identifies which features the majority found most problematic. Section A also analyzes which branch functions are performed by PCAOB members. Section B compares these with removal structures for ALJs and Merit Systems Protection Board members, as well as branch functions performed by ALJs. Section C examines removal structures for and branch functions performed by commissioned military officers.

#### A. PCAOB Removal Structure and Branch Functions

##### 1. PCAOB REMOVAL STRUCTURE

PCAOB members can only be removed from office by the SEC.<sup>66</sup> Under the Sarbanes-Oxley Act (prior to *Free Enterprise Fund*), PCAOB members could only be removed (prior to their term’s expiration) “for good cause shown.”<sup>67</sup> The Act specifically defines “good cause” to include situations in which:

The Commission [SEC] finds, on the record, after notice and opportunity for a hearing, that such member—(A) has willfully violated any provision of [the Sarbanes-Oxley Act], the rules of the [PCAOB] 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

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64. *Id.* at 3159 (emphasis added).

65. *See id.* at 3146–64.

66. 15 U.S.C. § 7211(e)(6) (2006).

67. *Id.*

standard by any registered public accounting firm or any associated person thereof.<sup>68</sup>

In addition to censuring or removing individual members from office, the SEC is also empowered to censure or impose limitations on the PCAOB as a whole.<sup>69</sup> Specifically, the SEC can:

censure or impose limitations upon the activities, functions, and operations of the [PCAOB] Board, if the Commission [SEC] finds, on the record, after notice and opportunity for a hearing, that the [PCAOB] Board—(A) has violated or is unable to comply with any provision of [the Sarbanes-Oxley Act], the rules of the [PCAOB] Board, or the securities laws; or (B) without reasonable justification or excuse, has failed to enforce compliance with any such provision or rule, or any professional standard by a registered public accounting firm or an associated person thereof.<sup>70</sup>

This employment oversight structure contains several limitations on PCAOB members' employment aside from all-out removal from office. For instance, the SEC can "impose limitations" on the PCAOB as a whole.<sup>71</sup> While the circumstances under which the SEC is statutorily authorized to do so are fairly narrow,<sup>72</sup> the extent to which the SEC may limit the PCAOB's functions is couched in broad terms.<sup>73</sup>

Actual removal of individual PCAOB members was, as Chief Justice Roberts noted, narrowly circumscribed in several respects.<sup>74</sup> First, in contrast to more general for-cause employment removal, PCAOB members could only be removed under three circumstances—following

68. § 7217(d)(3).

69. § 7217(d)(2).

70. *Id.*

71. *Id.*

72. In order for the SEC to impose limitations, the PCAOB must have either (1) shown itself unable to comply with the Act, the PCAOB's own rules, or securities laws, or (2) failed to enforce compliance with legal or professional rules by one of the companies being audited. *Id.* After either of these occurs, the SEC can only impose limitations "on the record, after notice and opportunity for a hearing." *Id.*

73. The SEC may place limitations on the PCAOB's "activities, functions, and operations"—language broad enough to be reasonably construed as encompassing any involvement the PCAOB might have in anything. § 7217(d)(2). Furthermore, the term "limitations" itself is not statutorily defined or restricted in any way. *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745.

74. *Free Enter. Fund*, 130 S. Ct. 3138, 3159 (characterizing PCAOB members' removal procedures as "including . . . a sharply circumscribed definition of what constitutes 'good cause,' and rigorous procedures that must be followed prior to removal").

(1) a violation of the Sarbanes-Oxley Act, PCAOB rules, or securities law; (2) an abuse of office authority; or (3) a failure to enforce compliance by a firm or its employee being audited by the PCAOB.<sup>75</sup> A PCAOB member, then, could only be removed for some form of malfeasance or neglect of duty *related to his or her employment*.<sup>76</sup> Second, there were several procedural safeguards in place. Before removing a PCAOB member whose actions fell into one of these three categories, the SEC had to “provide notice and opportunity for a hearing” and make an official finding “on the record.”<sup>77</sup>

Third, removal of PCAOB members was limited to the SEC itself—no other person or entity was statutorily authorized to remove PCAOB members.<sup>78</sup> Similarly, PCAOB member removal was limited to situations in which “good cause” removal was warranted.<sup>79</sup> This contrasts with a statutory scheme in which particular circumstances might trigger some other procedure for removal; for example, administrative agents are *normally* only removable for-cause.<sup>80</sup>

In holding that PCAOB members’ removal protections were unconstitutional when combined with SEC removal protections, the Court rejected the argument that the SEC’s other controls over the PCAOB (aside from removal) were sufficient to offset the PCAOB’s removal protections.<sup>81</sup> Chief Justice Roberts emphasized that “[b]road power over [PCAOB] Board functions is not equivalent to the power to remove Board members,” and reasoned that “altering the budget or powers of an agency as a whole is a problematic way to control an inferior officer.”<sup>82</sup> Thus, according to the Chief Justice, control over an agency generally, no matter how broadly construed, is irrelevant to any judicial consideration of the constitutionality of individual officers’ employment removal structures.<sup>83</sup>

The majority’s refusal to accept SEC control over the PCAOB generally as an adequate substitute for at-will removal of individual members might only be a consequence of the Sarbanes-Oxley Act’s particular structure. Under the Act, the circumstances under which the SEC can directly modify the PCAOB’s “activities, functions, and operations” are themselves narrower than those under which the PCAOB

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75. § 7217(d)(3).

76. *See id.*

77. *Id.*

78. § 7211(e)(6).

79. *Id.*

80. *See infra* Part II.A.2.a.

81. *Free Enter. Fund*, 130 S. Ct. 3138, 3157–59 (2010).

82. *Id.* at 3158–59.

83. *See id.*

can directly remove an officer.<sup>84</sup> While the two statutory sections share parallel structures, the former omits situations in which the PCAOB has willfully abused its authority.<sup>85</sup> Accordingly, there is effectively no situation in which the SEC could limit the PCAOB's activities, functions, and operations in which it could not also simply remove an individual member. Thus, if the SEC had been statutorily authorized to limit PCAOB functions in situations where it would not be able to remove an individual PCAOB member, the Court might have treated this factor differently.

Therefore, at least with regards to the specific organizational structures in the Sarbanes-Oxley Act, the Court did not find that the SEC's other controls over the PCAOB (outside of its ability to remove individual members) influenced its decision.<sup>86</sup> Regarding actual removal power, the Court relied in part on the fact that "good cause" for removing PCAOB members was limited to the three specific situations outlined in § 7217(d)(3).<sup>87</sup> The enumeration of three specific grounds constituted, according to the Court, "a sharply circumscribed definition of what constitutes 'good cause.'"<sup>88</sup> In its brief, the government argued that the Act "[did] not expressly make its three specified grounds of removal exclusive."<sup>89</sup> Justice Breyer in his dissent made a similar argument through parenthetical citations to other Supreme Court case law.<sup>90</sup> The majority found this argument "implausibl[e]," and reasoned that "Congress would not have specified the necessary [SEC] finding in

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84. Compare § 7217(d)(2) (2006) with § 7217(d)(3).

85. Compare § 7217(d)(2) with § 7217(d)(3).

86. Term limits comprise a further control over PCAOB members that neither *Free Enterprise Fund* opinion considered: members cannot serve more than two five-year terms, consecutive or otherwise. § 7211(e)(5)(B). By limiting the time period that a particular member can remain in office, term limits arguably mitigate the amount of "damage" caused by a problematic inferior officer. Given the majority opinion's emphasis on the importance of removal as a means of *directly* controlling inferior officers, though, see *Free Enter. Fund*, 130 S. Ct. 3138, 3158–59 (2010), it is unlikely that the Court would have been swayed by this consideration. Term limits still do not engender any specific control over the officer by any superior officer (or by the President). See § 7211(e)(5)(B).

87. *Free Enter. Fund*, 130 S. Ct. at 3158–59.

88. *Id.* at 3159.

89. *Id.* at 3158 n.7 (quoting Brief for United States at 51 n.19, *Free Enter. Fund v. PCAOB*, 130 S. Ct. 3138 (2010) (No. 08-861)).

90. *Id.* at 3173 (Breyer, J., dissenting) ("Cf. *Shurtleff v. United States*, 189 U.S. 311, 314–19, 23 S. Ct. 535, 47 L.Ed. 828 (1903) (holding that removal authority is not always 'restricted to a removal for th[e] causes' set forth by statute); *Bowsher v. Synar*, 478 U.S. 714, 729 (1986)] (rejecting the 'arguable premis[e]' 'that the enumeration of certain specific causes of removal excludes the possibility of removal for other causes').").

§ 7217(d)(3) . . . if [PCAOB] members could also be removed without any finding at all.”<sup>91</sup>

The majority’s point is inelegantly made—surely the government and Justice Breyer were not arguing that PCAOB members could be removed without *any* finding, but were instead arguing that the Act could be interpreted as permitting PCAOB member removal under a more general “good cause” standard. Nevertheless, its broader thesis is clear: the government and dissent were incorrect in arguing that PCAOB members’ removal could be interpreted more broadly than was expressly provided for in the Act. Specifically, the Court expressed concern that PCAOB members could not be removed from office “for violations of *other* laws that do not relate to the Act”—for example, the SEC would have no statutory grounds to remove a PCAOB member “who cheats on his [personal] taxes.”<sup>92</sup>

Strong limitations on the removal of inferior administrative officers are not themselves unconstitutional.<sup>93</sup> They only become unconstitutional, according to *Free Enterprise Fund*, when the superior officers who wield the removal authority themselves enjoy similar removal protections.<sup>94</sup> Presidential removal power is only impermissibly limited when there are “two levels of protection from removal for those who nonetheless exercise significant executive power.”<sup>95</sup>

## 2. SEC REMOVAL STRUCTURE

PCAOB members are removed from office by SEC members.<sup>96</sup> According to the Court in *Free Enterprise Fund*, SEC members are also insulated from presidential removal. “The parties agree that the Commissioners cannot themselves be removed by the President except under the *Humphrey’s Executor* standard of ‘inefficiency, neglect of duty, or malfeasance in office,’ . . . and we decide the case with that understanding.”<sup>97</sup>

Whether SEC members *are* in fact removable only for-cause is a matter of controversy. As Justice Breyer noted: “[T]he statute that established the Commission says nothing about removal. It *is silent* on the question.”<sup>98</sup> Moreover, there is a strong historical argument that

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91. *Free Enter. Fund*, 130 S. Ct. at 3158 n.7.

92. *Id.* at 3158.

93. *See id.* at 3164.

94. *See id.*

95. *Id.*

96. 15 U.S.C. § 7211(e)(6) (2006).

97. *Free Enter. Fund*, 130 S. Ct. at 3148–49.

98. *Id.* at 3182–83 (Breyer, J., dissenting); *see also* Securities Exchange Act of 1934, Pub. L. No. 291, 48 Stat. 881 (codified as 15 U.S.C. §§ 78a–78lll (2006)).

Congress specifically intended that SEC members be removable *at will* by the President.<sup>99</sup>

Regardless, for this Note's purposes, it is irrelevant whether SEC members are in fact only removable under the *Humphrey's Executor* standard. It is enough that the Court viewed this limitation of superior officers' removal as sufficiently limiting on Presidential removal power to trigger a dual for-cause problem.<sup>100</sup> Thus, if other superior officers are removable only for "inefficiency, neglect of duty, or malfeasance in office," this limitation would again raise concerns about dual layers of insulation from presidential removal.

### 3. PCAOB BRANCH FUNCTIONS

The specific government functions performed by PCAOB members were also an important factor in the Court's decision for two reasons. First, the Court emphasized that "two levels of protection from removal" was constitutionally impermissible "*for those who nonetheless exercise significant executive power.*"<sup>101</sup> Second, the Court distinguished PCAOB members from ALJs on the grounds that ALJs "perform adjudicative rather than enforcement or policymaking functions."<sup>102</sup> Therefore, it is important for this comparative analysis to enumerate what sorts of functions PCAOB members perform.

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99. See *Free Enter. Fund*, 130 S. Ct. at 3183 (Breyer, J., dissenting) ("Congress created the [SEC] during the 9-year period *after* this Court decided *Myers*, and thereby cast serious doubt on the constitutionality of all 'for cause' removal provisions, but *before* it decided *Humphrey's Executor*, which removed any doubt in respect to the constitutionality of making commissioners of independent agencies removable only for cause."). Other legal scholars have also noted that *Free Enterprise Fund* essentially decided by fiat that SEC members are removable for cause. See, e.g., Peter L. Strauss, *On the Difficulties of Generalization—PCAOB in the Footsteps of Myers, Humphrey's Executor, Morrison, and Freytag*, 32 CARDOZO L. REV. 2255, 2277–78 (2011) ("[T]he majority decided by bare assertion a question of law on which their holding that the PCAOB 'for cause' removal provision was unconstitutional utterly depended . . ."); see also Henry Paul Monaghan, *Essay: On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 702–03 (2012) (criticizing Chief Justice Roberts for relying uncritically on both parties' assertions that SEC members are removable only for cause); Patrick Jiang, Note, *Free Enterprise Fund v. PCAOB: In Which a Great Case Makes Bad Law*, 92 B.U. L. REV. 701, 725–27 (2012). But see Note, *The SEC Is Not an Independent Agency*, 126 HARV. L. REV. 781, 782 (2013) (arguing that "the Court did not squarely decide whether SEC commissioners are removable by the President at will," and that "if the President were to remove an SEC commissioner without cause, a reviewing court would uphold the removal.").

100. *Free Enter. Fund*, 130 S. Ct. at 3151, 3153.

101. *Id.* at 3164 (emphasis added).

102. *Id.* at 3160 n.10.

PCAOB members perform executive functions. First, they execute the Act by registering public accounting firms.<sup>103</sup> Second, they conduct inspections<sup>104</sup> and investigations<sup>105</sup> of registered public accounting firms. Third, they “enforce compliance” with the Sarbanes-Oxley Act.<sup>106</sup> PCAOB members also perform legislative functions. The PCAOB’s duties include enacting rules that establish “auditing, quality control, ethics, independence, and other standards relating to the preparation of audit reports for issuers . . . .”<sup>107</sup> Additionally, PCAOB members perform adjudicative functions. Specifically, the PCAOB conducts “disciplinary proceedings” and “impose[s] appropriate sanctions [on] registered public accounting firms and associated persons.”<sup>108</sup> These are formal proceedings for which the PCAOB is specifically authorized to require testimony, document production, and subpoenas.<sup>109</sup> The PCAOB is also specifically required to “bring specific charges,” provide notice, and “keep a record of the proceedings.”<sup>110</sup> In short, PCAOB members undertake a number of activities that satisfy each of the three branch functions. It is thus an executive, quasi-legislative, and quasi-judicial agency.

### *B. Administrative Law Judge Removal Structure and Branch Functions*

#### 1. ALJ REMOVAL STRUCTURE

Like PCAOB members,<sup>111</sup> administrative law judges may be removed “only for good cause.”<sup>112</sup> Similarly, in language virtually identical to that governing PCAOB members,<sup>113</sup> ALJs may only be removed “on the record after opportunity for hearing.”<sup>114</sup> As a general rule, ALJs may only be removed by members of the Merit Systems Protection Board (MSPB).<sup>115</sup> There are three situations that constitute

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103. 15 U.S.C. §§ 7211(c)(1), 7212 (2006).

104. §§ 7211(c)(3), 7214.

105. §§ 7211(c)(4), 7215.

106. § 7211(c)(6).

107. § 7211(c)(2); *see also* § 7213.

108. §§ 7211(c)(4), 7215.

109. *See* § 7215(b)(2).

110. § 7215(c)(1).

111. *See* §§ 7211(e)(6), 7217(d)(3).

112. 5 U.S.C. § 7521(a)–(b) (2006).

113. 15 U.S.C. § 7217(d)(3) (2006).

114. *Id.*

115. The MSPB is “an independent, quasi-judicial agency in the Executive branch” that safeguards the federal government’s merit-based employee promotion and hiring apparatus (the “merit system”). *About MSPB*, U.S. MERIT SYSTEMS PROTECTION

good cause to convene a disciplinary hearing before the MSPB—if the ALJ: (A) “committed a prohibited personnel practice”; (B) violated “any law, rule or regulation” governing public employees; or (C) “knowingly and willfully refused or failed to comply with an order of the [MSPB].”<sup>116</sup>

As with the PCAOB, then, the situations that constitute “good cause” for ALJ removal are all job-related. But unlike the PCAOB members (who could only ever be removed for good cause, by the SEC), there are other special circumstances in which an ALJ may be removed without good cause, by someone other than the MSPB. First, the head of the agency may remove an ALJ “in the interests of national security.”<sup>117</sup> If the head of the agency does not enjoy for-cause removal protection, then this would be a situation in which there was only one layer of insulation from presidential removal. Second, the Office of Personnel Management may remove an ALJ through a reduction-in-force action.<sup>118</sup> This scenario is less likely to inform a *Free Enterprise Fund* analysis. Reduction-in-force actions are governed by a carefully defined order of preference for employee retention.<sup>119</sup>

## 2. MERIT SYSTEMS PROTECTION BOARD REMOVAL STRUCTURE

MSPB members “may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office.”<sup>120</sup> These removal limitations are identical to the *Humphrey’s Executor* standard that the *Free Enterprise Fund* majority opinion ascribed to the SEC.<sup>121</sup> Any important differences between removal structures for ALJs and PCAOB members, then, occur at the ALJ level.

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BOARD, <http://www.mspb.gov/About/about.htm> (last visited Mar. 15, 2013); *see also* 5 U.S.C. § 7521(a). The MSPB’s statutory authority comes from § 1204.

116. § 1215(a)(1)(A)–(C). Jerome Nelson argues that PCAOB members had stronger removal protections than ALJs because the Sarbanes-Oxley Act prescribed three “precise categories” for removal. *See* Jerome Nelson, *Administrative Law Judges’ Removal “Only For Cause”: Is That Administrative Procedure Act Protection Now Unconstitutional?*, 63 ADMIN. L. REV. 401, 412–13 (2011). This position is implausible, though, given that—as noted here—ALJs also have a statutory list of three categories that constitute grounds for removal. Granted these categories are not identical in content to those of the PCAOB, but they are still more limited than *general* for-cause removal. Thus, *ceteris paribus*, they raise the same concerns as the PCAOB’s “unusually high standard.” *See Free Enter. Fund v. PCAOB*, 130 S. Ct. 3138, 3158 (2010).

117. §§ 7521(b)(5)(A), 7532(b).

118. § 7521(b)(5)(B).

119. *See* § 3502; 5 C.F.R. pt. 351 (2012).

120. § 1202(d).

121. *See Free Enter. Fund*, 130 S. Ct. at 3148–49.

### 3. ALJ BRANCH FUNCTIONS

ALJs primarily perform adjudicative functions.<sup>122</sup> However, as Justice Breyer’s dissent notes, some ALJs also have “important administrative duties beyond pure adjudication.”<sup>123</sup> For example, the Chief Immigration Judge “issue[s] operational instructions and policy,” “provide[s] for appropriate training of [other] immigration judges,” and “direct[s] the conduct of all employees” assigned to his or her office.<sup>124</sup> Similarly, chief judges of the Office of Administrative Law Judges are “responsible for the efficient and effective administration of the [Office of Administrative Law Judges].”<sup>125</sup> Therefore, at least some ALJs also perform executive and legislative functions.

#### *C. Commissioned Military Officer Removal Structure and Branch Functions*

##### 1. COMMISSIONED OFFICER REMOVAL STRUCTURE

In time of war, commissioned military officers—unlike PCAOB members—may be “dismissed” (i.e., removed from office) by the President.<sup>126</sup> During peacetime, however, commissioned officers can only be removed (dismissed) by general courts-martial.<sup>127</sup> This Section specifically addresses removal structures for peacetime military officers, who are insulated from direct removal by the President.

The *United States Code* provides that during peacetime “[n]o commissioned officer may be dismissed from any armed force except— (1) by sentence of a general court-martial; [or] (2) in commutation of a sentence of a general court-martial.”<sup>128</sup> Like PCAOB members,<sup>129</sup> then,

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122. See § 556 (empowering ALJs to preside over hearings).

123. *Free Enter. Fund*, 130 S. Ct. at 3177 (Breyer, J., dissenting).

124. 8 C.F.R. § 1003.9(b) (2012).

125. 34 C.F.R. § 81.4(b) (2012).

126. 10 U.S.C. § 1161(a)(3) (2006). Justice Breyer’s dissent conflates officer dismissal with removal from active duty and removal from a list of officers recommended for promotion. See *Free Enter. Fund*, 130 S. Ct. at 3181 (Breyer, J., dissenting). This Note focuses on dismissal, which more closely resembles removal from office. Along with dismissal, general courts-martial may adjudge two other forms of punitive separation from military service—dishonorable discharge and bad conduct discharge—but neither of these applies to commissioned officers. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1003(b)(8) (2012), available at [http://www.loc.gov/rr/frd/Military\\_Law/pdf/MCM-2012.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/MCM-2012.pdf).

127. See § 1161(a)(1)-(2).

128. *Id.* General courts-martial are distinguished from summary courts-martial and special courts-martial. See § 816. For a brief overview of the differences between types of courts-martial, see ESTELLA I. VELEZ POLLACK, CONG. RESEARCH SERV., RS 21850, MILITARY COURTS-MARTIAL: AN OVERVIEW 3–5 (2004), available at

peacetime military officers enjoy some form of for-cause removal protection. And, as with the PCAOB,<sup>130</sup> this protection involves a formal hearing process—in this case, a court-martial.

Courts-martial for commissioned officers are themselves composed of other commissioned officers on active duty.<sup>131</sup> Thus, in peacetime, only other commissioned military officers serving on courts-martial can remove a commissioned military officer from office. Initially, this appears to directly violate *Free Enterprise Fund*'s holding.<sup>132</sup> If commissioned officers can only be removed by other commissioned officers, then there could be a chain of officers removing other officers, with no officer in the chain being directly removable by the President. This would not be limited to dual layers of insulation. Instead, the length of the removal chain would theoretically only be limited by the number of commissioned officers in the armed forces. Even so, *none* of those officers could be directly removable by the President. There are two salient differences, however, that distinguish commissioned officers' removal structure from that of PCAOB members and mitigate this problem.

One difference from the PCAOB removal structure is that a wider range of situations can constitute grounds for good cause removal. Whereas PCAOB members could only be removed under three circumstances, courts-martial are authorized to punish an officer (with one option for punishment being dismissal) for any offense listed in the "punitive articles" of the *Uniform Code of Military Justice* (UCMJ).<sup>133</sup> Many of these offenses resemble the situations that constitute "good

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<http://www.fas.org/man/crs/RS21850.pdf>. Summary courts-martial do not have jurisdiction over commissioned officers, § 820, and special courts-martial are banned by statute from prescribing dismissal as a punishment, § 819. Thus, only general courts-martial are relevant to the issue of commissioned officer dismissal. For brevity, the remainder of this Note refers to general courts-martial simply as "courts-martial."

129. See 15 U.S.C. §§ 7211(e)(6), 7217(d)(3) (2006).

130. See § 7217(d)(3).

131. 10 U.S.C. § 825(a)–(c)(1) (2006) (stating that "[a]ny commissioned officer on active duty is eligible to serve on all courts-martial," but stipulating that warrant officers or enlisted members are not eligible to serve on courts-martial when the defendant is a commissioned officer). For a discussion of how court-martial members are selected, see R. Rex Brookshire, II, *Juror Selection under the Uniform Code of Military Justice: Fact and Fiction*, 58 MIL. L. REV. 71, 84–94 (1972).

132. Compare § 825(a)–(c)(1), with *Free Enter. Fund v. PCAOB*, 130 S. Ct. 3138, 3164 (2010) (holding that Congress cannot limit the President's authority to remove those who exercise significant executive power by creating two levels of protection from removal for the same).

133. See MANUAL FOR COURTS-MARTIAL, *supra* note 126, at R.C.M. 1003(b)(8)(A) ("[A] dismissal may be adjudged for any offense [in the punitive articles] of which a commissioned officer . . . has been found guilty."). The punitive articles are codified as §§ 877–934.

cause” for PCAOB member removal, in the sense that they are job related. For example, courts-martial can punish officers for violating or failing to obey orders,<sup>134</sup> being derelict in the performance of duties,<sup>135</sup> or engaging in “disorders and neglects to the prejudice of good order and discipline in the armed forces.”<sup>136</sup>

But courts-martial also function as a criminal justice tribunal for military members. Accordingly, they can punish officers for offenses analogous to civilian crimes—including, for example, murder,<sup>137</sup> rape,<sup>138</sup> or robbery.<sup>139</sup> This ability to remove officers for criminal conduct contrasts with PCAOB members who, according to Chief Justice Roberts, could not be removed “for violations of *other* laws that do not relate to the [Sarbanes-Oxley] Act.”<sup>140</sup>

A second difference from the PCAOB removal structure is that a wide range of persons is authorized to convene courts-martial. Under the Act, only the SEC was statutorily authorized to convene disciplinary or dismissal hearings for PCAOB members.<sup>141</sup> In contrast, the Secretary of Defense, any of various types of commanding officers, and—most importantly—the President may convene general courts-martial.<sup>142</sup> Presidential power to convene courts-martial was crucial to the majority opinion’s efforts to distinguish commissioned military officers from PCAOB members.<sup>143</sup> But although the President may convene courts-martial, he is *not* authorized to serve on or preside over the courts-martial themselves.<sup>144</sup> He can only order that a court-martial be

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134. § 892(1)–(2) (“Any [commissioned officer] who . . . violates or fails to obey any lawful general order or regulation . . . shall be punished as a court-martial may direct.”).

135. § 892(3) (“Any [commissioned officer] who . . . is derelict in the performance of his duties . . . shall be punished as a court-martial may direct.”).

136. § 934.

137. § 918 (“Any [commissioned officer] who . . . is guilty of murder . . . shall suffer such punishment as a court-martial may direct.”).

138. § 920 (“Any [commissioned officer] who . . . is guilty of rape . . . shall be punished as a court-martial may direct.”).

139. § 922 (“Any [commissioned officer] who . . . is guilty of robbery . . . shall be punished as a court-martial may direct.”). Alternatively, if the offense in question is not enumerated in the punitive articles of the UCMJ, courts-martial may prosecute officers under civilian statutes for “crimes and offenses not capital.” § 934.

140. *Free Enter. Fund v. PCAOB*, 130 S. Ct. 3138, 3158 (2010).

141. *See* 15 U.S.C. §§ 7211(e)(6), 7215(a), (d)(1) (2006).

142. 10 U.S.C. § 822(a) (2006).

143. *See Free Enter. Fund*, 130 S. Ct. at 3160–61 (“The President and his subordinates may also convene boards of inquiry or courts-martial to hear claims of misconduct or poor performance by those officers.”).

144. *See* § 825 (enumerating criteria for who may sit as members of courts-martial); § 826 (stating that the military judge presiding over a general court-martial must himself be a commissioned officer).

convened. Accordingly, he still has no ability to directly remove a commissioned military officer in peacetime.

In distinguishing military officers from PCAOB members, the *Free Enterprise Fund* opinion suggested a third difference. Chief Justice Roberts noted that, in contrast to PCAOB members, commissioned officers are “broadly subject to Presidential control through the chain of command and through the President’s powers as Commander in Chief.”<sup>145</sup> For reasons stated below, this difference turns out to be irrelevant.<sup>146</sup>

## 2. COMMISSIONED OFFICER BRANCH FUNCTIONS

The functions performed by specific commissioned officers vary widely, depending on their particular assignments. In general terms, though, officers perform all of the three branch functions. First, there is no doubt that officers perform executive functions. Actions performed in combat, for example, can hardly be construed as legislative or adjudicative. Second, commissioned officers also perform adjudicative functions—for example, when serving on courts-martial.<sup>147</sup> Third, commissioned officers perform legislative functions. Among other things, officers are authorized to “establish[] and communicate[] policies necessary to maintain good order and discipline.”<sup>148</sup>

## III. SYNTHESIS: FORMULATING AN ANALYTICAL MODEL FOR EVALUATING THE CONSTITUTIONALITY OF REMOVAL STRUCTURES

This Part combines the salient features from each removal structure analyzed above to form a working model. Using this model, any given administrative agent’s employment removal structure can be analyzed to determine the likelihood of its being upheld as constitutional after *Free Enterprise Fund*. The threshold question is whether there are two or more layers of for-cause removal protection involving an inferior officer of the United States. If so, then there is a *prima facie Free Enterprise Fund* problem.

The second step is to determine which branch functions are performed by the inferior officer. The above analysis suggests that ALJs are permitted to have greater insulation from presidential removal than PCAOB members. Like PCAOB members, ALJs can only be removed

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145. *Free Enter. Fund*, 130 S. Ct. at 3160.

146. *See infra* text accompanying notes 176–177.

147. *See* §§ 825(a), 826(b).

148. HOLLY M. STONE, *THE MILITARY COMMANDER AND THE LAW* 17 (Kyle W. Green et al. eds., 10th ed. 2010).

for “good cause,” which specifically references employment-related conduct. Assuming that ALJs’ “good cause” provisions are construed as an exhaustive list,<sup>149</sup> the MSPB cannot convene removal hearings on the basis of non-employment-related conduct by ALJs. The fact that heads of agencies may remove ALJs for national security reasons does not add substantial presidential removal power. In many instances, the heads of agencies themselves are also only removable for cause.

Accordingly, ALJs’ removal structure is analogous in relevant respects to the unconstitutional PCAOB removal structure. Nevertheless, *Free Enterprise Fund* suggested that ALJs’ removal structure would not fall under the scope of its decision. The majority opinion noted that “many [ALJs] of course perform adjudicative rather than enforcement or policymaking functions”<sup>150</sup> in contrast to PCAOB members who exercise “substantial executive authority”<sup>151</sup> or “significant executive power.”<sup>152</sup> This suggests that the branch functions performed by an inferior officer affect whether a particular removal structure is constitutional.<sup>153</sup> But the distinction cannot hinge on whether the officer performs adjudicative functions, because—as noted above—PCAOB members perform adjudicative functions.<sup>154</sup>

Professor Kevin Stack suggests that the appropriate distinction is whether the inferior officer performs *only* adjudicative functions or instead performs adjudicative, legislative, *and* executive functions.<sup>155</sup> But this is problematic because, as Justice Breyer pointed out, at least some ALJs also perform administrative duties.<sup>156</sup> Instead, as the majority’s language suggests, the correct distinction seems to be whether the inferior officer exercises “substantial executive authority.” If an officer

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149. That is, assuming that the Court adheres to the same method of statutory construction as it did in *Free Enterprise Fund*. See *Free Enter. Fund*, 130 S. Ct. at 3158 n.7; see also *supra* Part II.A.1.

150. *Free Enter. Fund*, 130 S. Ct. at 3160 n.10.

151. *Id.* at 3144–45.

152. *Id.* at 3164.

153. For other discussions of how branch functions might affect the constitutionality of removal structures, see Kevin M. Stack, *Agency Independence after PCAOB*, 32 CARDOZO L. REV. 2391, 2411–13 (2011), and Nelson, *supra* note 116, at 416–18.

154. See *supra* Part II.A.3.

155. Stack, *supra* note 153, at 2411–13 (“The ALJ’s adjudicative functions do not themselves mark the line between ALJs and the [PCAOB]. Rather, the fact that the [PCAOB] *also* performs enforcement and policymaking functions distinguishes it from ALJs.”).

156. *Free Enter. Fund*, 130 S. Ct. at 3177 (Breyer, J., dissenting).

does not exercise substantial executive authority,<sup>157</sup> then two layers of strong removal protections are constitutional.<sup>158</sup>

The more interesting and less-explored question, though, concerns what sort of removal structure is constitutional for officers who *do* exercise substantial executive authority. One reading, as suggested by *Free Enterprise Fund*'s severance of PCAOB members' "good cause" removal provisions, is that such officers cannot enjoy *any* removal protections if their superior officers are themselves insulated from presidential removal. But the removal structure for commissioned military officers in peacetime, which the majority opinion took pains to distinguish from that of the PCAOB,<sup>159</sup> offers a more nuanced approach.

In one sense, commissioned military officers in peacetime are completely isolated from presidential removal. They can only be removed by other commissioned officers serving on courts-martial. Those officers in turn can also only be removed by other commissioned officers serving on courts-martial. Yet the Court was reticent to find this removal structure unconstitutional.<sup>160</sup> Aside from generally invoking the President's Commander-in-Chief powers, the Court distinguished military removal on the grounds that the President has the power to convene courts-martial.<sup>161</sup> As noted above, though,<sup>162</sup> the President has no power over the *decisions* of courts-martial; he can order a hearing, but he cannot influence that hearing's determination.

There are two factors, then, that differentiate the pre-*Free Enterprise Fund* PCAOB removal structure from a constitutional removal structure for an inferior officer who exercises substantial executive authority. First, the grounds for "good cause" removal should include some provision for misconduct unrelated to employment duties. Second, insulation from presidential removal may be mitigated by a provision authorizing the President to convene—if not oversee—the disciplinary proceedings which precipitate the inferior officer's removal. These factors ensure broader grounds for inferior officer removal and allow the President to directly initiate the removal process.

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157. ALJs would be considered to fall into this latter category. Even ALJs who exercise administrative duties do so only as a corollary to their primary responsibilities as adjudicators.

158. One consequence of this interpretation is that an inferior officer who primarily performs only *legislative* functions—e.g., promulgating rules—would also be entitled to strong, dual insulation from presidential removal. Whether this is a plausible reading is another project worth exploring; most of the literature on this issue has focused on *adjudicative* functions through analysis of ALJs.

159. *See Free Enter. Fund*, 130 S. Ct. at 3160–61.

160. *See id.*

161. *Id.*

162. *See supra* note 144 and accompanying text.

These considerations can be summarized as follows:

- (1) Is an inferior officer separated from presidential removal by two or more layers of for-cause protection?
  - a. If no, then *Free Enterprise Fund* does not apply.
  - b. If yes, then there is a prima facie *Free Enterprise Fund* issue.
- (2) Does the inferior officer exercise substantial executive authority?
  - a. If no, then two layers of for-cause removal protections are constitutional—even if those protections are “heightened” (i.e., the officer may only be removed as a result of job-related conduct).
  - b. If yes, then there is a prima facie *Free Enterprise Fund* issue.
- (3) Can the inferior officer be removed for conduct that is not directly related to his employment?
- (4) Can the President initiate removal proceedings?
  - a. If the answer to either (3) or (4) is no, then the inferior officer’s removal structure is unconstitutional.
  - b. If the answers to both (3) and (4) are yes, then, according to this Note’s thesis, the inferior officer’s removal structure is constitutional.

#### IV. A PROPOSED SOLUTION FOR PCAOB REMOVAL STRUCTURE

Finally, this Part applies the analytical model developed in Part III to the PCAOB itself. The goal is to suggest minimal revisions for Congress to make to the Sarbanes-Oxley Act. These revisions will retain the advantages of the PCAOB’s previous removal protections while remaining constitutional under *Free Enterprise Fund*.

The statute as it currently stands, with all PCAOB removal protections severed, is inadequate. The PCAOB was created as a nonprofit organization and is not technically a government agency.<sup>163</sup> The primary purpose for this unusual arrangement is to recruit qualified candidates from the private sector “by paying salaries far above the standard Government pay scale.”<sup>164</sup> But salaries aside, it is plausible that qualified candidates are less likely to be attracted to a position with an at-will employment structure. The PCAOB is already at a disadvantage

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163. 15 U.S.C. § 7211(b) (2006).

164. *Free Enter. Fund*, 130 S. Ct. at 3147; see also S. REP. NO. 107-205, at 7 (2002) (“The bill makes it plain, as the Committee intends, that the Board is to provide for staff salaries that are fully competitive with those for comparable private-sector . . . positions.”).

compared to private employers, because it can only offer limited forms of compensation.<sup>165</sup> Moreover, because of the PCAOB's peculiar status as a government auditor, its members are prohibited from "engag[ing] in any other professional or business activity,"<sup>166</sup> and are further prohibited from sharing profits or receiving payments from any public accounting firm, aside from fixed retirement payments.<sup>167</sup>

Talent with the sophisticated knowledge of the accounting industry that is essential for the proper functioning of the PCAOB is likely to have attractive, competing employment opportunities. At-will employment, especially when combined with these further substantial limitations, is not likely to "sweeten the deal." Moreover, the costs of employing unqualified or subpar candidates in an important regulatory position are too high.<sup>168</sup>

Congress cannot respond by revising the Sarbanes-Oxley Act to include a PCAOB removal structure parallel to the one in place for ALJs.<sup>169</sup> As this Note argues above,<sup>170</sup> the PCAOB's pre-*Free Enterprise Fund* removal protections are in important respects analogous to ALJs' removal protections. The Court struck down those protections as unconstitutional because—unlike ALJs—PCAOB members exercise "substantial executive authority."<sup>171</sup>

Instead, Congress should respond by reintroducing the PCAOB's prior removal structure, but with two changes. First, Congress should add a fourth provision to the grounds that constitute "good cause" for PCAOB member removal. Previously, the SEC was authorized to remove PCAOB members from office for engaging in the activities enumerated in subsections 7217(d)(3)(A) through (C). Congress should add a new subsection, (D), which would include some reference to non-employment-related misconduct. This subsection would read as follows: "(D) has been convicted of a felony or engaged in other misconduct."

The addition of a felony conviction as a reason for removal serves two purposes. First, it parallels the punitive articles of the *Uniform Code*

165. For example, a nonprofit organization cannot offer stock options to its employees.

166. § 7211(e)(3) (emphasis added).

167. *Id.*

168. For example, Enron's bankruptcy, which should have been avoided by effective public auditing oversight, cost its shareholders almost \$11 billion. George J. Benston, *The Quality of Corporate Financial Statements and Their Auditors before and after Enron*, 497 POL'Y ANALYSIS, Nov. 6, 2003, 1, at 12, available at <http://www.cato.org/sites/cato.org/files/pubs/pdf/pa497.pdf>.

169. That is, a removal structure that only allows inferior officers to be removed as a consequence of conduct directly related to their job.

170. See *supra* Part II.B.

171. *Free Enter. Fund v. PCAOB*, 130 S. Ct. 3138, 3144–45 (2010).

of *Military Justice*, which authorize courts-martial to remove commissioned officers for committing crimes.<sup>172</sup> Second, it responds to the *Free Enterprise Fund* majority's fears that the President is powerless to remove PCAOB members who have, for example, cheated on their taxes.<sup>173</sup>

The inclusion of "other misconduct" is an intentionally general catchall category. This latter clause responds to the majority's concerns that PCAOB members were protected by a "sharply circumscribed definition of what constitutes 'good cause.'"<sup>174</sup> One might criticize this inclusion as vitiating the for-cause protection—if PCAOB members could be removed for mere "misconduct" broadly construed, would they be any more protected than they currently are under the complete absence of removal protections? This concern overreaches. At the very least, PCAOB members would regain the right to a formal hearing and a finding on the record.<sup>175</sup> Moreover, even a pretextual finding would require some actual misconduct. Section (D) is, of course, only a model provision; Congress could instead choose to pass a more robust restoration of PCAOB members' removal protections. But doing so would come with a higher likelihood that the Court might again strike down the provision. This Note's solution—repassing sections (A) through (C) with the addition of section (D)—minimizes this risk by broadening the range of behaviors that constitute grounds for removal while still requiring *some* form of misconduct.

Additionally, Congress should add a provision stating that both the SEC and the President may convene disciplinary hearings for PCAOB members. Towards this end, 15 U.S.C. § 7211(e)(6) would be amended to read:

- (6) A member of the Board may be removed by the Commission from office, in accordance with section 7217(d)(3) of this title, for good cause shown before the expiration of the term of that member. Both the Commission and the President of the United States shall have the power to convene hearings pursuant to section 7217(d)(3).

This resembles 10 U.S.C. § 822(a)(1), which provides that the President may convene general courts-martial for commissioned military officers. Importantly, the SEC would still preside over disciplinary proceedings,

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172. See *supra* notes 137-140 and accompanying text.

173. See *Free Enter. Fund*, 130 S. Ct. at 3158.

174. See *id.* at 3159.

175. See 15 U.S.C. §§ 7211(e)(6), 7217(d)(3) (2006).

just as courts-martial are composed of other commissioned military officers.

In effect, dual layers of insulation from presidential removal would remain, with two changes. First, the “good cause” provisions controlling PCAOB member removal would be broadened. Second, the President would gain the statutory authority to convene—but not preside over—removal proceedings for PCAOB members. Ironically, reintroducing for-cause protections in this way would actually *increase* the President’s control over PCAOB member removal by allowing him to initiate removal proceedings.

One counterargument to this proposal is that, as the *Free Enterprise Fund* majority noted, military officers are further “subject to Presidential control through the chain of command and through the President’s powers as Commander-in-Chief.”<sup>176</sup> PCAOB members, on the other hand, are not subject to this control. Therefore, the argument goes, emulating military removal structure is inadequate to ensure constitutionality.

This argument fails because the President’s general oversight powers for military officers can be seen as analogous to the SEC’s general oversight powers for PCAOB members. The majority opinion emphasized that “[b]road power over Board *functions* is not equivalent to the power to remove Board *members*.”<sup>177</sup> Similarly, presidential authority to *command* an officer is not equivalent to presidential authority to *remove* an officer. Thus, despite the majority’s boilerplate invocation of the President’s Commander-in-Chief powers, the relevant difference between military officers and PCAOB members’ removal structures is really the President’s ability to convene courts-martial.

Alternatively, Congress could make PCAOB members directly removable by the President, either for good cause or at will. The advantage of this option is that it would remove the PCAOB’s dual for-cause insulation entirely, and would accordingly run no risk of being overturned by the Supreme Court on the basis of *Free Enterprise Fund*. But this advantage comes at too high a cost. As Justice Breyer’s dissent notes, the PCAOB’s particular functions make it desirable to retain some level of insulation or independence from the President. For one thing, the PCAOB performs adjudicative functions. There is extensive precedential support for the policy determination that it is desirable for adjudicators in the executive branch to be insulated from presidential removal.<sup>178</sup> The majority opinion’s efforts to distinguish ALJs imply that it also endorses these policies. Additionally, it is important for agencies that exercise

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176. See *Free Enter. Fund*, 130 S. Ct. at 3160.

177. *Id.* at 3158 (emphasis added).

178. See *id.* at 3173–74 (Breyer, J., dissenting).

“technical expertise” to have some insulation from presidential control, to ensure that they remain apolitical.<sup>179</sup> If PCAOB members were directly removable by the President, there would be too much risk that political or partisan concerns could impede the PCAOB’s auditing of the accounting industry.

Therefore, the better option is to reintroduce dual layers of for-cause protections, but with the restrictions embodied by the above-proposed model provisions. Giving PCAOB members for-cause removal protections will help attract competitive candidates. Insulating them from presidential removal will help ensure agency independence. At the same time, broadening the grounds that constitute “good cause” for removal and allowing the President to convene removal proceedings will address the constitutionality concerns raised by the majority in *Free Enterprise Fund*.

#### CONCLUSION

This Note creates a working model for evaluating the constitutionality of administrative agents’ employment removal structures after *Free Enterprise Fund*. Stated briefly: one form of removal structure is constitutional if the agent does not wield substantial executive authority, while a different, narrower removal structure is constitutional if the agent does. A comparative analysis of PCAOB members, ALJs, and commissioned military officers yields a list of specific features, which are or are not constitutional for each of these two types of inferior officers. This analysis serves as a basis for drafting model provisions suggesting how Congress might modify the Sarbanes-Oxley Act in the wake of *Free Enterprise Fund*. The model provisions promise the best of both worlds by recapturing the benefits of PCAOB members’ for-cause removal protections, while still remaining constitutional under *Free Enterprise Fund*.

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179. *Id.* at 3174 (Breyer, J., dissenting).