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On

"Special Counsels and the Separation of Powers"

(Hearing on S. 1735 & S. 1741)

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Introduction

Chairman Grassley, Ranking Member Feinstein, and distinguished members of the Committee, thank you for inviting me to appear before you today to testify concerning special counsels and the separation of powers and to provide my views on the constitutionality of S. 1735 and S. 1741.

At the outset, I would like to compliment the Committee for devoting time and attention to the separation-of-powers issues raised in this legislation. Separated powers is one of the most important structural features of our constitutional system and, while the Article III courts ultimately rule on constitutional matters, the Congress fulfills its high responsibilities by insuring, to the extent possible, that new legislation is consistent with our uniquely American constitutional scheme.

My testimony will be divided into two parts, with each part devoted to one of the two pending pieces of legislation being considered by the Committee. With respect to S. 1735, my analysis suggests that the grant of statutory tenure protection for special counsels combined with the proposed transfer of removal authority from the Executive to the Judicial Branch is almost certainly unconstitutional under the Supreme Court's decision in *Free Enterprise Fund v. PCAOB*, 561 U. S. 477 (2010). Indeed, the removal system in S. 1735, to the extent it differs from the system held unconstitutional in *Free Enterprise Fund*, presents additional problems that would seem to militate even more clearly against sustaining its constitutionality.

I believe, however, that S. 1735 appears to be directed toward a legitimate policy goal, which is to provide an orderly process to test the legality of any removal order without the brinksmanship of the Executive Branch having to issue a disruptive removal order of uncertain legality. That policy goal can be fully achieved while respecting constitutional boundaries, and my testimony will suggest a specific alternative to accomplish that goal.

With respect to S. 1741, my constitutional analysis is more mixed. Subsection 2(e) of the proposed bill would provide a retroactive application of new statutory tenure protections and appears designed to cover one particular individual officer. That subsection raises difficult issues under the Appointments Clause and under more general separation-of-powers principles. The remainder of the bill seems, with some minor exceptions, to follow the pattern of the independent counsel statute sustained in *Morrison v. Olson*, 487 U.S. 654 (1988), and may be constitutional under that precedent.

I should note at the outset, however, that my analysis is necessarily tentative because the Supreme Court precedents on these issues have not been entirely consistent across time. Over the past century, each of the Court's most important precedents concerning the removal of Executive Branch officers seem only to contradict the reasoning, if not the holding, of its immediate predecessor. *Myers v. United States*, 272 U.S. 52, 134 (1926), stated in dicta that "[t]he moment that [the President] loses confidence in the intelligence, ability, judgment or loyalty of any one of [his chief executive subordinates], he must have the power to remove him without delay." Yet less than a decade later, the Court in *Humphrey's Executor v. United States*, 295 U.S. 602, 628 (1935), upheld statutory tenure protection for Federal Trade Commissioners

on the theory that the Commission "acts in part quasi-legislatively and in part quasi-judicially." That reasoning was, however, explicitly abandoned in *Morrison v. Olson*, which set forth a functional test seemingly permitting any tenure protections that do not "impede the President's ability to perform his constitutional duty." 487 U.S. at 691. Finally, *Free Enterprise Fund* does not quote or apply the functional test announced in *Morrison*, but instead announces a formalistic rule over a vigorous dissent that did quote and apply *Morrison*'s functional test.

The holdings in all four of those cases remain good law, but not necessarily the reasoning and analysis. Such judicial variability should make any thoughtful scholar hesitate to make definitive predictions about what the Court will do in the future. For this reason, my testimony attempts not only to point out possible constitutional flaws, but also to suggest ways in which the Congress could achieve its legitimate policy objectives while avoiding the risk of having any legislation held unconstitutional.

I. S. 1735 and the Transfer of Removal Power to Article III Courts.

Subsection 2(a) of S. 1735 provides that a special counsel "may only be removed if the Attorney General files an action in the United States District Court for the District of Columbia." While that subsection standing alone might be ambiguous as to whether the Attorney General could remove the special counsel at any time after the mere filing of such an action, § 2(c) makes clear that the special counsel "may be removed only after the court has issued an order finding" one of the listed grounds for removal.

Thus, under the proposed statute, a special counsel would have statutory tenure protection unless and until the Attorney General could convince life tenured Article III judges that the special counsel should be removed under one of the statutory grounds for removal. That removal system seems to impose two levels of tenure protection between a special counsel and the President, and under the Supreme Court's *Free Enterprise Fund* decision, "such multilevel protection from removal is contrary to Article II's vesting of the executive power in the President." 561 U.S. at 844.

Free Enterprise Fund considered the constitutionality of provisions in the Sarbanes-Oxley Act of 2002, 116 Stat. 745, that created the Public Company Accounting Oversight Board (PCAOB). Members of the Board were inferior officers appointed by the Securities and Exchange Commission (SEC). The statute made members of the Board removable by the SEC but only for certain specified causes, and the Court decided the case based on the understanding that the Commissioners of the SEC could be removed by the President only for "inefficiency, neglect of duty, or malfeasance in office." 561 U.S. at 487.

The *Free Enterprise Fund* Court recognized that prior decisions of the Court had permitted Congress to grant Executive Branch officers some degree of tenure protection, but the Court reasoned that the tenure system in the Sarbanes-Oxley Act did "something quite different." 561 U.S. at 495. The Court explained:

> 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 [SEC] 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.

Id.

The proposed removal system in S. 1735 has the same multilevel tenure problem. The decision whether good cause exists to remove the inferior officer would be vested in other tenured officers—here Article III judges, who are assuredly not subject to the President's direct control. Indeed, the removal system in S. 1735 is worse than that in *Free Enterprise Fund* because S. 1735 would vest removal power in federal judges, who have much more tenure protection than SEC Commissioners and whose tenure is not subject to any Presidential control.

The removal system in S. 1735 has two other constitutional problems, in addition to multilevel tenure protection held unconstitutional in *Free Enterprise Fund*. First, the statute's transfer of the discretionary removal power outside of the Executive Branch is also a constitutional problem. In the leading Supreme Court cases sustaining the constitutionality of tenure protections (*Humphrey's Executor* and *Morrison*), Congress left the removal power in the Executive Branch. Transferring the removal power to officers outside the Executive Branch is not supported by the holdings of those cases. Moreover, even the reasoning of the *Morrison* Court—which is generally viewed as favorable toward sustaining the constitutionality of tenure protections—strongly suggests that the power to remove Executive Branch officers cannot be transferred to officers in another constitutional branch lest the Executive lose its constitutionally required "ability to ensure that the laws are 'faithfully executed.'" 487 U.S. at 696.[1]

Second, transferring the removal power to the federal courts also raises Article III issues. The Supreme Court has long held that matters essentially "administrative" or "advisory" cannot be the proper subjects of actions in the Article III courts. *See, e.g.*, *Postum Cereal Co. v. California Fig Nut Co.*, 272 U.S. 693, 700 (1927) (holding that Congress may not vest in Article III courts functions that are "administrative" and "not properly judicial"); *Radio Comm. v. General Electric Co.*, 281 U.S. 464, 469 (1930) (holding that Article III courts "cannot give decisions which are merely advisory; nor … exercise or participate in the exercise of functions which are essentially legislative or administrative").

The functions that would be assigned to courts under § 2 of S. 1735 appear to be nonjudicial within the meaning of prior Supreme Court precedent. As both *Free Enterprise Fund* and *Morrison v. Olson* confirm, the supervision and removal of inferior officers in the Executive Branch are executive or administrative functions. Such functions cannot be exercised by Article III courts in the first instance.

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[1] The necessity for leaving the removal power in the Executive Branch is also supported by the holding in *Myers*, which held unconstitutional a statute requiring Senate consent to removal. Furthermore, the Supreme Court's reasoning in *Edmond v. United States*, 520 U.S. 651 (1997), suggests that, for officers in the Executive Branch a removal power in the Executive may necessary for the officer to be an "inferior" officer under the Appointments Clause. *See id*. at 663-64 (requiring that "inferior" officers must be "directed and supervised at some level by others who were appointed by Presidential nomination" and recognizing "the power to remove officers" as an important factor in determining whether sufficient supervision exists).

Furthermore, the functions assigned under § 2 of S. 1735 also may be advisory in nature. Section 2(a) requires the Attorney General to file an action in federal court prior to removing a special counsel, and § 2(c) provides that the special counsel "may be removed only after the court has issued an order finding" one of the statutory grounds for removal. The court order is merely permissive, and the statute does not require that the officer actually be removed after such a court order. Thus, the court order authorized in § 2(c) could be viewed as an advisory opinion that grounds for removal exist, but the Attorney General would retain discretion to remove the officer, to take alternative steps (such as disciplining the officer or, in the case of a conflict of interest, narrowing the counsel's jurisdiction so as to avoid the conflict), or even to do nothing at all.

To be sure, there is a counterargument that the court action is not advisory because it takes away a legal impediment to removal and thus changes the legal relations between the Attorney General and the special counsel. Nevertheless, a statutory provision requiring court permission to remove an officer in the Executive Branch appears to be unprecedented, and the fact that the resulting order can easily be viewed as both administrative and advisory makes it even more likely that the constitutionality of such an unprecedented statute would not be sustained.

As stated in the introduction to my testimony, I believe that S. 1735 appears to be directed toward a legitimate policy goal, which is to provide an orderly process to test the legality of any removal order and to minimize any disruption in government processes that might undermine public confidence in the rule of law. An alternative that would achieve the same goal would be to require that any Attorney General order of removal not take effect for a short period of time such as 14 days (and here I borrow the time period specified in S. 1741). To preserve the prerogatives of the Executive Branch, the legislation could also provide that, during that time period, the authority of the special counsel would be temporarily suspended. The two-week period would then provide adequate time at least for the special counsel to file an action seeking judicial review of the removal order and for the court to grant any preliminary relief that they, in the exercise of their traditional equitable discretion, are willing to provide. Legislation requiring such a process would be well within the mainstream of existing precedents and would be broadly consistent with the existing practice in administrative law.

II. S. 1741: Retroactive Grant of Statutory Tenure.

The most constitutionally troubling aspect of S. 1741 is the combined effect of § 2(b) and § 2(e), which together seemed designed to grant statutory tenure protection retroactively to a single known inferior officer in the Department of Justice. In affording new statutory tenure to an existing officeholder, those provisions of the bill bear some resemblance to the Tenure of Office Act of 1867, 14 Stat. 430, which also purported to grant new tenure to existing office holders. While the Supreme Court in *Myers* stated that the Tenure of Office Act was unconstitutional, 272 U.S. at 176, the Court's reasoning focused on aspects of the Act other than its retroactivity.

Statutory provisions granting tenure extensions seem reasonably similar to the combined effect of § 2(b) and § 2(e), for granting *longer* tenure to a particular officer seems to present the same concerns as granting *stronger* tenure. The authority on granting tenure extensions is, however, mixed. A prominent opinion from the Ninth Circuit, *In re Benny*, 812 F. 2d 1133, 1141 (9th Cir. 1987), reasoned that a legislative tenure extension might be constitutionally troubling only if it extends the tenure "for a very long time." A 1996 opinion from the Office of Legal Counsel (OLC), however, concluded that "lengthening the term of an officer who may be removed only for cause would be constitutionally questionable." 20 Op. O.L.C. 124, 154-55 (1996). The OLC opinion also noted that legislative extensions are more troubling where the legislation is "selective" in its extension of tenure for particular officers, *id.* at 156.

The combined effect of § 2(b) and § 2(e)—which changes the special counsel's regulatory tenure into statutory tenure—could be unconstitutional under these precedents. If the change from regulatory to statutory tenure is meaningful and not merely duplicative of the existing tenure,[2] then the change could extend the tenure of the special counsel "for a very long time"—i.e., for many years. Moreover, the additional term of office would occur only after the time when the special counsel's superiors would have removed him under the presumably more permissive tenure protection granted under DOJ regulations. Finally, the selectivity of § 2(e)—the statute's targeting of a single official—makes the provision look more like an unconstitutional attempt to circumvent the Executive's power to control appointments.

The retroactive change from regulatory to statutory tenure also bears some semblance to the situation in *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962). In that case, two judges had been appointed to courts that existing Supreme Court precedent characterized as non-Article III courts. At the time of their appointmenta, both judges enjoyed "statutory assurance of tenure and compensation." *Id.* at 533 (Harlan, J., for the plurality). Years later, Congress passed a statute declaring the judges' two courts to be Article III courts. See *id.* at 531-32. If such a statute were constitutional, then the judge's statutory tenure would be transformed into constitutionally protected tenure, but only two of the seven Justices who heard the case opined that such a statute could constitutional operate to change the tenure of existing judges. The other five Justices did not agree with that reasoning. The three-Justice plurality ruled that, despite earlier Supreme Court precedent, the judges' courts were Article III courts at the time of appointment, *see id.* at 584 (opinion of Harlan, J., for the plurality). The two dissenters thought the judges' courts were not Article III courts at the time of appointment, id. at 593 (Douglas, J., dissenting), and that the subsequent legislation could not transform non-Article III judges into Article III judges.

Glidden is obviously distinguishable on many grounds, and the case also lacks an authoritative majority opinion. Nevertheless, the case provides some additional authority suggesting that, without a new appointment, ordinary legislation cannot transform the tenure of an existing appointee from one mechanism of legal protection to another—i.e., from statutory to

[2] See *Nader v. Bork*, 366 F. Supp. 104 (D.D.C. 1973) (suggesting in dicta that the regulatory tenure of a special prosecutor may be difficult to remove due to the constraints imposed on agency action under the Administrative Procedure Act).

constitutional protection (in the case of *Glidden*) or from regulatory to statutory protection (in the case of S. 1741).

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In closing, I once again commend the Committee for devoting time to the important constitutional issues raised by these two proposals.

Thank you all for your time and attention to these issues, and thank you again Mr. Chairman for the invitation to speak to the Committee.