

National University of Ireland, Maynooth

From the Selected Works of Seth Barrett Tillman

August 3, 2009

BRIEF: Free Enter. Fund v. Pub. Co. Accounting Oversight Board: Law Professors' Amicus Brief in Support of Petitioners -- Filed August 3, 2009 -- in the Supreme Court of the United States citing Tillman's The Puzzle of Hamilton's Federalist No. 77

Seth Barrett Tillman



Available at: https://works.bepress.com/seth_barrett_tillman/134/

No. 08-861

IN THE
Supreme Court of the United States

FREE ENTERPRISE FUND AND
BECKSTEAD AND WATTS, LLP,

Petitioners,

v.

PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD
AND UNITED STATES OF AMERICA,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF LAW PROFESSORS
AS *AMICI CURIAE*
IN SUPPORT OF PETITIONERS

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power of appointing, overseeing, and controlling those who execute the laws." *Id.* at 463.

In the end, Benson's amendment carried, making clear that a majority of both houses of the First Congress thought that Article II placed the removal power in the President. *Id.* at 585. Congress similarly amended the framework statutes creating the War Department, *id.* at 592, and the Treasury Department, although the latter amendment engendered considerable conflict between the House and passed the Senate only by the casting vote of Vice President John Adams, *id.* at 55, 71–72, 674, 676, 688–89, 778, 782, 786. *See generally* Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021, 1063–67 (2006).

This series of congressional constructions of the Constitution, which came to be known as the "Decision of 1789," was regarded as settling that the Constitution vested the removal power in the President. *See Bowers v. Synar*, 478 U.S. 714, 723–24 (1986); *Myers v. United States*, 272 U.S. at 174–75; *Parsons v. United States*, 167 U.S. 324, 328–30 (1897); *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 259 (1839).⁶

⁶ Even Hamilton, who indicated some ambivalence about presidential removal in *The Federalist No. 77*, regarded the Decision of 1789 as settling the matter. *See* 4 PAPERS OF ALEXANDER HAMILTON 638 n.3 (reprinting the 1804 version of *The Federalist Papers* personally edited by Hamilton, which noted that "it is now settled in practice, that the power of displacing belongs exclusively to the president"). *But see* Seth Barrett Tillman, *The Puzzle of Hamilton's Federalist No. 77*, 33 HARV. J.L. & PUB. POL'Y (forthcoming 2010) (available at <http://ssrn.com/abstract=1331664>) (questioning whether