

Sec. 2—Powers, Duties of the President Cl. 2—Treaties and Appointment of Officers

As a result of these cases, the long-running controversy with respect to the legitimacy of the independent agencies appears to have been settled,⁵⁸⁰ although it appears likely that the controversies with respect to congressional-presidential assertions of power in executive agency matters are only beginning.

Inferior Officers.—In the case of inferior officers, Congress may “limit and restrict the power of removal as it deems best for the public interest,”⁵⁸¹ and when Congress has vested the power to appoint these officers in heads of departments, it is ordinarily the department head, rather than the President, who enjoys the power of removal. However, in the case of *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*,⁵⁸² the Court considered whether an inferior officer can be twice insulated from the President’s removal authority—in other words, can a principal officer whom Congress has protected from at will removal by the President in turn have his or her power to remove an inferior officer restricted?⁵⁸³ The Court held that such multilevel protection from removal is contrary to the President’s executive authority. First, even if the President determines that the inferior officer is neglecting his duties or discharging them improperly, the President does not have the power to remove that officer. Then, if the President seeks to have the principal officer remove the inferior officer, the principal officer may not agree with the President’s determination, and the President generally cannot remove the principal officer simply because of this disagreement.⁵⁸⁴

In the absence of specific legislative provision to the contrary, the President may at his discretion remove an inferior officer whose term is limited by statute,⁵⁸⁵ or one appointed with the consent of

⁵⁸⁰ Indeed, the Court explicitly analogized the civil enforcement powers of the independent agencies to the prosecutorial powers wielded by the independent counsel. *Morrison v. Olson*, 487 U.S. 654, 692 n.31 (1988).

⁵⁸¹ *United States v. Perkins*, 116 U.S. 483 (1886), cited with approval in *Myers v. United States*, 272 U.S. 52, 161–163, 164 (1926), and *Morrison v. Olson*, 487 U.S. 654, 689 n.27 (1988).

⁵⁸² 561 U.S. ___, No. 08–861, slip op. (2010).

⁵⁸³ The case involved the Public Company Accounting Oversight Board, a private non-profit entity with a five-member board, that has significant authority over accounting firms that participate in auditing public companies. The board members are appointed to staggered 5-year terms by the Securities and Exchange Commission, and can only be removed for “good cause shown,” which requires a finding of either a violation of securities laws or board rules, willful abuse of power, or failure to enforce compliance with the rules governing registered public accounting firms. 15 U.S.C. § 7217(d)(3). The members of the Commission, in turn, can only be removed by the President for inefficiency, neglect of duty, or malfeasance in office.

⁵⁸⁴ 561 U.S. ___, No. 08–861, slip op. at 14–15 (2010).

⁵⁸⁵ *Parsons v. United States*, 167 U.S. 324 (1897).