

BREYER, J., dissenting

SUPREME COURT OF THE UNITED STATES

No. 08–861

FREE ENTERPRISE FUND AND BECKSTEAD AND
WATTS, LLP, PETITIONERS *v.* PUBLIC COMPANY
ACCOUNTING OVERSIGHT BOARD ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[June 28, 2010]

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

The Court holds unconstitutional a statute providing that the Securities and Exchange Commission can remove members of the Public Company Accounting Oversight Board from office only for cause. It argues that granting the “inferior officer[s]” on the Accounting Board “more than one level of good-cause protection . . . contravenes the President’s ‘constitutional obligation to ensure the faithful execution of the laws.’” *Ante*, at 2. I agree that the Accounting Board members are inferior officers. See *ante*, at 28–29. But in my view the statute does not significantly interfere with the President’s “executive Power.” Art. II, §1. It violates no separation-of-powers principle. And the Court’s contrary holding threatens to disrupt severely the fair and efficient administration of the laws. I consequently dissent.

I
A

The legal question before us arises at the intersection of two general constitutional principles. On the one hand, Congress has broad power to enact statutes “necessary and proper” to the exercise of its specifically enumerated

constitutional authority. Art. I, §8, cl. 18. As Chief Justice Marshall wrote for the Court nearly 200 years ago, the Necessary and Proper Clause reflects the Framers' efforts to create a Constitution that would "endure for ages to come." *McCulloch v. Maryland*, 4 Wheat. 316, 415 (1819). It embodies their recognition that it would be "unwise" to prescribe "the means by which government should, in all future time, execute its powers." *Ibid.* Such "immutable rules" would deprive the Government of the needed flexibility to respond to future "exigencies which, if foreseen at all, must have been seen dimly." *Ibid.* Thus the Necessary and Proper Clause affords Congress broad authority to "create" governmental "'offices'" and to structure those offices "as it chooses." *Buckley v. Valeo*, 424 U. S. 1, 138 (1976) (*per curiam*); cf. *Lottery Case*, 188 U. S. 321, 355 (1903). And Congress has drawn on that power over the past century to create numerous federal agencies in response to "various crises of human affairs" as they have arisen. *McCulloch*, *supra*, at 415 (emphasis deleted). Cf. *Wong Yang Sung v. McGrath*, 339 U. S. 33, 36–37 (1950).

On the other hand, the opening sections of Articles I, II, and III of the Constitution separately and respectively vest "all legislative Powers" in Congress, the "executive Power" in the President, and the "judicial Power" in the Supreme Court (and such "inferior Courts as Congress may from time to time ordain and establish"). In doing so, these provisions imply a structural separation-of-powers principle. See, e.g., *Miller v. French*, 530 U. S. 327, 341–342 (2000). And that principle, along with the instruction in Article II, §3 that the President "shall take Care that the Laws be faithfully executed," limits Congress' power to structure the Federal Government. See, e.g., *INS v. Chadha*, 462 U. S. 919, 946 (1983); *Freytag v. Commissioner*, 501 U. S. 868, 878 (1991); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U. S. 50, 64 (1982); *Commodity Futures Trading Comm'n v. Schor*, 478

BREYER, J., dissenting

U. S. 833, 859–860 (1986). Indeed, this Court has held that the separation-of-powers principle guarantees the President the authority to dismiss certain Executive Branch officials at will. *Myers v. United States*, 272 U. S. 52 (1926).

But neither of these two principles is absolute in its application to removal cases. The Necessary and Proper Clause does not grant Congress power to free *all* Executive Branch officials from dismissal at the will of the President. *Ibid.* Nor does the separation-of-powers principle grant the President an absolute authority to remove *any and all* Executive Branch officials at will. Rather, depending on, say, the nature of the office, its function, or its subject matter, Congress sometimes may, consistent with the Constitution, limit the President’s authority to remove an officer from his post. See *Humphrey’s Executor v. United States*, 295 U. S. 602 (1935), overruling in part *Myers, supra*; *Morrison v. Olson*, 487 U. S. 654 (1988). And we must here decide whether the circumstances surrounding the statute at issue justify such a limitation.

In answering the question presented, we cannot look to more specific constitutional text, such as the text of the Appointments Clause or the Presentment Clause, upon which the Court has relied in other separation-of-powers cases. See, e.g., *Chadha, supra*, at 946; *Buckley, supra*, at 124–125. That is because, with the exception of the general “vesting” and “take care” language, the Constitution is completely “silent with respect to the power of removal from office.” *Ex parte Hennen*, 13 Pet. 230, 258 (1839); see also *Morrison, supra*, at 723 (SCALIA, J., dissenting) (“There is, of course, no provision in the Constitution stating who may remove executive officers . . .”).

Nor does history offer significant help. The President’s power to remove Executive Branch officers “was not discussed in the Constitutional Convention.” *Myers, supra*, at 109–110. The First Congress enacted federal statutes

that limited the President's ability to *oversee* Executive Branch officials, including the Comptroller of the United States, federal district attorneys (precursors to today's United States Attorneys), and, to a lesser extent, the Secretary of the Treasury. See, *e.g.*, Lessig, Readings By Our Unitary Executive, 15 *Cardozo L. Rev.* 175, 183–184 (1993); Teifer, The Constitutionality of Independent Officers as Checks on Abuses of Executive Power, 63 *B. U. L. Rev.* 59, 74–75 (1983); Casper, An Essay in Separation of Powers: Some Early Versions and Practices, 30 *Wm. & Mary L. Rev.* 211, 240–241 (1989) (hereinafter Casper); H. Bruff, Balance of Forces: Separation of Powers in the Administrative State 414–417 (2006). But those statutes did not directly limit the President's authority to *remove* any of those officials—"a subject" that was "much disputed" during "the early history of this government," "and upon which a great diversity of opinion was entertained." *Hennen, supra*, at 259; see also *United States ex rel. Goodrich v. Guthrie*, 17 *How.* 284, 306 (1855) (McLean, J., dissenting); Casper 233–237 (recounting the Debate of 1789). Scholars, like Members of this Court, have continued to disagree, not only about the inferences that should be drawn from the inconclusive historical record, but also about the nature of the original disagreement. Compare *ante*, at 11; *Myers, supra*, at 114 (majority opinion of Taft, C. J.); and Prakash, New Light on the Decision of 1789, 91 *Cornell L. Rev.* 1021 (2006), with, *e.g.*, *Myers, supra*, at 194 (McReynolds, J., dissenting); Corwin, Tenure of Office and the Removal Power Under the Constitution, 27 *Colum. L. Rev.* 353, 369 (1927); Lessig & Sunstein, The President and the Administration, 94 *Colum. L. Rev.* 1, 25–26 (1994) (hereinafter Lessig & Sunstein); and L. Fisher, President and Congress: Power and Policy 86–89 (1972).

Nor does this Court's precedent fully answer the question presented. At least it does not clearly invalidate the provision in dispute. See Part II–C, *infra*. In *Myers*,

BREYER, J., dissenting

supra, the Court invalidated—for the first and only time—a congressional statute on the ground that it unduly limited the President’s authority to remove an Executive Branch official. But soon thereafter the Court expressly disapproved most of *Myers*’ broad reasoning. See *Humphrey’s Executor*, 295 U. S., at 626–627, overruling in part *Myers*, *supra*; *Wiener v. United States*, 357 U. S. 349, 352 (1958) (stating that *Humphrey’s Executor* “explicitly ‘disapproved’” of much of the reasoning in *Myers*). Moreover, the Court has since said that “the essence of the decision in *Myers* was the judgment that the Constitution prevents Congress from ‘draw[ing] to itself . . . the power to remove or the right to participate in the exercise of that power.’” *Morrison*, *supra*, at 686 (emphasis added). And that feature of the statute—a feature that would *aggrandize* the power of Congress—is not present here. Congress has not granted itself any role in removing the members of the Accounting Board. Cf. *Freytag*, 501 U. S., at 878 (“separation-of-powers jurisprudence generally focuses on the danger of one branch’s *aggrandizing its power* at the expense of another branch” (emphasis added)); *Buckley*, 424 U. S., at 129 (same); *Schor*, 478 U. S., at 856 (same); *Bowsher v. Synar*, 478 U. S. 714, 727 (1986) (same). Compare *Myers*, *supra*, (striking down statute where Congress granted *itself* removal authority over Executive Branch official), with *Humphrey’s Executor*, *supra*, (upholding statute where such aggrandizing was absent); *Wiener*, *supra* (same); *Morrison*, *supra* (same).

In short, the question presented lies at the intersection of two sets of conflicting, broadly framed constitutional principles. And no text, no history, perhaps no precedent provides any clear answer. Cf. *Chicago v. Morales*, 527 U. S. 41, 106 (1999) (THOMAS, J., joined by Rehnquist, C. J., and SCALIA, J., dissenting) (expressing the view that “this Court” is “most vulnerable” when “it deals with judge-made constitutional law” that lacks “roots in the

language” of the Constitution (internal quotation marks omitted)).

B

When previously deciding this kind of nontextual question, the Court has emphasized the importance of examining how a particular provision, taken in context, is likely to function. Thus, in *Crowell v. Benson*, 285 U. S. 22, 53 (1932), a foundational separation-of-powers case, the Court said that “regard must be had, as in other cases where constitutional limits are invoked, not to mere matters of form, but to the substance of what is required.” The Court repeated this injunction in *Schor* and again in *Morrison*. See *Schor*, *supra*, at 854 (stating that the Court must look “‘beyond form to the substance of what’ Congress has done”); *Morrison*, 487 U. S., at 689–690 (“The analysis contained in our removal cases is designed *not to define rigid categories* of those officials who may or may not be removed at will by the President,” but rather asks whether, given the “functions of the officials in question,” a removal provision “interfere[s] with the President’s exercise of the ‘executive power’” (emphasis added)). The Court has thereby written into law Justice Jackson’s wise perception that “the Constitution . . . contemplates that practice will integrate the dispersed powers into *a workable government*.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579, 635 (1952) (opinion concurring in judgment) (emphasis added). See also *ibid.* (“The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context”).

It is not surprising that the Court in these circumstances has looked to function and context, and not to bright-line rules. For one thing, that approach embodies the intent of the Framers. As Chief Justice Marshall long

BREYER, J., dissenting

ago observed, our Constitution is fashioned so as to allow the three coordinate branches, including this Court, to exercise practical judgment in response to changing conditions and “exigencies,” which at the time of the founding could be seen only “dimly,” and perhaps not at all. *McCulloch*, 4 Wheat., at 415.

For another, a functional approach permits Congress and the President the flexibility needed to adapt statutory law to changing circumstances. That is why the “powers conferred upon the Federal Government by the Constitution were phrased in language broad enough to allow for the expansion of the Federal Government’s role” over time. *New York v. United States*, 505 U. S. 144, 157 (1992). Indeed, the Federal Government at the time of the founding consisted of about 2,000 employees and served a population of about 4 million. See Kaufman, *The Growth of the Federal Personnel System*, in *The Federal Government Service* 7, 8 (W. Sayre 2d ed. 1965); Dept. of Commerce, Census Bureau, *Historical Statistics of the United States: Colonial Times to 1970*, pt. 1, p. 8 (1975). Today, however, the Federal Government employs about *4.4 million workers* who serve a Nation of more than 310 million people living in a society characterized by rapid technological, economic, and social change. See Office of Management and Budget, *Analytical Perspectives, Budget of the U. S. Government, Fiscal Year 2010*, p. 368 (2009).

Federal statutes now require or permit Government officials to provide, regulate, or otherwise administer, not only foreign affairs and defense, but also a wide variety of such subjects as taxes, welfare, social security, medicine, pharmaceutical drugs, education, highways, railroads, electricity, natural gas, nuclear power, financial instruments, banking, medical care, public health and safety, the environment, fair employment practices, consumer protection and much else besides. Those statutes create a host of different organizational structures. Sometimes

they delegate administrative authority to the President directly, *e.g.*, 10 U. S. C. §2031(a)(1); 42 U. S. C. §5192(c); sometimes they place authority in a long-established Cabinet department, *e.g.*, 7 U. S. C. §1637b(c)(1); 12 U. S. C. §5221(b)(2) (2006 ed., Supp. II); sometimes they delegate authority to an independent commission or board, *e.g.*, 15 U. S. C. §4404(b); 28 U. S. C. §994; sometimes they place authority directly in the hands of a single senior administrator, *e.g.*, 15 U. S. C. §657d(c)(4); 42 U. S. C. §421; sometimes they place it in a sub-cabinet bureau, office, division or other agency, *e.g.*, 18 U. S. C. §4048; sometimes they vest it in multimember or multiagency task groups, *e.g.* 5 U. S. C. §§593–594; 50 U. S. C. §402 (2006 ed. and Supp. II); sometimes they vest it in commissions or advisory committees made up of members of more than one branch, *e.g.*, 20 U. S. C. §42(a); 28 U. S. C. §991(a) (2006 ed., Supp. II); 42 U. S. C. §1975; sometimes they divide it among groups of departments, commissions, bureaus, divisions, and administrators, *e.g.*, 5 U. S. C. §9902(a) (2006 ed., Supp. II); 7 U. S. C. §136i–1(g); and sometimes they permit state or local governments to participate as well, *e.g.*, 7 U. S. C. §2009aa–1(a). Statutes similarly grant administrators a wide variety of powers—for example, the power to make rules, develop informal practices, investigate, adjudicate, impose sanctions, grant licenses, and provide goods, services, advice, and so forth. See generally 5 U. S. C. §500 *et seq.*

The upshot is that today vast numbers of statutes governing vast numbers of subjects, concerned with vast numbers of different problems, provide for, or foresee, their execution or administration through the work of administrators organized within many different kinds of administrative structures, exercising different kinds of administrative authority, to achieve their legislatively mandated objectives. And, given the nature of the Government’s work, it is not surprising that administrative

BREYER, J., dissenting

units come in many different shapes and sizes.

The functional approach required by our precedents recognizes this administrative complexity and, more importantly, recognizes the various ways presidential power operates within this context—and the various ways in which a removal provision might affect that power. As human beings have known ever since Ulysses tied himself to the mast so as safely to hear the Sirens' song, sometimes it is necessary to disable oneself in order to achieve a broader objective. Thus, legally enforceable commitments—such as contracts, statutes that cannot instantly be changed, and, as in the case before us, the establishment of independent administrative institutions—hold the potential to empower precisely because of their ability to constrain. If the President seeks to regulate through impartial adjudication, then insulation of the adjudicator from removal at will can help him achieve that goal. And to free a technical decisionmaker from the fear of removal without cause can similarly help create legitimacy with respect to that official's regulatory actions by helping to insulate his technical decisions from nontechnical political pressure.

Neither is power always susceptible to the equations of elementary arithmetic. A rule that takes power from a President's friends and allies may weaken him. But a rule that takes power from the President's opponents may strengthen him. And what if the rule takes power from a functionally *neutral* independent authority? In that case, it is difficult to predict how the President's power is affected in the abstract.

These practical reasons not only support our precedents' determination that cases such as this should examine the specific functions and context at issue; they also indicate that judges should hesitate before second-guessing a "for cause" decision made by the other branches. See, *e.g.*, *Chadha*, 462 U. S., at 944 (applying a "presumption that

the challenged statute is valid”); *Bowsher*, 478 U. S., at 736 (STEVENS, J., concurring in judgment). Compared to Congress and the President, the Judiciary possesses an inferior understanding of the realities of administration, and the manner in which power, including and most especially political power, operates in context.

There is no indication that the two comparatively more expert branches were divided in their support for the “for cause” provision at issue here. In this case, the Act embodying the provision was passed by a vote of 423 to 3 in the House of Representatives and a by vote of 99 to 0 in the Senate. 148 Cong. Rec. 14458, 14505 (2002). The creation of the Accounting Board was discussed at great length in both bodies without anyone finding in its structure any constitutional problem. See *id.*, at 12035–12037, 12112–12132, 12315–12323, 12372–12377, 12488–12508, 12529–12534, 12612–12618, 12673–12680, 12734–12751, 12915–12960, 13347–13354, 14439–14458, 14487–14506. The President signed the Act. And, when he did so, he issued a signing statement that critiqued multiple provisions of the Act but did not express any separation-of-powers concerns. See President’s Statement on Signing the Sarbanes-Oxley Act of 2002, 30 Weekly Comp. of Pres. Doc. 1286 (2002). Cf. ABA, Report of Task Force on Presidential Signing Statements and the Separation of Powers Doctrine 15 (2006), online at http://www.signingstatementsaba_final_signing_statements_recommendations-report_7-24-06.pdf (all Internet materials as visited June 24, 2010, and available in Clerk of Court’s case file) (noting that President Bush asserted “over 500” “constitutional objections” through signing statements “in his first term,” including 82 “related to his theory of the ‘unitary executive’”).

Thus, here, as in similar cases, we should decide the constitutional question in light of the provision’s practical functioning in context. And our decision should take account of the Judiciary’s comparative lack of institutional

BREYER, J., dissenting

expertise.

II

A

To what extent then is the Act’s “for cause” provision likely, as a practical matter, to limit the President’s exercise of executive authority? In practical terms no “for cause” provision can, in isolation, define the full measure of executive power. This is because a legislative decision to place ultimate administrative authority in, say, the Secretary of Agriculture rather than the President, the way in which the statute defines the scope of the power the relevant administrator can exercise, the decision as to who controls the agency’s budget requests and funding, the relationships between one agency or department and another, as well as more purely political factors (including Congress’ ability to assert influence) are more likely to affect the President’s power to get something done. That is why President Truman complained that “the powers of the President amount to” bringing “people in and try[ing] to persuade them to do what they ought to do without persuasion.” C. Rossiter, *The American Presidency* 154 (2d rev. ed. 1960). And that is why scholars have written that the President “is neither dominant nor powerless” in his relationships with many Government entities, “whether denominated executive or independent.” Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 *Colum. L. Rev.* 573, 583 (1984) (hereinafter Strauss). Those entities “are *all* subject to presidential direction in significant aspects of their functioning, and [are each] able to resist presidential direction in others.” *Ibid.* (emphasis added).

Indeed, notwithstanding the majority’s assertion that the removal authority is “*the* key” mechanism by which the President oversees inferior officers in the independent agencies, *ante*, at 20, it appears that no President has ever

actually sought to exercise that power by testing the scope of a “for cause” provision. See Bruff, Bringing the Independent Agencies in from the Cold, 62 *Vanderbilt L. Rev. En Banc* 63, 68 (2009), online at <http://vanderbiltlawreview.org/articles/2009/11/Bruff-62-Vand-L-Rev-En-Banc-63.pdf> (noting that “Presidents do not test the limits of their power by removing commissioners . . .”); Lessig & Sunstein 110–112 (noting that courts have not had occasion to define what constitutes “cause” because Presidents rarely test removal provisions).

But even if we put all these other matters to the side, we should still conclude that the “for cause” restriction before us will not restrict presidential power significantly. For one thing, the restriction directly limits, not the President’s power, but the power of an already independent agency. The Court seems to have forgotten that fact when it identifies its central constitutional problem: According to the Court, the President “is powerless to intervene” if he has determined that the Board members’ “conduct merit[s] removal” because “[t]hat decision is vested instead in other tenured officers—the Commissioners—none of whom is subject to the President’s direct control.” *Ante*, at 14–15. But so long as the President is *legitimately* foreclosed from removing the *Commissioners* except for cause (as the majority assumes), nullifying the Commission’s power to remove Board members only for cause will not resolve the problem the Court has identified: The President will *still* be “powerless to intervene” by removing the Board members if the Commission reasonably decides not to do so.

In other words, the Court fails to show why *two* layers of “for cause” protection—Layer One insulating the Commissioners from the President, and Layer Two insulating the Board from the Commissioners—impose any more serious limitation upon the *President’s* powers than *one* layer. Consider the four scenarios that might arise:

1. The President and the Commission both want to

BREYER, J., dissenting

keep a Board member in office. Neither layer is relevant.

2. The President and the Commission both want to dismiss a Board member. Layer Two stops them both from doing so without cause. The President's ability to remove the Commission (Layer One) is irrelevant, for he and the Commission are in agreement.
3. The President wants to dismiss a Board member, but the Commission wants to keep the member. Layer One allows the Commission to make that determination notwithstanding the President's contrary view. Layer Two is irrelevant because the Commission does not seek to remove the Board member.
4. The President wants to keep a Board member, but the Commission wants to dismiss the Board member. Here, Layer Two *helps the President*, for it hinders the Commission's ability to dismiss a Board member whom the President wants to keep in place.

Thus, the majority's decision to eliminate only *Layer Two* accomplishes virtually nothing. And that is because a removal restriction's effect upon presidential power depends not on the presence of a "double-layer" of for-cause removal, as the majority pretends, but rather on the real-world nature of the President's relationship with the Commission. If the President confronts a Commission that seeks to *resist* his policy preferences—a distinct possibility when, as here, a Commission's membership must reflect both political parties, 15 U. S. C. §78d(a)—the restriction on the *Commission's* ability to remove a Board member is either irrelevant (as in scenario 3) or may actually help the President (as in scenario 4). And if the President faces a Commission that seeks to *implement* his policy preferences, Layer One is irrelevant, for the Presi-

dent and Commission see eye to eye.

In order to avoid this elementary logic, the Court creates two alternative scenarios. In the first, the Commission and the President *both* want to remove a Board member, but have varying judgments as to whether they have good “cause” to do so—*i.e.*, the President and the Commission both conclude that a Board member should be removed, but disagree as to whether that conclusion (which they have both reached) is *reasonable*. *Ante*, at 14–15. In the second, the President wants to remove a Board member and the Commission disagrees; but, notwithstanding its freedom to make reasonable decisions independent of the President (afforded by Layer One), the Commission (while apparently telling the President that it agrees with him and would like to remove the Board member) uses Layer Two as an “excuse” to pursue its actual aims—an excuse which, given Layer One, it does not need. *Ante*, at 15, n. 4.

Both of these circumstances seem unusual. I do not know if they have ever occurred. But I do not deny their logical possibility. I simply doubt their importance. And the fact that, with respect to the President’s power, the double layer of for-cause removal sometimes might help, sometimes might hurt, leads me to conclude that its overall effect is at most indeterminate.

But once we leave the realm of hypothetical logic and view the removal provision at issue in the context of the entire Act, its lack of practical effect becomes readily apparent. That is because the statute provides the Commission with full authority and virtually comprehensive control over all of the Board’s functions. Those who created the Accounting Board modeled it, in terms of structure and authority, upon the semiprivate regulatory bodies prevalent in the area of financial regulation, such as the New York Stock Exchange and other similar self-regulating organizations. See generally Brief for Former Chairmen of the SEC as *Amici Curiae* (hereinafter Brief

BREYER, J., dissenting

for Former SEC Chairmen). And those organizations—which rely on private financing and on officers drawn from the private sector—exercise rulemaking and adjudicatory authority that is pervasively controlled by, and is indeed “entirely derivative” of, the SEC. See *National Assn. of Securities Dealers, Inc. v. SEC*, 431 F. 3d 803, 806 (CA DC 2005).

Adhering to that model, the statute here gives the Accounting Board the power to adopt rules and standards “relating to the preparation of audit reports”; to adjudicate disciplinary proceedings involving accounting firms that fail to follow these rules; to impose sanctions; and to engage in other related activities, such as conducting inspections of accounting firms registered as the law requires and investigations to monitor compliance with the rules and related legal obligations. See 15 U. S. C. §§7211–7216. But, at the same time,

- No Accounting Board rule takes effect unless and until the Commission approves it, §7217(b)(2);
- The Commission may “abrogat[e], delet[e] or ad[d] to” any rule or any portion of a rule promulgated by the Accounting Board whenever, in the Commission’s view, doing so “further[s] the purposes” of the securities and accounting-oversight laws, §7217(b)(5);
- The Commission may review any sanction the Board imposes and “enhance, modify, cancel, reduce, or require the remission of” that sanction if it find’s the Board’s action not “appropriate,” §§7215(e), 7217(c)(3);
- *The Commission may promulgate rules restricting or directing the Accounting Board’s conduct of all inspections and investigations, §§7211(c)(3), 7214(h), 7215(b)(1)–(4);*
- *The Commission may itself initiate any investigation or promulgate any rule within the Accounting Board’s purview, §7202, and may also remove any*

Accounting Board member who has unreasonably “failed to enforce compliance with” the relevant “rule[s], or any professional standard,” §7217(d)(3)(C) (emphasis added);

- *The Commission may at any time “relieve the Board of any responsibility to enforce compliance with any provision” of the Act, the rules, or professional standards if, in the Commission’s view, doing so is in “the public interest,” §7217(d)(1) (emphasis added).*

As these statutory provisions make clear, the Court is simply wrong when it says that “the Act nowhere gives the Commission effective power to start, stop, or alter” Board investigations. *Ante*, at 23–24. On the contrary, the Commission’s control over the Board’s investigatory and legal functions is virtually absolute. Moreover, the Commission has general supervisory powers over the Accounting Board itself: It controls the Board’s budget, §§7219(b), (d)(1); it can assign to the Board any “duties or functions” that it “determines are necessary or appropriate,” §7211(c)(5); it has full “oversight and enforcement authority over the Board,” §7217(a), *including the authority to inspect the Board’s activities whenever it believes it “appropriate” to do so*, §7217(d)(2) (emphasis added). And it can censure the Board or its members, as well as remove the members from office, if the members, for example, fail to enforce the Act, violate any provisions of the Act, or abuse the authority granted to them under the Act, §7217(d)(3). Cf. *Shurtleff v. United States*, 189 U. S. 311, 314–319 (1903) (holding that removal authority is not always “restricted to a removal for th[e] causes” set forth by statute); *Bowsher*, 478 U. S., at 729 (rejecting the “arguable premis[e]” “that the enumeration of certain specified causes of removal excludes the possibility of removal for other causes”). Contra, *ante*, at 22, n. 7. See generally Pildes, Putting Power Back into Separation of Powers Analysis: Why the SEC-PCAOB Structure is Constitu-

BREYER, J., dissenting

tional, 62 Vand. L. Rev. En Banc 85 (2009), online at <http://vanderbiltlawreview.org/articles/2009/11/Pildes-62-Vand-L-Rev-En-Banc-85.pdf> (explaining further the comprehensive nature of the Commission's powers).

What is left? The Commission's inability to remove a Board member whose perfectly *reasonable* actions cause the Commission to overrule him with great frequency? What is the practical likelihood of that occurring, or, if it does, of the President's serious concern about such a matter? Everyone concedes that the President's control over the Commission is constitutionally sufficient. See *Humphrey's Executor*, 295 U. S. 602; *Wiener*, 357 U. S. 349; *ante*, at 1–2. And if the President's control over the Commission is sufficient, and the Commission's control over the Board is virtually absolute, then, as a practical matter, the President's control over the Board should prove sufficient as well.

B

At the same time, Congress and the President had good reason for enacting the challenged “for cause” provision. First and foremost, the Board adjudicates cases. See 15 U. S. C. §7215. This Court has long recognized the appropriateness of using “for cause” provisions to protect the personal independence of those who even only sometimes engage in adjudicatory functions. *Humphrey's Executor*, *supra*, at 623–628; see also *Wiener*, *supra*, at 355–356; *Morrison*, 487 U. S., at 690–691, and n. 30; *McAllister v. United States*, 141 U. S. 174, 191–201 (1891) (Field, J., dissenting). Indeed, as early as 1789 James Madison stated that “there may be strong reasons why an” executive “officer” such as the Comptroller of the United States “should not hold his office at the pleasure of the Executive branch” if one of his “principal dut[ies]” “partakes strongly of the judicial character.” 1 Annals of Congress 611–612; cf. *ante*, at 19, n. 6 (noting that the statute Congress ulti-

mately enacted limited Presidential control over the Comptroller in a different fashion); see *supra*, at 4. The Court, however, all but ignores the Board’s adjudicatory functions when conducting its analysis. See, e.g., *ante*, at 17–18. And when it finally does address that central function (in a footnote), it simply asserts that the Board *does not* “perform adjudicative . . . functions,” *ante*, at 26, n. 10 (emphasis added), an assertion that is inconsistent with the terms of the statute. See §7215(c)(1) (governing “proceeding[s] by the Board to determine whether a registered public accounting firm, or an associated person thereof, should be disciplined”).

Moreover, in addition to their adjudicative functions, the Accounting Board members supervise, and are themselves, technical professional experts. See §7211(e)(1) (requiring that Board members “have a demonstrated” technical “understanding of the responsibilities” and “obligations of accountants with respect to the preparation and issuance of audit reports”). This Court has recognized that the “difficulties involved in the preparation of” sound auditing reports require the application of “scientific accounting principles.” *United States v. Anderson*, 269 U. S. 422, 440 (1926). And this Court has recognized the constitutional legitimacy of a justification that rests agency independence upon the need for technical expertise. See *Humphrey’s Executor*, *supra*, at 624–626; see also Breger & Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 *Admin. L. Rev.* 1111, 1131–1133 (2000) (explaining how the need for administrators with “technical competence,” “apolitical expertise,” and skill in “scientific management” led to original creation of independent agencies) (hereinafter Breger & Edles); J. Landis, *The Administrative Process* 23 (1938) (similar); Woodrow Wilson, *Democracy and Efficiency*, 87 *Atlantic Monthly* 289, 299 (1901) (describing need for insulation of experts from political influences).

BREYER, J., dissenting

Here, the justification for insulating the “technical experts” on the Board from fear of losing their jobs due to political influence is particularly strong. Congress deliberately sought to provide that kind of protection. See, *e.g.*, 148 Cong. Rec. 12036, 12115, 13352–13355. It did so for good reason. See *ante*, at 3 (noting that the Accounting Board was created in response to “a series of celebrated accounting debacles”); H. R. Rep. No. 107–414, pp. 18–19 (2002) (same); Brief for Former SEC Chairmen 8–9. And historically, this regulatory subject matter—financial regulation—has been thought to exhibit a particular need for independence. See *e.g.*, 51 Cong. Rec. 8857 (1914) (remarks of Sen. Morgan upon creation of the Federal Trade Commission) (“[I]t is unsafe for an . . . administrative officer representing a great political party . . . to hold the power of life and death over the great business interests of this country. . . . That is . . . why I believe in . . . taking these business matters out of politics”). And Congress, by, for example, providing the Board with a revenue stream independent of the congressional appropriations process, §7219, helped insulate the Board from congressional, as well as other, political influences. See, *e.g.*, 148 Cong. Rec. 12036 (statement of Sen. Stabenow).

In sum, Congress and the President could reasonably have thought it prudent to insulate the adjudicative Board members from fear of purely politically based removal. Cf. *Civil Service Comm’n v. Letter Carriers*, 413 U. S. 548, 565 (1973) (“[I]t is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent”). And in a world in which we count on the Federal Government to regulate matters as complex as, say, nuclear-power production, the Court’s assertion that we should simply learn to get by “without being” regulated “by ex-

perts” is, at best, unrealistic—at worst, dangerously so. *Ante*, at 18.

C

Where a “for cause” provision is so unlikely to restrict presidential power and so likely to further a legitimate institutional need, precedent strongly supports its constitutionality. First, in considering a related issue in *Nixon v. Administrator of General Services*, 433 U. S. 425 (1977), the Court made clear that when “determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions.” *Id.*, at 443. The Court said the same in *Morrison*, where it upheld a restriction on the President’s removal power. 487 U. S., at 691 (“[T]he real question is whether the removal restrictions are of such a nature that they impede the President’s ability to perform his constitutional duty, and the functions of the officials in question must be analyzed in that light”). Here, the removal restriction may somewhat diminish the *Commission’s* ability to control the Board, but it will have little, if any, negative effect in respect to the President’s ability to control the Board, let alone to coordinate the Executive Branch. See Part II–A, *supra*. Indeed, given *Morrison*, where the Court upheld a restriction that significantly interfered with the President’s important historic power to control criminal prosecutions, a “purely executive” function, 487 U. S., at 687–689, the constitutionality of the present restriction would seem to follow *a fortiori*.

Second, as previously pointed out, this Court has repeatedly upheld “for cause” provisions where they restrict the President’s power to remove an officer with adjudicatory responsibilities. Compare *Humphrey’s Executor*, 295 U. S., at 623–628; *Wiener*, 357 U. S., at 355; *Schor*, 478

BREYER, J., dissenting

U. S., at 854; *Morrison, supra*, at 691, n. 30, with *ante*, at 17–18 (ignoring these precedents). And we have also upheld such restrictions when they relate to officials with technical responsibilities that warrant a degree of special independence. *E.g., Humphrey’s Executor, supra*, at 624. The Accounting Board’s functions involve both kinds of responsibility. And, accordingly, the Accounting Board’s adjudicatory responsibilities, the technical nature of its job, the need to attract experts to that job, and the importance of demonstrating the nonpolitical nature of the job to the public strongly justify a statute that assures that Board members need not fear for their jobs when competently carrying out their tasks, while still maintaining the Commission as the ultimate authority over Board policies and actions. See Part II–B, *supra*.

Third, consider how several cases fit together in a way that logically compels a holding of constitutionality here. In *Perkins*, 116 U. S., at 483, 484—which was reaffirmed in *Myers*, 272 U. S., at 127 and in *Morrison, supra*, at 689, n. 27—the Court upheld a removal restriction limiting the authority of the Secretary of the Navy to remove a “cadet-engineer,” whom the Court explicitly defined as an “inferior officer.” The Court said,

“We have no doubt that when Congress, by law, vests the appointment of inferior officers in the heads of Departments *it may limit and restrict the power of removal as it deems best for the public interest*. The constitutional authority in Congress to thus vest the appointment implies authority to limit, restrict, and regulate the removal by such laws as Congress may enact in relation to the officers so appointed.” *Perkins, supra*, at 485 (emphasis added; internal quotation marks omitted).

See also *Morrison, supra*, at 723–724 (SCALIA, J., dissenting) (agreeing that the power to remove an “inferior offi-

cer” who is appointed by a department head can be restricted). Cf. *ante*, at 30–33 (holding that SEC Commissioners are “Heads of Departments”).

In *Humphrey’s Executor*, the Court held that Congress may constitutionally limit the President’s authority to remove certain principal officers, including heads of departments. 295 U. S., at 627–629. And the Court has consistently recognized the validity of that holding. See *Wiener, supra*; *United States v. Nixon*, 418 U. S. 683, 706 (1974); *Buckley*, 424 U. S., at 133–136; *Chadha*, 462 U. S., at 953, n. 16; *Bowsher*, 478 U. S., at 725–726; *Morrison, supra*, at 686–693; *Mistretta v. United States*, 488 U. S. 361, 410–411 (1989).

And in *Freytag*, 501 U. S., at 921, JUSTICE SCALIA stated in a concurring opinion written for four Justices, including JUSTICE KENNEDY, that “adjusting the remainder of the Constitution to compensate for *Humphrey’s Executor* is a fruitless endeavor.” In these Justices’ view, the Court should not create a *separate* constitutional jurisprudence for the “independent agencies.” That being so, the law should treat their heads as it treats other Executive Branch heads of departments. Consequently, as the Court held in *Perkins*, Congress may constitutionally “limit and restrict” the Commission’s power to remove those whom they appoint (*e.g.*, the Accounting Board members).

Fourth, the Court has said that “[o]ur separation-of-powers jurisprudence generally focuses on the danger of one branch’s *aggrandizing its power* at the expense of another branch.” *Freytag, supra*, at 878 (emphasis added); accord, *Buckley, supra*, at 129; *Schor, supra*, at 856; *Morrison, supra*, at 686; cf. *Bowsher, supra*. Indeed, it has added that “the essence of the decision in *Myers*,” which is the only one of our cases to have struck down a “for cause” removal restriction, “was the judgment that the Constitution prevents Congress from ‘draw[ing] to itself . . . the power to remove.’” *Morrison, supra*, at 686 (quoting

BREYER, J., dissenting

Myers, supra, at 161; emphasis added). Congress here has “drawn” no power to itself to remove the Board members. It has instead sought to *limit* its own power, by, for example, providing the Accounting Board with a revenue stream independent of the congressional appropriations process. See *supra*, at 19; see also Brief for Former SEC Chairmen 16. And this case thereby falls outside the ambit of the Court’s most serious constitutional concern.

In sum, the Court’s prior cases impose functional criteria that are readily met here. Once one goes beyond the Court’s elementary arithmetical logic (*i.e.*, “one plus one is greater than one”) our precedent virtually dictates a holding that the challenged “for cause” provision is constitutional.

D

We should ask one further question. Even if the “for cause” provision before us does not itself significantly interfere with the President’s authority or aggrandize Congress’ power, is it nonetheless necessary to adopt a bright-line rule forbidding the provision lest, through a series of such provisions, each itself upheld as reasonable, Congress might undercut the President’s central constitutional role? Cf. *Strauss* 625–626. The answer to this question is that no such need has been shown. Moreover, insofar as the Court seeks to create such a rule, it fails. And in failing it threatens a harm that is far more serious than any imaginable harm this “for cause” provision might bring about.

The Court fails to create a bright-line rule because of considerable uncertainty about the scope of its holding—an uncertainty that the Court’s opinion both reflects and generates. The Court suggests, for example, that its rule may not apply where an inferior officer “perform[s] adjudicative . . . functions.” Cf. *ante*, at 26, n. 10. But the Accounting Board performs adjudicative functions. See

supra, at 17–18. What, then, are we to make of the Court’s potential exception? And would such an exception apply to an administrative law judge who also has important administrative duties beyond pure adjudication? See, *e.g.*, 8 CFR §1003.9, 34 CFR §81.4 (2009). The Court elsewhere suggests that its rule may be limited to removal statutes that provide for “judicial review of a[n] effort to remove” an official for cause. *Ante*, at 22; *ante*, at 25. But we have previously stated that *all* officers protected by a for-cause removal provision and later subject to termination are entitled to “notice and [a] hearing” in the “courts,” as without such review “the appointing power” otherwise “could remove at pleasure or for such cause as [only] it deemed sufficient.” *Reagan v. United States*, 182 U. S. 419, 425 (1901); *Shurtleff*, 189 U. S., at 314; cf. *Humphrey’s Executor, supra* (entertaining civil suit challenging removal). But cf. *Bowsher, supra*, at 729. What weight, then, should be given to this hint of an exception?

The Court further seems to suggest that its holding may not apply to inferior officers who have a different relationship to their appointing agents than the relationship between the Commission and the Board. See *ante*, at 22, 24–26. But the only characteristic of the “relationship” between the Commission and the Board that the Court apparently deems relevant is that the relationship includes two layers of for-cause removal. See, *e.g.*, *ante*, at 23 (“Broad power over Board functions is not equivalent to the power to remove Board members”). Why then would any different relationship that also includes two layers of for-cause removal survive where this one has not? Cf. Part II–A, *supra* (describing the Commission’s near absolute control over the Board). In a word, what differences are relevant? If the Court means to state that its holding in fact applies only where Congress has “enacted an *unusually high standard*” of for-cause removal—and does not otherwise render two layers of “ordinary” for-cause re-

BREYER, J., dissenting

removal unconstitutional—I should welcome the statement. *Ante*, at 22 (emphasis added); see also *ante*, at 24–25, 15, 22, (underscoring this statute’s “sharply circumscribed definition of what constitutes ‘good cause’” and its “rigorous,” “significant and unusual [removal] protections”). But much of the majority’s opinion appears to avoid so narrow a holding in favor of a broad, basically mechanical rule—a rule that, as I have said, is divorced from the context of the case at hand. Compare Parts III–A, III–B, III–C, *ante*, with Parts II–A, II–B, II–C, *supra*. And such a mechanical rule cannot be cabined simply by saying that, *perhaps*, the rule does not apply to instances that, at least at first blush, seem highly similar. A judicial holding by its very nature is not “a restricted railroad ticket, good for” one “day and train only.” *Smith v. Allwright*, 321 U. S. 649, 669 (1944) (Roberts, J., dissenting).

The Court begins to reveal the practical problems inherent in its double for-cause rule when it suggests that its rule may not apply to “the civil service.” *Ante*, at 26. The “civil service” is defined by statute to include “all appointive positions in . . . the Government of the United States,” excluding the military, but including *all* civil “officer[s]” up to and including those who are subject to Senate confirmation. 5 U. S. C. §§2101, 2102(a)(1)(B), 2104. The civil service thus includes many officers indistinguishable from the members of both the Commission and the Accounting Board. Indeed, as this Court recognized in *Myers*, the “competitive service”—the class within the broader civil service that enjoys the most robust career protection—“includes a *vast majority* of all the civil officers” in the United States. 272 U. S., at 173 (emphasis added); 5 U. S. C. §2102(c).

But even if I assume that the majority categorically excludes the competitive service from the scope of its new rule, cf. *ante*, at 26 (leaving this question open), the exclusion would be insufficient. This is because the Court’s

BREYER, J., dissenting

“double for-cause” rule applies to appointees who are “inferior officer[s].” *Ante*, at 2. And who are they? Courts and scholars have struggled for more than a century to define the constitutional term “inferior officers,” without much success. See 2 J. Story, *Commentaries on the Constitution* §1536, pp. 397–398 (3d ed. 1858) (“[T]here does not seem to have been any exact line drawn, who are and who are not to be deemed *inferior* officers, in the sense of the constitution”); *Edmond v. United States*, 520 U. S. 651, 661 (1997) (“Our cases have not set forth an exclusive criterion for [defining] inferior officers”); Memorandum from Steven G. Bradbury, Acting Assistant Attorney General, Office of Legal Counsel, to the General Counsels of the Executive Branch: Officers of the United States Within the Meaning of the Appointments Clause, p. 3 (Apr. 16, 2007) (hereinafter OLC Memo), online at <http://www.justice.gov/olc/2007/appointmentsclausev10.pdf> (“[T]he Supreme Court has not articulated the precise scope and application of the [Inferior Officer] Clause’s requirements”); Konecke, *The Appointments Clause and Military Judges: Inferior Appointment to a Principal Office*, 5 *Seton Hall Const. L. J.* 489, 492 (1995) (same); Burkoff, *Appointment and Removal Under the Federal Constitution: The Impact of Buckley v. Valeo*, 22 *Wayne L. Rev.* 1335, 1347, 1364 (1976) (describing our early precedent as “circular” and our later law as “not particularly useful”). The Court does not clarify the concept. But without defining who is an inferior officer, to whom the majority’s new rule applies, we cannot know the scope or the coherence of the legal rule that the Court creates. I understand the virtues of a common-law case-by-case approach. But here that kind of approach (when applied without more specificity than I can find in the Court’s opinion) threatens serious harm.

The problem is not simply that the term “inferior officer” is indefinite but also that efforts to define it inevitably

BREYER, J., dissenting

conclude that the term’s sweep is unusually broad. Consider the Court’s definitions: Inferior officers are, *inter alia*, (1) those charged with “the administration and enforcement of the public law,” *Buckley*, 424 U. S., at 139; *ante*, at 2; (2) those granted “significant authority,” 424 U. S., at 126; *ante*, at 25; (3) those with “responsibility for conducting civil litigation in the courts of the United States,” 424 U. S., at 140; and (4) those “who can be said to hold an office,” *United States v. Germaine*, 99 U. S. 508, 510 (1879), that has been created either by “regulations” or by “statute,” *United States v. Mouat*, 124 U. S. 303, 307–308 (1888).

Consider the definitional conclusion that the Department of Justice more recently reached: An “inferior officer” is anyone who holds a “continuing” position and who is “invested by legal authority with a portion of the sovereign powers of the federal Government,” including, *inter alia*, the power to “arrest criminals,” “seize persons or property,” “issue regulations,” “issue . . . authoritative legal opinions,” “conduc[t] civil litigation,” “collec[t] revenue,” represent “the United States to foreign nations,” “command” military force, or *enter into* “contracts” on behalf “of the nation.” OLC Memo 1, 4, 12–13, 15–16 (internal quotation marks omitted; emphasis added).

And consider the fact that those whom this Court has *held* to be “officers” include: (1) a district court clerk, *Hennen*, 13 Pet., at 258; (2) “thousands of clerks in the Departments of the Treasury, Interior and the othe[r]” departments, *Germaine*, *supra*, at 511, who are responsible for “the records, books, and papers appertaining to the office,” *Hennen*, *supra*, at 259; (3) a clerk to “the assistant treasurer” stationed “at Boston,” *United States v. Hartwell*, 6 Wall. 385, 392 (1868); (4 & 5) an “assistant-surgeon” and a “cadet-engineer” appointed by the Secretary of the Navy, *United States v. Moore*, 95 U. S. 760, 762 (1878); *Perkins*, 116 U. S., at 484; (6) election monitors, *Ex*

BREYER, J., dissenting

parte Siebold, 100 U. S. 371, 397–399 (1880); (7) United States attorneys, *Myers*, *supra*, at 159; (8) federal marshals, *Sieblod*, *supra*, at 397; *Morrison*, 487 U. S., at 676; (9) military judges, *Weiss v. United States*, 510 U. S., 163, 170 (1994); (10) judges in Article I courts, *Freytag*, 501 U. S., at 880–881; and (11) the general counsel of the Department of Transportation, *Edmond v. United States*, 520 U. S. 651 (1997). Individual Members of the Court would add to the list the Federal Communication Commission’s managing director, the Federal Trade Commission’s “secretary,” the general counsel of the Commodity Futures Trading Commission, and more generally, bureau chiefs, general counsels, and administrative law judges, see *Freytag*, *supra*, at 918–920 (SCALIA, J., concurring in part and concurring in judgment), as well as “ordinary commissioned military officers,” *Weiss*, *supra*, at 182 (Souter, J., concurring).

Reading the criteria above as stringently as possible, I still see no way to avoid sweeping hundreds, perhaps thousands of high level government officials within the scope of the Court’s holding, putting their job security and their administrative actions and decisions constitutionally at risk. To make even a conservative estimate, one would have to begin by listing federal departments, offices, bureaus and other agencies whose heads are by statute removable only “for cause.” I have found 48 such agencies, which I have listed in Appendix A, *infra*. Then it would be necessary to identify the senior officials in those agencies (just below the top) who themselves are removable only “for cause.” I have identified 573 such high-ranking officials, whom I have listed in Appendix B, *infra*. They include most of the leadership of the Nuclear Regulatory Commission (including that agency’s executive director as well as the directors of its Office of Nuclear Reactor Regulation and Office of Enforcement), virtually all of the leadership of the Social Security Administration, the

BREYER, J., dissenting

executive directors of the Federal Energy Regulatory Commission and the Federal Trade Commission, as well as the general counsels of the Chemical Safety Board, the Federal Mine Safety and Health Review Commission, and the National Mediation Board.

This list is a conservative estimate because it consists only of career appointees in the Senior Executive Service (SES), see 5 U. S. C. §§2101a, 3132(a)(2), a group of high-ranking officials distinct from the “competitive service,” see §2101(a)(1)(C), who “serve in the key positions just below the top Presidential appointees,” Office of Personnel Management, About the Senior Executive Service, online at http://www.opm.gov/ses/about_ses/index.asp; §2102(a)(1)(C), and who are, without exception, subject to “removal” only for cause. §§7542–7543; see also §2302(a)(2) (substantially limiting conditions under which “a career appointee in the Senior Executive Service” may be “transfer[red], or reassign[ed]”). SES officials include, for example, the Director of the Bureau of Prisons, the Director of the National Drug Intelligence Center, and the Director of the Office of International Monetary Policy in the Treasury Department. See Senate Committee on Homeland Security and Government Affairs, United States Government Policy and Supporting Positions (2008), pp. 99, 103, 129 (hereinafter Plum Book). And by virtually any definition, essentially all SES officials qualify as “inferior officers,” for their duties, as defined by statute, require them to “direct[t] the work of an organizational unit,” carry out high-level managerial functions, or “*otherwise exercis[e] important policy-making, policy-determining, or other executive functions.*” §3132(a)(2) (emphasis added). Cf. *ante*, at 2 (describing an “inferior officer” as someone who “determines the policy and enforces the laws of the United States”); *ante*, at 26 (acknowledging that career SES appointees in independent agencies may be rendered unconstitutional in future cases). Is the SES exempt from today’s rule or is it

not? The Court, after listing reasons why the SES may be different, simply says that it will not “addres[s]” the matter. *Ante*, at 27. Perhaps it does not do so because it cannot do so without revealing the difficulty of distinguishing the SES from the Accounting Board and thereby also revealing the inherent instability of the legal rule it creates.

The potential list of those whom today’s decision affects is yet larger. As JUSTICE SCALIA has observed, administrative law judges (ALJs) “are all executive officers.” *Freytag*, 501 U. S., at 910 (opinion concurring in part and concurring in judgment) (emphasis deleted); see also, *e.g.*, *id.*, at 881 (majority opinion) (“[A] [tax-court] special trial judge is an ‘inferior Officer’”); *Edmond*, *supra*, at 654 (“[M]ilitary trial and appellate judges are [inferior] officers”). But cf. *ante*, at 26, n. 10. And ALJs are each removable “only for good cause established and determined by the Merit Systems Protection Board,” 5 U. S. C. §§7521(a)–(b). But the members of the Merit Systems Protection Board are themselves protected from removal by the President absent good cause. §1202(d).

My research reflects that the Federal Government relies on 1,584 ALJs to adjudicate administrative matters in over 25 agencies. See Appendix C, *infra*; see also Memorandum of Juanita Love, Office of Personnel Management, to Supreme Court Library (May 28, 2010) (available in Clerk of Court’s case file). These ALJs adjudicate Social Security benefits, employment disputes, and other matters highly important to individuals. Does every losing party before an ALJ now have grounds to appeal on the basis that the decision entered against him is unconstitutional? Cf. *ante*, at 26, n. 10 (“[O]ur holding also does not address” this question).

And what about the military? Commissioned military officers “are ‘inferior officers.’” *Weiss*, 510 U. S., at 182 (Souter, J., concurring); *id.*, at 169–170 (majority opinion). There are over 210,000 active-duty commissioned officers

BREYER, J., dissenting

currently serving in the armed forces. See Dept. of Defense, Active Duty Military Personnel by Rank (Apr. 30, 2010), online at <http://siadapp.dmdc.osd.mil/personnel/MILITARY/rg1004.pdf>. Numerous statutory provisions provide that such officers may not be removed from office except for cause (at least in peacetime). See, e.g., 10 U. S. C. §§629–632, 804, 1161, 1181–1185. And such officers can generally be so removed only by *other* commissioned officers, see §§612, 825, 1187, who themselves enjoy the same career protections.

The majority might simply say that the military is different. But it will have to explain *how* it is different. It is difficult to see why the Constitution would provide a President who is the military’s “commander-in-chief,” Art. II, §2, cl. 1, with *less* authority to remove “inferior” military “officers” than to remove comparable civil officials. See Barron & Lederman, The Commander in Chief at the Lowest Ebb—A Constitutional History, 121 Harv. L. Rev. 941, 1102–1106 (2008) (describing President’s “superintendence prerogative” over the military). Cf. *ante*, at 26–27 (not “expressing any view whatever” as to whether military officers’ authority is now unconstitutional).

The majority sees “no reason . . . to address whether” any of “these positions,” “or any others,” might be deemed unconstitutional under its new rule, preferring instead to leave these matters for a future case. *Ante*, at 27. But what is to happen in the meantime? Is the work of all these various officials to be put on hold while the courts of appeals determine whether today’s ruling applies to them? Will Congress have to act to remove the “for cause” provisions? Cf. *Buckley*, 424 U. S., at 142–143. Can the President then restore them via executive order? And, still, what about the military? A clearer line would help avoid these practical difficulties.

The majority asserts that its opinion will not affect the Government’s ability to function while these many ques-

tions are litigated in the lower courts because the Court's holding concerns only "the conditions under which th[e]se officers might some day be removed." *Ante*, at 27. But this case was not brought by federal officials challenging their potential removal. It was brought by private individuals who were *subject to regulation* "*here-and-now*" and who "object to the" very "existence" of the regulators themselves. *Ante*, at 33, 8 (emphasis added). And those private individuals have prevailed. Thus, any person similarly regulated by a federal official who is potentially subject to the Court's amorphous new rule will be able to bring an "implied private right of action directly under the Constitution" "seeking . . . a declaratory judgment that" the official's actions are "unconstitutional and an injunction preventing the" official "from exercising [his] powers." *Ante*, at 10, n. 2, 6; cf., e.g., *Legal Services Corporation v. Velazquez*, 531 U. S. 533, 546 (2001) (affirming grant of preliminary injunction to cure, *inter alia*, a separation-of-powers violation); *Youngstown Sheet & Tube Co.*, 343 U. S. 579 (same). Such a plaintiff need not even first exhaust his administrative remedies. *Ante*, at 7–10.

Nor is it clear that courts will always be able to cure such a constitutional defect merely by severing an offending removal provision. For a court's "ability to devise [such] a judicial remedy . . . often depends on how clearly" the "background constitutional rules at issue" have been "articulated"; severance will be unavailable "in a murky constitutional context," which is precisely the context that the Court's new rule creates. *Ayotte v. Planned Parenthood of Northern New Eng.*, 546 U. S. 320, 329, 330 (2006). Moreover, "the touchstone" of the severability analysis "is legislative intent," *id.*, at 330, and Congress has repeatedly expressed its judgment "over the last century that it is in the best interest of the country, indeed essential, that federal service should depend upon meritorious performance rather than political service," *Civil Service Comm'n*,

BREYER, J., dissenting

413 U. S., at 557; see also *Bush v. Lucas*, 462 U. S. 367, 380–388 (1983) (describing the history of “Congressional attention to the problem of politically-motivated removals”). And so it may well be that courts called upon to resolve the many questions the majority’s opinion raises will not only apply the Court’s new rule to its logical conclusion, but will also determine that the only available remedy to certain double for-cause problems is to invalidate entire agencies.

Thus, notwithstanding the majority’s assertions to the contrary, the potential consequences of today’s holding are worrying. The upshot, I believe, is a legal dilemma. To interpret the Court’s decision as applicable only in a few circumstances will make the rule less harmful but arbitrary. To interpret the rule more broadly will make the rule more rational, but destructive.

III

One last question: How can the Court simply *assume* without deciding that the SEC Commissioners themselves are removable only “for cause?” See *ante*, at 5 (“[W]e decide the case with th[e] *understanding*” “that the Commissioners cannot themselves be removed by the President except” for cause (emphasis added)). Unless the Commissioners themselves are *in fact* protected by a “for cause” requirement, the Accounting Board statute, on the Court’s own reasoning, is not constitutionally defective. I am not aware of any other instance in which the Court has similarly (on its own or through stipulation) *created* a constitutional defect in a statute and then relied on that defect to strike a statute down as unconstitutional. Cf. *Alabama v. North Carolina*, 560 U. S. ___, ___ (2010) (opinion for the Court by SCALIA, J.) (slip op., at 20) (“We do not—we cannot—add provisions to a federal statute . . . especially [if] . . . separation-of-powers concerns . . . would [thereby] arise”); *The Anaconda v. American Sugar Refining Co.*, 322 U. S. 42, 46 (1944) (describing parties’ inabil-

ity to “stipulate away” what “the legislation declares”).

It is certainly not obvious that the SEC Commissioners enjoy “for cause” protection. Unlike the statutes establishing the 48 federal agencies listed in Appendix A, *infra*, the statute that established the Commission says nothing about removal. It *is silent* on the question. As far as its text is concerned, the President’s authority to remove the Commissioners is no different from his authority to remove the Secretary of State or the Attorney General. See *Shurtleff*, 189 U. S., at 315 (“To take away th[e] power of removal . . . would require very clear and explicit language. It should not be held to be taken away by mere inference or implication”); see also Memorandum from David J. Barron, Acting Assistant Attorney General, Office of Legal Counsel, to the Principal Deputy Counsel to the President: Removability of the Federal Coordinator for Alaska Natural Gas Transportation Projects, p. 2 (Oct. 23, 2009), online at <http://justice.gov/olc/2009/gas-transport-project.pdf> (“[Where] Congress did not explicitly provide tenure protection . . . the President, consistent with . . . settled principles, may remove . . . without cause”); The Constitutional Separation of Powers Between the President and Congress, 20 Op. Legal Counsel 124, 170 (1996) (same).

Nor is the absence of a “for cause” provision in the statute that created the Commission likely to have been inadvertent. Congress created the Commission 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. In other words, Congress created the SEC at a time when, under this Court’s precedents, it would have been *unconstitutional* to make the Commissioners removable only for cause. And, during

BREYER, J., dissenting

that 9-year period, Congress created at least three major federal agencies without making *any* of their officers removable for cause. See 48 Stat. 885, 15 U. S. C. §78d (Securities and Exchange Commission), 48 Stat. 1066, 47 U. S. C. §154 (Federal Communications Commission); 46 Stat. 797 (Federal Power Commission) (reformed post-*Humphrey's Executor* as the Federal Energy Regulatory Commission *with* “for cause” protection, 91 Stat. 582, 42 U. S. C. §7171). By way of contrast, only *one month* after *Humphrey's Executor* was decided, Congress returned to its pre-*Myers* practice of including such provisions in statutes creating independent commissions. See §3, 49 Stat. 451, 29 U. S. C. §153 (establishing National Labor Relations Board with an explicit removal limitation).

The fact that Congress did not make the SEC Commissioners removable “for cause” does not mean it intended to create a dependent, rather than an independent agency. Agency independence is a function of several different factors, of which “for cause” protection is only one. Those factors include, *inter alia*, an agency’s separate (rather than presidentially dependent) budgeting authority, its separate litigating authority, its composition as a multi-member bipartisan board, the use of the word “independent” in its authorizing statute, and, above all, a political environment, reflecting tradition and function, that would impose a heavy political cost upon any President who tried to remove a commissioner of the agency without cause. See generally Breger & Edles 1135–1155.

The absence of a “for cause” provision is thus not fatal to agency independence. Indeed, a “Congressional Research Service official suggests that there are *at least* 13 ‘independent’ agencies without a removal provision in their statutes.” *Id.*, at 1143, n. 161 (emphasis added) (citing congressional testimony). But it does draw the majority’s rule into further confusion. For not only are we left without a definition of an “inferior officer,” but we are also left

to guess which department heads will be deemed by the majority to be subject to for-cause removal notwithstanding statutes containing no such provision. If any agency deemed “independent” will be similarly treated, the scope of the majority’s holding is even broader still. See Appendix D, *infra* (listing agencies potentially affected).

The Court then, by assumption, reads *into* the statute books a “for cause removal” phrase that does not appear in the relevant statute and which Congress probably did not intend to write. And it does so in order to strike down, not to uphold, another statute. This is not a statutory construction that seeks to avoid a constitutional question, but its opposite. See *Ashwander v. TVA*, 297 U. S. 288, 347 (1936) (Brandeis, J., concurring) (“It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case” (internal quotation marks omitted)); *NLRB v. Catholic Bishop of Chicago*, 440 U. S. 490, 500 (1979) (“[A]n Act of Congress ought not to be construed to violate the Constitution if any other possible construction remains available”).

I do not need to decide whether the Commissioners are in fact removable only “for cause” because I would uphold the Accounting Board’s removal provision as constitutional regardless. But were that not so, a determination that the silent SEC statute means no more than it says would properly avoid the determination of unconstitutionality that the Court now makes.

* * *

In my view the Court’s decision is wrong—very wrong. As Parts II–A, II–B, and II–C of this opinion make clear, if the Court were to look to the proper functional and contextual considerations, it would find the Accounting Board provision constitutional. As Part II–D shows, insofar as the Court instead tries to create a bright-line rule, it fails to do so. Its rule of decision is both imprecise and overly

BREYER, J., dissenting

broad. In light of the present imprecision, it must either narrow its rule arbitrarily, leaving it to apply virtually alone to the Accounting Board, or it will have to leave in place a broader rule of decision applicable to many other “inferior officers” as well. In doing the latter, it will undermine the President’s authority. And it will create an obstacle, indeed pose a serious threat, to the proper functioning of that workable Government that the Constitution seeks to create—in provisions this Court is sworn to uphold.

With respect I dissent.

APPENDIXES

A

There are 24 stand-alone federal agencies (*i.e.*, “departments”) whose heads are, *by statute*, removable by the President only “for cause.” Moreover, there are at least 24 additional offices, boards, or bureaus situated within departments that are similarly subject, *by statute*, to for-cause removal provisions. The chart below first lists the 24 departments and then lists the 24 additional offices, boards, and bureaus. I have highlighted those instances in which a “for-cause” office is situated within a “for-cause” department—*i.e.*, instances of “double for-cause” removal that are essentially indistinguishable from this case (with the notable exception that the Accounting Board may *not* be *statutorily* subject to two layers of for-cause removal, cf. Part III, *supra*). This list does not include instances of “double for-cause” removal that arise in Article I courts, although such instances might also be affected by the majority’s holding, cf. *ante*, at 26, n. 10. Compare 48 U. S. C. §§1424(a), 1614(a), with 28 U. S. C. §§631(a), (i), and 18 U. S. C. §§23, 3602(a).

	Department	Statutory Removal Provision
1	Chemical Safety Board	“Any member of the Board, including the Chairperson, may be removed for inefficiency, neglect of duty, or malfeasance in office.” 42 U. S. C. §7412(r)(6)(B)
2	Commission on Civil Rights	“The President may remove a member of the Commission only for neglect of duty or malfeasance in office.” 42 U. S. C. §1975(e)
3	Consumer Product Safety Commission	“Any member of the Commission may be removed by the President for neglect of duty or malfeasance in office but for no other cause.” 15 U. S. C. §2053(a)

Appendix A to opinion of BREYER, J.

	Department	Statutory Removal Provision
4	Federal Energy Regulatory Commission	“Members shall hold office for a term of 5 years and may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office.” 42 U. S. C. §7171(b)(1)
5	Federal Labor Relations Authority	“Members of the Authority shall be appointed by the President by and with the advice and consent of the Senate, and may be removed by the President only upon notice and hearing and only for inefficiency, neglect of duty, or malfeasance in office.” 5 U. S. C. §7104(b)
6	Federal Maritime Commission	“The President may remove a Commissioner for inefficiency, neglect of duty, or malfeasance in office.” 46 U. S. C. §301(b)(3)
7	Federal Mine Safety and Health Review Commission	“Any member of the Commission may be removed by the President for inefficiency, neglect of duty, or malfeasance in office.” 30 U. S. C. §823(b)(1)
8	Federal Reserve Board	“[E]ach member shall hold office for a term of fourteen years from the expiration of the term of his predecessor, unless sooner removed for cause by the President.” 12 U. S. C. §242
9	Federal Trade Commission	“Any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office.” 15 U. S. C. §41
10	Independent Medicare Advisory Board	“Any appointed member may be removed by the President for neglect of duty or malfeasance in office, but for no other cause.” Pub. L. 111–148, §3403.
11	Merit Systems Protection Board	“Any member may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office.” 5 U. S. C. §1202(d)

FREE ENTERPRISE FUND *v.* PUBLIC COMPANY
ACCOUNTING OVERSIGHT BD.

Appendix A to opinion of BREYER, J.

	Department	Statutory Removal Provision
12	National Labor Relations Board	“Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.” 29 U. S. C. §153(a)
13	National Mediation Board	“A member of the Board may be removed by the President for inefficiency, neglect of duty, malfeasance in office, or ineligibility, but for no other cause.” 45 U. S. C. §154
14	National Transportation Safety Board	“The President may remove a member for inefficiency, neglect of duty, or malfeasance in office.” 49 U. S. C. §1111(c)
15	Nuclear Regulatory Commission	“Any member of the Commission may be removed by the President for inefficiency, neglect of duty, or malfeasance in office.” 42 U. S. C. §5841(e)
16	Occupational Safety and Health Review Commission	“A member of the Commission may be removed by the President for inefficiency, neglect of duty, or malfeasance in office.” 29 U. S. C. §661(b)
17	Office of Special Counsel	“The Special Counsel may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office.” 5 U. S. C. §1211(b)
18	Postal Regulatory Commission	“The Commissioners shall be chosen solely on the basis of their technical qualifications, professional standing, and demonstrated expertise in economics, accounting, law, or public administration, and may be removed by the President only for cause.” 39 U. S. C. §502(a)

Appendix A to opinion of BREYER, J.

	Department	Statutory Removal Provision
19	Postal Service*	“The exercise of the power of the Postal Service shall be directed by a Board of Governors composed of 11 members The Governors shall not be representatives of specific interests using the Postal Service, and may be removed only for cause.” 39 U. S. C. §202
20	Social Security Administration	“[The] Commissioner may be removed from office only pursuant to a finding by the President of neglect of duty or malfeasance in office.” 42 U. S. C. §902(a)(3)
21	United States Institute of Peace*	“A member of the Board appointed under subsection (b)(5) . . . may be removed by the President . . . in consultation with the Board, for conviction of a felony, malfeasance in office, persistent neglect of duties, or inability to discharge duties.” 22 U. S. C. §4605(f)
22	United States Sentencing Commission	“The Chair, Vice Chairs, and members of the Commission shall be subject to removal from the Commission by the President only for neglect of duty or malfeasance in office or for other good cause shown.” 28 U. S. C. §991(a)
23	Legal Services Corporation*	“A member of the Board may be removed by a vote of seven members for malfeasance in office or for persistent neglect of or inability to discharge duties, or for offenses involving moral turpitude, and for no other cause.” 42 U. S. C. §2996c(e)
24	State Justice Institute*	“A member of the Board may be removed by a vote of seven members for malfeasance in office, persistent neglect of, or inability to discharge duties, or for any offense involving moral turpitude, but for no other cause.” 42 U. S. C. §10703(h)

*See *Lebron v. National Railroad Passenger Corporation*, 513 U. S. 374 (1995).

FREE ENTERPRISE FUND *v.* PUBLIC COMPANY
ACCOUNTING OVERSIGHT BD.

Appendix A to opinion of BREYER, J.

	Office Within Department	Statutory Removal Provision
25	Department of Agriculture: National Appeals Division	“The Division shall be headed by a Director, appointed by the Secretary from among persons who have substantial experience in practicing administrative law. . . . The Director shall not be subject to removal during the term of office, except for cause established in accordance with law.” 7 U. S. C. §§6992(b)(1)–(2)
26	Department of Agriculture: Regional Fishery Management Councils	“The Secretary may remove for cause any member of a Council required to be appointed by the Secretary” 16 U. S. C. §1852(b)(6)
27	Department of Commerce: Corporation for Travel Promotion [†]	“The Secretary of Commerce may remove any member of the board [of the Corporation] for good cause.” 124 Stat. 57
28	Department of Defense: Office of Navy Reserve	“The Chief of Navy Reserve is appointed for a term determined by the Chief of Naval Operations, normally four years, but may be removed for cause at any time.” 10 U. S. C. §5143(c)(1)
29	Department of Defense: Office of Marine Forces Reserve	“The Commander, Marine Forces Reserve, is appointed for a term determined by the Commandant of the Marine Corps, normally four years, but may be removed for cause at any time.” 10 U. S. C. §5144(c)(1)
30	Department of Defense: Office of Air Force Reserve	“The Chief of Air Force Reserve is appointed for a period of four years, but may be removed for cause at any time.” 10 U. S. C. §8038(c)(1)
31	Department of Defense: Joint Staff of the National Guard Bureau	“[A]n officer appointed as Director of the Joint Staff of the National Guard Bureau serves for a term of four years, but may be removed from office at any time for cause.” 10 U. S. C. §10505(a)(3)(A)

[†]See *Lebron, supra*.

Appendix A to opinion of BREYER, J.

	Office Within Department	Statutory Removal Provision
32	Department of Defense: Board of Actuaries	“A member of the Board may be removed by the Secretary of Defense only for misconduct or failure to perform functions vested in the Board.” 10 U. S. C. A. §183(b)(3) (2010)
33	Department of Defense: Medicare-Eligible Retiree Health Care Board of Actuaries	“A member of the Board may be removed by the Secretary of Defense for misconduct or failure to perform functions vested in the Board, and for no other reason.” 10 U. S. C. §1114(a)(2)(A)
34	Department of Education: Performance-Based Organization for the Delivery of Federal Student Financial Assistance	“The Chief Operating Officer may be removed by . . . the President; or . . . the Secretary, for misconduct or failure to meet performance goals set forth in the performance agreement in paragraph (4).” 20 U. S. C. §1018(d)(3)
35	Federal Labor Relations Authority: Foreign Service Labor Relations Board (see <i>supra</i> , row 5)	“The Chairperson [of the FLRA, who also chairs the Board] may remove any other Board member . . . for corruption, neglect of duty, malfeasance, or demonstrated incapacity to perform his or her functions . . .” 22 U. S. C. §4106(e)
36	General Services Administration: Civilian Board of Contract Appeals (see <i>supra</i> , row 11)	“Members of the Civilian Board shall be subject to removal in the same manner as administrative law judges, [<i>i.e.</i> , ‘only for good cause established and determined by the Merit Systems Protection Board.’]” 41 U. S. C. §438(b)(2) (emphasis added)
37	Department of Health and Human Services: National Advisory Council on National Health Service Corps	“No member shall be removed, except for cause.” 42 U. S. C. §254j(b)

FREE ENTERPRISE FUND *v.* PUBLIC COMPANY
ACCOUNTING OVERSIGHT BD.

Appendix A to opinion of BREYER, J.

	Office Within Department	Statutory Removal Provision
38	Department of Health and Human Services: Medicare & Medicaid Office of the Chief Actuary	“The Chief Actuary may be removed only for cause.” 42 U. S. C. §1317(b)(1)
39	Department of Homeland Security: Office of the Coast Guard Reserve	“An officer may be removed from the position of Director for cause at any time.” 14 U. S. C. §53(c)(1)
40	Department of the Interior: National Indian Gaming Commission	“A Commissioner may only be removed from office before the expiration of the term of office of the member by the President (or, in the case of associate member, by the Secretary) for neglect of duty, or malfeasance in office, or for other good cause shown.” 25 U. S. C. §2704(b)(6)
41	Library of Congress: Copyright Royalty Judgeships	“The Librarian of Congress may sanction or remove a Copyright Royalty Judge for violation of the standards of conduct adopted under subsection (h), misconduct, neglect of duty, or any disqualifying physical or mental disability.” 17 U. S. C. §802(i)
42	Postal Service: Inspector General (see <i>supra</i> , row 19)	“The Inspector General may at any time be removed upon the written concurrence of at least 7 Governors, but only for cause.” 39 U. S. C. §202(e)(3)
43	Securities and Exchange Commission: Public Company Accounting Oversight Board	“A member of the Board may be removed by the Commission from office . . . for good cause shown” 15 U. S. C. §7211(e)(6)
44	Social Security Administration: Office of the Chief Actuary (see <i>supra</i> , row 20)	“The Chief Actuary may be removed only for cause.” 42 U. S. C. §902(c)(1)

Appendix A to opinion of BREYER, J.

	Office Within Department	Statutory Removal Provision
45	Department of State: Foreign Service Grievance Board	“The Secretary of State may, upon written notice, remove a Board member for corruption, neglect of duty, malfeasance, or demonstrated incapacity to perform his or her functions, established at a hearing (unless the right to a hearing is waived in writing by the Board member).” 22 U. S. C. §4135(d)
46	Department of Transportation: Air Traffic Services Committee	“Any member of the Committee may be removed for cause by the Secretary.” 49 U. S. C. §106(p)(6)(G)
47	Department of Transportation: Surface Transportation Board	“The President may remove a member for inefficiency, neglect of duty, or malfeasance in office.” 49 U. S. C. §701(b)(3)
48	Department of Veterans Affairs: Board of Veterans Appeals	“The Chairman may be removed by the President for misconduct, inefficiency, neglect of duty, or engaging in the practice of law or for physical or mental disability which, in the opinion of the President, prevents the proper execution of the Chairman’s duties. The Chairman may not be removed from office by the President on any other grounds.” 38 U. S. C. §7101(b)(2)

B

The table that follows lists the 573 career appointees in the Senior Executive Service (SES) who constitute the upper level management of the independent agencies listed in Appendix A, *supra*. Each of these officials is, under any definition—including the Court’s—an inferior officer, and is, by statute, subject to two layers of for-cause removal. See *supra*, at 25–30.

The data are organized into three columns: The first column lists the “office” to which the corresponding official is assigned within the respective agency and, where available, the provision of law establishing that office. Cf. *supra*, at 27 (citing *Mouat*, 124 U. S., at 307–308; *Germaine*, 99 U. S., at 510). The second and third columns respectively list the career appointees in each agency who occupy “general” and “reserved” SES positions. A “general” position is one that could be filled by either a career appointee or by a noncareer appointee were the current (career) occupant to be replaced. See 5 U. S. C. §3132(b)(1). Because 90% of *all* SES positions must be filled by career appointees, §3134(b), “most General positions are filled by career appointees,” Plum Book 200. A “reserved” position, by contrast, must always be filled by a career appointee. §3132(b)(1). The data for the “general position” column come from the 2008 Plum Book, a quadrennial manual prepared by the congressional committees responsible for government oversight. See *supra*, at 29. Positions listed as vacant in that source are not included. The data for the “reserved position” column come from a list periodically published by the Office of Personnel Management and last published in 2006. See 72 Fed. Reg. 16154–16251 (2007); §3132(b)(4). Given the Federal Government’s size and the temporal lag between the underlying sources, the list that follows is intended to be illustrative, not exact.

Appendix B to opinion of BREYER, J.

Nuclear Regulatory Commission (192)		
<i>Office</i>	<i>General Position</i>	<i>Reserved Position</i>
Office of the Executive Director for Operations 10 CFR §1.32 (2009)	Executive Director	Director of Nuclear Security Projects
	Deputy Executive Director for Reactor and Preparedness Programs	
	Deputy Executive Director for Materials, Waste, Research, State, Tribal, and Compliance, Programs	
	Deputy Executive Director for Corporate Management	
	Assistant for Operations	
	Director for Strategic Organizational Planning and Optimization	
Office of the Secretary 10 CFR §1.25	Secretary	
Office of the Chief Financial Officer 10 CFR §1.31	Chief Financial Officer	Director, Division of Planning, Budget and Analysis
		Director, Division of Financial Services
		Deputy Chief Financial Officer
		Director, Division of Financial Management
Office of the Inspector General 10 CFR §1.12		Deputy Inspector General
		Assistant Inspector General for Audits
		Assistant Inspector General for Investigations
Office of the General Counsel 10 CFR §1.23	General Counsel	Director, Commission Adjudicatory Technical Support
	Deputy General Counsel	Deputy Assistant General Counsel for Rulemaking and Fuel Cycle
	Solicitor	Deputy Assistant General Counsel for Administration
	Associate General Counsel for Licensing and Regulation	Assistant General Counsel for Operating Reactors
	Assistant General Counsel for Rulemaking and Fuel Cycle	

FREE ENTERPRISE FUND *v.* PUBLIC COMPANY
ACCOUNTING OVERSIGHT BD.

Appendix B to opinion of BREYER, J.

<i>Office</i>	<i>General Position</i>	<i>Reserved Position</i>
Office of the General Counsel (Continued)	Assistant General Counsel for Legal Counsel, Legislation, and Special Projects	
	Associate General Counsel for Hearings, Enforcement, and Administration	
	Assistant General Counsel for New Reactor Programs	
	Assistant General Counsel for Operating Reactors	
	Assistant General Counsel for the High-Level Waste Repository Programs	
Office of Commission Appellate Adjudication 10 CFR §1.24		Director
Office of Congressional Affairs 10 CFR §1.27	Director	
Office of Public Affairs 10 CFR §1.28	Director	
Office of International Programs 10 CFR §1.29	Director	
	Deputy Director	
Office of Investigations 10 CFR §1.36	Director	Deputy Director
Office of Enforcement 10 CFR §1.33	Director	
Office of Administration 10 CFR §1.34	Director	Deputy Director
		Director, Division of Contracts
		Director, Division of Administrative Services
		Director, Division of Facilities and Security
Office of Human Resources 10 CFR §1.39	Director	
	Deputy Director	
	Associate Director for Training and Development	

Appendix B to opinion of BREYER, J.

<i>Office</i>	<i>General Position</i>	<i>Reserved Position</i>
Office of Information Services 10 CFR §1.35	Director	Deputy Director
		Director, Information and Records Services Division
		Director, High-Level Waste Business and Program Integration Staff
		Director, Business Process Improvement and Applications
		Director, Program Management, Policy Development and Analysis Staff
		Director, Infrastructure and Computer Operations
Office of Nuclear Security and Incident Response 10 CFR §1.46	Director	Deputy Director (2)
		Director, Program Management, Policy Development
(Division of Security Policy)		Director
		Deputy Director
		Project Director, Nuclear Security Policy
		Project Director, Nuclear Security Operations
		Deputy Director for Material Security
		Deputy Director for Reactor Security and Rulemaking
(Division of Preparedness and Response)		Director
		Deputy Director (2)
		Deputy Director for Emergency Preparedness
(Division of Security Operations)		Director
		Deputy Director for Security Oversight
		Deputy Director for Security Programs
Office of Nuclear Reactor Regulation 10 CFR §1.43	Director	Director, Program Management, etc.
	Deputy Director	Deputy Director, Program Management, etc.

FREE ENTERPRISE FUND *v.* PUBLIC COMPANY
ACCOUNTING OVERSIGHT BD.

Appendix B to opinion of BREYER, J.

<i>Office</i>	<i>General Position</i>	<i>Reserved Position</i>
Office of Nuclear Reactor Regulation (Continued)		Associate Director, Operating Reactor Oversight and Licensing
		Associate Director, Risk Assessment and New Projects
		Associate Director, Engineering and Safety Systems
(Division of Safety Systems)		Director
		Deputy Director (2)
(Division of License Renewal)		Director
		Deputy Director
(Division of Operating Reactor Licensing)		Director
		Deputy Director (2)
(Division of Inspection and Regional Support)		Director
		Deputy Director (2)
(Division of New Reactor Licensing)		Director
		Deputy Director (2)
(Division of Engineering)		Director
		Deputy Director (3)
(Division of Risk Assessment)		Director
		Deputy Director (2)
(Division of Policy and Rulemaking)		Director
		Deputy Director (2)
(Division of Component Integrity)		Director
		Deputy Director
Office of New Reactors 10 CFR §1.44	Director	Assistant to the Director for Transition Management
Office of Nuclear Material Safety and Safeguards 10 CFR §1.42	Director	Director, Program Planning, etc.
	Deputy Director	
(Division of Fuel Cycle Safety and Safeguards)		Chief, Special Projects Branch
		Chief, Safety and Safeguards Support Branch
		Chief, Fuel Cycle Facilities Branch

Appendix B to opinion of BREYER, J.

<i>Office</i>	<i>General Position</i>	<i>Reserved Position</i>
(Division of Industrial and Medical Nuclear Safety)		Chief, Rulemaking and Guidance Branch
		Chief, Materials Safety and Inspection Branch
(Division of High Level Waste Repository Safety)		Deputy Director, Licensing and Inspection
		Deputy Director, Technical Review Directorate (2)
(Spent Fuel Project Office)		Deputy Director, Technical Review Directorate
		Deputy Director, Licensing and Inspection
Office of Federal and State Materials and Environmental Management Programs 10 CFR §1.41	Director	Deputy Director
		Director, Program Planning, etc.
(Division of Waste Management and Environmental Protection)		Director
		Deputy Director, Decommissioning (2)
		Deputy Director, Environmental Protection (2)
		Chief, Environmental and Performance Assessment
(Division of Materials Safety and State Agreements)		Director
		Deputy Director
(Division of Intergovernmental Liaison and Rulemaking)		Director
		Deputy Director
Office of Nuclear Regulatory Research 10 CFR §1.45	Director	Director, Program Management, etc.
	Deputy Director	Deputy Director for Materials Engineering
	Regional Administrator (4)	Deputy Director for Engineering Research Applications
		Deputy Director for New Reactors and Computational Analysis
		Deputy Director for Probabilistic Risk and Applications

FREE ENTERPRISE FUND *v.* PUBLIC COMPANY
ACCOUNTING OVERSIGHT BD.

Appendix B to opinion of BREYER, J.

<i>Office</i>	<i>General Position</i>	<i>Reserved Position</i>
Office of Nuclear Regulatory Research (Continued)		Deputy Director for Operating Experience and Risk Analysis
		Deputy Director for Radiation Protection, Environmental Risk and Waste Management
(Division of Engineering Technology)		Chief, Generic Safety Issues Branch
		Chief, Electrical, Mechanical, and Materials Branch
		Chief, Structural and Geological Engineering Branch
		Chief, Materials Engineering Branch
		Chief, Engineering Research Applications Branch
(Division of Systems Analysis and Regulatory Effectiveness)		Deputy Director
		Chief, Advanced Reactors and Regulatory Effectiveness
		Chief, Safety Margins and Systems Analysis Branch
(Division of Risk Analysis and Application)		Chief, Radiation Protection, etc.
		Deputy Director
		Chief, Operating Experience Risk Analysis Branch
(Division of Risk Assessment and Special Projects)		Chief, Probabilistic Risk Analysis Branch
		Director
(Division of Fuel, Engineering and Radiological Research)		Assistant Director(2)
		Director
Office of Small Business and Civil Rights 10 CFR §1.37		Assistant Director
		Director
Advisory Committee on Reactor Safeguards 10 CFR §1.13	Executive Director	Deputy Executive Director

Appendix B to opinion of BREYER, J.

<i>Office</i>	<i>General Position</i>	<i>Reserved Position</i>
Regional Offices 10 CFR §1.47		Deputy Regional Administrator (5)
		Director, Division of Fuel Facility Inspection (1)
		Director, Division of Reactor Projects (4)
		Deputy Director, Division of Reactor Projects (5)
		Director, Division of Reactor Safety (4)
		Deputy Director, Division of Reactor Safety (4)
		Director, Division of Nuclear Materials Safety (3)
		Deputy Director, Division of Nuclear Materials Safety
	Deputy Director, Division of Radiation Safety, etc.	
Social Security Administration (143)		
<i>Office</i>	<i>General Position</i>	<i>Reserved Position</i>
Office of the Commissioner 33 Fed. Reg. 5828 (1968)	Executive Counselor to the Commissioner	
	Deputy Chief of Staff	
	Director for Regulations	
	Senior Advisor to the Deputy Commissioner	
	Senior Advisor to the Commissioner	
Office of International Programs 63 Fed. Reg. 41888 (1998)	Associate Commissioner for International Programs	
Office of Executive Operations 56 Fed. Reg. 15888 (1991)		Assistant Inspector General
Office of the Chief Actuary 42 U. S. C. §902(c)(1) 33 Fed. Reg. 5828	Chief Actuary	
	Deputy Chief Actuary, Long-Range	
	Deputy Chief Actuary, Short-Range	

FREE ENTERPRISE FUND *v.* PUBLIC COMPANY
ACCOUNTING OVERSIGHT BD.

Appendix B to opinion of BREYER, J.

<i>Office</i>	<i>General Position</i>	<i>Reserved Position</i>
Office of the Chief Information Officer 33 Fed. Reg. 5829	Deputy Chief Information Officer	Director, Office of Information Technology Systems Review
Office of Information Technology Investment Management	Associate Chief Information Officer	
Office of Budget, Finance and Management 60 Fed. Reg. 22099 (1995)	Deputy Commissioner	
	Assistant Deputy Commissioner	
Office of Acquisition and Grants 60 Fed. Reg. 22099	Associate Commissioner	
Office of Budget 60 Fed. Reg. 22099	Associate Commissioner	
	Deputy Associate Commissioner	
Office of Facilities Management 60 Fed. Reg. 22099	Associate Commissioner	
	Deputy Associate Commissioner	
Office of Financial Policy and Operations 56 Fed. Reg. 15888	Associate Commissioner	
	Deputy Associate Commissioner	
Office of Publications and Logistics Management 60 Fed. Reg. 22099	Associate Commissioner	
	Deputy Associate Commissioner	
Office of Communications 62 Fed. Reg. 9476 (1997)	Assistant Deputy Commissioner	
	Press Officer	
Office of Communications Planning and Technology 63 Fed. Reg. 15476	Associate Commissioner	
Office of Public Inquiries 62 Fed. Reg. 9477	Associate Commissioner	

Appendix B to opinion of BREYER, J.

<i>Office</i>	<i>General Position</i>	<i>Reserved Position</i>
Office of Disability Adjudication and Review	Deputy Commissioner	
	Assistant Deputy Commissioner	
Office of Appellate Operations 53 Fed. Reg. 29778 (1988)	Executive Director	
Office of the General Counsel 65 Fed. Reg. 39218 (2000)	Deputy General Counsel	
Office of General Law 65 Fed. Reg. 39218	Associate General Counsel	
Office of Public Disclosure 67 Fed. Reg. 63186 (2002)	Executive Director	
Office of Regional Chief Counsels 65 Fed. Reg. 39219	Regional Chief Counsel (7)	
Office of Human Resources 60 Fed. Reg. 22128	Deputy Commissioner	
	Assistant Deputy Commissioner	
Office of Civil Rights and Equal Opportunity 60 Fed. Reg. 22128	Associate Commissioner	
Office of Labor Management and Employee Relations	Associate Commissioner	
	Deputy Associate Commissioner	
Office of Personnel 60 Fed. Reg. 22128	Associate Commissioner	
	Deputy Associate Commissioner	
Office of Training 60 Fed. Reg. 22128	Associate Commissioner	
Office of the Inspector General 42 U. S. C. §902(e) 60 Fed. Reg. 22133	Deputy Inspector General	
	Counsel to the Inspector General	

FREE ENTERPRISE FUND *v.* PUBLIC COMPANY
ACCOUNTING OVERSIGHT BD.

Appendix B to opinion of BREYER, J.

<i>Office</i>	<i>General Position</i>	<i>Reserved Position</i>
Office of Audits 60 Fed. Reg. 22133	Assistant Inspector General for Audit	
	Deputy Assistant Inspector General for Audit	
Office of Investigations 60 Fed. Reg. 22133	Assistant Inspector General	
	Deputy Assistant Inspector General for Field Investigations	
	Deputy Assistant Inspector General for National Investigative Operations	
Office of Legislation and Congressional Affairs 60 Fed. Reg. 22152	Senior Advisor to the Deputy Commissioner	
Office of Legislative Development 65 Fed. Reg. 10846	Associate Commissioner	
Office of Operations 60 Fed. Reg. 22107	Deputy Commissioner	
	Assistant Deputy Commissioner	
Office of Automation Support 60 Fed. Reg. 22108	Associate Commissioner	
Office of Central Operations 63 Fed. Reg. 32275	Associate Commissioner	
	Deputy Associate Commissioner	
	Assistant Associate Commissioner	
	Assistant Associate Commissioner for Management and Operations Support	
Office of Disability Determinations 67 Fed. Reg. 69288	Associate Commissioner	
	Deputy Associate Commissioner	
Office of Electronic Services 66 Fed. Reg. 29618 (2001)	Associate Commissioner	
Office of Public Service and Operations Support 59 Fed. Reg. 56511 (1994)	Associate Commissioner	
	Deputy Associate Commissioner	

Appendix B to opinion of BREYER, J.

<i>Office</i>	<i>General Position</i>	<i>Reserved Position</i>
Office of Telephone Services 60 Fed. Reg. 22108	Associate Commissioner	
	Deputy Associate Commissioner	
Office of Regional Commissioners 60 Fed. Reg. 22108	Regional Commissioners (10)	
	Deputy Regional Commissioner (10)	
	Assistant Regional Commissioner (15)	
Office of Retirement and Disability Policy	Deputy Commissioner	
	Assistant Deputy Commissioner (2)	
	Senior Advisor for Program Outreach	
Office of Disability Programs 67 Fed. Reg. 69289	Associate Commissioner	
Office of Employment Support Programs 64 Fed. Reg. 19397 (1999)	Associate Commissioner	
Office of Income Security Programs 67 Fed. Reg. 69288	Associate Commissioner	
	Deputy Associate Commissioner	
Office of Medical and Vocational Expertise	Associate Commissioner	
Office of Research, Evaluation and Statistics 61 Fed. Reg. 35847 (1996)	Associate Commissioner	
Office of Systems 60 Fed. Reg. 22116	Deputy Commissioner	
	Assistant Deputy Commissioner	
Office of Disability Systems 61 Fed. Reg. 35849	Associate Commissioner	
	Deputy Associate Commissioner	
Office of Supplemental Security Income Systems 67 Fed. Reg. 37892	Associate Commissioner	
	Deputy Associate Commissioner	

FREE ENTERPRISE FUND *v.* PUBLIC COMPANY
ACCOUNTING OVERSIGHT BD.

Appendix B to opinion of BREYER, J.

<i>Office</i>	<i>General Position</i>	<i>Reserved Position</i>
Office of Earnings, Enumeration and Administrative Systems 67 Fed. Reg. 37892	Associate Commissioner	
	Deputy Associate Commissioner	
Office of Enterprise Support, Architecture and Engineering 67 Fed. Reg. 37892	Associate Commissioner	
	Deputy Associate Commissioner (2)	
Office of Retirement and Survivors Insurance Systems 67 Fed. Reg. 37892	Associate Commissioner	
	Deputy Associate Commissioner	
Office of Systems Electronic Services 66 Fed. Reg. 10766 (2001)	Associate Commissioner	
	Deputy Associate Commissioner	
Office of Quality Performance 63 Fed. Reg. 32035	Deputy Commissioner	Chief Quality Officer
	Assistant Deputy Commissioner	Deputy Chief Quality Officer
		Deputy Associate Commissioner
Office of Quality Data Management	Associate Commissioner	
Office of Quality Improvement	Associate Commissioner	
	Deputy Associate Commissioner	
Office of Quality Review	Associate Commissioner	
	Deputy Associate Commissioner	
Office of the Chief Strategic Officer 67 Fed. Reg. 79950		Chief Strategic Officer
National Labor Relations Board (60)		
<i>Office</i>	<i>General Position</i>	<i>Reserved Position</i>
Office of the Board 29 U. S. C. §153(a)	Director, Office of Representation Appeals and Advice	Executive Secretary
	Solicitor	Deputy Executive Secretary
	Deputy Chief Counsel to Board Member (4)	Inspector General
		Chief Information Officer

Appendix B to opinion of BREYER, J.

<i>Office</i>	<i>General Position</i>	<i>Reserved Position</i>
Office of the General Counsel 29 U. S. C. §153(d)	Deputy General Counsel	
(Division of Enforcement Litigation)	Associate General Counsel	Deputy Associate General Counsel
		Deputy Associate General Counsel, Appellate Court Branch
		Director, Office of Appeals
(Division of Advice)		Associate General Counsel
		Deputy Associate General Counsel
(Division of Administration)		Director
		Deputy Director
(Division of Operations Management)		Associate General Counsel
		Deputy Associate General
		Assistant General Counsel (6)
Regional Offices 29 U. S. C. §153(b)		Regional Director (33)
Federal Energy Regulatory Commission (44)		
<i>Office</i>	<i>General Position</i>	<i>Reserved Position</i>
Office of the Executive Director 18 CFR §1.101(e) (2009)	Executive Director	
	Deputy Executive Director	
	Deputy Chief Information Officer	
Office of General Counsel 18 CFR §1.101(f)	General Counsel	
	Deputy General Counsel	
	Associate General Counsel (3)	
	Deputy Associate General Counsel (4)	
	Solicitor	
Office of Energy Market Regulation 18 CFR §376.204(b)(2)(ii)	Director	
	Deputy Director	
	Director, Tariffs and Market Development (3)	
	Director, Policy Analysis and Rulemaking	
	Director, Administration, Case Management, and Strategic Planning	

FREE ENTERPRISE FUND *v.* PUBLIC COMPANY
ACCOUNTING OVERSIGHT BD.

Appendix B to opinion of BREYER, J.

<i>Office</i>	<i>General Position</i>	<i>Reserved Position</i>
Office of Energy Projects 18 CFR §376.204(b)(2)(iii)	Director	Director, Dam Safety and Inspections
	Principal Deputy Director	
	Deputy Director	
	Director, Hydropower Licensing	
	Director, Pipeline Certificates	
	Director, Gas Environment and Engineering	
	Director, Hydropower Administration and Compliance	
Office of Enforcement 18 CFR §376.204(b)(2)(vi)	Director	Chief Accountant and Director, Division of Financial Regulations
	Deputy Director	Chief, Regulatory Accounting Branch
	Director, Investigations	
	Deputy Director, Investigations	
	Director, Audits	
	Director, Energy Market Oversight	
Office of Electric Reliability 18 CFR §376.204(b)(2)(iv)	Director	
	Deputy Director	
	Director, Compliance	
	Director, Logistics and Security	
Office of Administrative Litigation 64 Fed. Reg. 51226 (1999) 68 Fed. Reg. 27056 (2003)	Director	
	Director, Technical Division	
	Director, Legal Division	
	Senior Counsel for Litigation	
Federal Trade Commission (31)		
<i>Office</i>	<i>General Position</i>	<i>Reserved Position</i>
Office of the Chairman 16 CFR §0.8 (2010)	Secretary	
Office of the Executive Director 16 CFR §0.10	Executive Director	Deputy Executive Director
	Chief Financial Officer	Chief Information Officer

Appendix B to opinion of BREYER, J.

<i>Office</i>	<i>General Position</i>	<i>Reserved Position</i>
Office of the General Counsel 16 CFR §0.11	Principal Deputy General Counsel	Deputy General Counsel for Policy Studies
	Deputy General Counsel for Litigation	
	Deputy General Counsel for Legal Counsel	
Office of International Affairs 16 CFR §0.20	Director	
	Deputy Director	
Bureau of Competition 16 CFR §0.16	Associate Director	
	Associate Director, Policy	
	Assistant Director, Mergers (2)	
	Assistant Director, Compliance	
Bureau of Consumer Protection 16 CFR §0.17	Director	Associate Director for International Division
	Deputy Director (2)	
	Associate Director for Privacy and Identity Protection	
	Associate Director for Advertising Practices	
	Associate Director for Marketing Practices	
	Associate Director for Financial Practices	
	Associate Director for Consumer and Business Education	
	Associate Director for Planning and Information	
	Associate Director for Enforcement	
Bureau of Economics 16 CFR §0.18	Deputy Director for Research and Development and Operations	
	Deputy Director for Antitrust	
	Associate Director for Consumer Protection and Research	
Office of the Inspector General 16 CFR §0.13		Inspector General

FREE ENTERPRISE FUND *v.* PUBLIC COMPANY
ACCOUNTING OVERSIGHT BD.

Appendix B to opinion of BREYER, J.

Consumer Product Safety Commission (16)		
<i>Office</i>	<i>General Position</i>	<i>Reserved Position</i>
Office of the Executive Director 16 CFR §1000.18 (2010)	Deputy Executive Director	Assistant Executive Director for Compliance and Administrative Litigation
	Chief Financial Officer	Associate Executive Director for Field Operations
		Executive Assistant
Office of Compliance and Field Operations 16 CFR §1000.21	Deputy Director	
Office of Hazard Identification and Reduction 16 CFR §1000.25		Assistant Executive Director
		Deputy Assistant Executive Director
		Associate Executive Director for Economic Analysis
		Associate Executive Director for Engineering Sciences
Directorate for Health Sciences 16 CFR §1000.27	Associate Executive Director	
Directorate for Laboratory Sciences 16 CFR §1000.30	Associate Executive Director	
Office of International Programs and Intergovernmental Affairs 16 CFR §1000.24		Director
Office of Information and Technology Services 16 CFR §1000.23		Assistant Executive Director
Office of the General Counsel 16 CFR §1000.14	General Counsel	
Federal Labor Relations Authority (14)		
<i>Office</i>	<i>General Position</i>	<i>Reserved Position</i>
Office of the Chairman 5 CFR §2411.10(a) (2010)		Director, Human Resources, Policy and Performance Management
		Chief Counsel
		Senior Advisor

Appendix B to opinion of BREYER, J.

<i>Office</i>	<i>General Position</i>	<i>Reserved Position</i>
Office of the Solicitor 5 CFR §2417.203(a)		Solicitor
Offices of Members 5 U. S. C. §7104(b)		Chief Counsel (2)
Office of the Executive Director 5 U. S. C. §7105(d) 5 CFR §2421.7		Executive Director
Federal Services Impasses Panel 5 U. S. C. §7119(c)		Executive Director
Office of the General Counsel 5 U. S. C. §7104(f)		Deputy General Counsel
Regional Offices 5 U. S. C. §7105(d) 5 CFR §2421.6		Regional Director (5)
National Transportation Safety Board (14)		
<i>Office</i>	<i>General Position</i>	<i>Reserved Position</i>
Office of the Managing Director 49 CFR §800.2(c) (2009)		Managing Director
		Associate Managing Director for Quality Assurance
Office of the General Counsel 49 CFR §800.2(c)	General Counsel	
Office of Administration 60 Fed. Reg. 61488		Director
		Director, Bureau of Accident Investigation
Office of Aviation Safety 49 CFR §800.2(e)		Deputy Director, Technology and Investment Operations
		Deputy Director, Regional Operations
Office of Research and Engineering 49 CFR §800.2(j)		Director
		Deputy Director
Office of Chief Financial Officer 49 U. S. C. §1111(h) 49 CFR §800.28		Chief Financial Officer
Office of Safety Recommendations and Accomplishments 49 CFR §800.2(k)		Director

FREE ENTERPRISE FUND *v.* PUBLIC COMPANY
ACCOUNTING OVERSIGHT BD.

Appendix B to opinion of BREYER, J.

<i>Office</i>	<i>General Position</i>	<i>Reserved Position</i>
Office of Railroad, Pipeline and Hazardous Materials Investigations 49 CFR §§800.2(f), (i)		Director
National Transportation Safety Board Academy 49 U. S. C. §1117		Director President and Academic Dean
Performance-Based Organization for the Delivery of Federal Student Financial Assistance (13)		
<i>Office</i>	<i>General Position</i>	<i>Reserved Position</i>
Office of the Chief Operating Officer 20 U. S. C. §§1018(d)–(e)	Deputy Chief Operating Officer	Director, Student Aid Awareness
	Chief Financial Officer	
	Chief Compliance Officer	
	Director, Policy Liaison and Implementation Staff	
	Audit Officer	
	Director, Financial Management Group	
	Director, Budget Group	
	Deputy Chief Information Officer	
	Director, Application Development Group	
	Internal Review Officer	
	Director, Strategic Planning and Reporting Group	
Senior Adviser		
Merit Systems Protection Board (11)		
<i>Office</i>	<i>General Position</i>	<i>Reserved Position</i>
Office of the Clerk of the Board 5 CFR §1200.10(a)(4) (2010)		Clerk of the Board
Office of Financial and Administrative Management 5 CFR §1200.10(a)(8)		Director
Office of Policy and Evaluation 5 CFR §1200.10(a)(6)		Director

Appendix B to opinion of BREYER, J.

<i>Office</i>	<i>General Position</i>	<i>Reserved Position</i>
Office of Information Resources Management 5 CFR §1200.10(a)(9)		Director
Office of Regional Operations 5 CFR §1200.10(a)(1)		Director
		Regional Director (6)
Office of Special Counsel (8)		
<i>Office</i>	<i>General Position</i>	<i>Reserved Position</i>
Office of Special Counsel 5 U. S. C. §1211	Deputy Special Counsel	Associate Special Counsel for Investigation and Prosecution (3)
		Senior Associate Special Counsel for Investigation and Prosecution
		Associate Special Counsel, Planning and Oversight
		Associate Special Counsel for Legal Counsel and Policy.
		Director of Management and Budget
Postal Regulatory Commission (10)*		
<i>Office</i>	<i>General Position</i>	<i>Reserved Position</i>
Office of the General Counsel 39 CFR §3002.13 (2009)	General Counsel	
	Assistant General Counsel	
Office of Accountability and Compliance	Director	
	Assistant Director, Analysis and Pricing Division	
	Assistant Director, Auditing and Costing Division	
Office of Public Affairs and Governmental Relations 39 CFR §3002.15	Director	

*The officers in this agency are part of the “excepted service,” but enjoy tenure protection similar to that enjoyed by career SES appointees. See 5 U. S. C. §2302(a)(2)(B); Plum Book, p. v (distinguishing “excepted service” from “Schedule C”); *id.*, at 202 (describing schedule C positions).

FREE ENTERPRISE FUND *v.* PUBLIC COMPANY
ACCOUNTING OVERSIGHT BD.

Appendix B to opinion of BREYER, J.

<i>Office</i>	<i>General Position</i>	<i>Reserved Position</i>
Office of the Secretary and Administration 48 Fed. Reg. 13167 (1983)	Secretary and Director	
	Assistant Director, Human Resources and Infrastructure	
	Assistant Director, Strategic Planning, etc.	
Office of the Inspector General 39 CFR §3002.16	Inspector General	
Federal Maritime Commission (8)		
<i>Office</i>	<i>General Position</i>	<i>Reserved Position</i>
Office of the Managing Director 46 CFR §501.3(h) (2010) 75 Fed. Reg. 29452	Director	
Office of the Secretary 46 CFR §501.3(c)		Secretary
Office of the General Counsel 46 CFR §501.3(d)		Deputy General Counsel for Reports, Opinions and Decisions
Bureau of Certification and Licensing 46 CFR §501.3(h)(5)		Director
Bureau of Trade Analysis 46 CFR §501.3(h)(6)		Director
Bureau of Enforcement 46 CFR §501.3(h)(7)		Director
		Deputy Director
Office of Administration 70 Fed. Reg. 7660 (2005)		Director
Surface Transportation Board (4)		
<i>Office</i>	<i>General Position</i>	<i>Reserved Position</i>
Office of the Chairman 49 CFR §1011.3 (2009)	Director of Public Assistance, Governmental Affairs and Compliance	
Office of the General Counsel 49 CFR §1011.6(c)(3)	General Counsel	
	Deputy General Counsel	
Office of Proceedings 49 CFR §1011.6(h)	Director	

Appendix B to opinion of BREYER, J.

Federal Mine Safety and Health Review Commission (1)		
<i>Office</i>	<i>General Position</i>	<i>Reserved Position</i>
Office of the General Counsel 29 CFR §2706.170(c) (2009)	General Counsel	
Chemical Safety and Hazard Investigation Board (1)		
<i>Office</i>	<i>General Position</i>	<i>Reserved Position</i>
Office of the General Counsel 40 CFR §1600.2 (b)(3) (2009)	General Counsel	
National Mediation Board (1)		
<i>Office</i>	<i>General Position</i>	<i>Reserved Position</i>
Office of the General Counsel 29 CFR §1209.06(e) (2009)	General Counsel	
Commission on Civil Rights (1)		
<i>Office</i>	<i>General Position</i>	<i>Reserved Position</i>
Office of the Staff Director 42 U. S. C. §1975b(a)(2)(A)	Associate Deputy Staff Director	
Board of Veterans Appeals (1)		
<i>Office</i>	<i>General Position</i>	<i>Reserved Position</i>
Office of the Vice Chairman 38 U. S. C. §7101(a)		Vice Chairman

C

According to data provided by the Office of Personnel Management, reprinted below, there are 1,584 administrative law judges (ALJs) in the Federal Government. Each of these ALJs is an inferior officer and each is subject, by statute, to two layers of for-cause removal. See *supra*, at 30. The table below lists the 28 federal agencies that rely on ALJs to adjudicate individual administrative cases. The source is available in the Clerk of Court’s case file. See *ibid.*

AGENCY	TOTAL NUMBER OF ALJs
Commodity Futures Trading Commission	2
Department of Agriculture	4
Department of Education	1
Department of Health and Human Services (Departmental Appeals Board)	7
Department of Health and Human Services (Food and Drug Administration)	1
Department of Health and Human Services (Office of Medicare Hearings and Appeals)	65
Department of Homeland Security (United States Coast Guard)	6
Department of Housing and Urban Development	2
Department of the Interior	9
Department of Justice (Drug Enforcement Administration)	3
Department of Justice (Executive Office for Immigration Review)	1
Department of Labor (Office of the Secretary)	44
Department of Transportation	3
Environmental Protection Agency	4
Federal Communications Commission	1

Appendix C to opinion of BREYER, J.

AGENCY	TOTAL NUMBER OF ALJs
Federal Energy Regulatory Commission	14
Federal Labor Relations Authority	3
Federal Maritime Commission	1
Federal Mine Safety and Health Review Commission	11
Federal Trade Commission	1
International Trade Commission	6
National Labor Relations Board	39
National Transportation Safety Board	4
Occupational Safety and Health Review Commission	12
Office of Financial Institution Adjudication	1
Securities and Exchange Commission	4
Social Security Administration	1,334
United States Postal Service	1
TOTAL	1,584

D

The table below lists 29 departments and other agencies the heads of which are *not* subject to any statutory for-cause removal provision, but that do bear certain other indicia of independence.

The table identifies six criteria that may suggest independence: (1) whether the agency consists of a multi-member commission; (2) whether its members are required, by statute, to be bipartisan (or nonpartisan); (3) whether eligibility to serve as the agency’s head depends on statutorily defined qualifications; (4) whether the agency has independence in submitting budgetary and other proposals to Congress (thereby bypassing the Office of Management and Budget); (5) whether the agency has authority to appear in court independent of the Department of Justice, cf. 28 U. S. C. §§516–519; and (6) whether the agency is explicitly classified as “independent” by statute. See generally Breger & Edles 1135–1155; *supra*, at 35–36. Unless otherwise noted, all information refers to the relevant agency’s organic statute, which is cited in the first column. The list of agencies is nonexhaustive.

Department or Agency	Multi-Member	Bi-partisan	Statutory Eligibility Criteria	OMB Bypass	Litigation Authority	Explicit Statement
Securities and Exchange Commission 15 U. S. C. §78d	Yes	Yes		Yes 12 U. S. C. §250	Yes 15 U. S. C. §78u	
Architectural and Transportation Barriers Compliance Board 29 U. S. C. §792	Yes		Yes (related experience)		Yes	
Arctic Research Commission 15 U. S. C. §4102	Yes		Yes (related knowledge, experience)			

Appendix D to opinion of BREYER, J.

Department or Agency	Multi-Member	Bi-partisan	Statutory Eligibility Criteria	OMB Bypass	Litigation Authority	Explicit Statement
Broadcasting Board of Governors 22 U. S. C. §6203	Yes	Yes	Yes (citizenship; related knowledge)			Yes
Central Intelligence Agency 50 U. S. C. §403-4						Cf. <i>Freytag</i> , 501 U. S., at 887, n. 4
Commission of Fine Arts 40 U. S. C. §9101	Yes		Yes (related knowledge)			
Commodity Futures Trading Commission 7 U. S. C. §2(a)(2)	Yes	Yes	Yes (related knowledge)		Yes §2(a)(4)	Yes
Defense Nuclear Facilities Safety Board 42 U. S. C. §2286	Yes	Yes	Yes (citizenship; expert knowledge)			Yes
Equal Employment Opportunity Commission 42 U. S. C. §2000e-4	Yes	Yes			Yes §2000e-5(f)	
Export-Import Bank of the United States* 12 U. S. C. §635a	Yes	Yes			Yes §635(a)(1)	Yes
Farm Credit Administration 12 U. S. C. §§2241, 2242	Yes	Yes	Yes (citizenship)		Yes §2244(c)	Yes
Federal Communications Commission 47 U. S. C. §§151, 154	Yes	Yes	Yes (citizenship)		Yes §401(b)	
Federal Deposit Insurance Corporation 12 U. S. C. §§1811, 1812	Yes	Yes	Yes (citizenship; related experience)	Yes §250	Yes §1819(a)	

* See *Lebron*, 513 U. S. 374.

FREE ENTERPRISE FUND *v.* PUBLIC COMPANY
ACCOUNTING OVERSIGHT BD.

Appendix D to opinion of BREYER, J.

Department or Agency	Multi-Member	Bi-partisan	Statutory Eligibility Criteria	OMB Bypass	Litigation Authority	Explicit Statement
Federal Election Commission 2 U. S. C. §437c	Yes	Yes	Yes (general)	Yes §437d(d)	Yes §437d (a)(6)	
Federal Housing Finance Agency 12 U. S. C. A. §4511 (Supp. 2010)				Yes §250		Yes
Federal Retirement Thrift Investment Board 5 U. S. C. §8472	Yes	Cf. §8472(b) (2)	Yes (related knowledge)			
International Trade Commission 19 U. S. C. §1330	Yes	Yes	Yes (citizenship; expert knowledge)	Yes §2232	Yes §1333(g)	Yes
Marine Mammal Commission 16 U. S. C. §1401	Yes		Yes (related knowledge)			
Millennium Challenge Corporation† 22 U. S. C. §7703	Yes	Cf. §7703(c) (3)(B)	Yes (related experience)			
National Credit Union Administration 12 U. S. C. §1752a	Yes	Yes	Yes (related experience)	Yes §250		Yes
National Archives and Records Administration 44 U. S. C. §§2102, 2103		Yes	Yes (related knowledge)			Yes
National Council on Disability 29 U. S. C. §780	Yes		Yes (related experience)			
National Labor-Management Panel 29 U. S. C. §175	Yes		Yes (related knowledge)			

†See *Lebron, supra*.

Appendix D to opinion of BREYER, J.

Department or Agency	Multi-Member	Bi-partisan	Statutory Eligibility Criteria	OMB Bypass	Litigation Authority	Explicit Statement
National Science Foundation 42 U. S. C. §§1861, 1863, 1864	Yes		Yes (related expertise)			Yes
Peace Corps 22 U. S. C. §2501-1						Yes
Pension Benefit Guaranty Corporation [‡] 29 U. S. C. §1302	Yes				Yes	
Railroad Retirement Board 45 U. S. C. §231f	Yes				Yes	Yes

[‡] See *Lebron, supra*.