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Bringing the Independent Agencies in from the Cold

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The pending challenge to the constitutional architecture of the Public Company Accounting Oversight Board (“PCAOB”) is only the latest example of the capacity for seemingly technical and trivial legal issues to inspire large debates about the separation of powers.¹ Otherwise, who but the cognoscenti could delve greedily into questions whether the agency’s officers are principal or inferior under the Appointments Clause and whether the agency’s unique “double-decker” removal limitations invade the President’s removal powers? The explanation, as usual, is that bigger game is afoot nearby; small analytical steps regarding this relatively minor agency can produce great doctrinal leaps for theories about the place of agencies in government. I want to proceed the other way around, from broad separation-of-powers considerations to the particulars of the *Peekaboo* case, to use the agency’s charming nickname. The result will involve only modest doctrinal leaps, but ones that could help to resolve some longstanding questions about the structure of our government.

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1. The best examples are *Myers v. United States*, 272 U.S. 52 (1926), and *Bowsher v. Synar*, 478 U.S. 714 (1986).

Let us entertain a cosmic metaphor that the Framers of our Constitution would have understood. Imagine the executive establishment of the federal government as our solar system. (The Framers were no strangers to Newtonian physics, and the analogy of the solar system often has been employed for their creation.²) At the center sits the President, exuding light, heat, and blasts of particles in all directions. The inner planetary system, a.k.a. the terrestrial planets, consists of the fifteen cabinet departments and some non-departmental executive agencies such as the Environmental Protection Agency. Although they vary in importance and therefore occupy orbits of increasing distance from the sun, all of these objects feel strongly the presidential light, heat, and gravitational tug. Farther out, past a transition zone guarded by asteroids, lie the sixteen major independent regulatory commissions, a.k.a. the gas planets.³ The sun's light, heat, and gravity are still felt here, but at diminished levels. Next comes poor Pluto—the PCAOB in my story—recently demoted to the dubious status of a “dwarf planet,” partly because it does not dominate its neighborhood by clearing out passing debris. Pluto follows an eccentric orbit that sometimes carries it inward of its neighbor Neptune (the Securities and Exchange Commission) and sometimes outward, toward the very edge of our system. Out beyond Pluto lies an Oort cloud of entities taking variant forms, including public/private combinations that stand at the very edge of government. Objects in this cold, dim region are always subject to a competing gravitational tug that may take them out of our system entirely.

My proposal here is that the Supreme Court allow Neptune to capture Pluto as their orbits next intersect. Pluto might be too small for a planet, but it would make a fine moon. Attaching PCAOB to the orbit of the SEC would allow the Court to stress that both are parts of our constitutional system in the fundamental sense that they must respond to the President at the center in certain essential ways. Is this too much to ask of the Court? I think not. Given the level of self-regard that the Court so often displays, moving a dwarf planet around a bit should not be beyond its pretensions. And the outcome would be to increase the overall harmony of our system, as we shall see. First, though, let us place the metaphor in the background for a while as I engage in some conventional analysis.

2. *E.g.*, Harold H. Bruff, *The Federalist Papers: The Framers Construct an Orrery*, 16 HARV. J.L. & PUB. POL'Y 7 (1993).

3. *See generally* Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111 (2000).

Scholars of separation of powers tend to divide into two great realms: the presidentialists and the congressionalists, the two labels indicating which of the two branches they tend to support in interbranch clashes.⁴ There are also some scholars in the muddled middle, such as the eminent Peter Strauss and me, who bravely assert: "It depends."⁵ The fiercest presidentialists, citing the clause in Article II vesting the executive power in a President, adhere to the "unitary executive" theory, which demands very strong presidential powers of appointment and removal as guarantees of the individual political responsibility that the Framers placed in the President.⁶ They envision a simplified organization chart for the executive branch, with presidential control and responsibility flowing down many lines into the heart of the bureaucracy. (In my metaphor, they would haul everything that now lies out past the asteroid belt in closer to better experience the President's light and heat.)

The fiercest congressionalists, citing the Faithful Execution Clause, argue that the President must generally rest content with the powers that Congress chooses to confer by statute. Thus, constraints on appointment and removal are usually valid.⁷ They are happy with a quite pluralist—even messy—organization chart that reflects varying congressional judgments about independence over the years. (In my metaphor, they would leave the outer regions alone, even if something drifts away from time to time.)

4. I discuss this topic at length in HAROLD H. BRUFF, *BAD ADVICE: BUSH'S LAWYERS IN THE WAR ON TERROR*, ch. 5 (2009).

5. Peter Strauss's approach is exemplified by *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984), and *Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696 (2007). For my approach, see HAROLD H. BRUFF, *BALANCE OF FORCES: SEPARATION OF POWERS LAW IN THE ADMINISTRATIVE STATE* (2006). For other thoughtful examples of the middle way, see PETER M. SHANE, *MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY* (2009); HAROLD J. KRENT, *PRESIDENTIAL POWERS* (2005).

6. See STEVEN G. CALABRESI & CHRISTOPHER YOO, *THE UNITARY EXECUTIVE* (2008); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992). For some extreme presidentialist views, see JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11* (2005).

7. For a thoughtful congressionalist approach, see the work of LOUIS FISHER, e.g., *THE CONSTITUTION AND 9/11: RECURRING THREATS TO AMERICA'S FREEDOMS* (2008), and *CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT* (5th rev. ed. 2007); see also *THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY* (David Gray Adler & Larry N. George eds., 1996). A fine book that lies toward the congressionalist end of the spectrum is Harold H. Koh, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* (1990).

Those who muddle want to know more about the specific situation. In particular, they want to know the complete relationship between each constitutional branch and an agency, and then assess the appropriateness of the arrangement for the functions to be performed. (In my metaphor, they would consider some limited orbital modifications.) This approach forfeits the predictability and elegance of the more polar positions. Taken seriously, it demands some difficult empirical and legal judgments. It can, nonetheless, claim legitimacy from a structural constitutional characteristic. The Constitution's first three articles outline ties between the constitutional branches and the agencies, implying that the role of all three is pertinent to constitutional analysis. The behavior of the framing generation supports this approach; they had fleshed out the oversight roles of all three branches by the time that *Marbury* clarified the power of the courts to review execution in 1803.⁸

For its part, the Supreme Court wobbles back and forth between "formal" opinions that please the presidentialists and "functional" opinions that please the congressionalists.⁹ The Court has never satisfactorily explained why it selects one approach or the other, probably because, apart from the role of the choice in justifying a predetermined outcome, it does not know. Scholars have helpfully offered their speculations, but the Court majestically ignores them.

Alas, the sum total of Congress's legislation and the Court's cases has led to an organization chart that few students of public administration (or of logic) could love. In my metaphor, we are a long way from a simple schematic showing eight planets (sorry, Pluto!) ranging gracefully out from the sun. Happily, the President does have direct lines of command to some of the most important agencies, for example, the Departments of State and Defense and the EPA. Yet some other highly important tasks are conferred on such independent agencies as the Federal Reserve Board and the SEC. We might well view this state of affairs as an organization chart in search of a theory. The theory will then revise the chart. The challenge to the structure of the PCAOB is the latest attempt to gain entry to the chart via one entity within it.

Before turning to that challenge, I want to add a component to the analysis that is not always embraced by the law: practicality. The President is (and constitutionally must be) one person. However able,

8. DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789-1801* (1997).

9. Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1987); Harold H. Bruff, *The Incompatibility Principle*, 59 ADMIN. L. REV. 225 (2007).

one person can only do so much. As Chief Justice (and former President) Taft pointed out correctly in *Myers*, therefore the President must execute the law through subordinates. This is surely true, yet it only frames the central issues: how *much* control may he constitutionally assert, through *what* methods, and over *which* subordinates? Since any sensible legal answer to this question is likely to be less than starkly simple, the practical needs and capacities of the presidential office should inform the answer. My reference to the presidential office notes the reality that modern Presidents are served by significant bureaucracies of their own that attempt to control the rest of the executive establishment in his name. The White House Office, which contains the President's inner circle, has about 400 employees; the larger Executive Office of the President has about 1700 employees.¹⁰

Given the size of the President's bureaucracy-for-controlling-the-bureaucracy, one of a modern President's principal tasks is controlling *it*, never mind the agencies themselves. Upon his inauguration, Barack Obama signaled his awareness of this problem by naming various "czars" who will intermediate between him and the agencies, partially or wholly end-running the rest of the presidential bureaucracy.¹¹ (In my metaphor, these would be solar flares.) Obviously, this step may only add another layer of practically divided responsibility to the existing mix. My point for present purposes, however, is only that separation-of-powers debates should not ignore the actual nature of the executive branch in favor of a vision drawn solely from the expansionist dreams of Hamilton or the minimalist dreams of Madison. Consequently, I will argue below that the larger issues lurking in the *Peekaboo* case should be resolved incrementally, rather than broadly, in hopes of doing some good and not too much harm. There I go again, muddling away.

Practical considerations should also inform resolution of the particular issues of appointment and removal powers. Justice Scalia's "lion's kill" consists of portions of the President's power to select nominees and to remove officers that Congress has effectively taken from him.¹² Despite routine, bureaucratic objections to these

10. See U.S. Office of Personnel Management, Federal Employment Statistics, Table 2 – Comparison of Total Civilian Employment of the Federal Government by Branch, Agency, and Area as of October 2008 and November 2008, <http://www.opm.gov/feddata/html/2008/november/table2.asp> (last visited Oct. 28, 2009).

11. Will Englund, *Czar Wars*, NATIONAL JOURNAL, February 14, 2009, at 16.

12. In *FCC v. Fox Television Stations, Inc.*, he objects to "letting Article III judges—like jackals stealing the lion's kill—expropriate some of the power that Congress has wrested from the unitary Executive." 129 S.Ct. 1800, 1817 (2009). He doesn't like the lion much either.

congressional invasions of their discretion, Presidents have conceded the main issues in the simple sense that they are unwilling to mount major battles over them.¹³ Regarding nominees, the Senate's confirmation power early began morphing into a power to determine who got nominated, first for state-based officers like lower federal judges and later for members of the independent agencies. The boundaries of this ground have occasionally been tested, with presidential or senatorial armies advancing a ways from their trenches. Presidents, though, have never succeeded in obtaining the Senate's unconditional surrender, and never will. Therefore, it is a bit strained to argue that the principal/inferior officer line must be read to preserve lines of political accountability that are unlikely to be pursued in fact. In other words, Presidents who do not insist on their own preferences for SEC commissioners have only an indirect and limited interest in whom the SEC chooses for the PCAOB.

Similarly, regarding removals, the dicta of *Humphrey's Executor* that the independent agencies are wholly independent from the President except for the appointments power may be silly constitutional law (as I think they are), but as a prediction they largely came true. Presidents do indeed leave the independents mostly alone, except for budgetary supervision and a nomination power that is shared with the Senate. Taking on an independent agency is a game not usually worth the candle for a President, given the protectiveness of Congress toward independent agencies. Hence, it is no accident that we do not know what the standard statutory formulations of "cause" mean. Presidents do not test the limits of their power by removing commissioners for disagreeing with them over issues of securities regulation, or trade regulation, or communications policy. Perhaps that project would start if *Humphrey's Executor* were simply overruled in *Peekaboo*, but I regard such a decision as both unlikely and unwise.

The points that I have just made invite an objection from adherents of the unitary executive: I identify problems that should be corrected, not condoned, because these are bad practices that undermine political accountability. In that view, what is needed is a sufficiently thunderous Supreme Court opinion eviscerating the PCAOB, thereby empowering Presidents and calling them to their supervisory duties. To see whether that conclusion is justified, let us turn to the two main issues in the case, inquiring what measure of presidential power is needed.

13. THE UNITARY EXECUTIVE, *supra* note 6, collects all of the routine objections and the relatively few serious controversies about unitariness. But Presidents have not normally pressed the controversies to the point of constitutional confrontation with Congress.

The facts of *Peekaboo* certainly invite the Court to revisit some of the statements it made in its *Freytag* and *Edmond* cases, and to resolve the tension between them. In *Freytag*, Justice Blackmun outlined a unitarian's vision of the executive branch. Blackmun seemed to be saying that the only heads of departments who could name inferior officers were the members of the cabinet, "limited in number and easily identified."¹⁴ Why? Because "[t]heir heads are subject to political oversight and share the President's accountability to the people." If this is meant as a statement about the actual operation of our government, it somewhat strains reality. (Quick, who is the Secretary of Housing and Urban Development?) Therefore, it must refer to an assignment of responsibility for oversight to the President, which, if missing, breaks the necessary link to the people. Thus, it also implies that heads of the independent commissions are not heads of departments because the President may not oversee them and because they are not accountable to the people. In that direction lies an overruling of *Humphrey's Executor*.

Of course, *Freytag* involved no such grand issues. Nor did *Edmond*, but the case gave Justice Scalia an opportunity to correct Justice Blackmun's rhetorical excess. He did so, arguing that "in 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 advice and consent of the Senate."¹⁵ This simple formulation is more consistent with the text of Article II than is the creative Blackmun version. It also carries a broad implication: anyone who *is* a principal officer in the formal sense *may* be supervised by the President to preserve political accountability. That would include members of the independent agencies, and would jettison the dicta of *Humphrey's Executor* about the estrangement of those agencies from the executive branch. (Whether the holding of that case would survive depends on analysis of the removal issue, to which I will turn presently.)

For appointments purposes, I hope the *Peekaboo* Court will affirm the *Edmond* view of the clause and hold that the PCAOB is at least minimally supervised by members of the SEC for constitutional purposes. (In my metaphor, this step lets Neptune capture Pluto.) This conclusion is easy to reach. The SEC controls PCAOB's budget, approves its rules, appoints its members, and may remove them, albeit for apparently quite limited cause. There are two main gaps in

14. *Freytag v. Commissioner*, 501 U.S. 868, 886 (1991).

15. *Edmond v. United States*, 520 U.S. 651, 663 (1997).

the otherwise plenary supervisory powers of the SEC: the removal restriction and the absence of oversight power over investigation and enforcement decisions. Regarding the latter, executive supervision of these activities is quite sensitive, as Peter Strauss has explained, and hence can appropriately be insulated from plenary political oversight. Here, due process considerations counterweight claims for presidential supervision. The salience of the removal limit for Appointments Clause purposes, which is its impediment to characterizing an officer as inferior, is clearly outweighed by the SEC's power to negate the PCAOB's formal actions and to vitiate its activities by budgetary cuts. Since the SEC can hamstring the PCAOB's actions that have the force of law, what does it matter that the Commission may have to leave the Board members in place, enjoying their giant salaries and lingering over long, expensive lunches? When the PCAOB wants to make policy, it has to get it past the boss, and that identifies it as a unit inferior to the SEC. (In my metaphor, the PCAOB, like Pluto, cannot even clear its neighborhood.)

Thus, the inferior officer issue should not long detain the Court. The removal issue is more interesting and more troublesome, but I think there is a way to uphold the PCAOB while helpfully clarifying the status of the independent agencies generally. The essential problem, of course, is that officers who are thought to be removable by the President only for cause, the SEC commissioners, can remove members of the PCAOB only for cause. How, then, can the President fulfill his faithful-execution duties at such a remove? If I am right that having the PCAOB members be protected from plenary removal by a principal officer is acceptable by itself because they are inferior officers, the question shifts to the President's relationship to the SEC. This is where the big game emerges from the bureaucratic jungle. The Court could preserve the PCAOB by holding that what is unconstitutional is any restriction on presidential removal of members of the SEC. If the result is to overrule *Humphrey's Executor*, Justice Blackmun's vision of more direct political accountability becomes real.

Such a heroic step is not warranted, because it would go well beyond the President's actual oversight needs and would invalidate some removal restrictions that are justified. The President's constitutional claim to oversight of the executive branch is not unitary; rather, it varies with the function involved. The Framers clearly understood this point, and bequeathed us a perfect example of it as they constructed the new federal government. Because the President needs plenary supervisory powers over foreign policy and defense activities if he is to exercise his own constitutional powers over them, the Departments of State and War were explicitly made

subject to the President's direction.¹⁶ Treasury, in contrast, stands in a close relation to Congress's appropriation functions. Congress accordingly omitted any explicit reference to presidential directive powers over the Department. Within Treasury, the First Congress protected the Comptroller from plenary presidential removal because that officer was to exercise auditing functions, which Madison correctly regarded as quasi-judicial.¹⁷

Since the PCAOB audits the nation's auditors, it can assert a good pedigree, going back to the founding, to some independence from political oversight. The protection of its Board from at-will removal by the SEC (or the President) secures that independence, and ought to be regarded as constitutional. Presumably, that would mean that ordinary differences of opinion over regulatory policy would not be cause for removal, as the statute surely confirms. Remember, the SEC could still supervise the policy itself. Even so, one can imagine a Board run amok, conducting harassing investigations and pursuing unwarranted enforcement actions. What can the President do then if the SEC does not take action to fire the miscreants?

The Supreme Court could easily uphold a simple, two-stage process of controlled removal. First, the President may always invoke his explicit constitutional power to demand an opinion in writing from the pertinent "heads of department," the SEC commissioners, to explain why they are not discharging their statutory duty, in this case by firing Board members. If the response did not satisfy the President, he could remove commissioners until they got the point. The resultant litigation over salary, *Commissioner X's Executor*, would finally bring the long-dormant question of what should be cause for removal to the courts for resolution. In that litigation, the question whether the President needs plenary supervisory power over the SEC could be determined. Even better, the Court could consider the question actually presented: whether a particular kind of asserted cause for removal must be upheld if the President is to exercise his constitutional obligation of faithful execution. This process would allow the incremental and fact-based articulation of a body of law about removal as it relates to supervision.

Such an articulation would bring the powers of all three constitutional branches into play in determining the oversight powers of the President. The presidentialists would lose their prized goal that the appropriate reach of these powers be determined unilaterally by the President himself. The congressionalists would lose the current

16. Bruff, *supra* note 5, at 415-17.

17. *Id.*

practical assumption that whatever Congress does by way of structure prevails. Both President and Congress have too much institutional self-interest in this struggle to be allowed to prevail unchecked. The courts can serve as (relatively) disinterested umpires. Even if they do not get every call right, as umpires never do, there would be an improvement over the current situation, which features a standoff between untested and almost-unlimited competing claims to power.

Finally, swinging back around to the cosmic metaphor, both the PCAOB in particular and the independent agencies in general would have more secure constitutional orbits. The PCAOB, like little Pluto, would be captured by its nearby planetary neighbor, the SEC, through the doctrinal step of deeming its Board to be inferior officers. As for the SEC and the other independent regulatory agencies, the Court can interpret the President's powers of appointment and removal in a way that clarifies a simple proposition: as with the solar system, the fundamental principles that define relationships to the center apply to all other entities, even if many of the entities' detailed characteristics vary (some small and rocky, some large and gassy, but all governed by Newtonian mechanics). The result would be to bring some independent agencies inward from the cold and wandering orbits they now occupy and to place them somewhat nearer the President, but not as close as the traditional executive agencies lie. Thus, the steps taken to save the PCAOB could help stabilize our system as a whole. If, instead, the Court consigns the agency to the cold and dark nether regions, it will have destabilized the system, whatever its benign intentions.