

2009

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Recommended Citation

Peter L. Strauss, *Our Twenty-First Century Constitution*, VANDERBILT LAW REVIEW EN BANC, VOL. 62, P. 121, 2009; COLUMBIA PUBLIC LAW RESEARCH PAPER No. 10-227 (2009).

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Columbia Law School

Public Law & Legal Theory Working Paper Group

Paper Number 10-227

OUR TWENTY-FIRST CENTURY CONSTITUTION

(version of Dec. 17, 2009)

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Our Twenty-First Century Constitution

Peter L. Strauss

Surely the PCAOB case illustrates how hard it is to accommodate the governmental structures Congress has created for the Twenty-First Century to a Constitution created in the Eighteenth. Three of the four essays published here last month are up to that task, and frame the issues as one hopes they may be decided by the Court. Prof. Lawson predicts, rightly in my judgment, that if there is one Supreme Court precedent that must be abandoned, it is *Freytag v. Commissioner* – and with its abandonment the potential straight-jacket of constitutional originalism disappears as well. What is a “Department” whose head[s] *must* be appointed by the President with the advice and consent of the Senate (and who may then themselves be vested with the power to appoint inferior officers) cannot be limited to the handful of cabinet-level bodies, as *Freytag* impeccably reasoned the drafters of the Constitution intended to do. Yes, the Framers feared the dispersal of appointive authority, as Justice Blackmun reasoned for the Court majority; at an early point in our history, perhaps that principle could have been enunciated and enforced. But we have now two and a quarter centuries of congressional creation of governmental structures under the Necessary and Proper clause – as, with equal certainty, the Framers intended would occur – and judicial acceptance of that. The alphabet soup of agencies having been created, and countless legal consequences of their behavior judicially ratified through the decades, it is impossible to imagine its being undone.

Nor is it as clear as Professors Calabresi and Yoo would have us believe that these creations run against the tides of history and precedent. The English Parliament, as they remark, knew how to create jobs to be held during “good behavior.” So did our first Congresses – think William Marbury, presidentially appointed with Senate confirmation to a five year term as a municipal judge in the new District of Columbia. Consider as well the protective treatment given important “inferior officers” in the Department of the Treasury, created by the first Congress as anything but mere mouthpieces of the President, obliged to do his will. *Shurtleff*,¹ which they invoke, involved appointment to an office whose tenure was not time-limited; it held only that it would not be presumed that the statute in that case

“[gave] an appraiser of merchandise the right to hold that office during his life or until he shall be found guilty of some act specified in the statute. ... We think it quite impermissible to attribute an intention on the part of Congress to make such an extraordinary change in the usual rule governing the tenure of office, and one which is to be applied to this particular office only, without stating such intention in plain and explicit language.”²

Civil Service laws – which in our history have included such persons as the heads of the Forest Service and of the Social Security Administration³ – are unshadowed, and so are offices created for a fixed term.

So the issue is finding a way of accommodating the prolixity of government structures Congress

¹ *Shurtleff v. United States*, 189 U.S. 311 (1903).

² At 316.

³ Herbert Kaufman, *The Administrative Behavior of Federal Bureau Chiefs* (1983).

creates without teaching Congress how to avoid the President's constitutionally necessary role as our unitary executive. If Congress, knowing it cannot itself appoint to executive office, could find the means to vest that power in a person or body that was itself independent of presidential oversight, that line would have been crossed. And, if not in this case, the Court seems likely soon to have the opportunity to find such a problem. Consider the Copyright Royalty Tribunal, a body of three federal officials responsible for setting royalty rates for digitally distributed music. In *SoundExchange v. Librarian of Congress*,⁴ Judge Kavanaugh (whose articulate dissent in our case helped catalyze the grant of certiorari), pointed tellingly to the hundreds of millions of dollars CRT decisions allocate. The members of this tribunal are appointed to fixed terms of office by the Librarian of Congress in consultation with the Register of Copyrights – who is also appointed by the Librarian of Congress. They are removable by the Librarian only “for cause.”

Is the Librarian a “Head of Department”? Although the Librarian has been (nominally) a presidential appointment since 1802, it was not until 1897 that Senate approval of his appointment was required (by the same act as first gave him sole responsibility for making the institution's rules and regulations and appointing its staff). This strongly suggests that, from the outset, the Library of Congress has not been regarded as a “Department.” Nor have its Librarians been treated as political appointees. Librarians are not politicians or even professional librarians, but leading literary figures like Archibald MacLeish. Dr. James Hadley Billington, the Librarian today, was a highly respected academic historian and Director of the Woodrow Wilson International Center for Scholars when he was appointed in September 1987, during the presidency of George Bush. His extended tenure reflects the proposition, celebrated on the Library's web site, that “in the twentieth century the precedent seems to have been established that a Librarian of Congress is appointed for life.”⁵ His office – also responsible for such clearly *non*-executive bodies as the Congressional Research Service – is the *only* link between the CRT and the President. What political controls can the President effectively exercise over the administrator responsible for that congressional resource? It is hard to think that the *Library of Congress* will be regarded as a constitutional “Department,” in which the appointment of officials with functions like the CRT's may constitutionally be vested. Else Congress *would* have learned that dangerous lesson.

But what about the SEC and the PCAOB? The SEC is surely a constitutional “Department,” as Professor Lawson forthrightly acknowledges. Only on that basis could it be entrusted with the functions it exercises. That one could describe its rulemaking as “quasi-legislative” and its adjudication as “quasi-judicial” cannot make it a part of either Congress or the Judiciary – and certainly not of both at once. Like its enforcement responsibilities, these are, as the Court has recognized, executive functions. The flim-flam of *Humphrey's Executor* lay in its pretending otherwise. As the SEC's business involves executive functions, it *must* be done within the framework of presidential oversight. The only serious questions are about what constitute the constitutionally indispensable elements of that oversight. More than a century's practice has established that the ordinary accoutrements of independent agency status – such as fixed terms of office, which the President can shorten only “for cause” – do not deny the President's necessary

⁴ 571 F.3d 1220 (D.C. Cir. 2009).

⁵ Jefferson's Legacy; A Brief History of the Library of Congress, <http://www.loc.gov/loc/legacy/librs.html>, visited October 31, 2009.

role.⁶ He still appoints the Commissioners; he *may* remove them from office with reason; he controls their budget requests, their legislative requests, and – at least at the highest level – their legal representation; ordinarily (and in the particular case of the SEC) he is afforded plenary control over the identity of the Commission chair; he may if he chooses⁷ command the written opinion of the Commission’s leaders on any matter within their assigned duties and reason with them about that; etc., etc. The political price he might have to pay to Congress, which doubtless inhibits such choices, seems comparable to the price entailed in congressional participation in appointment; there remain significant bases for influence, and it is not as if, in this case, Congress had taken over the role of oversight. In this respect the situation of the Library and the Librarian *of Congress* is quite different.⁸

Although Professors Calabresi and Yoo speak only to the Court’s decision in *Morrison*, make no mistake about it – if *Morrison* falls, the independent regulatory commissions (that is to say, *Humphrey’s Executor*) fall with it. For if the result in *Humphrey’s Executor* is sound, as in my judgment it is, that result can *only* be sustained by reasoning like *Morrison’s*. *Humphrey’s Executor’s* pretense that the FTC lies outside the executive branch is both indefensible on the facts of its functions, and impossible to square with a Constitution that places all executive functioning under the aegis of a unitary President. The flaw in their argument, to be brief about it, is that they stop reading Article II after its first sentence. But it goes on. While it describes the President as “Commander in Chief” of the military – no question here, he is entitled to issue orders that are to be unquestioningly obeyed – all it says about his relationship to domestic authorities is that he is entitled to “require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the Duties of their respective Offices.” This power, which he has over the SEC as well as the EPA, stands in sharp contrast to being “Commander in Chief.” *The agencies* have the duties; he gets to reason with them, as he strives to “take Care that the Laws *be* faithfully executed.” One believes the drafters understood the significance of the passive voice; its use entails that others perform congressionally assigned “Duties,” under his watchful gaze. And for him to ignore those placements of “Duties” in others would in itself be to fail to “take Care that the Laws be faithfully executed.” Again, the question is not whether he is entitled to command or decide, but what constitute the constitutionally indispensable elements of his necessary oversight relationship. Perhaps, on its facts, *Morrison* struck that balance wrong – Justice Scalia’s dissent has long moved me on its facts, and the *Edmonds* formulation is cleaner. But, as Prof. Lawson properly recognizes, the appropriate inquiry is about oversight, not command.

This leaves the Appointments Clause issue – are the Members of the PCAOB “principal” or “inferior” officers? Professors Pildes, Bruff and Lawson essentially agree on the inquiry here – it is the *Morrison/Edmonds* question of sufficiency of control. Are the PCAOB Members in the orbit

⁶ See generally Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum.L.Rev. 573 (1984).

⁷ While Executive Order 12866, requiring cost-benefit impact analyses of agency rulemaking proposals, omits the independent regulatory commissions for most purposes, this is uniformly understood to reflect a political and not a legal judgment. Its Section 4 requires the independents as well as other agencies to submit an annual regulatory plan (comparable to the annual budget) for OIRA review, and one is aware of no doubt that the remainder of the order could be addressed to them as well, if that were the President’s wish.

⁸ Compare *Bowsher v. Synar*, 478 U.S. 714 (1986) (roles assigned the General Accounting Office).

of the SEC (Bruff)? Are their functions in fact subject to the close scrutiny and control of the SEC (Pildes)? Or are they so independent and unsupervised in important activities that they must themselves be regarded as Heads of Department, who must be appointed by the President with senatorial Advice and Consent (Lawson)? In my judgment, this is the right question, and these essays limn it with characteristic brilliance and effect. Perhaps as important, the Court can decide the question on these terms, in either direction, without significantly disturbing the overall shape Congress has given our government by its “Necessary and Proper” judgments over the past decades. The Supreme Court’s most important function, as Charles Black once remarked, lies in its legitimation of Congress’s choices, not the opposite. If a single such choice fails the test, that has far less significance than a judgment pulling the string on an extraordinary range of long-established institutions.

Two more observations in closing: First, the Court might solve the problem by observing, as at least one amicus brief reminds it, that Congress has not explicitly made SEC Commissioners removable only “for cause”; that protection of their tenure has simply been assumed. So a double “for cause” layer is not an inevitable element of the case. Second, one would have to look long and hard to find developed systems anywhere in the world that deliver financial institutions into politicians’ direct control. The money supply is not safe in their hands. This is a judgment Congress made as early as the first Bank of the United States and continued with the Federal Reserve. The Constitution does not require otherwise and – Professors Calabresi and Yoo to the contrary notwithstanding – the Court should and surely will avoid a result that suggests otherwise..