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Presidential Control of the Elite "Non-Agency"

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PRESIDENTIAL CONTROL OF THE ELITE "NON-AGENCY"*

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This Article examines the constitutionality of legislation creating a new form of independent agency—in effect, a "non-agency" agency residing in the no-man's-land between Articles I and II of the Constitution. In the Sarbanes-Oxley Act, Congress established the Public Company Accounting Oversight Board ("PCAOB" or "Board") and endowed it with massive governmental powers while insulating it from traditional mechanisms for ensuring accountability. Congress deemed the PCAOB not an agency, rendered it substantially immune from judicial review, empowered Board members to set their own salaries and budget, and gave the embattled Securities and Exchange Commission—not the President—the power to appoint and remove Board members. In Free Enterprise Fund v. Public Co. Accounting Oversight Board, *the statute was challenged as violating the Appointments Clause of the Constitution and principles of separation of powers. The D.C. Circuit upheld the statute, with the dissenting judge calling it "the most important separation-of-powers case regarding the President's appointment and removal powers to reach the courts in the last 20 years." The Supreme Court has granted certiorari. This Article considers the legal and normative implications of the PCAOB blueprint for future independent agencies, and explores the underlying constitutional tension between Congress's power to restrict and channel agency administration and the President's power to control it. It suggests that the prevailing analytic framework for evaluating challenges to novel agency forms is problematic, as it reflects a myopic emphasis on presidential power per se. This Article posits that a more justiciable "checks-and-balances" standard may be fashioned by considering whether sufficient checks operate to cabin a suspect independent agency's*

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actions without delving into thorny questions about the proper scope and definition of executive power.

INTRODUCTION

Although the framers of the Constitution consciously established a national government comprised of separated powers, the modern administrative state is dotted with numerous "independent" agencies, which have been aptly characterized as "strange amalgam[s] of executive, legislative, and judicial powers, combining functions of all

three branches yet the creature[s] of none."[1] There is a long list of them. It includes such powerful regulators as the Federal Reserve Board, the Securities and Exchange Commission, the Federal Communications Commission, and the National Labor Relations Board. The constitutionality of independent agencies has been well established since 1935, when the Supreme Court decided, in *Humphrey's Executor v. United States*,[2] that Congress can place limitations on the President's authority to remove independent agency appointees.[3] A primary justification for the nearly ubiquitous tolerance of independent agencies[4] is that the power to appoint members remains the President's, and that power implicates a corollary, though limited, power to remove.[5] But in modern times, Congress has not been content with confining its hybrid creations to the structural contours previously blessed by the Supreme Court.[6] As a consequence, it has pushed the mechanisms for ensuring the accountability of such public entities close to the constitutional breaking point.[7]

The case in point is the Public Company Accounting Oversight Board (the "PCAOB" or "Board"), which Congress created in the aftermath of numerous accounting scandals following the implosion of Enron and WorldCom.[8] Congress endowed the PCAOB with significant governmental authority to carry out its *raison d'être*: auditing the auditors of public companies subject to federal securities laws. The Board promulgates rules; inspects and investigates firms for violations of federal securities laws; and imposes censures, suspensions, and monetary fines.[9] The Board has subpoena authority, official immunity from liability, and privileges from third party discovery.[10] But to Congress, it is not a federal agency.[11]

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1. Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 41.

2. 295 U.S. 602 (1935).

3. *Id.* at 625–26, 632.

4. *See* Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 490 (1987).

5. RICHARD J. PIERCE, JR., SIDNEY A. SHAPIRO & PAUL R. VERKUIL, ADMINISTRATIVE LAW AND PROCESS 102 (5th ed. 2009).

6. *See infra* Part I.B.

7. *See* Donna M. Nagy, *Playing Peekaboo with Constitutional Law: The PCAOB and Its Public/Private Status*, 80 NOTRE DAME L. REV. 975, 977–78 (2005) (discussing 15 U.S.C. §§ 7211–7219 (2000)); *see also infra* Part I.B (same).

8. *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 101, 116 Stat. 745, 750–53 (codified at 15 U.S.C. § 7211 (2006)) (establishing the Public Company Accounting Oversight Board ("PCAOB")); *see also infra* Part I.B (discussing the PCAOB).

9. 15 U.S.C. §§ 7211(c), 7215 (2006); *see also infra* Part I.B. (discussing the establishment and powers of the PCAOB).

10. § 7215.

The statute creating the PCAOB takes extraordinary steps toward insulating it from traditional means of accountability, and in doing so, puts great pressure on separation-of-powers norms. Most significantly, it places the power to appoint and remove Board members in the hands of the Securities and Exchange Commission ("SEC")—itself an independent agency—and not the President.[12] The Board sets its own budget[13] and is exempt from the procedural and judicial review strictures of the Administrative Procedure Act ("APA").[14] In what the dissenting judge called "the most important separation-of-powers case regarding the President's appointment and removal powers to reach the courts in the last 20 years,"[15] the United States Court of Appeals for the D.C. Circuit upheld the constitutionality of the statute establishing the PCAOB, and the Supreme Court has granted certiorari.[16]

The PCAOB has ignited constitutional controversy because it represents a new template for agencies that are not really agencies in the traditional sense. The Board is, to coin a phrase, a "non-agency" agency residing in the no-man's-land between Article I and Article II of the Constitution.

Although Congress will, no doubt, continue to mint new public entities with structural independence as it works to address twenty-first century problems, the political appetite for novel forms of "independent" regulators may well change. The ongoing recession and the regulatory failures leading up to gargantuan economic declines have prompted cries for agency reform.[17] The very entity

11. § 7211 ("The Board shall not be an agency or establishment of the United States Government . . . .").

12. 15 U.S.C. §§ 7211(e)(1)–(5), 7217 (2006) ("The [Securities and Exchange Commission ("SEC")] shall have oversight and enforcement authority over the Board . . . .").

13. § 7211(c)(7).

14. § 7211(b) (declaring PCAOB "not . . . an agency"); 5 U.S.C. §§ 551–559 (2006) (applying the Administrative Procedure Act to any "agency").

15. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667, 685 (D.C. Cir. 2008) (Kavanaugh, J., dissenting), *reh'g en banc denied, cert. granted*, 129 S. Ct. 2378 (2009).

16. *Id.* As Peter Strauss observes, the Supreme Court may well dodge the constitutional questions and resolve the case on other grounds. Peter L. Strauss, Free Enterprise Fund v. Public Company Accounting Oversight Board, 62 VAND L. REV. EN BANC 51, 58 (2009), http://ssrn.com/abstract=1442879 (suggesting that questions of exhaustion of administrative remedies, finality, or statutory construction might render the constitutional questions unripe).

17. *See generally* Aaron Unterman, *Innovative Destruction—Structured Finance and Credit Market Reform in the Bubble Era*, 5 HASTINGS BUS. L.J. 53 (2009) (discussing causes of the financial crisis and the need for regulatory reform).

responsible for overseeing the PCAOB—the SEC—is charged with inexplicably failing to protect investors from staggering financial losses caused by a Ponzi scheme of historic proportions.[18] The White House recently proposed the establishment of a new agency to protect the public from harmful financial products.[19] The constitutionality of novel "non-agency" agencies with dubious lines of accountability thus looms large.

This Article considers some of the legal and normative implications of the PCAOB blueprint. Such implications are legion.[20] Who is accountable if the Board abuses its power? If the President has no power to appoint or remove members, does the Board's exercise of authority violate the Appointments Clause or the separation of powers more generally? To what extent is an entity like the PCAOB accountable for its actions through judicial review? Is it possible to challenge the PCAOB without disturbing the viability of *any* independent agency that departs from a Cabinet-level structure characterized by unfettered presidential removal power? This Article explores, in particular, the underlying constitutional tension between Congress's power to restrict and channel agency administration and the President's power to control it.

Courts are currently ill-equipped to address these questions. Prevailing Supreme Court precedent leaves them without a single guiding principle or analytic framework for resolving questions

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18. *See* Steven Pearlstein, *SEC's Gaping Blind Spots Kept Madoff's Misdeeds out of Sight*, WASH. POST, July 1, 2009, at A14 (describing the impending inspector general report as likely to be a "devastating rebuke" of the SEC's "Madoff screwup"); Aaron Pressman, *Madoff Whistleblower Markopolos Blasts SEC*, BUS. WK. ONLINE, June 8, 2009, http://www.businessweek.com/investor/content/jun2009/pi2009065_888396.htm (describing a push for dramatic changes at the SEC after the $65 billion dollar Madoff Ponzi scheme was uncovered as the "biggest fraud in U.S. investing history"); *see also* U.S. SEC. & EXCH. COMM'N, INVESTIGATION OF FAILURE OF THE SEC TO UNCOVER BERNARD MADOFF'S PONZI SCHEME (2009), *available at* http://www.sec.gov/news/studies/2009/oig-509.pdf (detailing the SEC's failures in uncovering the Madoff scheme).

19. David Cho & Michael D. Shear, *Obama Presents Bill to Create Consumer-Finance Watchdog: New Agency's Scope Draws Stiff Industry Resistance*, WASH. POST, July 1, 2009, at A14 (discussing President Obama's proposal for establishment of the Consumer Financial Protection Agency); Posting of Kimberly Palmer to Alpha Consumer, http://www.usnews.com/blogs/alpha-consumer/2009/06/17/the-debate-over-obamas-new-consumer-agency-.html (June 17, 2009) (same).

20. *See, e.g.*, Michael A. Carvin et al., Practitioner Note, *Massive, Unchecked Power by Design: The Unconstitutional Exercise of Executive Authority by the Public Company Accounting Oversight Board*, 4 N.Y.U. J. L. & BUS. 199, 200 (2007) (arguing that Congress violated fundamental constitutional principles in creating the PCAOB); Nagy, *supra* note 7, at 1031–32 (exploring whether the PCAOB is a state actor governed by the Constitution).

surrounding the propriety of limits on the President's power to appoint and remove independent agency officials.[21] In effect, the sky is virtually the limit when it comes to new legislative configurations for independent agencies. So long as Congress does not retain any appointment or removal power for itself, it is largely free to insulate agencies from effective presidential oversight if the officers of such agencies are structurally subordinate to someone else.[22]

This Article proceeds from the premise that some constraints on Congress's ability to create new forms of independent agencies are appropriate. If Congress and the Supreme Court are to continue down the path of creating and endorsing structural novelties with substantial governmental powers, they should first have in mind some notion of where the outermost constitutional boundary for such entities lies.[23] The prevailing standard for evaluating the constitutionality of infringements on the President's appointment and removal powers—the so-called "core functions" test[24]—is of limited utility when it comes to novel entities like the PCAOB. This is partly because, in crafting the test for this purpose in *Morrison v. Olson*,[25] the Supreme Court failed to grapple with a key underlying question: the meaning of executive power per se. Yet the scope of such power—in particular, whether it encompasses the ability to dictate the day-to-day exercise of agency officials' discretion—is hotly debated.[26]

This Article posits that it is possible to fashion a justiciable standard for review of the constitutionality of novel agency structures without arriving at a requisite definition of "executive power." Encroachments on the President's removal power may be analyzed by considering the balance of power between the three branches rather than by looking at presidential power in isolation. If Congress delegates lawmaking and enforcement authority to an agency, it should include some minimally sufficient accountability controls if legislation is to survive checks-and-balances scrutiny. Such a "checks-and-balances" analysis would enable courts to move beyond the stagnancy of *Morrison* without undermining the central viability of the independent agency model.

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21. *See infra* Part II (discussing the problems with the prevailing "core functions" test, such as the questions surrounding the foundational definition of executive power).

22. *See infra* Part II.B.2–3.

23. *See* Strauss, *supra* note 4, at 491.

24. Morrison v. Olson, 487 U.S. 654, 687–89 (1988).

25. Morrison v. Olson, 487 U.S. 654 (1988).

26. *See infra* notes 192–204 and accompanying text (discussing the debate).

Part I reviews the legal framework justifying the existence of independent agencies. It then briefly summarizes the competing D.C. Circuit opinions,[27] which analyze the propriety of the latest blueprint for the independent agency: the PCAOB.

Part II discusses the fundamental dilemma that remains after *Morrison*: how does one know when Congress has gone too far in constraining the President's power to appoint and remove officers of independent agencies?[28] It analyzes the prevailing approaches to the problem and identifies a critical fault line: a singular focus on the undefined concept of executive power per se. Because this emphasis begs a virtually unanswerable question, a fresh perspective is warranted.

Part III introduces an alternative approach to the question of independent agencies' constitutionality. Rather than consider presidential prerogative as an ideal to uphold for its own sake, this Part outlines[29] an analytical method that would focus on the overall balance of power between the three branches, asking whether sufficient checks exist to prevent tyranny by a given entity exercising federal power under prevailing conditions. This Article concludes, foremost, that Congress should provide mechanisms for ensuring fair process, public disclosure, and judicial review in legislation establishing novel structures for independent agencies.

I. PRELIMINARY CONSIDERATIONS: THE INDEPENDENT AGENCY AND THE PCAOB

The administrative bureaucracy has long been criticized as a "headless 'fourth branch' of the government," lacking in coordination and control.[30] Although the Constitution provides that there will be

27. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667 (D.C. Cir. 2008), *reh'g en banc denied, cert. granted*, 129 S. Ct. 2378 (2009).

28. *Cf.* Thomas O. Sargentich, *The Contemporary Debate About Legislative-Executive Separation of Powers*, 72 CORNELL L. REV. 430, 463 (1987) ("[Agency] 'independence' fosters the kind of supposedly creative tug-and-pull between Congress and the President that underlies the concept of checks and balances.").

29. The precise contours of this approach will be explored further in a subsequent piece by the author.

30. PIERCE ET AL., *supra* note 5, at 85 (quoting PRESIDENT'S COMM. ON ADMIN. MGMT., REPORT OF THE COMMITTEE WITH STUDIES OF ADMINISTRATIVE MANAGEMENT IN THE FEDERAL GOVERNMENT 40 (1937)). Some commentators have gone much further with their criticism. *See, e.g.*, Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231 (1994) (declaring the post-New Deal administrative state "unconstitutional").

executive "Departments,"[31] it does not itself establish federal agencies. All institutions of the United States government—other than the President, the Vice President, the Supreme Court, and Congress—are created by Congress under the Necessary and Proper Clause, including the multitudinous bureaucracies of unelected agents subordinate to the President.[32] As a consequence, no single structure or definition exists for so-called "federal agencies."

Nonetheless, a major distinction can be drawn between single-headed or Cabinet-level agencies on the one hand and multi-member or independent entities on the other.[33] Although legislatively denominated a "non-agency,"[34] the PCAOB is structured like an independent agency,[35] with one critical difference: the President lacks the power to appoint or remove its members.[36] This Part reviews the traditional characteristics of the independent agency and how the PCAOB defies them. It then summarizes the dueling D.C. Circuit opinions on the constitutionality of the statute creating the Board which, as Part II discusses, reflect inherent shortcomings with prevailing law.

A. The Traditional Independent Agency Model

Having first emerged in the late nineteenth century,[37] independent agencies exercise a "full range" of regulatory and adjudicatory authority.[38] Because of their "novelty in terms of anything imagined by the framers," independent agencies present a

31. U.S. CONST. art. II, § 2; *see also id.* art. I, § 9 (identifying a "Treasury" of the United States).

32. GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 4–5 (4th ed. 2007); *see also* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 107–08 (1994) (noting that the Necessary and Proper Clause provides the constitutional authority for independent agencies but suggesting that a strong showing of necessity is required); *cf.* Lawson, *supra* note 30, at 1235 (arguing that the word "proper" requires that Congress enact laws that are "consistent with background principles of separation of powers, federalism, and individual rights").

33. *See, e.g.*, Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1236–94 (2000) (listing and describing existing independent agencies).

34. 15 U.S.C. § 7211(b) (2006).

35. *But see* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667, 680 n.9 (D.C. Cir. 2008) (refuting the contention that PCAOB is an independent agency upon finding that it is comprised of inferior officers), *reh'g en banc denied, cert. granted*, 129 S. Ct. 2378 (2009).

36. *See supra* note 12 and accompanying text.

37. Breger & Edles, *supra* note 33, at 1117.

38. *Id.* at 1112 ("[Independent agencies] can issue regulations, take administrative action to enforce their statutes and regulations, and decide cases through administrative adjudication.").

challenge to the constitutional plan of government.[39] In the words of Geoffrey Miller, "[t]here is little rhyme or reason" to Congress's choices with respect to their creation.[40] Both the Federal Trade Commission ("FTC") (an independent agency) and the Department of Justice ("DOJ") (a Cabinet-level agency), for example, enforce the federal antitrust laws.[41]

The key element that differentiates independent agencies from Cabinet-level departments is insulation from presidential control.[42] Although the President appoints most members of independent agencies, he can generally only remove them "for cause" under express or implied statutory limitations.[43] By contrast, Cabinet-level heads of executive departments mentioned in the Constitution can be removed at will by the President.[44]

The President's appointment power is also attenuated for independent agencies. Commission or board members generally serve for fixed, staggered terms extending beyond a given President's term, rendering a new administration incapable of replacing them upon taking office.[45] Additionally, independent agencies are exempt from a number of burdensome statutes and executive orders that add

39. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 131 (3d ed. 2000).

40. Miller, *supra* note 1, at 73.

41. *Compare* 15 U.S.C. §§ 45, 46 (2006) ("The [Federal Trade Commission ("FTC")] is hereby empowered and directed to prevent persons, partnerships, or corporations ... from using unfair methods of competition ...."), *with* 15 U.S.C. §§ 4, 25 (2006) ("[I]it shall be the duty of the several United States attorneys ... to institute proceedings in equity to prevent and restrain [violations of the federal antitrust laws]."). Peter Strauss has suggested that this happenstance is indicative of "the circumstances of the particular regulatory regime, the temper of presidential/congressional relations at the time, or the perceived success or failure of an existing agency performing like functions, more than any grand scheme of government." Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 585 (1984). Despite the apparent arbitrariness underlying the establishment of many independent agencies, even "the executive branch has not consistently opposed [them] on constitutional grounds." Miller, *supra* note 1, at 84.

42. Breger & Edles, *supra* note 33, at 1136; *see also* Miller, *supra* note 1, at 51 (listing seven characteristics that independent agencies "[a]lmost uniformly ... display").

43. *See, e.g.*, Humphrey's Ex'r v. United States, 295 U.S. 602, 626–32 (1935) (holding that Congress can impose "for cause" conditions on the President's removal of quasi-legislative or quasi-judicial officers).

44. *See* John C. Fortier & Norman J. Ornstein, *Presidential Succession and Congressional Leaders*, 53 CATH. U. L. REV. 993, 1004 (2004) (noting that Cabinet members may be fired at will).

45. In recent years, Congress has also created single-headed independent agencies (such as the Social Security Administration) with administrators who serve fixed terms and has placed limits on the President's ability to remove them. Breger & Edles, *supra* note 33, at 1207–08.

procedural requirements and protections for members of the public[46] beyond those contained in the APA's notice-and-comment rulemaking provisions.[47]

The emergence of the independent form of agency reflected a belief that structuring government in a way that removes it from presidential influence and politics is a good thing.[48] The theory is that agency independence facilitates logical decision making grounded in objective data and science.[49] Accordingly, independent agencies are generally comprised of an odd number of individuals from competing political parties so that no more than a bare majority can dominate the political agenda.[50] Although most modern enabling statutes do not dictate special qualifications or experience for members of independent agencies, others require empirical experts in particular areas of regulation to foster neutrality.[51]

A prominent example of the traditional model of the independent agency is the SEC, which administers the federal securities laws and regulates firms and individuals engaged in the purchase or sale of securities.[52] Its five members serve staggered five-year terms and are appointed by the President with the advice and consent of the Senate, with no more than three members coming from

46. *See* Lessig & Sunstein, *supra* note 32, at 107 & n.438 (noting that independent agencies are expressly exempted from Executive Orders that require agencies to undertake cost-benefit analyses in connection with regulations).

47. 5 U.S.C. § 553 (2006).

48. *See* Breger & Edles, *supra* note 33, at 1132 (explaining that the FTC emerged from the belief that apolitical experts—versus a single person—were required for an antitrust commission to develop a body of administrative law).

49. *See id.* at 1130–31 (discussing the influence of the Progressive movement on Congress's establishment of independent agencies). Scholars dispute the expertise and apolitical rationales for independent agencies. *See* Miller, *supra* note 1, at 80 ("There is no evidence that the level of expertise in independent agencies is any higher than it is in executive branch agencies."); *id.* at 83 ("In agencies serving the interests of particular industries, it is all too possible for them to pass over the line of objectivity and become the advocates of their industries."); *see also* Lessig & Sunstein, *supra* note 32, at 96 (discussing capture theory—which posits that regulatory agencies act in the interests of the dominant industries they are charged with regulating versus in the interests of the public—in relation to independent agencies); *id.* at 102 (suggesting that politics is at the core of so-called independent agencies).

50. Breger & Edles, *supra* note 33, at 1137.

51. *Id.* at 1131. An example is the Defense Nuclear Facilities Safety Board, whose members must be experts in nuclear safety. *Id.* at 1140 (citing 42 U.S.C. § 2286(b)(1) (1994)). The Federal Reserve Board must be selected "with due regard to a fair representation of the financial, agricultural, industrial and commercial interests, and geographical divisions of the country." *Id.* (quoting 12 U.S.C. § 241 (1994)).

52. *See id.* at 1285–86 (discussing the Securities and Exchange Commission (citing 15 U.S.C. § 78d to 78d-2 (1994))); *see also id.* at 1236–94 (listing and describing existing independent agencies).

the same political party.[53] There is no statutory provision for their removal by the President,[54] although lower courts have accepted the idea "that the President may remove a commissioner only for 'inefficiency, neglect of duty or malfeasance in office.' "[55] Despite its conventional structure, the SEC plays a critical role in distinguishing the PCAOB from the traditional independent agency because it—and not the President—appoints the Board's members.

B. *The PCAOB: A Blueprint for the "Non-Agency" Agency Within an Independent Agency*

The PCAOB is, indeed, a structural anomaly. During oral argument before the D.C. Circuit in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*,[56] in which the constitutionality of the Sarbanes-Oxley Act ("Act") creating the PCAOB was challenged, the court observed that if the Act "were upheld, it would be a green light for all sorts of new creations, independent agencies within independent agencies."[57] Having unavailingly pressed for a historical example of a similarly structured entity, the court offered an answer from the bench: "Zero. Zero. In our history."[58]

Independent agencies were historically devised " '[w]ithout too much political theory,' "[59] and the PCAOB is no exception. It was created in reaction to swelling criticism of the self-regulatory system that characterized the accounting profession prior to the scandals of Enron and WorldCom.[60] Although the federal securities laws empower the SEC to regulate accounting methods for the preparation and auditing of financial statements, the SEC historically deferred to the accounting industry's principal trade association to set

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53. 15 U.S.C. § 78d(a) (2006).

54. *See* Breger & Edles, *supra* note 33, at 1285.

55. SEC v. Blinder, Robinson & Co., 855 F.2d 677, 681 (10th Cir. 1988); *accord* MFS Sec. Corp. v. SEC, 380 F.3d 611, 619 (2d Cir. 2004) ("[T]he power to remove Commissioners belongs to the President, and even that is 'commonly understood' to be limited to removal for 'inefficiency, neglect of duty or malfeasance in office.' ")

56. 537 F.3d 667 (D.C. Cir. 2008), *reh'g en banc denied, cert. granted*, 129 S. Ct. 2378 (2009).

57. Transcript of Oral Argument at 35, *Free Enter. Fund*, 537 F.3d 667 (No. 07-5127) (Judge Kavanaugh speaking).

58. *Id.* at 38.

59. Miller, *supra* note 1, at 43 (quoting JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 2 (1938)).

60. *See* Stephen Labaton, *A Push to Fix the Fix on Wall Street*, N.Y. TIMES, Dec. 17, 2006, at C4 (describing events leading up to creation of the PCAOB).

auditing standards.[61] When the Enron debacle exploded at the end of 2001, Congress revamped this failed system of self-regulation.[62] After consideration of more than thirty bills, the Act was passed, and President George W. Bush signed it into law,[63] substituting the PCAOB as the primary force behind auditing standards for the accounting industry.[64]

The Board is a creature of Congress, but it does not reside squarely within the executive or legislative branches. Congress established the PCAOB as "a body corporate, [to] operate as a nonprofit corporation"[65]—"not . . . an agency or establishment of the United States Government"[66]—and deemed "[n]o member or person employed by, or agent for, the Board . . . to be an officer or employee of or agent for the Federal Government."[67]

Despite its legislative and self-described "private sector, nonprofit" persona,[68] the PCAOB operates as an arm of the federal government[69] with a distinctly public mission: "to oversee the audit of public companies that are subject to the securities laws . . . in order to protect the interests of investors and further the public interest in the preparation of informative, accurate, and independent audit

61. Nagy, *supra* note 7, at 984–86. The American Institute of Certified Public Accountants ("AICPA") sets standards for so-called "generally accepted accounting principles" ("GAAP") and "generally accepted auditing standards" ("GAAS"); responsibility for the former was later absorbed by the Financial Accounting Standards Board ("FASB"). *Id.*

62. *Id.* at 996.

63. *Id.* For an engaging discussion of the various proposals for structuring the entity that ultimately became the PCAOB, including competing views of appropriate executive oversight, see *id.* at 996–1006.

64. *See id.* at 992 (citing Lawrence A. Cunningham, *The Sarbanes-Oxley Act Yawn: Heavy Rhetoric, Light Reform (And It Just Might Work)*, 35 CONN. L. REV. 915, 919 (2003) (recognizing that the Sarbanes-Oxley Act took away the AICPA's decision-making power); Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 103(a)(3)(A)(ii), 116 Stat. 745, 747 (codified at 15 U.S.C. § 7213(a)(3)(A)(ii) (2006))).

65. Sarbanes-Oxley Act, § 101(a) (codified at 15 U.S.C. § 7211(a) (2006)).

66. 15 U.S.C. § 7211(a)–(b) (2006) ("[The Board] shall be subject to, and have all the powers conferred upon a nonprofit corporation by the District of Columbia Nonprofit Corporation Act.").

67. § 7211(b).

68. *See* Public Company Accounting Oversight Board Home Page, http://www.pcaobus.org (last visited Nov. 17, 2009).

69. In the *Free Enterprise Fund* litigation, the PCAOB itself conceded that Board members are federal officers. *See* Brief of Appellees at 19, Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667 (D.C. Cir. 2008) (No. 07-5127) ("Board members are unquestionably inferior officers [under the Constitution], and Congress properly lodged authority to appoint them in the Commissioner of the SEC—the head of the department that comprehensively oversees the Board's work."), *reh'g en banc denied, cert. granted*, 129 S. Ct. 2378 (2009).

reports."[70] It is entrusted with five primary responsibilities:[71] (1) *registration* of all domestic and foreign public accounting firms;[72] (2) *promulgation of rules* establishing the auditing, quality control, and ethics standards for preparation of audit reports;[73] (3) *periodic inspections* of registered accounting firms to evaluate compliance with securities laws;[74] (4) *investigations* of registered firms for violations of such laws;[75] and (5) *imposition of disciplinary sanctions*, with a maximum penalty of $750,000 for individuals and $15 million for firms.[76]

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70. § 7211(a).

71. *See* Nagy, *supra* note 7, at 1007 (listing the PCAOB's principal responsibilities as set out in the Sarbanes-Oxley Act of 2002).

72. § 7211(c)(1).

73. 15 U.S.C. § 7213(a)(1) (2006); *see also* 15 U.S.C. § 78j-1(g)(1)–(8) (2006) (amending the Exchange Act, Ch. 404, 48 Stat. 881 (1934) (codified as amended at 15 U.S.C. §§ 78a–78*lll* (2006)), to empower the Board to bar registered firms from performing non-audit services along with the audit of a public company); 15 U.S.C. § 7231 (2006) (empowering the Board to exempt firms from the prohibition of services under the Exchange Act). *See generally* Nagy, *supra* note 7, at 1011–12 (discussing PCAOB's duty to promulgate rules establishing standards for audit reports).

74. 15 U.S.C. § 7214(a) (2006).

75. 15 U.S.C. § 7215(b)(1) (2006). Applications for registration with the PCAOB must include "consent executed by the public accounting firm to cooperation in and compliance with any request for testimony or the production of documents made by the Board." 15 U.S.C. § 7212(b)(3)(A) (2006).

76. § 7215(c)(4). As a congressional experiment on delegating authority outside the boundaries of the executive branch, the PCAOB shares common ground with other entities operating on the fringe of presidential control. *See* Strauss, *supra* note 16, at 53 (noting similarities between the PCAOB and other "mixed-character 'government entities' "). So-called self-regulatory organizations ("SROs") have long played a major role in oversight of the U.S. securities industry. For example, the regulatory, enforcement, and adjudicatory arms of the New York Stock Exchange ("NYSE") and the National Association of Securities Dealers ("NASD") recently merged their operations to become the Financial Industry Regulatory Authority ("FINRA"), which bills itself as "the largest independent regulator for all securities firms doing business in the United States." *See* Financial Industry Regulatory Authority, About FINFRA, http://www.finra.org/About FINRA/index.htm (last visited Nov. 9, 2009). There are a number of structural factors that distinguish SROs and government corporations from the independent agencies discussed here. *See* Breger & Edles, *supra* note 33, at 1228–31 (describing public corporations in the context of independent agencies); Stavros Gadinis & Howell E. Jackson, *Markets as Regulators: A Survey*, 80 S. CAL. L. REV. 1239, 1246–50 (2007) (describing self-regulatory stock exchanges and their public interest role); Nagy, *supra* note 7, at 1022–29 (comparing PCAOB to SROs and government corporations). Similar accountability questions linger, however. Moreover, a different legal framework—the state action doctrine—is implicated in addressing those questions with respect to SROs and government corporations. *See* Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 52 (1999) (providing that, under the traditional state action doctrine, the analysis turns on whether a "sufficiently close nexus" exists between the state and the challenged action to deem a private entity a state actor for constitutional purposes). These issues are not discussed in any detail here.

Because Congress created the PCAOB "for the furtherance of governmental objectives,"[77] there is little question that the Board is a public entity subject to the strictures of the Constitution.[78] In *Lebron v. National Railroad Passenger Corp.*,[79] the Supreme Court held that Amtrak is a governmental unit for constitutional purposes despite a similar statutory declaration that it was a corporation and " 'not . . . an agency or establishment of the United States Government.' "[80] It rejected the contention that Congress can relieve "what the Constitution regards as the Government" by proclaiming an entity a private corporation.[81]

Nonetheless, the PCAOB is different from Cabinet-level executive agencies exercising powers of similar magnitude. Department heads are accountable to the President—and thus to the political process—through the powers of appointment and removal.[82] The PCAOB is comprised of five members who are appointed by the SEC. Board members serve staggered, five-year terms that are renewable once.[83] Only the SEC may remove them, and only upon a showing of "good cause."[84] For the President to exert any control over the PCAOB through his constitutional appointment power, he must satisfy what opponents of the Act call its "double for-cause" provision;[85] that is, he must dismiss SEC members for cause for failing to dismiss PCAOB members for cause.

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77. Lebron v. Nat'l R.R. Passenger, 513 U.S. 374, 400 (1995). The statute creating Amtrak—like the statute creating the PCAOB—declared that it is not an agency or establishment of the U.S. Government. Rail Passenger Service Act of 1970, § 301, 84 Stat. 1327, 1330, *repealed by* Pub. L. No. 103–272, 108 Stat. 1379 (1994). Unlike the PCAOB, however, Amtrak is federally funded and controlled by a board whose directors are largely appointed by the President. *See* Nagy, *supra* note 7, at 1037–38 (discussing *Lebron*).

78. Indeed, the PCAOB defended the constitutional challenge on the merits in the *Free Enterprise Fund* case without making the claim that it is immune from constitutional scrutiny. *See* Brief of Appellees, *supra* note 69, at 19 ("[P]laintiffs' challenges fail on the merits."); *see also* Nagy, *supra* note 7, at 981–82, 1036–40 (arguing that the PCAOB is a public entity that is liable for constitutional violations under *Lebron*).

79. 513 U.S. 374 (1995).

80. *Id.* at 391 (quoting Rail Passenger Service Act of 1970, § 301, 84 Stat. 1327, 1330, *repealed by* Pub. L. No. 103-272, 108 Stat. 1379 (1994)); *see also* Breger & Edles, *supra* note 33, at 1231–38 (discussing the emergence and use of public corporations).

81. *Lebron*, 513 U.S. at 400.

82. Loren A. Smith, *Judicialization: The Twilight of Administrative Law*, 1985 DUKE L.J. 427, 448 (noting that agencies are headed by a politically accountable individual whose links to the President are sustained by the appointment and removal powers).

83. 15 U.S.C. § 7211(e)(1)–(5) (2006).

84. § 7211(e)(6).

85. Brief of Appellants at 6, Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667 (D.C. Cir. 2008) (No. 07-5127), *reh'g en banc denied, cert. granted*, 129 S. Ct. 2378 (2009).

The bulk of the responsibility for keeping the Board's actions in check thus falls on the SEC, which also has broad (but not unlimited) oversight authority over the PCAOB. As a result, a key question regarding the legality of the Act's provisions creating the PCAOB is whether diverting oversight responsibility almost exclusively to another independent agency suffices under the Constitution. The D.C. Circuit considered this question in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*,[86] which is now pending before the Supreme Court.

C. Free Enterprise Fund v. PCAOB

In 2006, a public accounting firm that underwent a PCAOB audit challenged the constitutionality of the Act that created Board,[87] raising two principal arguments: (1) that the Act violates the Constitution's Appointments Clause because the President has no authority to appoint or remove Board members; and (2) that the PCAOB's insulation from presidential control conflicts more generically with separation-of-powers principles.[88]

The district court entered summary judgment for the PCAOB,[89] and the D.C. Circuit affirmed two to one.[90] The majority observed that

> [t]he crux of the [plaintiffs'] challenge—that the double for-cause limitation on removal makes it impossible for the President to perform his duties—is a question of first impression as neither the Supreme Court nor this court has

86. 537 F.3d 667 (D.C. Cir. 2008), *reh'g en banc denied, cert. granted*, 129 S. Ct. 2378 (2009).

87. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., No. 06-0217, 2007 WL 891675, at *2 (D.D.C. Mar. 21, 2007), *aff'd*, 537 F.3d 667 (D.C. Cir. 2008), *reh'g en banc denied, cert. granted*, 129 S. Ct. 2378 (2009). For more information regarding the accounting firm itself and the results of the inspection, see PUB. CO. ACCOUNTING OVERSIGHT BD., PCAOB RELEASE NO. 104-2005-082, INSPECTION OF BECKSTEAD & WATTS, LLP 2–5 (2005), *available at* http://www.pcaobus.org/Inspections/Public_Reports/2005/Beckstead_and_Watts.pdf.

88. *Free Enter. Fund*, 2007 WL 891675, at *4–5. On appeal, the Board characterized the case as a facial challenge, and the majority and dissent sparred over whether this characterization affected the analysis, with the dissenting judge suggesting that the distinction was unimportant as "this is not the kind of case where a statute might be applied constitutionally in some instances but not in others." *Free Enter. Fund*, 537 F.3d at 704 n.12 (Kavanaugh, J., dissenting). *But cf. id.* at 684 n.14 (majority opinion) ("[T]he fact that this is a facial challenge significantly affects the analysis.").

89. *Free Enter. Fund*, 2007 WL 891675, at *4–5.

90. *Free Enter. Fund*, 537 F.3d at 669.

considered a situation where a restriction on removal passes through two levels of control.[91]

A petition for rehearing en banc was denied, and the Supreme Court granted certiorari in May of 2009.[92]

1. Appointment and Removal

The D.C. Circuit found no violation of the Appointments Clause.[93] The Constitution provides that "[t]he President ... shall nominate, and by and with the Advice and Consent of the Senate, shall appoint ... all other Officers of the United States."[94] "[B]ut," it continues, "the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."[95] Thus, although the President alone appoints "Officers," Congress can authorize courts or department heads to appoint "inferior Officers."[96] As a consequence, if PCAOB members are "principal" officers, the SEC cannot appoint them.[97] If they are "inferior," the SEC can appoint them so long as it constitutes a "Head of Department."[98] These constitutional terms are not defined.

Applying the Supreme Court's reading of "inferior officer" in *Edmond v. United States*,[99] the D.C. Circuit majority held that the Board is composed of officers inferior to the SEC.[100] Under *Edmond*, "the term 'inferior officer' connotes a relationship with some higher ranking officer or officers below the President."[101] Because the SEC "exercise[s] comprehensive control over Board procedures and decisions and Board members,"[102] the court reasoned, its exclusive

91. *Id.* at 679.

92. *Id.*; *Free Enterprise Fund*, 129 S. Ct. 2378 (2009).

93. *Free Enterprise Fund*, 537 F.3d at 669.

94. U.S. CONST. art. II, § 2.

95. *Id.*

96. *Id.*

97. *See* Buckley v. Valeo, 424 U.S. 1, 126–33 (1976) (interpreting the Constitution's reference to "inferior officers" to mean that Congress cannot appoint principal officers).

98. For the *Free Enterprise Fund* court's analysis of this issue, see *infra* notes 102–05 and accompanying text.

99. 520 U.S. 651, 662 (1997).

100. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667, 672–76 (D.C. Cir. 2008), *reh'g en banc denied, cert. granted*, 129 S. Ct. 2378 (2009).

101. *Edmond*, 520 U.S. at 662.

102. *Free Enter. Fund*, 537 F.3d at 672–76 (citing various provisions of the Sarbanes-Oxley Act).

authority to appoint and remove them is constitutional.[103] The dissent retorted that Board members are principal—not inferior—officers.[104] In the dissent's view, they would be inferior only if the SEC could remove them "for failure to follow substantive SEC direction" with respect to Board inspections, investigations, and enforcement actions,[105] that is, the exercise of quintessential indicia of executive power. As discussed below,[106] this debate over inferior status is at the heart of the legal questions raised by the *Free Enterprise Fund* case.

2. Separation of Powers

As for the plaintiffs' alternative argument that the "double for-cause" structure undermines the President's prerogative to "take Care that the Laws be faithfully executed,"[107] the majority employed a facile, "mountain-versus-molehill"[108] reading of *Morrison v. Olson*,[109] the seminal decision in which the Supreme Court rejected a challenge to the independent counsel provisions of the Ethics in Government Act of 1978.[110] Although "the President does not directly select or supervise the Board's members," the D.C. Circuit reasoned, he possesses "significant influence over the Commission"—which in turn exercises "comprehensive control over the Board"[111]—through his power to appoint "[l]ike-minded [SEC] Commissioners" and remove

103. *Id.* at 680 ("The Board's status, as a heavily controlled component of an independent agency, is fully congruent with the paradigm laid out in *Humphrey's Executor.*").

104. *Id.* at 687 (Kavanaugh, J., dissenting).

105. *Id.* The majority rejected the plaintiffs' contention that, even if Board members are inferior officers, the Commission is not a "Department" and its five Commissioners are not its "Head." *Id.* at 676 (majority opinion). The majority reasoned that, although the Supreme Court did not resolve in *Freytag v. Commissioner*, 501 U.S. 868, 886 (1991), whether independent agencies are "Departments," it loosely described "Departments" as "*like* the Cabinet-level departments." *Free Enter. Fund*, 537 F.3d at 667. The D.C. Circuit found the SEC to be Cabinet-like. *Id.* Given that independent agencies are constitutional under *Humphrey's Executor*, it added, the SEC must accordingly be allowed to exercise its legislatively-authorized power to appoint inferior officers. *Id.* The majority concluded that, although the SEC Chairman is not an agency "Head," the plaintiffs "pointed to no authority wherein the Framers foreclosed Congress from granting multi-member commissions authority to appoint inferior officers." *Id.* at 677–78. The dissent agreed that "both text and longstanding Executive interpretation confirm that the head of a department can consist of multiple persons." *Id.* at 712 n.24 (Kavanaugh, J., dissenting).

106. *See infra* Part II.B.1–3.

107. U.S. CONST. art. II, § 3.

108. *Free Enter. Fund*, 537 F.3d at 681 n.11.

109. 487 U.S. 654 (1988).

110. *Id.* at 660–61 (reviewing the constitutionality of 28 U.S.C. §§ 49, 591–599 (Supp. V 1982)).

111. *Free Enter. Fund*, 537 F.3d at 681.

them for cause.[112] "[B]ecause the Board is subject to much greater Executive control than the independent counsel," the court dismissed what it called a " 'sky is falling' . . . response to a relatively insignificant innovation."[113]

The dissent responded that the essential levers of presidential power include the ability to direct the actions of "alter egos" within the executive branch.[114] Viewed in this light, the PCAOB is a far cry from the independent agency model previously endorsed by the Supreme Court. To be sure, members of traditional independent agencies are removable for cause—but by the President. In *Morrison*, the Attorney General retained the authority to remove the independent counsel, and the President retained the authority to remove the Attorney General at will. By contrast, the SEC is not a presidential "alter ego" like the Attorney General, as Commissioners can only be removed for cause.[115]

Thus, the dissent added, the arrangement between the SEC, the PCAOB, and the President is inconsistent with a "constitutional structure [that is] premised . . . on the notion that such unaccountable power is inconsistent with individual liberty."[116] Congress constrained the President's influence in the appointment and removal of PCAOB members to ordering SEC Commissioners to remove Board members for cause, and firing them if they refuse. "For cause" restrictions do not enable the President to remove Commissioners for failing to take the discretionary act of firing a Board member,[117] and even if they did, removal of a Commissioner would not result in removal of a Board member unless the President with Senate confirmation replaced a majority of SEC Commissioners with individuals willing to fire sitting

112. *Id. at* 682.

113. *Id.* at 681 n.11. The independent counsel could be removed " 'only by the personal action of the Attorney General and only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties.' " *Morrison*, 487 U.S. at 663 (quoting 28 U.S.C. § 596(a)(1) (Supp. V 1982)). The Attorney General was required to submit a report to both the Special Division (a special court created by the Act to appoint independent counsels) and the Judiciary Committee of the Senate and House. *Id.* at 663–64 (citing 28 U.S.C. § 596(a)(2) (Supp. V 1982)). The Special Division could terminate the office of the independent counsel at any time upon a finding that its investigation was "substantially completed." *Id.* at 664 (quoting 28 U.S.C. § 596(b)(2) (Supp. V. 1982)). The statute also provided for congressional oversight of the independent counsel's activities. *Id.* (citing 28 U.S.C. § 595(a)(1) (Supp. V 1982)).

114. *Free Enter. Fund*, 537 F.3d at 686 (Kavanaugh, J., dissenting).

115. *Id.*

116. *Id.* at 688.

117. *See* Brief of Appellants, *supra* note 85, at 19.

PCAOB members.[118] Satisfied that the "double for-cause" provision readily survived *Morrison*, however, the D.C. Circuit majority did not engage the dissent on the normative question of whether the Act enabled "unaccountable power" in conflict with broader separation of powers principles.[119]

II. ON THE CONSTITUTIONALITY OF AN INDEPENDENT AGENCY WITHIN AN INDEPENDENT AGENCY: AD HOC STANDARDS AND EXECUTIVE POWER PER SE

Although unsatisfying, the D.C. Circuit majority's decision seems technically correct. As this Part explains, *Morrison* on its face leaves Congress tremendous leeway to configure independent agencies in a manner that severs them from traditional mechanisms of accountability. After looking first to the text of the Constitution for guidance, this Part critiques the "incompletely defined"[120] modes of prevailing analysis of the constitutionality of legislation constraining presidential appointment and removal power and identifies two key problems. First, the crown jewel of *Morrison*—its so-called "core functions" inquiry—is effectively trumped by its preliminary analysis of the term "inferior officer." Because the Court has defined inferiority by virtue of an officer's structurally subordinate position—rather than by the scope of his authority—there is little chance that the President's power will be considered compromised if he cannot directly terminate an inferior officer for any reason. As a result, Congress is free to render agencies unaccountable to the public through a democratically-elected branch of government. The second is a fundamental bootstrapping problem: the failure to resolve requisite questions regarding the scope of core executive power over agencies.[121] Because the Court has failed to define the foundational concept of presidential core functions, *Morrison* provides a shaky foundation on which to scrutinize the constitutionality of legislation establishing new agencies. This Part concludes that something akin to a "presidential accountability" approach has greater potential for systematically distinguishing between problematic agency structures

118. *See id.* at 21–22.

119. *Free Enter. Fund*, 537 F.3d at 688 (Kavanaugh, J., dissenting).

120. JERRY L. MASHAW, RICHARD A. MERRILL & PETER M. SHANE, ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM 225 (5th ed. 2003).

121. *See generally* Jonathan Zasloff, *Taking Politics Seriously: A Theory of California's Separation of Powers*, 51 U.C.L.A. L. REV. 1079, 1095 (2004) (" 'Core function' as currently constituted poses deep and perhaps insurmountable problems because as a theoretical matter, it is impossible to distinguish clearly between the supposedly 'separate and distinct' powers of government.").

and tolerable ones, but suggests that it too ultimately falls short because of its narrow focus on executive power per se.

A. *The Constitutional Text*

Although scholars dispute the propriety of functionalism as a mode of constitutional analysis,[122] it is largely beyond debate that constitutional text is a proper starting point for evaluating the legitimacy of novel entities like the PCAOB.[123] Few clues appear in the Constitution as to what the framers intended the executive apparatus to look like beyond the President and the Vice President. It is clear that they envisioned the creation of executive departments, each headed by a "principal Officer" appointed exclusively by the President with the advice and consent of the Senate.[124] The constitutional text enables the President to "require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices."[125] It thus suggests that the framers conceived of subordinate executive officials with policymaking roles.[126] The only enterprise that the Constitution expressly links to such officials is the "executive Department," for which there will be a principal officer—"*the* principal Officer"[127]—whom only the President can appoint.[128]

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122. *See* Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1522–29 (1991); Strauss, *supra* note 4, at 489–92; Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 493–96 (1987). *But cf.* Sargentich, *supra* note 28, at 458 (noting that critiques of formalism exist and that those critiques focus on the idea that the law is in reality very similar to morals and politics in many respects).

123. *See* Miller, *supra* note 1, at 57 (advocating a "neoclassical" approach to analyzing the constitutionality of independent agencies and noting that such an analysis should start from the constitutional text, interpreted "in light of the tripartite structure established by the Framers"). *But see* William Michael Treanor, *Against Textualism*, 103 NW. U. L. REV. 983, 998–1000 (2009) (arguing that textualists wrongly assume that text was central to meaning at the time of the founding).

124. U.S. CONST. art. II, § 2.

125. *Id.* Professors Lessig and Sunstein suggest that, without the Opinions Clause, it is not evident that the President would have had the power to direct the departments to report to him as a matter of constitutional necessity. Lessig & Sunstein, *supra* note 32, at 34. The Opinions Clause thus prevents Congress from creating agencies completely severed from presidential control. *See id.* Peter Strauss has identified another potential constitutional problem with the PCAOB that is grounded in the Opinions Clause, *viz.*, whether Congress in the Sarbanes-Oxley Act has "discovered a way impermissibly to delegate important executive 'duties' to officials who are beyond the President's effective ability to command an 'Opinion, in writing' on the matter in which those duties will be exercised." Strauss, *supra* note 16, at 59.

126. *See* PIERCE ET AL., *supra* note 5, at 86–87.

127. U.S. CONST. art. II, § 2 (emphasis added).

128. Because the Constitution separately refers to "Heads" of "Departments," there is a counterargument that if "the principal officer" and department heads were one and the

Thus, the framers may have envisioned an executive branch composed of numerous departments with single heads below the President who, in turn, may be authorized by Congress to appoint "inferior" officers.[129] They could have drafted the text to leave room for the creation of agencies headed by boards or commissions comprised of multiple individuals—by stating, for example, that the President may require the written opinion of "principal Officers in executive Departments," or of "any principal Officer." The precise use of the word "the" suggests that multiple "principal Officers" may not have been within the constitutional purview for an executive department. Yet even the dissenting D.C. Circuit judge in *Free Enterprise Fund* accepted without hesitation that multi-headed independent agencies comport with the constitutional "executive Department" concept.[130]

The Supreme Court has not relied on the Opinions Clause to assess the constitutionality of entities operating "independent" of the President; it has looked instead through the lens of the Appointments Clause.[131] The Constitution is quite explicit with respect to the President's appointment power,[132] but it says nothing about his authority to remove officers. Article II, Section 4 provides for congressional removal of officers only by impeachment.[133] A reader "could reasonably believe: that impeachment is the only permissible form of removal ... [or] that Congress's power to create offices carries with it the power to prescribe the form of removal."[134] Alternatively, removal by the President could be contingent—like

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same, there is little reason—other than inadvertence—for the framers to have made the distinction. *See* Lessig & Sunstein, *supra* note 32, at 34–35 (citing U.S. CONST. art. II, § 2). The framers' separate reference to "executive Departments" in the Opinions Clause also raises the question of whether some other type of department could exist. *Id.* at 35.

129. U.S. CONST. art. II, § 2.

130. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667, 688 (D.C. Cir. 2008) (Kavanaugh, J., dissenting), *reh'g en banc denied, cert. granted*, 129 S. Ct. 2378 (2009).

131. *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 670–71 (1988) (assessing the constitutionality of the independent counsel statute under the Appointments Clause).

132. U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.").

133. U.S. CONST. art. II, § 4 ("[A]ll Civil Officers of the United States, shall be removed from Office on Impeachment for and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.").

134. Lawson, *supra* note 30, at 1244 n.74.

appointment—on the advice and consent of the Senate.[135] Alexander Hamilton stated, regarding the Senate's role, that "the consent of that body would be necessary to displace as well as appoint."[136]

Although Congress historically embraced Hamilton's view of the removal process,[137] the Supreme Court ultimately did not.[138] Initially, in *Myers v. United States*,[139] it understood the President's power to remove officers to be incident to the appointment power and "exclusive" to the President.[140] The Court narrowed the scope of *Myers* in *Humphrey's Executor v. United States*,[141] however, and upheld legislative restrictions on the President's removal powers.[142] Rather than hewing closely to constitutional text, the Court based its decision on pragmatic concerns that the "coercive influence" of presidential removal power threatened agencies' ability to act with independence.[143] It concluded that, so long as the agency in question exercised "quasi-legislative" or "quasi-judicial" as well as executive functions, Congress could forbid the President from removing officials except "for cause."[144] *Humphrey's Executor* is considered the seminal case that legitimated independent agencies as a constitutional matter.[145] As Peter Strauss has observed, the Supreme Court has signaled a reluctance to disturb the well-entrenched legality of independent agencies since *Humphrey's Executor* and "[m]ost of the literature thriving under the influence of these cases has assumed such an outcome, indeed struggled for a means of justifying it."[146]

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135. PIERCE ET AL., *supra* note 5, at 103.

136. THE FEDERALIST NO. 77, at 485 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961).

137. PIERCE ET AL., *supra* note 5, at 103.

138. *See infra* Part II.B.2.

139. 272 U.S. 52 (1926).

140. *Id.* at 106.

141. 295 U.S. 602 (1935).

142. PIERCE ET AL., *supra* note 5, at 104 & n.70.

143. *Humphrey's Ex'r*, 295 U.S. at 630.

144. *Id.* at 629, 631–32; *see also* Weiner v. United States, 357 U.S. 349, 356 (1958) (preventing President Eisenhower from removing, without cause, a member of the War Crimes Commission with quasi-judicial duties). *Humphrey's Executor* has been called "one of the more egregious opinions to be found on pages of the United States Supreme Court Reports." Miller, *supra* note 1, at 93 (citations omitted). Taken to its logical extreme, the *Humphrey's* approach enables Congress to render even Cabinet-level officials removable for cause simply by including in their job descriptions quasi-judicial or quasi-legislative functions. *But cf. id.* at 66 (suggesting that such functions can be considered "purely executive in nature" as agencies are simply executing legislative mandates).

145. *See* MASHAW ET AL., *supra* note 120, at 225.

146. Strauss, *supra* note 4, at 490.

B. *The Leading Approach and Its Limits*

The implication of *Humphrey's Executor*, that Congress may tinker with the President's power to appoint and remove, has enabled modern legislators to comfortably experiment with new forms of independent agencies. Litigants seeking to challenge entities like the PCAOB find themselves in a double bind: they must either confront the very concept that limitations on the President's power to appoint and remove officials are constitutional or find a principled way to distinguish a new agency structure from the panoply of existing independent agencies.[147] Because *Morrison* sets forth the most current approach to evaluating the constitutionality of statutes that constrain the President's ability to remove officers exercising executive power, its capacity to accommodate evolving bureaucratic structures is critical to ensuring that Congress does not stray too far from the Constitution's tripartite system when it legislates the existence of new agencies. But the standard applied in *Morrison* raises more questions than it answers.[148] At least two problems predominate. First, the Court relied on the ambiguous distinction between "principal" and "inferior" officer to effectively render Congress in complete control of the scope of the President's constitutional power to appoint and remove officers exercising executive power.[149] So long as Congress makes top officers structurally subordinate to someone else, the President's appointment and removal power falls by the wayside regardless of the scope of executive power afforded that officer. Second, the *Morrison* Court overlooked the requisite definition of

147. *See, e.g.*, Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667, 685 (D.C. Cir. 2008) ("The bulk of the [plaintiffs'] challenge to the Act was fought—and lost—over seventy years ago when the Supreme Court decided *Humphrey's Executor.*"), *reh'g en banc denied, cert. granted*, 129 S. Ct. 2378 (2009).

148. *See* Kevin M. Stack, *The Story of* Morrison v. Olson*: The Independent Counsel and Independent Agencies in Watergate's Wake*, *in* PRESIDENTIAL POWER STORIES 401, 442 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009) (noting that *Morrison* left open numerous questions, including why Congress's power to create independent agencies is best explained by impairment of executive functions, how core functions balancing should be performed, and the theoretical justification for agency independence).

149. Morrison v. Olson, 487 U.S. 654, 671 (1988) ("We need not attempt here to decide exactly where the line falls between the two types of officers, because in our view appellant clearly falls on the 'inferior officer' side of that line . . . appellant is subject to removal by a higher Executive Branch official."); *see also infra* notes 162–64 and accompanying text (discussing the *Morrison* Court's analysis of whether the independent counsel was a "principal" or "inferior" officer). The Supreme Court did not provide a definitive test for inferior status in subsequent decisions addressing the issue, either. *See* Edmond v. United States, 520 U.S. 651, 661 (1997) ("Our cases have not set forth an exclusive criterion for distinguishing between principal and inferior officers for Appointments Clause purposes."); *see also infra* notes 169–71 (discussing *Edmond*).

"core executive functions" in holding that, whatever they may be, the independent counsel statute did not compromise them.[150] Even if there were such a definition, the Court provided no meaningful standards for ascertaining when a statute impermissibly interfered with such functions.[151] As a result, the prevailing law is feckless and ill-suited for evaluating the constitutionality of novel entities like the PCAOB.

1. *Morrison v. Olson*

Without overruling *Humphrey's Executor*, the *Morrison* Court discarded the distinction between purely executive and quasi-legislative or quasi-judicial functions in favor of an alternative functional approach to analyzing infringements on the President's authority to remove appointed officials.[152] To state the goal of *Morrison*'s "core functions" test is to define it: "to ensure that Congress does not interfere with the President's exercise of the 'executive power' and his constitutionally appointed duty 'to take care that the laws be faithfully executed' under Article II."[153] The Court thus identified the locus of executive authority in two provisions of Article II—the "Vesting Clause," which lodges "executive power" in the President alone,[154] and the "Take Care Clause," which provides that the President shall ensure faithful execution of the laws.[155] It then established a constitutional standard that tolerates infringements on the President's removal authority so long as the core executive functions derived from Article II are not unduly compromised.[156]

In *Morrison*, the question before the Court was whether a provision of the Ethics in Government Act limiting the President's ability to remove the independent counsel impermissibly interfered

150. *Morrison*, 487 U.S. at 689–93.

151. *See* Strauss, *supra* note 4, at 513 ("While 'core functions' may be the best that the most sophisticated of analysts can suggest, it has no stable content.") (citations omitted). Professors Lessig and Sunstein note that the composition of the President's core functions depends heavily on the amount of presidential removal (hence supervisory) power that the statutory words afford. Lessig & Sunstein, *supra* note 32, at 110.

152. *Morrison*, 487 U.S. at 689–90.

153. *Id.*

154. *Cf.* Lessig & Sunstein, *supra* note 32, at 47–48 (arguing that the Vesting Clause only refers to which branch of government has executive power, not what that power consists of).

155. U.S. CONST. art. II, §§ 1, 3.

156. *Morrison*, 487 U.S. at 691 ("[T]he real question is whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty . . . .").

with the President's exercise of his constitutionally appointed functions.[157] Under the statute, only the Attorney General could remove the independent counsel and " 'only for good cause.' "[158] In holding that the "good cause" provision did not interfere with the President's core executive functions,[159] the Court left scant room for finding novel independent agency structures unconstitutional.

Two features of the *Morrison* decision operate to protect subsequent statutory schemes from serious constitutional scrutiny. The first is the Court's hinging of the core functions query on a potentially circular and over-inclusive cause-and-effect test: if an officer is inferior, the analysis goes, the President's ability to fire at will is not central to the exercise of his "executive power" under the Vesting Clause[160] or his executive functions under the Take Care Clause.[161] In *Morrison*, the independent counsel was deemed inferior largely because she was "subject to removal by a higher Executive Branch official"—the Attorney General.[162] Because the "inferior" label fit, the Court found that the President's need to control the exercise of the independent counsel's discretion was not "so central to the functioning of the Executive Branch as to require ... that the counsel be terminable at will by the President."[163] The label, in other

157. *Id.* at 685. The Court relatedly asked whether, "taken as a whole, the Act violates the separation of powers by reducing the President's ability to control the prosecutorial powers wielded by the independent counsel." *Id.*

158. *Id.* at 663 (quoting 28 U.S.C. § 596(a)(1) (Supp. V 1982)).

159. *Id.* at 691.

160. U.S. CONST. art. II, § 1.

161. *Morrison*, 487 U.S. at 692 (reasoning that, unlike the hypothetical case where removal power over an executive official has been completely stripped from the President, thereby removing any means to ensure "faithful execution" of the laws, the statute in question gave him authority to ensure the independent counsel's competent performance by virtue of the Attorney General's power to remove her for cause); *see also id.* at 695–96 (finding no separation of powers violation because the Attorney General retained the authority to remove the independent counsel for cause).

162. *Id.* at 671. She also had "limited jurisdiction and tenure and lack[ed] policymaking or significant administrative authority." *Id.* As discussed below, these factors do not serve to meaningfully distinguish between principal officers and inferior ones. *See infra* notes 189–91 and accompanying text.

163. *Morrison*, 487 U.S. at 691; *see* Edmond v. United States, 520 U.S. 651, 661 (1997). There are few contemporaneous signals as to what the framers had in mind in drawing this distinction between "Officer" and "inferior Officer," U.S. CONST. art. II, § 2, cl. 2, as "the inferior appointment provision was added on the last day of the Convention with virtually no discussion." United States v. Libby, 429 F. Supp. 2d 27, 35 (D.D.C. 2006) (citing 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 627–28 (Max Farrand ed., Yale University Press rev. ed. 1937) (1911)) ("There was little discussion of this [inferior officer] component of the provision during the Constitutional Convention."). Nineteenth-century jurisprudence suggested that the framers created the lesser classification because they foresaw that, "when offices became numerous, and sudden removals necessary,"

words, satisfied the elusive requirements of Article II even though "[t]here is no real dispute that the functions performed by the independent counsel are 'executive' in the sense that they are law enforcement functions that typically have been undertaken by officials within the Executive Branch."[164]

One might thus arguably derive a two-part, bright-line rule for the constitutionality of new independent agencies from the Court's inferior officer analysis. First, if an officer is subject to removal by someone other than the President, inferior status follows,[165] regardless of the level of executive or policy-making authority endowed upon that officer.[166] The Supreme Court has been hard-pressed to identify a "principal" officer below the rank of department head who is removable by the President.[167] Second, if an officer is deemed inferior, he may constitutionally escape presidential at-will removal on that basis. The Court eschewed consideration of the nature and scope of the authority exercised by an officer when it pronounced in *Edmond v. United States* that "[t]he exercise of significant authority pursuant to the laws of the United States marks, not the line between

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nomination by the President and confirmation by the Senate "might be inconvenient." United States v. Germaine, 99 U.S. 508, 509–10 (1879). The distinction thus became meaningful only with the proliferation of new posts and agencies in the mid- to late-twentieth century.

164. *Morrison*, 487 U.S. at 691.

165. *Id.* at 671 (finding independent counsel inferior because she was removable by the Attorney General); *see also, e.g.*, Schaghticoke Tribal Nation v. Kempthorne, 587 F. Supp. 2d 389, 419 (D. Conn. 2008) ("The fact that the [Associate Deputy Secretary] serves at the pleasure of the Secretary and can be removed by him at any time is indicative of his subordinate role to the Secretary."); *cf.* United States v. Sotomayor Vazquez, 69 F. Supp. 2d 286, 291 (D.P.R. 1999) (holding that a United States Attorney is inferior to the Attorney General for purposes of the Appointments Clause even though the Attorney General lacks removal power).

166. *See infra* note 168 and accompanying text.

167. *See* Edmond v. United States, 520 U.S. 651, 661 (1997) (judge of Coast Guard Court of Criminal Appeals is inferior); Freytag v. Comm'r, 501 U.S. 868, 881–82 (1991) (special trial judge is inferior); Morrison v. Olson, 487 U.S. 654, 655 (1988) (independent counsel is inferior); Buckley v. Valeo, 424 U.S. 1, 126 (1976) (per curiam) (Federal Election Commissioners are inferior); Go-Bart Importing Co. v. United States, 282 U.S. 344, 352–53 (1931) (United States commissioners are inferior); Myers v. United States, 272 U.S. 52, 158 (1926) (postmaster first class is inferior); Reagan v. United States, 182 U.S. 419, 424 (1901) (United States commissioners in Indian territory are inferior); United States v. Eaton, 169 U.S. 331, 343 (1898) (vice consuls are inferior); *Ex parte* Siebold, 100 U.S. 371, 397–98 (1879) (election supervisors are inferior); *In re* Hennan, 38 U.S. (13 Pet.) 230, 258–59 (1839) (district court clerks are inferior); *see also* Weiss v. United States, 510 U.S. 163, 182 (1994) (Souter, J., concurring) (military judges, like ordinary commissioned military officers, are inferior). *But see* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667, 677 (D.C. Cir. 2008) (finding that the SEC is a department head), *reh'g en banc denied, cert. granted*, 129 S. Ct. 2378 (2009).

principal and inferior officer for Appointments Clause purposes, but rather . . . the line between officer and non-officer."[168]

Even absent removal power, an officer can be deemed inferior if a court is satisfied that he is supervised or directed by someone other than the President.[169] In *Edmond*, the Court suggested that "direction and supervision"—as distinct from the power to remove—is a critical component to whether an officer is "inferior."[170] Hence, if Congress structures an agency to ensure some measure of supervision *or* removal authority below the President himself, the President's appointment and removal powers are not readily triggered.[171]

To be sure, one might take the view that Congress ought not to be constrained in its ability to fashion agencies with independence from presidential control and supervision. In other words, Congress's ability to unilaterally decide whether to confer "at-will" removal authority on the President is a reasonable outgrowth of express

168. *Edmond*, 520 U.S. at 662 (internal quotation marks omitted).

169. Indeed, courts have repeatedly found United States Attorneys "inferior" even though they are appointed by the President because they are "directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." United States v. Hilario, 218 F.3d 19, 23 (1st Cir. 2000) (quoting Edmond v. United States, 520 U.S. 651, 663 (1997)); *see* United States v. Gantt, 194 F.3d 987, 999 n.6 (9th Cir. 1999) (holding that United States Attorneys are "inferior" officers), *overruled on other grounds*, United States v. Grace, 526 F.3d 499 (9th Cir. 2008) (determining that interim United States Attorneys and United States Attorneys are "inferior" officers because they are "statutorily under the direction and control of the Attorney General"); United States v. Sotomayor Vazquez, 69 F. Supp. 2d 286, 291 (D.P.R. 1999) ("United States Attorneys, including interim United States Attorneys, are 'inferior' officers for Appointments Clause purposes."); *see also* United States v. Libby, 429 F. Supp. 2d 27, 45 (D.D.C. 2006) (finding that Patrick J. Fitzgerald, who was appointed special counsel by the Attorney General to investigate the possible unauthorized disclosure of classified information about Valerie Plame Wilson's affiliation to the Central Intelligence Agency, was an inferior officer).

170. *Edmond*, 520 U.S. at 663. Peter Strauss observes that, in permitting the Secretary of Transportation to appoint members of the Coast Guard's Court of Criminal Appeals, Justice Scalia wrote for the majority in *Edmond v. United States* that "in the context of a clause designed to preserve political accountability relative to important government assignments, we think it evident that 'inferior officers' are officers whose work is directed and supervised at some level by others who are appointed by presidential nomination with the advice and consent of the Senate." Strauss, *supra* note 16, at 58 (quoting Edmond v. United States, 520 U.S. 651, 663 (1997)). Interestingly, Professor Strauss derives two constitutional requirements from the "two halves" of this sentence—preservation of political accountability on the one hand and direction and supervision by appointees on the other—and suggests that there is a "disconnect" between them in the *Free Enterprise Fund* case, with the PCAOB satisfying the latter but not the former. *See id.*

171. Because *Morrison* and *Edmond* emphasize different factors in evaluating "inferior officer" status, these two cases have been construed as providing only "a modicum of guidance on the distinction between principal and inferior officers." United States v. Hilario, 218 F.3d 19, 23 (1st Cir. 2000).

constitutional text enabling Congress to vest the appointment of inferior officers in someone other than the President. The problem with construing prevailing law this way is that it fails to address the accountability problems that arise when a policymaking, law-enforcing entity is structured to operate independent of presidential or judicial scrutiny. By the same token, it assumes the answer to a question the Court has never expressly addressed: whether *some* limit on Congress's ability to create "non-agency" agencies severed from traditional means of accountability is appropriate.[172]

2. What Are "Core Executive Functions"?

Second, even without the "inferior officer" loophole, *Morrison*'s "core functions" inquiry fails as a workable test for identifying unconstitutional independent agency arrangements for another critical reason: the Court neglected to engage in a substantive analysis of what the President's "constitutionally assigned duties" are in the first place.[173] As a consequence, the notion of "core functions" remains indeterminate and therefore difficult to apply predictably and non-arbitrarily in a given case.[174] The *Morrison* Court made clear that the President's "take care" power contemplates some influence on the removal process,[175] but what actual powers comprise the President's core constitutional prerogative remains uncertain.

The Constitution bears no definition of the executive or legislative power, and provides scant guidance on what constitutes a "case" or "controversy" within the meaning of Article III.[176] It is difficult "aggressively to apply textual and structural devices to impart constitutional meaning to 'executive' . . . functions."[177] A test

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172. Some might alternatively argue that the removal–supervision–direction test for "inferior" status provides an appropriate limit on Congress's power. Because it is easy to draft legislation rendering an official subordinate to another, such a test remains problematic to the extent it can be satisfied without careful scrutiny of whether the arrangement violates broader constitutional principles.

173. Morrison v. Olson, 487 U.S. 654, 696 (1988).

174. *See* Lawson, *supra* note 30, at 1245 (opining that "[t]he absence of a functioning unitary executive principle" may have made it possible for Congress to grant "agencies their current, almost-limitless powers").

175. *Morrison*, 487 U.S. at 689–90 (observing that its analysis in prior removal cases was designed to prevent congressional interference with the President's constitutionally appointed "take care" duty).

176. *See* U.S. CONST. art. III (establishing the Judicial Branch of government and setting forth its powers).

177. Frederick R. Anderson, *Revisiting the Constitutional Status of the Administrative Agencies*, 36 AM. U. L. REV. 277, 291 (1987). This may not have been an oversight on the part of the framers: it retains flexibility as the federal apparatus evolves over time.

that hinges on consensus around the constitutional meaning of core executive functions, therefore, is inherently fraught with peril.

At a minimum, the *Morrison* Court conceded that faithful execution of the laws is accomplished through investigation and prosecution.[178] It follows that there must be some boundary of infringement which, if crossed, tags certain encroachments on investigative and prosecutorial power as unconstitutional under the core functions test. Yet *Morrison* blurred any such boundary in allowing the independent counsel to exercise executive power to investigate the President himself—power which included "framing and signing indictments . . . and handling *all aspects of any case*, in the name of the United States."[179] The majority reasoned that such core functions—although belonging to the President in the first instance—were not impeded in *Morrison* because the President retained some authority over the independent counsel's exercise of such functions by virtue of the Attorney General's power to remove her for good cause.[180] Contrast this, the Court suggested, with a statute that "completely stripped" the President of removal power.[181]

Presumably, Congress could not "completely strip" the President of his investigatory and prosecutorial powers by creating a free-standing agency outside the tripartite system, with members appointed by someone other than the President, and removable by—and thus answerable to—no one. So long as independent agencies are per se constitutional,[182] however, it is difficult realistically to conceive

178. *Morrison*, 487 U.S. at 691; *see also id.* at 706 (Scalia, J., dissenting) (arguing that the independent counsel possesses full power to exercise all investigative and prosecutorial functions of the Attorney General and Department of Justice, and therefore the independent counsel's functions are executive and infringe upon separation of powers). Congress exercises a similar function with its legislative powers to obtain information through congressional investigations and punish refusals to testify with contempt, although the Supreme Court has made clear that this power is not to be confused with the powers of law enforcement assigned to the executive branch and the judiciary, and is subject to constitutional constraints such as the Fifth Amendment's privilege against compulsory self-incrimination. Quinn v. United States, 349 U.S. 155, 161 (1955); *see also* McGrain v. Daugherty, 273 U.S. 135, 161 (1927) (noting that legislative investigatory powers have "long been treated as an attribute of the power to legislate").

179. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667, 681 (D.C. Cir. 2008) (quoting *Morrison*, 487 U.S. at 662), *reh'g en banc denied, cert. granted*, 129 S. Ct. 2378 (2009).

180. *Morrison*, 487 U.S. at 695–96.

181. *Id.* at 692.

182. In *Morrison*, the Court reiterated its holding in *Humphrey's Executor* "that the Constitution did not give the President 'illimitable power of removal' over the officers of independent agencies." *Id.* at 687 (quoting Humphrey's Ex'r v. United States, 295 U.S. 602, 629 (1935)).

of an agency structure that would satisfy the *Morrison* Court's rhetorical outlier. The Court has effectively held that limitations on the President's power to remove board or commission members do not "completely strip" the President of his removal power, regardless of the scope of executive power exercised by them.[183] It has effectively held that limitations on the President's power to remove officers exercising unfettered investigative and prosecutorial discretion do not "completely strip" the President of his removal power, either.[184] The Court has also made clear that Congress cannot retain the power to remove appointed officers.[185] So what did it mean in referring to a hypothetical statute that "completely strips" the President of removal power? Such impermissible legislation would, in theory, lodge such power either exclusively in the courts, in a government agency, or in a private party. Although the Constitution allows Congress to give courts the power to appoint inferior officers,[186] a statute that shifted from the President to the courts the power to appoint principal officers would presumably be unconstitutional on separation-of-powers grounds.[187] But what about shifting that power to agencies? Again, a statute that allowed an agency to appoint a Cabinet-level official would likely be unconstitutional. But so long as Congress sandwiches a layer of bureaucracy between the President and the official in question, his resulting inferior status would protect legislation constraining the President's removal power from an Appointments Clause challenge, regardless of whether broader constitutional principles relating to "core executive power" are in play. As a practical matter, therefore, *Morrison* may well "create[] a safe harbor for independent agencies"—such as the PCAOB—whose members are appointed and removed by another independent agency.[188]

183. *See id.*

184. *Id.* The Court has not resolved whether independent agencies are departments. *See* Freytag v. Comm'r, 501 U.S. 868, 887 n.4 (1991) (reserving this question). Thus, the Court might entertain an argument that the SEC cannot appoint (and thus cannot remove) inferior officers because it is not a department and its five Commissioners are not department heads. As Justice Scalia observed in his *Freytag* concurrence, however, this argument does not make much sense so long as *Humphrey's Executor* remains good law. *Id.* at 920–21 (Scalia, J., concurring in part); *see also Free Enter. Fund*, 537 F.3d at 712 n.24 (Kavanaugh, J., dissenting) (citing Justice Scalia's concurrence).

185. Bowsher v. Synar, 478 U.S. 714, 726 (1986).

186. U.S. CONST. art. II, § 2, cl. 2.

187. *Cf.* Myers v. United States, 272 U.S. 52, 161 (1926) (finding unconstitutional on separation of powers grounds a statute that enabled removal of postmasters only with the advice and consent of the Senate).

188. Stack, *supra* note 148, at 441.

The dissenting D.C. Circuit judge in *Free Enterprise Fund* attempted to distinguish *Morrison* because, unlike the PCAOB, the independent counsel's jurisdiction was confined, her tenure was restricted, and her duties were limited by DOJ policies.[189] Every Cabinet-level appointee, however, has limited jurisdiction and limited duties. And even the Attorney General must abide by DOJ policies. Moreover, it was the independent counsel who "determined when her statutory duties were complete," and she could request that her prosecutorial jurisdiction be expanded.[190] As the headline-grabbing Whitewater investigation suggested, this aspect of the statute operated to enlarge the prosecutorial freedom of the independent counsel.[191] Unlike a line prosecutor faced with finite resources and policy preferences of the Attorney General and main DOJ, the independent counsel's budget was unlimited and she answered on a day-to-day basis to no one. Despite best efforts, therefore, the facts of *Morrison* make it hard to condemn legislation that severs executive officials from presidential control.

Scholars have attempted to distill executive power beyond the tasks of investigation and prosecution. A key battlefront concerns the question of whether Article II establishes presidential control over agencies' discretionary authority or whether Congress may vest such authority in subordinate officers free from direct control of the President.[192] Geoffrey Miller argues, for example, that "[t]he President retains the constitutional power to direct the officer to take particular actions within his or her discretion or to refrain from acting when the officer has discretion not to act," and that Congress may not constitutionally deny the President the power to remove officials who

189. *Free Enter. Fund*, 537 F.3d. at 708 n.17 (Kavanaugh, J., dissenting).

190. *Id.* at 682 (majority opinion).

191. *See* Erwin Chemerinsky, *Learning the Wrong Lessons from History: Why There Must Be an Independent Counsel Law*, 5 WIDENER L. SYMP. J. 1, 1–2 (2000).

192. *See* Lessig & Sunstein, *supra* note 32, at 10 (observing that, for believers in a strongly unitary executive, "the so-called independent agencies are in conspicuous violation of the Constitution"); *see also* Lawson, *supra* note 30, at 1241 (describing scholarly debate). *But see* Lessig & Sunstein, *supra* note 32, at 20–30 (debunking the unitary executive theory and arguing that, historically, prosecutors were not answerable to the President, nor were all departments according to the framing Congress). Thus far, "[n]o modern judicial decision specifically addresses the President's power either directly to make all discretionary decisions within the executive department or to nullify the actions of insubordinate subordinates." Lawson, *supra* note 30, at 1244; *see also* Thomas O. McGarity, *Presidential Control of Regulatory Agency Decisionmaking* 36 AM. U. L. REV. 443, 465–66 (1987) (discussing the implications of the executive power on discretionary decisions and Congress's power to vest that authority in subordinates).

do not cooperate with such directives.[193] Under this theory, *Humphrey's Executor* was wrongly decided because a statute that limits the President's removal to specified "cause" would interfere with his core executive functions. If the Take Care Clause is construed as creating presidential power to direct how the laws are executed, the PCAOB may be problematic because neither the SEC nor the President retain the power under the Act to direct the day-to-day operation of PCAOB inspections, investigations, or enforcement actions.[194] The plaintiffs in *Free Enterprise Fund* advanced this viewpoint, arguing that "the President must retain the *exclusive* removal authority over those executing the laws,"[195] which extends well beyond Cabinet-level officials to " 'the lowest officers, the middle grade, and the highest.' "[196]

Other theorists argue that the President can express discontent with principal officers by removing them—either for their own misconduct or for mismanagement of inferior officers or employees—but lacks the authority to direct the exercise of their discretion.[197] Under this theory of executive power, the framers envisioned some measure of separation between the President and other executive officials, from whom he could seek guidance but who exercise a degree of independent discretion.[198] Accordingly, the Take Care Clause empowers the President to make sure that the executive

193. Miller, *supra* note 1, at 44. This theory of executive power is more than a purely academic exercise in the conceivable. As Harold Krent has observed, President George W. Bush's "centralization efforts, even in routine administrative matters, have stretched our understanding of the unitary executive almost beyond recognition." Harold J. Krent, *From a Unitary to a Unilateral Presidency*, 88 B.U. L. REV. 523, 524 (2008); *cf.* Lessig & Sunstein, *supra* note 32, at 2, 40 ("[T]he view that the framers constitutionalized anything like [the unitary executive] is a myth.... [T]he framers meant to constitutionalize just some of what we now think of as 'executive power,' leaving the balance to Congress to structure as it thought proper.").

194. *See* 15 U.S.C. § 7211(c) (2006) (giving the Board authority to direct day-to-day inspections, investigations, and enforcement actions). This tension figured prominently in *Free Enterprise Fund*, with the dissenting judge arguing that the President's Article II powers afford him the constitutional prerogative to direct the exercise of the PCAOB's discretion and to remove Board members for noncompliance. *Free Enter. Fund*, 537 F.3d at 687 (Kavanaugh, J., dissenting).

195. Brief of Appellants, *supra* note 85, at 15 (emphasis added).

196. *Id.* (quoting 1 ANNALS OF CONGRESS 499 (Joseph Gales ed., Washington, D.C., Gales & Seaton 1834) (remarks of Madison)).

197. *See, e.g.*, Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1166 (1992) (describing three models of the unitary executive, the weakest of which recognizes the President's power to remove principal officers at will but maintains that his subordinates' exercise of discretionary executive power remains valid until revoked by a successor).

198. *See id.*

branch officers do not flout or ignore the law—that they execute it faithfully—but it is not an independent source of presidential power.[199] Because the President would not be entitled to fire an official for failure to exercise his or her discretion in a desired manner, a statute that bars the President from removing officers on such grounds is constitutional under this narrower conception of executive power.

Although *Humphrey's Executor* comports with a theory of executive power that tolerates agency decision making independent of presidential oversight, the Court has never clearly defined the scope of core executive power to control agency activity. The *Morrison* Court suggested that the independent counsel's authority to "exercise[] no small amount of discretion and judgment in deciding how to carry out . . . her duties under the Act" did not constitutionally require unfettered removal power on the part of the President.[200] Nevertheless, the Court was fundamentally persuaded that, because the independent counsel could be controlled *indirectly* through the Attorney General, the statute did not impermissibly infringe on executive power.[201] In theory, the foregoing passage from *Morrison* means that that the President constitutionally possesses directory authority, but the statute did not interfere with it. It is equally possible that the President lacks such authority, so the statute's impact on his ability to direct agency officials' discretion is irrelevant. The Court did not identify the premise underlying its rhetoric. Because the PCAOB is not controlled by a principal officer who—like the Attorney General—can be removed at will by the President, the question remains whether endowing removal authority on someone whom the President could only fire for cause would "interfere" with his core functions. And that question cannot be answered without first identifying what core functions belong to the President, which *Morrison* failed to do.

Richard Pierce offers a possible definition of "core functions" by suggesting a policymaking definition of executive power: "It seems near certain that the framers intended the politically accountable branches to make all policy decisions except those incident to the process of adjudicating cases under the Constitution, statutes, and the

199. *See* Mary M. Cheh, *When Congress Commands a Thing to be Done: An Essay on* Marbury v. Madison, *Executive Inaction, and the Duty of the Courts to Enforce the Law*, 72 GEO. WASH. L. REV. 253, 275 (2003) (describing the Take Care Clause as imposing a duty rather than as conferring power).

200. Morrison v. Olson, 487 U.S. 654, 691 (1988).

201. *See id.* at 671–72.

common law."[202] Without rejecting "for cause" limitations on the President's removal power, therefore, he argues that " 'cause' must include failure to comply with any valid policy decision made by the President or his agent."[203] As a consequence, the President could not remove an independent counsel for having unearthed politically damaging evidence, but could do so for violating a generally applicable policy established by the President or his agents. This policymaking thesis is consistent with *Morrison*, in which the Court highlighted that the independent counsel's authority did "not include any authority to formulate policy for the Government or the Executive Branch."[204]

Although the dissent in *Free Enterprise Fund* condemned the Sarbanes-Oxley Act in part because the PCAOB enjoys broad authority to promulgate rules, among other things,[205] the PCAOB may well pass muster under a policymaking standard. While it has the authority to promulgate rules, the rules are subject to SEC review.[206] In this way, it operates like a negotiating committee that drafts a proposed rule for SEC Commissioners' consideration—the SEC is ultimately responsible for the policy choice once the rule is finalized.[207] There is no mechanism for judicial review of the PCAOB's failure to regulate,[208] but nothing constrains the SEC from promulgating rules itself to fill such gaps. And even though the PCAOB's investigatory and prosecutorial decisions are largely

202. Richard J. Pierce, Jr., Morrison v. Olson, *Separation of Powers, and the Structure of Government*, 1988 SUP. CT. REV. 1, 24.

203. *Id.* at 25; *cf.* Lessig & Sunstein, *supra* note 32, at 118 ("[A] removal standard would be unconstitutional if it ... entirely eliminated presidential control over general policy decisions.").

204. *Morrison*, 487 U.S. at 671. Other scholars sharply dispute the notion that the substantive hallmark of executive power is policymaking. *See, e.g.*, Calabresi & Rhodes, *supra* note 197, at 1170 (discussing the competing view that Congress has the constitutional authority to divest the President of executive power); Lee S. Liberman, Morrison v. Olson: *A Formalistic Perspective on Why the Court Was Wrong*, 38 AM. U. L. REV. 313, 324 (1989) (suggesting that the President is obliged to adhere to prior policy decisions under the Take Care Clause of the Constitution).

205. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667, 704–05 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) ("PCAOB members have extraordinarily broad power under the Sarbanes-Oxley Act of 2002 to, among other things, promulgate rules, initiate and conduct investigations and inspections, compel testimony, and impose sanctions."), *reh'g en banc denied, cert. granted*, 129 S. Ct. 2378 (2009).

206. 15 U.S.C. § 7217(b)(2) (2006) ("No rule of the Board shall become effective without prior approval of the Commission ....").

207. *See* Negotiated Rulemaking Act, 5 U.S.C. §§ 561–570a (2006).

208. *Compare* 15 U.S.C. § 7211(a)–(b) (2006) (declaring the PCAOB "not ... an agency"), *with* 5 U.S.C. §§ 701, 706(1) (providing that judicial review applies only to statutorily-defined "agenc[ies]"), *and* 5 U.S.C. § 706(2) (same).

immune from judicial review, law enforcement functions do not involve policymaking. If the independent counsel is not making policy by investigating and prosecuting under federal criminal laws, in other words, the PCAOB is not doing so in policing compliance with auditing standards for accountants. Perhaps, therefore, the Act's provisions for SEC review of the Board's rulemaking save it from serious constitutional challenge under a policymaking definition of "core functions." Ironically, this standard turns the one relatively settled definition of executive power on its head: because traditional law enforcement does not involve policymaking, the President's authority to remove the Attorney General and senior prosecutors could, in theory, be confined to "cause." Of course, neither *Morrison* nor prior cases on appointment and removal endorsed "for cause" limits on the President's power to remove Cabinet-level officials such as the Attorney General. A policymaking explication of core executive functions, therefore, would not resolve the definitional problems *Morrison* left bare.

3. Does Limited Removal Power Interfere with a "Core Function"? Practicality and Efficiency Concerns

Even assuming a definition of "core functions," *Morrison* leaves no clear standard for identifying whether a given scheme impermissibly "interferes" with those functions. The Court did accept that investigation and prosecution are quintessentially executive functions but found that the independent counsel scheme did not impermissibly interfere with them because the President retained some indirect control (through the Attorney General) over removal of the independent counsel.[209] If an inferior officer is not supervised or removable by the Attorney General or a Cabinet-level equivalent, then, does that render the President's core functions compromised? *Morrison* provides no obvious means of answering that question. Wherever the boundary for impermissible interference lies, *Morrison* merely teaches that the independent counsel statute did not cross it.[210]

One way to get at the meaning of "interference" without arriving at a definitive understanding of "core executive functions" is to consider the constitutional purpose behind a single-headed executive branch. The Vesting and Take Care Clauses of Article II reflect a well-documented decision by the framers of the Constitution to vest

209. Morrison v. Olson, 487 U.S. 654, 695–96 (1988).
210. *Id.* at 696–97.

all executive responsibilities in one person rather than a committee.[211] As the dissent in *Free Enterprise Fund* observed, "[a] single head of the Executive Branch enhances efficiency and energy in the administration of the Government," regardless of the breadth or narrowness of executive power.[212] Thus, as an addendum to the core functions test, one might look to whether limitations on the President's power to appoint and remove officials undermine the efficiency rationale behind the unitary executive embodied in the Constitution. As with the core functions test itself, however, practicality and efficiency concerns do not provide a workable test for identifying the limits of congressional authority to create agencies that operate independent of presidential control.

The efficiency rationale for preserving presidential at-will removal authority made more sense in 1787 than it does today.[213] In modern times, the very goal of efficiency borders on the spurious in light of the gargantuan administrative bureaucracy, which has increased dramatically in size and scope over the past century.[214] Accompanying the expansion of the administrative state, moreover, has been the analogous increase in the size of the bureaucracy in and around the White House itself.[215] The number of political employees within the White House has increased ten-fold over the last forty years and four-fold over the last decade.[216] When viewed against the

211. *See* Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 NW. U. L. REV. 62, 72 (1990); Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 DUKE L.J. 963, 967 (2001); *see also* Miller, *supra* note 1, at 70 (discussing the rejection of the council idea at the Constitutional Convention).

212. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667, 689 (D.C. Cir. 2008), *reh'g en banc denied*, *cert. granted*, 129 S. Ct. 2378 (2009). In addition to serving the values of efficiency and accountability (discussed below), the unitary executive fosters coordination, avoids factionalism, and enables the President to act with dispatch. Lessig and Sunstein, *supra* note 32, at 94–95.

213. *See, e.g.*, Harold H. Bruff, *On the Constitutional Status of Administrative Agencies*, 36 AM. U. L. REV. 491, 509–10 (1987) (observing that the President oversees modern agencies but cannot participate in all subordinates' decisions).

214. *See* David C. Vladeck, Commentary, *The Administrative Conference's Role in Promoting Government Efficiency Today, Tomorrow, and Next Year*, 8 ADMIN. L.J. AM. U. 697, 698 (1994) ("[T]he need to simplify and streamline the nation's administrative state has only increased in recent years.").

215. Richard J. Pierce, Jr., *Saving the Unitary Executive Theory from Those Who Would Distort and Abuse It: A Review of* The Unitary Executive, *By Steven G. Calabresi and Christopher Yoo*, 12 U. PA. J. CONST. L. (forthcoming Dec. 2009) (manuscript on file with the North Carolina Law Review).

216. *Id.* (manuscript at 19) (citing PAUL R. VERKUIL, OUTSOURCING SOVEREIGNTY 164 (2007)).

thousands of appointed officials and federal employees within the numerous executive and independent agencies that comprise the broader administrative bureaucracy, the White House seems miniscule in comparison. Yet "[i]t is simply impossible for the president to control the White House, much less the bureaucracy."[217] As Richard Pierce explains:

> There are not enough hours in the day for the president to be aware of more than a tiny fraction of the policy decisions that are made by agencies every day. Moreover, the chain of agency relationships between the president and the people who actually make policy decisions in the bureaucracy is far too long to indulge the assumption that everyone in the White House who purports to speak for the president is acting consistently with the president's policy preferences.[218]

Thus, although there are virtues—rooted in the Constitution—to having a single leader who brings policy in line with a set of principles on which the President was elected, as a practical matter this justification for unfettered appointment and at-will removal authority only goes so far.

Notwithstanding the elusiveness of efficiency as a goal for executive administration, practicality is a troubling basis for marginalizing the unitary executive theory that animates Article II. Presumably, avoidance of fractious executive control is partly why the framers left it to the President alone to appoint principal officers, and why the cluster of people who populate that category might be expanded—if anything—rather than narrowed with the swelling of the administrative state. The fact that the President cannot effectively orchestrate along a single note the entire federal bureaucracy is a poor reason to throw the baby out with the bathwater. He certainly can connect with a key group of officers who work at his pleasure. Under prevailing Supreme Court precedent, however, the independent agency model enables Congress to configure substantively powerful agencies "independent" of the President so long as a layer of bureaucracy cushions officials from presidential control.[219] This construction of the legislative power stands in tension with the unitary executive model the framers envisioned.

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217. *Id.* (manuscript at 16).
218. *Id.*
219. *See supra* notes 160–70 and accompanying text.

To be sure, one purpose of the early independent agency was to frustrate presidential control.[220] Its existence, therefore, forces a choice between the efficient administration of a unitary executive and the virtues of agency independence. *Morrison* accepts the consequence that under some circumstances, it is appropriate to compromise efficiency values for the benefit of something greater. The question then becomes: what values are sufficiently important to trump the need for the efficient administration of executive government? There is no easy way to concoct a framework for analysis that produces a clear answer to this question—it is again ultimately unsatisfying because it seems too subjective.

One possibility is to consider the historical justification for independent agencies: the corrosive effect of politics on the democratically-responsive operation of government. *Morrison* occurred in the wake of the Watergate scandal.[221] The idea behind the independent counsel law was to avoid a repeat of the so-called "Saturday Night Massacre" whereby President Nixon dismissed special prosecutor Archibald Cox, who was appointed by the Attorney General.[222] The perceived need to ensure effective investigation and prosecution of wrongdoing at the highest levels of government, in other words, outweighed the efficiency rationale for a unitary executive that would no doubt be undermined by the independent counsel law. This idea probably made sense at the time. Because no President is above the law, no President should dictate investigations into his own conduct; were he to do so, it would hardly facilitate the efficient operation of the executive branch as a whole.

220. In its seminal decision validating the appointment and removal structure of the FTC, therefore, the Supreme Court considered the "coercive influence" of presidential removal power a threat to agencies' ability to act with independence. Humphrey's Ex'r v. United States, 295 U.S. 602, 630 (1935). As Geoffrey Miller has observed, "[t]he case was decided in the thick of the bitter battle over the constitutionality of the New Deal [and] may well have reflected reservations about the danger of overwhelming presidential power—a concern that had not inconsiderable force during the early days of the Roosevelt Administration." Miller, *supra* note 1, at 94. Later, the Court rejected a constitutional challenge to the War Claims Commission, which was established to hear certain claims arising out of World War II because that body was designed to be "entirely free from the control or coercive influence" of the President and to adjudicate claims strictly "according to law." Weiner v. United States, 357 U.S. 349, 355 (1958).

221. *See* George D. Brown, *Putting Watergate Behind Us*—Salinas, Sun-Diamond, *and Two Views of the Anti-Corruption Model*, 74 TUL. L. REV. 747, 804–07 (2000) (describing events giving rise to the independent counsel statute and the Supreme Court's decision in *Morrison*).

222. *See supra* notes 157–58 and accompanying text.

The independent counsel statute, however, was not renewed.[223] Not only did the investigations drag on for dubious benefit at enormous cost to the taxpayers, but in hindsight it became evident that the public outcry over President Nixon's actions and the scrutiny imposed by the press operated to bring down the President regardless of whether Cox stayed in office.[224] The need for a truly independent prosecutor may have been largely illusory. Whether independent agencies in fact operate as they were intended—that is, divorced from political influence and driven by facts and science versus loyalty to the current White House occupant—is similarly debatable.[225]

Even assuming *arguendo* that independence from the President does ensure objective policymaking by executive branch subordinates, it cannot be denied that such independence comes at a cost. The cost, of course, is presidential power and unitary control. The argument for independence is, by its very nature, at odds with the conclusion that the President wields control over independent agencies. Although the Court long-ago established that "for cause" limitations on the President's removal power are an acceptable price to pay for independence,[226] it has laid no viable groundwork for determining when the price becomes too high.

Congress conceived of the PCAOB as peculiarly independent. Its independence is uniquely fortified by the "double for-cause" structure for removal of its members. There is no evidence that Congress had the Appointments Clause and removal precedent in mind when, in the words of Senator Gramm, it endowed the Board with "massive power, unchecked power, by design," for use in "mak[ing] decisions that affect all accountants and everybody they work for, which directly or indirectly is every breathing person in this country."[227] Once the inherent tension between independence and presidential control is acknowledged, it becomes difficult to argue persuasively that the need for independence trumps fidelity to the

223. *See* Stephan O. Kline, *Heal It, Don't Bury It! Testimony on Reauthorization of the Independent Counsel Act*, 1999 L. REV. M.S.U.-D.C.L. 51, 56–67 ("[S]ome commentators suggest that the firing of Archibald Cox shows that the prosecutorial system functioned perfectly well before the 1978 law came into existence."); *cf.* Stack, *supra* note 148, at 440 ("Independent Counsel Starr's investigation turned the political tables on the independent counsel statute.").

224. *See* Stack, *supra* note 148, at 409 ("[W]hile the Watergate special prosecutor model allowed politics to trump legal process in the short term, it was not without political accountability for President Nixon.").

225. *See supra* note 49.

226. Humphrey's Ex'r v. United States, 295 U.S. 602, 629 (1935).

227. 148 CONG. REC. 12,119 (2002) (statement of Sen. Gramm).

principle of a unitary executive. Nothing in the Constitution compels the former. Yet the latter arises from historical records contemporaneous to the Constitution[228] and implicit in Article II itself: "The executive Power shall be vested in *a President* of the United States of America."[229] Thus, the argument that presidential appointment and at-will removal power is necessary to ensure efficient coordination of the executive branch is a valid one.

The efficiency rationale for a unitary executive extends well beyond the novelties of the PCAOB, however, and bears upon the propriety of independent agencies per se. There is not much to be gained, therefore, in employing it as a standard for testing future iterations of the independent agency model. Under prevailing case law, it is hard to make the argument that restraints on presidential removal and appointment power interfere with the efficiency objective of a unitary executive. Independent agencies are here to stay. The Court has repeatedly tolerated curtailment of the President's at-will removal power.[230] A retreat from these authorities based on an argument that the efficiency benefits of a unitary executive must be protected could not be accomplished without substantial retraction of precedents that have been in place for over three-quarters of a century.

Moreover, even if an efficient executive branch were the driving objective behind the question of interference with core presidential functions,[231] scholars debate whether removal plays a meaningful role in ensuring agency adherence to the President's agenda.[232] The President exercises control over agency bureaucracy in ways that might satisfy *Morrison*'s core functions test even if a statute completely separates him from the locus of removal power. A string of executive orders have long authorized the Office of Information and Regulatory Analysis ("OIRA") within the President's Office of Management and Budget ("OMB") to monitor agency compliance

228. Christopher R. Berry & Jacob E. Gersen, *The Unbundled Executive*, 75 U. CHI. L. REV. 1385, 1406–07 (2008) (discussing views of Hamilton and Madison supporting a unitary executive).

229. U.S. CONST. art. II (emphasis added).

230. *See supra* notes 137–46 and accompanying text.

231. *See* Morrison v. Olson, 487 U.S. 654, 692 (1988).

232. *See, e.g.*, Pierce, *supra* note 215 (manuscript at 13–17) (arguing that most executive branch officers are incentivized to act in a manner consistent with the President's objectives regardless of the removal power, and that "for cause" restrictions on removal are unimportant).

with various regulatory analysis requirements.[233] Moreover, as Richard Pierce recently observed, the "[l]argely invisible ad hoc White House jawboning is now, and always has been, far more important in its impact on agency policy decisions."[234] A phone call from Vice President Cheney to a relatively low-level agency appointee prompted shifts in policy decisions during the Bush Administration that rippled to the upper echelons of the agency.[235] And even absent a statutory obstacle to removal power, the political costs of removing a presidential appointee can be too high to entertain.[236] President Nixon's removal of Attorney General Elliot Richardson ultimately led to the end of his presidency.[237] Given these other means of influencing agency activity, the President's "core functions" might not be impeded even if his removal power were "completely stripped" with respect to a certain officer.[238]

At bottom, the Court's historical approach to the question of the constitutionality of independent agencies has been ad hoc and outcome determinative. It lacks any guiding theoretical principle that might withstand the idiosyncrasies of the modern regulatory state. In this regard, the "core executive functions" rhetoric of *Morrison* is misleading. The Court failed to define core executive functions or provide standards for recognizing when legislation impermissibly interferes with them. To the extent that some limiting principles exist—such as consideration of the purposes behind a unitary executive, the President's policy-making role, or the classic executive functions of investigation and prosecution—the facts of *Morrison* deprive them of any real force. As a result, litigants seeking to challenge or defend legislation establishing an unprecedented agency structure are largely left to distinguish the facts of *Morrison*, that is, how the specifics of new legislation compare to the challenged provisions of the Ethics in Government Act. The dissent in *Free*

233. *See, e.g.*, Exec. Order No. 12,291, 3 C.F.R. 127 (1982), *reprinted in* 4 U.S.C. § 601 (1988); Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993); Exec. Order No. 13,422, 72 Fed. Reg. 2763 (Jan. 18, 2007). *See* Pierce, *supra* note 215 (manuscript at 13).

234. Pierce, *supra* note 215 (manuscript at 13); *see also* Lisa Bressman & Michael Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 69–70 (2008) (concluding that various White House offices and the OIRA attempted to control rulemaking at EPA).

235. *See* Pierce, *supra* note 215 (manuscript at 14) (discussing Jo Becker & Barton Gellman, *Leaving No Tracks*, WASH. POST, June 27, 2007, at A1 (describing the Department of Interior's reversal of the decision regarding dam operation after Vice President Cheney communicated with the nineteenth ranking person at the agency)).

236. *Id.* (manuscript at 9) (discussing the high cost of exercising removal power).

237. *Id.*

238. Morrison v. Olson, 487 U.S. 654, 692 (1988).

Enterprise Fund struggled mightily to demonstrate, for example, that the independent counsel's tenure was limited in duration and that the SEC is less susceptible to presidential control than the Attorney General.[239] Hinging the constitutionality of the Act on such features seems patternless and subjective; that *Morrison* demands such an analysis is a testament to its failure to replace the obsolete "quasi-" approach of *Humphrey's Executor* with a meaningful constitutional standard. Because Congress will continue to experiment with new agency forms, the Court should derive a workable standard from enduring constitutional principles rather than tinker at the margins of the elusive meaning of executive power.

C. *The Promising—but Incomplete—Presidential Accountability Concept*

A possible alternative to the core functions test would consider the constitutionality of independent agencies from an important structural premise implicit in the Constitution: officers within the executive branch are accountable to the public through the President. In his famous opinion in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*,[240] Justice Stevens wrote for the majority that, "[w]hile agencies are not directly accountable to the people, the Chief Executive is."[241] A "presidential accountability" approach sidesteps the thorny definition of core executive functions while serving up a broad principle from which a meaningful standard might be derived. As with an approach to core executive functions that closely tethers the President to the powers of investigation, prosecution, or policy making, or strives to serve the efficiency justification for a unitary executive, however, a test that looks exclusively to an agency's accountability to the President cannot operate alone within existing doctrine.

A presidential accountability approach would build on the Supreme Court's premise that "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."[242] If an officer

239. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667, 708–09 n.17 (D.C. Cir. 2008) (Kavanaugh, J., dissenting), *reh'g en banc denied, cert. granted*, 129 S. Ct. 2378 (2009). The dissenting opinion was not particularly persuasive on these points. *See supra* notes 189–91 and accompanying text.

240. 467 U.S. 837, 865 (1984).

241. *Id.* at 865.

242. Humphrey's Ex'r v. United States, 295 U.S. 602, 629 (1935); *see* Bowsher v. Synar, 478 U.S. 714, 730 (1986) (noting that the Appointments Clause was "designed to preserve political accountability"); *see also* Edmond v. United States, 520 U.S. 651, 663 (1997)

understands that the President can fire her at any point for any reason, she will strive to conform to the President's directives and agenda for fear of losing her job.[243] Reciprocally, the President is responsible to the electorate for the successes and failures of such an "alter ego" in effectuating the platform on which he was elected. If the President is too far removed from that official's chain of command, he cannot reasonably be held accountable for the official's mistakes.

The Board is exceedingly remote from electoral accountability. The Sarbanes-Oxley Act affords the President no power to appoint and remove Board members.[244] The recipient of such power—the SEC—is not democratically elected. The Act would thus be susceptible to challenge under a presidential accountability approach.

Because the Court appeared satisfied in *Humphrey's Executor* and *Morrison* that affording the President only indirect removal power does not per se render the government actor unaccountable, the question raised by a presidential accountability approach is how much independence is too much. This question may be hard to answer by looking simply at the length of the chain of command to the President. The SEC is effectively in charge of the PCAOB and exercises greater oversight than the Attorney General exercised under the independent counsel statute.[245] But the Act creating the PCAOB is distinguishable from the independent counsel statute because the SEC—unlike the Attorney General—is not removable at will.[246] There is certainly a more tenuous accountability track under the Sarbanes-Oxley Act, and no method under prevailing law for determining when that track becomes too lengthy. The *Morrison* Court hung its hat on a finding of "inferior" status:[247] if the PCAOB is inferior, it follows, the question of presidential removal melts away. But such a technical holding obscures the very real dilemma posed by the PCAOB. The idea behind presidential control is a fundamentally democratic one: if the President appoints and the agency makes

("The power to remove officers . . . is a powerful tool for control."); *see* Strauss, *supra* note 16, at 58 (deriving accountability requirement from *Edmond*); *supra* note 169.

243. *But see supra* notes 231–37 and accompanying text (discussing debate over whether removal actually operates to ensure agency compliance with the President's agenda).

244. 15 U.S.C. § 7211(e)(4) (2006) (providing that the SEC will appoint Board members).

245. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667, 685 (D.C. Cir. 2008), *reh'g en banc denied, cert. granted*, 129 S. Ct. 2378 (2009).

246. *See supra* notes 84–85 and accompanying text.

247. Morrison v. Olson, 487 U.S. 654, 691–92 (1988).

mistakes, the voters can hold the President accountable for the alter ego's misdeeds. Such accountability is missing under the Act because the SEC is unelected, and no single President is realistically responsible for appointing all of its members.[248]

The executive, moreover, is the only democratically-elected branch that can hold officials accountable through the power of removal under Supreme Court case law involving congressional attempts to reserve removal power for itself. Congress cannot participate in the appointment or removal of officials charged with executing the law except by impeachment.[249] The Court thus took care in *Morrison* to provide reassurance that the independent counsel law "d[id] not involve an attempt by Congress itself to gain a role in the removal of executive officials other than its established powers of impeachment and conviction."[250]

Ostensibly, Congress made no attempt in the Sarbanes-Oxley Act to afford itself any unconstitutional influence in the removal of Board members. On the one hand, then, the inquiry as to whether the statute expressly aggrandizes congressional power at the President's expense supports the conclusion that the Act is constitutional. The power to remove Board members lies exclusively with the SEC.

On the other hand, the Act should fail under a presidential accountability approach precisely because *no* democratically elected branch of government can remove Board members. Whereas Congress is constitutionally forbidden from involving itself in the

248. Moreover, as Part III, *infra*, explains, the notion of separation of powers is premised on a balancing of powers between the three primary branches. Here, the "balance" is provided by an independent hybrid entity—the SEC. There is no pretense that the President exercises the real power here. The SEC does. But the idea that balance derives from some quasi-executive entity that is only marginally responsible to the President distracts from the basic concept of three separated powers.

249. *Myers v. United States* involved a statute which provided that certain postmasters could be removed only "by and with the advice and consent of the Senate." 272 U.S. 52, 106 (1925). The President removed a postmaster unilaterally, and a lawsuit followed. The Court declared the statute unconstitutional on the ground that for Congress to "draw to itself, or to either branch of it, the power to remove or the right to participate in the exercise of that power ... would be ... to infringe the constitutional principle of the separation of governmental powers." *Id.* at 161. The Court applied this principle again in *Bowsher v. Synar*, 478 U.S. 714, 732–34 (1986) (rebuffing Congress's attempt to control spending by appointing the Comptroller General of the United States to monitor compliance with spending limitations and vesting removal power in itself). Similarly, in *Buckley v. Valeo*, 424 U.S. 1, 132, 137 (1976), the Supreme Court rejected Congress's attempt to vest in itself the power to *appoint* members of the Federal Election Commission to the extent that they are charged with tasks that do not merely aid in the operation of congressional legislative authority.

250. *Morrison*, 487 U.S. at 686.

removal process, the President's authority is limited to firing certain SEC Commissioners for cause for failing to persuade the SEC as a whole to fire PCAOB members for cause (assuming that such "cause" even encompasses whatever problem the President has with the PCAOB's actions). The problem with this argument is that the Court has consistently endorsed the constitutionality of agency independence from the President.[251] If it turns out that the Constitution requires a clear line of accountability to the President for agency officials, existing "for cause" limitations on the President's removal powers become fundamentally suspect to the extent that statutory "cause" excludes the act or omission for which the President seeks to hold an officer accountable.

The Court could draw a line at the facts of *Morrison* and hold that independent agencies are tolerable only if their members are appointed and removed by the President or a Cabinet-level officer who is removable at will.[252] After all, the President's ability to remove the Attorney General for any reason rendered the independent counsel more accountable to the President than the PCAOB by comparison. Such a distinction is somewhat arbitrary, however, as the very purpose of the independent counsel statute was to insulate prosecution of senior executive officials from presidential control. It begs the question of whether removal power is an effective tool for ensuring accountability to the President. Thus, although accountability is fertile ground on which to plant a seed for an alternative framework for assessing limits on the President's appointment and removal power, it cannot do the job alone within existing doctrine.

Another analytical thread lies dormant in the aforementioned case law barring Congress from retaining removal authority for itself. Fundamental separation-of-powers principles—and not the aggrandizement of congressional power for its own sake—drove these decisions.[253] In *Bowsher v. Synar*,[254] the Court rebuffed Congress's attempt to control spending by vesting in itself the power to remove the Comptroller General of the United States,[255] emphasizing that the tripartite system "was deliberately so structured . . . to provide

251. *See supra* Part II.A.

252. *See* Strauss, *supra* note 16, at 60 (observing that the fact that the SEC as a whole is responsible for appointment and removal of Board members distinguishes the PCAOB from similar entities).

253. *See Bowsher*, 478 U.S. at 722.

254. 478 U.S. 714 (1986).

255. *Id.*

avenues for the operation of checks on the exercise of government power."[256] The ban on congressional removal power thus sprung from " '[t]he fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others.' "[257] As Part III suggests, this bedrock concept of balanced powers should prominently inform the propriety of modern attempts by Congress to relieve the President of his traditional role in appointing and removing independent agency members or commissioners for cause.

III. TOWARD A REVISED FRAMEWORK FOR ASSESSING THE CONSTITUTIONALITY OF NOVEL INDEPENDENT AGENCY STRUCTURES

This Part seizes upon the theory animating the ban on congressional attempts to retain removal authority and suggests that courts evaluate modern infringements on the President's appointment and removal power from the perspective of a particular facet of separation-of-powers theory: ensuring proper checks and balances. This framework departs from an accountability approach in one significant respect. Rather than look at presidential power in isolation, it scrutinizes the posture of a given independent agency relative to all three branches of government. The question is, are there sufficient checks and balances on the actions of the agency to satisfy the conventions of separation of powers theory? By enabling meaningful judicial scrutiny of new independent agency forms, such an approach could operate to reign in legislative efforts to insulate entities exercising executive power from traditional means of ensuring accountability without disturbing the viability of existing independent agencies.

The objective here is merely to outline the preliminary features of such an approach, beginning with a description of the proposal and then applying it to the Sarbanes-Oxley Act. In the process, this Part identifies how this alternative method for establishing boundaries on Congress's ability to fashion new independent agencies improves upon the methods discussed thus far.

256. *Id.*

257. *Id.* at 725 (quoting Humphrey's Ex'r v. United States, 295 U.S. 602, 629–30 (1935)).

A. A Checks-and-Balances Approach to Appointment and Removal

Laurence Tribe has remarked that, "to decide major cases," it may "be necessary to extrapolate what amounts to a blueprint of organizational relationships from the fundamental structural postulates one sees as informing the Constitution as a whole."[258] As argued in Part II, the inherent shortcomings of the approach in *Morrison* highlight a need for an alternative analysis derived from general constitutional tenets. Given the limitations of an approach that would look exclusively to an agency's structural posture vis-à-vis the President, review of entities like the PCAOB would benefit from an analysis that borrows from broader principles of separation of powers, in particular, the need to ensure sufficient checks and balances.

The doctrine of separation of powers concerns "the distribution of powers *among* the three coequal Branches . . . ; it does not speak to the manner in which authority is parceled out within a single Branch."[259] Although not express in the Constitution, the doctrine is inferred from the document's organizing principles.[260] As the Supreme Court has explained,[261] its purpose is to prevent any one branch from exercising the whole power of another, or from exercising the fundamental powers of the government as a whole.[262] The separation of powers presumes some common understanding of what activities are appropriate to the legislature, the courts, and the President, but contains no immutable rules; it "is a structural safeguard, or prophylactic device" that is, by design, "sufficiently flexible to permit practical arrangements in a complex government."[263]

The important separation-of-powers flaw in the Sarbanes-Oxley Act is not that the statute diminishes presidential power in favor of a coordinate branch of government. After all, the power holder under the Act is another independent agency—the SEC. Fundamental separation-of-powers principles are implicated because the Act effectively enables the PCAOB to conduct investigations, inspections, and enforcement actions independent of *any* direct oversight by one of the three branches of government, thus rendering it reasonably

258. TRIBE, *supra* note 39, at 130.
259. Touby v. United States, 500 U.S. 160, 167–68 (1991) (citation omitted).
260. 16 C.J.S. *Constitutional Law* § 215 (2005) (citation omitted).
261. Humphrey's Ex'r v. United States, 295 U.S. 602, 629–30 (1935).
262. 16A AM. JUR. 2D *Constitutional Law* § 246 (1998).
263. 16 C.J.S. *Constitutional Law* § 217.

accountable to none of them.[264] The remaining question is whether the doctrine's flexibility tolerates such a diversion from the framers' explicit (three-branch) and implicit (designed to preclude overreaching by any one branch) structural plan.

To address legislative attempts to render agencies increasingly independent of the three branches of government, an alternative approach to reviewing the constitutionality of unprecedented agency forms would turn on one particular aspect of the doctrine—the concept of checks and balances. The structure of the Constitution operates to diffuse power.[265] The separateness of the branches "permit[s] a working interdependence in which each branch, in guarding its own prerogatives, effectively checks and balances self-interested behavior by the other branches."[266] In doing so, they collectively "protect the governed from arbitrary oppressive acts on the part of those in political authority."[267] As a consequence, the separation of powers inherent in the Constitution ensures an order of checks and balances.[268] As Chaihark Hahm recently explained:

> The idea is that, since power that is left unchecked tends to enlarge itself and become arrogant and abusive, a mechanism must be set in place to counter that tendency. Power must be divided into smaller parts so that it becomes less threatening, or it should be counterbalanced by another power of similar size and strength so that it does not become larger and stronger. It was in this vein that James Madison famously remarked, "Ambition must be made to counteract ambition."[269]

Accordingly, if legislation establishing agency independence leaves an entity with insufficiently checked power within the tripartite system, it may be constitutionally infirm even if it satisfies the porous

264. *See infra* Part III.B.2–3.

265. *See* 16A AM. JUR. 2D § 247 (explaining that the Constitution prevents concentration of power).

266. Sargentich, *supra* note 28, at 435.

267. 16 C.J.S. *Constitutional Law* § 215 (citing United States v. Morrison, 529 U.S. 598, 616 n.7 (2000)).

268. *Id.* § 217 (citing Mistretta v. United States, 488 U.S. 361, 381–82 (1989)).

269. Chaihark Hahm, *Ritual and Constitutionalism: Disputing the Ruler's Legitimacy in a Confucian Polity*, 57 AM. J. COMP. L. 135, 136 (2009) (quoting THE FEDERALIST NO. 51, at 356 (James Madison) (Benjamin Fletcher Wright ed., 1961)); *see also* BERNARD BAILYN, TO BEGIN THE WORLD ANEW: THE GENIUS AND AMBIGUITIES OF THE AMERICAN FOUNDERS 48 (2003) ("Only structural balances within a government, Madison thought, pitting one force against another, could keep the misuse of power in check and so protect minority rights.").

Appointments Clause framework established by *Humphrey's Executor* and *Morrison*.[270]

This "checks-and-balances" test of the constitutionality of a statute establishing an independent agency has a number of features that better accomplish the objective of identifying when Congress has gone too far in structuring agencies with independence from the President. First, unlike the core functions approach and the variants discussed in Part II, it does not focus on executive power per se and is therefore not unduly constrained by the facts of *Morrison*. If executive power is analogized to clear water that fills "Beaker One" to its brim, in other words, the core functions test would ask whether the water in Beaker One has been partially drained by a statute to the point where it can no longer serve its intended constitutional purpose. So, too, consideration of whether the efficiency justification for a unitary executive has been compromised would, by analogy, focus on the absolute amount of water in Beaker One. But the question of whether the water has been drained to an excessive point begs another crucial one: what is the intended purpose and role of the water in Beaker One in the first instance? Without an answer to this provocative question, the core functions test and the related efficiency justification approach falter.

The presidential accountability approach discussed in Part II is also largely concerned with executive power per se. That is, if the clear water represents the actual (versus normative) whole of executive power, does that power include responsibility for the acts of the inferior officer in question? With its "double for-cause" limitation on the President's power to remove Board members, and its denial of presidential power to appoint them, the answer is likely "no" under

270. Other scholars have endorsed similar lines of analysis. *See* Harold J. Krent, *The Lamentable Notion of Indefeasible Presidential Powers: A Reply to Professor Prakash*, 91 CORNELL L. REV. 1383, 1398 (2006) ("In assessing [a] congressional intrusion, courts should thus not ask whether the intrusion is reasonable in light of the congressional objective, . . . nor ask whether the intrusion leaves the Executive with sufficient power to attain constitutional objectives, as in *Morrison v. Olson*. Rather, the Court should first ask whether the clash threatens to undermine one of the critical checks and balances in the Constitution itself.") (citations omitted); *cf.* Sargentich, *supra* note 28, at 463 ("[T]he matter is so muddled that we should abandon the task, and focus instead on an effort to realize the values of checks and balances in the relations between agencies, on the one hand, and Congress and the President, on the other hand."); Strauss, *supra* note 4, at 499 ("Rather than argue that particular relationships (such as the removal power) are necessary, the alternative inquiry I suggest would have focused upon the overall framework of relationships, a framework whose elements may vary."); Treanor, *supra* note 123, at 997 ("Judges in the Founding era were not textualists when they engaged in constitutional interpretation . . . [but] acted aggressively to protect the basic constitutional boundaries that were not protected by the political process itself.").

the Sarbanes-Oxley Act.[271] Responsibility for the PCAOB's actions, by design, does not evidently lie with the President. Although appealing, the problem with the accountability approach is that it collides with *Morrison.* The independent counsel law was enacted to remove prosecution of executive branch officials from the purview of presidential accountability and control. Technically, the Attorney General had removal authority; but for all practical purposes, the independent counsel was most certainly not accountable to the President.[272]

The accountability approach does, however, become useful if Beaker One is not viewed in isolation. If Beaker Two contains yellow water representing Congress, and Beaker Three contains blue water representing the courts, responsibility for the PCAOB resides in neither. In effect, the Act requires the addition of another beaker to the analogy: Beaker Four representing the SEC. The SEC has no constitutionally assigned powers, so Beaker Four is empty. But it still reflects the locus of responsibility for the PCAOB's actions.

Building on the concept of presidential accountability, a checks-and-balances approach would assess the contents of Beaker One relative to those of Beakers Two and Three. In other words, if the President does not have the actual power in Beaker One to check the Board's activities and hold it accountable for missteps, then either Congress or the courts must. This approach does not concern itself in the first instance with the question of what absolute powers *should* be housed in each beaker or, if oversight responsibility for the PCAOB is shared, in what proportion. It simply requires that mechanisms for effective oversight of the PCAOB are lodged in one of the beakers containing water. Otherwise, the Act may well fail the test.

The second distinguishing feature of a checks-and-balances approach is that it would enable the Supreme Court to meaningfully scrutinize independent agency configurations without disavowing prior appointment and removal decisions that operate to protect the constitutionality of independent agencies per se.[273] As the D.C. Circuit majority pointed out in much of *Free Enterprise Fund*, the plaintiffs' *Morrison*-based challenge to the Act's constitutionality was

271. 15 U.S.C. § 7211(e)(4), (6) (2006).

272. *See supra* Part II.B.1.

273. *See* Miller, *supra* note 1, at 57–58 ("Other things being equal, it would be desirable if the rule to be adopted were one that could be squared with the Court's decisions in the area.").

essentially foreclosed by *Humphrey's Executor* and its progeny.[274] Under a checks-and-balances approach, the Court could find that the traditional independent agency model includes sufficient checks on agency behavior while tamping down on legislative attempts to increase agency independence. The Court in *Humphrey's Executor* explicitly emphasized, for example, that Congress intended the FTC to "be independent of executive authority, *except in its selection.*"[275] Thus, the President's ability to appoint and remove independent agency officials presents a critical distinction between the SEC and the PCAOB under a checks-and-balances approach to the Act's constitutionality.

Nor does *Humphrey's Executor*'s tolerance of "for cause" limitations on the President's removal power foreclose a finding that sufficient checks and balances exist under the traditional independent agency model. "For cause" limitations have persisted for decades, yet Presidents have not complained of an impaired ability to manage independent agencies.[276] Although a President cannot remove most board members or commissioners for any reason, "cause" generally encompasses those of greatest concern, such as inefficiency, neglect of duty, or outright malfeasance.[277] *Morrison* does not hold to the contrary. The Court at least implied that some level of control through the President's chain of command is a constitutional imperative.[278] And, in fact, the independent counsel was subject to legislative, judicial, and executive checks on the exercise of undue power. She was removable for cause by the Attorney General (a Cabinet-level principal officer), her tenure was terminable by the special court responsible for her appointment, her activities were subject to congressional oversight, and her prosecutorial decisions

274. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667, 685 (D.C. Cir. 2008) ("The bulk of the Fund's challenge to the Act was fought—and lost—over seventy years ago when the Supreme Court decided *Humphrey's Executor.*"), *reh'g en banc denied, cert. granted*, 129 S. Ct. 2378 (2009).

275. Humphrey's Ex'r v. United States, 295 U.S. 602, 625 (1935).

276. *See* Miller, *supra* note 1, at 84 ("If a practice of government has persisted for many years without significant controversy, then this is evidence that the practice is constitutional, or has become so by prescription.").

277. Geoffrey Miller has observed that "[m]any statutes creating independent agencies do not clearly set forth the kinds of actions that constitute 'cause' justifying removal by the President," while others "set forth a detailed list of the actions that justify removal." *Id.* at 86–87 (citations omitted).

278. *See* Lessig & Sunstein, *supra* note 32, at 113 ("The notion of 'inferior' implies the existence of a superior, and a truly independent counsel—that is, one not at all controllable by the Attorney General or the President—would have no superior.").

were susceptible to judicial review under conventional criminal law principles.[279]

Third, a checks-and-balances analysis acknowledges the complexities of the modern administrative state and thus affords Congress flexibility in crafting new agency forms. The dissenting D.C. Circuit judge in *Free Enterprise Fund* suggested a clear threshold for the constitutionality of independent agencies that would require Congress to lodge appointment and removal power with the President or his alter ego, that is, someone whom the President can fire at will.[280] A "President or alter ego-only" standard for appointment and removal of independent agency officials would categorically reject the notion that, as a matter of separation of powers, Congress may have good reason to protect a future entity from such (albeit indirect) presidential oversight. This may be entirely appropriate. Yet as commentators have observed, the administration of President George W. Bush was characterized by an expansive view of executive power that brought theory into practice and, in the view of many, led to widespread abuses.[281] If permanently ensconced in American politics and constitutional doctrine, the Bush theory of the unitary executive could require a rebalancing of power within the administrative state to foster objective and reasoned decision-making on the part of agency officials. Because a President or alter ego-only standard assumes that minor adjustments to the PCAOB model would never be good policy, it should be embraced only upon careful consideration of its cost: the luxury of legislative adaptation that gave birth to the independent agency in the first place.

Finally, instead of looking to removal as the key mechanism for ensuring agency accountability to the public, a checks-and-balances approach considers a full menu of mechanisms for scrutinizing and penalizing overreaching and incompetence on the part of independent agency officials and asks whether those provided in given legislation, taken together, operate to sufficiently cabin agency behavior. A checks-and-balances model would thus enable Congress to continue its quest for agency independence without the

279. *See supra* note 113 and accompanying text (citing pertinent provisions of the independent counsel statute).

280. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667, 686 (D.C. Cir. 2008) (Kavanaugh, J., dissenting), *reh'g en banc denied, cert. granted*, 129 S. Ct. 2378 (2009).

281. Charlie Savage & Neil A. Lewis, *Release of Memos Fuels Push for Inquiry into Bush's Terror-Fighting Policies*, N.Y. TIMES, Mar. 4, 2009, at A18; *see also supra* note 193 and accompanying text (describing Bush's extreme unitary-executive position).

unwavering "green light" to create novel independent agencies that existing doctrine appears to afford it. Courts would look to whether the branches of government are collectively positioned to meaningfully "check" the excesses of the independent entity in question. Such an approach keeps faith with the most fundamental goals of the framers' original scheme—regardless of whether a mechanical application of Appointments Clause precedent allows for independent officials to operate beyond the President's meaningful control.

B. Structural Constraints and the PCAOB

This section proceeds from the premise set forth in Part II—that the Court's appointment and removal jurisprudence has drained Article II of its heft in restraining congressional attempts to render independent agencies even more independent. It then applies a checks-and-balances approach to the Sarbanes-Oxley Act creating the PCAOB, and suggests that the tools for PCAOB oversight that exist under the statute are insufficient. Instead, SEC oversight coupled with other traditional oversight mechanisms, such as judicial review, would go a long way toward ensuring proper checks on PCAOB activity.

1. Checks on Agencies

A checks-and-balances standard for reviewing the constitutionality of novel independent agency structures requires in the first instance some coalescence around what mechanisms exist for agency oversight. Collectively, such mechanisms enhance the separation of powers by safeguarding an important structural interest protected by the Appointments Clause: accountability.[282] Under a checks-and-balances approach to the constitutionality of independent agencies, these structural interests may be satisfied by a variety or combination of oversight tools grounded in the three-branch system.

The *first* of such tools is appointment by the President. William Howard Taft once stated that "one of the functions which in a practical way gives the President more personal influence than any other is that of appointments."[283] Appointment is one way in which the President implements the goals of his administration. Congress, in

282. A checks-and-balances approach would not necessarily operate to protect other structural interests of the Appointments Clause, such as ensuring coordination and uniformity within the executive branch.

283. WILLIAM HOWARD TAFT, THE PRESIDENT AND HIS POWERS 55 (1916).

turn, has the power to either consent to or reject presidential appointments, which "can be used as leverage over related and even completely unrelated areas in which the Senate has an interest in the execution of the laws."[284]

Second is the President's reciprocal removal power. By posing the threat of removal, the President operates as a check on potential malfeasance by those who he appointed. The threat of impeachment by Congress, to a lesser extent, also serves this objective.[285]

Third is the power of the purse. Congress must appropriate to agencies the money they need to operate. If members of the democratically-elected Congress perceive dysfunction or wrongdoing on the part of an agency, legislators can exert influence by legislatively specifying how funding may or may not be spent.[286] Moreover, the President prepares an annual budget.[287] Most agencies must have their budgets approved by OMB,[288] which oversees and coordinates the President's procurement, financial management, information, and regulatory policies. The process enables the President to enforce his program priorities by restraining agency spending and monitoring performance.[289] Hence, control of the purse strings plays a substantial role in administrative oversight, and it is exercised by both Congress and the President.[290]

Congress has additional tools at its disposal to check agency excesses. These include, *fourth*, the power to hold investigative hearings to bring public scrutiny to agency activities. Congress has conducted investigations of malfeasance since the 1790s.[291] After the House of Representatives empowered the Committee on Manufacturers to "send for persons and papers" relating to tariff legislation in 1827, both houses have considered it their right to summon anyone, whether inside or outside the government, to

284. Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 111 (2006).

285. Jack Beermann explains that executive officials are rarely threatened with impeachment "because they can usually be removed by the President or some other supervisory federal official." *Id.* at 112.

286. *Id.* at 85–90 (explaining that Congress can influence federal agencies through appropriation riders or by threatening to withhold funds).

287. Budget and Accounting Act, 1921, ch. 18, 42 Stat. 20 (1921) (codified as amended in scattered sections of 31 U.S.C.).

288. PIERCE ET AL., *supra* note 5, at 92.

289. *Id.*

290. *Id.*

291. Michael Edmund O'Neill, *The Fifth Amendment in Congress: Revisiting the Privilege Against Compelled Self-Incrimination*, 90 GEO. L.J. 2445, 2458–59 (2002).

testify.[292] Congress established the General Accountability Office to conduct investigations and engage in general oversight of the executive branch.[293] The very anticipation of public testimony may be enough to prompt unelected officials to make adjustments to agency priorities, policies, or programs.

Fifth, both Congress and the President supervise agencies informally. This form of oversight "takes a variety of forms, including cajoling, adverse publicity . . . [and] informal contacts with agency members and staff."[294] Congress, accordingly, may achieve desired administrative outcomes by merely threatening to take legislative action, thereby shortcutting the legislative process.[295]

Sixth, Congress can legislatively amend the statute that gives an agency its powers to enhance statutory oversight mechanisms, to constrict agency authority,[296] or to abolish the agency entirely.[297] It may also pass legislation approving particular agency action notwithstanding pending litigation[298] or setting forth burdensome reporting or certification requirements.[299] Under the Congressional Review Act ("CRA"),[300] for example, agencies must submit proposed rules to Congress along with a cost-benefit analysis, and Congress may legislatively reject them within a specified time frame.[301] Although Congress possesses this power without the CRA, the statute gives it advance notice of proposed rules and an expedited procedure for overriding them.[302] Other statutes contain "sunset

292. Howard R. Sklamberg, *Investigation Versus Prosecution: The Constitutional Limits on Congress's Power to Immunize Witnesses*, 78 N.C. L. REV. 153, 182–83 & n.191 (1999). In 1857, Congress provided that reluctant witnesses could be held in contempt and tried by the federal courts. *See* Watkins v. United States, 354 U.S. 178, 207 n.45 (1957).

293. Beermann, *supra* note 284, at 128.

294. *Id.* at 70.

295. *Id.* at 68.

296. The Senate must also concur with the President's exercise of his power to make treaties, U.S. CONST. art. II, § 2, and "may attach conditions to the ratification to force interpretation or application of the treaty in a particular direction" or later "pass legislation that is inconsistent with the treaty or that, in effect, prevents the President from carrying out the treaty." Beermann, *supra* note 284, at 77.

297. *See* Beermann, *supra* note 284, at 108 ("Dissatisfaction with the Immigration and Naturalization Service's performance, for example, led Congress to abolish that agency and reallocate its functions among agencies within the Department of Justice, where the Immigration and Naturalization Service ("INS") was located, and the new Department of Homeland Security.").

298. *Id.* at 68.

299. *Id.* at 106–07.

300. Congressional Review Act, Pub. L. No. 104-121, 110 Stat. 868 (1996) (codified as amended at 5 U.S.C. §§ 801–808 (2006)).

301. 5 U.S.C. § 801 (2006).

302. Beermann, *supra* note 284, at 83–84.

provisions" which automatically extinguish legislation after a certain period of time unless reauthorized by Congress, thereby incentivizing agencies to construe and enforce legislation in a manner that maximizes its chances of renewal by a satisfied Congress.[303]

Seventh, the President has peremptory powers under the Constitution. He can either sign or veto a bill that broadens or restricts agency power or independence from the President.[304] He also has the power to issue pardons contravening criminal convictions secured by prosecutors.[305]

Eighth, Congress has enacted numerous statutes of broad applicability, such as the APA and its Freedom of Information Act ("FOIA") provisions,[306] which impose important procedural limitations on agency activity.[307] The President plays a role in enforcing such legislation, as well: OIRA, a division of OMB, administers the Paperwork Reduction Act and thus oversees the rulemaking process.[308] Presidents on their own initiative have issued executive orders providing for additional procedural safeguards on agency decision making, although these generally do not extend to independent agencies.[309]

The importance of the final two mechanisms by which agency activity is checked cannot be overstated. The *ninth* of these is judicial review. The APA contains a catch-all provision enabling affected parties to challenge both action and inaction by any "agency," as that

303. *Id.* at 106.

304. *See* U.S. CONST. art. I, § 7 (enabling the President to enact or reject legislation generally).

305. *Id.* art. II, § 2 ("[The President] shall have Power to grant Reprieves and pardons for Offences against the United States, except in Cases of Impeachment.").

306. Freedom of Information Act, Pub. L. No. 89-554, 80 Stat. 383 (1966) (codified as amended at 5 U.S.C. § 552 (2006)).

307. *See* Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 100–01 (2003) (describing core Administrative Procedure Act requirements); David C. Vladeck, *Information Access—Surveying the Current Legal Landscape of Federal Right-to-Know Laws*, 86 TEX. L. REV. 1787, 1795–99 (2008) (describing history and basic provisions of the Freedom of Information Act).

308. PIERCE ET AL., *supra* note 5, at 93.

309. *See* Stack, *supra* note 148, at 410 & n.41 (observing that the Reagan White House's decision not to extend the executive order requiring centralized review to independent agencies was driven by politics and the desire to avoid a turf battle with Congress). Executive Order 12,866 is the latest in a succession of presidential efforts to control agency policy making by requiring that "agency rules undergo cost-benefit analysis supervised by OMB officials." PIERCE ET AL., *supra* note 5, at 97.

term is defined in the statute.[310] Numerous other statutes specific to particular agencies contain their own provisions for judicial review.[311]

Tenth, and finally, the media serves an invaluable role in the checks-and-balances equation by bringing public attention to abuses and malfeasance by government officials. Its ability to do this effectively, however, is contingent upon its access to information. Although informal, off-the-record communications are central to this process, the press's ability to fulfill its societal role in ensuring government accountability would be compromised without the numerous disclosure statutes that constrain the ability of government officials to act in secret. These include most prominently the FOIA,[312] the Government in the Sunshine Act,[313] the Presidential Records Act,[314] and the Federal Advisory Committee Act.[315]

2. Checks on the PCAOB

As for the PCAOB, too many of the traditional tools for ensuring adequate checks and balances appear to be missing.

The President neither appoints nor removes Board members. Although President Bush could have vetoed the Act and preserved the measure of presidential removal authority that exists under the traditional agency model, he did not.[316]

The legislature established the Board to "have succession until dissolved by an Act of Congress."[317] Congress has broad authority to alter its structure, powers, and responsibilities; to call members before an oversight hearing; to strengthen the statutory mechanisms for oversight of the Board; or to dissolve it entirely.[318] Political scientists debate whether active congressional hearings provide Congress with a

310. 5 U.S.C. § 706 (2006).

311. *See, e.g.*, 41 U.S.C. § 609 (2006) (providing judicial review of contract disputes between agencies and contractors). Congress has also statutorily granted itself the right to intervene in litigation. Beermann, *supra* note 284, at 112–13 (citing 2 U.S.C. § 288e(a) (2000)).

312. Freedom of Information Act, Pub. L. No. 89-554, 80 Stat. 383 (1966) (codified as amended at 5 U.S.C. § 552 (2006)).

313. Government in the Sunshine Act, Pub. L. No. 94-409, 90 Stat. 1241 (1976) (codified as amended at 5 U.S.C. § 552b (2006)).

314. Presidential Records Act of 1978, Pub. L. No. 95-591, 92 Stat. 2523 (codified as amended at U.S.C. §§ 2201–2207 (2006)).

315. Federal Advisory Committee Act, Pub. L. No. 92-463, 86 Stat. 770 (1972) (codified as amended at 5 U.S.C. §§ 1–16 (2006)).

316. Vetoes, of course, are politically costly and cause gridlock. In any event, the fact that a sitting President chooses not to veto legislation does not render that legislation constitutional.

317. 15 U.S.C. § 7211(a) (2006).

318. *See supra* Part I.B.

durable check on the actions of agencies[319] or whether "the only mechanisms that prevent [agencies] from ignoring Congress's goals altogether are judicial review and the possibility of further legislation."[320] As Jack Beermann has observed, the "sheer number of administrative actions and level of technical detail often involved make it impossible for Congress to monitor the vast majority of administrative actions."[321] Congress's ability to influence an agency by controlling its budget may be of greater utility.[322] Yet Congress foreswore it in the Sarbanes-Oxley Act,[323] under which the Board sets its own budget and salaries and funds itself by collecting fees—or a "tax"—on publicly traded companies pursuant to rules promulgated by the PCAOB.[324]

The Act defines the PCAOB in such a way as to exempt it from the APA's coverage, providing that "[t]he Board shall not be an agency or establishment of the United States Government."[325] Documents prepared or received by the Board in connection with inspections, investigations, or Board deliberations are exempt from disclosure to the public under the FOIA.[326] Without FOIA access to

319. Douglas Kriner, *Can Enhanced Oversight Repair "The Broken Branch"?*, 89 B.U. L. REV. 765, 783 (2009).

320. Beermann, *supra* note 284, at 65 (citation omitted).

321. *Id.* at 99.

322. *See id.* at 68, 84.

323. This is not entirely unusual, however, as "most independent agencies enjoy a measure of discretionary authority over matters such as budget, relations with Congress, and positions taken in litigation." Miller, *supra* note 1, at 51.

324. 15 U.S.C. § 7211(f)(5) (2006). *See* Carvin et al., *supra* note 20, at 207. From its funds, Board members and their staff are paid exponentially higher salaries than their SEC counterparts—$615,000 for the Board's Chairman in 2007 alone. Nicholas Rummell, *The SarBOX: Accounting Czar Is a $600,000 Man*, FINANCIAL WEEK, Aug. 20, 2007, http://www.financialweek.com/article/20070820/REG/70817024/1002/TOC. This salary substantially exceeds those of former SEC Chairman Christopher Cox, who made $154,600 that year, Lynn Hume, *Regulator Salary Gap Widens*, BOND BUYER (New York), Aug. 16, 2007, at 1, and President Bush himself, who was paid approximately $400,000, *see Bush Paid $221,635 in Taxes for 2007*, USA TODAY, Apr. 11, 2008, http://www.usatoday.com/money/perfi/taxes/2008-04-11-bush-taxes_N.htm. The pay of PCAOB staff members similarly dwarfs those of career government employees paid on the general schedule—or GS—scale. *See* Rummell, *supra*.

325. § 7211(b). The APA defines "agency" as "each authority of the Government of the United States," with certain exceptions. 5 U.S.C. § 551(1) (2006).

326. 15 U.S.C. § 7215(b)(5)(A) (2006) ("[A]ll documents and information prepared or received by or specifically for the Board, and deliberations of the Board and its employees and agents, in connection with an inspection . . . or with an investigation under this section . . . shall be exempt from disclosure, in the hands of an agency or establishment of the Federal Government, under the Freedom of Information Act (5 U.S.C. § 552 (2006)), or otherwise, unless and until presented in connection with a public proceeding or released . . . .").

the PCAOB's records, the ability to bring public scrutiny to Board malfeasance is hampered.

The Act is largely silent with respect to whether the PCAOB's exercised powers—as well as the SEC's review of the same—may be challenged in court. The Act generically contemplates that the PCAOB will defend itself in state and federal court, and authorizes the Board to do so with SEC approval.[327] But it includes no provision for judicial review of the Board's actions. This is noteworthy. As Peter Strauss has observed, "Congress generally provides rather full review of administrative action," and enhanced agency independence "suggests a need for greater judicial control than would be experienced for an agency more firmly attached to the President."[328]

Even where available, the scope of judicial review is more circumscribed than that which applies to the actions of the SEC itself.[329] Judicial review of the Board's inspection activity is expressly foreclosed.[330] Judicial review of the Board's final rules is only available under the Securities and Exchange Act ("SEC Act") if those rules were approved by the SEC.[331] It is unavailable, however, if a party seeks to challenge the PCAOB's *failure* or refusal to address a

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327. § 7211(f) ("[The Board] shall have the power . . . to sue and be sued, complain and defend, in its corporate name and through its own counsel, with the approval of the Commission, in any Federal, State, or other court.").

328. Strauss, *supra* note 4, at 524–25.

329. For PCAOB investigations that culminate in sanctions, the Act says nothing about review by a federal court, although the judicial review provision of the Securities Exchange Act ("SEC Act") does apply to final SEC orders resolving appeals from the Board's disciplinary determinations. 15 U.S.C. § 78y(a)(1) (2006) ("A person aggrieved by a final order of the Commission . . . may obtain review of the order in [an appropriate federal Court of Appeals].").

330. 15 U.S.C. § 7214(h)(2) (2006) ("Any decision of the Commission with respect to a review [of an inspection report] shall not be reviewable under . . . [the Securities Exchange Act] . . . or deemed to be 'final agency action' for purposes of [APA review].").

331. § 78y(b)(1) ("A person adversely affected by a rule of the Commission . . . may obtain review of this rule in the United States Court of Appeals for the circuit in which he resides or has his principal place of business or for the District of Columbia Circuit, by filing in such court, within sixty days after the promulgation of the rule, a written petition requesting that the rule be set aside."). Section 78y(a)(1) of the Securities Exchange Act further provides for judicial review of SEC decisions:

> A person aggrieved by a final order of the Commission entered pursuant to this chapter may obtain review of the order in the United States Court of Appeals for the circuit in which he resides or has his principal place of business, or for the District of Columbia Circuit, by filing in such court, within sixty days after the entry of the order, a written petition requesting that the order be modified or set aside in whole or in part.

§ 78y(a)(1).

regulatory need—including the promulgation of a new rule or the amendment or repeal of an existing one.[332]

3. Another Look at the Sarbanes-Oxley Act

The primary check on Board activity resides neither in the legislative, executive, or judicial branches, but in another independent agency which exercises legislative, executive, and judicial power: the SEC. Despite the widespread integration of independent agencies into the national system of government, the very notion of an agency that lies neither amongst the legislators nor the judges nor the President's Cabinet remains difficult to square with a tripartite governmental structure.[333] With the PCAOB, moreover, its non-agency within an independent agency stature renders it directly beholden only to a form of agency that is itself not directly beholden to the President. It is as if the Constitution created Beakers One to Three in our analogy but Congress unilaterally decided that the Constitution was incomplete. It therefore produced Beaker Four to ensure proper auditing of public companies subject to federal securities laws—despite the lack of constitutional "water" to fill it.

Even if the creation of Beaker Four was justified as a matter of policy, it was not created to encompass the full power of the PCAOB. To be sure, in addition to affording it appointment and removal power, the Act broadly provides that the SEC "shall have oversight and enforcement authority over the Board,"[334] including the power to modify or abrogate PCAOB rules,[335] relieve the Board of its

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332. Accordingly, the APA's requirement that agencies give interested persons a right to petition for a new or amended rule, 5 U.S.C. § 553(e) (2006), as well as "[p]rompt notice . . . of the denial" of such a petition, *id.*, and rights to judicial review, *see* 5 U.S.C. §§ 701, 702, 706 (2006), do not constrain the PCAOB.

333. *See* Carvin et al., *supra* note 20, at 201.

334. 15 U.S.C. § 7217(a) (2006).

335. § 7217(b)(2)–(3) ("No rule of the Board shall become effective without prior approval of the Commission, [which] . . . shall approve a proposed rule, if it finds that the rule is consistent with the requirements of this Act and the securities laws, or is necessary or appropriate in the public interest or for the protection of investors."); *see also* 15 U.S.C. § 7231 (2006) (amending the SEC Act to enable the Board to grant exemptions from various prohibitions on registered firms' ability to perform non-audit services contemporaneously with the audit of public companies, and subjecting the Board's exemption determinations to SEC review in the same manner as § 7217 provides for rules). Thus, the SEC must approve all PCAOB rules before they go into effect, a process which includes a second public notice and comment period as required by the SEC Act. *See* § 7217 (b)(4) ("The provisions of . . . [the Securities Exchange Act of 1934 (15 U.S.C. § 78s(b) (2006))] shall govern the proposed rules of the Board, as fully as if the Board were a 'registered securities association' for purposes of that section 78s(b)."). The SEC can abrogate PCAOB rules, as well. *See* § 7217(b)(5) ("The provisions of section 78s(c) of

enforcement responsibilities entirely,[336] and censure it for impropriety.[337] If the PCAOB decides to impose sanctions following an investigation, it must report them to the SEC,[338] which can affirm, modify, remand, set aside, or enhance the Board's sanction.[339]

The SEC only narrowly reviews the PCAOB's ongoing inspection program, however. Parties can seek SEC review of the Board's "draft inspection reports,"[340] but there is no statutory provision enabling appeals of final inspection reports or authorizing SEC review of the conduct of the Board's inspections. Similarly, nothing in the Act enables parties to appeal the Board's decisions to initiate investigations.[341] Yet the Board has the power to subpoena testimony or production of documents and revoke a firm's registration for refusals "to testify, produce documents, or otherwise cooperate with the Board in connection with an investigation."[342]

The Act's shortcomings under a checks-and-balances approach, therefore, are twofold. First, it leaves certain activities of the PCAOB completely beyond review.[343] The structure of the Constitution presupposes the existence of both political and judicial checks on the

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[the Securities Exchange Act of 1934 (15 U.S.C. § 78s(c))] shall govern the abrogation, deletion, or addition to portions of the rules of the Board by the Commission as fully as if the Board were a 'registered securities association' for purposes of that section 78c . . . .").

336. § 7217(d)(1).

337. § 7217(d)(2). In particular, the SEC can impose limitations on the Board's activities if it finds, after notice and opportunity for a hearing, that the Board "has violated or is unable to comply with any provision of this Act, the rules of the Board, or the securities laws" or "without reasonable justification or excuse, has failed to enforce compliance with any such provision or rule, or any professional standard by a registered public accounting firm or an associated person thereof." § 7217(d)(2)(A)–(B). The Act also specifies that the Board shall be treated as a "registered securities association" for purposes of SEC Act provisions which mandate recordkeeping by covered entities and allow SEC examinations of securities-related records and reports. § 7217(a) (citing 15 U.S.C. § 78q(a)(1), (b)(1) (2006)).

338. 15 U.S.C. § 7215(d)(1)(A), 7217(c)(1) (2006). For purposes of the SEC's review, the Board is considered a "self-regulatory organization" governed by the SEC Act, which affords aggrieved parties basic guarantees of due process. 15 U.S.C. §§ 78s(d)(2), (e)(1).

339. §§ 78s(e)(1), 7217(c)(3).

340. 15 U.S.C. § 7214(h)(1)(A)–(B) (2006) ("A registered public accounting firm may seek review by the [Securities and Exchange] Commission, pursuant to such rules as the Commission shall promulgate.").

341. § 7215(a)–(b)(1).

342. § 7215(b)(2)(A)–(B), (b)(3)(A). Although the Board may request documents and testimony from persons other than registered firms and their associates, it must go to the SEC for a subpoena if such parties are non-compliant. *See* § 7215(b)(2)(C)–(D).

343. Peter Strauss notes that quasi-public institutions such as the NASD similarly control the initiation of disciplinary actions. Strauss, *supra* note 16, at 53.

exercise of power.[344] The Sarbanes-Oxley Act provides neither. Even if the proper role of the President vis-à-vis agencies is merely "one of oversight rather than substitution of judgment,"[345] the statute leaves the PCAOB beyond his reach. It embodies a movement of the national bureaucracy "beyond effective control, either by the people or by those whom the people directly select to head the government for them."[346] Senator Gramm touched upon the problem with allowing the PCAOB to have such "massive power, unchecked power, by design"[347]:

> Its members are not elected officials. They are not appointed in the sense that they are not Government officials. They will have the ability to make decisions that will affect the livelihood of Americans who are in the accounting profession. They will literally have the ability to say to a CPA: We are taking your license away and you can never practice again in providing accounting services to a publicly traded company.... I think when you are taking people's livelihoods; they ought to have an opportunity to appeal to the Federal district court where they live. I think there ought to be a burden on them to make their case, and obviously the court is going to take into account that this board, that was duly constituted, made a decision. But I think that is an opportunity that people ought to have that they do not have under this bill.[348]

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344. J. Harvie Wilkinson III, *Our Structural Constitution*, 104 COLUM. L. REV. 1687, 1691 (2004).

345. Strauss, *supra* note 4, at 496.

346. *Id.* at 490 (discussing Bowsher v. Synar, 478 U.S. 714 (1986), INS v. Chadha, 462 U.S. 919 (1983), and N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982)).

347. 148 CONG. REC. 12,119 (2002) (statement of Sen. Gramm).

348. *Id.* at 14,442 (statement of Sen. Gramm). The legislative history of the Act reveals little discussion regarding the amenability of the PCAOB to judicial review and no discussion of the propriety of exempting the Board from the APA. Senator Phil Gramm (R–Texas) was the only member of Congress to comment on the issue of judicial review of the Board's decisions or, for that matter, on the overall powers of the Board. Senator Gramm notably remarked that the Board was to have "massive power, unchecked power, by design" that will enable it to "make decisions that affect all accountants and everybody they work for, which directly or indirectly is every breathing person in the country." *Id.* at 12,119 (statement of Sen. Gramm). Despite their sound-byte appeal, these comments were aimed not at the desirability of the Board having such power, but at the question of who should be on a Board with such "tremendous, unbridled, unchecked power." He explained:

> We need to give some more thought to who is going to be on this board and is it going to be something that is attractive enough to make people want to serve.... I urge my colleagues, think long and hard when you think about this board exerting tremendous, unbridled, unchecked power, about how many people you want on

Short of Congress enabling judicial review, the issue Senator Gramm raises might be addressed by requiring the SEC to sign off on the PCAOB's investigative decisions. Such latter revisions to the Act, however, would leave in place a second problem. The notion that a *fourth* branch of government—here, the SEC—provides the needed checks and balances is inconsistent with the doctrine of separation of powers. The Constitution establishes three branches of government. The SEC is not democratically elected,[349] and Congress is constitutionally barred from removing Commissioners.[350] Nor does the SEC fall within the judicial power of Article III. To the extent it is constitutionally viable, it is likely so because the President appoints and removes Commissioners for cause.[351] In that way, it is arm of the executive branch.[352] But the entire justification for finding the Act constitutional rests on *SEC* oversight—and distinctly not on presidential oversight.

The Act does leave intact the President's ability to appoint SEC members and remove them for cause, the SEC's susceptibility to judicial review, and Congress's ability to exert influence over the SEC through its appropriations, investigatory, and legislative powers. This Article does not attempt to address as an empirical matter whether such constraints on SEC power operate to effectively constrain PCAOB power as well. It suggests, rather, that crowning the SEC as a pseudo-government "branch" that is responsible for checking PCAOB power is somewhat extraordinary under basic separations-of-powers principles. If Congress is going to limit presidential appointment and removal power, it should consider retaining levers of oversight that originate in Articles I or III of the Constitution—judicial review, statutory requirements for public disclosure, and financial control.

> the board who know something about the subject matter. Today, in an environment where accountants are the evil people of the world, the enemies of the people, having no accountants on this board or relatively few and not letting them vote when ethics matters are being dealt with, I assert that kind of approach means you are not going to have first-rate people who are going to want to serve.

Id.

349. *See supra* notes 52–55 and accompanying text.

350. Bowsher v. Synar, 478 U.S. 714, 722–23 (1986) (holding that Congress may not retain the power to remove an officer exercising executive powers).

351. *See* Miller, *supra* note 1, at 65 (concluding that since the Constitution specifies that there are three branches of government, independent agencies must be considered as part of the executive branch); *see also* Alan B. Morrison, *How Independent Are Independent Regulatory Agencies*, 1988 DUKE L.J. 252, 252–56 (disputing independence of independent agencies because chairmen are re-designated on an annual basis by the President).

352. Miller, *supra* note 1, at 65.

One problem with a checks-and-balances approach to constraining the creation of novel independent agencies is that it attempts to elevate mechanisms of accountability that are entirely discretionary on Congress's part—such as judicial review and the appropriations power—and render them constitutionally mandatory. In that sense, it would be preferable to use the Appointments Clause because the Constitution binds Congress. This Article does not mean to suggest that a checks-and-balances approach is superior to one grounded in the Appointments Clause. The point is that the facts of *Morrison* largely foreclose such an analysis. As a result, the Appointments Clause is not a vibrant tool for cabining congressional overreaching in fashioning independence for agencies. And the Court is unlikely to touch its longstanding precedent under it.

What is missing from prevailing doctrine governing the constitutionality of the Act, therefore, is an accounting of the myriad mechanisms for ensuring that policymaking, law-enforcing bodies are accountable to the public via the elected branches and to the rule of law via the courts. Judicial review would enable the PCAOB to be checked by the power set forth in Article III. Ongoing appropriations authority would put the PCAOB within the legislative power of Article I. Susceptibility to disclosure statutes would enable public access to the inner workings of the PCAOB which, in turn, can prompt congressional calls for investigation. All of these mechanisms for ensuring accountability are missing from the Act. The statutory dearth of these details falls under the radar. And there is no evident basis in existing case law for ensuring that a statute that lacks such mechanisms conforms to separation of powers norms.

To be sure, the checks-and-balances approach proposed here is both incomplete and susceptible to the same line-drawing critique this Article lodges against the "core function" test.[353] How to determine whether a statute contains sufficient mechanisms for accountability under the list compiled above is a question that warrants further research and analysis. The aim of this Article is not to propose and defend a self-contained answer to the conundrum of independent agencies. It is, rather, to begin a dialogue for responding to this problem within the Court's existing doctrine. As Peter McCutchen has suggested, given the entrenchment of independent agencies in our

353. *See* Sargentich, *supra* note 28, at 459 (noting that the idea of checks and balances "does not answer all questions, for many involve doubts about the very nature of such a boundary" between the branches). Indeed, a key question in implementing a checks-and-balances approach is "how much is too much, and by what measures are such things to be determined?" *Id.* at 440–41.

modern government, "a form of constitutional damage control" is what is called for at this point.[354] Checks-and-balances scrutiny could, accordingly, "move governmental structures closer to the constitutional equilibrium" that has been disrupted by deficient precedent.[355]

CONCLUSION

The current economic crisis has shined a spotlight on the status of the modern administrative state. Skirmishes continue over the propriety of re-regulation after the catastrophic failures of de-regulation.[356] Finger-pointing abounds, as politicians and the public strive to identify responsible government and private actors. How best to regulate the regulators lies among these pressing issues. In this regard, this Article addresses whether there exists a meaningful constitutional standard for reviewing the propriety of increased independence for independent agencies.

The independent agency, though oft-critiqued as beyond the purview of the three-branch system established by the framers in the Constitution, has become a cornerstone of American government. In a series of opinions over the last century, the Supreme Court has tailored constitutional doctrine under the Appointments Clause to uphold these institutions.[357] The most recent case—*Morrison v. Olson*—stands undisturbed for nearly two decades. Congress's creation of the PCAOB after the collapse of Enron has reignited the debate over the constitutionality of novel agency forms. This is because, in establishing the Board, Congress eschewed the traditional independent agency model and fashioned the PCAOB to have "massive power, unchecked power, by design."[358] The most glaring aspect of this design is that the SEC—and not the President—has the power to appoint and remove Board members and to oversee its operations.[359]

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354. Peter McCutchen, *Mistakes, Precedent, and the Rise of the Administrative State: Toward a Constitutional Theory of the Second Best*, 80 CORNELL L. REV. 1, 6 (1994).

355. *Id.*

356. *Compare* Richard D. Cudahy, *The Coming Demise of Deregulation II*, 61 ADMIN. L. REV. 543, 556 (2009) ("[T]he demise of deregulation is now virtually guaranteed."), *with* Luca Enriques, *Regulators' Response to the Current Crisis and the Upcoming Reregulation of Financial Markets: One Reluctant Regulator's View*, 30 U. PA. J. INT'L L. 1147, 1155 (2009) ("[E]xcessive reregulation today is the best guarantee of effective pressure towards deregulation tomorrow.").

357. *See supra* Part II.

358. 148 CONG. REC. 12,119 (2002) (statement of Sen. Gramm).

359. *See supra* Part I.B.

In *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, this new blueprint for the independent agency was challenged unsuccessfully in the D.C. Circuit, prompting the dissenting judge to charge the majority with giving Congress a "green light for all sorts of new creations, independent agencies within independent agencies."[360] Under prevailing law, Congress controls the extent to which the President has appointment and removal authority so long as it identifies within the administrative apparatus a person or entity—other than the President—that has some supervisory, directory, or removal power over Board members. This formula for creating an "inferior officer" within the meaning of Article II fails to address the broader problem of a policymaking, law-enforcing entity that is effectively independent of any of the three branches of government. This is partly because the Court has bootstrapped its narrow "inferiority" analysis into the more expansive conclusion that limitations on the President's power to appoint and remove such officers does not interfere with core executive functions. In doing so, it has neglected to engage the threshold questions of the scope of executive power and what it means to unconstitutionally interfere with it.

This Article suggests that the Court instead employ a segment of separation-of-powers theory—the need to ensure proper checks and balances amongst the three branches of government—in evaluating statutes such as the Sarbanes-Oxley Act. While the Act leaves the PCAOB substantially unrestrained by the President, the legislature, and the courts, the unelected, "independent" SEC is a dubious substitute for the coordinate branches established in the Constitution. This Article posits as a general approach that if Congress aims to insulate independent agencies from the President's direct power to appoint and remove officials in future legislation, it should retain traditional oversight mechanisms that are grounded in Articles I and III of the Constitution, such as judicial review, budget control, and susceptibility to government-in-the-sunshine laws.

360. Transcript of Oral Argument, *supra* note 57, at 35.