

2011 Update

Federal Administrative Law Cases and Materials

by

Kristin E. Hickman and Richard J. Pierce, Jr.

Overall, not much has changed for purposes of teaching the basic administrative law course since we published the textbook in 2010 and the teacher's manual in 2011. Nevertheless, we offer this supplement to highlight a few recent cases and events that are not mentioned in the textbook but that you may wish to explore with your students. The materials in this supplement are as follows:

- In connection with Chapter 3, alternative materials for teaching the removal power including excerpted opinions from *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 130 S.Ct. 3138 (2010).
- Either in connection with the comparison of the judicial model versus the bureaucratic model of agency adjudication in Section C of Chapter 4 or with the discussions of *Heckler v. Campbell* and *Bowen v. Yuckert* in Section A of Chapter 5, a short essay and related questions concerning a crisis in the variability in decision making patterns among administrative law judges in Social Security disability cases.
- In connection with Chapter 6, additional materials concerning judicial review of agency interpretations of agency regulations, including Justice Scalia's concurring opinion in *Talk America, Inc. v. Michigan Bell Telephone Co.*, 131 S.Ct. 2254 (2011).

Chapter 3 Presidential Control of Agencies

B. THE POWER TO REMOVE

Unlike the power to appoint officers, the Constitution does not mention the power to remove officers at all. Nevertheless, Presidents from George Washington to George W. Bush have asserted the power to remove subordinate executive officials from office. See STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE* (2008) (documenting removal power claims of each President). As a result, the Court has been required to draw inferences with respect to the removal power based on other characteristics of the Constitution. The Court has done so several times:

- In *Myers v. United States*, 272 U.S. 52 (1926), in a lengthy opinion by Chief Justice William Howard Taft, who had previously served as President from 1909 to 1913 before assuming the position of Chief Justice in 1921, the Court declared unconstitutional a provision of the Tenure in Office Act that required Presidents to seek the advice and consent of the Senate in seeking to remove first, second, and third class postmasters. At the time the Court decided *Myers*, its opinion was widely interpreted to stand for the broad proposition that congress cannot limit in any way the power of the President to remove any officer of the United States. *Myers* no longer carries that meaning but is frequently cited for other propositions concerning the removal power.
- Notwithstanding its decision in *Myers*, less than a decade later, in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), the Court upheld a provision of the Federal Trade Commission Act that granted commissioners of the Federal Trade Commission a term of years and limited the President's ability to remove those commissioners to circumstances of "inefficiency, neglect of duty, or malfeasance in office," a limitation often referred to as a "for cause" or a "good cause" restriction. The Court's decision in *Humphrey's Executor* emphasized the status of the Federal Trade Commission as a nonpartisan body of experts charged with quasi-judicial and quasi-legislative duties. Along with other statutes that provide for a term of years and a for cause limit on the President's removal power, the Court's decision in *Humphrey's Executor* is cited as the reason why some agencies are labeled as independent.
- In *Weiner v. United States*, 357 U.S. 349 (1958), the Court considered President Eisenhower's removal of a member of the War Claims Commission. That body was established by the War Claims Act of 1948 for a limited number of years to adjudicate certain personal injury and property damage claims connected with World War II. Given the limited tenure of the Commission itself, Congress did not include a separate statutory provision addressing the removal of a Commissioner. Nevertheless, in light of the adjudicatory nature of the Commission's duties, and citing *Humphrey's Executor*, the Court concluded that Congress did not intend for the President to be able to remove members of the War Claims Commission except for good cause.

- In *Morrison v. Olson*, 487 U.S. 654 (1988), the Court considered the constitutionality of a good cause restriction on the ability of the President through the Attorney General, a principal officer, to remove an independent counsel from office. While acknowledging that the duties of independent counsels were “executive” rather than quasi-legislative or quasi-judicial in nature, because independent counsels were inferior officers “with limited jurisdiction and tenure and lacking policymaking or significant administrative authority,” the Court concluded that the good cause limitation on the President’s removal power over independent counsels did not “sufficiently deprive[] the President of control over the independent counsel to interfere impermissibly with his constitutional obligation to ensure the faithful execution of the laws.”

With these precedents as a backdrop, the Supreme Court recently had yet another opportunity to consider the scope of the President’s removal power and Congress’s authority to impose limitations thereon.

**Free Enterprise Fund v.
Public Company Accounting Oversight Board**
130 S.Ct. 3138 (2010)

■ MR. CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Our Constitution divided the “powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial.” *INS v. Chadha*, 462 U.S. 919, 951 (1983). Article II vests “[t]he executive Power ... in a President of the United States of America,” who must “take Care that the Laws be faithfully executed.” Art. II, § 1, cl. 1; *id.*, § 3. In light of “[t]he impossibility that one man should be able to perform all the great business of the State,” the Constitution provides for executive officers to “assist the supreme Magistrate in discharging the duties of his trust.” 30 Writings of George Washington 334 (J. Fitzpatrick ed.1939).

Since 1789, the Constitution has been understood to empower the President to keep these officers accountable—by removing them from office, if necessary. See generally *Myers v. United States*, 272 U.S. 52 (1926). This Court has determined, however, that this authority is not without limit. In *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935), we held that Congress can, under certain circumstances, create independent agencies run by principal officers appointed by the President, whom the President may not remove at will but only for good cause. Likewise, in *United States v. Perkins*, 116 U.S. 483 (1886), and *Morrison v. Olson*, 487 U.S. 654 (1988), the Court sustained similar restrictions on the power of principal executive officers—themselves responsible to the President—to remove their own inferiors. The parties do not ask us to reexamine any of these precedents, and we do not do so.

We are asked, however, to consider a new situation not yet encountered by the Court. The question is whether these separate layers of protection may be combined. May the President be restricted in his ability to remove a principal officer, who is in turn restricted in his ability to remove an inferior officer, even though that inferior officer determines the policy and enforces the laws of the United States?

We hold that such multilevel protection from removal is contrary to Article II's vesting of the executive power in the President. The President cannot "take Care that the Laws be faithfully executed" if he cannot oversee the faithfulness of the officers who execute them. Here the President cannot remove an officer who enjoys more than one level of good-cause protection, even if the President determines that the officer is neglecting his duties or discharging them improperly. That judgment is instead committed to another officer, who may or may not agree with the President's determination, and whom the President cannot remove simply because that officer disagrees with him. This contravenes the President's "constitutional obligation to ensure the faithful execution of the laws." *Id.*, at 693.

I

A

After a series of celebrated accounting debacles, Congress enacted the Sarbanes-Oxley Act of 2002 (or Act), 116 Stat. 745. Among other measures, the Act introduced tighter regulation of the accounting industry under a new Public Company Accounting Oversight Board. The Board is composed of five members, appointed to staggered 5-year terms by the Securities and Exchange Commission. It was modeled on private self-regulatory organizations in the securities industry—such as the New York Stock Exchange—that investigate and discipline their own members subject to Commission oversight. Congress created the Board as a private "nonprofit corporation," and Board members and employees are not considered Government "officer[s] or employee[s]" for statutory purposes. 15 U.S.C. §§ 7211(a), (b). The Board can thus recruit its members and employees from the private sector by paying salaries far above the standard Government pay scale. See §§ 7211(f)(4), 7219.

Unlike the self-regulatory organizations, however, the Board is a Government-created, Government-appointed entity, with expansive powers to govern an entire industry. Every accounting firm—both foreign and domestic—that participates in auditing public companies under the securities laws must register with the Board, pay it an annual fee, and comply with its rules and oversight. §§ 7211(a), 7212(a), (f), 7213, 7216(a)(1). The Board is charged with enforcing the Sarbanes-Oxley Act, the securities laws, the Commission's rules, its own rules, and professional accounting standards. §§ 7215(b)(1), (c)(4). To this end, the Board may regulate every detail of an accounting firm's practice, including hiring and professional development, promotion, supervision of audit work, the acceptance of new business and the continuation of old, internal inspection procedures, professional ethics rules, and "such other requirements as the Board may prescribe." § 7213(a)(2)(B).

The Board promulgates auditing and ethics standards, performs routine inspections of all accounting firms, demands documents and testimony, and initiates formal investigations and disciplinary proceedings. §§ 7213-7215 (2006 ed. and Supp. II). The willful violation of any Board rule is treated as a willful violation of the Securities Exchange Act of 1934, 48 Stat. 881, 15 U.S.C. § 78a *et seq.*—a federal crime punishable by up to 20 years' imprisonment or \$25 million in fines (\$5 million for a natural person). §§ 78ff(a), 7202(b)(1) (2006 ed.). And the Board itself can issue severe sanctions in its disciplinary proceedings, up to and including the permanent revocation of a firm's

registration, a permanent ban on a person's associating with any registered firm, and money penalties of \$15 million (\$750,000 for a natural person). § 7215(c)(4). Despite the provisions specifying that Board members are not Government officials for statutory purposes, the parties agree that the Board is "part of the Government" for constitutional purposes, *Lebron v. National Railroad Passenger Corporation*, 513 U.S. 374, 397 (1995), and that its members are " 'Officers of the United States' " who "exercis[e] significant authority pursuant to the laws of the United States," *Buckley v. Valeo*, 424 U.S. 1, 125-126 (1976) (*per curiam*) (quoting Art. II, § 2, cl. 2).

The Act places the Board under the SEC's oversight, particularly with respect to the issuance of rules or the imposition of sanctions (both of which are subject to Commission approval and alteration). §§ 7217(b)-(c). But the individual members of the Board—like the officers and directors of the self-regulatory organizations—are substantially insulated from the Commission's control. The Commission cannot remove Board members at will, but only "for good cause shown," "in accordance with" certain procedures. § 7211(e)(6).

* * *

The parties agree that the Commissioners [of the SEC] cannot themselves be removed by the President except under the *Humphrey's Executor* standard of "inefficiency, neglect of duty, or malfeasance in office," 295 U.S., at 620 (internal quotation marks omitted), and we decide the case with that understanding.

* * *

III

We hold that the dual for-cause limitations on the removal of Board members contravene the Constitution's separation of powers.

A

The Constitution provides that "[t]he executive Power shall be vested in a President of the United States of America." Art. II, § 1, cl. 1. As Madison stated on the floor of the First Congress, "if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws." 1 Annals of Cong. 463 (1789).

The removal of executive officers was discussed extensively in Congress when the first executive departments were created. The view that "prevailed, as most consonant to the text of the Constitution" and "to the requisite responsibility and harmony in the Executive Department," was that the executive power included a power to oversee executive officers through removal; because that traditional executive power was not "expressly taken away, it remained with the President." Letter from James Madison to Thomas Jefferson (June 30, 1789), 16 Documentary History of the First Federal Congress 893 (2004). "This Decision of 1789 provides contemporaneous and weighty evidence of the Constitution's meaning since many of the Members of the First Congress had taken part in framing that instrument." *Bowsher v. Synar*, 478 U.S. 714, 723-724 (1986) (internal quotation marks

omitted). And it soon became the “settled and well understood construction of the Constitution.” *Ex parte Hennen*, 38 U.S. 230 (1839).

The landmark case of *Myers v. United States* reaffirmed the principle that Article II confers on the President “the general administrative control of those executing the laws.” 272 U.S., at 164. It is *his* responsibility to take care that the laws be faithfully executed. The buck stops with the President, in Harry Truman’s famous phrase. As we explained in *Myers*, the President therefore must have some “power of removing those for whom he can not continue to be responsible.” *Id.*, at 117.

Nearly a decade later in *Humphrey’s Executor*, this Court held that *Myers* did not prevent Congress from conferring good-cause tenure on the principal officers of certain independent agencies. That case concerned the members of the Federal Trade Commission, who held 7-year terms and could not be removed by the President except for “‘inefficiency, neglect of duty, or malfeasance in office.’ ” 295 U.S., at 620 (quoting 15 U.S.C. § 41). The Court distinguished *Myers* on the ground that *Myers* concerned “an officer [who] is merely one of the units in the executive department and, hence, inherently subject to the exclusive and illimitable power of removal by the Chief Executive, whose subordinate and aid he is.” 295 U.S., at 627. By contrast, the Court characterized the FTC as “quasi-legislative and quasi-judicial” rather than “purely executive,” and held that Congress could require it “to act ... independently of executive control.” *Id.*, at 627-629. Because “one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter’s will,” the Court held that Congress had power to “fix the period during which [the Commissioners] shall continue in office, and to forbid their removal except for cause in the meantime.” *Id.*, at 629.

Humphrey’s Executor did not address the removal of inferior officers, whose appointment Congress may vest in heads of departments. If Congress does so, it is ordinarily the department head, rather than the President, who enjoys the power of removal. See *Myers*, *supra*, at 119, 127; *Hennen*, *supra*, at 259-260. This Court has upheld for-cause limitations on that power as well.

* * *

B

As explained, we have previously upheld limited restrictions on the President’s removal power. In those cases, however, only one level of protected tenure separated the President from an officer exercising executive power. It was the President—or a subordinate he could remove at will—who decided whether the officer’s conduct merited removal under the good-cause standard.

The Act before us does something quite different. It not only protects Board members from removal except for good cause, but withdraws from the President any decision on whether that good cause exists. That decision is vested instead in other tenured officers—the Commissioners—none of whom is subject to the President’s direct control. The result is a Board that is not accountable to the President, and a President who is not responsible for the Board.

The added layer of tenure protection makes a difference. Without a layer of insulation between the Commission and the Board, the Commission could remove a Board member at any time, and therefore would be fully responsible for what the Board does. The President could then hold the Commission to account for its supervision of the Board, to the same extent that he may hold the Commission to account for everything else it does.

A second level of tenure protection changes the nature of the President's review. Now the Commission cannot remove a Board member at will. The President therefore cannot hold the Commission fully accountable for the Board's conduct, to the same extent that he may hold the Commission accountable for everything else that it does. The Commissioners are not responsible for the Board's actions. They are only responsible for their own determination of whether the Act's rigorous good-cause standard is met. And even if the President disagrees with their determination, he is powerless to intervene—unless that determination is so unreasonable as to constitute “inefficiency, neglect of duty, or malfeasance in office.” *Humphrey's Executor*, 295 U.S., at 620 (internal quotation marks omitted).

This novel structure does not merely add to the Board's independence, but transforms it. Neither the President, nor anyone directly responsible to him, nor even an officer whose conduct he may review only for good cause, has full control over the Board. The President is stripped of the power our precedents have preserved, and his ability to execute the laws—by holding his subordinates accountable for their conduct—is impaired.

That arrangement is contrary to Article II's vesting of the executive power in the President. Without the ability to oversee the Board, or to attribute the Board's failings to those whom he *can* oversee, the President is no longer the judge of the Board's conduct. He is not the one who decides whether Board members are abusing their offices or neglecting their duties. He can neither ensure that the laws are faithfully executed, nor be held responsible for a Board member's breach of faith. This violates the basic principle that the President “cannot delegate ultimate responsibility or the active obligation to supervise that goes with it,” because Article II “makes a single President responsible for the actions of the Executive Branch.” *Clinton v. Jones*, 520 U.S. 681, 712-713 (1997) (Breyer, J., concurring in judgment).⁴

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

⁴ Contrary to the dissent's suggestion, the second layer of tenure protection does compromise the President's ability to remove a Board member the Commission wants to retain. Without a second layer of protection, the Commission has no excuse for retaining an officer who is not faithfully executing the law. With the second layer in place, the Commission can shield its decision from Presidential review by finding that good cause is absent—a finding that, given the Commission's own protected tenure, the President cannot easily overturn. The dissent describes this conflict merely as one of four possible “scenarios,” but it is the central issue in this case: The second layer matters precisely when the President finds it necessary to have a subordinate officer removed, and a statute prevents him from doing so.

third? At oral argument, the Government was unwilling to concede that even *five* layers between the President and the Board would be too many. The officers of such an agency—safely encased within a Matryoshka doll of tenure protections—would be immune from Presidential oversight, even as they exercised power in the people’s name.

* * *

The diffusion of power carries with it a diffusion of accountability. The people do not vote for the “Officers of the United States.” Art. II, § 2, cl. 2. They instead look to the President to guide the “assistants or deputies ... subject to his superintendence.” The Federalist No. 72, p. 487 (J. Cooke ed.1961) (A. Hamilton). Without a clear and effective chain of command, the public cannot “determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall.” *Id.*, No. 70, at 476 (same). That is why the Framers sought to ensure that “those who are employed in the execution of the law will be in their proper situation, and the chain of dependence be preserved; the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community.” 1 Annals of Cong., at 499 (J. Madison).

By granting the Board executive power without the Executive’s oversight, this Act subverts the President’s ability to ensure that the laws are faithfully executed—as well as the public’s ability to pass judgment on his efforts. The Act’s restrictions are incompatible with the Constitution’s separation of powers.

C

Respondents and the dissent resist this conclusion, portraying the Board as “the kind of practical accommodation between the Legislature and the Executive that should be permitted in a ‘workable government.’ ” *Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 276 (1991) (*MWAA*) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)). According to the dissent, Congress may impose multiple levels of for-cause tenure between the President and his subordinates when it “rests agency independence upon the need for technical expertise.” The Board’s mission is said to demand both “technical competence” and “apolitical expertise,” and its powers may only be exercised by “technical professional experts.” * * *

No one doubts Congress’s power to create a vast and varied federal bureaucracy. But where, in all this, is the role for oversight by an elected President? The Constitution requires that a President chosen by the entire Nation oversee the execution of the laws. And the “ ‘fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution,’ ” for “[c]onvenience and efficiency are not the primary objectives—or the hallmarks—of democratic government.” *Bowsher*, 478 U.S., at 736 (quoting *Chadha*, 462 U.S., at 944).

One can have a government that functions without being ruled by functionaries, and a government that benefits from expertise without being ruled by experts. Our Constitution

was adopted to enable the people to govern themselves, through their elected leaders. The growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life, heightens the concern that it may slip from the Executive's control, and thus from that of the people. This concern is largely absent from the dissent's paean to the administrative state.

* * *

The Framers created a structure in which “[a] dependence on the people” would be the “primary control on the government.” The Federalist No. 51, at 349 (J. Madison). That dependence is maintained, not just by “parchment barriers,” *id.*, No. 48, at 333 (same), but by letting “[a]mbition ... counteract ambition,” giving each branch “the necessary constitutional means, and personal motives, to resist encroachments of the others,” *id.*, No. 51, at 349. A key “constitutional means” vested in the President—perhaps *the* key means—was “the power of appointing, overseeing, and controlling those who execute the laws.” 1 Annals of Cong., at 463. And while a government of “opposite and rival interests” may sometimes inhibit the smooth functioning of administration, The Federalist No. 51, at 349, “[t]he Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty.” *Bowsher, supra*, at 730.

Calls to abandon those protections in light of “the era’s perceived necessity,” *New York*, 505 U.S., at 187, are not unusual. Nor is the argument from bureaucratic expertise limited only to the field of accounting. The failures of accounting regulation may be a “pressing national problem,” but “a judiciary that licensed extraconstitutional government with each issue of comparable gravity would, in the long run, be far worse.” *Id.*, at 187-188. Neither respondents nor the dissent explains why the Board’s task, unlike so many others, requires *more* than one layer of insulation from the President * * *.

* * *

The President has been given the power to oversee executive officers; he is not limited, as in Harry Truman’s lament, to “persuad[ing]” his unelected subordinates “to do what they ought to do without persuasion.” In its pursuit of a “workable government,” Congress cannot reduce the Chief Magistrate to a cajoler-in-chief.

* * *

The Constitution that makes the President accountable to the people for executing the laws also gives him the power to do so. That power includes, as a general matter, the authority to remove those who assist him in carrying out his duties. Without such power, the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else. Such diffusion of authority “would greatly diminish the intended and necessary responsibility of the chief magistrate himself.” The Federalist No. 70, at 478.

While we have sustained in certain cases limits on the President’s removal power, the Act before us imposes a new type of restriction—two levels of protection from removal for those who nonetheless exercise significant executive power. Congress cannot limit the President’s authority in this way.

- Justice BREYER, with whom Justice STEVENS, Justice GINSBURG, and Justice SOTOMAYOR join, dissenting.

[I]n 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*, 17 U.S. 316 (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*). 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).

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 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 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.

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 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).

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 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. 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.

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; sometimes they place authority in a long-established Cabinet department; sometimes they delegate authority to an independent commission or board;

sometimes they place authority directly in the hands of a single senior administrator; sometimes they place it in a sub-cabinet bureau, office, division or other agency; sometimes they vest it in multimember or multiagency task groups; sometimes they vest it in commissions or advisory committees made up of members of more than one branch; sometimes they divide it among groups of departments, commissions, bureaus, divisions, and administrators; and sometimes they permit state or local governments to participate as well. 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.

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 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"). 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. The creation of the Accounting Board was discussed at great length in both bodies without anyone finding in its structure any constitutional problem. 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.

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 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, it appears that no President has ever actually sought to exercise that power by testing the scope of a "for cause" provision.

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." 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 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—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 President 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*. 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.

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.

* * *

[T]he 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. 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 finds 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. 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).

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. 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. 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. * * *

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

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. And historically, this regulatory subject matter—financial regulation—has been thought to exhibit a particular need for independence. And Congress, by, for example, providing the Board with a revenue stream independent of the congressional appropriations process, helped insulate the Board from congressional, as well as other, political influences.

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. 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 experts” is, at best, unrealistic—at worst, dangerously so.

Notes and Questions

1. The statute at issue in *Free Enterprise Foundation*—the Sarbanes-Oxley Act of 2002—has been enormously controversial, and the petitioners in the case had asked the Supreme Court to invalidate the actions of the Public Company Accounting Oversight Board as a remedy for finding its insulation from the presidential removal power unconstitutional. The Court declined to do so, however, leaving undisturbed the Board’s prior acts and concluding instead that merely allowing the SEC to remove members of the Board without cause henceforth was a more appropriate remedy. Imagine that you are a member of Congress and that you disagree with the Court’s conclusion regarding the constitutionality of two levels of “for cause” removal restrictions. Faced with the possibility of such a consequence for violating the President’s removal power, would you be inclined to adopt similar removal restrictions in future legislation establishing other governmental bodies?

2. Elsewhere in his dissenting opinion and in an accompanying appendix, Justice Breyer identified 573 government officials who he claimed resemble members of the Public Company Accounting Oversight Board in that they can only be removed from office “for cause” by superiors who themselves are only removable from office by the President “for cause.” Indeed, given the uncertainty surrounding the identification of particular government officials as inferior officers, Justice Breyer suggested there could be thousands of government officers currently protected by two levels of for cause removal restrictions and who now might be potentially subject to removal by their superiors at will as a result of *Free Enterprise Foundation*. In light of the remedy offered by the Court in this case, would you expect regulated parties to challenge the constitutionality of the for cause restrictions protecting these government officers from removal?

3. Now imagine that you are an inferior officer working in a government agency, and that the Court’s decision in *Free Enterprise Foundation* raises a question regarding the constitutionality of a “for cause” removal restriction for your position. In other words, while the President may or may not know your name today, the head of your agency (who herself is only removable “for cause”) may now have the power to fire you without first establishing good cause for doing so. Would you be inclined under such circumstances to do your job differently? How so? Would you expect the ability to fire inferior officers at will to have good or bad consequences for the operation of government?

Chapter 4 Adjudication

C. PERMISSIBLE DECISIONMAKING STRUCTURES AND IMPERMISSIBLE BIAS

* * *

2. THE JUDICIAL MODEL VERSUS THE BUREAUCRATIC MODEL

The Role of Administrative Law Judges in the Social Security Disability System

Recent studies of the Social Security disability system conducted by the Social Security Advisory Board (SSAB), the Congressional Budget Office (CBO), and researchers at MIT and University of Maryland have painted a picture of an unsustainably generous and incoherent program. See CBO, SOCIAL SECURITY DISABILITY INSURANCE: PARTICIPATION RATES AND THEIR FISCAL IMPLICATIONS (2010); SSAB, IMPROVING THE SOCIAL SECURITY HEARING PROCESS (2006); SSAB, CHARTING THE FUTURE OF SOCIAL SECURITY'S DISABILITY PROGRAMS: THE NEED FOR FUNDAMENTAL CHANGE (2001); David Autor & Mark Duggan, *The Growth in the Social Security Disability Rolls: A Fiscal Crisis Unfolding*, 20 J. ECON. PERSPECTIVES 71 (2006). The percent of the population that has been determined to be disabled has doubled since 1970 and the cost of the program has more than quadrupled since 1990. The trust fund Congress established to fund the program is expected to run out of money by 2018, many years before the trust funds for the Social Security retirement program or the Medicare programs are expected to run out of money.

Like the studies conducted during the 1970s, 1980s, and 1990s, the recent studies identify Social Security Administration (SSA) administrative law judges (ALJs) as one of the major sources of the problems with the disability program. The decision making process begins when a team consisting of a disability examiner and a medical advisor reviews the materials submitted by an applicant for benefits. The team can, and often does, request additional materials and/or examinations and reports by consulting physicians. The team then decides whether the applicant is eligible. If the initial team decides that the applicant is not disabled, the applicant can appeal that decision. In such cases, a second examiner/medical advisor team considers the record independently. The second team also can, and often does, obtain additional materials and/or reports from consulting physicians. The members of the decision making teams are state employees, but their decisions are audited by the SSA quality assurance office, and the team members are provided feedback and additional training to the extent that the SSA finds deficiencies in their decision making process.

If an applicant is determined not to be disabled by both of the examiner/medical advisor teams, he can appeal to an ALJ, who conducts a de novo oral hearing. Over time, ALJs have become increasingly generous in deciding that applicants who have been the subject of two independent SSA determinations that they are not disabled are in fact disabled. On average, ALJs make findings that such applicants are disabled in 60 percent of cases. There is tremendous variability in the patterns of ALJ decision making, however. At least 2 ALJs grant benefits in 100 percent of cases; 27 ALJs grant benefits in over 95 percent of cases; and 100 ALJs grant benefits in over 90 percent of cases. Unlike the examiner/medical advisor teams, SSA ALJs do not have medical advisors, are not subject to

any quality assurance program, and cannot be supervised or evaluated by the SSA. An ALJ decision that denies an application is subject to potential review by a federal district court, but an ALJ decision that grants benefits is final and is not reviewable by any government institution.

Notes and Questions:

1. Are SSA ALJs employees or officers of the United States? In evaluating this question, reconsider *Landry v. FDIC*, 204 F.3d 1125 (D.C. Cir. 2000), which is excerpted on page 154 of the textbook.

2. An SSA ALJ can only be removed or otherwise disciplined through a process in which the SSA files a petition with the Merit Systems Protection Board (MSPB), the MSPB assigns the case to another ALJ for hearing, and the MSPB decides that the ALJ can be removed for “good cause.” The SSA is an independent agency that is headed by a Commissioner who can only be removed by the President for “inefficiency, neglect of duty, or malfeasance of office.” The MSPB is also an independent agency that is headed by a three-member Board, each member of which can be removed by the President only for “neglect of duty or malfeasance in office.”

Is this structure consistent with the Take Care Clause of the Constitution? In evaluating this question, reconsider the opinions in *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 130 S.Ct. 3138 (2010), excerpted at the start of this update. How many levels of protection separate SSA ALJs from presidential control?

3. What, if anything, should Congress do to address the variability among ALJs in granting Social Security disability benefits to applicants?

Chapter 6 Statutory Interpretation in Administrative Law

D. AGENCY INTERPRETATIONS OF AGENCY REGULATIONS

The Supreme Court's 2010 term brought two cases in which the Court applied the *Seminole Rock* or *Auer* standard in a fairly conventional way to defer to agencies' interpretations of their own regulations as articulated in amicus briefs filed at the request of the Court. In *Chase Bank USA, N.A. v. McCoy*, 131 S.Ct. 871 (2011), a unanimous Court applied the standard to defer to the Federal Reserve Board's interpretation of its Regulation Z, promulgated under the Truth-In-Lending Act (TILA). Writing on behalf of the Court, Justice Sotomayor summarized the Court's post-*Mead* approach to the *Auer* standard thusly:

Under *Auer*, therefore, it is clear that deference to the interpretation in the Board's *amicus* brief is warranted. The cases *McCoy* cites in which we declined to apply *Auer* do not suggest that deference is unwarranted here. In *Gonzales v. Oregon*, 546 U.S. 243 (2006), we declined to defer because—in sharp contrast to the present case—the regulation in question did “little more than restate the terms of the statute” pursuant to which the regulation was promulgated. *Id.*, at 257. Accordingly, no deference was warranted to an agency interpretation of what were, in fact, Congress' words. In contrast, at the time of the transactions in this case, TILA itself included no requirements with respect to the disclosure of a change in credit terms. In *Christensen v. Harris County*, 529 U.S. 576 (2000), we declined to apply *Auer* deference because the regulation in question was unambiguous, and adopting the agency's contrary interpretation would “permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation.” 529 U.S., at 588. In light of Regulation Z's ambiguity, there is no such danger here. And our statement in *Christensen* that “deference is warranted only when the language of the regulation is ambiguous,” *ibid.*, is perfectly consonant with *Auer* itself; if the text of a regulation is unambiguous, a conflicting agency interpretation advanced in an *amicus* brief will necessarily be “plainly erroneous or inconsistent with the regulation” in question. *Auer*, 519 U.S., at 461 (internal quotation marks omitted). Accordingly, under our precedent deference to the Board's interpretation of its own regulation, as presented in the agency's *amicus* brief, is wholly appropriate.

A few months later, the Court again unanimously applied *Seminole Rock* and *Auer* in deferring to an agency's interpretation of its own regulations, but with Justice Scalia expressing a change of heart regarding that standard.

Talk America, Inc. v. Michigan Bell Telephone Co.
131 S.Ct. 2254 (2010)

[In this case between two private parties, the issue was whether the Telecommunications Act of 1996 and Federal Communications Commission (FCC) regulations promulgated thereunder required the respondent to lease certain of its facilities to its competitors at cost-based rates. Although not a party to the case, the FCC filed an amicus briefs before both the Sixth Circuit and the Supreme Court interpreting existing regulations in a manner favorable to the petitioner. Justice Thomas wrote an opinion on behalf of all eight

participating Justices deferring to the FCC’s interpretation of its own regulations under *Auer v. Robbins*, 519 U.S. 452 (1997), and *Chase Bank USA, N.A. v. McCoy*, 131 S.Ct. 871 (2011). Justice Kagan did not participate in the case. Ed.]

■ JUSTICE SCALIA, concurring.

I join the opinion of the Court. I would reach the same result even without benefit of the rule that we will defer to an agency’s interpretation of its own regulations, a rule in recent years attributed to our opinion in *Auer v. Robbins*, 519 U.S. 452, 461 (1997), though it first appeared in our jurisprudence more than half a century earlier, see *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). In this suit I have no need to rely on *Auer* deference, because I believe the FCC’s interpretation is the fairest reading of the orders in question. * * *

It is comforting to know that I would reach the Court’s result even without *Auer*. For while I have in the past uncritically accepted that rule, I have become increasingly doubtful of its validity. On the surface, it seems to be a natural corollary—indeed, an *a fortiori* application—of the rule that we will defer to an agency’s interpretation of the statute it is charged with implementing, see *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). But it is not. When Congress enacts an imprecise statute that it commits to the implementation of an executive agency, it has no control over that implementation (except, of course, through further, more precise, legislation). The legislative and executive functions are not combined. But when an agency promulgates an imprecise rule, it leaves *to itself* the implementation of that rule, and thus the initial determination of the rule’s meaning. And though the adoption of a rule is an exercise of the executive rather than the legislative power, a properly adopted rule has fully the effect of law. It seems contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well. “When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.” Montesquieu, *Spirit of the Laws* bk. XI, ch. 6, pp. 151–152 (O. Piest ed., T. Nugent transl.1949).

Deferring to an agency’s interpretation of a statute does not encourage Congress, out of a desire to expand its power, to enact vague statutes; the vagueness effectively cedes power to the Executive. By contrast, deferring to an agency’s interpretation of its own rule encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases. This frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government. The seeming inappropriateness of *Auer* deference is especially evident in cases such as these, involving an agency that has repeatedly been rebuked in its attempts to expand the statute beyond its text, and has repeatedly sought new means to the same ends.

There are undoubted advantages to *Auer* deference. It makes the job of a reviewing court much easier, and since it usually produces affirmance of the agency’s view without conflict in the Circuits, it imparts (once the agency has spoken to clarify the regulation) certainty and predict-ability to the administrative process. The defects of *Auer* deference, and the alternatives to it, are fully explored in Manning,

Judicial Deference to Agency Interpretations of Agency Rules, 96 Colum. L.Rev. 612 (1996). We have not been asked to reconsider *Auer* in the present case. When we are, I will be receptive to doing so.

Note

If the Supreme Court ultimately follows Justice Scalia's lead in doubting the continued merits of *Seminole Rock/Auer* deference, the shift could be significant. A study by William Eskridge and Lauren Baer of judicial deference standards in the Supreme Court found a 91% deference rate when the Court applied the *Seminole Rock/Auer* standard. See William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083 (2008). The high deference rate in *Seminole Rock/Auer* in the Supreme Court stands in sharp contrast to other administrative law standards of review, as two recent articles summarizing empirical studies in the area demonstrate. See Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 63 ADMIN. L. REV. 77 (2011); David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135 (2010). To quote Pierce,

With one notable exception, the studies suggest that a court's choice of which doctrine to apply in reviewing an agency action is not an important determinant of outcomes in the Supreme Court or the circuit courts. The ranges of affirmance rates by doctrine are as follows: *Chevron*, 60% to 81.3%; *Skidmore*, 55.1 to 73.5%; *State Farm*, 64%; substantial evidence, 64% to 71.2%; and de novo, 66%. All of the ranges of findings overlap, and doctrinally-based differences in outcome are barely detectable. The one notable exception is the *Auer* doctrine. The Supreme Court affirms agency interpretations of agency rules at a much higher rate—90%—than the roughly 70% rate at which it upholds other agency decisions.

Pierce, *supra*, at 85. The Eskridge and Baer study, and Pierce's acknowledgment of *Seminole Rock/Auer* deference as highly and uniquely deferential, are countered somewhat by findings offered in a forthcoming article by Pierce and Joshua Weiss. They document a 76% affirmance rate for agency interpretations of agency rules in the lower federal courts. See Richard J. Pierce, Jr. & Joshua A. Weiss, *An Empirical Study of Judicial Review of Agency Interpretations of Agency Rules*, 63 ADMIN. L. REV. __ (forthcoming 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1744990.