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The Auditor for the Auditors' Auditor: Accounting for the Unitary Executive in Free Enterprise Fund v. Public Company Accounting Oversight Board

Kelsey Elizabeth Stapler

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I. INTRODUCTION

The most directly democratic branch of government does not make decisions by vote. It does not negotiate for one geographic constituency. In its pure form, the Executive Branch is perhaps "the most accessible, politically accountable force in government at the local, state, and national levels"[1] because it vests the law's execution in the administration of one man.[2] The President rises or falls by the success of his policies.[3] The same mechanisms that ensure this accountability, however, also create an equal and opposite fear of tyrannical opacity.[4] The Executive's built-in discretion

1. Judy Coleman, *Introduction to Symposium, The Most Dangerous Branch? Mayors, Governors, Presidents, and the Rule of Law*, 115 YALE L.J. 2215, 2216 (2006). The founding fathers recognized this aspect of the Executive during the ratification debates. *See* RICHARD BEEMAN, PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION 128–29 (2010). James Wilson of Pennsylvania provided a key voice in support of a single Executive. *Id.* He argued that a president directly elected by the population would possess the strongest incentive to give energy and direction to the national government. *Id.* Echoing this perspective, modern day supporters of the unitary Executive note that the Executive remains the most nationally minded political branch, in stark contrast to the constituency-driven special interests threading through the decisions of the Legislative Branch. *See, e.g.*, DAVID KAIRYS, THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 606 (1998).

2. *See* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 197 (2005); *see also* Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23 (1995). Renowned unitary executive theorist Steven Calabresi describes this particular strength of the Executive through comparative analysis of the electoral process:

> The collective action problem exists because most of the constituencies might be better off with less largesse and lower levels of taxation, borrowing, and regulation. But no member of Congress will dare vote for this absent an effective mechanism of collective enforcement for fear that other members of Congress will cheat and will continue to steer national pork to their local interests. The only official with any incentive under our present electoral structure to stop this game is the President who is (along with the Vice President) our only nationally elected official. Representing as he does a national electoral college majority, the President at least has an incentive to steer national resources toward the 51% of the nation that last supported him (and that might support him again), thereby mitigating the bad distributional incentives faced by members of Congress.

Calabresi, *supra*, at 35. James Madison described the executive power as "restrained within a narrower compass, and being more simple in its nature" than the Legislative Branch due to its compact size and accountability. THE FEDERALIST NO. 48, at 332–38 (James Madison) (Jacob E. Cooke ed., 1961).

3. Calabresi, *supra* note 2, at 35.

4. *See* THE FEDERALIST NO. 70, *supra* note 2, at 471–80 (Alexander Hamilton). In this Federalist Paper, Hamilton defends the unitary Executive for its energy and accountability. *Id.* Even as he wrote in favor of the structure, Hamilton acknowledged that "[t]here is an idea, which is not without its advocates, that a vigorous Executive is inconsistent with the genius of republican government." *Id.* This fear stemmed from the belief that a single Executive could become tyrannical without the transparency of multiple counselors. BEEMAN, *supra* note 1, at 127–28. Yet, Hamilton continues, these dissenters "must at least hope that the supposition is destitute of foundation; since they can never admit its truth, without at the same time admitting the condemnation of their own principles. Energy in the Executive is a leading character in the definition of good government." *Id.* As he noted in *The Federalist No. 67*, there is "hardly any part of the system which could have been attended with greater difficulty in the arrangement of it than [the Executive Branch]; and there is, perhaps, none which has been . . . criticised with less judgment." THE FEDERALIST NO. 67, *supra* note 2, at 452–57 (Alexander Hamilton).

ultimately leads to a tension between public trust and distrust of the Branch.[5]

The modern administrative state brings this tension to its breaking point.[6] The unitary executive philosophy exalts executive discretion, believing the Constitution formally vests the President with exclusive power to execute the laws, which in turn provides energy and accountability.[7] Critics of the unitary Executive argue that functionally, the Constitution's separation of powers only provides accountability when the President's discretionary executive power is nonexclusive and tempered by legislative and judicial involvement.[8] Today's era of complex, expansive federal

5. The power of the Executive stands alone among the branches as the most ambivalent and discretionary. U.S. CONST. art. II; *see also supra* notes 4, 5 and accompanying text. *See generally* HARVEY C. MANSFIELD, TAMING THE PRINCE: THE AMBIVALENCE OF MODERN EXECUTIVE POWER (1993).

6. "Administrative state" meaning post-New Deal bureaucracy. *See* Saikrishna B. Prakash, *Hail to the Chief Administrator: The Framers and the President's Administrative Powers*, 102 YALE L.J. 991, 991 (1993). The debate over the unitary Executive can only practically exist so long as the Executive has the power to remain unitary. At least in administration, the endurance of this power has come into question with the rise of fully insulated independent agencies. *See supra* Parts III, IV. Since the New Deal, and even before, the powerful simplicity of the presidency has been replaced with a flexible arrangement of departments, agencies, and oversight committees all intending to enforce a wide expanse of federal regulation. *See* Calabresi, *supra* note 2, at 30–31, 50. For more on how this development has impacted separation of powers, see Morrison v. Olson, 487 U.S. 654, 694 (1988) ("'While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.'" (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (concurring opinion)). *But see* Bowsher v. Synar, 478 U.S. 714, 727 (1986) (striking down congressional Comptroller); INS v. Chadha, 462 U.S. 919, 958 (1983) (striking down legislative veto).

7. *See* U.S. CONST. art. II, § 1 ("The executive power shall be vested in a President of the United States of America."); STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 3–4 (2008) [hereinafter PRESIDENTIAL POWER]; Gary Lawson, *Changing Images of the State: The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1242 (1994). Calabresi defines the unitary Executive by the three explicit powers: "the President's power of removal; the President's power to direct subordinate executive officials' exercises of discretionary executive power; and the President's power to nullify or veto subordinate executive officials' exercises of discretionary executive power." Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 CASE W. RES. L. REV. 1451, 1458 (1997) [hereinafter *The Unitary Executive*]. The President's appointment power also falls under the hearing of unitary powers, though it is defined by a different constitutional provision. *See id.* at 1458 n.23.

8. Calabresi identifies four primary complaints voiced by Anti-Presidentialists (using the term to describe those who oppose the unitary executive philosophy): first, that the presidency has become too "imperial" through the subversion of checks and balances by executive orders; second, that the presidency has amassed a sweeping network of administrative powers due to bureaucratic delegation; third, that the President has too much unilateral control over foreign policy and war-making; and fourth, that the President is too easily able to politicize law enforcement and thus insulate himself from public scrutiny. Calabresi, *supra* note 2, at 30–31. These arguments are used to justify or even require the creation of more independent agencies and counsels combined with more aggressive judicial review of executive actions. *Id.*; *see also* Charles N. Steele & Jeffrey H. Bowman, *The Constitutionality of Independent Regulatory Agencies Under the Necessary and Proper Clause: The Case of the Federal Election Commission*, 4 YALE J. ON REG. 363 (1987). The debate between these two camps has continued for decades, primarily constrained to the pages of

government condenses the debate to a single question: Regardless of form or function, who is ultimately responsible to the voters when regulation goes wrong?

Currently, there is one particular field of regulation that can facilitate this debate and respond to its ultimate inquiry.[9] Due to Congress's actions on the subject, the area of securities regulation raises unique constitutional issues and offers a chance to examine the practical impact of limiting or expanding executive authority.[10] Congress enacted the Sarbanes-Oxley Act in the wake of financial scandals and securities fraud that emerged in the late 1990s.[11] The "sweeping reform"[12] of the Act focused on six main areas of securities regulation: creating the Public Company Accounting Oversight Board ("PCAOB" or "the Board"), strengthening public company auditor independence, regulating corporate governance and responsibility, enhancing financial disclosure, regulating securities analyst conflicts of interest, and adding several new substantive securities crimes while enhancing penalties for violations.[13] With the creation of the PCAOB,[14] the

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academia. *The Unitary Executive*, *supra* note 7, at 1452–57.

9. Economic policy is ripe for this discussion because it directly impacts the lives of nearly all voters and is, thus, most easily generalized. *See generally* DOUGLASS C. NORTH & ROBERT P. THOMAS, THE RISE OF THE WESTERN WORLD: A NEW ECONOMIC HISTORY 1–8 (1973). In particular, the Sarbanes-Oxley Act offers a recent and expansive example of such policy. *See* Public Company Accounting Reform and Investor Protection (Sarbanes-Oxley) Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified at 15 U.S.C. §§ 7201–66). As will be discussed, the Act's particular introduction of the Public Company Accounting Oversight Board ("PCAOB" or "the Board") ties together a discussion of the unitary Executive and government accountability. *See infra* Part III.

10. *See infra* Parts III, IV.

11. Congress acknowledged this when it first enacted the Sarbanes-Oxley Act of 2002. *See* John W. Cioffi, *Irresistible Forces and Political Obstacles: Securities Litigation Reform and the Structural Regulation of Corporate Governance* 28 (Comparative Research in Law & Political Econ., Research Paper No. 7/2006), *available at* http://ssrn.com/abstractid=902648. The legislation was designed to reform the system of securities regulation in response to a wave of financial scandals at Enron, WorldCom, Adelphia, and others. *Id.* For a discussion of the reform intended by Sarbanes-Oxley, see *id.* For more references to the financial scandals, see Geoffrey C. Rapp, *Beyond Protection: Invigorating Incentives for Sarbanes-Oxley Corporate and Securities Fraud Whistleblowers*, 87 B.U. L. REV. 91, 94–95 (2007).

12. *See* Lawrence A. Cunningham, *The Sarbanes-Oxley Yawn: Heavy Rhetoric, Light Reform (And It Just Might Work)*, 35 CONN. L. REV. 915, 917 n.5 (2003) ("Scores of news stories used the phrase 'sweeping reform' and compared the Act, using the same words its champions did, to the New Deal era's enactment of the original securities laws, the Securities Act of 1933 and the Securities Exchange Act of 1934 . . . . The president of the American Institute of Certified Public Accountants ("AICPA") said the Act 'contains some of the most far-reaching changes that Congress has ever introduced to the business world.'").

13. Rapp, *supra* note 11, at 95 n.16. By casting such a broad net of new regulation, Congress has been criticized for creating a costly, confusing complex of laws. *See, e.g.*, Stephen M. Bainbridge, *Sarbanes-Oxley: Legislating in Haste, Repenting in Leisure* 2 (UCLA Law & Econ. Research Paper Series, Paper No. 06-14, 2006), *available at* http://ssrn.com/abstract=899593 ("[Congress] threw a bunch of ideas into a single basket and rushed it into law so that angry investors would blame somebody—anybody—other than Congress for the stock market bubble's bursting and the corporate governance scandals."); Cunningham, *supra* note 12, at 918–19 ("Apart from sweeping punts and stunts, the Sarbanes-Oxley Act reenacts in a new federal guise more than a dozen existing federal regulations, state laws, stock exchange and securities industry rules, accounting or auditing practices, and corporate governance norms. These codifications do little more than shine a spotlight on some

Act presents an opportunity to reexamine the administrative state and answer the basic question of who will be held responsible if or when this next wave of reform goes wrong.[15] To answer this question, it is necessary to evaluate the constitutionality and usefulness of entities like the Board.[16]

The PCAOB stands at the crossroads of executive branch authority and congressional oversight. Congress charges the PCAOB with overseeing "the audit of public companies that are subject to the securities laws, and related matters, in order to protect the interests of investors and further the public interest in the preparation of informative, accurate, and independent audit reports for companies the securities of which are sold to . . . public investors."[17] It is a quasi-private agency,[18] vested with a wide range of

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best practices, an important function but hardly reform of any sort, sweeping or otherwise. Incremental provisions of the Act are best seen as patchwork responses to precise transgressions present in the popularized scandals . . . .").

14. It is important to note that the Sarbanes-Oxley Act does not have a "severability clause" for its individual sections. Thus, prior to the Supreme Court decision, it was possible that legal challenges to the PCAOB could have resulted in striking down the entire law. *See Sarbanes-Oxley on Trial*, WALL ST. J., Dec. 4, 2009, http://online.wsj.com/article/SB10001424052748704107104574571662869948676.html; Bainbridge, *supra* note 13, at 10. The respondents for the PCAOB argued that severability was still an option:

> Even absent a severability clause, "the unconstitutional provision[s] [of a statute] must be severed unless the statute created in [their] absence is legislation that Congress would not have enacted." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685-686 (1987). Given the crisis Congress confronted, it is inconceivable that Congress would have declined to enact Sarbanes-Oxley if it could not have included a removal limitation.

Brief for Respondents Public Company Accounting Oversight Board at 48–49, Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138 (2010) (No 08-861), 2009 WL 3327230, at *48–49 [hereinafter Brief for Respondents]. Their arguments prevailed, and the Supreme Court severed the removability portion from the rest of the statute. *Free Enter. Fund*, 130 S. Ct. at 3161 ("[T]he existence of the Board does not violate the separation of powers, but the substantive removal restrictions . . . do.").

15. This question may indicate a rather pessimistic view of the Sarbanes-Oxley Act, but it is not without basis. Commentators have begun to suggest that the Act is more costly than beneficial and, as will be discussed in this Comment, potentially unconstitutional. *See, e.g.*, Bainbridge, *supra* note 13, at 7–15; James Freeman, *The Supreme Case Against Sarbanes-Oxley*, WALL ST. J., Dec. 15, 2009, http://online.wsj.com/article/SB10001424052748704431804574539921864252380.html.

16. *See infra* Parts III, IV.

17. Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7211(a) (2006).

18. The public/private status of the Board is not clearly defined within the Act. Functionally, the Board is an independent government agency. Formalistically, the members of the Board are not government employees. As Professor Donna Nagy explains:

> Notwithstanding its governmental creation, its governmental objectives, its governmental powers and privileges, and its governmentally appointed board members, Congress established the PCAOB as a private, not-for-profit corporation. Congress's determination to situate the PCAOB in the private sector could not have been clearer. In a section entitled "status," the Sarbanes-Oxley Act provides that "[t]he Board shall not be an agency or establishment of the United States Government" and that "[n]o member or person employed by, or agent for, the Board shall be deemed to be an officer or employee of or agent for the Federal Government by reason of such service." The PCAOB's public/private status renders its sardonic nickname "peekaboo" more than a bit profound.

Donna M. Nagy, *Playing Peekaboo with Constitutional Law: The PCAOB and Its Public/Private* powers, including power to create rules, investigate compliance, and impose substantial fines for violations of its rules.[19] To put it simply, "[t]he PCAOB is now, without question, the congressionally designated auditor for auditors."[20] Members of the PCAOB are not appointed by the President[21] but rather appointed solely by the Securities and Exchange Commission ("SEC" or "the Commission").[22] Congress fully intended the insulation, as one senator noted: "Anybody who thinks this board is just going to slap around a few accountants does not understand this bill. This board is going to have massive power, unchecked power, by design."[23]

This unrestrained power eventually triggered the lawsuit of *Free Enterprise Fund v. Public Co. Accounting Oversight Board* considered by the Supreme Court at the end of the 2009 term.[24] In 2006, Free Enterprise Fund[25] joined with Beckstead and Watts LLP[26] to bring a facial challenge to

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Status, 80 NOTRE DAME L. REV. 975, 978 (2005). Despite the Board's ambiguity, Supreme Court precedent indicates it is most likely a government agency for constitutional purposes. *See* Lebron v. Nat'l R.R. Passenger, 513 U.S. 374, 394 (1995) (defining AMTRAK as a government agency for constitutional purpose despite a congressional declaration that the train service would not be a government agency). In *Lebron*, the Supreme Court held, "[W]here, as here, the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment." *Id.* at 400. The PCAOB fits this definition, and the parties in *Free Enterprise* stipulated to this fact. *See also* Nagy, *supra*, at 982; Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., No. 06-0217, 2007 U.S. Dist. LEXIS 24310, at *10–11 (D.D.C. 2007), *aff'd*, 537 F.2d 667 (D.C. Cir. 2008), *aff'd in part, rev'd in part, and remanded*, 130 S. Ct. 3138 (2010) ("The parties agree that, at least for purposes of these motions, PCAOB should be considered a governmental entity, and so it shall be.").

19. Bainbridge, *supra* note 13, at 7. The Board is empowered to create audit procedures and policies, register public accounting firms, maintain standards concerning audit reports, as well as oversight, discipline and sanctioning of public accounting firms. Cunningham, *supra* note 12, at 943.

20. Nagy, *supra* note 18, at 978.

21. *See* U.S. CONST. art 2, § 2. The Appointments Clause grants the following to the President:

> [The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he 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.

Id.

22. *See* 15 U.S.C. § 7211.

23. 148 CONG. REC. S6334 (daily ed. July 8, 2002) (statement of Sen. Phil Gramm). Former Senator Phil Gramm (TX-R) served as Chairman of the Senate Banking Committee from 1999–2001 and was succeeded in that position by Paul Sarbanes, who served from 2001–2002. *See* UNITED STATES SENATE COMMITTEE ON BANKING, HOUSING, & URBAN AFFAIRS, *History of the Chairmen of the Senate Banking Committee*, http://banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=bc9f496c-7777-44b0-bd2e-4989fb0663d6 (last visited Jan. 8, 2011). Sen. Gramm worked closely with Sen. Sarbanes during the creation of the PCAOB. *See* 148 CONG. REC. S6333–34 (daily ed. July 8, 2002) (statement of Sen. Phil Gramm).

24. *See* Petition for a Writ of Certiorari, Free Enter. Fund v. Pub. Co. Oversight Bd., 130 S. Ct. 3138 (2010) (No. 08-861).

25. "The Free Enterprise Fund is a non-profit, 501(c)(4) organization focusing on limited government and tax relief." FREE ENTERPRISE FUND, http://fefund.org/page1.aspx (last visited Jan.

the constitutionality of the PCAOB.[27] They argued that the structure of the PCAOB violates separation of powers guaranteed by the Executive's appointments and removal powers within Article II of the Constitution.[28]

In a five-to-four decision,[29] the Supreme Court held in favor of Free Enterprise, ruling that, though the PCAOB itself was constitutional, its members could not be removable only "for cause" without infringing on the President's removal powers in Article II.[30] The Court also held, however, that the Board's members acted as "inferior officers" who could be appointed by the SEC without infringing on the President's appointment powers in Article II.[31]

Though it rendered a final decision on the constitutionality of the Board,[32] the Court's decision failed to establish any bright line for the constitutional role of independent agencies under the President's control.[33] The *Free Enterprise* case ultimately provides little guidance for future action in similar cases.[34] And as a result, analysis of the PCAOB should not stop with the Supreme Court's decision.[35] Instead, to avoid a repeat of such costly and relatively unproductive litigation, Congress should recognize problems with the Board and perhaps find a way to improve it through the use of executive oversight.[36] The Board enforces regulation; the unitary

8, 2011).

26. An accounting firm subject to the jurisdiction of the PCAOB.

27. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., No. 06-0217, 2007 U.S. Dist. LEXIS 24310, at *6–7 (D.D.C. 2007), *aff'd*, 537 F.2d 667 (D.C. Cir. 2008), *aff'd in part, rev'd in part, and remanded*, 130 S. Ct. 3138 (2010). The D.C. District Court and the D.C. Circuit Court both held that the PCAOB did not violate separation of powers, but the Supreme Court to granted certiorari to resolve this issue of first impression. *See* Petition for a Writ of Certiorari, *supra* note 24, at 7 ("At every level, it is clear that this Court's review is warranted. The issues presented go to the heart of the relationship between the Legislative and Executive Branches and all agree that this is a 'case of first impression' (Pet. App. 26a) because it involves a wholly unprecedented model for federal agencies"). The Supreme Court handed down its ruling in the case in June 2010. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138 (2010); *see also infra* Part III.

28. U.S. CONST. art. II, § 2. See *infra* Part III for an explanation of the suit and the arguments of each side.

29. Chief Justice Roberts wrote the majority opinion with the support of Justices Scalia, Thomas, Kennedy, and Alito. *Free Enter. Fund*, 130 S. Ct. at 3146. Justice Breyer penned the dissenting opinion in which Justices Stevens, Ginsburg, and Sotomayor joined. *Id.* at 3164 (Breyer, J., dissenting).

30. *Id.* at 3161 (majority opinion).

31. *Id.* at 3162.

32. *Id.* at 3161 (noting that the Board will continue to exist though the Court ruled its members can no longer be removable only "for cause").

33. *See infra* Part IV; *see also Free Enter. Fund*, 130 S. Ct. at 3177 (Breyer, J., dissenting) (arguing the majority failed to define when an Executive Branch worker's duties qualify him as an "inferior officer" that cannot be insulated with double for-cause removal limitations).

34. *See infra* Part IV.

35. *See infra* Part IV.

36. *See infra* Parts III, IV.

executive doctrine suggests the President holds executive power and should have direct control over enforcement functions.[37] This Comment will argue that, in light of the *Free Enterprise* case, the unitary executive doctrine should inspire Congress's reconsideration of the PCAOB, and agencies similar to it, because the Board's functions will be more accountable and more effective under executive leadership.[38]

Part II of this Comment presents a brief history of the unitary executive view as well as Supreme Court precedent shaping the issue.[39] Part III addresses the current state of law defined by *Free Enterprise* as well as the purpose behind the Sarbanes-Oxley Act and the PCAOB.[40] Part IV analyzes problems with the PCAOB and discusses how separation of powers and the unitary executive doctrine would work to encourage transparency and accountability for the PCAOB.[41] Part V concludes this Comment with final thoughts on the issues at stake in the structure of the PCAOB.[42]

II. BACKGROUND: PRESIDENTS AND PRECEDENT

Each American president has utilized aspects of the unitary Executive, whether in leadership style or in exercises of power.[43] Even so, the concept of a single Executive did not universally appeal to the public at the time of the Constitution's ratification.[44] The Founders offered three basic arguments in favor of a strong Executive: he would infuse the government with energy,[45] ensure straightforward accountability,[46] and protect the

37. *See infra* Part II.

38. *See infra* Part III, IV. Of course, this goal is purely normative and is proposed with the understanding that genuine legislative support of a broad view of executive power is very unlikely. *See* THE FEDERALIST NO. 51, *supra* note 2, at 349 (James Madison) (noting that separation of powers allows ambition to counteract ambition, motivating each branch to resist the encroachment of others). As will be discussed *infra*, however, Congress might eventually find that by allowing the President to control executive functions, they may, in fact, receive credit from the voters for their successful policymaking.

39. *See infra* Part II.

40. *See infra* Part III.

41. *See infra* Part IV.

42. *See infra* Part V.

43. PRESIDENTIAL POWER, *supra* note 7, at 4.

44. *See* THE FEDERALIST NO. 67, *supra* note 2, at 452–57 (Alexander Hamilton). Hamilton recognized that many opponents of the Constitution used the people's fear of monarchical tyranny to sway them against the idea of a unitary Executive. *See id.* As he wrote in *The Federalist No. 67*:

> Here the writers against the Constitution seem to have taken pains to signalize their talent of misrepresentation. Calculating upon the aversion of the people to monarchy, they have endeavored to enlist all their jealousies and apprehensions in opposition to the intended President of the United States; not merely as the embryo, but as the full-grown progeny, of that detested parent.

Id.

45. *See* THE FEDERALIST NO. 70 (Alexander Hamilton). Hamilton argued that energy in the Executive is "leading character in the definition of good government." *Id.* For an in-depth discussion of this view, *see* Calabresi, *supra* note 2, at 37–39.

46. *See* THE FEDERALIST NO. 70, *supra* note 2 (Alexander Hamilton). Hamilton explains that more than one executive would decrease responsibility and allow the passage of blame from one executive to the next. *Id.* at 479–80. However, it is important to note that constitutionalism, as

Executive Branch from infringement by the legislature.[47] These arguments ultimately prevailed, and Article II of the Constitution emerged.[48] Beyond just their historical importance, though, these arguments of energy, accountability, and separation of powers have shaped the modern debate over the unitary Executive.[49]

The unitary Executive derives from the words of Article II, which provide that "the executive Power shall be vested in a President of the United States of America."[50] Unlike the enumerated powers of Article I,[51] the powers granted in Article II are not meant to be an exhaustive list.[52] Instead, the vesting words of Article II give the President "a residuum of general authority . . . ."[53] And though a cabinet of advisors assists the President in his duties, Article II ultimately holds the President responsible for the law's faithful execution.[54] Particularly relevant to the issue at hand,

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advocated by Hamilton, does not assume one executive will submit to accountability to the people out of the goodness of his heart. *See* MANSFIELD, *supra* note 5, at 185–211. Instead, his accountability is born out of necessity. *See id.* Mansfield explains:

> Modern constitutionalism begins from Aristotle's, or any philosopher's, observation that the claims of justice made by regimes are partisan. But rather than argue with such claims in order to improve them, modern constitutionalism forces the claimants to abandon their partisanship by confronting necessity. Necessity as revealed in the state of nature will compel partisans to consider what is essential, their self-preservation, and to forsake their partisan opinions about the good or godly life.

Id. at 185.

47. *See* Calabresi, *supra* note 2, at 37. In *The Federalist*, Madison and Hamilton both forcefully advocated a strong separation of powers within the federal branches so that the political ambitions of men in one branch would counteract the political ambitions of men in another. *See, e.g.*, THE FEDERALIST NO. 51, *supra* note 2, at 347–53 (James Madison). Madison also recognized that in a republic government, the Legislature would necessarily be the strongest branch and would therefore need an invigorated Executive to check the ambitions of its members. *See id.*

48. U.S. CONST. art. II.

49. *See* Geoffrey P. Miller, *The Unitary Executive in a Unified Theory of Constitutional Law: The Problem of Interpretation*, 15 CARDOZO L. REV. 201, 201–02 (1993).

50. U.S. CONST. art. II.

51. U.S. CONST. art. I. *Cf.* U.S. CONST. amend. X (granting to the states all powers not expressly given to Congress).

52. AMAR, *supra* note 2, at 133. Congress's powers are enumerated, while the President is simply given a general power of execution. *Id.*

53. *Id.*; *see also*, PRESIDENTIAL POWER, *supra* note 7, at 4 ("The president's powers go beyond those specifically enumerated in Article II, Sections 2 and 3, and include at least some implied, residual executive powers like the removal power, as well.").

54. *See* AMAR, *supra* note 2, at 197 ("What Article II *did* make emphatically clear from start to finish was that the president would be personally responsible for his branch. Though he would be aided by subordinates in discharging his many and varied functions, the Constitution took pains to disavow the idea of a collective cabinet or directory behind whom he might hide . . . . Article II required the president alone to openly nominate his candidates, enabling the public to assess the nominator while the Senate assessed the nominees."). One of the original congressmen, James Wilson, described this arrangement as an eye witness to its implementation:

> In the United States, our first executive magistrate is not obnubilated behind the mysterious obscurity of counsellors. Power is communicated to him with liberality, though with ascertained limitations. To him the provident or improvident use of it is to be

the Constitution also gives the President power to appoint "principle officers."[55] According to the Appointments Clause, 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.[56]

The Appointments Clause also implies the President's power to remove these officers.[57] This clause, combined with the President's duty to "take care that the Laws be faithfully executed,"[58] provides the foundation for presidential authority and the theory of the unitary Executive.[59]

A. Executive and Legislative Tension Over Removal Powers[60]

The powers granted by the Appointments Clause create a key battleground for the Executive and Legislative Branches.[61] The President's

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> ascribed. For the first, he will have and deserve undivided applause. For the last, he will be subjected to censure; if necessary, to punishment. He is the dignified, but accountable magistrate of a free and great people.

1 JAMES WILSON, THE WORKS OF JAMES WILSON 319 (Robert Green McCloskey ed., 1967); *see also* Clinton v. Jones, 520 U.S. 681, 712–13 (1997) (Breyer, J., concurring in judgment) (recognizing the President "cannot delegate ultimate responsibility or the active obligation to supervise that goes with it" because Article II "makes a single President responsible for the actions of the Executive Branch"); Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3154 (2010).

55. *See* Buckley v. Valeo, 424 U.S. 1, 132 (1976).

56. U.S. CONST. art. II, § 2, cl. 2.

57. *See* Myers v. United States, 272 U.S. 52, 176 (1926) (holding in favor of the President's independent removal power but later limited by *Humphrey's* to apply only to executive agencies). *C.f.* Humphrey's Ex'r v. United States, 295 U.S. 602, 627–29 (1935) (upholding the President's removal power of independent agency officials subject to "specific cause" limitations set by Congress).

58. U.S. CONST. art. II, § 3.

59. *See generally* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power To Execute the Laws*, 104 YALE L.J. 541 (1994).

60. In the *Free Enterprise* case, the D.C. Circuit used "separation of powers" to describe tension between the Legislative and Executive Branches over the President's control of agencies, particularly in his ability to remove officers. *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 537 F.3d 667, 678–79, 689–93 (D.C. Cir. 2008), *aff'd in part, rev'd in part, and remanded*, 130 S. Ct. 3138 (2010), 130 S. Ct. 3138 (2010); Julian Helisek, *The Fault, Dear PCAOB, Lies Not in the Appointments Clause, but in the Removal Power, That You Are Unconstitutional*, 77 GEO. WASH. L. REV. 1063, 1070–71 (2009). However, "separation of powers" in this Comment will refer more generally to preservation of executive power through the powers of appointment *and* removal. *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting).

61. Miller, *supra* note 49, at 204 ("The principal battleground between the executive and legislative branches under the system of separation of powers is the power to control the administrative state.").

authority to remove officers at his discretion directly conflicts with Congress's creation of the so-called "Fourth Branch"[62]—independent agencies insulated from the President's discretionary removal.[63] This "headless"[64] branch first surfaced as federal government power grew exponentially during the New Deal era.[65]

1. Removal Power Limitations for Quasi-Legislative or Quasi-Judicial Officers

President Franklin Roosevelt developed a new breed of administration energized by politicalization.[66] Yet, even though FDR is credited with founding the "modern activist state,"[67] the open structure of his many administrative agencies allowed him to retain the power of decision.[68] He preserved this power in part by asserting his ability to remove officers for any cause.[69] President Roosevelt predicated his removal power on the Supreme Court's decision in *Myers v. United States*, which upheld the President's power to remove the same officers he had the power to appoint.[70] Yet, as FDR's executive power expanded, Congress began to

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62. For use of this term in greater context, see Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 578 (1984).

63. *See id.* at 607 (noting that presidential control stems substantially from the President's ability to remove officers who do not support or advance his agenda).

64. THE PRESIDENT'S COMM. ON ADMIN. MGMT., ADMINISTRATIVE MANAGEMENT IN THE GOVERNMENT OF THE UNITED STATES 30 (1937).

65. BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 279 (1998). Ackerman draws a connection between the ideas of the Founders and the extent of their natural consequences found within the New Deal. *Id.* He notes:

> [T]he Founding precedent can usefully put the New Deal into historical perspective. But the salient similarities are noticeable only on a wider canvas. As in the 1780's, so in the 1930's, a relatively nationalistic group of revolutionary reformers refused to play by the old higher lawmaking rules—without, however, utterly obliterating the institutional matrix that had previously organized political life. As in the 1780's, so in the 1930's, the reformers created new legitimating patterns out of older institutional materials—finally earning the credibility needed to make new higher law in the name of We the People. As in the 1780's, so in the 1930's, their accelerating institutional bandwagon proceeded from a signaling phase through a series of appeals to the People at the polls to a period of consolidation. In all these senses—and more—the New Deal revolution carried forward the Founders' unconventional experiment in popular sovereignty into the twentieth century.

Id.

66. PRESIDENTIAL POWER, *supra* note 7, at 278.

67. ACKERMAN, *supra* note 65, at 279.

68. PRESIDENTIAL POWER, *supra* note 7, at 279.

69. *See id.*

70. Myers v. United States, 272 U.S. 52, 119 (1926) ("The view of Mr. Madison and his associates was that not only did the grant of executive power to the President in the first section of article 2 carry with it the power of removal, but the express recognition of the power of appointment in the second section enforced this view on the well-approved principle of constitutional and

assert its own control over the new administrative structure.[71] The tension between the Executive and Legislative Branches came to a head in the Supreme Court decision of *Humphrey's Executor v. United States.*[72] The decision openly suppressed Roosevelt's power of decision.[73] Up until 1935, FDR had worked without opposition to establish his administrative network and to assert complete executive control over its officers through the appointment and removal power upheld in *Myers.*[74] In *Humphrey's Executor*, however, the Supreme Court short-circuited President Roosevelt's unitary agenda.[75] Distinguishing *Myers* almost into oblivion,[76] the Court

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statutory construction that the power of removal of executive officers was incident to the power of appointment."). The Court also explained how the removal power was tied directly to the basic executive power, noting:

> The power of removal is incident to the power of appointment, not to the power of advising and consenting to appointment, and when the grant of the executive power is enforced by the express mandate to take care that the laws be faithfully executed, it emphasizes the necessity for including within the executive power as conferred the exclusive power of removal.

Id. at 122. It is helpful to note for historical comparison that in *The Federalist No. 77*, Hamilton recognized the constitutional inference of presidential removal power, but noted that "[t]he consent of [the Senate] would be necessary to displace as well as to appoint." THE FEDERALIST NO. 77, *supra* note 2, at 515 (Alexander Hamilton).

71. *See also* Calabresi, *supra* note 2, at 33–34. Calabresi notes that the "enormous, mind-boggling growth in federal governmental power" sparked by the New Deal drastically changed the distribution of power between the President and Congress. *Id.* He suggests it is even difficult to tell whether the executive power has increased or decreased due to the subtle ways in which the President has lost or gained power through the administrative system. *Id.* As an additional note, Calabresi concludes that because the system of incentives and accountability has remained stronger in the Executive: "The net result . . . is an unmitigated redistributive disaster that no one would defend if they thought about it and that as a practical matter can only be ameliorated by strengthening presidential power . . . ." *Id.* at 34; *see also infra* Part IV.B.

72. 295 U.S. 602 (1935).

73. PRESIDENTIAL POWER, *supra* note 7, at 287. Calabresi and Yoo note specifically that "Roosevelt regarded his defeat in *Humphrey's Executor* as a personal affront. Even more important, it threatened his ability to coordinate the execution of the law." *Id.*

74. *Id.* at 283.

75. FDR's administration represented the respondent in *Humphrey's Executor* and relied heavily on the *Myers* decision in its brief and oral argument to support a hard-line view of the unitary executive. *Id.* at 284.

76. The Court took the removal power upheld in *Myers* and limited it to purely executive officers, finding that the "actual decision" in *Myers* merely relied on the theory that "such an officer is merely one of the units in the executive department and, hence, inherently subject to the exclusive and illimitable power of removal by the Chief Executive, whose subordinate and aid he is." *Humphrey's Ex'r*, 295 U.S. at 627. The Court went on to hold that

> the necessary reach of the [*Myers*] decision goes far enough to include all purely executive officers. It goes no farther; much less does it include an officer who occupies no place in the executive department and who exercises no part of the executive power vested by the Constitution in the President.

Id. at 627–28. Contrasting *Myers*'s support of removal power over the post-master general, the Court noted that as the FTC enforced statutory prohibitions of "unfair methods of competition," it acted as a quasi-legislative body. *Id.* at 628. When it acted as a master in chancery for the adjudication of such claims, the FTC acted as a quasi-judicial body. *Id.* The Court concluded that "[t]o the extent that [the FTC] exercises any executive function—as distinguished from executive power in the constitutional sense—it does so in the discharge and effectuation of its quasi-legislative or quasi-judicial powers, or as an agency of the legislative or judicial departments of the government." *Id.*

upheld congressional restrictions on the President's removal power of members of the Federal Trade Commission ("FTC").[77] The Court's analysis sprung from a candid understanding of new agency functions at the time of the New Deal.[78] The Court explained:

> The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid. Such a body cannot in any proper sense be

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77. *Id.* at 629. The Court upheld fixed terms for members of the FTC and "for cause" restrictions on their removal due to the informational and nonpartisan purposes of the FTC. *Id.* at 621–26. According to the decision of *FTC v. Eastman Kodak Co.*, 274 U.S. 619 (1927), the FTC functionally is

> empowered to prevent the using of "unfair methods of competition" in interstate and foreign commerce, and, if it finds that "any unfair method of competition" is being used, to issue an order requiring the offender "to cease and desist from using such method of competition." The [Federal Trade] Commission exercises only the administrative functions delegated to it by the [Federal Trade Commission] Act . . . .

Id. at 623 (quoting Nat'l Harness Mfrs. Ass'n v. FTC, 268 F. 795, 707 (1920)).

78. One of the major constitutional contributions of the New Deal was that of congressional delegation of legislative functions. *See* PATRICK M. GARRY, AN ENTRENCHED LEGACY: HOW THE NEW DEAL CONSTITUTIONAL REVOLUTION CONTINUES TO SHAPE THE ROLE OF THE SUPREME COURT 20 (2008). As the "fourth branch" grew in size and power, Congress found it necessary to leave many legislative functions to agencies, as Congress could no longer anticipate the legal framework required for the agency's purpose. *See id.*; *see, e.g.*, Lichter v. United States, 334 U.S. 742, 785 (1948) ("It is not necessary that Congress supply administrative officials with a specific formula for their guidance in a field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program."). In a line of post-New Deal cases, the Supreme Court swept aside the traditional constitutional construction of nondelegation (barring delegation of legislative power) in favor of the "flexibility" afforded to agencies by legislative delegation. GARRY, *supra*, at 20; *see, e.g.*, Yakus v. United States, 321 U.S. 414, 425–26 (1944). Since its decision in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), the Court has not overturned any federal legislation for violating the nondelegation doctrine. GARRY, *supra*, at 22. The reasons for this may be twofold, as suggested by Prof. Michael Hertz:

> First, well-known, and no doubt most important, is simply a straightforward assessment of the merits; the current Justices, like their predecessors, have concluded that a nondelegation doctrine with teeth would be unmanageable and unenforceable in a consistent way. A second factor is likely also at work here. The Court's nondelegation nondoctrine enhances the authority of agencies at the expense of Congress. The Court seems not unhappy with such a shift. It insists—in a counterfactual effort to maintain constitutional form, as under *Chevron*—that Congress has made a meaningful decision and that the agency is not "legislating."

Michael Hertz, *The Rehnquist Court and Administrative Law*, 99 NW. U. L. REV. 297, 358 (2004). For a discussion of the Court's aversion to nondelegation "with teeth," see *id.* at 358, n.300 (citing Mistretta v. United States, 488 U.S. 361, 372 (1988) (recognizing Congress "simply cannot do its job absent an ability to delegate power under broad general directives")); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1693–97 (1975) ("While the courts might in some cases more carefully limit broad legislative delegations through statutory construction, any large-scale enforcement of the nondelegation doctrine would clearly be unwise. Detailed legislative specification of policies under contemporary conditions would be neither feasible nor desirable in many cases, and the judges are ill-equipped to distinguish contrary cases.").

characterized as an arm or an eye of the executive. Its duties are performed without executive leave and, in the contemplation of the statute, must be free from executive control.[79]

The *Humphrey's Executor* decision drastically limited the President's removal powers by confining *Myers* to purely executive agencies and purely Executive Branch offices.[80] Perhaps even more significantly, the Court essentially created a class of independent agencies insulated from executive control.[81]

The Court revisited presidential removal power and its decision in *Humphrey's Executor* only once more before 1988.[82] In the case of *Wiener v. United States*, the Court upheld this functional distinction between purely executive and quasi-legislative or quasi-judicial agencies.[83] *Wiener* compared President Eisenhower's removal power over the War Powers Commission with President Roosevelt's power over the FTC.[84] The Court concluded that because, like the FTC, the War Powers Commission functioned as a quasi-judicial agency,[85] President Eisenhower had no power to remove a member of the War Powers Commission without cause, even though the governing statute did not explicitly impose limits on removal.[86]

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79. *Humphrey's Ex'r*, 295 U.S. at 628.

80. The Court explained that the *Myers* case supports the principle that a purely executive officer "is merely one of the units in the executive department and, hence, inherently subject to the exclusive and illimitable power of removal by the Chief Executive." *Id.* at 627. However, the Court also noted that "the necessary reach of the [*Myers*] decision goes far enough to include all purely executive officers. It goes no farther . . . ." *Id.* at 627–28. *See also* PRESIDENTIAL POWER, *supra* note 7, at 285.

81. *See* Wiener v. United States, 357 U.S. 349, 353 (1958) ("Humphrey's case was a *cause célèbre*—and not least in the halls of Congress. . . . It drew a sharp line of cleavage between officials who were part of the Executive establishment and were thus removable by virtue of the President's constitutional powers, and those who are members of a body 'to exercise its judgment without the leave or hindrance of any other official or any department of the government,' as to whom a power of removal exists only if Congress may fairly be said to have conferred it. This sharp differentiation derives from the difference in functions between those who are part of the Executive establishment and those whose tasks require absolute freedom from Executive interference." (citations omitted)). The Court in *Humphrey's Executor* rejected Chief Justice Taft's dicta in *Myers*, which suggested that the rationale supporting the President's removal powers might be extended to include agencies with quasi-judicial functions. *See Humphrey's Ex'r*, 295 U.S. at 627–28 ("Putting aside *dicta*, which may be followed if sufficiently persuasive but which are not controlling, the necessary reach of the decision goes far enough to include all purely executive officers."); Myers v. United States, 272 U.S. 52, 135 (1926); *see also* LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 62–63 (2007).

82. The Court's decision in *Bowsher v. Synar* resurrected a discussion of *Humphrey's Executor* and *Myers* in 1986, but the case focused on whether Congress could vest executive functions in the Comptroller General, an officer controlled solely by the Legislative Branch. *See* Bowsher v. Synar, 478 U.S. 714 (1986). The next case addressing presidential removal power was *Morrison v. Olson*, 487 U.S. 654 (1988). *Cf.* Dan Balhoff, Bowsher v. Synar*: Separation of Powers, the Removal of Officers, and the Administrative State*, 47 LA. L. REV. 617, 626 (1987); FISHER, *supra* note 81, at 71.

83. *Wiener*, 357 U.S. at 353.

84. *See id.* at 354; *see also infra* note 86 and accompanying text.

85. *Wiener*, 357 U.S. at 356.

86. The Court noted with rhetorical flourish:

If, as one must take for granted, the War Claims Act precluded the President from

The Court's holding severely clashed with President Eisenhower's emphasis on unitary executive influence over independent agencies.[87] Yet, citing *Humphrey's Executor*, the Court made the plain statement that the Constitution does not give the President the power to remove officers without cause from an agency with quasi-judicial functions.[88]

2. Removal Power Limitations for Purely Executive Officers

Thirty years later, the Court solidified its limits on presidential removal power. In *Morrison v. Olson*, the Court addressed the issue of whether Congress could constitutionally impose a "good cause" restriction on the President's removal power over purely executive officers.[89] The case addressed Congress's construction of the Ethics in Government Act of 1978, which authorized the Attorney General to appoint an "independent counsel" empowered to investigate and prosecute high-ranking government officials.[90] The Act imposed a restriction that allowed the President, through the Attorney General, to remove the independent counsel only after a showing of "good cause."[91] The Court upheld the Act, most significantly indicating that even officers conducting quintessentially executive activities could be at least partially shielded from presidential removal power through the vesting of removal power in an "alter ego"[92] like the Attorney General. Like his predecessors, President Ronald Reagan and his administration opposed the ruling and argued that such restrictions impeded the President's ability to "take Care that the Laws be faithfully executed . . . ."[93] As the

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> influencing the [FTC] in passing on a particular claim, *a fortiori* must it be inferred that Congress did not wish to have hang over the [FTC] the Damocles' sword of removal by the President for no reason other than that he preferred to have . . . men of his own choosing [within the FTC].

Id.; *see also* PRESIDENTIAL POWER, *supra* note 7, at 324. As noted in the quotation above, the Court simply inferred Congress's intent to limit removal power from the quasi-judicial nature of the FTC.

87. *See* PRESIDENTIAL POWER, *supra* note 7, at 323–25. Much like FDR, Eisenhower used multiple avenues of influence over independent agencies. *Id.* at 323. By assigning policy studies to the commissions and notifying them of his legislative and budgetary priorities, Eisenhower tried to incorporate independent agencies into the Executive Branch and change agency commissioners into executive officers. *Id.*

88. *See Wiener*, 357 U.S. at 356.

89. Morrison v. Olson, 487 U.S. 654, 659–61 (1988).

90. *Id.* at 660; *see also* FISHER, *supra* note 81, at 71.

91. *Morrison*, 487 U.S. at 663; *see also id.* at 686 n.23 (allowing an independent counsel to be removed through impeachment and conviction or by the action of the Attorney General for "physical disability, mental incapacity, or any other condition that substantially impairs the performance" of the counsel's duties).

92. *Id.* at 688–92 ("[B]ecause the independent counsel may be terminated for 'good cause,' the Executive, through the Attorney General, retains ample authority to assure that the counsel is competently performing his or her statutory responsibilities in a manner that comports with the provisions of the Act."); *see also* PRESIDENTIAL POWER, *supra* note 7, at 378.

93. U.S. CONST. art. II, § 3; *see also* PRESIDENTIAL POWER, *supra* note 7, at 377.

Solicitor General's amicus brief reasoned, "[t]he independent counsel statute violates the plain meaning of those words by taking an important part of the executive power . . . away from the President and assigning it to a person unaccountable to the President . . . ."[94] The Court's ruling in *Morrison* set precedent against a unitary-executive interpretation of removal power.[95] Yet, despite limiting presidential removal, *Morrison* also carved out alternative opportunities for executive power through the Appointments Clause, as will be discussed below.[96]

B. *Legislative and Executive Tension Over the Appointments Clause*

Though the removal power is often a source of conflict between the unitary Executive and Congress, the President's appointment power is just as inflammatory.[97] In key decisions regarding the appointment power, the Supreme Court has focused on finding a test for which government employees qualify as officers appointable by the President.[98] In its modern decisions on the Appointments Clause, the Court builds upon a century-old judicial distinction between principal and inferior officers:

> The Constitution for purposes of appointment very clearly divides all its officers into two classes. The primary class requires a nomination by the President and confirmation by the Senate. But foreseeing that when offices became numerous, and sudden removals necessary, this mode might be inconvenient, it was provided that, in regard to officers inferior to those specially mentioned, Congress might by law vest their appointment in the President alone, in the courts of law, or in the heads of departments.[99]

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94. Brief for the United States as Amicus Curiae Supporting Appellees, Morrison v. Olson, 487 U.S. 654 (1988) (No. 87-1279), 1988 WL 1031600, at *5–6.

95. *See* PRESIDENTIAL POWER, *supra* note 7, at 378.

96. Though *Morrison* specifically addressed constitutional limits on the removal power, it also discussed the foundational inquiry necessary for analysis of the Appointments Clause, a natural segue considering that the former is simply the inverse of the latter. *See generally* Chad N. Eckhardt, Free Enterprise Fund v. Public Company Accounting Oversight Board*: The Decision That Corporate America May Forever Be Waiting For*, 36 N. KY. L. REV. 143, 147–48 (2009).

97. *See generally* MICHAEL GERHARDT, THE FEDERAL APPOINTMENTS PROCESS 81–180 (2000). Gerhardt's work suggests that the friction triggered by the appointments power and tensions triggered by the removal power are somewhat of a matched set. *Id.* Congress reins in a President's calculated removal action by creating offices that are not purely executive. *See supra* Part II.A; *infra* Part II.B. In the same way, Congress seeks to limit presidential appointment power by creating officer positions that are not "principal" according to the terms of the Appointments Clause. *See* GERHARDT, *supra*, at 153. "The Appointments Clause empowers Congress to create (and, by implication, to eliminate) confirmable positions, and U.S. history is replete with examples of congressional attempts to use this power to facilitate the [L]egislative [B]ranch's control over the federal appointments process." *Id.*

98. GERHARDT, *supra* note 97, at 158–59; *see also* United States v. Hartwell, 73 U.S. (6 Wall.) 385, 393 (1867) ("An office is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties.").

99. United States v. Germaine, 99 U.S. 508, 509–10 (1878), *relied upon by* Buckley v. Valeo,

1. Appointment Power Over Independent Agencies

In *Buckley v. Valeo*, the Court clarified the distinction between classes of officers and upheld the President's power over the appointment of principal officers.[100] The case addressed the constitutionality of the Federal Election Campaign Act, which among many other purposes gave Congress the power to appoint four of the six members on the Federal Election Commission ("FEC").[101] The appellee-FEC argued that because Congress holds special authority over the regulation of elections, the Appointments Clause should also be read to give Congress appointment power over officers in charge of regulating elections.[102] The Court responded with a strong defense of formalistic separation of powers, holding that it saw no reason to believe that "the authority of Congress over federal election practices is of such a wholly different nature from the other grants of authority to Congress that it may be employed in such a manner as to offend well-established constitutional restrictions stemming from the separation of powers."[103] The *Buckley* Court softened the edges of its previous precedent and offered more deference to the Executive by noting that "[t]he Court in [*Humphrey's Executor*] carefully emphasized that although the members of such agencies were to be independent of the Executive in their day-to-day operations, the Executive was not excluded from selecting them."[104] Although the Court acknowledged that an agency of "an investigative and informative nature" could be appointed by Congress,[105] the Necessary and

424 U.S. 1, 125–26 (1976).

100. *Buckley*, 424 U.S. at 143; *see also* GERHARDT, *supra* note 97, at 158. The *Buckley* Court specifically sought to preserve separation of powers and the President's power of appointment.

101. *See Buckley*, 424 U.S. at 126–27 ("Although two members of the [FEC] are initially selected by the President, his nominations are subject to confirmation not merely by the Senate, but by the House of Representatives as well. The remaining four voting members of the [FEC] are appointed by the President *pro tempore* of the Senate and by the Speaker of the House. While the second part of the Clause authorizes Congress to vest the appointment of the officers described in that part in 'the Courts of Law, or in the Heads of Departments,' neither the Speaker of the House nor the President *pro tempore* of the Senate comes within this language.").

102. *Id.* at 131–32.

103. *Id.* at 132.

104. *Id.* at 133 (citing Humphrey's Ex'r v. United States, 295 U.S. 602, 625–26). The relevant portion of *Humphrey's Executor* points out:

> The debates in both houses demonstrate that the prevailing view was that the commission was not to be "subject to anybody in the government but . . . only to the people of the United States"; free from "political domination or control" or the "probability or possibility of such a thing"; to be "separate and apart from any existing department of the government—not subject to the orders of the President."

Humphrey's Ex'r, 295 U.S. at 625 (omission in original). In *Humphrey's Executor*, the Court emphasized that the members of the Federal Trade Commission members were "called upon to exercise the trained judgment of a body of experts 'appointed by law and informed by experience.'" *Id.* at 624.

105. *Buckley*, 424 U.S. at 137.

Proper Clause[106] did not extend so far as to allow Congress to appoint officers of the United States performing an executive function.[107] Put another way, the *Buckley* decision provided a much-needed bookend to *Humphrey's Executor.* The Court particularly emphasized that although *Humphrey's Executor* upheld restrictions on removal power, it did not stand for the proposition that the President could not exercise his appointment power over officers in such agencies, even if they were of a quasi-legislative or quasi-judicial nature.[108]

2. Definitions for Appointable "Principal Officers"

The *Buckley* decision set the stage for the next legal battles over how executive officers should be appointed. The Court used its decisions in *Morrison* and *Edmond v. United States*[109] to develop a clearer test[110] for appointments.[111] *Morrison* declined to draw any bright line between inferior or principal officers, yet it drew upon several key factors to determine that the independent counsel at issue was in fact an inferior officer.[112] In *Edmond,* the Court explained the distinction: "[I]n the context of a Clause designed to preserve political accountability[,] . . . we think it evident that 'inferior officers' are officers whose work is directed and supervised at some level by others who were appointed by presidential nomination with the

106. U.S. CONST. art. I, § 8, cl. 18 (giving Congress the power "[t]o make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.").

107. *Buckley*, 424 U.S. at 134–35; *see also* GERHARDT, *supra* note 97, at 158.

108. *See Buckley*, 424 U.S. at 133. Though more about congressional limits than presidential power, *Bowsher v. Synar* also offers a supporting piece to the *Buckley* Court's framework. *See* GERHARDT, *supra* note 97, at 159. In *Bowsher*, the Court struck down the Balanced Budget and Emergency Deficit Control Act of 1985, which vested the comptroller general, an officer removable only by Congress, with executive functions, including the implementation of policies for deficit reduction. *See* Bowsher v. Synar, 478 U.S. 714 (1986). The Court pointed out, "[t]he Constitution does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts." *Id.* at 722 (citing later the decision of *INS v. Chadha*, 462 U.S. 919 (1983), where the Court struck down a single-house "legislative veto" provision giving each house of Congress the power to reverse a decision of the attorney general).

109. 520 U.S. 651 (1997).

110. The Court freely acknowledged that the Founders left very little guidance on where to draw the line between inferior and principal officers. *See* Morrison v. Olson, 487 U.S. 655, 671 (1988). Perhaps this is why the Court in *Morrison* declined to draw the line at all. *See id.* at 671 ("We need not attempt here to decide exactly where the line falls between the two types of officers . . . ."). Despite this declaration, the *Morrison* Court did in fact outline four factors to begin the inquiry: (1) whether the officer can be removed by a superior executive officer; (2) the scope of the officer's duties; (3) the scope of the officer's jurisdiction; and (4) any limitations on the officer's tenure. *Id.* at 670–71.

111. *See* Eckhardt, *supra* note 96, at 146.

112. *Edmond*, 520 U.S. at 661. "[W]e [the Court] relied on several factors: that the independent counsel was subject to removal by a higher officer (the Attorney General), that she performed only limited duties, that her jurisdiction was narrow, and that her tenure was limited." *Id.* (citing *Morrison*, 487 U.S. at 671–72). In *Edmond,* the Court upheld the appointment of civilian Coast Guard judges by the Secretary of Transportation because the judges were inferior officers by the terms of the Appointments Clause. *Id.* at 666.

advice and consent of the Senate."[113] In many ways, this description is a succinct summation of the factors discussed in *Morrison*.[114] An officer's supervisors, duties, jurisdiction, and tenure all roughly estimate whether he or she is *directed and supervised* by a higher officer.[115] This connection may explain why some courts still look to *Morrison* for guidance to answer the *Edmond* test.[116] In the end, the *Morrison/Edmond* interpretation of principal and inferior officers provides the modern foundation for the President's appointment power over principal officers.[117]

The *Edmond* Court explained the implications of the Appointments Clause for separation of powers: "By vesting the President with the exclusive power to select the principal (noninferior) officers of the United States, the Appointments Clause prevents congressional encroachment upon the Executive and Judicial Branches."[118] Yet even with these inherent protections, the tension between the Executive and Legislative Branches over the administrative state has only become more complex since the

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113. *Id.* at 663. The *Edmond* case is one of three cases since *Morrison* where the Court has taken the opportunity to reject challenges to nonpresidential appointments. GERHARDT, *supra* note 97, at 160. Prior to *Edmond*, the Court decided the cases of *Freytag v. Commissioner*, 501 U.S. 868 (1991), and *Weiss v. United States*, 510 U.S. 163 (1994). In *Freytag*, the Court held that the chief judge of the Tax Court could appoint special tax judges under the Tax Reform Act of 1984. *See Freytag*, 501 U.S. at 891–92. The Court reasoned that because the Tax Court was primarily a court of law rather than an executive "department," it could hold limited appointment power while providing appropriately constitutional diffusion of the power. *Id.* at 892. Despite its decision to expand nonpresidential appointment powers, the Court also recognized,

> [t]he Appointments Clause prevents Congress from distributing power too widely by limiting the actors in whom Congress may vest the power to appoint. The Clause reflects our Framers' conclusion that widely distributed appointment power subverts democratic government. Given the inexorable presence of the administrative state, a holding that every organ in the Executive Branch is a department would multiply indefinitely the number of actors eligible to appoint.

Id. at 885. In *Weiss*, the Court upheld the appointment power of the judge attorney general for the selection of military judges for special and general court-martial. *Weiss*, 510 U.S. at 175–76. Relying on the status of the military judges as presidentially appointed, commissioned officers, the Court noted,

> while Congress may create an office, it cannot appoint the officer; . . . the officer can only be appointed by the [P]resident with the approval of the [S]enate. . . . [O]fficers of the United States who had been theretofore appointed by the [P]resident and confirmed by the [S]enate, we do not think that, because additional duties, germane to the offices already held by them, were devolved upon them by the act, it was necessary that they should be again appointed by the [P]resident and confirmed by the [S]enate . . . .

Weiss, 510 U.S. at 173–74 (quoting Shoemaker v. United States, 147 U.S. 282, 300–01 (1893)).

114. *See* Helisek, *supra* note 60, at 1069.

115. *Id.*

116. *See, e.g.*, Stanley v. Gonzales, 476 F.3d 653, 659 (9th Cir. 2007) ("Generally, if an officer is limited in 'tenure, duration, [and] . . . duties,' those findings lead to the conclusion that she is an inferior officer. . . . It is well established that Congress may vest the appointment of inferior officers in the Department of Justice.").

117. *See* Helisek, *supra* note 60, at 1069.

118. *Edmond*, 520 U.S. at 659.

development of the Court's precedent on the issue.[119] Perhaps this is why, notwithstanding the popular accountability of the Executive[120] and the direction of the Court, Congress has continued to create complex schemes to avoid entanglement with the Appointments Clause. After years of silence on the issue,[121] the Court has now ruled upon, without directly answering, *Free Enterprise*'s question regarding the "next generation"[122] of Congress's conflict with presidential appointment and removal powers.[123]

III. CURRENT STATE OF THE LAW: *FREE ENTERPRISE* AND THE PCAOB

The precedent and philosophy supporting the Appointments Clause suggest why the current state of the law for the PCAOB has now become so pivotal.[124] Judge Kavanaugh of the D.C. Circuit described *Free Enterprise* as the most important case on the President's appointment and removal powers to occur in the past twenty years.[125] This "case of first impression"[126] brings the unitary Executive into conflict with the will of Congress in an unprecedented fashion.[127] Because the PCAOB is an independent agency under the control of another independent agency, its structure cannot coexist with the unitary executive perspective.[128] It is the first agency to be completely and permanently exempt from executive oversight.[129] In order to understand the true impact of the case, however, it is first necessary to examine the roots of the PCAOB.

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119. *See* PRESIDENTIAL POWER, *supra* note 7, at 424–31.

120. *See generally* Calabresi, *supra* note 2, at 58–60.

121. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667, 685 (D.C. Cir. 2008), *aff'd in part, rev'd in part, and remanded*, 130 S. Ct. 3138 (2010) (Kavanaugh, J., dissenting).

122. *See* Petition for a Writ of Certiorari, *supra* note 24, at 8 ("In creating the Board, Congress deliberately sought to test the outer boundaries of its ability to reduce Presidential power, by establishing a '"Fifth Branch" of the Federal Government' (Pet. App. 72a) over which the President has markedly less control than he exercises over traditional 'Fourth Branch' independent agencies like the SEC, which 'up to now have [reflected] the outermost constitutional limits of permissible congressional restrictions' on the President (Pet App. 67a)."); *see also supra* note 62 and accompanying text.

123. *See Free Enter. Fund*, 129 S. Ct. 2378 (2009), *aff'd in part, rev'd in part, and remanded*, 130 S. Ct. 3138 (2010).

124. *See infra* Part III.

125. *See Free Enter. Fund*, 537 F.3d at 685 (Kavanaugh, J., dissenting), *cert. granted*, 129 S. Ct. 2378.

126. Petition for a Writ of Certiorari, *supra* note 24, at 7 (citation omitted).

127. Richard H. Pildes, *Separation of Powers, Independent Agencies, and Financial Regulation: The Case of the Sarbanes-Oxley Act*, 5 N.Y.U. J.L. & BUS. 485, 486–87 (2009). Pildes proposes that "the challengers to the [Sarbanes-Oxley] Act present this constitutional struggle as the latest battlefront over the 'unitary executive branch' theory of the Constitution." *Id.* at 486.

128. Unlike the temporary independent counsel law upheld in *Morrison* or the nonpresidential judicial appointments upheld in *Edmond* and *Freytag*, the PCAOB is permanently insulated from the Executive Branch because its members are removable only by an independent agency whose members are removable only for good cause. This characteristic does not change even in light of the Supreme Court's ruling. *See infra* Part IV.

129. *See* Pildes, *supra* note 127, at 487–88; *c.f.* 15 U.S.C. § 7211 (2006).

A. Purpose and Structure of the PCAOB

The "sweeping reform"[130] of the Sarbanes-Oxley Act established the PCAOB for the purpose of confronting the embarrassing auditing scandals of the late 1990s and early 2000s.[131] Congress intended the Board to protect the interests of investors and the public by ensuring accurate and independent auditing of public companies.[132] To carry out this purpose, Congress designed the Board to police independently the auditors of public companies.[133] The PCAOB possesses a broad array of enforcement powers, including the ability to create auditing standards,[134] enforce compliance with such standards,[135] conduct investigations into accounting company compliance,[136] hold disciplinary proceedings,[137] and impose sanctions for violations.[138]

Notably, Congress gave this new Board a function traditionally left to a confederation of private organizations facilitating the auditing companies' self-regulation.[139] Congress intended the Board to be "independent" above and beyond the industry's self-regulation,[140] but it created the Board to

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

131. Pildes, *supra* note 129, at 486. For an in-depth discussion of the "Big Four" scandals (Enron, Global Crossing, Qwest, and World Com), see Cunningham, *supra* note 12, at 928–37. It is interesting to note that of these four incidents, the Sarbanes-Oxley Act mentions two by name in its section requiring a General Accounting Office study of investment banks. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 705(a), 116 Stat. 745 (2002). Such a mention highlights the focus of the act and illustrates Congress's intent to confront the public chagrin over financial dishonesty.

132. 15 U.S.C.S. § 7211 (LexisNexis 2006).

133. *Id.*; *see also* MICHAEL V. SEITZINGER & ELIZABETH BAZAN, CONG. RESEARCH SERV., RL 31879, SECURITIES LAW: SARBANES-OXLEY ACT OF 2002 AND SELECTED 108TH CONGRESS BILLS CONCERNING CORPORATE ACCOUNTABILITY 1 (2003), http://digital.library.unt.edu/ark:/67531/metacrs4660/m1/1/high_res_d/.

134. 15 U.S.C. § 7213(a)(1).

135. *Id.* § 7214(a).

136. *Id.* § 7215(b)(1).

137. *Id.* § 7215(c)(4).

138. *Id.*; *see also U.S. Tax Shelter Industry: The Role of Accountants, Lawyers, and Financial Professionals: Hearings Before the Permanent Subcomm. on Governmental Affairs, U.S. S.*, 108th Cong. 350 (2003) [hereinafter *Hearings*] (prepared statement of William J. McDonough, Chairman of the Public Company Accounting Oversight Board).

139. *See* Pildes, *supra* note 127, at 486. *See also* Michael A. Carvin et al., *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, 202 (2007). The shortcomings of the self-regulation system for auditors provided a unifying theme for Congress's consideration of the new PCAOB. A parade of testifying witnesses noted that the confusing network of auditor oversight organizations created a "positively Byzantine structure of accounting disciplinary bodies which generally lack adequate and assured financial support, clear and undivided responsibility for discipline, and an effective system of SEC oversight." *Accounting Reform and Investor Protection Issues Raised by Enron and Other Public Companies: Hearings Before the Senate Comm. on Banking, Hous., and Urban Affairs*, 107th Cong. 532 (2002) (testimony of Joel Seligman, Dean and Ethan A.H. Shepley Univ. Professor, Washington Univ. Sch. of Law).

140. *See* Nagy, *supra* note 18, at 1003–04. Prior to the enactment of the Sarbanes-Oxley Act,

mirror the structure of a corporation, rather than a government agency.[141] As a technically private creation, the Board's rules are subject to SEC approval as products of a "registered securities association."[142] The budget of the PCAOB is approved by the SEC,[143] but its funding relies solely on the fees the Board excises from public companies and other issuers of securities.[144]

Set permanently in this quasi-private, quasi-public purgatory, the Board represents what Senator Phil Gramm described as "a strange kind of entity [in that we] want it to be private, but we want it to have governmental powers."[145] Testimony on the legislative history of Sarbanes-Oxley reveals the prevailing interest[146] in the Board's unorthodox structure: "Without

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Congress also considered at least four different alternative mechanisms for enforcement of new standards for accounting firms conducting public company audits. *See id.* at 1001–03. Nagy notes:

> Four proposals are particularly important to an understanding of the PCAOB. The first was a bill (H.R. 3763) sponsored by Representative Michael Oxley (R-Ohio) . . . [and] titled "The Corporate and Auditing Accountability, Responsibility, and Transparency Act" (CAARTA)[, which] . . . required the SEC to establish criteria for "public regulation organizations," but the bill itself did not actually create such an entity. CAARTA's critics favored an alternative bill (H.R. 3818) sponsored by Representative John LaFalce (D-N.Y.), that required the SEC to establish a "Public Accounting Regulatory Board." The third proposal took the form of a draft bill disseminated by Senator Michael Enzi (R-Wyo.), with input from Senator Phil Gramm (R-Tex.), that required the SEC to establish a "Professional Standards Board." The last of these proposals was a bill (S. 2004) co-sponsored by Senators Christopher Dodd (D-Conn.) and Jon Corzine (D-N.J.) requiring the SEC to create an "Independent Public Accounting Board."

Id. at 1001. Nagy goes on to explain that a comparison of these proposals to the eventual structure of the PCAOB shows a distinct lack of partisan push for the Board to be in the public or private sector. *Id.* Rather, Congress essentially decided to have its cake and eat it too by creating a quasi-private entity holding powers delegated by the federal government. *See* 148 Cong. Rec. S6337 (daily ed. July 8, 2002) (statement of Sen. Phil Gramm) (describing the PCAOB as "a strange kind of entity [in that we] want it to be private, but we want it to have governmental powers"); *see also supra* note 23 and accompanying text.

141. *See* 15 U.S.C.S. § 7211 (LexisNexis 2006); *see also* SEITZINGER & BAZAN, *supra* note 133, at 1–2.

142. SEITZINGER & BAZAN, *supra* note 133, at 4. The SEC emerged in the Securities Exchange Act of 1934 during the country's recovery after the Great Depression. *See generally* Securities Exchange Act of 1934 § 2, 15 U.S.C. § 78d. As the statutory parent of the PCAOB, the SEC is an independent agency entrusted with the administration of securities and finance laws. *See, e.g.*, S. Rep. No. 110-417, at 107 (2009). The mission of the agency is "to administer and enforce Federal securities laws in order to protect investors, maintain fair, honest, and efficient markets, and promote capital formation. This includes ensuring full disclosure of financial information, regulating the Nation's securities markets, and preventing and policing fraud and malpractice in the securities and financial markets." *Id.*

143. *See* 15 U.S.C.S. § 7211; *see also Hearings*, *supra* note 138, at 351 (prepared statement of William J. McDonough) ("The Securities and Exchange Commission . . . approved [the budget of $68 million for the Board's first fiscal year] . . . and we [the Board] have sent invoices to public companies and other issuers of securities—based on their relative equity market capitalizations, in accordance with the Act—to fund it.").

144. 15 U.S.C. § 7219(b)–(d); *see also Hearings*, *supra* note 138, at 351 (prepared statement of William J. McDonough).

145. 148 CONG. REC. S6337 (daily ed. July 8, 2002) (statement of Sen. Phil Gramm). For a summary of Sen. Gramm's connection to the PCAOB, see *supra* note 23 and accompanying text.

146. *See* Carvin et al., *supra* note 139, at 203–04 (citing 148 CONG. REC. S6331 (daily ed. July 8, 2002) (statement of Sen. Sarbanes) ("I believe, frankly, that we need to establish this oversight board in statute in order to provide an extra guarantee of its independence and its plenary authority to deal

independence and neutrality, standards setters cannot effectively withstand the myriad of constituent pressures that it inevitably will face to make the tough decisions that it inevitably will need to make."[147] The PCAOB replaces the American Institute of Certified Public Accountants with a five-member board, appointed and supervised by the SEC.[148] A majority of the five members must be non-CPAs, and the chairman must have abstained from practicing public accounting for at least five years before joining the Board.[149] Each member serves for a five-year term with a two-term limit and, before the Supreme Court decision,[150] no member could be removed by the SEC except "for good cause,"[151] defined as: "willful violations of the [Sarbanes-Oxley] Act, Board rules, or the securities laws; willful abuse of authority; or unreasonable failure to enforce compliance—as determined in a formal Commission order . . . ."[152]

Although the Board's structure is unique, its purpose is not.[153] Since the 1930s, the SEC has overseen regulation of the securities market by a wide variety of public, private, and quasi-private organizations.[154] These entities collaborated under the plenary supervision of the SEC to regulate capital markets.[155] The Board's design thus reflects Congress's attempt to echo the industry's system of regulation while answering the public scandals with the weight of government leadership.[156]

with this important situation.")).

147. *Accounting Reform and Investor Protection: Hearings on the Legislative History of the Sarbanes-Oxley Act of 2002: Accounting Reform and Investor Protection Issues Raised by Enron and Other Public Companies Before the S. Comm. on Banking, Hous., and Urban Affairs*, 107th Cong. 44 (2002) (testimony of Michael Sutton, Chief Accountant of the Securities and Exchange Commission from 1995 to 1998); *see also id.* (testimony of Arthur Levitt, Former SEC Chairman) (offering an example of such "extraordinary . . . political pressure" previously pushed on the SEC in its attempts to limit auditor ability to double as public company consultant).

148. Cunningham, *supra* note 12, at 943.

149. *Id.* at 944.

150. *See infra* Parts III.B, IV.

151. Cunningham, *supra* note 12, at 943 (citing 15 U.S.C. § 7211 (2006)). Note that SEC members themselves are appointed for fixed terms removable only for cause. *See* 15 U.S.C. § 78d(a); Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3148 (2010) (quoting Humphrey's Ex'r v. United States, 295 U.S. 602, 620 (1935)) ("The parties agree that the [SEC] Commissioners cannot themselves be removed by the President except under the *Humphrey's Executor* standard of 'inefficiency, neglect of duty, or malfeasance in office . . . .'").

152. *Free Enter. Fund*, 130 S. Ct. at 3158 (citing 15 U.S.C. § 7217(d)(3)).

153. *See* Pildes, *supra* note 127, at 486.

154. These entities included the New York Stock Exchange, the Chicago Board of Options Exchange, and the Financial Industry Regulatory Authority (replacing the National Association of Securities Dealers). Pildes, *supra* note 127, at 489.

155. *Id.*

156. *Id.* Specifically, the Board essentially replaces the American Institute of Certified Public Accountants, "the industry body having since 1939 defined Generally Accepted Auditing Standards." Cunningham, *supra* note 12, at 919.

B. Constitutional Analysis of the PCAOB: The Free Enterprise *Case*

Congress set up the PCAOB to have "unchecked power"[157] in a way that would ensure its full autonomy and, by extension, its ability to create, adjudicate, and enforce auditing standards without industry or constituent pressures.[158] Despite this laudable aim, *Free Enterprise* reveals the devil in the Board's legislative details.[159] As noted earlier, though the Board's enacting legislation expressly classifies it as a non-governmental, nonprofit corporation,[160] Supreme Court precedent establishes that the Board is a government agency for purposes of constitutional analysis.[161] This classification provides the foundation for the constitutional questions brought by *Free Enterprise.*[162] Given the high volume of work already published on the case,[163] it is perhaps more helpful now to discuss briefly the decision of the D.C. Circuit,[164] then to turn to the decision of the Supreme Court, and finally to conduct an analysis of the Board framed by constitutional and policy interests represented in the amicus curiae[165] briefs

157. 148 CONG. REC. S6334 (daily ed. July 8, 2002) (statement of Sen. Phil Gramm). For a summary of Sen. Gramm's connection to the PCAOB, see *supra* note 23 and accompanying text.

158. *See, e.g.*, S. REP. NO. 107-205, at 2 (2002).

159. This point is illustrated vividly, of course, by the *Free Enterprise* case itself.

160. *See* 15 U.S.C. § 7211 (2006); *supra* note 18 and accompanying text.

161. *See* Lebron v. Nat'l R.R. Passenger, 513 U.S. 374, 400 (1995); *supra* note 18 and accompanying text.

162. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., No. 06-0217, 2007 U.S. Dist. LEXIS 24310, at *10–11 (D.D.C. 2007), *aff'd*, 537 F.2d 667 (D.C. Cir. 2008), *aff'd in part, rev'd in part, and remanded*, 130 S. Ct. 3138 (2010) ("The parties agree that, at least for purposes of these motions, PCAOB should be considered a governmental entity, and so it shall be.").

163. *See, e.g.*, Carvin et al, *supra* note 139; Eckhardt, *supra* note 96; Harvard Law Review Association, *D.C. Circuit Holds that the SEC Chairman Is Not the "Head" of the SEC*, 122 HARV. L. REV. 2267 (2009) (arguing the D.C. Circuit decision was decided incorrectly and that the Sarbanes-Oxley Act did in fact violate separation of powers and the Appointments Clause); Helisek, *supra* note 60; Michael R. Keefe, *The Constitutionality of the Double For-Cause Removal Restriction*, 77 U. CIN. L. REV. 1653 (2009) (analyzing the D.C. Circuit decision and possible congressional responses); Nagy, *supra* note 18.

164. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd, 537 F.3d 667 (D.C. Cir. 2008), *aff'd in part, rev'd in part, and remanded*, 130 S. Ct. 3138 (2010).

165. *See* Brief for Amici Curiae Former Chairmen of the Securities and Exchange Commission in Support of Respondents, Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138 (2010) (No. 08-861), 2009 U.S. S. Ct. Briefs LEXIS 1081 (describing the SEC's plenary power over the PCAOB); Brief for the Center for Audit Quality as *Amicus Curiae* Supporting Respondent Public Company Accounting Oversight Board, *Free Enter. Fund*, 130 S. Ct. 3138 (No. 08-861), 2009 U.S. S. Ct. Briefs LEXIS 1083 (addressing the role of the PCAOB in accomplishing Congress's goals for public company auditing); Brief of National Association of State Boards of Accountancy as *Amicus Curiae* in Support of Respondents, *Free Enter. Fund*, 130 S. Ct. 3138 (No. 08-861), 2009 U.S. S. Ct. Briefs LEXIS 1084 (arguing the PCAOB is constitutional and the Court should exercise judicial restraint in its decision due to the important work of the Board); Brief for Constitutional and Administrative Law Scholars as *Amici Curiae* Supporting Respondents, *Free Enter. Fund*, 130 S. Ct. 3138 (No. 08-861), 2009 U.S. S. Ct. Briefs LEXIS 1085 (arguing a ruling for the petitioners would overturn precedent and disrupt government functions); Brief of the Council of Institutional Investors et al. as Amici Curiae Supporting Respondents, *Free Enter. Fund*, 130 S. Ct. 3138 (No. 08-861), 2009 U.S. S. Ct. Briefs LEXIS 1082 (emphasizing the important role of the PCAOB and urging the Court to preserve the Board even if necessary to strike constitutionally offending aspects of it); Brief of Law Professors as *Amici Curiae* in Support of Petitioners, *Free Enter. Fund*, 130 S. Ct. 3138 (No.

filed with the Court. These interests frame the underlying issues of the PCAOB and echo the fundamental question: who will ultimately be responsible if it fails?[166]

1. Removal Power Arguments

The D.C. Circuit ruled two-to-one that the PCAOB did not violate the Appointments Clause or the doctrine of separation of powers.[167] The majority addressed the question of whether the PCAOB violated separation of powers by insulating its members from presidential removal.[168] The court discussed a very brief history of Supreme Court precedent on the issue of

08-861), 2009 U.S. S. Ct. Briefs LEXIS 661 (arguing the holding in *Morrison* should be overturned and the Board should be held to violate the Appointments Clause); Brief of *Amici Curiae* Law Professors in Support of Petitioners, *Free Enter. Fund*, 130 S. Ct. 3138 (No. 08-861), 2009 U.S. S. Ct. Briefs LEXIS 677 (arguing the PCAOB is not under the oversight of the SEC and its members are principal officers who should be appointed by the President); Brief *Amici Curiae* of William P. Barr et al. in Support of Petitioners, *Free Enter. Fund*, 130 S. Ct. 3138 (No. 08-861), 2009 U.S. S. Ct. Briefs LEXIS 678 (arguing the structure of the Board unconstitutionally strips the President of his removal powers and contradicts original intent and Supreme Court precedent); Brief of *Amici Curiae* American Civil Rights Union & Mallory Factor in Support of Petitioners, *Free Enter. Fund*, 130 S. Ct. 3138 (No. 08-861), 2009 U.S. S. Ct. Briefs LEXIS 679 (emphasizing that the Board's double insulation from presidential control controverts the public interest in preserving separation of powers); Brief of *Amicus Curiae* The Claremont Institute Center for Constitutional Jurisprudence in Support of Petitioners, *Free Enter. Fund*, 130 S. Ct. 3138 (2010) (No. 08-861), 2009 U.S. S. Ct. Briefs LEXIS 680 (arguing the Board violates separation of powers and cannot be justified by "convenience and complicity" between Congress and the President); Amicus Curiae Brief on the Merits of Mountain States Legal Foundation in Support of Petitioners, *Free Enter. Fund*, 130 S. Ct. 3138 (No. 08-861), 2009 U.S. S. Ct. Briefs LEXIS 682 (arguing the Court should overturn its precedent that conflicts with the text and original intent of the Appointments Clause and thus rule independent agencies unconstitutional); Brief for the Cato Institute et al. as *Amici Curiae* in Support of Petitioners, *Free Enter. Fund*, 130 S. Ct. 3138 (No. 08-861), 2009 U.S. S. Ct. Briefs LEXIS 683 (underscoring the policy failures of the Board and dangerous policy implications of its structure); Amicus Brief of the Center for Individual Rights in Support of Petitioners, *Free Enter. Fund*, 130 S. Ct. 3138 (No. 08-861), 2009 U.S. S. Ct. Briefs LEXIS 676 (arguing that the petitioners properly passed over use of the administrative review scheme offered by the Board in order to present a constitutional challenge); Brief for the Coalition for Fair Lumber Imports as Amicus Curiae Supporting Petitioners, *Free Enter. Fund*, 130 S. Ct. 3138 (No. 08-861), 2009 U.S. S. Ct. Briefs LEXIS 681 (using the *Free Enterprise* case as a springboard to argue that NAFTA bi-national panels violate the Appointments Clause).

166. *See* discussion *supra* Part I.

167. *Free Enter. Fund*, 537 F.3d at 672, 685. The court affirmed summary judgment granted at the trial in favor of the PCAOB. *Id.* at 685. In the Supreme Court's hearing of *Free Enterprise*, it is probably not surprising to note that the circuit court's majority opinion parallels the arguments presented by the respondent at the next level. *See id.* at 671–74; Brief for Respondents, *supra* note 14. In the same way, Judge Kavanaugh's dissent in the circuit decision outlines the same general arguments put forth by the petitioner in the Supreme Court appeal. *See Free Enter. Fund*, 537 F.3d at 685–715 (Kavanaugh, J., dissenting); Brief for Petitioners, *Free Enter. Fund*, 130 S. Ct. 3138 (2010) (No. 08-861), 2009 WL 2247130.

168. *Free Enter. Fund*, 537 F.3d at 679. For the specific statutory provision the court addressed, see 15 U.S.C. § 7211(e)(6) (2006) ("A member of the Board may be removed by the Commission from office, in accordance with section 7217(d)(3) of this title, for good cause shown . . . .").

removal power and asserted that "[t]he Supreme Court has long recognized that some types of restrictions on Presidential authority within the Executive Branch are permissible, especially in the case of independent agencies."[169] Analogizing the President's limited removal powers in *Humphrey's Executor* and *Morrison*, the majority noted that the SEC possesses both appointment and removal powers over the Board.[170] They concluded: "Given the constitutionality of independent agencies and the Commission's comprehensive control over the Board, the Fund cannot show that the statutory scheme so restricts the President's control over the Board as to violate separation of powers."[171]

Judge Kavanaugh responded to the majority's argument with the black-and-white comparison between the PCAOB and the agencies upheld in *Humphrey's Executor* and *Morrison*:

> The removal issue in this case arises because, unlike in *Humphrey's Executor* and *Morrison*, neither the President nor a Presidential alter ego can remove the members of the PCAOB. Rather, the Board is removable only by the Securities and Exchange Commission, and only for cause. Put another way, the PCAOB is an independent agency appointed by and removable for cause by another independent agency.[172]

He argued that rather than merely limiting the President's ability to remove officers, the Board's structure "completely strip[s]"[173] the President's power to execute the laws through control of his officers.[174] Kavanaugh began by tracing the history of separation of powers from the founding, arguing solidly for a unitary executive interpretation of executive powers.[175] He made the same arguments as many scholars,[176] notably that Article II vests executive power in a single person in order to focus accountability and ensure energetic execution.[177] Judge Kavanaugh

169. *Free Enter. Fund*, 537 F.3d at 679.

170. *Id.* at 679–80.

171. *Id.* at 685.

172. *Id.* at 697 (Kavanaugh, J., dissenting). In this quotation, Judge Kavanaugh is referring to the "alter ego" principle supported in *Myers* and *Morrison*. *See id.* at 686 n.1 (citing Myers v. United States, 272 U.S. 52, 133 (1926); Morrison v. Olson, 487 U.S. 654, 692 (1988)). The Supreme Court uses "alter ego" to describe an executive officer that serves at the pleasure of the President and is removable at will by the President. *Id.*

173. *Id.* Here, Judge Kavanaugh is referring to the Supreme Court's explanation of their holding in *Morrison*: "[The Independent Counsel] is not a case in which the power to remove an executive official has been completely stripped from the President, thus providing no means for the President to ensure the 'faithful execution' of the laws." *Id.* at 698.

174. *Id.*

175. *See id.* at 688–92; *see also supra* Parts I, II.

176. *See generally* Calabresi, *supra* note 2; Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

177. *See Free Enter. Fund*, 537 F.3d at 689 (Kavanaugh, J., dissenting) (citing Printz v. United States, 521 U.S. 898, 922 (1997)); *see also* Sierra Club v. Costle, 657 F.2d 298, 405 (D.C. Cir. 1981); THE FEDERALIST NOS. 69, 70, 72, 76 (Alexander Hamilton); Kagan, *supra* note 176, at 2332

combined this view of the presidency with his understanding of *Morrison* and *Humphrey's Executor*—namely that these cases represent the outer limits of infringement on executive power and should not be exceeded.[178] In the end, Judge Kavanaugh presented a textbook argument for a formalistic interpretation of separation of powers.[179] Not only did he dissent to the holding, he dissented to the majority's functional interpretation of separation of powers.[180]

The Supreme Court reversed the D.C. Circuit Court on the issue of removal powers.[181] The rhetoric employed by the Court seems to indicate that it fully supports a broad view of executive power.[182] For example, the Chief Justice cited *The Federalist* and Supreme Court precedent for the proposition that

> [w]ithout the ability to oversee the Board, or to attribute the Board's failings to those whom he *can* oversee, the President is no longer the judge of the Board's conduct. . . .
>
> . . . .
>
> The diffusion of power carries with it a diffusion of accountability. . . .
>
> By granting the Board executive power without the Executive's oversight, this Act subverts the President's ability to ensure that the laws are faithfully executed—as well as the public's ability to pass judgment on his efforts.[183]

The Court limited its holding, however, to say only that the "dual for-cause" limitations on the Board members' removal violated the President's removal power.[184] Following this conclusion, the Court held that the Board itself was constitutional apart from its "for cause" removal aspects.[185] As discussed *infra* in Part IV, this holding does not

("The Presidency's unitary power structure, its visibility, and its 'personality' all render the office peculiarly apt to exercise power in ways that the public can identify and evaluate.").

178. *See Free Enter. Fund*, 537 F.3d at 697–98 (Kavanaugh, J., dissenting).

179. *See* Helisek, *supra* note 60, at 1078.

180. *See id.*; *Free Enter. Fund*, 537 F.3d at 689 (Kavanaugh, J., dissenting).

181. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3150 (2010).

182. *See* Kevin Russell, *Provision of Sarbanes-Oxley Unconstitutionally Interferes with Presidential Authority*, SCOTUSBLOG (June 28, 2010, 10:00 PM), http://www.scotusblog.com/2010/06/provision-of-sarbanes-oxley-unconstitutionally-interferes-with-presidential-authority/; *see also* Al-Bihani v. Obama, 619 F.3d 1, 47 n.26 (D.C. Cir. 2010) (citing *Free Enterprise Fund*, 130 S. Ct. 3138) ("Rather than accepting concessions, the Supreme Court on occasion has found that the law (either constitutional or statutory) is more favorable to the Executive than the Executive itself asserted in litigating the particular case.").

183. *Free Enter. Fund*, 130 S. Ct. at 3154–55.

184. *Id.* at 3151.

185. *Id.* at 3161.

effectively protect the separation of powers described in the Court's lofty rhetoric.

2. Appointment Power Arguments

The D.C. Circuit also addressed the Board's relationship with the Appointments Clause.[186] Relying on the rules from *Edmond* and *Morrison*,[187] the court first examined whether the members of the Board served as inferior or principal officers.[188] The court then reasoned that SEC members act as superiors to the PCAOB because they possess the power to review nearly all of the Board's decisions.[189] Despite the significant powers vested in the PCAOB, the majority opinion explained, "[T]he fact that the Board is charged with exercising extensive authority on behalf of the United States does not mean that Board members must be appointed by the President, for principal as well as inferior officers, by definition, 'exercis[e] significant authority pursuant to the laws of the United States.'"[190] Instead of emphasizing the broad powers of the Board, the court focused on the fact that the Board possesses no technical power to "render a final decision on behalf of the United States" without the permission of other executive officers.[191] The court also stated that the for-cause restriction on the SEC's

186. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667, 671 (D.C. Cir. 2008), *aff'd in part, rev'd in part, and remanded*, 130 S. Ct. 3138 (2010). The court noted that the Appointments Clause contemplates congressional delegation of appointment powers to entities other than the President. *Id.* at 672. The petitioners (Free Enterprise Fund) argued that because the SEC only reviews the Board's decisions and not its day-to-day operations and because the SEC is limited to "for cause" removal of Board members, the members are not inferior officers for purposes of the Appointments Clause. *Id.* The petitioners argued in the alternative that even if the Board members could be considered inferior officers, the SEC does not constitute a "department" in which removal powers may be vested. *Id.*

187. The court quoted *Edmond*: "Generally speaking, the term 'inferior officer' connotes a relationship with some higher ranking officer or officers below the President: Whether one is an 'inferior' officer depends on whether he has a superior." *Id.* (quoting Edmond v. United States, 520 U.S. 651, 662 (1997)).

188. *Id.*

189. The court gave examples of the SEC's control over the Board:

> [T]he Commission approves all Board rules and may abrogate, delete, or add to them. All Board sanctions are subject to plenary review by the Commission, and the Commission "may enhance, modify, cancel, reduce, or require the remission of a sanction imposed by the Board." As such, the Board's disciplinary authority "ultimately belongs to the [Commission], and the legal views of the [Board] must yield to the Commission's view of the law." The Commission both appoints and removes Board members. It also may impose limitations upon Board activities and relieve the Board of its enforcement authority altogether.

Id. (third and fourth alterations in original) (citations omitted). The court compared these aspects of oversight and found that the oversight exceeded the level of oversight over the coast guard judges in *Edmond* and the independent counsel in *Morrison*. *Id.* at 672–73.

190. *Id.* at 672 (quoting Freytag v. Comm'r, 501 U.S. 868, 881 (1991) (quoting Buckley v. Valeo, 424 U.S. 1, 126 (1976))).

191. *Edmond*, 520 U.S. at 665, *quoted in Free Enter. Fund*, 537 F.3d at 672. In its analysis of the Board's literal powers, the court cited the Supreme Court decision *Chevron, USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *Free Enter. Fund*, 537 F.3d at 673. The Supreme Court held in *Chevron* that in the event of statutory ambiguity, courts must accept the interpretation

power of removal[192] did not indicate Board members are principal officers.[193] Affirming the SEC's oversight of the Board's decisions, the court held that the Board's structure does not violate the Appointments Clause because its members serve as inferior officers under the oversight of the SEC.[194]

Judge Kavanaugh's dissent of this point began with his assertion that the "key initial question" is whether the officers of the Board are subject to for-cause removal.[195] He argued that *Edmond* was a "relatively easy case" to determine the officers were inferior because they were subject to at-will removal, which "has always been considered a powerful tool for control."[196] Judge Kavanaugh contrasted this status with that of an officer removable only for cause, who is "ordinarily designed and understood to be free from significant substantive direction and supervision by superiors."[197] He concluded that under the *Edmond* test, the members of the PCAOB are principal officers because they are not subject to at-will removal or other substantive control by the SEC.[198]

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of an executive agency so long as it is a reasonable interpretation. *Chevron*, 467 U.S. at 844–45, 865. In *Free Enterprise*, the D.C. Circuit noted that the Board does not hold substantial, "*Chevron*-like" interpretation powers. *Free Enter. Fund*, 537 F.3d at 673. Instead, the majority argues that the Sarbanes-Oxley provision gives the SEC wide latitude to review and regulate the decisions of the Board. *Id.*

192. *See* 15 U.S.C. § 7217(d)(3) (2006). The language of the statute limits removal power as follows:

> The Commission may . . . remove from office . . . any member of the Board, if the Commission finds . . . that such member—
>
> (A) has willfully violated any provision of this Act, the rules of the Board, or the securities laws;
>
> (B) has willfully abused the authority of that member; or
>
> (C) without reasonable justification or excuse, has failed to enforce compliance with any such provision or rule, or any professional standard by any registered public accounting firm or any associated person thereof.

Id. (*quoted in Free Enter. Fund*, 537 F.3d at 674 n.5).

193. The petitioners argued that the for-cause limitation on the SEC's power to remove the Board's members indicates the members are in fact principal officers. *Free Enter. Fund*, 537 F.3d at 673–74. The court responded by pointing out that removal limitations are only one factor of the *Edmond* test for inferior officers. *See Edmond*, 520 U.S. at 666. The court quoted the Supreme Court's decision in *United States v. Perkins*, 116 U.S. 483 (1886), which stated that "[t]he constitutional authority in Congress to thus vest the appointment implies authority to limit, restrict, and regulate the removal by such laws as Congress may enact in relation to the officers so appointed." *Id.* at 485.

194. *Free Enter. Fund*, 537 F.3d at 674. The majority comes to this conclusion based on its determination that the SEC is a "department" and thus constitutionally allowed to appoint inferior officers. *See id.*

195. *Id.* at 707 (Kavanaugh, J., dissenting).

196. *Id.* (citing *Edmond*, 520 U.S. at 664).

197. *Id.* (citing Humphrey's Ex'r v. United States, 295 U.S. 602, 625–26 (1935)).

198. *Id.* at 711. In addition to the test for at-will removal, Judge Kavanaugh also attacked the majority's premise of SEC control over the functions of the Board. In summing up his argument, he asks:

The Supreme Court affirmed the D.C. Circuit's decision regarding the Appointments Clause.[199] It reconciled Judge Kavanaugh's dissent by resolving the separation-of-powers issue first.[200] The Court held that the Board members are inferior officers under *Edmond* because, as the Board members will be removable at-will after the Court's decision, the SEC will now be able to remove them whenever necessary and exercise sufficient oversight over the Board's decisions.[201] Essentially, by eliminating the Board members' removability for cause, the Court could then turn the Board members into inferior officers appointable by the SEC.[202]

The D.C. Circuit Court's decision placed a constitutional question before the Supreme Court[203] untouched in earlier precedent.[204] The Circuit Court's majority opinion advocated a functional interpretation of separation of powers that allows an independent agency to cross over into executive

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> How can we say that the Board is directed and supervised by the SEC given that the Board has plenary statutory authority to conduct its most critical functions—inspections, investigations, and enforcement actions—without *any* opportunity for the SEC to prevent and affirmatively command, and to manage the ongoing conduct of, those activities? What are the purpose and effect of the stringent statutory for-cause removal provision if the Board is simply a subordinate of the SEC subject to the SEC's "comprehensive and pervasive" control? And why should we accept the Board's characterization of itself as part of the SEC when, as both statutory text and history reveal, Congress specifically considered—and rejected—proposals to make the Board part of the SEC and Congress expressly decided to create the Board as an independent entity?

Id. at 712.

199. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3163 (2010).

200. *Id.* at 3162.

201. *Id.*

202. *Id.* Chief Justice Roberts explained,

> [g]iven that the Commission is properly viewed, under the Constitution, as possessing the power to remove Board members at will, and given the Commission's other oversight authority [such as veto power over PCAOB rules and investigations], we have no hesitation in concluding that under *Edmond* the Board members are inferior officers whose appointment Congress may permissibly vest in a "Hea[d] of Departmen[t]."

Id. (second and third alterations in original). The Court clarified that "[b]ecause the Commission is a freestanding component of the Executive Branch, not subordinate to or contained within any other such component, it constitutes a 'Departmen[t]' for the purposes of the Appointments Clause." *Id.* at 6163 (second alteration in original).

203. *See* Helisek, *supra* note 60, at 1078–79; *Free Enter. Fund*, 130 S. Ct. at 3153.

204. *See Free Enter. Fund*, 130 S. Ct. at 3147; *cf., e.g.*, Freytag v. Comm'r, 501 U.S. 868, 890 (1991) ("[W]e now examine the Tax Court's functions to define its constitutional status and its role in the constitutional scheme."); Morrison v. Olson, 487 U.S. 654, 691 (1988) ("But the real question is whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty, and the functions of the officials in question must be analyzed in that light."); Humphrey's Ex'r v. United States, 295 U.S. 602, 628 (1935) ("To the extent that [the FTC] exercises any executive function—as distinguished from executive power in the constitutional sense—it does so in the discharge and effectuation of its quasi-legislative or quasi-judicial powers . . . ."); *cf. Morrison*, 487 U.S. at 705 (Scalia, J., dissenting) ("It seems to me, therefore, that the decision of the Court of Appeals invalidating the present statute must be upheld on fundamental separation-of-powers principles if the following two questions are answered affirmatively: (1) Is the conduct of a criminal prosecution (and of an investigation to decide whether to prosecute) the exercise of purely executive power? (2) Does the statute deprive the President of the United States of exclusive control over the exercise of that power?").

functions without executive control through appointment or removal.[205] However, as Judge Kavanaugh points out, functional analysis may not justify the Board's complete insulation from presidential power.[206] Judge Kavanaugh argued that because the President holds exclusively executive power, agencies exercising executive power should fall under presidential control.[207] Unlike previous cases, the PCAOB does not merely inhibit the President's ability to appoint or remove officers of the agency. Instead, he argued it establishes a class of agencies without political headship.[208]

Theoretically, the outcome of *Free Enterprise* could have determined the legitimacy of such a class and whether the unitary Executive could still inform agency development.[209] Instead, the Supreme Court avoided the question. Its analysis of the Board extends only to whether or not a sub-agency's members can be removable "for cause" if its head agency's members are also removable "for cause."[210] As discussed below, such a decision does little to guide the shape of independent agencies to come.

IV. RECONCILING THE UNITARY EXECUTIVE WITH CONGRESSIONAL INTENTIONS FOR THE PCAOB

Free Enterprise provides a window into the constitutionality and practicality of independent agencies. The PCAOB challenges the outer limits of separation of powers.[211] It also challenges the ability of the administrative state to replace an industry's self-regulation.[212]

The constitutional theories of the parties fell along predictable lines.[213] Petitioner Free Enterprise Fund argued for formulistic separation of powers, arguing that "Congress thus violates separation of powers when it

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205. *See Free Enter. Fund*, 537 F.3d at 674; *see also Free Enter. Fund*, 130 S. Ct. at 3156 (discussing the dissent's functional approach, which mirrors the approach of the majority in the D.C. Circuit).

206. *See Free Enter. Fund*, 537 F.3d at 707 (Kavanaugh, J., dissenting).

207. *See id.*

208. *See id.*

209. *See* Pildes, *supra* note 127, at 486–87. The unitary executive philosophy relies in part executive control of agencies that perform executive functions. *See supra* Parts I, II. If the Court endorses the double for-cause insulation of the Board, it will become the first independent agency to be *completely* free from presidential control. *See Free Enter. Fund*, 537 F.3d at 698 (Kavanaugh, J., dissenting); *Morrison*, 487 U.S. at 692. Such a ruling would indelibly strike part of the President's power to execute the law through the federal bureaucracy. *See* Helisek, *supra* note 60, at 1079.

210. *Free Enter. Fund*, 130 S. Ct. at 3153–54 ("Without a layer of insulation between the Commission and the Board, the Commission could remove a Board member at any time, and therefore would be fully responsible for what the Board does. The President could then hold the Commission to account for its supervision of the Board, to the same extent that he may hold the Commission to account for everything else it does.").

211. Pildes, *supra* note 127, at 486–87.

212. *See* Cunningham, *supra* note 12, at 943.

213. *See infra* notes 214, 239 and accompanying text.

undermines the authority and independence of the President by reassigning or splintering his executive power. Such splintering increases Congress'[s] power... and obliterates public accountability. . . ."[214] Contrarily, the respondent PCAOB argued that because the Board members are inferior officers controlled by the SEC, "Congress can grant department heads sole authority to remove the inferior officers they appoint. That traditional arrangement does not undermine the President's executive power; it merely requires him to supervise inferior officers in customary 'chain of command' fashion."[215] First, analysis of the Supreme Court decision in *Free Enterprise* reveals its failure to correct the Board's fundamental flaws. Second, in light of the Supreme Court's decision and recalling the initial inquiry of this Comment,[216] perhaps it is now appropriate to go beyond the *Free Enterprise* case[217] to address whether the Board, and agencies like it in the future, can find a practical, accountable equilibrium.[218] Congress's intent and the Board's nature indicate the Board could accomplish its purposes more effectively if placed under executive authority.

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214. Brief for Petitioners, *supra* note 167, at 7. The following quotation represents the application of the Fund's constitutional philosophy:

> In short, by making the Board "independent" of both the legislature's budget responsibilities and the President's duty to execute the laws, Congress has bestowed on itself power without responsibility and denied the people any ability to correct improvident law enforcement. Since *no* elected representative is involved in appointing or removing Board members, or reviewing the Board's budget, taxation or enforcement policies, no amount of public disapproval can be converted into replacing Board members or reforming any misguided policies. The Act's gratuitous and unprecedented effort to immunize government power from public accountability, by creating a "Fifth Branch" of government neither appointed nor removable by the President, therefore violates every basic precept of separated powers.

Id. at 10. The petitioner's reasoning echoes advocacy for the unitary Executive, as represented in a few of the amicus briefs submitted on behalf of the petitioner. *See, e.g.*, Amicus Curiae Brief on the Merits of Mountain States Legal Foundation in Support of Petitioners, *supra* note 165, at 12, 17 ("The protection of the executive power requires vesting all such power in one person, the President . . . . The concept of independent agencies, plural bodies of persons wielding executive power, over whom the President exercises little if any control or supervision, is anathema to the structure of the Constitution."); Brief of *Amicus Curiae* The Claremont Institute Center for Constitutional Jurisprudence in Support of Petitioners, *supra* note 165, at 18 ("The Framers vested executive authority in the President for purposes of unity, consistency, and accountability.").

215. Brief for Respondents, *supra* note 14, at 12.

216. *See supra* p. 103.

217. *See, e.g.*, Brief for Petitioners, *supra* note 167, at 8 ("Congress had no overriding need or even legitimate reason to upset the Constitution's balance of powers; the *only* reason for not authorizing Presidential appointment and removal, as is done with *every* other independent agency, was Congress' gratuitous desire to reduce 'the level of Presidential control' that the Executive exercises over traditional independent agencies.").

218. This concern might best be conveyed through the sentiments of the law professors writing as amicus for the petitioners:

> As law professors who have studied and written about the massive accounting and corporate governance scandals that prompted the passage of the Act, we applauded Congress's decision to establish a new independent regulator to oversee the conduct of the auditors of public companies. We have been concerned, however, that the particular design chosen by Congress accorded the PCAOB substantial discretion and autonomy without imposing constitutionally sufficient accountability.

Brief of *Amici Curiae* Law Professors in Support of Petitioners, *supra* note 165, at 1.

A. The Supreme Court's Decision Did Not Resolve the Issue of Executive Control Over the Board

The crux of the Supreme Court's ruling is that "two layers [of removability] are not the same as one."[219] The majority opinion simplifies the Board's flaw to a basic scenario, arguing that because the Board members can only be removed for good cause, the SEC cannot remove them at will, and the President in turn "cannot hold the Commission fully accountable for the Board's conduct, to the same extent that he may hold the Commission accountable for everything else that it does."[220] Conversely, if the Board members are removable at will, then "the Commission has no excuse for retaining an officer who is not faithfully executing the law."[221] The majority concludes that the President will be able to keep the Board accountable if the SEC can remove its members at will—changing two layers back to a constitutional one.[222]

On a practical level, however, removing the Board's good-cause tenure will not solve the problem that the majority identifies. The members still lack a constitutionally necessary connection to the President.[223] For example, in *Morrison*, the President could sufficiently control the independent counsel's actions because the counsel was removed for cause by the Attorney General, who was then removable at will by the President.[224] In the same way, members of the FTC in *Humphrey's Executor* were removable only for cause, but the President could exert direct influence over them through his Appointment Power,[225] and the members primarily functioned as judicial or legislative aides rather than executive officers.[226] In contrast, the PCAOB primarily creates and enforces all auditing standards,[227] two basic executive agency functions.[228] Under the

219. *Free Enter. Fund*, 130 S. Ct. at 3157.

220. *Id.* at 3153–54.

221. *Id.* at 3154 n.4.

222. *Id.* at 3157.

223. A formalistic understanding of executive power requires the Executive to exercise some form of control over his subordinates. *See id.* at 3151 (citing U.S. CONST. art. II, § 1, cl. 1). "As Madison stated on the floor of the First Congress, 'if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws.'" *Id.* (citation omitted). The dissent argues instead that "[t]he functional approach required by our precedents recognizes . . . administrative complexity and, more importantly, recognizes the various ways presidential power operates within this context—and the various ways in which a removal provision might affect that power." *Id.* at 3169 (Breyer, J., dissenting). The precedential power of the majority's formalism will guide this discussion.

224. *Morrison v. Olson*, 487 U.S. 654, 688–92 (1988).

225. *Humphrey's Ex'r v. United States*, 295 U.S. 602, 625–26 (1935).

226. *Id.* at 628.

227. *See supra* notes 135–39 and accompanying text.

228. *Free Enter. Fund*, 130 S. Ct. at 3155. The Court explains, "[b]y granting the Board *executive power within the Executive's oversight*, this Act subverts the President's ability to ensure that the

majority's decision, the Board is neither accountable to the President through the judgment of a removable alter ego, nor is it accountable as a quasi-judicial agency whose members the President appoints.[229] The Board remains in a constitutional no man's land.[230]

The Chief Justice acknowledges this very distinction between the Board and *Morrison*. "In those cases . . . only one level of protected tenure separated the President from an officer exercising executive power. It was the President—or a subordinate *he could remove at will*—who decided whether the officer's conduct merited removal under the good-cause standard."[231] Rather than acting on this observation, however, the majority opinion reverts to an oversimplification. It presumes, without clear evidence, that the SEC will respond to the President's wishes regarding the removal of Board members.[232] As Justice Breyer shrewdly points out in the dissent, "If the President confronts a Commission that seeks to *resist* his policy preferences—a distinct possibility when, as here, a Commission's membership must reflect both political parties[—] . . . the restriction on the *Commission's* ability to remove a Board member is . . . irrelevant . . . ."[233] As a result, by changing the Board members to be removable at will, the majority's decision does not practically change the PCAOB's relationship to the President.[234]

In the end, the majority's ruling nullifies its own political philosophy:

> The President has been given the power to oversee executive officers; he is not limited, as in Harry Truman's lament, to "persuad[ing]" his unelected subordinates "to do what they ought to do without persuasion." In its pursuit of a "workable government," Congress cannot reduce the Chief Magistrate to a cajoler-in-chief.[235]

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laws are faithfully executed—as well as the public's ability to pass judgment on his efforts." *Id.* (emphasis added).

229. *C.f. Morrison*, 487 U.S. at 688–92; *Humphrey's Ex'r*, 295 U.S. at 625–26.

230. *See supra* note 172 and accompanying text. Judge Kavanaugh makes a similar argument in his dissenting opinion, noting that even if the SEC can control the Board's members as "inferior officers," the President has no ability to control the SEC as an alter ego Department Head. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667, 686–87 (D.C. Cir. 2008), *aff'd in part, rev'd in part, and remanded*, 130 S. Ct. 3138 (2010).

231. *Free Enter. Fund*, 130 S. Ct. at 3155 (emphasis added).

232. *Id.* at 3154 n.4. The Chief Justice decries the second layer of tenure because it "matters precisely when the President finds it necessary to have a subordinate officer removed, and a statute prevents him from doing so." *Id.*

233. *Id.* at 3171 (Breyer, J., dissenting). Under 15 U.S.C. § 78d(a), the SEC Commissioners must reflect both political parties. *Id.*

234. Note that the majority's decision on the issue of removal power connects directly to its decision on appointment power. The Court ruled the SEC is a Department that can appoint PCAOB members because "[t]he Commission is a freestanding component of the Executive Branch, not subordinate to or contained within any other such component . . . ." *Id.* at 3163. If this is the case, however, the President's lack of control over the "department head" of the SEC only highlights its uncontrollability and deep contrast with the Attorney General's position in *Morrison*.

235. *Free Enter. Fund*, 130 S. Ct. at 3157 (citation omitted).

By leaving the Board under the removable-for-good-cause authority of the SEC, the Court forces the President to persuade the SEC and the Board to execute the laws as he wishes. The Board, as it stands after the Court's decision, still violates separation of powers.[236] Additionally, as discussed below, the Board's at-will removability under the SEC, as a kind of sub-agency, will not likely give the President more control or ensure additional accountability.[237]

B. Independence of the PCAOB Leaves Room for Executive Control

Whether or not the Supreme Court successfully rehabilitated the Board, its structure is not optimal. At a fundamental level, both sides in the *Free Enterprise* case agree that financial regulation serves an important purpose and should be carried out through non-biased channels.[238] Even more significantly, although proponents of the Board argued for its constitutionality in opposition to the unitary Executive,[239] they argued for its independence only in opposition to the industry.[240] The Council of Institutional Investors argued for the respondent that the Board must

236. As the Court itself recognizes, the constitutional mechanism separating powers prevents "[a] diffusion of accountability." *Id.* at 3155. It continues, "Without a clear and effective chain of command, the public cannot 'determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall.'" *Id.* Leaving the Board as a vaguely independent sub-chapter of the SEC leaves it insulated from the President's control.

237. *See infra* Part IV.C.2.

238. *E.g.*, Brief for the Cato Institute et al. as *Amici Curiae* in Support of Petitioners, *supra* note 165, at 28 (recognizing independent agencies such as the SEC and the Federal Reserve play a significant role in preserving market participant confidence through a depoliticized process of regulation); Brief for Amici Curiae Former Chairmen of the Securities and Exchange Commission in Support of Respondents, *supra* note 165, at 12 (quoting Senator Sarbanes, who explained that the auditing industry's failure to self-regulate responsibly was "obviously one of the reasons we are moving, in [the Sarbanes-Oxley] legislation, to an independent public company accounting oversight board."); *see also supra* note 196 and accompanying text.

239. *See* Brief for Respondents, *supra* note 14, at 35–36 ("Petitioners claim that Congress violated separation-of-powers principles by giving the SEC rather than the President authority to remove Board members. But the settled rule since the Framing has been that, when Congress grants a department head authority to appoint its own subordinates, Congress can also grant the department head sole authority to remove them."). The respondents essentially argue that the unitary Executive is an unrealistic application of the appointment and removal powers. *See id.*

240. *See id.* at 1–7; *see also* Brief of the Council of Institutional Investors et al. as Amici Curiae Supporting Respondents, *supra* note 165, at 6 ("The PCAOB's independence from the industry it is charged with regulating is key to its effectiveness. So is its accountability to the SEC and the investing public. The PCAOB's essential powers to promulgate auditing and other rules, inspect accounting firms to assure quality audits, and sanction improper auditor conduct are dependent on both its independence from the industry and its accountability to the SEC."); Brief for Amici Curiae Former Chairmen of the Securities and Exchange Commission in Support of Respondents, *supra* note 165, at 13 ("Congress borrowed from the financial system's existing regulatory institutions and long tradition of public-private partnership, while adding even greater safeguards to make the new board more independent from the accounting profession than existing SROs [self-regulatory organizations] were with respect to the elements of the securities industry they oversaw.").

maintain its independence from the industry because the accounting scandals of the last two decades illustrate that the industry needs governmental enforcement rather than self-regulation.[241] The respondent also pointed out "[t]he 'independence' Congress sought was independence from the accounting profession, not the SEC."[242] Notably, such intentions leave the door open for the Board's reconciliation with the Executive Branch.[243]

C. *Congress Mistakenly Rejected Alternative Designs*

The intended industry independence of the Board subsequently begs the question of why Congress chose such a constitutionally questionable[244] design in the first place. Former Chairmen of the SEC[245] writing as amici for the respondent seek to answer this question.[246] "Congress considered two polar alternatives that lie on either side of the structure it ultimately enacted: to create a new, independent agency altogether, or to create a new unit within the SEC."[247] Yet Congress did not adopt either of these options because, the amici explain, witnesses warned members against the alternatives during hearings prior to the passage of the Sarbanes-Oxley Act.[248] Unfortunately, evidence now suggests that the PCAOB has fallen, or will fall, into the pitfalls Congress hoped to avoid.

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241. *See* Brief of the Council of Institutional Investors et al. as Amici Curiae Supporting Respondents, *supra* note 165, at 12–13.

242. Brief for Respondents, *supra* note 14, at 28. On a side note, the appointment process for the Board was also politically driven (like Congress's reaction to the financial scandals), but for different reasons. At the time of the Act's passage, some Republicans recognized that President Bush could not politically afford to be linked to industry favoritism by any potential appointments to the Board. *See* Keefe, *supra* note 163, at 1672; *see also* Richard L. Berke, *Enron's Collapse: The Strategist; Associates of Bush Aide Say He Helped Strategist Win an Enron Contract*, N.Y. TIMES, Jan. 25, 2002, at C1. Thus, Republicans pushed to vest the appointment powers in the SEC. Keefe, *supra* note 163, at 1672.

243. *See supra* Part IV.B.

244. This is not necessarily meant to imply support for the petitioners in *Free Enterprise*. Rather, the Supreme Court might deem the issue constitutionally questionable simply by virtue of consideration. And, as discussed in *supra* Part IV.A, the Supreme Court's ruling on the Board may not resolve all of the constitutional issues surrounding it.

245. Including the following: G. Bradford Cook (1973), Roderick M. Hills (1975–1977), Harold M. Williams (1977–1981), David S. Ruder (1987–1989), Arthur Levitt, Jr. (1993–2001), Harvey L. Pitt (2001–2003), and William Donaldson (2003–2005). Brief for Amici Curiae Former Chairmen of the Securities and Exchange Commission in Support of Respondents, *supra* note 165, at 1.

246. Amici argue essentially that Congress had no choice but to structure the PCAOB as a compromise between traditional but unworkable alternatives. *See id.* at 30–34.

247. *Id.* at 17.

248. *Id.* at 17 (citing *H.R. 3763, The Corporate and Auditing Accountability, Responsibility, and Transparency Act of 2002: Hearings Before the H. Comm. on Fin. Servs.*, 107th Cong., at 158–59). Concerns voiced during the hearings included possible "turf wars" between a new agency and the SEC, or insufficient funding and manpower for the SEC to regulate auditing through a newly created sub-entity. *Id.* at 17–18. Note that the Corporate and Auditing Accountability, Responsibility, and Transparency Act of 2002 ("CAARTA") is the direct predecessor of the Sarbanes-Oxley Act, and was originally introduced into the House by Rep. Michael Oxley. Keefe, *supra* note 163, at 1672. Notwithstanding this evidence, the Court muses, "Neither respondents nor the dissent explains why the Board's task, unlike so many others, requires *more* than one layer of insulation from the President—or, for that matter, why only two." *Free Enter. Fund*, 130 S. Ct. at 3157.

1. Independent Agency Status

For example, former SEC Chairman Richard Breeden testified that if Congress created a separate independent agency for auditing controls, its agenda would overlap with the SEC and lead to conflict and inefficiency.[249] Yet in the current relationship between the PCAOB and the SEC, compliance costs for some firms increased to over $1.7 million per year in 2007.[250] For the average company, compliance costs for section 404 of the Sarbanes-Oxley Act[251] have now risen to $2.3 million per year.[252] This is due largely to a duplicative regulatory burden.[253] For example, as bill co-author Michael Oxley explained, the Board's 330 pages of regulations on the "internal controls" of publicly traded companies parallel existing banking regulations enforced by the SEC.[254] In-house controllers and accountants face similar issues.[255] According to the Institute of Management Accountants, "[t]he SEC and the PCAOB have issue[d] two sets of guidance rules to perform the same assessment task . . . resulting in unnecessary confusion and complexity for management."[256] Though the SEC procedurally oversees the PCAOB,[257] the Board ultimately lacks policy incentives to coordinate its regulations and enforcement with the goals of the SEC.[258]

249. *Id.*

250. Larry E. Ribstein & Henry N. Butler, *Where Was SOX?*, FORBES, Dec. 22, 2008, at 28.

251. Section 404 addresses requirements for internal controls over company bookkeeping. Sarbanes-Oxley Act of 2002, § 404. The PCAOB is charged with implementing the section 404 controls. *See* Freeman, *supra* note 15.

252. Freeman, *supra* note 15.

253. Brief for the Cato Institute et al. as *Amici Curiae* in Support of Petitioners, *supra* note 165, at 24–26.

254. Stephen Taub, *Oxley: I'm Not Happy With Sarbox*, CFO.COM (Apr. 6, 2007) (quoting Rep. Michael Oxley, former House Financial Services Committee Chairman) ("For banks, it is an unnecessary regulatory burden [in addition to those] they are already complying with.") *cited in* Brief for the Cato Institute et al. as *Amici Curiae* in Support of Petitioners, *supra* note 165, at 24.

255. Brief for the Cato Institute et al. as *Amici Curiae* in Support of Petitioners, *supra* note 165, at 25.

256. Press Release, *IMA Responds to SEC and PCAOB Exposure Drafts on SOX: Much More Is Needed to Get It Right* (Feb. 27, 2007) *cited in* Brief for the Cato Institute et al. as *Amici Curiae* in Support of Petitioners, *supra* note 165, at 25.

257. *See* Brief for Respondents, *supra* note 14, at 16.

258. This is supported by an examination of Congress's own inspiration for the Board, the self-regulating organizations (SROs). *See* Brief for the United States at 2–3, Free Enter. Fund v. Public Co. Accounting Oversight Bd., 130 S. Ct. 3138 (2010) (No. 08-861), 2009 WL 3290435. The SRO model puts government agencies in a "residual role" while the securities exchanges take place under SRO oversight. *See* WILLIAM O. DOUGLAS, DEMOCRACY AND FINANCE 82 (James Allen ed., 1940), *cited in* Silver v. N.Y. Stock Exch., 373 U.S. 341, 352 (1963).

2. Sub-Agency Status

Congress rejected another alternative, the creation of a sub-agency within the SEC, because the SEC did not have the resources to regulate auditing through such a sub-agency.[259] Yet now, as a non-sub-agency removable-at-will,[260] the PCAOB's resources could outpace the SEC but still face the same limitations that the SEC suffers.[261] Because the Board lacks in-depth financial oversight,[262] its source of revenue may not sustain its operations efficiently.

By their nature, agencies tend to aggrandize their institutional interests by increasing their budget while decreasing their responsibilities.[263] This tendency becomes all the more conflated in the Board's power to raise revenues through taxation of public companies.[264] The Board can increase its budget as it sees fit without needing to account for its spending or equalize marginal cost and marginal benefit.[265] Even with the power to set and raise its own budget, the Board now faces significant budgetary demands.[266] For example, the Board holds the responsibility to regulate international accounting firms that audit U.S. companies.[267] In its rollout of international regulation, the costs of time and travel are already draining the

259. Brief for Amici Curiae Former Chairmen of the Securities and Exchange Commission in Support of Respondents, *supra* note 165, at 17. *See also H.R. 3763, The Corporate and Auditing Accountability, Responsibility, and Transparency Act of 2002: Hearings Before the H. Comm. on Fin. Servs.*, 107th Cong. at 158–59. The hearings noted problems with insufficient funding and manpower when the SEC regulated auditing through the PCAOB as a sub-entity, which is why Congress rejected the idea. Brief for Amici Curiae Former Chairmen of the Securities and Exchange Commission in Support of Respondents, *supra* note 165, at 18.

260. Under the Supreme Court's decision, the Board remains in place but its members must be removable at-will by the SEC Commissioners. *Free Enter. Fund*, 130 S. Ct. at 3161.

261. Brief for Amici Curiae Former Chairmen of the Securities and Exchange Commission in Support of Respondents, *supra* note 165 at 17 (citing *H.R. 3763, The Corporate and Auditing Accountability, Responsibility, and Transparency Act of 2002: Hearings Before the H. Comm. on Fin. Servs.*, 107th Cong. at 158–59).

262. The Board sets it own budget and funds itself with the fees it charges auditing companies. 15 U.S.C. § 7219(b) (2006). The SEC possesses technical approval power but is not involved in the development of the Board's financial agenda. *Id.*

263. *See generally* WILLIAM A. NISKANEN, JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT (1971); William A. Niskanen, *Bureaucracy, in* THE ELGAR COMPANION TO PUBLIC CHOICE 264 (2001).

264. *See* 15 U.S.C. § 7219(b)-(d) (2006).

265. This reasoning rises from the understanding that "[t]he bureaucrat, like everyone else, can be assumed to be a selfish utility maximizer." DENNIS C. MUELLER, PUBLIC CHOICE III 360 (2003). Famed sociologist Max Weber applied this assumption and found that bureaucrats naturally strive to obtain power. *Id.* This goal of power can be directly compared to the businessman's pursuit of profit. *Id.* at 362; *see also id.* at 365–67. In particular, the non-pecuniary goals of an independent agency can be translated into leverage through bargaining power. As Mueller notes, the agency is able to inflate its budget against the wishes of its institutional sponsor because "(1) the bureau is a monopolist supplier, (2) it alone knows its true cost schedule, and (3) it is institutionally allowed to make take-it-or-leave-it budget proposals." *Id.* at 365.

266. *See* Brief for the Cato Institute et al. as *Amici Curiae* in Support of Petitioners, *supra* note 165, at 18–19.

267. *See* 15 U.S.C. § 7216.

Board's resources.[268] The Board's budget in 2007 exceeded $136 million,[269] as compared to the SEC's $100 million budget for its entire corporate finance division in 2007.[270] In 2009, the Board members each received an annual salary of $547,000 and the chairmen received $673,000.[271] Without a limit on its budget or salaries, the Board possesses little incentive to rein in costs or promote efficiency within the agency.[272]

Amici to the respondent explain that if the Board had been set within the SEC, the system would have lost "the long-recognized benefits of the SRO structure."[273] These touted benefits stem from the "ability to attract and retain experienced professionals focused on specific policy priorities and able to provide their own expert advice."[274] By infusing the SRO structure with public-minded government authority, Congress hoped to preserve the benefits of the SROs while skirting the previously exploited flaws of the system.[275]

Despite this hope, the Board cannot be independent from the industry without being dependent on the government structure.[276] The irony of the Board's current situation is that its proponents must argue the SEC possesses wide plenary authority over it[277] while still insisting that the Board should remain a separate, quasi-private agency.[278] Essentially, Congress wanted to

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268. Brief for the Cato Institute et al. as *Amici Curiae* in Support of Petitioners, *supra* note 165, at 19.

269. PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD, PCAOB 2007 BUDGET 22, http://www.pcaobus.org/About/Ops/Documents/Annual%20Reports/2007.pdf.

270. U.S. SEC. & EXCH. COMM'N, FISCAL 2007 CONGRESSIONAL BUDGET REQUEST 26 (Feb. 2006), http://www.sec.gov/about/secfy07budgetreq.pdf.

271. *See* Ian Katz, *Sarbanes-Oxley Auditing Board Chairman Olson Resigns*, BLOOMBERG (June 8, 2009), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aXflsnBpiwzA.

272. *See supra* note 262 and accompanying text; *see also* Brief for the Cato Institute et al. as *Amici Curiae* in Support of Petitioners, *supra* note 165, at 11–12.

273. Brief for Amici Curiae Former Chairmen of the Securities and Exchange Commission in Support of Respondents, *supra* note 165, at 18 (citing *Accounting Reform and Investor Protection: Hearings Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 107th Cong. 532 (2002) (statement of NASD Chairman Glauber)).

274. *Id.* at 18–19.

275. *See* Brief of the Council of Institutional Investors et al. as Amici Curiae Supporting Respondents, *supra* note 165, at 18.

276. This dichotomy makes sense in the context of economic law enforcement. If an entity no longer derives its power from peer review and self-regulation, it can only draw power from a body with greater enforcement power over the market—namely, the U.S. government. *See id.* at 23–24. In its last days, the predecessor of the PCAOB, the Public Oversight Board (POB) of the AICPA, called for a legislative replacement where "all critical elements of regulation—including all standard setting, inspections and reviews of accounting firms, enforcement and discipline, and other functions—be placed under the aegis of a single regulator operating under statutory authority." *Id.* at 23.

277. *See* Brief for Respondents, *supra* note 14, at 49.

278. *Id.*; *see also* Brief of the Council of Institutional Investors et al. as Amici Curiae Supporting Respondents, *supra* note 165, at 16.

attract experienced, competent regulators for the auditing industry without the administrative or budgetary constraints endured by the typical independent agency.[279] Such a goal is laudable but perversely optimistic because the Board has almost no political incentive to regulate in the general public interest as defined by the electoral process.[280] Given the shortcomings of the Board, policymakers should consider alternative structures regardless of the Supreme Court's ruling on the case.[281] In the end, the constitutional questions engulfing the Board[282] should encourage reform rather than passive deference to the reasoning of the Court.[283]

D. *Precedent and Policy Arguments Support Executive Control of the PCAOB*

When considering an alternative structure for the Board, it is important to keep in mind Congress focused on insuring the Board's industry

279. *See supra* Part IV.A.

280. In a perfect world, an independent bureaucracy could enforce government policy for the public interest with swift efficiency. Congress's attempt, however, ignores the nature of a bureaucracy. *See supra* note 265 and accompanying text. Without the threat of at-will removal or electoral backlash from the Executive, agencies are shaped instead by the special interests motivating their congressional authors. *See* Mathew D. McCubbins, et al., *Administrative Procedures as Instruments of Political Control,* 3 J.L. ECON. & ORG. 243 (1987). Taking it on the abstract, if a bureaucracy strives to gain power, and its power structure is defined by congressional perpetuation and support, then the bureaucracy will only look to protect the public interests that will in turn feed the interests of its *current* congressional supporters. In essence, "[a]gencies are insulated precisely because those who create them do not want them held accountable by tomorrow's authorities." Terry M. Moe & Scott A. Wilson, *Presidents and the Politics of Structure,* 57 LAW & CONTEMP. PROBS., Spring 1994, at 1, 6; *see also* JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 72–90 (1989). Wilson discusses four kinds of political environments occupied by government agencies: "[The agency] can confront (1) a dominant interest group favoring its goals; (2) a dominant interest group hostile to its goals; (3) two or more rival interest groups in conflict over its goals; or (4) no important interest group." WILSON, *supra*, at 76. Most likely, the PCAOB falls into the second category, defined by Wilson as "entrepreneurial politics" where the "costs are heavily concentrated on some industry . . . but the benefits are spread over many if not all people. Because costs have a high per-capita value, the affected group has a strong incentive to oppose the proposed law." *Id.* at 77. The PCAOB fits this definition because its sanctions and compliance costs most heavily affect auditors and public companies though its policies benefit U.S. investors on the whole. Wilson describes the threats facing such an agency:

> [M]any of the founding members of the new agency will be drawn from the social movement that helped to create it and they will have the aid of watchdog groups composed of political allies. For a while these forces will be able to fend off the pressures of the cost-bearing interest and even to impart a degree of regulatory zeal to the agency's work. But such an agency will be very much at risk: when the zeal of their early allies flags, it may find itself confronting an environment where much of the information it needs and many of the political resources to which it must respond will be in the hands of an interest fundamentally hostile to its purposes.

Id. at 77–78.

281. *See infra* Part IV.B.

282. *See supra* Part III.

283. While deference to the Court is of course important, Congress should recognize that a ruling in favor of the constitutionality of the Board does not necessarily endorse its structure as effective.

independence, not independence from the Executive.[284] It thus does not conflict with Congress's intent to argue for increased executive oversight of the Board.[285] Moreover, such an increase may be the most effective way to ensure political accountability and support for the Board's policies.[286]

The Board's functions should not necessarily limit executive oversight. As defined by past cases,[287] the Board is responsible for quasi-legislative[288] and executive functions.[289] Yet these definitions show only what triggers appointment or removal power,[290] not what will actually ensure better policy. The separation-of-powers principles laid down by the Court speak more directly to this normative question.[291] Throughout its

284. *See* Brief for Amici Curiae Former Chairmen of the Securities and Exchange Commission in Support of Respondents, *supra* note 165, at 22–24; *see also supra* note 240 and accompanying text. In addition, amicus for the respondent essentially concede that the Board could still function with an altered structure. *See* Brief of National Association of State Boards of Accountancy as *Amicus Curiae* in Support of Respondents, *supra* note 165, at 27–28 ("[I]f the [C]ourt does find any of these provisions to be unconstitutional, it is imperative that the PCAOB nevertheless be permitted to continue to function."). Though it is true Congress also hoped the Board would be independent of "constituent pressures," there is little indication that its somewhat quixotic insulation inside the SEC is necessary to maintain distance from such pressures. *See supra* note 147 and accompanying text

285. *C.f.* Brief for Amici Curiae Former Chairmen of the Securities and Exchange Commission in Support of Respondents, *supra* note 165, at 22–24; Brief of National Association of State Boards of Accountancy as *Amicus Curiae* in Support of Respondents, *supra* note 165, at 27–28. In other words, "independence from the executive" is glaringly absent from the predominant justifications for the Board's structure. Rather, the primary concern appeared to be independence from the industry. *See* Brief for Amici Curiae Former Chairmen of the Securities and Exchange Commission in Support of Respondents, *supra* note 165, at 22–24; Brief of National Association of State Boards of Accountancy as *Amicus Curiae* in Support of Respondents, *supra* note 165, at 27–28. As a result, reintroducing executive control over the Board does not conflict with Congress's initial intentions.

286. For a notional perspective on the support necessary for an agency like the Board, see *supra* note 242 and accompanying text.

287. *See* discussion of *Morrison* and *Edmond*, *supra*, Part II.

288. The Board is empowered to create regulations and levy taxes to support its budget. *See* 15 U.S.C. §§ 7213(a)(1), 7219(b)–(d) (2006). Such functions constitutionally fall into the category of legislative power. *See* U.S. CONST. art. I, § 8 (giving Congress the power to levy taxes and to make all laws necessary and proper to the execution of the powers vested in the government). For a discussion of the non-delegation non-doctrine relating to this issue, see *supra* note 73 and accompanying text.

289. The Board's other functions (investigations, inspections, and subsequent sanctions for violations) all fall into the constitutional category of executive power. *See* U.S. CONST. art. II, §§ 1, 3; *see also* Springer v. Gov't of Phil. Islands, 277 U.S. 189, 202 (1928) ("Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions.").

290. *See supra* Part II (discussing the development of the appointment and removal power tests in Supreme Court precedent).

291. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3157 (2010). The respondent in *Free Enterprise* recognizes that the "Court has repeatedly and properly emphasized the indispensable role of separation of powers in preserving individual liberty."

precedent,[292] the Supreme Court has consistently recognized that separation of powers preserves individual liberty.[293] Under these principles, the President is most capable of ensuring the Board's actions will preserve individual liberty while effectively executing Congress's intentions.[294]

1. Increase in Voter Confidence

First, looking to the Board's enforcement responsibilities, presidential control of the Board could increase the confidence of American investors by linking the decisions of the Board back to an elected representative.[295] Despite the respondent's focus on the Board's functions, the reality is that voters recognize form over function—that is, they elect or oust the officials who are formally responsible for particular government actions.[296] Under the Supreme Court's ruling, the members of the Board can only be removed by the SEC, whose members in turn can only be removed for cause by the President.[297] Such insulation eliminates accountability to the voters for the Board's discretionary decisions because the SEC, not the President, is responsible for the Board's actions.[298] In its current structure,

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Brief for Respondents, *supra* note 14, at 35. Given this acknowledgement, "better policy" might be most easily measured by the ways in which it preserves individual liberty. *See* Buckley v. Valeo, 424 U.S. 1, 119 (1976) ("separation of powers . . . is at the heart of our Constitution"); Mistretta v. United States, 488 U.S. 361, 380 (1989) ("Madison, in writing about the principle of separated powers, said: 'No political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty.'" (quoting THE FEDERALIST NO. 47, *supra* note 2, at 324 (James Madison))).

292. *See supra* Part II.

293. Morrison v. Olson, 487 U.S. 654, 693 (1988) ("Time and again we have reaffirmed the importance in our constitutional scheme of the separation of governmental powers into the three coordinate branches."); *see, e.g.*, Myers v. United States, 272 U.S. 52, 138–39 (1926); Humphrey's Ex'r v. United States, 295 U.S. 602, 629–30 (1935); Bowsher v. Synar, 478 U.S. 714, 730 (1986); Freytag v. Comm'r, 501 U.S. 868, 884 (1991); *Buckley*, 424 U.S. at 122; INS v. Chadha, 462 U.S. 919, 951 (2001).

294. *See infra* Part IV.B.

295. *See* Brief of *Amicus Curiae* The Claremont Institute Center for Constitutional Jurisprudence in Support of Petitioners, *supra* note 165, at 18 ("The Framers vested executive authority in the President for purposes of unity, consistency, and accountability."). Looking to the work of legal historian James Kent, amici for the petitioners recognize that "[u]nity increases not only the efficacy, but the responsibility, of the executive power. Every act can be immediately traced and brought home to the proper agent. There can be no concealment of the real author, nor, generally, of the motives of public measures . . . ." JAMES KENT, COMMENTARIES ON AMERICAN LAW 291 (Oliver Wendell Holmes, ed., Rothman & Co., 12th ed. 1989) (1873), *cited in* Brief of *Amicus Curiae* The Claremont Institute Center for Constitutional Jurisprudence in Support of Petitioners, *supra* note 165, at 17.

296. The logic of this point flows from the basic principles of representative democracy. In a presidential system, the President is directly accountable to the voters, who place their demands on the government and reward responsive policymaking with political support. *See* Bernhard Webels, *Political Representation and Democracy*, *in* THE OXFORD HANDBOOK OF POLITICAL BEHAVIOR 834 (Russell J. Dalton & Hans-Dieter Klingemann eds., 2007).

297. *See supra* Part III.

298. In this case, the base definition of accountability is whether someone can lose his job for making the wrong decision. The Supreme Court has implicitly recognized the removal power as

the Board has already created unprecedented compliance costs[299] and unintended deterrence of public companies.[300] Putting the PCAOB back under the control of the President would bring a voice to impacted voters and encourage institutional effectiveness.[301]

2. Preservation of Expertise and Accountability

Second, executive control over the PCAOB would mitigate Congress's concerns over the Board's industry expertise and budgetary needs.[302] In the same manner that the President appoints competent Federal Reserve Chairmen,[303] SEC Commissioners,[304] and even Supreme Court Justices,[305] Congress could retain the power to vet appointments to the Board for their

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the application of this principle. *See* Loving v. United States, 517 U.S. 748, 757–58 (1996) (recognizing that the Constitution gave specific powers like appointment and removal to the Executive Branch, "allow[ing] the citizen to know who may be called to answer for making, or not making, those delicate and necessary decisions essential to governance"); *Myers*, 272 U.S. at 117 (holding the President's removal powers are essential for upholding his responsibilities to the public). Keep in mind that the SEC is still an independent agency. If members of the SEC are still removable only for cause, then they have no exterior accountability for their oversight of the Board.

299. *See supra* Part IV.C.1.

300. Increasingly, the Sarbanes-Oxley Act and its section 404 internal-control regulations (imposed by the PCAOB) have led to companies choosing to remain private rather than incur the compliance costs of going public. *See* Peter J. Wallison, *Sarbanes-Oxley and the Ebbers Conviction*, AM. ENTER. INST. FOR PUB. POLICY RESEARCH, 4 (June 2005), http://www.aei.org/docLib/ 20050610_FSOJune_g.pdf.

301. As political theorists Terry Moe and Scott Wilson explain:

> Unlike legislators, presidents are held responsible by the public for virtually every aspect of national performance. When the economy declines, an agency falters, or a social problem goes unaddressed, it is the president who gets the blame, and whose popularity and historical legacy are on the line. All presidents are aware of this, and they respond by trying to build an institutional capacity for effective governance. As a result, they are the only players in the politics of structural choice who are motivated to seek a unified, coordinated, centrally directed bureaucratic system.

Moe & Wilson, *supra* note 280, at 11 (footnote omitted). The Court invokes this same principle as it quotes James Madison:

> [T]he Framers sought to ensure that those who are employed in the execution of the law will be in their proper situation, and the chain of dependence be preserved; the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community.

Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3155 (2010) (internal quotation marks omitted).

302. This suggestion does not directly controvert any of the arguments considered by the majority in *Free Enterprise*. *See supra* note 248 and accompanying text.

303. *See The Structure of the Federal Reserve System*, FED. RESERVE BD., http://www.federal reserve.gov/pubs/frseries/frseri.htm (last visited Jan. 6, 2011).

304. *See Current SEC Commissioners*, U.S. SEC. & EXCH. COMM'N, http://www.sec.gov/about/ commissioner.shtml (last visited Jan. 6, 2011).

305. *See A Brief Overview of the Supreme Court*, SUPREME COURT OF THE U.S., http://www. supremecourt.gov/about/briefoverview.aspx (last visited Jan. 6, 2011).

expertise without cutting off presidential influence.[306] It is understandable that the Board's original insulation from presidential appointment was motivated in part by a desire to protect the President from public scrutiny.[307] The appointment process is often personalized to hold presidents responsible for "every action or decision made in their name or on behalf of those (such as the nominees) aligned with them."[308] Yet this impulse to protect the President runs contrary to his role in the federal system "to ensure both vigor and accountability"[309] by openly maintaining control over executive functions.[310] Such oversight also protects the decisions of the independent agency from partisan reproach.[311] As former FTC Chairman Calvin Collier noted, independent agencies "'have no lifeline to the White House. [They] are naked before Congress, without protection there.'"[312] Executive control over the Board would preserve individual liberty by linking policies back to an elected official while avoiding factional pressures.

It is true that the Board must ensure competitive salaries to draw industry talent.[313] Yet the Board's budget and its levied fees do not rely on its independence from executive power.[314] On the contrary, the respondent in *Free Enterprise* particularly emphasized the SEC's approval power over the Board's budget[315] and the Board's allocation, assessment, and collection of support fees.[316] Ultimately, the fee and budget structure of the Board need not change if placed more directly under executive authority.[317] Congress's concerns for the Board's functionality would not

306. The Senate has the power to impose criteria for the occupants of particular federal offices informally, if not potentially formally. *See* GERHARDT, *supra* note 97, at 153–57.

307. *See supra* note 242 and accompanying text.

308. GERHARDT, *supra* note 97, at 83.

309. Printz v. United States, 521 U.S. 898, 922 (1997).

310. Strauss, *supra* note 62, at 592.

311. *See* Calvin Collier, Remarks at the Assembly of the Administrative Conference of the United States, Washington D.C. (Dec. 15, 1983), *quoted in* Strauss, *supra* note 62, at 592 & n.75).

312. *Id.*

313. *See* S. REP. NO. 107-205, at 7 (2002) ("The bill makes it plain, as the Committee intends, that the Board is to provide for staff salaries that are fully competitive with those for comparable private-sector self-regulatory, accounting, technical, supervisory, or related staff or management positions.").

314. The taxation power of the Board is not predicated on its independence. *See* 15 U.S.C. § 7219(c)–(d) (2006).

315. Brief for Respondents, *supra* note 14, at 7 (citing 15 U.S.C. § 7219(b)).

316. *Id.* (citing 15 U.S.C. § 7219(d)).

317. A possible constitutional challenge to this structure might rise under the nondelegation doctrine, but the claim was not pursued in *Free Enterprise* beyond the trial level and would not likely succeed considering Supreme Court precedent on the issue. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667, 670 n.2 (D.C. Cir. 2008), *aff'd in part, rev'd in part, and remanded*, 130 S. Ct. 3138 (2010); Keefe, *supra* note 163, at 1676 n.194; *see also supra* note 78 and accompanying text; *compare* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 328–31 (3d ed. 2006), *with* Nagy, *supra* note 18, at 1050–60 (addressing the possibility of a nondelegation challenge).

be significantly disrupted by executive control.[318] Instead, presidential oversight would heighten the effectiveness of the Board by coordinating its role with other agencies and bringing much-needed public transparency to the auditor-regulation process.[319] Formal separation of powers and respect for the unitary Executive[320] offer stability and accountability for the Board.

V. CONCLUSION

Even if the unitary Executive still walks the halls of the West Wing,[321] the Supreme Court has recognized his constitutional existence without protecting his constitutional power.[322] The Court's precedent has shaped the President's appointment and removal powers with significant deference to the will of Congress.[323] Despite this, the Public Company Accounting Oversight Board challenges the stature of the Executive Branch in a new[324] and ultimately unnecessary way.[325] Though the Supreme Court's decision failed to correct the Board's flaws, Congress and the public should sit up and take notice of the Board's questionable structure. The unitary Executive does not always threaten; it can in fact support the mission of independent agencies by providing political accountability.[326]

The independence of the Board would not be compromised by executive oversight because it would remain independent from the industry it regulates.[327] Instead, many of the Board's current problems might be corrected by increasing voter confidence and by preserving its expertise and budget through executive oversight.[328] Though separation of powers may split between formal and functional understandings, supporting

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318. The arguments of the respondent and its amici bear this point out by emphasizing the SEC's already pervasive supervision of the Board and suggesting that the Board could still function if the Court excised its constitutionally-offending aspects. *See* Brief for Respondents, *supra* note 14, at 15–16; Brief of National Association of State Boards of Accountancy as *Amicus Curiae* in Support of Respondents, *supra* note 165, at 27–28.

319. *See* Brief for the Cato Institute et al. as *Amici Curiae* in Support of Petitioners, *supra* note 165, at 12; *see also supra* Part IV.A–B.

320. These two concepts are most notably and effectively combined in Justice Scalia's dissenting opinion in *Morrison*. *See generally* Morrison v. Olson, 487 U.S. 654, 697–734 (1988) (Scalia, J., dissenting).

321. *See* PRESIDENTIAL POWER, *supra* note 7, at 418–19.

322. *See supra* Part IV.A.

323. *See, e.g.*, Edmond v. United States, 520 U.S. 651 (1997); *Morrison*, 487 U.S. 654; *supra* Part II.

324. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667, 686 (D.C. Cir. 2008) (Kavanaugh, J., dissenting), *aff'd in part, rev'd in part, and remanded*, 130 S. Ct. 3138 (2010).

325. *See supra* Part IV.B.

326. *See supra* Part IV.

327. *See supra* Part IV.A.

328. *See supra* Part IV.B.1–2.

political accountability of independent agencies is good governance.[329] And should the Board's reform fail? The unitary Executive stands responsible to the voters. The Board and its inevitable progeny could serve the people most in the accountable hands of the President. Even the *Free Enterprise* decision recognizes this much.[330]

Kelsey Elizabeth Stapler*

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329. *See supra* Parts I, III.

330. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3156–57 (2010).

* J.D. Candidate, 2011, Pepperdine University School of Law; B.A. in Government, emphasis in Public Policy, *summa cum laude*, 2008, Patrick Henry College. Thank you to my parents, Dale and Sally Stapler, whose loving, selfless, and delight-filled teaching gave me the key to learning and how to use it.