I'm Unconstitutional

Another Dubious Restriction on the Power to Remove

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There are many alleged implications of the Supreme Court's decision in *Free Enterprise Fund v. Public Company Accounting Oversight Board*[1] (which somehow also goes by "Peekaboo"), but here I will solipsistically note what I believe to be its effect on me and the organization I help oversee, the Legal Services Corporation. The Court found constitutionally infirm Peekaboo's structure of having its five members only removable "for good cause" by the Securities and Exchange Commission (SEC), the agency in which it is embedded and which appoints its leadership. The SEC Commissioners are themselves only removable for good cause, providing them with legal independence.[2] Where's the President in

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[1] *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010). See *also PHH Corp. v. Consumer Financial Protection Bureau*, 839 F.3d 1 (D.C. Cir 2016) (applying *Free Enterprise Fund* to find removal provision for the solo director of independent agency unconstitutionally restrictive of presidential authority), *reh'g en banc granted, order vacated* (Feb. 16, 2017).

[2] Whether this is really, totally, according to Hoyle true is a complicated question – it's an inference from a precedent about independent-style agencies *like* the SEC (*Wiener v. United States* 357 U.S. 349 (1958)), rather than an actually articulated statutory restriction on removal. I don't want all the unitary executive types out there reading this to feel short-

all this, one might ask? And indeed, Chief Justice Roberts had exactly the same question, and as he didn't receive a satisfactory answer, found that two degrees of separation from Article II's chief executive was one degree too many, and meant the President could not adequately supervise Peekaboo members. As that happens to be the President's job under the Take Care clause and other constitutional indicia, and the governance structure interfered with it, said statutory provision must yield to the will of the Founders.

If SEC Commissioners go wrong, the President could at least evaluate and assert "good cause" and try to remove them (although that could certainly be a mess if a removed official contested dismissal in court). By contrast, and one step too far for the Constitution, if an appointee to the PCAOB was not executing the laws to Presidential satisfaction, the President could only complain to the SEC – over whom, as just noted, the President has only a limited degree of leverage in the first place. In theory, the Commander-in-Chief could threaten *them* (the SEC) with removal for good cause if they didn't find good cause to remove the PCAOB member, but that seemed like a practically powerless power to the majority. (Would failure to find good cause itself constitute good cause? – nobody wants *that* case litigated). Over a typically wise-in-the-ways-of-bureaucracy dissent by Justice Breyer, suggesting the case was going to create actual problems and solve only notional ones, the majority determined this scheme weakened the President overmuch and severed the good-cause clause. This left pretty much everything as it was, except that now the Commissioners could dump Peekaboo members at their discretion, thereby increasing the SEC's power, and at least theoretically, the President's.

There has been extensive academic and practitioner commentary in subsequent years on the Supreme Court's opinion and Justice Breyer's dissent. *Free Enterprise Fund* is the first great presidential removal case since *Morrison v. Olson* in 1988,[3] and debate centers on whether its relatively

changed, so I'll just say you can read all about the controversy – and from what you'll find an agreeable viewpoint – in *Note: The SEC is Not an Independent Agency*, 126 HARV. L. REV. 781 (2013). Except that the SEC *definitely was* an independent agency in the PCAOB case because the parties stipulated to that as a fact and the Court decided the case on that understanding. 561 U.S. at 487.

[3] *Morrison v. Olson*, 487 U.S. 654, 691 (1988); the Court held that removal restrictions are

narrow and situation-specific holding presages there will soon be an all-out assault on the *first* layer of "good cause" restrictions, or indeed whether any barriers at all on presidential power over personnel are ultimately to be sustained.[4] Since removal protection is usually considered the cornerstone of the independent agency, this could be, so saith the prophets, a Judgment Day for the Fourth Branch.[5] Thus far though, the independent agency form still seems to have a long happy life ahead of it, probably because it has a guardian angel named the U.S. Congress.

Much more could be said about *Free Enterprise Fund*, especially its more functionalist than is recently usual take on separation-of-powers jurisprudence, and its many other aspects, but various people have explicated those things already.[6] I would rather discuss what they have manifestly failed to do: talk about me. I have given them several years to single me out and find there are things about me that are repugnant to the Constitution. But they just won't do it.

Now, the things that have not been said about me could fill a book.[7] But the only important aspects for purposes of this essay have to do with my role as member of the Legal Services Corporation (LSC) Board of Directors. I have indeed been duly appointed by President Obama and confirmed by the Senate twice. And there was nothing wrong with their doing that, according to *Free Enterprise Fund* doctrine as such. *Free Enterprise Fund* concerns removal, not appointment, and protecting the second layer, not the first.

It's true that Professor Krotoszynski and his collaborators have recently opined that a Democratic President should never have had to put up with the onerous statutory burden of putting forward a Republican for *any* po-

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constitutional so long as they do not "impede the President's ability to perform his constitutional duty."

[4] See Kevin M. Stack, *Agency Independence after PCAOB*, 32 CARDOZO L. REV. 2391 (2011); Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 ALA. L. REV. 1205 (2014); Ronald J. Krotoszynski Jr., Johnjerica Hodge & Wesley W. Wintermyer, *Partisan Balance Requirements in the Age of New Formalism*, 90 NOTRE DAME LAW REVIEW 979 (2015).

[5] Kent H. Barnett, *Avoiding Independent Agency Armageddon*, 87 NOTRE DAME L. REV. 1349 (2012).

[6] See e.g., *supra* n. 4, all of which are interesting.

[7] Which, if written out, would be called a biography.

litical appointment,[8] much less me. The LSC, like many independent entities, has a bare-majority "partisan balance" requirement for its eleven board members,[9] so that as a practical matter it splits 6-5 Democrat-Republican at this writing, and was at the inverse ratio for most of the Bush Administration. But as far as the Supreme Court is concerned, currently this sort of thing is fine. Whew! In my judgment there's a benefit to bringing a diversity of viewpoints to complex areas of administration and regulation (but then I *would* think that, wouldn't I?), and I view collegial bipartisan structures as at least echoing the legislature that delegated to them the power to write rules, thereby keeping a kind of faith with separation of powers principles. So there's no need for me to mention this disturbing new theory of unconstitutional appointment anymore, at least until I can find a better way to refute it.

My unconstitutionality, such as it is, relates not to my appointment, but to my (thankfully so far hypothetical) removal from the Board of LSC. At least until my official term ended in June 2016, and I entered into indefinite holdover status,[10] I was really quite difficult to get rid of. And it still

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[8] See Krotoszynski, et al., *supra* n. 4. But, see, they do not discuss LSC, much less yours truly, at all.

[9] 42 U.S.C. § 2996c(a).

[10] See *Swan v. Clinton*, 100 F.3d 973 (D.C. Cir. 1996). This case determined that even if an appointee had "good cause" protection, this vanished when their statutory term expired. The situation with directors on the LSC Board might be (or have been) distinguishable, since there is explicit protection for them in their organic statute, whereas for-cause protection was merely implied for the agency at issue in *Swan*, the National Credit Union Administration. But after *Free Enterprise Fund*, it seems fairly clear that there would still be "serious constitutional problems," 100 F.3d at 990 (Silberman, J., concurring), with allowing the Senate to *de facto* extend good cause protection by refusing to act on presidential nominees as replacements. This puts the removal of an Executive Branch officer at least partially in the hands of an institution external to both the President and the courts, and would seem constitutionally problematic. See also *Bowsher v. Synar*, 478 U.S. 714 (1986). Under the Supreme Court's current reasoning, it seems likely that regardless of whether there was explicit *term* protection, there would be no implied *holdover* protection because this would undermine presidential authority and there is no clear statement showing congressional intent to do so. Furthermore, it might be that even a statutory attempt to provide holdover protection would be deemed another "step too far," like the double level protection for the PCAOB. This is one of those footnotes that exists because the topic really deserves its own long and learned article, but the author lacks time to write one right now, so settles for somebody (probably doing a law note) to

might not be that easy. "*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*."[11]

Scholar that he is, Justice Breyer listed LSC among the 48 agencies that could potentially be affected by the *Free Enterprise Fund* Court's decision (quoting 42 U.S.C. § 2996c(e), the provision above).[12] Although it's nice to be mentioned at all, what Breyer did not discuss is just how weird LSC's language is, even for an independent agency (or "entity" if you want to be persnickety about it, since LSC is not formally an agency). Except for the parallel provision applicable to the State Justice Institute (SJI),[13] which was just cribbed by Congress from LSC's, there's nothing quite like the level of self-governance with regard to removal in Breyer's list. There are twenty-four freestanding entities (not embedded in another agency) in this compendium, including several denominated as "corporations" like LSC: twenty mention a particular word that you might have found noticeable by its absence in LSC's removal rule. Begins with a "P." Two others, the Chemical Safety Board, and the Board of Governors of the Postal Service, specify they can be removed, but not by whom – perhaps because the drafters thought that person ought to be blindingly obvious.

Only LSC (and SJI) have the startling capacity to decide whether to remove a member of their own leadership.[14] The President is nowhere mentioned in the context of removal, and I think a fair reading of the statute is that I cannot be given the boot unless seven of my colleagues vote to do so, meaning in the context of the partisan balance requirements, a vote to

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pick this up and then hopefully cite him.

[11] 42 U. S. C. § 2996c(e)

[12] See 561 U.S. at 552 (Breyer, J., dissenting) (Appendix A).

[13] 42 U.S.C. § 10703(h). I am sorry to say that everything I say about me must also apply to the distinguished jurists on the SJI.

[14] Until recently, one member of the Amtrak's Board – the President of Amtrak – was both appointable and removable by the rest of the Board. Justice Alito pointed out with sharp skepticism this constitutional anomaly in the course of adjudicating *DOT v. Ass'n of Am. R.R.*, 135 S. Ct. 1225, 1239-40 (2015) (Alito, J., concurring). With admirable and acronymically appropriate promptness, Congress responded in Fixing America's Surface Transportation (FAST) Act, Pub. L. No. 114-94, § 11205 (2015), by revoking the Amtrak President's Board voting privileges, and presumably obviating most Article II concerns about his or her status as a putative principal officer.

remove me must be at least minimally bipartisan. Moreover, they are constrained to act only upon the specified grounds. There are, for instance, really an astounding number of crimes I could commit and laws I could break without descending into moral turpitude. These include drunkenness, vagrancy, smuggling, fist-fighting, joy-riding, loan sharking, and violations of the Mann Act occurring with mutual consent.[15] Although I wish to assure readers (especially those of you who might be federal legislators) that I am not in the habit of indulging in these sorts of activities, not only could I not be removed by my colleagues for being such a miscreant, *nobody else* could remove me either.

As a Republican, I frequently disagree with the President who appointed me.[16] Perhaps a little less on matters of access to justice and civil legal aid, the jurisdiction of LSC, but on occasion there as well. In itself it is no bad thing that a variety of perspectives oversee and inform a sometimes-controversial taxpayer-funded system meant to provide lawyers to tens of millions of poorer Americans. For this useful intellectual diversity to realistically persist, the President can in my view be constrained by a specified cause standard, so that policy disagreements can continue without being squelched by the threat of removal.

However, the President still remains seized of the authority and responsibility to assure my faithful execution of my duties. My dissent and divergence from his preferences, when well-grounded in alternative analysis, is simply a part of that faithful execution in the context of the legislative grant of statutory independence and bipartisan representation. Yet if I were to neglect my office, abuse it so as to constitute malfeasance, or engage in crimes of moral turpitude, I certainly would not be faithfully executing my duties, and the President *should* be empowered to do something about it. Enforcing an officer's rectitude is perhaps even more critical for LSC, founded on the rationale of upholding the rule of law, and with a leader-

[15] The concept of moral turpitude is probably most often assessed in the immigration context. See *Foreign Affairs Manual*, Department of State, *Defining Moral Turpitude*, 9 FAM 302.3-2(B)(2).

[16] By "the President" I mean of course his administration and the Democratic Board Members more likely to align with his views; President Obama actually does have some personal interest in LSC and support for its issues, but he found himself too occupied with leading the Free World to bicker with me mano-a-mano about his nuclear agreement with Iran or the Affordable Care Act.

ship consisting overwhelmingly of members of the bar. This seems like administrative common sense, but by "should" I mean, of course, for an administrative scheme to stay in the good graces of Article II as interpreted by *Free Enterprise Fund*.

Under 42 U.S.C. § 2996c(e), it appears the President cannot fulfill his constitutional duty to determine if good cause exists to remove me. Only the LSC Board – another entity over which the President lacks plenary authority of removal – is in a position to act. In the analogy to *Free Enterprise Fund*, the LSC Board thus takes the role of both the PCAOB and the SEC. But that should not deter us from recognizing that the functional correspondence between the cases remains strong. What Chief Justice Roberts was concerned with was a structure that "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 . . . none of whom is subject to the President's direct control."[17] The commands of Article II are violated because the President "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 . . . .'"[18]

The fact that LSC is not deemed a federal agency for many purposes, and exists legally as a nonprofit corporation in the District of Columbia,[19] does not change the applicability of the Supreme Court's reasoning. LSC was legally conceived as a DC-based nonprofit, and normally the boards of such entities are empowered to remove rogue members, although possibly only for cause depending on their by-laws or articles of incorporation.[20] This is presumably the type of structure Congress built upon in specifying the removal provisions of the LSC Act. It is interesting to note that even under this law, the default presumption is that "a director who is appointed by persons other than the members may be removed with or without

[17] 561 U.S. at 495.

[18] Id. at 496, quoting *Clinton v. Jones*, 520 U.S. 681, 712-713 (1997) (Breyer, J., concurring in judgment).

[19] See 42 U.S.C § 2996d(e)(1) and 42 U.S.C. § 2996b(a).

[20] D.C. Code § 29-406.08(b).

cause by those persons"[21] (whether or not, I would add, those persons live in the White House). But DC nonprofit law is not going to be held to govern those aspects of LSC that have constitutional dimensions. Otherwise, the Supreme Court's oversight of the administrative state could be transferred via Congressional reorganization to the tender mercies of the D.C. City Council, and I would bet my folding money that won't be allowed to happen.

Like LSC, the PCAOB was *also* structured as a nominally private entity,[22] and although the Board members were not government officials for statutory purposes, the Court treated them as part of the federal government for constitutional purposes under the doctrine of *Lebron v. National Railroad Passenger Corporation*.[23] Amtrak is, like LSC, a D.C. Corporation (although I was surprised to discover it was listed in the *for*-profit section – who knew?). But Amtrak is deemed a part of the government for First Amendment purposes, because, as Justice Scalia intoned, "It surely cannot be that government, state or federal, is able to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form."[24] Scalia specifically noted in his opinion the resemblance of LSC to Amtrak, repeatedly referring with shudder quotes to LSC as among those "'private' corporations" and "'private' enterprises" whose status he was calling into question.[25]

Indeed, apart from this ominous punctuation dicta, the *Lebron* doctrine is even more applicable to the LSC Board than it was to the Peekaboo. LSC is led exclusively by Senate-confirmed political appointees, is almost totally funded by Congressional appropriation, issues binding federal regulations, and has already been compelled to follow the Constitution on numerous occasions, despite its "private" character.[26] Therefore, it seems

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[21] Id. at § 29-406.08(e).

[22] 15 U.S.C. §§ 7211(a), (b).

[23] 561 U.S. at 487 (by agreement of the parties), relying on *Lebron v. National Railroad Passenger Corporation*, 513 U.S. 374, 397 (1995).

[24] 513 U.S. at 397.

[25] *Id*. at 391.

[26] *Wilkinson v. Legal Serv. Corp*, 27 F. Supp. 2d 32, 45 (D.D.C. 1998); *Texas Rural Legal Aid, Inc. v. Legal Serv. Corp.*, 940 F.2d 685, 699 (D.C. Cir. 1991) (LSC is federal actor when it issues regulations pursuant to LSC Act). *See also Legal Serv. Corp. v. Velazquez*, 531 U.S.

inevitable that the constitutionally relevant aspects of LSC governance structure, and in particular its removal provision, must also comply with *Free Enterprise Fund's* Article II jurisprudence.

As written, it simply does not. Under the unlawful SEC/PCAOB structure, at least the President could in principle usually rely on the relevant decisionmakers being members of his own party – an SEC majority seems to have been sufficient to remove a PCAOB member. But for LSC, with its supermajority and bipartisan requirement, any President's effort to remove is held hostage not merely by independent officials (itself unconstitutional under *Free Enterprise Fund*) but by at least one independent official who is a *member of the political opposition* to the President. Having been such a person for several years, I've started to feel uncomfortably unconstitutional. And this is true whether a President is seeking to oust a director of either party (indeed, if seeking to remove a Democratic member, President Obama would have had to get *two* Republicans to support him). Moreover, at least the President had some (constitutionally insufficient) threat to apply to recalcitrant SEC Commissioners if they thwarted him with regard to the PCAOB. But he has nothing equivalent if the LSC Board refuses to accede to his removal wishes; he can seek removal only through the Board itself, and thus cannot threaten them for failure to remove. This is a closed circle of oversight which shuts out the President of the United States, and thus appears even more defective than the scheme rejected in *Free Enterprise Fund*, despite occurring at the "first layer" of political appointment.

I was tempted to end this essay right there, Q.E.D. style, but perhaps a few words about remedy need to be offered. It is extraordinarily unlikely for the courts to be properly presented with a case adjudicating 42 U.S.C. § 2996c(e). LSC's main interactions are with its grantee civil legal aid organizations, and as disputatious as any groups of lawyers naturally are, none of them have any interest in finding their grantor unconstitutionally constructed. The case would presumably arise if the Board found itself burdened with a truly odious or off-his-or-her-rocker member; but rather the opposite seems to be true in my experience. All current Board members are fine people, even if one self-referential fellow occasionally causes

533 (2001) (finding against LSC in First Amendment action).

trouble because he appears "constitutionally" incapable of keeping quiet about dormant statutory oddities others might well pass over in silence.[27]

But if a future Board *were* saddled with a Director worth removing – and after all, the potential for such an event is the obvious purpose of the relevant provision in the LSC Act – the analysis here suggests a serious problem. Since the only method of disposing of an uncollegial colleague is unconstitutional, he or she would almost certainly be able to reverse the decision of the Board's seven members in a court action. Yet since this appears to be the exclusive method of removal, after the Supreme Court's opinion in *Free Enterprise Fund* there is now *no lawful way to get rid of obnoxious Board members at all.* (At least short of impeachment, and it's not clear even this would work.) No matter where one stands on the independent agency question, my guess is that there would be a consensus both that a situation of complete unremovability is unacceptable and that ideally we should not be compelled to wait for years of constitutional litigation for it to be corrected. In the meantime, the operation of our federal civil legal aid system would presumably suffer due to the presence on the Board of an unremovable and awful member.

Congress should act, as it recently did in correcting the somewhat similar but less severe problem of a single anomalous Amtrak Board Member serving at the pleasure of the rest of the Board (rather than within oversight of the President).[28] Simply severing the "good cause" provisions as was done in *Free Enterprise Fund*, and recently in *PHH Corp.* by the D.C. Circuit for the Consumer Protection Financial Bureau, does not seem to be the right remedy.[29] An *unrestricted* power given to seven members would create the possibility of a majority going after a minority on policy disagreements, defeating both the collegiality and the diversity that the Board structure is designed to promote. Rather, to bring the statute in line with other entities and with historical practice, a good cause standard should be retained, but put into the hands of the President. One model that retains the spirit of the original LSC act, but appears constitutional

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[27] Also, his puns, and his sense of humor generally, leave much to be desired. But under current caselaw these defects do not constitute moral turpitude.

[28] See *supra* n. 14; *DOT v. Ass'n of Am. R.R.* 135 S. Ct. at 1239-40 (2015) (Alito, J., concurring).

[29] 561 U.S. at 509; 839 F.3d at 37-39, *reh'g en banc granted, order vacated* (Feb. 16, 2017).

under *Free Enterprise Fund* (as well as its progeny in *PHH Corp.*) is the removal provision for the more recently created Board of the United States Institute of Peace (IOP). IOP Board members "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."[30] Although a role is retained for the Board, it is procedural and informational, and does not obstruct the President in the performance of his or her constitutional function. As a side bonus, by replacing the "moral turpitude" language with "felony," this modernized provision also eliminates an anomaly that can hardly be considered appropriate, since it might result in protecting a criminally offending officer who is almost always an attorney as well.[31]

[30] 22 U. S. C. § 4605(f).

[31] DC nonprofit law specifically authorizes removal of a director who commits a felony. § 29-406.08(c) (D.C. Code).