Essay

The Fault, Dear PCAOB, Lies Not in the Appointments Clause, but in the Removal Power, That You Are Unconstitutional

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Introduction

Free Enterprise Fund v. Public Co. Accounting Oversight Board,[1] easily one of "the most important separation-of-powers case[s] regarding the President's appointment and removal powers . . . in the last 20 years,"[2] is off to the Supreme Court.

The case involves a facial challenge to the constitutionality of the Public Company Accounting Oversight Board ("PCAOB" or "Board"),[3] an entity created by the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley").[4] In their lawsuit, plaintiffs, Free Enterprise Fund and Beckstead & Watts, LLP (collectively, "the Fund"), allege that the structure of the PCAOB violates the Appointments Clause of the Constitution,[5] separation-of-powers principles,[6] and the nondelegation

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1 Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667 (D.C. Cir. 2008), *cert. granted*, 77 U.S.L.W. 3625 (U.S. May 18, 2009) (No. 08-861).

2 *Id.* at 685 (Kavanaugh, J., dissenting).

3 *Id.* at 668.

4 Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.).

5 U.S. CONST. art. II, § 2, cl. 2. Specifically, the Fund's Appointments Clause arguments

doctrine.[7] In the district court, the PCAOB successfully moved for summary judgment on all three claims,[8] and a divided panel of the D.C. Circuit affirmed.[9] For now, then, the PCAOB is constitutional. On the Appointments Clause question, PCAOB members are "inferior officers"[10] who need not be appointed by the President, the Securities and Exchange Commission ("SEC") is within the meaning of "Department"[11] in Article II, and its commissioners constitute a Department "Head."[12] On the separation-of-powers question, because the President appoints the SEC commissioners,[13] who in turn retain broad oversight authority over the PCAOB, the structure of the Board does not impermissibly restrict the President's removal power.[14] But given Judge Kavanaugh's piercing dissent and the 5-4 decision denying rehearing en banc,[15] the Supreme Court's grant of certiorari likely took few by surprise.

Still, how the Court will react to the majority's conclusions and Judge Kavanaugh's arguments is difficult to predict. The majority rejected *both* the Fund's separation-of-powers argument and its Ap-

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are that (1) PCAOB members are not "inferior officers" and thus must be appointed by the President (and not, as under Sarbanes-Oxley, by the Securities and Exchange Commission ("SEC")), *see* 15 U.S.C. § 7211(e)(4)(A) (2006)), and (2) alternatively, even if PCAOB members are "inferior officers," they may not be appointed by the SEC because the SEC is not a "Department," nor are the SEC's commissioners a "Head" of a "Department." *Free Enter. Fund*, 537 F.3d at 672.

6 The separation-of-powers argument concerns the President's so-called "removal power." The Fund argues that the mechanism by which PCAOB members may be removed—that is, by the SEC only, and then, only "for cause"—unconstitutionally constrains the President's authority to remove executive officers. *See Free Enter. Fund*, 537 F.3d at 679. For purposes of this Essay, unless otherwise noted, "separation-of-powers principles" is synonymous with the President's removal power.

7 Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., Civil Action No. 06-0217, 2007 WL 891675, at *5 (D.D.C. Mar. 21, 2007). The Fund's nondelegation argument is that under Sarbanes-Oxley, the PCAOB is unconstitutionally endowed with legislative power reserved for Congress. *Id.*

The D.C. Circuit did not consider the nondelegation argument because the Fund did not raise it on appeal. *See* Brief of Appellants at 1, *Free Enter. Fund*, 537 F.3d 667 (No. 07-5127) (arguing only that the PCAOB's structure violates separation-of-powers principles and the Appointments Clause).

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

9 *Free Enter. Fund*, 537 F.3d at 685 (2-1 decision).

10 *Id.* at 676.

11 *Id.* at 676–77.

12 *Id.* at 677–78.

13 15 U.S.C. § 78d(a) (2006).

14 *Free Enter. Fund*, 537 F.3d at 678–84.

15 *See* Denial of Petition for Rehearing En Banc, *Free Enter. Fund*, 537 F.3d 667 (No. 07-5127) (5-4 decision).

pointments Clause argument,[16] as it had to, in order to find the Board constitutional. Judge Kavanaugh, by contrast, concluded that *both* the separation-of-powers argument and the Appointments Clause arguments had merit.[17] This Essay takes the middle ground by contending that although Judge Kavanaugh probably is correct to find the PCAOB unconstitutional, the fault lies only in the statutory mechanism providing for removal of PCAOB members. That is, the majority got the better of the Appointments Clause argument, but Judge Kavanaugh got the better of the presidential removal power argument. Ultimately, because violating *either* spells doom for the PCAOB, Judge Kavanaugh's position likely will prevail when the Supreme Court decides the case.

In Part I, this Essay describes briefly the origin of the PCAOB and the statutory scheme that authorizes its creation and sets forth its various functions. Part I then reviews (1) the SEC's broad authority over the PCAOB and (2) the statutory provisions specifying appointment and removal of PCAOB members. This coverage is needed to analyze the Fund's Appointments Clause and separation-of-powers arguments.

Part II offers a high-level overview of the relevant Supreme Court precedent addressing (1) the Appointments Clause and (2) the President's removal power.

Part III takes a close look at the D.C. Circuit's analysis in *Free Enterprise Fund*. This Essay agrees with the majority's decision that the PCAOB does not violate the Appointments Clause. But this Essay agrees with the dissent that the PCAOB impermissibly constrains the President's removal power and is thus unconstitutional.

Concluding in Part IV, this Essay identifies the potential "fallout" from a finding that the PCAOB is unconstitutional and then muses about how such a finding might facilitate fresh dialogue on the unitary executive theory and the place of independent agencies in our scheme of government.

I. Sarbanes-Oxley and the Birth of the PCAOB

Congress passed the Sarbanes-Oxley Act of 2002 in response to "repeated failures of audit effectiveness and corporate financial and broker-dealer responsibility"[18] epitomized by accounting scandals at

16 *Id.* at 685.

17 *Id.* at 704, 712 (Kavanaugh, J., dissenting).

18 S. REP. NO. 107-205, at 2 (2002).

Enron[19] and WorldCom.[20] The Act established the PCAOB,[21] "a strong independent board to oversee the conduct of the auditors of public companies,"[22] over which the SEC would "have oversight and enforcement authority."[23] Congress endowed the PCAOB with wide-ranging responsibilities: the PCAOB was to register public accounting firms,[24] "establish or adopt, or both, by rule, auditing, quality control, ethics, independence, and other standards relating to the preparation of audit reports for issuers,"[25] conduct inspections and investigations of registered public accounting firms,[26] and conduct disciplinary proceedings and impose sanctions where appropriate.[27] Tellingly though, the SEC retained significant authority over the PCAOB.[28]

Yet for all of the arguably judicial and legislative powers that Congress conferred on the PCAOB, the PCAOB's constitutionality appears to turn on the provisions of Sarbanes-Oxley specifying appointment and removal of PCAOB members.[29] This Part reviews the SEC's authority over the PCAOB as envisioned by the statutory scheme, as well as the Board's appointment and removal mechanisms.

SEC Oversight. Section 107 of Sarbanes-Oxley specifies the nature and extent of the SEC's authority over the PCAOB—authority that is most aptly characterized as "broad."[30] With few exceptions, no rule of the PCAOB is effective unless, and until, the SEC approves

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19 *See generally Lessons Learned from Enron's Collapse: Auditing the Accounting Industry: Hearing Before the H. Comm. on Energy & Commerce*, 107th Cong. (2002) (investigating policy issues of corporate governance, accounting, and governance of the auditing industry); *Accountability Issues: Lessons Learned from Enron's Fall: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. (2002) (same).

20 *See generally Wrong Numbers: The Accounting Problems at WorldCom: Hearing Before the H. Comm. on Financial Services*, 107th Cong. (2002) (investigating the collapse of WorldCom).

21 15 U.S.C. § 7211(a) (2006).

22 S. REP. NO. 107-205, at 2 (2002).

23 15 U.S.C. § 7217(a) (2006).

24 *Id.* § 7211(c)(1).

25 *Id.* § 7211(c)(2).

26 *Id.* § 7211(c)(3)–(4).

27 *Id.* § 7211(c)(4).

28 *See* S. REP. NO. 107-205, at 12 ("The Board is subject to SEC oversight and review to assure that the Board's policies are consistent with the administration of the federal securities laws, and to protect the rights of accounting firms and individuals subject to the Board's jurisdiction.").

29 *See* Complaint at 19–22, Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., Civil Action No. 06-0217, 2007 WL 891675 (D.D.C. Mar. 21, 2007); Donna M. Nagy, *Playing Peekaboo with Constitutional Law: The PCAOB and Its Public/Private Status*, 80 NOTRE DAME L. REV. 975, 1049–57 (2005).

30 *See* 15 U.S.C. § 7217(a).

it.[31] And the SEC retains authority to amend or modify rules proposed by the Board.[32] Further, the PCAOB must notify the SEC as to any sanctions that the PCAOB imposes on any registered public accounting firm, and the SEC has authority to review such sanctions and modify or cancel them.[33] Perhaps the ultimate oversight power of the SEC over the Board lies in the SEC's ability to "relieve the Board of any responsibility to enforce compliance with any provision of [Sarbanes-Oxley], the securities laws, the rules of the Board, or professional standards."[34] Indeed, the majority opinion in *Free Enterprise Fund* called the SEC's authority over the Board, "explicit," "comprehensive," and "extraordinary."[35]

PCAOB Membership. The PCAOB has five members,[36] one chairperson along with four other members,[37] all to be appointed by the SEC in consultation with the Secretary of the Treasury and the Chair of the Board of Governors of the Federal Reserve System.[38] All members serve five-year, staggered terms.[39] Service on the Board is limited to two terms.[40] With respect to removal, the SEC may remove a member of the Board for "good cause."[41] If one thing is clear about the appointment and removal of PCAOB members as contemplated by Sarbanes-Oxley, it is that the President is not involved directly. Yet the role of the President is, along with the President's relationship to other officers or government employees, at the heart of the Appointments Clause and presidential removal power. In the next section, this Essay briefly reviews the relevant Supreme Court precedent on the Appointments Clause and presidential removal power.

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31 *See* 15 U.S.C. § 7217(b)(2). The statutory command for SEC approval does, however, restrict the SEC's flexibility somewhat: "The Commission shall approve a proposed rule, if it finds that the rule is consistent with the requirements of [Sarbanes-Oxley] and the securities laws, *or is necessary or appropriate in the public interest or for the protection of investors*." *Id.* § 7217(b)(3) (emphasis added).

32 *Id.* § 7217(b)(5).

33 *Id.* § 7217(c)(1)–(3). All PCAOB adjudications are subject to de novo review by the SEC. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667, 670 (D.C. Cir. 2008).

34 *See* 15 U.S.C. § 7217(d)(1).

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

36 15 U.S.C. § 7211(e)(1).

37 *Id.* § 7211(e)(4)(A).

38 *Id.*

39 *See id.* § 7211(e)(5)(A)(i).

40 *Id.* § 7211(e)(5)(B).

41 *Id.* §§ 7211(e)(6), 7217(d)(3).

II. The Appointments Clause and Presidential Removal Power

Cases involving the Appointments Clause and the presidential removal power seem to be few and far between, but when they do arise, the Supreme Court has devoted an unusually large number of pages of the U.S. Reports to interpreting these powers, the removal power in particular.[42] That the D.C. Circuit's opinion in *Free Enterprise Fund* was fairly lengthy, then, is in large measure par for the course. This section reviews the relevant "rules" to be gleaned from the case law.

A. The Appointments Clause

The Constitution specifies how certain government actors are appointed. For example, Congress selects its own officers.[43] The capital "A" Appointments Clause, though, gives the President the power to appoint particular officers including ambassadors, Supreme Court justices, and public ministers and consuls. In addition, the constitutional language draws a distinction between "officers" and "inferior officers." It provides that 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.[44]

As this Essay recounts below, the Supreme Court has distinguished both "officers" from "employees," and "inferior officers" from so-called "principal officers." Defining the contours of this latter distinction has represented the bulk of the Court's Appointments Clause precedent and is, by and large, at the center of the dispute in the D.C. Circuit on the Appointments Clause issue. In short, "principal officers" must be appointed by the President with the advice and consent of the Senate; Congress, on the other hand, may vest the power to appoint "inferior officers" in the President alone, the courts,

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42 *See, e.g.*, Myers v. United States, 272 U.S. 52 (1926) (addressing President's removal power in a seventy-one page majority opinion, along with two dissenting opinions covering 118 pages).

43 U.S. CONST. art. I, § 2 (House of Representatives); U.S. CONST. art. I, § 3 (Senate).

44 U.S. CONST. art. II, § 2, cl. 2.

or in "Heads of Departments."[45] The difficult questions are how the Court identifies officers, and then how it distinguishes between principal and inferior officers.

First, "officers," as opposed to mere employees, are those who "exercis[e] significant authority pursuant to the laws of the United States."[46] By "authority," the Court has indicated that it means "executive authority," of which enforcement duties are considered the paradigmatic form.[47] If, on the other hand, an individual's functions parallel those typically associated with the kinds of functions that Congress could delegate to its own committees, the Court has noted, such as investigatory duties, those functions likely would not be "executive," and the individual likely would not be an officer.[48]

Second, and more important for present purposes, is the distinction between principal officers and inferior officers. Taken together, *Morrison v. Olson*,[49] and *Edmond v. United States*,[50] constitute the current state of the law concerning the dividing line between principal officers and inferior officers.

Morrison involved a challenge to the independent counsel provisions of a 1978 government ethics statute.[51] There the Court supported its conclusion that the independent counsel was an inferior officer by identifying four relevant factors: the independent counsel (1) was removable by the Attorney General,[52] albeit for cause; (2) was authorized to perform limited duties;[53] (3) had limited jurisdiction;[54] and (4) had limited tenure.[55] This "test," such as it is, is not definitive.[56] As the Court reaffirmed in *Edmond*, there is no "exclusive criterion for distinguishing between principal and inferior officers for Appointments Clause purposes."[57] There, the Court held that civilian

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

46 *Id.* at 126.

47 *See id.* at 137–38.

48 *Id.* at 137 (noting that "investigative and informative" powers were similar to powers that Congress could delegate to any of its committees).

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

50 Edmond v. United States, 520 U.S. 651, 651 (1997).

51 *Morrison*, 487 U.S. at 659.

52 *Id.* at 671.

53 *Id.* at 671–72.

54 *Id.* at 672.

55 *Id.*

56 *Id.* at 671 (describing four factors with the caveat that "[t]he line between 'inferior' and 'principal' officers is one that is far from clear . . . . We need not attempt here to decide exactly where the line falls between the two types of officers . . . .").

57 Edmond v. United States, 520 U.S. 651, 661 (1997).

members of the Coast Guard Court of Criminal Appeals, appointed by the Secretary of Transportation, were inferior officers on a theory of "relationship."[58] Making an arguably unhelpful observation, the Court wrote that "[w]hether one is an 'inferior' officer depends on whether he has a superior."[59] Because the Judge Advocate General was the "superior" to the Coast Guard judges, those judges were deemed to be inferior officers.[60]

The final relevant piece of the Appointments Clause puzzle here is the question of what constitutes "Heads of Departments" for purposes of appointing inferior officers. Specifically, what is a "Department" and who is its "Head"? The Court broached the first question in *Freytag v. Commissioner of Internal Revenue*.[61] There the Court held that the Tax Court was not a "Department" for Appointments Clause purposes.[62] Departments must be solely within the executive branch, the Court noted, and should be confined to "executive divisions *like* the Cabinet-level departments."[63] There is no Supreme Court precedent on point answering the question of who is or can be the "Head" of a "Department."[64]

The Fund draws from each of these cases to advance the position that the PCAOB violates the Appointments Clause. The specific arguments, plus analyses of the relevant portion of the majority and dissenting opinions are taken up in Part III.

B. Separation of Powers

Unlike the presidential appointment power, which is grounded in the text of the Constitution, there is no corresponding "Removal Clause" in the Constitution granting the President the power to re-

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58 *See id.* at 662–63.

59 *See id.* at 662.

60 *See id.* at 666.

61 Freytag v. Comm'r, 501 U.S. 868, 868 (1991).

62 *Id.* at 885–86.

63 *Id.* at 886 (emphasis added).

64 The *Free Enterprise Fund* majority cites to a Ninth Circuit opinion, an early twentieth century opinion of the Attorney General's office, and a federal statute in support of its conclusion that the "Head" of a "Department" can be either one individual or a multimember board. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667, 677–78 (D.C. Cir. 2008).

Both the majority and dissenting opinions in *Free Enterprise Fund* reached the same conclusion with respect to the Fund's "Heads of Departments" argument: namely, that the SEC is a "Department" and its five members constitute its "Head" for purposes of the Appointments Clause. *See id.* at 676–78; *id.* at 712 n.24 (Kavanaugh, J., dissenting). Because the D.C. Circuit was essentially in agreement on this matter, this Essay does not address the merits and demerits of the Fund's "Heads of Departments" argument.

move officers. But because the "executive power" is vested in the President,[65] the Supreme Court has interpreted the Constitution, by negative implication, to confer on the President the power to remove,[66] subject, in certain circumstances, to congressional limitation.[67]

Two early twentieth century Supreme Court cases form the basis of this constitutional interpretation. Taken together, *Myers v. United States*[68] and *Humphrey's Executor v. United States*[69] stand for the proposition that the President has an inherent removal authority, but that inherent authority is limited to the removal of those officers who are purely executive branch officers. In *Humphrey's Executor*, the Court held that the President did not have the inherent authority to remove the head of the Federal Trade Commission because neither that agency nor that officer could "in any proper sense be characterized as an arm or an eye of the executive."[70] In other words, where an officer is not a "purely executive" branch officer, Congress may limit the President's ability to remove that officer, say, for cause. In this way, *Humphrey's Executor* arguably placed independent agencies on a firmer constitutional footing.[71]

The Court returned to the question of the President's removal power in 1988 when it decided *Morrison v. Olson*,[72] the independent counsel case. Congress had granted the Attorney General the power to remove the independent counsel "only for good cause."[73] The Court in *Morrison* held that because the President could act through the Attorney General, who was removable at will, the President's control over the independent counsel was not "completely stripped."[74] Indeed, the Court placed a premium not on the "purely executive" inquiry that had been developed in *Myers* and *Humphrey's Executor*, but rather on whether the statutory limitations on the President's removal power impeded the President's ability to do his job.[75] In other words, the inquiry after *Morrison* seems to focus on whether the statu-

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65 U.S. CONST. art. II, § 1.

66 *See* Myers v. United States, 272 U.S. 52, 176 (1926).

67 *See, e.g.*, Humphrey's Ex'r v. United States, 295 U.S. 602, 627–29 (1935).

68 Myers v. United States, 272 U.S. 52, 52 (1926).

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

70 *Id.* at 628.

71 *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667, 695 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) ("Humphrey's Executor thereby blessed Congress's creation of the so-called 'independent' agencies . . . .").

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

73 *Id.* at 663.

74 *Id.* at 692.

75 *See id.* ("Nor do we think that the 'good cause' removal provision at issue here imper-

tory limitation on the President's power to remove eliminates (or effectively eliminates) the President's ability to control executive officers.

Free Enterprise Fund presents, as both the majority and dissent acknowledge, a question of first impression.[76] Under the rule of *Humphrey's Executor*, the President may remove the SEC commissioners only for cause; and under Sarbanes-Oxley, the SEC commissioners may remove PCAOB members only for cause.[77] *Free Enterprise Fund* thus tees up the logical "next question" after *Morrison*: may Congress limit the President's power to remove an executive branch officer by two for-cause levels?

III. The PCAOB Does Not Violate the Appointments Clause (But It Does Unconstitutionally Restrict the President's Removal Power)[78]

A. The Appointments Clause: The Free Enterprise Fund *Majority Got It Right*

In *Free Enterprise Fund*, the Fund claims that the PCAOB's structure violates the Appointments Clause.[79] First, the Fund argues that PCAOB members are principal officers because (1) they may be removed for cause only[80] and (2) are neither directed nor supervised by

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missibly burdens the President's power to control or supervise the independent counsel, as an executive official, in the execution of his or her duties under the Act.").

76 *Free Enter. Fund*, 537 F.3d at 679; *id.* at 698 (Kavanaugh, J., dissenting).

77 15 U.S.C. §§ 7211(e)(6), 7217(d)(3).

78 Incidentally, defendant PCAOB presents—and the *Free Enterprise Fund* majority addresses—the Appointments Clause issue first, presumably because it is the stronger argument. *See Free Enter. Fund*, 537 F.3d at 671; Brief of Appellees at 19, *Free Enter. Fund*, 537 F.3d 667 (No. 07-5127). Likewise, Judge Kavanaugh's dissent, the Fund, and the one amicus brief submitted on behalf of the Fund address the presidential removal power first, presumably because it is *their* stronger argument. *See Free Enter. Fund*, 537 F.3d at 698 (Kavanaugh, J., dissenting); Brief of Appellants, *supra* note 7 at 14; Brief for Washington Legal Foundation as Amicus Curiae Supporting Appellants at 5, *Free Enter. Fund*, 537 F.3d 667 (No. 07-5127).

79 Brief of Appellants, *supra* note 7, at 30.

80 *Id.* at 31–33. At the trial court, the Fund cavalierly remarked, in a footnote no less, how "plain" it is that members of the PCAOB are officers (as opposed to employees) under *Buckley v. Valeo*, 424 U.S. 1 (1976), because Board members are endowed with "significant governmental authority." *See* Plaintiff's Memorandum of Points of Authorities in Support of their Motion for Summary Judgment at 29 n.6., Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., Civil Action No. 06-0217, 2007 WL 891675 (D.D.C. Mar. 21, 2007). Insofar as neither the majority nor the dissent in *Free Enterprise Fund* addressed this question, the D.C. Circuit, it would appear, agreed with the Fund's characterization. Although the Board did not directly argue at summary judgment that its members were employees (as opposed to officers), it did argue that Board members were "at most" inferior officers. Defendants' Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of Defendants' Cross-Motion for Summary Judgment at 11, *Free Enter. Fund*, 2007 WL 891675 (Civil Action No. 06-0217). What is

the SEC,[81] and thus, as principal officers, PCAOB members must be appointed by the President (and not by the SEC). Second, the Fund argues in the alternative that even if PCAOB members are inferior officers, and thereby capable of appointment by "Heads of Departments," (1) the SEC is not a "Department" within the meaning of the Appointments Clause,[82] and (2) even if it is, the five SEC commissioners are not its "Head."[83]

The majority rejected the Fund's argument that Board members are principal officers.[84] Relying on *Edmond*'s "relationship test," the majority correctly pointed out that PCAOB members are beholden to the SEC in almost every way; given the SEC's broad powers over the PCAOB, the PCAOB's rulemaking, adjudicatory, and sanction power are all conducted in the shadow of SEC review.[85] The majority found that PCAOB members were subject to greater oversight than was the independent counsel in *Morrison*, and more supervision than the judges in *Edmond*—both of whom the Supreme Court found to be inferior officers. And the fact that Board members are subject to removal by the SEC lends weight to the probability that they are inferior officers.[86] The majority thus correctly concluded that because PCAOB members are inferior officers, they need not be appointed directly by the President.

In dissent, Judge Kavanaugh's analysis on this count misses the mark. Judge Kavanaugh begins with the premise that PCAOB members are "traditional executive officers"[87] (they are not) who perform "quintessentially executive functions"[88] (they do not). It is on this

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more, papers filed in opposition to the Fund's petition for rehearing and rehearing en banc took the position that the Board's members are akin to "lower-level bureaucrats who can typically be removed only b[y] their direct bosses, not the [P]resident." Posting of Zach Lowe to The Am Law Daily Blog, http://amlawdaily.typepad.com/amlawdaily/2008/10/baker-botts-def.html (Oct. 23, 2008, 18:39 EST). Such language suggests that perhaps the employee/officer question has not been entirely laid to rest. For present purposes, this Essay assumes that the PCAOB members are "officers" as opposed to mere "employees."

81 Brief of Appellants, *supra* note 7, at 33.

82 *Id.* at 36.

83 *Id.* at 39.

84 *Free Enter. Fund*, 537 F.3d at 672–76.

85 *Id.* at 673 (stating that the PCAOB's exercise of the broad range of duties statutorily conferred on it is "subject to check by the Commission at every significant step"). Board rules are not merely subject to SEC review, the majority pointed out, but are also susceptible to amendment or modification by the SEC. *Id.* at 672.

86 *Id.* at 674 (noting that the independent counsel in *Morrison* was, like PCAOB members, removable).

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

88 *Id.*

point that Judge Kavanaugh tries to distinguish this case from *Edmond*, which involved nonquintessentially executive officers "whose decisions were subject to review by a higher adjudicatory body."[89] But bizarrely, earlier in his dissent, Judge Kavanaugh listed "promulgat[ing] rules,"[90] a traditionally legislative function, and "impos[ing] sanctions,"[91] a traditionally judicial function, among the powers of the PCAOB. Given the Board's powers of various stripes, Judge Kavanaugh's argument that PCAOB members perform "quintessentially executive functions" cannot stand. Likewise, given the SEC's broad oversight authority over the PCAOB, Judge Kavanaugh's argument that the Board's decisions are somehow not subject to meaningful review by a higher authority is without merit.

Most important, perhaps, is Judge Kavanaugh's reliance on for-cause removal. In fact, Judge Kavanaugh refers to for-cause removal as the "key initial question."[92] Officers who are removable for cause only, Judge Kavanaugh posits, should be presumed to be principal officers.[93] There are two difficulties with Judge Kavanaugh's position. First, it is incongruous to argue simultaneously, as Judge Kavanaugh does, that (1) for-cause removal power is effectively determinative of the principal officer/inferior officer question *and* (2) that the President's removal power is constrained because of the multilevel attenuation between the President and PCAOB members. For example, Sarbanes-Oxley specifically gives the PCAOB the power to organize itself.[94] If the PCAOB were to establish its own divisions[95] and appoint individuals to head those divisions who could be removed by the PCAOB only for cause, there would be *three* levels between the President and the officer[96] in question. Yet Judge Kavanaugh's analysis suggests that he would still impute a presumption of "principal officer status" to an individual who heads a division of the PCAOB, which is directed and supervised by the PCAOB's five members, who in turn

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89 *See id.*

90 *Id.* at 705.

91 *Id.*

92 *Id.* at 707.

93 *See id.* at 707–08.

94 *See* 15 U.S.C. § 7211(d).

95 The PCAOB does in fact have various divisions and offices including, among others, a Division of Registration and Inspections, an Office of Research and Analysis, and an Office of Internal Oversight and Performance Assurance—none of which is compelled, let alone affirmatively contemplated, by Sarbanes-Oxley. *See* PCAOB, The Staff, http://www.pcaobus.org/About_the_PCAOB/Staff/index.aspx (last visited May 20, 2009).

96 There is a nonfrivolous argument that these Division heads would be mere employees and not officers at all.

are overseen by the SEC. Even Judge Kavanaugh, one could easily imagine, might be troubled by the implications of this reasoning.

Second, as Judge Kavanaugh notes, any officer who requires appointment by the President and confirmation by the Senate is a principal officer.[97] There can be little doubt that the President's Cabinet-level officers are "principal officers." These officers are removable at will. Consequently, it is odd that Judge Kavanaugh argues that *for-cause* removal should be the primary indicia of "principal officer" status. Aware of the asymmetry in his position, Judge Kavanaugh attempts to carve out an exception for "heads of departments": "if an executive officer is removable at will *and is not the head of a department*, the officer ordinarily may be considered inferior for purposes of the Appointments Clause."[98] Trying to fit a square peg into a round hole, Judge Kavanaugh presses the point in an unsubstantiated footnote: "Whether removable-at-will executive officers are principal or inferior depends on their place in the Executive Branch organizational chart."[99] Whatever the parameters of this nebulous "organizational chart" test, there is no precedent to support it.

In sum, the *Free Enterprise Fund* majority "got it right" on the Appointments Clause issue: the PCAOB does not violate the Appointments Clause of the Constitution.

B. Presidential Removal Power: Judge Kavanaugh Got It Right

In *Free Enterprise Fund*, the Fund argues that the PCAOB's structure violates separation-of-powers principles, that is, that the structure unconstitutionally constrains the President's exercise of executive power because it insulates PCAOB members from presidential removal.[100]

At the outset, it is worth recognizing that if, under Sarbanes-Oxley, *the President* had the power to remove PCAOB members for cause, no new constitutional question would be implicated;[101] indeed,

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97 *Free Enter. Fund*, 537 F.3d at 705 (Kavanaugh, J., dissenting).

98 *See id.* at 707 (emphasis added).

99 *See id.* at 707 n.15.

100 Brief of Appellants, *supra* note 7, at 14.

101 Section 101(e)(6) of Sarbanes-Oxley reads in pertinent part: "A member of the Board may be removed by the Commission from office, in accordance with section 107(d)(3), for good cause shown . . . ." 15 U.S.C. § 7211(e)(6). Presumably, the D.C. Circuit read this provision to *imply* that the President has no authority to remove a Board member. In other words, the D.C. Circuit interpreted the provision to mean that the SEC was the only entity statutorily capable of removing a Board member. It is curious that neither the majority opinion nor Judge Kavanaugh in dissent compared the text of the independent counsel statute at issue in *Morrison* to the text

that scenario would be, to use Judge Kavanaugh's words, "*Humphrey's Executor* redux."[102] Congress could have enacted such a scheme. Likewise, if the President had the authority to remove the SEC commissioners at will, no new constitutional question would be implicated; that would be *Morrison* revisited (it would also suggest that the SEC was not an independent agency; Congress probably could not have enacted *this* scheme without drastically reordering and repackaging the SEC).

Instead, the President may remove SEC commissioners for cause only.[103] And SEC commissioners may remove PCAOB members for cause only.[104] As Judge Kavanaugh correctly points out, the focus in *Morrison* was on the President's ability to fulfill his constitutional mandate.[105] Unlike in *Morrison*, where the Attorney General—the conduit through which the President acted—retained for-cause removal power over the independent counsel, here the President has been effectively "completely stripped" of the power to remove PCAOB members.[106] It is difficult to read dicta in *Morrison* to suggest that only where Congress completely and totally insulates an executive branch officer from removal will a constitutional violation result. Surely, if an executive officer could not be removed under any circumstances, the "executive power" would no longer be vested solely in "the President."[107] But, as Judge Kavanaugh points out, that expansive reading of *Morrison* would allow precisely what the *Morrison*

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of Sarbanes-Oxley. The relevant provision of the independent counsel statute at issue in *Morrison* read:

> An independent counsel appointed under this chapter may be removed from office, other than by impeachment and conviction, *only* by the personal action of the Attorney General and *only* for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties.

28 U.S.C. § 596(a)(1) (1988) (emphasis added). That statute is clear. The independent counsel may be removed by the Attorney General *only*; and then, *only* for cause. There is no correspondingly clear language in the relevant provisions of Sarbanes-Oxley. Still, some in Congress understood the statute to push the President outside the picture, noting that Congress was giving the Board "massive power, unchecked power, by design." *See Accounting Reform and Investor Protection: Documents Before the S. Comm. on Banking, Housing, and Urban Affairs*, 107th Cong. 1189 (2002) (statement of Sen. Phil Gramm, Member, S. Comm. on Banking, Housing, and Urban Affairs).

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

103 *Id.* at 697 n.7.

104 15 U.S.C. §§ 7211(e)(6), 7217(d)(3).

105 *See Free Enter. Fund*, 537 F.3d at 696 (Kavanaugh, J., dissenting).

106 *See id.* at 698.

107 The majority makes reference in a footnote to the Supreme Court's silence in *Morrison* as to the definition of "completely stripped." *Id.* at 682 n.12.

Court was concerned with: the continued circumscription of the President's executive power. If, for example, a PCAOB member willfully abused his or her authority (by definition making him or her eligible to be removed under the statute[108]), but the SEC chose, as it has the statutory authority to do so, not to remove that Board member, the President would be formally powerless to effect the removal. This is the nightmare scenario envisioned by the Court in *Morrison*,[109] and it is the principal reason why the PCAOB is unconstitutional.

The majority's analysis on this count misses the mark. The majority, sensing that its defense of the "removal power" issue is flimsy, tries to deflect attention from the very question of the removal power: "The removal power . . . does not operate in a vacuum; rather, it is one of several criteria relevant to assessing limits on the President's ability to exercise Executive power."[110] It appears, then, that the majority tries to reframe the Fund's lawsuit from one challenging the restrictions on removal to one merely challenging broader "limits" on presidential power. The majority's sleight of hand, while clever, cannot in any event mask its unsupportable defense of the removal restrictions.

And that is because the majority puts forth no defense at all, or at least, its position is conclusory: after restating the statutory two-level removal mechanism set forth in Sarbanes-Oxley, the court makes the leap that "this statutory scheme preserves sufficient Executive influence over the Board through the Commission so as not to render the President unable to perform his constitutional duties."[111] Because the majority cannot speak to the precise question of removal, it falls back on its contention that because the SEC retains seemingly comprehensive control over the Board, that control constitutes executive authority. But this cannot be correct if the SEC is, rightly, an independent agency. The SEC was designed to retain some independence *from the President*; to hold that because the SEC has authority over the PCAOB, *therefore* the President retains control over the PCAOB, strains credulity.

In addition, when Judge Kavanaugh addressed the removal power issue he disagreed with the notion that the SEC had broad oversight authority in the first place;[112] he pointed out that it is the

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108 *See* 15 U.S.C. § 7217(d)(3)(B).

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

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

111 *See id.* at 682–83.

112 *See id.* at 703 (Kavanaugh, J., dissenting).

Board's powers—not the SEC's—that are "extraordinarily broad."[113] But even if Judge Kavanaugh *had agreed* that the Board's powers were constrained by SEC oversight, his position probably would have remained unchanged given his comment that the PCAOB is an "independent executive agency"[114] *merely because its members are removed for cause*.[115] His approach is a formal rather than a functional one. But that comment raises important questions about agency independence, to which this Essay next turns.

IV. The "Fallout" to Come: Agency Independence in a Post-PCAOB Landscape

Assuming, as some commentators do, that the PCAOB is unconstitutional,[116] the question becomes: "What happens next?" If, as this Essay argues, the sole defect lies in the too-attenuated ability of the President to remove PCAOB members, Congress will have to amend Sarbanes-Oxley to provide for presidential removal of Board members.[117] There is consequently little practical and immediate "fallout" because any constitutional defects can be cured straightforwardly.

But there may be longer-term concerns. If the PCAOB is unconstitutional as originally constituted, it is a victory for formalism over

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113 *Id.* at 704–05.

114 *Id.* at 686. What Judge Kavanaugh meant when he referred to the Board as an "independent executive agency" is unclear. On the one hand there are *independent* agencies, like the SEC and FTC, which "function outside the President's direct control." *See* Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 899 (2008). On the other hand there are *executive* agencies, like the Environmental Protection Agency, and the Office of Management and Budget, which, along with cabinet departments, the President oversees directly. *Id.* at 898. To describe an agency as an "independent executive agency" thus seems at best gratuitous (operating under the understanding that the agency is independent and, as a mere reminder, organized within the executive branch) and at worst confusing (is the agency independent in form, spirit, or both? What is the relationship between the President and the agency?). For thoughts on these questions, see *infra* Part IV.

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

116 *See, e.g.*, Nagy, *supra* note 29, at 1055; HANS BADER & JOHN BERLAU, COMPETITIVE ENTERPRISE INST., THE PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD: AN UNCONSTITUTIONAL ASSAULT ON GOVERNMENT ACCOUNTABILITY 3 (2005), *available at* http://cei.org/pdf/4873.pdf.

Attorneys for the Fund in *Free Enterprise Fund* published a Practitioner Note in the New York University Journal of Law and Business which, needless to say, argues that the PCAOB is unconstitutional. *See* 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, 199 (2007).

117 Judge Kavanaugh makes this point in his dissent. *See Free Enter. Fund*, 537 F.3d at 688 (Kavanaugh, J., dissenting).

functionalism. The PCAOB was created to be an independent oversight board to ensure that the malfeasance of Enron's leadership (and their similarly situated comrades) would not be repeated. Yet if "agency independence" comes with the price tag of direct (or nearly direct) control by the President, the purpose of distinguishing between "independent agencies" and "executive agencies" is arguably eviscerated. If independent agencies and the theory of the unitary executive coexist (and they do), and if it is true, as the *Free Enterprise Fund* majority indicated, that "for cause" is to be accorded a broad interpretation within the meaning of "for-cause removal,"[118] then there is a nonfrivolous argument to be made that the "independence" of so-called "independent agencies" is little more than lip service.

If independent agencies are to be independent *from the President*, not in the sense that they will not "depend" on the President to exercise their statutorily conferred authority (we do not take "independent" to mean the opposite of "dependent"), but rather in the sense that they are not at the mercy *of the President* (we take "independent" to mean free from external control), and if independent agencies are desirable as a matter of good governance and public policy, then the Supreme Court should consider endorsing the *Free Enterprise Fund* majority's totality of the circumstances inquiry. But until the Court does, the D.C. Circuit's conclusion on the separation-of-powers (i.e., removal) issue is incorrect under the current state of the law. And the PCAOB as formulated under Sarbanes-Oxley is therefore unconstitutional.

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118 *See id.* at 680 n.8.