PCAOB and the Persistence of the Removal Puzzle

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ABSTRACT

In Free Enterprise Fund v. Public Company Accounting Oversight Board *("*PCAOB*"), the Supreme Court invalidated a statutory provision protecting the tenure of members of the PCAOB, a board created to oversee the auditing of public companies subject to the securities laws. The case carried the potential for a major shift in the Court's approach to separation of powers disputes. Although the Court delivered no such result, the* PCAOB *case provides a fascinating window on the removal puzzle. The case reflects an entanglement of multiple textually derived and nontextual separation of powers principles. One of the central principles on which the Court appeared to rely in invalidating the PCAOB's tenure protection provision—that the "executive Power" Article II vests in the President encompasses a power of removal—cannot account for the Court's ultimate holding. Disentangling the threads of the* PCAOB *Court's reasoning, and tracing those threads back to prior removal disputes, exposes both how the* PCAOB *Court sought to refocus assessment of removal questions on the specific obligations that faithful execution of the laws entails and the ways in which the* PCAOB *Court's own assessment fell short.*

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INTRODUCTION

In *Free Enterprise Fund v. Public Company Accounting Oversight Board* ("*PCAOB*"),[1] the Supreme Court invalidated a key portion of the Sarbanes-Oxley Act of 2002.[2] In creating the multimember Public Company Accounting Oversight Board ("PCAOB"), Congress had provided that a member of the PCAOB could be removed only by the Securities and Exchange Commission ("SEC"), and only upon an on-the-record finding of a violation of law, willful abuse of authority, or failure to enforce compliance with accounting standards.[3] Members of the SEC themselves enjoy protection against removal by the President except for cause.[4] The Court concluded that the resulting "dual for-cause limitations" on removal—with PCAOB members only removable for cause by an entity whose members the President could only remove for cause—"contravene the Constitution's separation of powers."[5]

Judge Brett Kavanaugh, whose dissent in the U.S. Court of Appeals for the D.C. Circuit likely propelled the case to the Supreme

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

2 *Id.* at 3161; Sarbanes-Oxley Act of 2002, 15 U.S.C. §§ 7201–7266 (2006).

3 15 U.S.C. § 7217(d)(3).

4 The Court so assumed, based on the agreement of the parties, despite statutory silence on this point. *Free Enter. Fund*, 130 S. Ct. at 3148–49. For criticism of that assumption, see *id.* at 3182–84 (Breyer, J., dissenting); *see also* Peter L. Strauss, *On the Difficulties of Generalization—*PCAOB *in the Footsteps of* Myers, Humphrey's Executor, Morrison, *and* Freytag, 32 CARDOZO L. REV. 2255, 2276–77 (2011) (characterizing the majority's assumption as "astonishing, particularly coming from conservative Justices who repeatedly assert that it is for Congress, not the courts, to make law"). *But see* Gary Lawson, *Stipulating the Law*, 109 MICH. L. REV. 1191, 1195 (2011) (arguing that although critics of the Court's assumption are "probably right from the standpoint of established practice," they are "wrong from the standpoint of sound principles of adjudication").

5 *Free Enter. Fund*, 130 S. Ct. at 3151.

Court,[6] characterized *PCAOB* as "the most important separation-of-powers case regarding the President's appointment and removal powers to reach the courts"[7] since *Morrison v. Olson*,[8] the 1988 decision sustaining the creation of the Office of the Independent Counsel.[9] That was perhaps not much of a distinction, as appointment and removal disputes arrive in court relatively infrequently.[10] Yet both defenders and detractors of the PCAOB's structure recognized the potential for a major shift in the Court's approach in separation of powers cases, with those in the former camp urging that the Court not use a "relatively minor case . . . to address very large issues concerning the structure of the executive branch of the federal government,"[11] and those in the latter camp treating the case as an opportunity to reconsider and reject *Morrison* as "a problematic and flawed precedent."[12]

The Court satisfied neither camp. Substantively, the Court granted the PCAOB's challengers a hollow victory. Although the Court invalidated the PCAOB's tenure-protection provision, it found that the provision could be severed from the remainder of the

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6 *Cf.* Peter L. Strauss, Free Enterprise Fund v. Public Company Accounting Oversight Board, 62 VAND. L. REV. EN BANC 51, 52 (2009) (calling Judge Kavanaugh's opinion "an open invitation to the originalists on the [Supreme] Court").

7 Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667, 685 (D.C. Cir. 2008) (Kavanaugh, J., dissenting), *rev'd*, 130 S. Ct. 3138.

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

9 *See* Ethics in Government Act of 1978, Pub. L. No. 95-521, § 601, 92 Stat. 1824, 1867 (creating the "Special Prosecutor"); Ethics in Government Act Amendments of 1982, Pub. L. No. 97-409, § 2, 96 Stat. 2039, 2039 (1983) (changing the "Special Prosecutor" title to "Independent Counsel"); *Morrison*, 487 U.S. at 696–97 (upholding the Independent Counsel provisions).

10 *See Free Enter. Fund*, 537 F.3d at 685 (Kavanaugh, J., dissenting) (noting that appointment and removal cases "have arisen sporadically throughout American history"). Appointments Clause controversies reaching the Supreme Court after *Morrison*, for example, include *Freytag v. Commissioner*, 501 U.S. 868 (1991); *Weiss v. United States*, 510 U.S. 163 (1994); *Ryder v. United States*, 515 U.S. 177 (1995); and *Edmond v. United States*, 520 U.S. 651 (1997). The last three of these cases all related to the same basic statutory scheme. *See Weiss*, 510 U.S. at 165–68 (sustaining the assignment of commissioned military officers, without reappointment under the Appointments Clause, to serve as military judges); *Ryder*, 515 U.S. at 188 (vacating a decision by a panel of military judges that included two civilians appointed by the General Counsel of the Department of Transportation); *Edmond*, 520 U.S. at 666 (upholding decisions by panels of military judges that included civilians reappointed by the Secretary of Transportation).

11 Harold H. Bruff, *On Hunting Elephants in Mouseholes*, 62 VAND. L. REV. EN BANC 127, 127 (2009); *see also* 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, 489 (2009) (characterizing the PCAOB's critics as launching "thinly disguised attacks on the constitutionality of independent administrative agencies per se").

12 Steven G. Calabresi & Christopher S. Yoo, *Remove* Morrison v. Olson, 62 VAND. L. REV. EN BANC 103, 104 (2009).

Sarbanes-Oxley Act, making the PCAOB's members removable at will by the SEC.[13] This ruling gave no practical relief to petitioner Beckstead and Watts, LLP, the Nevada accounting firm (and Free Enterprise Fund member) as to which the PCAOB had filed a critical report.[14] The Court also rejected an Appointments Clause challenge to the PCAOB's structure—a challenge that, if successful, likely would have called the validity of the PCAOB's prior actions into question.[15] More broadly, the Court declined to reconsider its past cases, no doubt a frustration for advocates of overruling *Morrison* and a solace to those who had argued that the Court should not "put the constitutionality of a wide range of government institutions in shadow."[16] As the dissent and many commentators recognized, however, the practical sweep of the Court's holding is unclear, both for other officers protected by dual for-cause removal provisions[17] and for independent agencies more generally.[18]

Similarly, the PCAOB's critics and defenders alike would have found the Court's separation of powers methodology unsatisfying. The Court appeared to fracture along predictable formal and functional lines. The majority focused on whether the dual for-cause removal provision satisfied the Constitution's assignment of the

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13 Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3161 (2010).

14 *Id.* at 3149.

15 *Id.* at 3163–64; *cf.* Stryker Spine v. Biedermann Motech GmbH, 684 F. Supp. 2d 68, 72 (D.D.C. 2010) (rejecting the claim that a decision by a panel of patent judges, one of whom was allegedly appointed unconstitutionally, is null and void, where the panel considered claims on rehearing after the concededly constitutional reappointment of the judge).

16 Strauss, *supra* note 6, at 51–52.

17 *See Free Enter. Fund*, 130 S. Ct. at 3177–82 (Breyer, J., dissenting); Jerome Nelson, *Administrative Law Judges' Removal "Only for Cause": Is That Administrative Procedure Act Protection Now Unconstitutional?*, 63 ADMIN. L. REV. 401, 410, 413–16 (2011) (noting that after *PCAOB*, administrative law judges ("ALJ") could be constitutionally "at risk on one day and not the next" depending on the nature of the agency, the nature of the ALJ's decision, and "third-party choices about appealing or reviewing [decisions]"); *cf.* Kevin M. Stack, *Agency Independence After* PCAOB, 32 CARDOZO L. REV. 2391, 2392 (2011) (suggesting that *PCAOB*'s implications for dual for-cause removal structures are "clear"—meaning that *PCAOB* would invalidate such structures).

18 *See* Richard H. Pildes, Free Enterprise Fund, *Boundary-Enforcing Decisions, and the Unitary Executive Branch Theory of Government Administration*, 6 DUKE J. CONST. L. & PUB. POL'Y 1, 7–8 (2010) (noting the potential for future courts to expand the principles of the decision "beyond the peculiar context of dual for-cause removal structures"); Neomi Rao, *A Modest Proposal: Abolishing Agency Independence in* Free Enterprise Fund v. PCAOB, 79 FORDHAM L. REV. 2541, 2541 (2011) (arguing that the logic of *PCAOB* "calls into question the constitutionality of agency independence"); Stack, *supra* note 17, at 2411–13 (arguing that after *PCAOB*, the fact that an agency performs some adjudicative functions may not be enough to sustain for-cause removal provisions).

legislative, executive, and judicial powers[19] and rejected the argument that it should sustain the dual for-cause removal structure as the sort of "practical accommodation between the Legislature and the Executive that should be permitted in a workable government."[20] The dissent, by contrast, emphasized that the proper analysis required "examining how a particular provision, taken in context, is likely to function"[21]—in this case, whether the dual for-cause removal provision permits Congress to "aggrandize" its own power.[22] The invalidation of the PCAOB's dual for-cause protection thus might be taken as another formalist peak in the Court's pendulum swing between separation of powers methodologies. The Court stopped far short, however, of accepting what many commentators saw as the clear implications of a textual, formal approach to removal: that the President must have an unlimited power to direct or remove any and all officials who exercise significant executive authority.[23]

One cannot fault the Court for deciding only the case before it. A closer look at *PCAOB*, however, shows that the case is not simply an incremental application of formalist methodology. Rather, the case reflects an entanglement of multiple textually derived and nontextual separation of powers principles. One of the central principles on which the Court appears to rely to invalidate the dual for-cause removal provision—that Article II's vesting of the executive power in the President confers removal authority on the President—cannot account for the Court's ultimate holding. Whether or not the *PCAOB* Court's analysis is correct as a matter of first principles, it is worth asking whether the case signals any shifting methodological ground for removal disputes. We can answer that question only by disentangling the threads of the *PCAOB* Court's reasoning, and trac-

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19 *See Free Enter. Fund*, 130 S. Ct. at 3146 (noting that "[o]ur Constitution divided the 'powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial'" (quoting INS v. Chadha, 462 U.S. 919, 951 (1983))).

20 *Id.* at 3155 (quoting Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc., 501 U.S. 252, 276 (1991)) (internal quotation marks omitted).

21 *Id.* at 3167 (Breyer, J., dissenting).

22 *See id.* (noting that "Congress has not granted itself any role in removing the members of the [PCAOB]"); *see also* Pildes, *supra* note 11, at 490 (claiming that whether the PCAOB's structure is constitutional depends solely upon whether there is "impermissible congressional participation *itself*" in appointment, removal, or execution and implementation of federal law).

23 *See, e.g.*, Calabresi & Yoo, *supra* note 12, at 107 ("The constitutional text is crystal clear: [officials who "exercise executive power" such as SEC Commissioners or members of the PCAOB] must be subject to presidential powers of direction and control, or they must be removable by the President at will.").

ing those threads back to prior removal disputes. The *PCAOB* case thus offers a fascinating window on the removal puzzle.

This Article proceeds as follows: Part I outlines three key theories on the source of removal authority. This Part presumes the need to anchor the removal power in the Constitution and thus links each of the positions to the constitutional text. It does so, however, not to take sides in the debate over the proper methodology for resolving separation of powers controversies, but rather to facilitate a later comparison with the Supreme Court's analysis of removal questions. Part II carries two of the three theories forward to assess how the theories fare in major removal disputes before *PCAOB*. Part III then turns to *PCAOB*. The *PCAOB* Court commits to an analysis of the PCAOB's structure that is both textual and formal, but it ultimately delivers something quite different. First, although the Court repeatedly invokes Article II's vesting of the executive power in the President, the Court offers a limited vision of the executive power and ultimately produces a holding—validating the PCAOB's structure after excising the second layer of tenure protection—that is in tension with a broad understanding of the executive power in this context. Second, the Court invokes the duty the Constitution imposes on the President to "take Care that the Laws be faithfully executed."[24] Yet the Court neither distinguishes any powers implied by the Take Care duty from the powers that the executive power encompasses nor uses the Take Care Clause to inform its understanding of the executive power. Finally, the Court invokes a set of structural considerations untethered to specific constitutional provisions.[25] The structural principles the Court identifies, however, do not fully explain the Court's holding.

PCAOB, in short, reflects the Court's continuing ambivalence about the source of constraints on Congress's power to limit the President's removal authority. As for whether the *PCAOB* case signals any shifting methodological ground for analyzing removal disputes, disentangling *PCAOB*'s threads reveals that the obligation of faithful execution provides the most plausible constitutional basis for the Court's holding. Although *PCAOB* itself reflects no significant move toward an unlimited presidential removal power to direct or remove executive officials, the Court's reasoning, taken to its logical conclusion, demands more sustained attention to the relationship between

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24 U.S. CONST. art. II, § 3.

25 *See* John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1950 (2011) (describing a "penumbral" approach to separation of powers that is a feature of functional and formal methodologies alike).

the President's obligation of faithful execution and the power of removal.

I. LOCATING REMOVAL AUTHORITY (AND ITS LIMITS) IN CONSTITUTIONAL SILENCE

The only constitutional provisions that speak directly to removal of federal officers are those concerning impeachment. Article II, Section 4 of the Constitution specifies that "all Civil Officers of the United States, shall be removed from Office on Impeachment for and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."[26] Article I vests the "sole Power of Impeachment" in the House[27] and the "sole Power to try all Impeachments" in the Senate.[28]

In 1789, as they considered how to structure key executive departments under the new Constitution, members of the First Congress explored at length questions about the source and scope of the power to remove executive officers other than through Congress's impeachment powers.[29] After debates spanning more than a month, Congress by statute established three executive departments: the Department of Foreign Affairs,[30] the Department of War,[31] and the Treasury Department.[32] Each statute provided for the appointment within the department of a Secretary as the "principal officer" or "head of the department."[33] That officer would be nominated by the President by and with the advice and consent of the Senate.[34] By providing for an inferior officer to have custody of departmental papers in the event that the President removed the head of the department, each statute also indirectly acknowledged a presidential authority to remove the Secretary.[35]

The debates leading up to the passage of the three statutes have been explored in great detail elsewhere.[36] The challenge these stat-

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26 U.S. CONST. art. II, § 4.

27 U.S. CONST. art. I, § 2, cl. 5.

28 U.S. CONST. art. I, § 3, cl. 6.

29 For a detailed overview of these debates, see Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021, 1029–34 (2006).

30 Act of July 27, 1789, ch. 4, 1 Stat. 28.

31 Act of Aug. 7, 1789, ch. 7, 1 Stat. 49.

32 Act of Sept. 2, 1789, ch. 12, 1 Stat. 65.

33 § 1, 1 Stat. at 29 (creating the Secretary for the Department of Foreign Affairs); § 1, 1 Stat. at 50 (creating the Secretary for the Department of War); § 1, 1 Stat. at 65 (creating the Secretary of the Treasury).

34 U.S. CONST. art. II, § 2, cl. 2.

35 *See* § 2, 1 Stat. at 29; § 2, 1 Stat. at 50; § 7, 1 Stat. at 67.

36 *See, e.g.*, DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PE-

utes present is that their indirect acknowledgment of presidential removal authority is consistent with multiple theories about the source of that removal authority: that the authority to appoint an officer carries with it the authority to remove the officer;[37] that the Constitution grants Congress the authority under the Necessary and Proper Clause to delegate the removal power as Congress sees fit;[38] or that Article II of the Constitution, by vesting the executive power in the President and imposing a duty of faithful execution of the laws, confers removal authority directly on the President.[39] These different potential sources of removal authority, moreover, may generate a removal power of different scope or tolerate different congressional limitations. Accordingly, the 1789 statutes' implied acknowledgment of an unfettered presidential removal authority, without more, says nothing about whether the Constitution demands such an authority, or whether it instead permits substantial legislative regulation of removal authority. As a result, judges and scholars alike have long debated whether the actions of the First Congress signal a "Decision of 1789" on the scope of a presidential authority to remove executive officials, what that decision entails, and whether any such decision is relevant at all to our modern understanding of separation of powers.[40]

This Article will not enter that debate. Regardless of how one evaluates the First Congress's actions in 1789, the controversy surrounding the creation of the great executive departments provides a useful lens for viewing the possible constitutional sources of the removal authority. Rather than offering a descriptive account of the congressional debates of 1789, this Article uses key arguments from those debates to frame, and to test the limits of, three basic theories of how the Constitution allocates removal authority.[41] We can set aside

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RIOD 1789–1801, at 40–43 (1997); Edward S. Corwin, *Tenure of Office and the Removal Power Under the Constitution*, 27 COLUM. L. REV. 353, 360–63 (1927); Prakash, *supra* note 29, at 1023–26 .

37 *See infra* Part I.A.

38 *See infra* Part I.B.

39 *See infra* Part I.C.

40 *See, e.g.*, Humphrey's Ex'r v. United States, 295 U.S. 602, 630–31 (1935) (derisively referring to "the so-called 'decision of 1789'"); Myers v. United States, 272 U.S. 52, 142–63 (1926) (extensively discussing judicial use of and congressional acquiescence in the "Decision of 1789"); *id.* at 250 (Brandeis, J., dissenting) (arguing that "Congress has, from the foundation of our Government, exercised continuously some measure of control [over removal] by legislation"); *see also* Corwin, *supra* note 36, at 361; Currie, *supra* note 36, at 41; Prakash, *supra* note 29, at 1023–26.

41 For a thorough descriptive account of the debates and theories, see Prakash, *supra* note 29, at 1028–41.

the theory that the Constitution limits removal to cases of impeachment and conviction.[42] The Article considers in turn: (1) the theory that removal authority flows from the appointment power, thus creating at a minimum a default removal power in the appointing authority; (2) the theory that Congress can grant removal authority, either as an incident to its power to except appointment of inferior officers from presidential appointment and Senate advice and consent, or under its authority under the Necessary and Proper Clause to carry government powers into execution; and (3) the theory that the Vesting Clause or the Take Care Clause of Article II confers removal authority on the President. As will become clear, however, the critical question is not merely which of the underlying constitutional provisions—the Appointments Clause, the Necessary and Proper Clause, or the Vesting or Take Care Clauses of Article II—gives rise to the authority to remove executive officers, but how the remaining constitutional provisions might constrain that authority.

A. Removal Authority as Incidental to Appointment Authority

Article II, Section 2 of the Constitution provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint," officers of the United States, but that "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."[43] The Appointments Clause thus establishes presidential appointment after senatorial advice and consent as the *required* procedure for appointment of principal officers and as the *default* procedure for appointment of inferior officers. The question is whether under either approach the appointment power carries with it an inherent power of removal.

In the House debates over establishing the key executive departments,[44] numerous representatives asserted or acknowledged that the

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42 The notion that the Impeachment Clauses might set the boundaries of authority to remove executive officials sits uneasily both with the constitutional text, which specifically guarantees tenure "during good Behaviour" for judges but not other officers, U.S. CONST. art. III, § 1, and with a long tradition of patronage. The House debates on the bills to establish the key executive departments indicate minimal support for the position that the Constitution limits removal to cases of impeachment. *See* Corwin, *supra* note 36, at 361–62 n.22 (noting that one of the few proponents of the impeachment theory came to change his position); Prakash, *supra* note 29, at 1035–36 (explaining that the impeachment theory had the support of "no more than two or three Representatives" and "would have led to the splintering and distribution of executive power").

43 U.S. CONST. art. II, § 2, cl. 2.

44 *See supra* text accompanying notes 30–36.

power of appointment carries with it the power of removal. For some, however, this claim meant that the *Senate* should have a say in the removal of officers for whom the Constitution required its advice and consent to the appointment[45]—i.e., in the case of all principal officers and in the case of inferior officers whose appointment Congress did not except from this process. As adopted, the statutes creating the key executive departments implicitly rejected any role for the Senate, for they acknowledged only the possibility of presidential removal of each Secretary.[46] Indeed, in connection with the initial House resolution calling for creation of the three executive departments, the House had rejected a motion that would have required the advice and consent of the Senate for removals.[47]

Neither Congress's statutory acknowledgment of a presidential removal authority nor the House's earlier rejection of a motion providing for senatorial advice and consent on removal, however, clarifies whether the removal power flows from the appointment power or from some other source. The statutes involved principal officers whose appointment could not be vested with anyone but the President, so the statutes' acknowledgment of a presidential removal authority was consistent with the idea that the removal power follows the appointment power. As for the House's rejection of senatorial advice and consent to removal, the debates indicate that some representatives opposed the Senate's participation in removal not because they rejected the removal-follows-appointment theory, but because they believed that the Senate's consent did not actually constitute exercise of the appointment authority,[48] or that the Senate's involvement in

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45 *See, e.g.*, CONGRESSIONAL REGISTER, June 17, 1789, *reprinted in* DEBATES IN THE HOUSE OF REPRESENTATIVES, FIRST SESSION: JUNE–SEPTEMBER 1789, 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, 4 MARCH 1789–3 MARCH 1791, at 904, 917 (Charlene Bangs Bickford et al. eds., 1992) [hereinafter DEBATES JUNE–SEPTEMBER 1789] (statement of Rep. Sherman) (calling the argument that the President has the sole power to remove principal officers "ill founded, because [the advice and consent] provision was intended for some useful purpose, and by that construction would answer none at all"); CONGRESSIONAL REGISTER, May 19, 1789, *reprinted in* DEBATES IN THE HOUSE OF REPRESENTATIVES, FIRST SESSION: APRIL–MAY 1789, 10 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, 4 MARCH 1789–3 MARCH 1791, at 722, 729 (Charlene Bangs Bickford et al. eds., 1992) [hereinafter DEBATES APRIL–MAY 1789] (statement of Rep. Bland) (arguing that "the power which appointed should remove" and noting that he would not object to a declaration that "the president shall remove from office, by and with the advice and consent of the senate").

46 *See supra* text accompanying note 35.

47 *See* Prakash, *supra* note 29, at 1030 (noting that Rep. Bland proposed a short-lived amendment that would have required senatorial advice and consent to removal).

48 *See, e.g.*, CONGRESSIONAL REGISTER, June 18, 1789, *reprinted in* DEBATES

trying impeachments foreclosed any other removal role.[49] In other words, even if we take the statutes creating the key executive departments as a congressional acknowledgment of presidential authority to remove the principal officers heading those departments, the statutes do not definitively identify the constitutional source of that presidential authority.

Moreover, even if the power to appoint carries the power to remove, questions about the scope of and limitations on the removal power remain. In the case of an inferior officer whose appointment Congress has vested with the head of a department,[50] the removal-follows-appointment theory might foreclose direct presidential removal authority, because the President is not the appointing authority. In addition, whether the President or the department head is the appointing authority, the removal-follows-appointment theory does not foreclose the possibility that, through its power to "make all Laws which shall be necessary and proper for carrying into Execution"[51] the powers conferred by the Constitution, Congress retains some authority to restrict removal.

In sum, the 1789 statutes are consistent with the removal-follows-appointment theory, but that theory does not necessarily imply that

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JUNE–SEPTEMBER 1789, *supra* note 45, at 966 (statement of Rep. Boudinot) ("[D]oes it appear from this distribution of power [between the Senate and President] that the senate appoints? Does an officer exercise powers by authority of the senate? No; I believe the president is the person from whom he derives his authority. . . . [S]urely the removal follows as coincident."); DAILY ADVERTISER, June 19, 1789, *reprinted in* DEBATES JUNE–SEPTEMBER 1789, *supra* note 45, at 886–87 (statement of Rep. Laurence) (arguing that the Constitution grants the President the appointment power and that the Senate's role is merely advisory); *see also* Myers v. United States, 272 U.S. 52, 119 (1926) ("Does [the Senate's advice and consent role] make the Senate part of the removing power? And this, after the whole discussion in the House is read attentively, is the real point which was considered and decided in the negative by the vote already given."); Prakash, *supra* note 29, at 1037 ("One of the most powerful objections [to allowing the Senate a role in removal] was that a Senate check on presidential removals would render the legislature a two-headed monster" and would limit presidential power by allowing "[o]fficers [to] curry senatorial favor and thereby secure the permanence of their positions.").

49 *See, e.g.*, CONGRESSIONAL REGISTER, June 16, 1789, *reprinted in* DEBATES JUNE–SEPTEMBER 1789, *supra* note 45, at 875 (statement of Rep. Boudinot) (arguing that in light of the Senate's role in trying impeachments, "it was never the intention of the constitution to vest the power of removal in the president and senate"); CONGRESSIONAL REGISTER, May 19, 1789, *reprinted in* DEBATES APRIL–MAY 1789, *supra* note 45, at 739 (statement of Rep. Vining) (noting that the Senate's judgment on removal questions could prevent the Senate from acting as "the equal and unbiassed judicature which the constitution contemplates them to be" in deciding impeachments).

50 U.S. CONST. art. II, § 2, cl. 2 ("[T]he 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.").

51 U.S. CONST. art. I, § 8, cl. 18.

the appointing authority—whether the President or a department head—possesses *unfettered* removal authority. Such a conclusion requires a separate inquiry into the scope of Congress's power to limit removal authority, an inquiry undertaken in Section D.

B. Congressional Delegation of Removal Authority

The Necessary and Proper Clause grants Congress the authority to carry into execution the governmental powers the Constitution creates.[52] Under that authority, Congress can establish executive offices.[53] One could argue that the congressional authority to establish an office includes the authority to delegate the power to remove the officer. Analogously, the Appointments Clause recognizes Congress's power to alter the default mode of appointment for inferior officers. One could argue that the authority to vary the default mode of appointment carries with it the authority to confer removal power, at least in those cases in which Congress does vary the mode of appointment. For present purposes, then, we must ask whether removal authority is a product of congressional *delegation* either under the Necessary and Proper Clause or the power to vary the mode of appointment of inferior officers.

During the 1789 debates over creation of the executive departments, a number of representatives took the position that Congress should confer removal authority on the President.[54] To the extent that the statutes as approved by Congress recognize a presidential removal power,[55] they are consistent with a view that the presidential power is the product of congressional delegation. The theory presents some difficulties, however. First, Congress's authority to vary the mode of appointment of inferior officers cannot be the sole source of the authority to confer removal power, for if it were, Congress could not confer removal authority in the case of principal officers. The Necessary and Proper Clause would have to come into play. Second, what would occur if Congress failed to delegate removal authority at all? If

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52 *Id.*

53 U.S. CONST. art. II, § 2, cl. 2; *see also* Corwin, *supra* note 36, at 384–85 ("Congress's power to create offices is a mere matter of inference from the 'necessary and proper' clause, an inference, albeit, which is directly and significantly confirmed by the express language of the Constitution.").

54 *See* Prakash, *supra* note 29, at 1038 ("The congressional-delegation theory's champions . . . [argued that] Congress could remedy [the lack of express constitutional removal power] simply by delegating removal authority. . . . Most supporters of this theory favored the delegation of removal to the President.").

55 *See supra* text accompanying note 35.

there were no *default* removal power, then Congress's failure to delegate the power to remove would leave impeachment as the sole means of removal. In light of the widespread consensus that impeachment is not the exclusive avenue of removal,[56] the Constitution must lodge the removal authority somewhere by default. Third and most important, the congressional delegation theory appears to admit of no limitations. Those who favored the congressional delegation approach could not explain why, if Congress has the power to delegate removal authority, Congress could not delegate that authority to someone outside of the executive branch. Accounts of James Madison's comments during the debate over creation of the Department of Foreign Affairs captured this difficulty:

> [I]f the legislature has a power, such as contended for, they may . . . exclude the president altogether from exercising any authority in the removal of officers; they may give it to the senate alone, or the president and senate combined; they may vest it in the whole congress, or they may reserve it to be exercised by this house.[57]

These considerations, taken together, suggest that the Constitution necessarily vests the removal authority somewhere by default. They do not foreclose the possibility that the Necessary and Proper Clause or Congress's authority to vary the mode of appointment of inferior officers encompasses a power to constrain whatever removal authority the Constitution confers by default. Madison's comments, however, indicate that Congress's power to regulate the exercise of removal authority cannot be unlimited.[58] To evaluate that claim, we must consider the source of any limits on congressional authority. Article II provides one possible source of such limits.

C. *Article II: The Vesting Clause and the Obligation of Faithful Execution as Sources of Removal Authority*

The opening clause of Article II of the Constitution provides that "[t]he executive Power shall be vested in a President of the United

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56 *See supra* note 42 and accompanying text.

57 CONGRESSIONAL REGISTER, June 17, 1789, *reprinted in* DEBATES JUNE–SEPTEMBER 1789, *supra* note 45, at 921–22 (statement of Rep. Madison); *see also* DAILY ADVERTISER, June 22, 1789, *reprinted in* DEBATES JUNE–SEPTEMBER 1789, *supra* note 45, at 895 (summarizing Madison's objection to the proposition that "the power of displacing from office is subject to a legislative discretion, which is to create and to modify").

58 *See* Prakash, *supra* note 29, at 1072 ("[Madison]'s concern was that this theory permitted Congress to modify or abridge the President's removal power and that Congress conceivably could decide not to grant a removal power at all.").

States of America."[59] The meaning of Article II's Vesting Clause remains the subject of intense debate. Some commentators claim that the Vesting Clause is not a grant of power at all, but merely identifies the person who is to exercise the authorities enumerated in other parts of Article II.[60] Others contrast the Vesting Clause of Article II with the Vesting Clause of Article I,[61] which confers on Congress only "[a]ll legislative Powers *herein granted*."[62] Based on this distinction, as well as a number of other historical and structural arguments, such commentators argue that Article II's grant of the executive power to the President carries with it a core of powers recognized as executive in nature and yet consistent with the republican form of government that the Constitution established.[63] Article II also requires the President to "take Care that the Laws be faithfully executed."[64] The Take Care Clause imposes an obligation on the President rather than granting a power to him.[65] That observation does not mean that the Take Care Clause carries no power with it, for the Clause must carry with it the necessary powers to fulfill that obligation.[66]

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59 U.S. CONST. art. II, § 1, cl. 1.

60 *See, e.g.*, Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 546–53 (2004) (rejecting the argument that the Vesting Clause "implicitly grants the President a broad array of residual powers not specified in the remainder of Article II"); A. Michael Froomkin, *The Imperial Presidency's New Vestments*, 88 NW. U. L. REV. 1346, 1363–65 (1994) (noting that "[t]he chief problem with reading the Vesting Clause[ ] as [a] grant[ ] of 'executive' . . . power is that we have no clear idea what those words mean in the context of the Constitution other than from the text of the articles that follow").

61 *See* Froomkin, *supra* note 60, at 1362–63 (outlining the debate over contrasting Article I's Vesting Clause with Article II's).

62 U.S. CONST. art. I, § 1 (emphasis added).

63 *See* STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 3–4 (2008) (arguing that the Vesting Clause of Article II "is a grant to the president of all the executive power," and that the President's powers go "beyond those specifically enumerated in Article II" to include "the power to remove and direct all lower-level executive officials"); Steven G. Calabresi, *The Vesting Clauses as Power Grants*, 88 NW. U. L. REV. 1377, 1389–400 (1994) (arguing that any governmental action not involving legislation or adjudication "must be an executive action which the President can control"); Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701, 704 ("Vested with [the executive power], the president may execute any federal law by himself, whatever a federal statute might provide. . . . The president also may control other government officials who execute federal law.").

64 U.S. CONST. art. II, § 3.

65 *See, e.g.*, Manning, *supra* note 25, at 2036 n.480 (referring to the "undeniable fact that the Take Care Clause is framed as a duty rather than as a power").

66 *See id.* at 2036 ("Since well-settled rules of implication suggest that the imposition of a duty implicitly connotes a grant of power minimally sufficient to see that duty fulfilled, the Take Care Clause seems straightforwardly to call for the recognition of sufficient 'executive Power' to allow the President to remove subordinates who, in his or her view, are not faithfully implementing governing law.").

The question, then, is whether the Vesting Clause or the Take Care Clause gives rise to a presidential removal authority. During the House debates over creation of the executive departments, representatives cited both the Vesting Clause and the Take Care Clause to support the proposition that Article II itself confers removal authority on the President. Accounts of Madison's comments on this question are worth examining in detail:

> I agree that if nothing more was said in the constitution than that the president, by and with the advice and consent of the senate, should appoint to office, there would be great force in saying that the power of removal resulted by a natural implication from the power of appointing. But there is another part of the constitution, no less explicit . . . [;] it is that part which declares, that the executive power shall be vested in a president of the United States. The association of the senate with the president in exercising that particular function, is an exception to this general rule; and exceptions to general rules, I conceive, are ever to be taken strictly. But there is another part of the constitution which inclines in my judgment, to favor the construction I put upon it; the president is required to take care that the laws be faithfully executed. If the duty to see the laws faithfully executed be required at the hands of the executive magistrate, it would seem that it was generally intended he should have that species of power which is necessary to accomplish that end.[67]

Madison's comments related in part to the question whether the Senate should have a role in removing principal officers. Madison's answer was that it should not.[68] His comments, however, also went to the broader question whether the removal power was part of the "executive Power" that the Constitution vests in the President: "Is the power of displacing an executive power? I conceive that if any power whatsoever is in its nature executive it is the power of appointing, overseeing, and controling those who execute the laws."[69] Others

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67 CONGRESSIONAL REGISTER, June 17, 1789, *reprinted in* DEBATES JUNE–SEPTEMBER 1789, *supra* note 45, at 922 (statement of Rep. Madison); *see also* DAILY ADVERTISER, June 22, 1789, *reprinted in* DEBATES JUNE–SEPTEMBER 1789, *supra* note 45, at 896 (providing a similar account of Madison's comments).

68 *See* Prakash, *supra* note 29, at 1040 (noting that Madison held his view "with the zeal of a convert").

69 CONGRESSIONAL REGISTER, June 16, 1789, *reprinted in* DEBATES JUNE–SEPTEMBER 1789, *supra* note 45, at 868 (statement of Rep. Madison); *see also* DAILY ADVERTISER, June 18, 1789, *reprinted in* DEBATES JUNE–SEPTEMBER 1789, *supra* note 45, at 846 (providing a similar account of Madison's remarks).

shared the view that the executive power encompassed a power of removal.[70]

Madison reinforced his argument about the executive nature of the removal power with an argument about the Take Care Clause. For Madison, the duty the Take Care Clause imposed carried at least some presidential removal power with it.[71] One could also argue that the conferral of the executive power on the President, just as much as the Take Care Clause, obliges the President to faithfully execute the laws, and that this obligation to execute carries with it the powers necessary to achieve that end. During the 1789 debates, others made arguments similar to Madison's about the President's inability to accomplish his duty to the country—whether a duty imposed by the executive power itself or by the Take Care Clause—without the power of removal.[72]

The 1789 statutes creating the executive departments[73] are consistent with the recognition of an Article II-derived presidential removal power, whether it is part and parcel of the Vesting Clause's "executive Power" or implied in the duty of faithful execution that the Vesting or the Take Care Clauses impose. As noted earlier, the statutes themselves are also consistent with other theories of the source of removal authority. The controversy over whether the actions of the First Congress signal a "Decision of 1789"[74] on the scope of Article II stems not from the statutory language, but from a succession of votes on earlier bills. In particular, when the House considered a draft bill to create

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70 *See, e.g.*, CONGRESSIONAL REGISTER, May 19, 1789, *reprinted in* DEBATES APRIL–MAY 1789, *supra* note 45, at 738 (statement of Rep. Clymer) ("[T]he power of removal was an executive power, and as such belonged to the president alone, by the express words of the constitution, 'the executive power shall be vested in a president of the United States of America.'"); *see also* Prakash, *supra* note 29, at 1041 n.143 (arguing that "[a]lthough some Representatives who thought the Constitution granted the President a removal power also made arguments about the Appointments Clause, they did not endorse the view that the President had a removal power by virtue of his power to appoint").

71 *See* CONGRESSIONAL REGISTER, June 17, 1789, *reprinted in* DEBATES JUNE–SEPTEMBER 1789, *supra* note 45, at 922 (statement of Rep. Madison) (observing that the President's duty to take care that the laws be faithfully executed carries "that species of power which is necessary to accomplish that end").

72 *See, e.g.*, CONGRESSIONAL REGISTER, June 16, 1789, *reprinted in* DEBATES JUNE–SEPTEMBER 1789, *supra* note 45, at 880 (statement of Rep. Ames) ("The constitution places all executive power in the hands of the president, and could he personally execute all the laws, there would be no occasion for establishing auxiliaries . . . . But in order that he may be responsible to his country, he must have a choice in selecting his assistants, a control over them, with power to remove them when he finds the qualifications which induced their appointment cease to exist.").

73 *See supra* text accompanying notes 30–35.

74 *See supra* note 40 and accompanying text.

the Department of Foreign Affairs, the House passed two amendments sponsored by Representative Egbert Benson of New York. The first sought to alter a provision concerning the chief clerk of the Department.[75] Under Benson's proposal, the clerk would have custody of departmental papers "whenever the said principal officer shall be removed from office by the President."[76] The amendment passed by a vote of thirty to eighteen.[77] Benson then moved to strike language in the bill providing that the Secretary would be "removable by the President."[78] The House previously had voted to reject such an amendment.[79] Benson, however, argued that he introduced the amendment to avoid any implication that the power to remove had been legislatively granted.[80] Representative Benson's motion passed by a vote of thirty-one to nineteen.[81]

The debate over how to interpret these votes arises from the fact that the majority coalitions for each of the amendments were quite different, leading some commentators to conclude that a majority of the House viewed the final statute as a congressional delegation of the removal power to the President rather than as a recognition of a constitutionally based removal power.[82] Others insist that even those who voted to retain the language on presidential removal believed that the President's removal power flows from Article II. Professor Saikrishna Prakash, for example, with the benefit of archival materials not available to prior commentators, argues that Congress's "Decision of 1789" was that "the Constitution granted the President the power to remove secretaries of the executive departments."[83]

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75 CONGRESSIONAL REGISTER, June 22, 1789, *reprinted in* DEBATES JUNE–SEPTEMBER 1789, *supra* note 45, at 1028.

76 JOURNAL OF THE FIRST SESSION OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, June 22, 1789, *reprinted in* HOUSE OF REPRESENTATIVES JOURNAL, 3 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, MARCH 4, 1789–MARCH 3, 1791, at 91–92 (Linda Grant De Pauw et al. eds., 1977) [hereinafter JOURNAL].

77 *Id.* at 92.

78 CONGRESSIONAL REGISTER, June 22, 1789, *reprinted in* DEBATES JUNE–SEPTEMBER 1789, *supra* note 45, at 1030.

79 *See* Prakash, *supra* note 29, at 1031 (noting that the same proposal had been defeated by a vote of twenty to thirty-four just three days before Benson's proposal).

80 *See* CONGRESSIONAL REGISTER, June 22, 1789, *reprinted in* DEBATES JUNE–SEPTEMBER 1789, *supra* note 45, at 1028 (describing Rep. Benson's motivation as to "establish a legislative construction of the constitution").

81 JOURNAL, *supra* note 76, at 93.

82 *See* Myers v. United States, 272 U.S. 52, 194 (1926) (McReynolds, J., dissenting) ("That the majority [of the First Congress] did not suppose they had assented to the doctrine under which the President could remove inferior officers contrary to an inhibition prescribed by Congress, is shown plainly enough . . . .").

83 *See* Prakash, *supra* note 29, at 1068.

A conclusion that the Decision of 1789 recognized a presidential removal power flowing from the grant of executive power or from presidential obligations of faithful execution, however, still leaves significant questions open. In particular, the question remains whether the President's power to remove executive officers tolerates any congressional limitations.

D. Congressional Limitations on Removal Authority

The argument that the Constitution grants the President the power to direct or remove all executive officials is not simply an argument about the source of removal power. It is an argument about the scope of and limits of that power, whatever its source. To assess the limits of a presidential removal power, one must look both to "internal" limits stemming from the provisions that might give rise to the removal power and "external" limits derived from other provisions. The removal-follows-appointment theory, for example, contains potential internal limits, for it both empowers and restricts the President. Under the removal-follows-appointment theory, the Appointments Clause *implies* a presidential removal authority in the case of principal officers and inferior officers subject to the default procedure of presidential nomination and Senate advice and consent, but it *preempts* a direct presidential removal authority in the case of an inferior officer whose appointment Congress vests in the head of a department.[84] Similarly, the theory that the duty of faithful execution implies a removal power also suggests a possible limitation on the removal power. If the duty of faithful execution, derived from the Take Care Clause or the vesting of the executive power in the President, is the source of presidential removal authority, then the removal power may extend only so far as is necessary to ensure faithful execution.

Perhaps more important than the limitations internal to the constitutional sources of removal authority are the potential external limitations, specifically those deriving from Congress's power under the Necessary and Proper Clause. One could argue that congressional power under the Necessary and Proper Clause to establish an office includes various "lesser" authorities, such as the power to establish a term of years during which the officer will serve or to set other terms and conditions of the office.[85] Similarly, one could argue that the au-

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84 The theory presumes, of course, that the President supervises inferior officers in the traditional chain of command, by supervising the department head who appoints and removes them. *See infra* text accompanying notes 194–95.

85 *See* Corwin, *supra* note 36, at 391–92 ("From the first Congress has exercised its power

thority to vary the default mode of appointment carries the authority to limit removal, at least in those cases in which Congress has in fact varied the mode of appointment.

In short, whatever the 1789 statutes reveal about the source of the presidential removal authority, they say little about the scope of and limits on that authority. As the next Part shows, that uncertainty persists through *PCAOB*.

II. FROM THE DECISION OF 1789 TO *PCAOB*

Part I drew upon the debate over the creation of the key executive departments to identify three possible understandings of the removal authority. The First Congress's statutory acknowledgment of presidential removal authority is consistent both with the removal-follows-appointment theory and with various conceptions of removal authority stemming from Article II. More, however, is required to conclude that Congress cannot, through its power to vary the default mode of appointment of inferior officers or its power under the Necessary and Proper Clause, restrict presidential removal authority in any way.

This Part traces the removal-follows-appointment and Article II theories forward to the *PCAOB* case. Analyzing the removal caselaw prior to *PCAOB* shows that the removal-follows-appointment theory and the Article II theories each have played prominent roles in significant removal cases. Even in those cases in which the Court relies heavily on Article II, however, the Court does little to connect or disentangle the different possible threads of removal authority, including the Vesting Clause or the obligation of faithful execution. This lack of analytical clarity persists through *PCAOB*.

A. Removal Authority as Incidental to Appointment Authority

Recall that during the 1789 debate over the creation of the key executive departments, a number of representatives took the position that the power of appointment carries with it the power of removal.[86] Some representatives invoked the removal-follows-appointment theory to support senatorial advice and consent in removal of principal officers, while others invoked the theory to defeat senatorial involve-

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under the 'necessary and proper' clause to fix the qualifications of officers, not only in respect to inferior offices but also in respect to superior offices . . . . [T]he tenure of an office is also a matter which Congress may determine when it is necessary and proper for it to do so.").

86 *See supra* notes 43–49 and accompanying text.

ment.[87] Although some scholars have argued that those who took the latter approach in fact favored the theory that the Vesting Clause or the Take Care Clause of Article II confers removal authority on the President,[88] the removal-follows-appointment theory played a prominent role in early removal cases.

The removal-follows-appointment theory can operate both as a sword and as a shield—as noted earlier, under this theory, the Constitution *empowers* the appointing authority to remove his or her appointees but *restricts* removal by a nonappointing authority or perhaps even removal outside of limitations imposed by Congress.

Ex parte Hennen[89] primarily illustrates the use of the removal-follows-appointment rule as an affirmative source of removal authority. The *Hennen* Court considered the claim of a district court clerk whom an incoming district judge purported to remove for the stated reason of granting the position to a friend.[90] The Court rejected the proposition that offices are held for life and instead concluded that an officer who is removable at will is removable by the appointing authority: "[I]t would seem to be a sound and necessary rule, to consider the power of removal as incident to the power of appointment."[91] The clerk had argued that the Decision of 1789 showed that in fact the power of removal does not follow the power of appointment; rather, the Decision of 1789 rested on a theory of *presidential* authority to control his agents in the performance of his duties—a theory that did not extend to the relationship between a judge and a clerk.[92] The Court rejected this understanding of the Decision of 1789, interpreting the 1789 statutes as precluding the involvement of the Senate rather than as disclaiming the removal-follows-appointment rule altogether.[93]

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87 *See supra* notes 43–49 and accompanying text.

88 *See supra* text accompanying note 83.

89 Ex parte Hennen, 38 U.S. (13 Pet.) 230 (1839).

90 *Id.* at 232.

91 *Id.* at 259.

92 *Id.* at 234–35 ("It is perfectly manifest . . . that these proceedings of the Congress of 1789, cannot justly be considered as a legislative exposition of the Constitution, that the power of appointment necessarily implies a power of removal. . . . It is equally apparent, that the arguments advanced on that occasion in favour of the executive power of removal, leave the case at bar untouched" because "[w]idely different is the relation which subsists between the Court and its clerk.").

93 *Id.* at 259 ("No one denied the power of the President and Senate, jointly, to remove, where the tenure of the office was not fixed by the Constitution; which was a full recognition of the principle that the power of removal was incident to the power of appointment.").

In dictum, the *Hennen* Court went on to discuss the operation of the removal-follows-appointment rule with respect to inferior officers within the executive branch, using language that is sometimes the source of the argument that the removal-follows-appointment rule is a shield—i.e., that the rule precludes removal by a nonappointing authority.[94] In the executive departments,

> power is given to the secretary, to appoint all necessary clerks; and although no power to remove is expressly given, yet there can be no doubt, that these clerks hold their office at the will and discretion of the head of the department. It would be a most extraordinary construction of the law, that all these offices were to be held during life, which must inevitably follow, unless the incumbent was removable at the discretion of the head of the department: *the President has certainly no power to remove.*[95]

The Court's dictum in *Hennen* affirming the removal-follows-appointment theory and rejecting presidential removal where the President is not the appointing authority proved influential in subsequent cases. The 1886 case of *United States v. Perkins*[96] treated the removal-follows-appointment theory as a shield—in this case, as a source of congressional power to limit the appointing authority's exercise of the removal power over inferior officers.[97] In *Perkins*, a naval engineer claimed that he was an officer whose tenure was protected under a statute providing that "'[n]o officer in the military or naval service shall in time of peace be dismissed from service except upon and in pursuance of the sentence of a court-martial to that effect.'"[98] The Supreme Court adopted in full the reasoning of the Court of Claims[99]: after concluding that the naval engineer was in fact an officer falling within the terms of the statute, the Court of Claims had rejected the argument that the statutorily imposed limitations on removal infringed the executive power.[100] The Supreme Court quoted the Court of Claims:

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94 *See, e.g.*, The Constitutional Separation of Powers Between the President and Congress, 20 Op. O.L.C. 124, 166 (1996) (citing *Hennen* for the proposition that "inferior officers appointed by a department head were not removable by the President (absent statutory authorization to do so) but by the secretary who appointed them").

95 *Id.* at 259–60 (emphasis added) (citation omitted).

96 United States v. Perkins, 116 U.S. 483 (1886).

97 *Id.* at 484–85.

98 *Id.* at 484 (quoting Act of Aug. 5, 1882, § 1229, 22 Stat. 219).

99 *Id.* at 485.

100 *See id.*

> Whether or not Congress can restrict the power of removal incident to the power of appointment of those officers who are appointed by the President by and with the advice and consent of the Senate under the authority of the Constitution does not arise in this case and need not be considered.
>
> We have no doubt that when Congress, by law, vests the appointment of inferior officers in the heads of Departments, it may limit and restrict the power of removal as it deems best for the public interest. The 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.
>
> The head of a Department has no constitutional prerogative of appointment to offices independently of the legislation of Congress, and by such legislation he must be governed, not only in making appointments but in all that is incident thereto.[101]

In *Myers v. United States*,[102] the twentieth-century removal case that is most often associated with an Article II-based removal authority, the Court also explored both the enabling and the restrictive facets of the removal-follows-appointment theory. In *Myers*, the Court considered the constitutionality of a statute that purported to require senatorial advice and consent for the removal of a first-class postmaster during a four-year term of office.[103] After Myers was removed without the Senate's consent, he sued for salary owed to him from the time of his removal to the expiration of his four-year term.[104]

In considering whether Congress could constitutionally impose a requirement of Senate advice and consent to removal in this context, the Court discussed in detail the 1789 debate preceding adoption of the statutes creating the executive departments.[105] The Court emphasized evidence that the Vesting Clause or the Take Care Clause car-

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101 *Id.* at 484–85 (citation and internal quotation marks omitted).

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

103 Act of July 12, 1876, ch. 179, § 6, 19 Stat. 78, 80 ("Postmasters of the first, second, and third classes shall be appointed and may be removed by the President by and with the advice and consent of the Senate, and shall hold their offices for four years unless sooner removed or suspended according to law . . . ."). The provision was similar to one included in the controversial Tenure of Office Act passed in 1867 and repealed in 1887. *See* Tenure of Office Act, ch. 154, § 1, 14 Stat. 430, 430 (1867), *repealed by* Act of March 3, 1887, ch. 353, 24 Stat. 500; *Myers*, 272 U.S. at 166–69 (describing the enactment and repeal of the Tenure of Office Act and noting the passage of acts concerning the Post Office during this interval).

104 *Myers*, 272 U.S. at 106.

105 *See id.* at 111–32.

ried a presidential removal authority.[106] Yet the Court also acknowledged the removal-follows-appointment theory in several ways. First, the Court suggested that Madison and others who viewed removal as an executive power saw the Appointments Clause as reinforcing the theory that the Senate should have no role in removal:

> 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 II 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 statutory construction that the power of removal of executive officers was incident to the power of appointment. . . . This principle as a rule of constitutional and statutory construction, then generally conceded, has been recognized ever since. The reason for the principle is that those in charge of and responsible for administering functions of government who select their executive subordinates need in meeting their responsibility to have the power to remove those whom they appoint.[107]

Despite initially focusing on the removal-follows-appointment theory as reinforcing the claim that Article II is the source of an executive removal authority, the Court elsewhere acknowledged the Appointments Clause as a possible source of congressional authority to restrict removal of inferior officers.[108] The Court concluded, however, that the authority to impose removal restrictions is triggered only when Congress opts to remove an officer from the default mode of presidential appointment with senatorial advice and consent.[109] Con-

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106 *See infra* notes 128–37 and accompanying text.

107 *Myers*, 272 U.S. at 119 (citations omitted).

108 *Id.* at 126–27 ("[B]y the specific constitutional provision for appointment of executive officers with its necessary incident of removal, the power of appointment and removal is clearly provided for by the Constitution, and the legislative power of Congress in respect to both is excluded *save by the specific exception as to inferior offices in the clause that follows* [i.e., U.S. CONST. art. II, § 2, cl. 2, providing that Congress may vest the appointment of inferior officers in nonpresidential offices]. . . . By the plainest implication [the clause concerning inferior officers] excludes Congressional dealing with appointments or removals of executive officers not falling within the exception, and leaves unaffected the executive power of the President to appoint and remove them." (emphasis added)).

109 *Id.* at 162 ("The condition upon which the power of Congress to provide for the removal of inferior officers rests is that it shall vest the appointment in some one other than the President with the consent of the Senate. Congress may not obtain the power and provide for the removal of such officer except on that condition.").

gress had not done so in the case of the position to which the President had appointed Myers.[110]

As is well known, in *Humphrey's Executor v. United States*,[111] the Court repudiated substantial portions of the *Myers* Court's reasoning, at least as to officers with adjudicative functions. In the Federal Trade Commission Act,[112] Congress had provided that Commissioners of the Federal Trade Commission ("FTC") were removable only for "inefficiency, neglect of duty, or malfeasance in office."[113] The Court sustained this restriction.[114] Congress's lodging of the removal authority in the President, with restrictions, made it unnecessary for the Court to consider the power of appointment as a source of removal authority. The decision nevertheless has interesting implications for the *Myers* Court's theory that it is Congress's decision to remove an inferior officer from the default mode of presidential appointment and Senate advice and consent that triggers Congress's power to attach conditions on removal.[115] There was no contention that members of the FTC were inferior officers. The *Humphrey's Executor* Court thus implicitly rejected the Appointments Clause as the source of Congress's authority to restrict removal, in favor of an apparently broader theory of congressional authority to restrict removal under the Necessary and Proper Clause.[116] In *Humphrey's Executor*, the Court identified no outer limit of this authority, although the facts of the case confined the holding to circumstances in which the officer performs adjudicative functions (or at least does not perform purely executive functions).[117]

The Court jettisoned this limit in *Morrison v. Olson* when it sustained the creation of the Office of the Independent Counsel.[118] It did

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110 *Id.* at 163 (concluding that because postmasters are appointed by the President with the consent of the Senate, they are "subject to removal by the President alone, and any legislation to the contrary must fall as in conflict with the Constitution").

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

112 Federal Trade Commission Act, ch. 311, 38 Stat. 717 (1914).

113 § 1, 38 Stat. at 718.

114 Humphrey's Ex'r v. United States, 295 U.S. 602, 631–32 (1935).

115 *See supra* note 108 and accompanying text.

116 *See Humphrey's Ex'r*, 295 U.S. at 629 ("The authority of Congress, in creating quasi-legislative or quasi-judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted; and that authority includes, as an appropriate incident, power to fix the period during which they shall continue in office, and to forbid their removal except for cause in the meantime.").

117 *See id.* at 624 (noting that an unlimited presidential removal power would "threaten[ ] the independence of a commission, which is not only wholly disconnected from the executive department, but which . . . was created by Congress as a means of carrying into operation legislative and judicial powers").

118 Morrison v. Olson, 487 U.S. 654, 689–91 (1988) ("[O]ur present considered view is that

so, however, with respect to an officer whom the Court deemed inferior[119] and who was subject to an interbranch appointment.[120] While acknowledging the vitality of congressional limits on the removal of inferior executive officers (without identifying the source of those limits),[121] the Court also recognized the possibility that in the case of an interbranch appointment, placing the removal authority with the appointing authority could raise constitutional questions.[122]

B. Article II and Removal Authority

We can now consider the extent to which the key removal cases discussed above rely on a theory that Article II confers removal power on the President. In *Ex parte Hennen*, as noted, the Court explored this theory in the context of the removal of an official outside of the executive branch.[123] The Court ultimately concluded that the Decision of 1789 recognized a removal power flowing from the appointment power.[124] Of course, because *Hennen* did not address the scope of Congress's power to limit the appointing authority's removal, it had no occasion to mark the constitutional boundaries of that authority.

Perkins, by contrast, dealt more directly with the claim that Congress lacks the power to regulate the removal of executive officials—that the executive power encompasses an unfettered authority to direct or remove executive officials.[125] In the case of an officer whose appointment Congress had vested in a department head, the Court rejected that theory, but again failed to identify the outer boundaries of Congress's authority.[126]

The *Myers* Court, addressing a requirement of senatorial consent to removal, gave the most sustained attention to the question of executive authority to remove executive officials. The Court considered

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the determination of whether the Constitution allows Congress to impose a 'good cause'-type restriction on the President's power to remove an official cannot be made to turn on whether or not that official is classified as 'purely executive.'").

119 *Id.* at 691.

120 The Independent Counsel was appointed by a special court upon the Attorney General's application. Ethics in Government Act of 1978, Pub. L. No. 95-521, § 592, 92 Stat. 1824, 1868; *Morrison*, 487 U.S. at 660–61.

121 *See Morrison*, 487 U.S. at 689 n.27.

122 *See id.* at 693 n.33 (noting that judicial reviewability of a removal decision "does not inject the Judicial Branch into the removal decision," and implying that doing so could burden the "President's exercise of executive authority").

123 Ex Parte Hennen, 38 U.S. (13 Pet.) 230, 256 (1839).

124 *See supra* text accompanying notes 93–95.

125 *See supra* text accompanying notes 97–100.

126 *See supra* text accompanying note 101.

two aspects of Article II: the Vesting Clause and the Take Care Clause. First, the Court marshaled Founding-era evidence that the executive power, as a technical matter, includes the authority to remove executive officials.[127] Drawing upon the debate in the First Congress over the creation of the executive departments, the Court focused on Madison's argument that the executive power encompasses the power of removal.[128] The Court likewise noted that, in the debates, "[i]t was urged that the natural meaning of the term 'executive power' granted the President included the appointment and removal of executive subordinates. If such appointments and removals were not an exercise of the executive power, what were they?"[129] The Court acknowledged that in state and colonial governments at the time of the Founding, the appointment and removal powers had sometimes been lodged with the legislatures or the courts.[130] The Court characterized such systems as "vesting part of the executive power in another branch of the Government"; thus, the fact that the removal power was lodged with legislatures or courts did not mean that it was not by its nature executive.[131] The Court reasoned that those who framed the Constitution would have looked to the British system under which the Crown had the power of appointment and removal of executive officers: "[I]t was natural . . . for those who framed our Constitution to regard the words 'executive power' as including both [appointment and removal power]."[132] After extensive discussion of secondary authorities, the Court concluded that "the executive power of the Government" includes "the power of appointment and removal of executive officers."[133]

Second, the *Myers* Court considered the implications of the duty of faithful execution that the Take Care Clause of Article II imposes. The Court noted that

> [a]s [the President] is charged specifically to take care that [the laws] be faithfully executed, the reasonable implication, even in the absence of express words, was that as part of his

127 *See* Myers v. United States, 272 U.S. 52, 110–18 (1926) (discussing debates at the constitutional convention and in the First Congress over the role of the various branches in removing executive officers).

128 *Id.* at 115–16 ("Mr. Madison insisted that Article II by vesting the executive power in the President was intended to grant to him the power of appointment and removal of executive officers except as thereafter expressly provided in that Article.").

129 *Id.* at 117.

130 *Id.* at 118.

131 *Id.*

132 *Id.*

133 *Id.* at 163–64.

> executive power he should select those who were to act for him under his direction in the execution of the laws.[134]

Likewise, in examining the Decision of 1789, the Court characterized the actions of Congress as affirming that the Constitution did not give the Congress or the Senate

> the means of thwarting the Executive . . . by fastening upon him, as subordinate executive officers, men who by their inefficient service under him, by their lack of loyalty to the service, or by their different views of policy, might make his taking care that the laws be faithfully executed most difficult or impossible.[135]

In the Court's view, the President's obligation to take care that the laws be faithfully executed "confirmed" that the President's executive power encompasses the authority to remove executive officials.[136] To hold that the President lacked the sole power to remove executive officials would "make it impossible for the President, in case of political or other differences with the Senate or Congress, to take care that the laws be faithfully executed."[137]

For the *Myers* Court, Article II was both a source of the President's removal authority and a limit on Congress's power to constrain that authority. Yet the Court never clarified how the Vesting Clause and the Take Care Clause related to one another. For example, if the executive power itself precludes congressional interference with removal authority, then the Take Care Clause adds little to the analysis. If instead the contours of the removal authority conferred by the executive power are not easily identified, then the Take Care Clause may inform assessment of the scope of that authority, on the theory that the duty of faithful execution implies whatever power is necessary to carry out that duty.

The cases limiting *Myers*'s understanding of the executive power demonstrate this analytical difficulty. *Humphrey's Executor*, for example, confined *Myers* to officials who engage in purely executive functions[138] and focused heavily on the adjudicative (what the Court termed "quasi-judicial") functions of the FTC.[139] Because the FTC,

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134 *Id.* at 117.

135 *Id.* at 131.

136 *Id.* at 163–64.

137 *Id.* at 164.

138 Humphrey's Ex'r v. United States, 295 U.S. 602, 627–28 (1935) ("[T]he necessary reach of [*Myers*] goes far enough to include all purely executive officers. It goes no farther.").

139 *Id.* at 629.

even in 1935, exercised substantial enforcement powers,[140] *Humphrey's Executor* is inconsistent with a theory that the executive power includes unfettered removal authority of all officers exercising executive authority. The question is whether *Humphrey's Executor* is inconsistent with the more modest conception of presidential removal authority that might flow from the President's duty of faithful execution.[141] That is, if the duty of faithful execution implies a power of removal, that power extends only so far as is necessary to ensure the President's faithful execution of the laws. *Humphrey's Executor* thus raises the possibility that where adjudicative functions are involved, unfettered presidential removal authority is not necessary for faithful execution of the laws. Although one needs a separate explanation for insulating from removal those who perform a mix of functions, the duty of faithful execution may not lead to an unlimited presidential removal authority in all cases.

Morrison v. Olson likewise suggests that the duty of faithful execution provides a softer limit on congressional power than does a conclusion that the executive power itself encompasses removal authority. The *Morrison* Court did not fully analyze the duty of faithful execution the Constitution imposes or any power of removal that duty might entail. The Court's more functional approach, however, asked whether Congress's limitation on removal of the Independent Counsel—concededly an officer who performs purely executive functions[142]—impermissibly interferes with the executive function.[143] Although the Court never fully explored the duty of faithful execution, instead implying that the President can ensure faithful execution of the laws so long as a statute does not "completely strip[ ]"[144] the President's power to remove, the question the *Morrison* Court posed bears some similarity to the assessment whether a removal limitation unduly jeopardizes the President's fulfillment of the duty of faithful execution.

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140 *See* Morrison v. Olson, 487 U.S. 654, 689–90 n.28 (1988) ("[I]t is hard to dispute that the powers of the FTC at the time of *Humphrey's Executor* would at the present time be considered 'executive,' at least to some degree.").

141 *See supra* text accompanying notes 134–37.

142 *Morrison*, 487 U.S. at 691 ("There is no real dispute that the functions performed by the independent counsel are 'executive' in the sense that they are law enforcement functions that typically have been undertaken by officials within the Executive Branch.").

143 *Id.* at 689–90 (describing the proper analysis as "designed . . . to ensure that Congress does not interfere with the President's exercise of the 'executive power' and his constitutionally appointed duty to 'take care that the laws be faithfully executed' under Article II").

144 *Id.* at 692.

Justice Scalia's dissent in *Morrison* arguably reveals a third approach connecting Article II with the removal power. Justice Scalia's dissent does not specifically cast removal authority as part and parcel of the executive power.[145] Rather, he identifies the investigative and prosecutorial functions the Independent Counsel performs as core executive functions[146] and argues that Congress cannot deny the President exclusive control, through supervision and removal, of those functions.[147] This inferential approach—where the question is not whether removal is technically an executive power, but rather whether the need for control over *other* executive powers demands a removal power of a particular scope—shares much with the analysis described above of the obligation of faithful execution.[148]

III. *PCAOB*'s REMOVAL THEORIES

The *PCAOB* case demonstrates the persistence of these fundamental questions about the source and limits of removal authority. Although PCAOB does not complete the removal puzzle, tracing the thread of the Court's decision exposes some shifting methodological ground for evaluating removal disputes. This Part begins by exploring the dispute over the structure of the PCAOB and sketching the Court's holding. It then turns back to the removal theories explored in Parts I and II. At first blush, the *PCAOB* decision appears to reflect an attempt to re-set the terms of the removal debate, by empha-

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145 *Id.* at 724 n.4 (Scalia, J., dissenting) (rejecting the argument that the executive power encompasses an unfettered removal power in favor of a theory requiring that "the President . . . have control over all exercises of the executive power").

146 *Id.* at 726 (describing the prosecutorial function as "the virtual embodiment of the power to 'take care that the laws be faithfully executed'").

147 *Id.* ("[T]he President ha[s] to be the repository of *all* executive power, which, as *Myers* carefully explained, necessarily means that he must be able to discharge those who do not perform executive functions according to his liking." (citation omitted)).

148 *See supra* text accompanying notes 134–37. Justice Scalia's discussion of the removal limitations refers to the Take Care Clause, but only in the context of describing the prosecutorial function as "the virtual embodiment of the power to 'take care that the laws be faithfully executed.'" *Morrison*, 487 U.S. at 726 (Scalia, J., dissenting). That is, Justice Scalia does not reason from the obligation of faithful execution of the laws to a power to remove executive officials. Rather, his assumption that the investigative and prosecutorial functions are executive in nature, along with the assumption that Congress cannot restrict the exercise of executive functions, produces the conclusion that the statutory scheme is unconstitutional. One could argue, as Professor Manning does, that the analysis is missing a step. *See* Manning, *supra* note 25, at 1967 ("Because [the Necessary and Proper Clause] . . . expressly grants Congress at least some authority to structure the way the executive and judicial powers are 'carr[ied] into Execution,' one cannot establish a constitutional violation simply by showing that Congress has constrained the way '[t]he executive Power' is implemented." (second alteration in original) (quoting U.S. CONST. art. I, § 8, cl. 18)).

sizing the textual and formal threads of past removal disputes and invoking a Vesting Clause–centered removal theory. As will become clear, however, *PCAOB* cannot be taken seriously as an endorsement of the proposition that the vesting of executive power in the President confers an unfettered power to direct or remove subordinates. *PCAOB* in fact validates the rejection of such a theory. To understand *PCAOB*'s methodological and practical implications, then, we must assess what remains after the collapse of *PCAOB*'s Vesting Clause edifice.

A. The PCAOB *Dispute and Decision*

The Sarbanes-Oxley Act of 2002[149] ended the system of auditor self-regulation that many perceived to have contributed to a series of accounting debacles, including those at Enron and WorldCom.[150] Congress created the PCAOB "to oversee the audit of public companies that are subject to the securities laws"[151] and granted the PCAOB broad powers to regulate public accounting firms that prepare audit reports for securities issuers.[152] More specifically, the Sarbanes-Oxley Act requires that such firms register with the PCAOB and provide detailed information on their operations;[153] empowers the PCAOB to issue rules governing the preparation of audit reports;[154] authorizes the PCAOB to "conduct a continuing program of inspections to assess the degree of compliance of each registered public accounting firm" with statutory, regulatory, and professional auditing standards;[155] and permits the PCAOB to set rules for investigating and disciplining registered public accounting firms.[156] The statute also gives the Securities and Exchange Commission ("SEC") certain oversight and enforcement authority over the PCAOB.[157] For example, the statute requires prior SEC approval of PCAOB rules;[158] authorizes the SEC to review or modify sanctions imposed by the PCAOB on registered firms;[159]

149 Sarbanes-Oxley Act of 2002, 15 U.S.C. §§ 7201–7266 (2006).

150 *See, e.g.*, Elliott J. Weiss, *Some Thoughts on an Agenda for the Public Company Accounting Oversight Board*, 53 DUKE L.J. 491, 491–92 (2003).

151 15 U.S.C. § 7211(a).

152 *Id.* §§ 7211(c), 7213–7215.

153 *Id.* § 7212.

154 *Id.* § 7213(a)(1).

155 *Id.* § 7214(a).

156 *Id.* § 7215(a).

157 *Id.* § 7217.

158 *Id.* § 7217(b)(2).

159 *Id.* § 7217(c).

and permits the SEC to rescind the PCAOB's authority to enforce compliance with auditing standards.[160]

The PCAOB has five members, who are appointed by the SEC[161] "from among prominent individuals of integrity and reputation who have a demonstrated commitment to the interests of investors and the public."[162] To ensure that the PCAOB can attract qualified members, the statute provides that PCAOB members are not to be considered officers or employees of the United States,[163] thus freeing the PCAOB from the standard government pay scale.[164] Members serve staggered five-year terms,[165] but the SEC may remove members from office "for good cause shown" and subject to certain procedures.[166] More specifically, removal can occur only after the SEC finds, "on the record, after notice and opportunity for a hearing," that the PCAOB member:

> (A) has willfully violated any provision of [the Sarbanes-Oxley] Act, the rules of the [PCAOB], 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.[167]

In 2005, after inspecting Beckstead and Watts, LLP, a small Nevada accounting firm registered with the PCAOB, the PCAOB filed a report critical of the firm's auditing procedures.[168] Beckstead and Watts, along with the nonprofit group Free Enterprise Fund, of which the firm is a member, filed suit against the PCAOB.[169] Among other

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160 *Id.* § 7217(d)(1).

161 *Id.* § 7211(e)(1), (e)(4). The statute requires the SEC to consult with the Chairman of the Board of Governors of the Federal Reserve System and the Secretary of the Treasury before making an appointment. *Id.* § 7211(e)(4).

162 *Id.* § 7211(e)(1).

163 *See also id.* § 7211(a)–(b) (providing that the PCAOB will operate as a nonprofit corporation and not as "an agency or establishment of the United States Government" and that its members, employees, and agents shall not "be deemed to be . . . officer(s) or employee(s) of or agent(s) for the Federal Government by reason of such service").

164 *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3147 (2010) (noting that PCAOB members' annual salaries ranged, at the time of litigation, from $547,000 to $673,000 for the Board's Chairman).

165 15 U.S.C. § 7211(e)(5).

166 *Id.* § 7211(e)(6).

167 *Id.* § 7217(d)(3).

168 *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., No. 06-0217 (JR), 2007 WL 891675, at *2 (D.D.C. Mar. 21, 2007), *aff'd*, 537 F.3d 667 (D.C. Cir. 2008), *rev'd in part*, 130 S. Ct. 3138 (2010).

169 *Id.* at *1.

things, the plaintiffs argued that the PCAOB's for-cause removal provisions violated the Constitution's separation of powers.[170] Although the statute creating the SEC is silent on the circumstances under which the President can remove the SEC Commissioners, the United States and the plaintiffs agreed that the Commissioners are removable only for cause.[171] Thus, the plaintiffs claimed, the PCAOB members were impermissibly insulated from removal by two layers of for-cause protection.[172]

The U.S. District Court for the District of Columbia[173] and the U.S. Court of Appeals for the D.C. Circuit[174]—the latter over a dissent by Judge Kavanaugh[175]—sustained the constitutionality of the removal scheme. The Supreme Court reversed, holding by a vote of five to four that the two levels of tenure protection for PCAOB members—with PCAOB members removable only for cause by SEC Commissioners who are themselves removable only for cause—rendered the PCAOB's structure unconstitutional.[176]

Writing for the majority, Chief Justice Roberts framed the question as whether the dual for-cause removal provision was consistent with the Constitution's "vesting of the executive power in the President."[177] The Court canvassed key removal precedents and determined that they did not resolve that question. In particular, although *Humphrey's Executor v. United States* sustained for-cause tenure protection for members of the Federal Trade Commission[178] and *Morrison v. Olson* upheld for-cause tenure protection of the Independent

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170 *Id.* at *5. The plaintiffs also claimed that members of the PCAOB were appointed in violation of the Appointments Clause; PCAOB members, the plaintiffs argued, are principal officers who must be appointed by and with the consent of the Senate. *Id.* at *4; *see* U.S. CONST. art. II, § 2, cl. 2. The plaintiffs claimed in the alternative that even if PCAOB members are "inferior" officers whose appointment Congress could vest "in the President alone, in the Courts of Law, or in the Heads of Departments," U.S. CONST. art. II, § 2, cl. 2, Congress did not do so; Congress vested the appointment authority in the SEC, *see* 15 U.S.C. § 7211(e)(4)(A). The plaintiffs claimed that the SEC is not a "Department[ ]," and that even if it is a Department, the SEC Commissioners collectively (as opposed to just the Chairman of the SEC) cannot serve as the Department's "Head[ ]." U.S. CONST. art. II, § 2, cl. 2; *see Free Enter. Fund*, 2007 WL 891675, at *4.

171 *See supra* note 4 and accompanying text.

172 *See Free Enter. Fund*, 2007 WL 891675, at *5–6.

173 *Id.* at *6.

174 Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667, 685 (D.C. Cir. 2008), *rev'd*, 130 S. Ct. 3138 (2010).

175 *Id.* at 685–715 (Kavanaugh, J., dissenting).

176 Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3151–54 (2010).

177 *Id.* at 3147.

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

Counsel,[179] each case involved only a single layer of tenure protection.[180] The Court concluded that the PCAOB's second layer of tenure protection was relevant, because with that layer, the President "can neither ensure that the laws are faithfully executed, nor be held responsible for a Board member's breach of faith."[181]

The Court rejected the PCAOB's argument that despite the limitations on the SEC's power to remove PCAOB members, the SEC exercises extensive control over the PCAOB.[182] As noted, in addition to controlling the PCAOB's budget,[183] the SEC has control over whether the PCAOB's rules and sanctions become final.[184] Moreover, the SEC can "relieve" the PCAOB of its enforcement authority.[185] The United States and the PCAOB contended that the SEC's control over the PCAOB meant that the President had as much control over the PCAOB's functions as he would have had if Congress had lodged the PCAOB's relevant functions with the SEC itself.[186] The Court rejected that argument on the ground that the SEC's "[b]road power over Board functions is not equivalent to the power to remove Board members."[187] In addition, the Court concluded that the PCAOB is empowered to take significant enforcement actions independently of the Commission, and that those functions are subject only to "latent Commission control."[188]

Finally, the Court dismissed claims that invalidating the PCAOB's two-layer tenure protections would disrupt longstanding congressional practice. The Court found that the Sarbanes-Oxley Act is "highly unusual in committing substantial executive authority to officers protected by two layers of for-cause removal."[189] According to the Court, the parties had identified "only a handful of isolated posi-

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

180 *See Free Enter. Fund*, 130 S. Ct. at 3153 (calling the removal restrictions in *Myers* and *Humphrey's Executor* "limited restrictions on the President's removal power," while the Sarbanes-Oxley Act "does something quite different").

181 *Id.* at 3154.

182 *Id.* at 3158–59.

183 15 U.S.C. § 7219(b) (2006).

184 *Id.* § 7217(b)(2), (c)(2)–(3).

185 *Id.* § 7217(d)(1).

186 *See* Brief for the United States at 47–48, Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138 (2010) (No. 08-861); Brief for Respondents Public Co. Accounting Oversight Board at 15–18, *Free Enter. Fund*, 130 S. Ct. 3138 (No. 08-861); *see also* Pildes, *supra* note 11, at 491 ("[T]he Board functions under the direct and full legal oversight and control of the SEC.").

187 *Free Enter. Fund*, 130 S. Ct. at 3158.

188 *Id.* at 3159.

189 *Id.*

tions" with such features.[190] In response to Justice Breyer's claim in dissent that the Court's decision would call into question the constitutionality of a variety of existing institutional structures, including the use of the civil service system within the independent agencies and the tenure protection of administrative law judges ("ALJs"),[191] the Court insisted that the positions the dissent identified are not similarly situated to the PCAOB.[192]

Having held that the PCAOB's two-layer tenure protection was unconstitutional, the Court turned to the question whether the freedom from presidential control engendered by that protection required invalidation of the entire PCAOB structure. The Court concluded that it did not, because the tenure protection was severable from the remainder of the statute.[193] Without the good-cause restrictions on the SEC's power to remove PCAOB members, the Court stated, the PCAOB would be subject to the "default rule" that "removal is incident to the power of appointment."[194] That is, the members of the PCAOB would be removable by the SEC at will. The Commission thus would be "fully responsible for the Board's actions, which are no less subject than the Commission's own functions to Presidential oversight."[195]

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190 *Id.*

191 *Id.* at 3179–82 (Breyer, J., dissenting).

192 *Id.* at 3159–60 (majority opinion). Regarding the civil service system, the Court observed that its holding had no relevance to government employees—as opposed to officers—and that the President has greater tools to ensure control of senior or policymaking positions than he has to ensure control of the PCAOB. *Id.* at 3160. Regarding ALJs, the Court reasoned that ALJs: (1) may be employees rather than officers of the United States; (2) may "perform adjudicative rather than enforcement or policymaking functions"; or (3) may "possess purely recommendatory powers." *Id.* at 3160 n.10.

193 *Id.* at 3161.

194 *Id.*

195 *Id.* The Court also held that the appointment of the PCAOB's members conformed to the Appointments Clause. Based in part on the fact that the SEC could now remove PCAOB members at will, the Court first held that members of the PCAOB are "inferior" officers whose appointment Congress may permissibly vest in the head of a department. *Id.* at 3162 (quoting U.S. CONST. art. II, § 2, cl. 2). Adopting the reasoning of a four-Justice concurrence in *Freytag v. Commissioner*, 501 U.S. 868 (1991), which defined a department as any "free-standing, self-contained entity in the Executive Branch," *id.* at 915 (Scalia, J., concurring in part and concurring in the judgment), the Court concluded that the SEC is a department, *Free Enter. Fund*, 130 S. Ct. at 3163. That conclusion raised the question whether the Commissioners could collectively be viewed as the "Hea[d]" of the SEC for purposes of the Appointments Clause. *See Free Enter. Fund*, 130 S. Ct. at 3163. Based on legislative acknowledgment that the head of an agency can be a commission with more than one member, and on past instances of appointments of inferior officers by multimember bodies—appointments that would be invalid if a multimember body could not be the head of a department for purposes of the Appointments Clause—the Court

Justice Breyer, joined by Justices Stevens, Ginsburg, and Sotomayor, dissented from the Court's invalidation of the PCAOB's tenure-protection provision.[196] The dissent focused on the degree of SEC control over the PCAOB.[197] In addition, Justice Breyer argued that the Court had repeatedly recognized that removal restrictions are constitutional where they restrict the President's power to remove an officer with any adjudicatory responsibilities[198] and where officials have "technical responsibilities that warrant a degree of special independence."[199] Justice Breyer also claimed that the Court's decision would give rise to tremendous uncertainty—potentially affecting "hundreds, perhaps thousands of high level government officials,"[200] including individuals who are removable only for cause and who serve within independent agencies whose heads are likewise removable only for cause;[201] ALJs, removable only through for-cause hearings conducted by the Merit Systems Protection Board, whose members are themselves protected by a for-cause tenure provision;[202] and many others.[203]

B. PCAOB*'s Principles?*

When we examine *PCAOB*'s reasoning in greater depth, particularly in light of the removal theories considered in Parts I and II, what appears to be most significant is the Court's turn back to the Vesting Clause. As will become clear, however, the Vesting Clause cannot provide the basis for the Court's ultimate decision to invalidate the second layer of tenure protection and sustain the remainder of the statutory scheme.

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concluded that there was no constitutional infirmity in the appointment of the PCAOB's members by the SEC Commissioners acting jointly. *Id.* at 3163–64.

196 The four Justices who dissented from the Court's holding did not join the portion of the Court's opinion addressing the Appointments Clause, but the dissenters would have upheld the statute in its entirety, signaling unanimity on the Appointments Clause issues. *See Free Enter. Fund*, 130 S. Ct. at 3164 (Breyer, J., dissenting).

197 *Id.* at 3172–73.

198 *Id.* at 3173–74.

199 *Id.* at 3175.

200 *Id.* at 3179.

201 *Id.* at 3179–80; *id.* at 3185–92 (listing in Appendix A twenty-four departments "in which a 'for-cause' office is situated within a 'for-cause department'—*i.e.*, instances of 'double for-cause' removal that are essentially indistinguishable from [*PCAOB*]").

202 *Id.* at 3180–81.

203 *See id.* at 3181 (noting that numerous commissioned military officers are removable for cause only by other commissioned military officers who are removable only for cause).

1. *The Vesting Clause*

The notion that the executive power encompassed a power of removal figured prominently in the debate over the creation of the executive departments in 1789.[204] It was also critical to the Court's reasoning in *Myers*.[205] In the move away from *Myers* in *Humphrey's Executor* and *Morrison*, however, any discussion of the executive power as a source of removal authority receded. The *PCAOB* Court appeared to bring the Vesting Clause back to the fore. In *PCAOB*, the Court bookended its discussion of the removal question with references to the Vesting Clause.[206] The Court also asserted that the removal power is in fact an element of the executive power. It first quoted an account of James Madison's statement on the floor of the First Congress that "if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws."[207] The prevailing view in the First Congress, the Court concluded, was that "the executive power included a power to oversee executive officers through removal."[208] The Court also described the removal power as a "traditional executive power" that, according to Madison, was not "'expressly taken away'" and which therefore "'remained with the President.'"[209] The Court closed its opinion by referring to the removal power as part of the executive power: "The Constitution that makes the President accountable to the people for executing the laws also gives him the power to do so. That power includes, as a general matter, the authority to remove those who assist him in carrying out his duties."[210]

A closer look at the Court's decision, however, shows that the Court's turn back to the Vesting Clause was more rhetorical than substantive. The Court read the Constitution as demanding that the SEC have unlimited authority to remove PCAOB members.[211] The Court, however, offered no insight into why the executive power might de-

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204 *See supra* Part I.C.

205 *See supra* text accompanying notes 127–33.

206 *See Free Enter. Fund*, 130 S. Ct. at 3147 ("We hold that such multilevel protection from removal is contrary to Article II's vesting of the executive power in the President."); *id.* at 3154 (declaring that the PCAOB's dual for-cause removal limitation "is contrary to Article II's vesting of the executive power in the President").

207 *Id.* at 3151 (internal quotation marks omitted).

208 *Id.* at 3151–52.

209 *Id.* (quoting Letter from James Madison to Thomas Jefferson (June 30, 1789), *in* 16 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 1789–1791, at 893 (Charlene Bangs Bickford et al. eds., 2004)).

210 *Id.* at 3164.

211 *See id.* at 3158–59.

mand unlimited removal authority for officials whose tenure Congress can protect, but not demand unlimited removal authority for the President. If the vesting of the executive power in the President were truly the source of a requirement of unlimited removal authority, then the rule would necessarily run upward and demand that the President have unlimited removal authority over the SEC itself. The Court did more than simply avoid that question. After severing the PCAOB's tenure provision,[212] the Court sustained the constitutionality of the statutory scheme. In so doing, the Court necessarily (though implicitly) rejected any requirement of unlimited removal authority over the SEC. In short, despite repeatedly invoking Article II's Vesting Clause and suggesting that the power to oversee executive officials is part of the "executive Power," the Court did not suggest that the executive power includes an unlimited presidential power to supervise or remove executive officials. The vesting of the executive power in the President thus cannot be taken seriously as the basis for the Court's holding.

2. *The Obligation of Faithful Execution*

Like the participants in the 1789 debate and the Court in the pre-*PCAOB* cases, the *PCAOB* Court relied on another aspect of Article II—the fact that Article II imposes a duty on the President to "take Care that the Laws be faithfully executed."[213] The Court treated that duty of faithful execution as implying a power of oversight: "The President cannot 'take Care that the Laws be faithfully executed' if he cannot oversee the faithfulness of the officers who execute them."[214] After discussing Madison's view that the executive power included a power of oversight through removal,[215] the Court returned to the power that the Take Care Clause implies for the President: "It is *his* responsibility to take care that the laws be faithfully executed. . . . [T]he President therefore must have some 'power of removing those for whom he can not continue to be responsible.'"[216] Focusing specifi-

212 *See id.* at 3161–64.

213 *Id.* at 3146 (internal quotation marks omitted).

214 *Id.* at 3147 (quoting U.S. CONST. art. II, § 3); *see also id.* (discussing that the flaw in the PCAOB's structure is that it lodges the determination whether an officer has properly discharged his or her duties in another officer "who may or may not agree with the President's determination," and concluding that this structure "contravenes the President's 'constitutional obligation to ensure the faithful execution of the laws'" (quoting Morrison v. Olson, 487 U.S. 654, 693 (1988))).

215 *Id.* at 3151–52.

216 *Id.* at 3152 (quoting Myers v. United States, 272 U.S. 52, 117 (1926)).

cally on the structure of the PCAOB—and again immediately after invoking the scope of the executive power vested by Article II—the Court returned to the Take Care Clause theme: In the case of the PCAOB, "[the President] is not the one who decides whether Board members are abusing their offices or neglecting their duties. He can neither ensure that the laws are faithfully executed, nor be held responsible for a Board member's breach of faith."[217]

Although the *PCAOB* Court's reliance on the Take Care Clause does not suffer from the same internal inconsistencies as its discussion of the executive power, the Court's analysis is not complete. Even if the President's obligation of faithful execution carries whatever removal power is necessary to fulfill that obligation, the Court gives no indication of the scope of the removal authority that the President's faithful execution obligation would require. The Court's decision to uphold the statutory scheme after eliminating the second for-cause-removal layer, despite the apparent limitations on presidential removal of SEC Commissioners, suggests a presumption that for-cause-removal restrictions in the case of an agency with the SEC's authority do not interfere with the President's duties of faithful execution. If so, then the *PCAOB* case stands for the proposition that it is the second layer of removal protection that tips the balance. The necessary inquiry here, however, into precisely what removal power is needed to fulfill the faithful execution duty, is notably absent from the Court's analysis.[218]

3. *Structural Principles*

Finally, the Court's invalidation of the structure of the PCAOB relied not only on the scope of the executive power and the implications of the Take Care Clause, but also on structural separation of powers principles, untethered to specific constitutional text. The Court's opinion highlighted two such principles: concerns about presi-

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217 *Id.* at 3154.

218 Similarly, the Court mentioned in passing the "traditional default rule" that "removal is incident to the power of appointment." *Id.* at 3161. The Court did not connect that rule to its invalidation of the PCAOB's tenure protection provision, but rather used the rule to presume that, once the provision was invalidated, PCAOB members would be removable by the SEC. *See id.* The logic behind the removal-follows-appointment theory, however, is similar to that connecting the removal power to the obligation of faithful execution: those responsible for executing the law through their subordinates need to have the power to remove those whom they appoint. *See supra* text accompanying note 107.

dential accountability and fears of congressional aggrandizement at the expense of the executive power.[219]

First, the Court repeatedly invoked the idea of presidential accountability to the electorate, reasoning that the diffusion of power to officials whom the President cannot directly supervise entails "a diffusion of accountability."[220] Quoting *The Federalist No. 72*, the Court observed that "[t]he people do not vote for the 'Officers of the United States,'"[221] but instead "look to the President to guide the 'assistants or deputies . . . subject to his superintendence.'"[222] "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.'"[223] For this reason, the Court suggested:

> [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."[224]

The Court returned to the theme of accountability in the opinion's conclusion: without the removal power, "the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else."[225]

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219 Professor John Manning acknowledged the second of these two principles in critiquing aspects of the *PCAOB* decision. *See* Manning, *supra* note 25, at 1971 n.167 (noting that the *PCAOB* Court "reasoned from the broad purposes of the separation of powers to the specific conclusion that the two-tiered removal restriction was impermissible"); *id.* at 1961 (describing the phenomenon of the Court, even in formalist opinions, reasoning "from a general principle of separation of powers to quite specific prohibitions against particular governmental practices").

220 *Free Enter. Fund*, 130 S. Ct. at 3155.

221 *Id.* (quoting U.S. CONST. art. II, § 2, cl.2).

222 *Id.* (quoting THE FEDERALIST NO. 72, at 487 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)).

223 *Id.* (quoting THE FEDERALIST NO. 70, at 476 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)). This theme of course echoes a similar structural theme in the Court's federalism opinions. *See, e.g.*, New York v. United States, 505 U.S. 144, 169 (1992) ("[W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.").

224 *Free Enter. Fund*, 130 S. Ct. at 3155 (quoting 1 ANNALS OF CONG. 499 (1789) (Joseph Gales ed., 1834) (statement of Rep. Madison)); *see also id.* at 3154 (observing that a dual for-cause tenure protection has no outer limit and could result in officials being protected by multiple layers of for-cause protection, rendering such officials "immune from Presidential oversight, even as they exercised power in the people's name").

225 *Id.* at 3164.

The Court's second structural separation of powers concern suggested that conferring executive authority upon officials over whom the President lacks effective oversight disperses authority to Congress. The Court described PCAOB's dual-layer tenure protection as a "'blueprint for extensive expansion of the legislative power.'"[226] Because Congress controls the salary and duties of executive officials and the very existence of executive offices, "[o]nly Presidential oversight can counter [Congress's] influence."[227] Quoting James Madison in *The Federalist No. 51*, the Court observed that the Constitution not only separates the legislative, executive, and judicial powers but also gives each branch "'the necessary constitutional means, and personal motives, to resist encroachments of the others.'"[228] The President's "key means" of resisting congressional encroachment is "'the power of appointing, overseeing, and controlling those who execute the laws.'"[229]

Like its reliance on the vesting of the executive power in the President and the obligation of faithful execution, the Court's reliance on structural separation of powers principles cannot fully account for its invalidation of the PCAOB's tenure protection provision. The Court's focus on accountability implies the need for the sort of unitary executive structure that many commentators believe the executive power demands.[230] But the Court offered no account of why a second layer of tenure protection threatens accountability when one layer does not.[231] Similarly, although the Court offered the PCAOB's insulation as an example of legislative encroachment,[232] it did not suggest that any legislative regulation of the power to execute the law constitutes legislative encroachment. The Court thus left open the questions of when the balance tips from permissible legislative regulation of the power to execute the law to impermissible legislative encroachment upon that power, and why two layers of insulation are excessive when one layer is not.

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226 *Id.* at 3156 (quoting Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc., 501 U.S. 252, 277 (1991)).

227 *Id.*

228 *Id.* at 3157 (quoting THE FEDERALIST NO. 51, at 349 (James Madison) (James E. Cooke ed., 1961)).

229 *Id.* (quoting 1 ANNALS OF CONG. 463 (1789) (Joseph Gales ed., 1834) (statement of Rep. Madison)).

230 *See supra* note 63 and accompanying text.

231 *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Board, 130 S. Ct. 3138, 3170–73 (2010) (Breyer, J., dissenting) (noting that "the Court fails to show why *two* layers of 'for cause' protection . . . impose any more serious limitation upon the *President's* powers than *one* layer").

232 *See supra* text accompanying notes 226–29.

C. *Beyond* PCAOB

The *PCAOB* Court took pains to emphasize the narrowness of its holding—in particular, that the holding carried no implications for the civil service or for ALJs.[233] The Court did not similarly narrow the constitutional sources of its decision. On the surface, the Court's use of the Vesting Clause is significant as the first instance since *Myers* in which the Court relied on the Vesting Clause to invalidate a removal restriction. Yet on closer inspection, the Vesting Clause cannot account for the decision. The Take Care Clause may account for the decision, but the Court's discussion of that provision is underdeveloped. The Court's reliance on structural principles likewise involves significant gaps.

Taking the PCAOB case to its logical conclusion nevertheless suggests that the Court sought to refocus assessment of removal disputes. Under the Court's approach, two questions are critical. First, the case demonstrates the need for sustained attention to the question of how the Take Care Clause bears upon analysis of presidential removal authority. If the executive power encompasses unlimited removal authority, then the *PCAOB* Court was right for the wrong reasons. If instead *PCAOB* is properly read as requiring interpretation of the executive power in light of the duty of faithful execution, then the scope of the power that duty implies—a topic that would require a separate article—becomes critical. The obligation of faithful execution has played a significant role in executive branch arguments about the power to direct or remove executive officials,[234] but courts and scholars have not fully explored the scope of any removal power implied by the obligation of faithful execution. In this vein, it is important to ask whether an inquiry into what the obligation of faithful execution requires is simply a variant of functional analysis. Taking the Take Care Clause seriously, however, would require a more detailed textual and historical assessment than functional analysis typically entails. Justice Breyer's *PCAOB* dissent, for example, focused principally on whether the dual for-cause removal provision would

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233 *See Free Enter. Fund*, 130 S. Ct. at 3159–60.

234 *See, e.g.*, CALABRESI & YOO, *supra* note 63, at 142 (citing 4 Op. Att'y Gen. 515, 516 (1846)); *id.* at 154 (citing United States v. Guthrie, 58 U.S. 284, 286-87 (1854)); *id.* at 154-55 (citing 7 Op. Att'y Gen. 453, 463 (1855)); *id.* at 182 (citing Andrew Johnson, Message to the Senate (Dec. 12, 1867), *in* 8 A COMPILATION OF MESSAGES AND PAPERS OF THE PRESIDENTS 3781, 3790 (James D. Richardson ed., 1925)); *id.* at 324 (citing Brief of the United States at 15-16, Wiener v. United States, 357 U.S. 349 (1958) (No. 52)).

lead to congressional aggrandizement.[235] That narrow inquiry does not capture the question whether a removal restriction prevents the President from ensuring faithful execution of the laws. The broader question of whether a removal restriction prevents the President from accomplishing his constitutionally assigned functions—the question posed by advocates of upholding the statutory scheme at issue in *PCAOB*,[236] and by the *Morrison* Court[237]—is stated in such a generalized form that it requires no specific assessment of the powers that the duty of faithful execution might entail. The *PCAOB* Court, of course, fell short of conducting the specific assessment that its invocation of the Take Care Clause requires.

Second, if the linchpin of the *PCAOB* decision is that the two-layer removal provision is inconsistent with the duty of faithful execution, then the decision may have implications throughout the administrative structure, despite the Court's disclaimers. If we take the Court's reliance on the obligation of faithful execution seriously, then what those implications are again depends critically on the scope of the removal power that the obligation of faithful execution entails. Other scholars grappling with the implications of *PCAOB* have not fully engaged this methodological point. Some have suggested that, at its core, *PCAOB* is simply an application of functionalist reasoning.[238] As a descriptive matter, it is surely the case that the *PCAOB* Court stopped far short of a complete analysis of the implications of the duty of faithful execution. Yet dominant functional methodologies likely would have pointed toward sustaining the dual for-cause removal provision, and there is little question that the Court sought to distance itself from such methodologies.[239]

Others have recognized a shifting methodological ground in *PCAOB* but not discussed the role of the obligation of faithful execution in that shift. In a thoughtful article, for example, Professor Kevin Stack argues that *PCAOB*'s principle "is that the consistency of good-cause removal protections with separation of powers depends in part on the combination of functions of the officials whose tenure those

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235 *See Free Enter. Fund*, 130 S. Ct. at 3167 (Breyer, J., dissenting) ("[T]hat feature of the statute—a feature that would *aggrandize* the power of Congress—is not present here.").

236 *See, e.g.*, Brief for Constitutional and Administrative Law Scholars as *Amici Curiae* in Support of Respondents at 9, *Free Enter. Fund*, 130 S. Ct. 3138 (No. 08-861).

237 *See* Morrison v. Olson, 487 U.S. 654, 689–90 (1988).

238 *See, e.g.*, Jack M. Beermann, *An Inductive Understanding of Separation of Powers*, 63 ADMIN. L. REV. 467, 489 (characterizing *PCAOB* as "a particularized application of the principle that no branch may prevent another from fulfilling its constitutionally assigned function").

239 *See Free Enter. Fund*, 130 S. Ct. at 3146.

provisions protect."[240] That is, Professor Stack argues that the Court's decision to invalidate the PCAOB's structure while carefully preserving the constitutionality of adjudicators operating within independent agencies[241] must depend on the fact that PCAOB members exercise a combination of functions.[242] Reasoning backwards from the constitutionality of tenure protection for ALJs to the unconstitutionality of tenure protection of the PCAOB suggests that the Court flipped the constitutional baseline from one in which any adjudicative functions entitle an officer to for-cause tenure protection to one in which the exercise of any nonadjudicative functions preclude for-cause tenure protection.[243] Professor Stack's conclusion about the importance of the combination of functions may be correct, but disentangling the threads of *PCAOB* suggests that a different mode of analysis is appropriate. The challenge is not to identify a new constitutional baseline by reasoning backwards from the constitutionality of tenure protection of ALJs to the unconstitutionality of the tenure protection of the PCAOB, but to reason forward to determine the scope of the presidential removal power that the obligation of faithful execution entails. *PCAOB* thus marks neither a full shift toward a Vesting Clause–centered removal analysis nor a surrender to functionalism. It instead highlights the need to explore the obligation of faithful execution to assess the scope of removal power that such an obligation entails.

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240 Stack, *supra* note 17, at 2392.

241 One could argue that, from the perspective of the *PCAOB* case, adjudicators operating outside of independent agencies are indistinguishable from adjudicators operating within them, because removal procedures are launched by the agency head, but also require a hearing before another entity whose members have for-cause tenure: members of the Merit Systems Protection Board. *See* 5 U.S.C. § 7521 (2006); *Free Enter. Fund*, 130 S. Ct. at 3180–81 (Breyer, J., dissenting) (questioning the constitutional soundness of ALJ removal procedures following *PCAOB*).

242 Stack, *supra* note 17, at 2392 ("The [PCAOB] possesses rulemaking, enforcement, and adjudicative functions. This combination of functions sets the Board's removal protections apart from those of dedicated adjudicators within independent agencies whose removal protections the Court sought to preserve, and furnishes the key ground of the [*PCAOB*] decision.").

243 *Id.* at 2392–93 (arguing that, taken to its logical extension, *PCAOB* "redraws the constitutional grounding of agency independence" by "preserv[ing] the constitutional foundation for good-cause removal protections for dedicated adjudicators, but sweep[ing] aside that foundation for officials with more than adjudicative functions").