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Peter L. Strauss

Columbia Law School, strauss@law.columbia.edu

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The Role of the Chief Executive in
Domestic Administration

Peter L. Strauss
Columbia Law School

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The Role of the Chief Executive in Domestic Administration

Peter L. Strauss*

The nomination of United States Solicitor General Elena Kagan to the vacant seat on our Supreme Court coincided with the Supreme Court's extended consideration of what many regarded as potentially the most important decision concerning the President's necessary role in relation to domestic agency action in decades. In a long article on her administrative law scholarship appearing in the New York Times shortly after her nomination, Pulitzer Prize-winning reporter Charlie Savage – a strident critic of President George W. Bush's uses of executive authority¹ – wrote:

For decades, presidents of both parties have sought to impose greater White House control over the federal agencies that regulate matters like workplace rules, food and drug safety, and protections for natural resources. Elena Kagan, the Supreme Court nominee, has been a strong supporter of such efforts to expand presidential power over domestic affairs, her writings show. ... Ms. Kagan's views place her within the center of a debate about the balance between making the bureaucracy more responsive to national elections and fears that excessive politicization could trump neutral expertise.²

Free Enterprise Fund v. Public Company Accounting Oversight Board had been argued in the Supreme Court (by Solicitor General Kagan) early last December, and was decided June 28, 2010 – the last day of the Supreme Court's sitting for the current argument year,³ on the very day Senate hearings on her confirmation began, and five days after the conference for which this paper was written.

The case questioned the constitutionality of a particular form of government entity Congress had created to oversee the business of public company accounting. Pre-crash scandals such as Enron and World-Com had revealed the inadequacies of the accountancy profession's efforts at self-regulation. As accountancy principles had particular importance for the auditing of public companies whose shares were subject to the regulation of the Securities & Exchange Commission [SEC], one of America's "independent regulatory commissions," Congress had created a new multi-member body, the Public Company Accounting Oversight Board [PCAOB], to be named and extensively overseen by the SEC – in effect an independent commission within an independent commission. Had they placed this Board, invested with powers of rulemaking,

* Betts Professor of Law, Columbia Law School. Thanks to the participants in the conference in Aix en Provence, for which this paper was first written, and to my colleague Abbe Gluck for a thoughtful reading after it had been revised.

¹ Takeover: The Return of the Imperial Presidency and the Subversion of American Democracy (2007).

² Charlie Savage, "Kagan's Writings Back Wider Executive Powers," The New York Times, May 22, 2010.

³ The United States Supreme Court sits from the first Monday in October (hence, the period of its sitting is referred to as October Term, 20xx) until, usually, the last Monday in June. By convention, every case argued during that October Term will have been decided before the period of its sitting ends, unless as rarely occurs it is set for reargument the following Term.

enforcement and adjudication under the careful and unusually extensive oversight of the SEC, so far away from the presidency as to defeat our Constitution's vesting of "the executive Power ... in a President of the United States"?⁴ What is the executive power, anyway, and how can we have arrived a decade into the Twenty-First Century under an Eighteenth Century Constitution without knowing the answer to that question?

That the case took over six months for the Court to issue its opinions can be taken as a signal of its difficulty. The last part of this paper, that could hardly have been presented at the Conference, essays a preliminary analysis of the two opinions in the case – a majority opinion written by Chief Justice Roberts for what is conventionally regarded as the conservative wing of the Court (himself and Justices Alito, Kennedy, Scalia and Thomas) and a dissent written by Justice Breyer for the more liberal four (himself and Justices Ginsburg, Sotomayor, and Stevens.) The disagreement was evidently deeply felt; Justice Breyer took the unusual step of reading his dissent from the bench when the decision was announced. Yet, as will be seen, the result was hardly as dramatic as some had hoped for, and the apparently deliberate ambiguities of the majority opinion leave for the future the task of reconciling the ostensible theory of its actions with the realities of common government arrangements.

What precedes this discussion will, it is hope, illuminate the general framework of our Constitution's provision for a single, elected chief executive – at the head now of an enormously complex and varied apparatus of government that the Constitution's framers could never have anticipated – and the continuing controversies over just how powerful a position his is in relation to the activities of domestic government.

THE PRESIDENT AND THE GOVERNMENT IN THE CONSTITUTION

Other than establishing his office and vesting in him "the executive power," the Constitution's text says remarkably little about how it is to be exercised, and virtually nothing about government itself. After its vesting clause, Article II gives the bulk of its attention to the President's election, necessary qualifications, wages, and oath of office. The diction of the remaining paragraphs suggests, if anything, that he has relatively little command authority over domestic affairs. Its second section, three paragraphs devoted to his powers, makes him "Commander in Chief" of the nation's military; as to his relation with domestic government, however, it says only that he "may 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."⁵ He does not have personal authority to people government with those he would prefer, unless Congress grants that authority to him for specified, less important positions: "with the Advice and Consent of the Senate" he is to appoint "Officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."⁶ He has limited power to force legislative action; where the Prime Minister in a parliamentary democracy can herself place draft legislation on the parliamentary agenda, in substantial certainty of its passage

⁴ U.S. Constitution, Art. II, sec. 1, cl. 1.

⁵ Id., sec. 2, cl. 1.

⁶ Id., sec. 2, cl. 2

if she wishes to hazard her government's continuation on the event, our President may merely "recommend to [Congress'] Consideration such Measures as he shall judge necessary and expedient."⁷ Members of Congress have actually to place any "measure" on the legislative calendar, and are free to change the President's drafts as they wish even before introducing them – knowing that their terms in office cannot be affected by the measure's failure. Finally, sandwiched between commands that he "receive Ambassadors and other public Ministers" and "Commission all the Officers of the United States" is the President's obligation to "take Care that the Laws be faithfully executed."⁸

Although this language twice refers to "Departments," as does the clause vesting general authority in the Congress to adopt whatever laws are "necessary and proper" for carrying its legislative powers "into Execution,"⁹ it is a striking feature of our Constitution that it makes no provision whatever for the executive government, as such – just the President. From the constitutional convention's emphatic choice of this single, elected executive official to be the head of government, in preference to a council of state, and from the convention's consequent vesting of "executive Power" solely in him, some have fashioned arguments that he must be regarded, essentially, as "Commander in Chief" of domestic government, as he explicitly is of the military.¹⁰ From the contrast between the authority of a "Commander in Chief" and the apparently responsibility-conceding power to ask an "Opinion, in writing" of other executive officials having "Duties," as well as from the passive wording of the "take care" clause ("*be* faithfully executed," as if by someone else), and from concerns about the location of excessive power in one person, others – myself included¹¹ – have understood his appropriate relationship to domestic government as one of oversight, not decision. In between are those scholars, including Justice-to-be Kagan, who find reason in the contemporary circumstances of government to recognize a presumptive right of the President to control departmental action, that might be replaced by the weaker responsibility to oversee should Congress explicitly so

⁷ Id., sec. 3.

⁸ Ibid.

⁹ Id., Art. I, Sec. 8, cl. 18. The whole of the clause reads: "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing [enumerated legislative] Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." The reference to "all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof" is quixotic, as the Constitution vests executive power *only* in the President. Likely the wording is a survival from an earlier draft, that named expected departments and assigned them particular responsibilities. Peter L. Strauss, *The Place of Agencies in Government*, 84 Colum. L. Rev. 573, 600 (1984). While revision of that draft left the structuring of our government entirely to Congress' legislation, the references to Departments, and to their having "Duties," as if legally distinct from the President's "Executive power," remained, twice stated.

¹⁰ E.g., Steven Calabresi & Saikrishna Prakash, *The President's Power to Execute the Laws*, 104 Yale. L.J. 541 (1994); Christopher Yoo, Stephen Calabresi, & Anthony Colangelo, *The Unitary Executive in the Modern Era, 1945-2004*, 90 Iowa L.Rev. 601 (2005).

¹¹ Overseer, or "The Decider"? *The President in Administrative Law*, 75 G.W.L. Rev. 695 (2007) and op. cit. n. 9 above; see also, e.g., Kevin Stack, *The President's Statutory Power to Administer the Laws*, 106 Colum.L.Rev. 263 (2006); Cynthia Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 Chi-Kent L. Rev. 987 (1997)

provide.¹² When Congress creates an “independent regulatory commission,” that is an example of such a provision; most these days would concede, as the Supreme Court has several times said, that that these bodies are elements of the executive branch – but elements at a farther remove from the President than cabinet Departments.

AFTER THE APPOINTMENT IS MADE

Two sorts of authority the President might enjoy over those he appoints to office are the power to substitute his judgment for theirs – the power to command in the military sense, where disobedience is unlawful – and the power to remove from office an official of whose actions he disapproves. The “opinion in writing” clause is certainly suggestive as to the first – legal authority, the duty to act, is where Congress puts it. As to removal, the text is wholly silent. The early practices of Presidents and Congresses provide some grist for every mill. As Gordon Wood remarks in a recent book,¹³ there was considerable uncertainty whether the drafters had merely recreated the English monarch in an elective context, or had established a weaker role. Congress quickly created offices, in the Treasury Department in particular, that were quite remote from the presidency. Presidents acted as if they could control, for example, the bringing or suspending of prosecutions for federal crime, but with prosecutions decentralized they had to find a complaisant US attorney to accomplish this, and Congress could grant roles to private citizens or state officials who would not be within reach of his disciplinary capacities.¹⁴ This is an issue that would be hard to litigate, as such; but it may be noted, as expanded upon within, that when courts review administrative action it is inevitably reviewed *as if* it were the administrator’s decision, justified or not on the basis the administrator has chosen to express, and limited to the considerations her particular statute authorizes her to consider.

The President’s power to remove from office federal officials of whose work he disapproves is unstated in the Constitution but implicit in his appointment power. Whether and in what ways Congress may lawfully limit has been litigated with some frequency and was, indeed, the central question in the *PCAOB* case. Those issues are taken up below. For the moment, the thing to note is that any legal power the President has to remove government officials may influence how they choose to act, but is not identical with the power himself to take the action a statute assigns to them. Removal of an official with responsibilities for given policies, out of a disagreement with how she is implementing those policies, may be discouraged by its high political cost and by the necessity to secure Senate approval of a replacement official’s appointment; and officers who might be removed for failing to act as the President wishes will be aware of these inhibitions, and of the corresponding room they may have for acting on their own understanding of law and policy.

A particularly dramatic illustration occurred in October of 1973, the so-called “Saturday Night Massacre.” Attorney General Elliott Richardson and his Deputy William Ruckelshaus had undertaken to the Senate Judiciary Committee that they would not interfere with the independent investigation of the Watergate break-in then being conducted by Archibald Cox. President

¹² Laurence Lessig & Cass Sunstein, *The President and the Administration*, 94 Colum.L.Rev. 1 (1994); Elena Kagan, *Presidential Administration*, 114 Harv.L.Rev. 2245 (2001).

¹³ Gordon Wood, *Empire of Liberty* (2009)

¹⁴ Compare Saikrishna Prakash, *The Chief Prosecutor*, 73 Geo. Wash. L. Rev. 521 (2005), with Harold Krent, *Executive Control Over Criminal Law Enforcement: Some Lessons from History*, 38 Am. U. L. Rev. 275 (1989).

Nixon, perhaps aware of the contents of tapes whose disclosure Cox was seeking, and which would eventually force his resignation, wanted Cox fired and his investigation closed down. Although the newspaper accounts, when Cox was fired, tended to say it was the President who did it, he knew this was not an action he could take directly. Only the Attorney General could actually do the firing, and both Richardson and Ruckleshaus refused (having given their promises to the Senate committee), and resigned in protest. It took an order from Solicitor General Robert Bork (who immediately, automatically became the Acting Attorney General, and who had made no such promises) to achieve the President's ends – at an enormous political cost to the President.¹⁵

A lesser example, but one directly tied to policy concerns, arose during Ronald Reagan's presidency. The first administrator he appointed to head the Environmental Protection Agency, Anne Gorsuch, presumably reflected his personal preferences respecting environmental policy. When she resigned under fierce political pressure from Congress and environmentalists concerned that she was dismembering the agency, he appointed Ruckleshaus (who had also served President Nixon as the EPA's first head) to take her place. He could have had great confidence that Ruckleshaus would win confirmation, as his views were much friendlier to environmental matters than Ms. Gorsuch's. But with a committed environmentalist in office, one who had shown he knew how to stand on his principles, would the President be free to have environmental matters decided just as he might prefer? Congressional preferences about environmental policy continued to limit the President's options. Ruckleshaus's successors during Republican administrations, Lee Thomas and William Reilly, were cut of similar cloth.

CENTRALIZED COORDINATION? DIRECTION? OF RULEMAKING

Perhaps precisely for this reason – because Presidents did not have, and knew they did not have, direct control over the outputs of the many administrative agencies Congress had created actually to implement particular policies it had legislated – recent decades have seen the steady growth of a White House mechanism for coordination, and perhaps control, of governmental policy-making. At least equally the product of the increasing importance of rulemaking, manifested following the 1970s' dramatic growth in health, environmental and safety regulation, the processes now embodied in Executive Order 12,866 began to emerge in the Nixon administration, and have grown steadily in stringency and breadth ever since. All agencies (including in this respect the independent commissions) are under an obligation, not yet much developed in practice, to participate in an annual process for government-wide development of a regulatory plan. Once particular regulations of a defined importance are under development, the elements of the Executive Order that have proved the more important in practice require executive agencies (but not yet the independent commissions) to coordinate extensively with the White House Office of Information and Regulatory Affairs [OIRA] (an element of the larger Office of Management Budget; OMB has long been the President's agent for coordinating legislative proposals, including budgetary submissions). OIRA supervises the agencies' performance of "cost-benefit analyses." While the language of the executive order is careful to acknowledge agency responsibility for any regulation that may ultimately be adopted (and courts

¹⁵ One hundred forty years earlier, President Jackson similarly had to run through two Secretaries of the Treasury before finding an Acting Secretary – Roger Taney – willing to execute his wish to withdraw government funds from the second US Bank and deposit them in state banks. Here, the result was senatorial censure of the President and refusal to confirm Taney as Secretary of the Treasury (or, on his first nomination, Justice of the Supreme Court). Overseer or "The Decider," n. 11 above, 75 G.W.L.Rev. at 706.

review those regulations *as* agency actions, indifferent to the possibility that presidential interventions may have altered their ultimate shape),¹⁶ a command element has long been suspected.¹⁷

Congress, seeing this expansion of presidential participation in work it had assigned to others, has reacted in a variety of ways. It early converted the Administrator of OIRA into an official whose appointment required senatorial confirmation – not likely a constitutional requirement but, rather, a means of encouraging broadly acceptable appointments, and of securing promises that might contribute some independence and objectivity. It has twice refused to confirm presidential nominations to the office, and delayed others – a particularly unusual action for someone directly serving the President. And it has in effect conditioned its continuing acceptance of OIRA’s operations on high levels of professionalism in its staff and an unusual degree of transparency in its operation.

A quite recent development illustrates both OIRA’s influence, and how this congressionally demanded transparency, to which the Obama administration has repeatedly committed itself, may operate to moderate it. A terrible accident a few years ago released 5.4 million cubic yards of coal ash, a byproduct of coal combustion, into waterways from an impoundment at a Kingston, Tennessee electric power plant, fouling downstream properties. Quite apart from its immediate destructive impacts on aquatic life and riverside properties, coal ash can contain arsenic, lead, chromium, and other heavy metals, and reports have linked exposure to these toxic components to cancer and other health problems.¹⁸ After lengthy delays that may themselves have reflected White House pressures, EPA sent OIRA a draft regulation treating coal ash as hazardous waste. Under subtitle C of the federal Resource Conservation and Recovery Act (RCRA), designation of coal ash as hazardous waste would mean that disposal and care would be closely supervised by federal authorities.

An unusually lengthy and apparently controversial period of internal consideration followed. OIRA publicly commits itself to a 90-day turn-around of such drafts – 120 days, if the rulemaking agency agrees. It uses this time not only for its own review, but also to coordinate with other agencies (the Department of Agriculture, for example) whose interests may be affected. One readily understands the need for coordination in a complex world, and OMB generally – OIRA for the rulemaking function – has been an important presidential means of securing it. But it takes time. OIRA’s review lasted not for 90 or 120, but for 200 days. When recently EPA finally published its draft, giving [only] a 90-day window for public comment, the

¹⁶ Nina Mendelson, *Disclosing ‘Political’ Oversight of Agency Decision Making*, 108 MICH. L. REV. (forthcoming 2010), available at <http://ssrn.com/abstract=1470850>; Kathryn Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2 (2009).

¹⁷ As Lisa Bressman and Michael Vandenbergh point out in a careful study of attempted White House influence on the EPA, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 Mich. L. Rev. 47 (2006), OIRA is only the most formal of presidential communicators; more political White House actors frequently invoke his wishes – and, as EPA administrators understand, not always with explicit direction to do so. Elena Kagan, looking from inside the White House, made essentially the same point in admiringly writing *Presidential Administration*, n. 12 above, with barely a glance in OIRA’s direction.

¹⁸ Commentary: White House Misadventures in Coal Ash Rule, <http://www.ombwatch.org/node/11001>, published May 19, 2010 and visited May 19, 2010. The remainder of this paragraph draws substantially on this analysis.

draft had taken a milder form. It presented as a possible alternative treating the ash as a much more ordinary waste product under another subtitle (D) of RCRA; use of subtitle D would entail considerably less federal supervision.

Consistently with the order's transparency undertakings, EPA immediately posted to its website *both* the draft it had submitted,¹⁹ and a document showing the revisions it had made during the OIRA process.²⁰ Initially, it also posted interagency comments received from other government bodies during OIRA's processing of the draft,²¹ although these were withdrawn from the governmental database to which they had been posted almost as soon as their presence had been reported.²² The immediate result has been political; and one imagines, too, that the publicity strengthens the EPA's capacity to exercise its own judgment, and that such revelations could be damaging on judicial review, as well, should it choose the weaker alternative.

A similar event had occurred late in the Bush administration. In the spring of 2008, the public became aware of disagreements between the White House and the Environmental Protection Administration [EPA] about the level of ozone exposure appropriate for national ambient air quality standards to protect forest growth and other "secondary" targets of protection from harm by air pollution.²³ ("Primary" standards are set for public health concerns.) Reflecting the differences they understood between the needs and vulnerabilities of human and forest lungs, the various scientific advisory committees and bureaucratic decisionmakers within EPA had settled on an ozone level marginally differing from the primary standard. It would have been somewhat more stringent than the primary level but also with a more forgiving measurement interval.

These standards are to be set following the public procedures of the Clean Air Act for rulemaking, procedures building on but somewhat more stringent than those of our Administrative Procedure Act. The EPA's Administrator, by statute given the authority to decide such matters, was prepared to accept and act on the advice he had received from his staff. OIRA initially sought reconsideration of this conclusion, suggesting that the primary and secondary standards would most efficiently be identical – set at the somewhat more permissive level already determined for the primary standard. EPA staff generated a response detailing why, in their judgment, the best scientific evidence available about the differing vulnerabilities of humans and forests required differing standards under their statutory responsibilities,. The EPA

¹⁹ <http://www.regulations.gov/search/Regs/home.html#documentDetail?R=0900006480ae5de2>

²⁰ <http://www.regulations.gov/search/Regs/home.html#documentDetail?R=0900006480ae7513>. EPA perhaps does better at honoring this commitment to transparency than other agencies – and the current (Obama) administration has a much stronger commitment to transparency than its predecessor. Professor Mendelson noted in her work cited at n. 16 above, that she had experienced great difficulty in locating these items in agency dockets. At 32 & n.150.

²¹ See Commentary, n. 18 above, describing them in some detail.

²² <http://www.regulations.gov/search/Regs/home.html#documentDetailError> (visited May 19, 2010). The withdrawal is consistent with the American Freedom of Information Act's exception for pre-decisional inter-agency communications, 5 U.S.C. 552(b)(5). OMB Watch had earlier downloaded this posting, however, and promptly made it available on its own website by a link from its commentary, n. 18 above.

²³ Juliet Eilperin, "Ozone Rules Weakened at Bush's Behest; EPA Scrambles To Justify Action," *The Washington Post*, March 14, 2008, at A1.

Administrator indicated to the White House, then, that he intended to stand by his staff's judgment. At this point he was directed – told President Bush had decided – that identical standards must be adopted. The Administrator acquiesced.

The resulting blizzard of newspaper stories and congressional inquiries suggested that something untoward had occurred. The relevant statute, placing the responsibility for this decision in the Administrator and not the President, both assumed and required that the decision would be made in accordance with the best available scientific information. Neither the President nor his agent OIRA has the resources or expertise to do good science on such an issue. Moreover, the relevant statute precludes using economic cost/benefit, as such, as a decisional consideration. (While this proposition might seem questionable as a policy matter, it had underlain our Supreme Court's willingness just a few years earlier to accept the significant law-making authority the statute confers on the EPA's Administrator.²⁴ Permitting EPA to make political trade-offs rather than base its actions on ostensibly objective judgments about best science would heighten concerns about the constitutionality of conferring this law-making authority on unelected officials.²⁵) Suspicions were rife that the White House judgment about ozone was animated by raw political concerns for the well-being of favored industries; or if not that, certainly by the factors of economic cost that the statutes had excluded from the Administrator's consideration. Congressional committees demanded, and the Bush White House adamantly refused to provide, a variety of documentary evidence and testimony on the issue. The standard was issued in the form the White House had insisted upon, and in that form could have been subject to judicial review.²⁶

That the back-and-forth became public is again due in substantial part to the increasing availability of information about governmental regulatory activities on the Internet. The EPA has been one of the leading agencies in developing public Internet data-bases associated with its rulemaking activities. As a matter of the APA's text, the obligations to expose matters concerned with rulemaking appear to be rather slight. Nonetheless, judicial decisions and the realities of our Freedom of Information Act have resulted in thorough agency exposure of the scientific reports or data on which rulemaking decisions may be based, as well as commentary received from outside the agency. The idea that this should happen is uncontroversial, and is strongly voiced in one of President Obama's early executive orders. To the extent such information is made available and searchable on the Internet, as increasingly it is, citizen monitoring is facilitated. And, responding in part to commitments made in the OIRA mandate, the

²⁴ *Whitman v. American Trucking Ass'n, Inc.*, 531 U.S. 457, 475 (2001) ("While Congress need not provide any direction to the EPA regarding the manner in which it is to define 'country grain elevators,' which are to be exempt from [certain statutory requirements], it must provide substantial guidance on setting air standards that affect the entire national economy.").

²⁵ Cf. *Boreali v. Axelrod*, 71 N.Y. 2d 1 (1987) (New York's Public Health Council authorized to consider only public health factors in adopting a regulation controlling smoking in public places; it lacks the "open-ended discretion" to construct "a regulatory scheme laden with exceptions based solely upon economic and social concerns.")

²⁶ On September 16, 2009, the EPA Administrator, now in the Obama administration, announced that she was reopening the standard, which presumably will moot any review petition that may have been filed. <http://yosemite.epa.gov/opa/advpress.nsf/6424ac1caa800aab85257359003f5337/85f90b7711acb0c8852576330061-7d0d!OpenDocument>, visited Sept. 20, 2009.

computerized database for the ozone rulemaking quickly included much material revealing the back-and-forth that had occurred. Perhaps a knowledgeable EPA official then suggested to the reporter that he have a look.

What one can take from both of these episodes, it is submitted, as from the bureaucratic regime within which they arose, is that neither within the agencies, nor in the larger political world, is it taken as given that the President gets to decide the issues committed to agency responsibility, *and* that the White House nonetheless (and understandably) works to bend their outputs to its preferences. They suggest important means by which recent Presidents have used White House bureaucracies in shaping their government's complex behavior.

POLITICIZATION OF THE AGENCIES

An alternative route to control, to which American administrative law scholars are turning increasing attention, is through increasing the proportion of agency staff who are subject to political appointment.²⁷ Like European nations, with the emergence of a bureaucracy and regulatory government dependent on law-constrained behavior for its legitimacy, the United States created a civil service system in the late 19th century. While it might initially have been thought a regime just for clerks and similarly powerless employees,²⁸ Congress also applied it to powerful bureau chiefs.²⁹ Thus, it embraced professional positions often exercising considerable responsibility as well as clerks and other functionaries, in a framework of merit selection and protected tenure.

With the creation of a "Senior Executive Service" during the Presidency of Jimmy Carter, the more powerful civil service positions – those in the upper reaches of the statutory compensation hierarchy – were made subject to management controls such as the possibilities of bonuses or reassignment, that were thought important to improve the efficiency of the Service. Of course, these changes also had the effect of considerably increasing the effective power of the political leadership of agencies over their most important staff. Apart from this change, the number of "political" positions in administration controlled by the White House, wholly outside the Civil Service and not requiring Senate confirmation, increased, and now exceeds 2,500. (The Senate-confirmed positions corresponding to ministerial positions in parliamentary systems are much less numerous, and notoriously slow to be filled.)³⁰ Persons living in parliamentary systems built over permanent civil service bodies will find this level of politicality astounding.

Again, one can see these changes as an understandable political response to the difficulties of dealing with a more-or-less permanent and protected bureaucracy. This is particularly true for Republican Presidents, at least when (as recently) their general program has been to "get the government off the backs" of those it regulates. People with permanent jobs in government often

²⁷ See David J. Barron, *From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 GEO. WASH. L. REV. 1095, 1123-25 (2008),

²⁸ *United States v. Perkins*, 116 U.S. 483 (1886).

²⁹ Herbert Kaufman, *The Administrative Behavior of Federal Bureau Chiefs* (1983). Creation of the Senior Executive Service in President Carter's administration somewhat ameliorated the resulting tensions.

³⁰ Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S.Cal.L.Rev. 913 (2009) and *Waiting for Leadership*, Center for American Progress Report, April 2010, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1607263 (Visited June 30, 2010).

choose them in order to satisfy preferences that see government as a “good.” The Washington, D.C. metropolitan area is well known to be the most heavily Democrat constituency in the country – perhaps reflecting these commitments among its largest work force, which is the civil service. Political penetration of the agencies will appear an effective means of securing control of their behavior, on behalf of a President who is the country’s only elected executive official.

A particularly dramatic and perhaps revealing form of this development took place late in the Bush administration, almost immediately following the opening of a Congress that, for the first time in his administration, was not controlled by his own political party. EO 12,866 had long required the agency head personally to approve the annual regulatory plan, and agencies to designate “regulatory policy officers” as subordinate officials, reporting to the agency head, with responsibility to oversee the regulatory analysis process. Now Executive Order 13,422 (1) put this officer (*not* the agency head) in charge of the annual regulatory plan, (2) forbade the initiation of any rulemaking without his approval (unless the head specifically intervened), (3) removed the language that made him responsible to the agency head, and (4) provided that he must be a presidential appointee – that is, a person whose appointment might not need to be confirmed by the Senate, and whose tenure in office the President could directly control. The RPO would now be a White House gatekeeper far less visible than the agency’s head and without his possible commitments to the Senate; she would be someone who could see to it that the President’s preferences were enforced.

President Obama early rescinded these amendments, but the numerosity of political appointees generally remains, in sharp contrast to what one expects of parliamentary systems.

SECURING A PLACE FOR “THE RULE OF LAW” IN ADMINISTRATION

Of course one cannot – should not – expect to separate politics from administration. “A government of laws and not of men” could be effected only in a robot state. The issue is maintaining a balance in which law has a significant role as a constraint on politics. One could think that the separation of responsibility for ordinary administration from the White House, under judicial as well as presidential (and congressional) oversight, is a means by which this might be achieved.

The tension between law and politics lives in the centerpiece of American constitutional development, Chief Justice Marshall’s decision in *Marbury v. Madison*.³¹ In passages less often the occasion for focus in American law school classrooms than its famous defense of constitutional review, Chief Justice Marshall asserted the sufficiency of political will, rather than judicially assessed judgment, for those matters committed to the President’s discretion:

The Secretary of State, in administering foreign affairs] is to conform precisely to the will of the President. He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can *never* be examinable by the courts.

. . .

. . . [W]here the heads of departments are . . . to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear, than that their acts are *only* politically examinable. . . . The province of the courts is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive

³¹ *Marbury v. Madison*, 5 U.S. 137(1803).

officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can *never* be made in this court.³²

Yet when administrative agencies exercise “discretion” in the form of executive agency rulemaking, judicial review of its reasonableness is the very coin of its legitimacy.³³

The Court has squared this circle by characterizing the activities Chief Justice Marshall is invoking – the conduct of military or foreign affairs – as the realm of unreviewable **DISCRETION!!!** those settings in which there is “no law to apply.”³⁴ Where the law does set standards—as it must where agencies are authorized to act with the force of law—one finds, rather, “discretion,” a setting in which judicial review of its exercise is *de rigeur*. While courts must abjure substituting their judgment for the agency’s, yet nonetheless they are to engage in “searching and careful,” if “narrow,” review.³⁵ Seeking to assure the exercise of judgment, not simply political will, reviewing courts assess the adequacy of those judgments by inquiries quite severe in their demands for rationality.³⁶ And for more than three decades, some have celebrated this development as a means for giving “those who care about well-documented and well-reasoned decision-making a lever with which to move those who do not.”³⁷

Consider, in this respect, the Supreme Court’s famous decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*³⁸ Cited more often than any other recent administrative law decision, the unanimous opinion in *Chevron* is at pains to celebrate the fact of presidential oversight as support for its conclusion that once a reviewing court has found that an agency’s statutory interpretation falls within the possible meanings of the language empowering it – that the statute *could* mean what the agency has concluded it *does* mean – then the court’s function is reduced to reviewing that conclusion for reasonableness in the conventional way. Some might take this reasoning as an endorsement of presidential control. But note that this “*Chevron* deference,” as it is called, is limited to an agency’s interpretations of statutes *for which the agency itself has particular responsibility*. If the agency is interpreting a statute of broader application for which it has no special responsibility – the federal Administrative Procedure Act, for example – no such respect is owing to its view. Now suppose the President has a view what the statute means – is *that* view entitled to *Chevron* deference? – perhaps especially so, since he

³² *Id.* at 166, 170 (1803)(emphasis added).

³³ *Ethyl Corp. v. EPA*, 541 F.2d 1, 68 (D.C. Cir. 1976) (Leventhal, J.) (“In the case of agency decision-making the courts have an additional responsibility set by Congress. Congress has been willing to delegate its legislative powers broadly - and courts have upheld such delegation - because there is court review to assure that the agency exercises the delegated power within statutory limits, and that it fleshes out objectives within those limits by an administration that is not irrational or discriminatory.”).

³⁴ *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971)

³⁵ *Id.* at 416 (“inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one.”).

³⁶ *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

³⁷ William F. Pedersen, Jr., *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38, 59-60 (1975).

³⁸ 467 U.S. 837 (1984).

is after all the President? The argument has been made, by Justice-to-be Kagan when she was a Harvard law professor.³⁹ The contrary view, mine, is that Congress has *not* given the President particular responsibility for this statute; that, it has assigned to the agency – and that assignment is one element of the law to whose faithful execution the President is constitutionally required to see. To admit the President’s view to the same degree of deference, in my judgment, is to confer on him broad authority for the interpretation of all law – a step our courts have never indicated they are willing to take (and properly so, in this writer’s opinion).

Thus, a court that suspects Presidential involvement in a decision, rather than finding in this a reason for ready acceptance of the agency’s outcome, may work especially hard to see that the outcome can be justified in terms of the materials *publicly* on the agency’s plate. Judge Patricia Wald’s canonical decision in *Sierra Club v. Costle* spends 103 pages closely attending to the EPA’s reasoning supporting its early rule requiring scrubbing and other measures to control sulphur dioxide emissions by electric power plants, before reaching (and putting aside) the possibility that unrecorded presidential and congressional counseling might have influenced the EPA Administrator in choosing among the several possibilities the record would support.⁴⁰ This rigorous analysis makes clear that she was reviewing the EPA Administrator’s decision and doing so with intensity:

We reach our decision after interminable record searching (and considerable soul searching). We have read the record with as hard a look as mortal judges can probably give its thousands of pages.⁵⁴⁰ ... We cannot redo the agency’s job So in the end we can only make our best effort to understand, to see if the result makes sense, and to assure that nothing unlawful or irrational has taken place. In this case, we have taken a long while to come to a short conclusion: the rule is reasonable.⁴¹

Whatever the conversation with the President may have been, Judge Wald understood that the decision was the administrator’s – not the President’s – and one to be closely reviewed following the administrator’s reasons. Every judicial review opinion I am aware of reflects the same premise.

STRUCTURAL LIMITATIONS AND THE PCAOB⁴²

The Public Company Accounting Oversight Board case raised the final question to be treated here – to what extent Congress must honor the President’s necessary relations to a governmental body responsible for law-execution in creating governmental structures. An essentially unanimous Congress, with President Bush’s strong support, created the PCAOB, under the aegis

³⁹ Kagan, n. 12 above, so argues.

⁴⁰ The opinion begins at 657 F.2d 298, and discussion of the *ex parte* issue begins on page 400; excluding its appendices, the opinion ends on p. 410.

⁴¹ 657 F.2d at 410; footnote 540 is omitted, but do note its number, in itself a signal of the intensity of the exercise.

⁴² The paragraphs following draw heavily on essays that first appeared in a “Roundtable” in the En Banc section of the website of the Vanderbilt Law Review, Peter L. Strauss, *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 62 Vand. L. Rev. En Banc 51 (2009), and Peter L. Strauss, *Our Twenty-First Century Constitution*, 62 Vand. L. Rev. En Banc 121 (2009). They have been somewhat revised to take into account the Supreme Court’s June 28 ruling.

of the Securities and Exchange Commission, in an effort to replace deficient accounting industry self-regulation with effective external regulation. The choices it made in doing so engendered passionate arguments about constitutionally necessary presidential authority and separation of powers, that divided the D.C. Circuit 2-1.⁴³ The dissenting opinion there hinted, and some commentators appear to have hoped, that the Court's decision would endorse the position that the President, vested with "the executive power," must have at least that degree of authority over agency action as would permit him to remove any government official exercising executive authority for any reason, free of "for cause" restrictions. But the majority opinion of the closely divided Court expressed no reservations about Congress's authority to create a single level of "for cause" protection – as it found was enjoyed by the Commissioners of the SEC. The only difficulty it found was that Congress had given PCAOB members' similarly protected tenure, with the question of "cause" for their removal to be decided not by the President but by the Commissioners. Finding that provision constitutionally objectionable, it preserved both what it understood as the President's necessary capacity to oversee the faithful execution of the laws, and every element of the PCAOB's affirmative authority over the accounting profession.

Congress's choices in creating the PCAOB may suggest both the wide variety of government institutions it has established, and the difficulties involved in measuring them against the Constitution's limited provisions. Neither any party nor any Justice doubted that the PCAOB must be considered a "government entity" in assessing any constitutional constraints imposed by separation of powers considerations. Yet in many respects – and not only those that excited this litigation – it is an odd duck. Its five members each earn a salary considerably higher than is paid to *any* person we might usually think a government official, including our President.⁴⁴ Its employees are free of the salary restrictions and other characteristics of the civil service system. The expense of maintaining them, and the PCAOB's program generally, is met not by the congressionally enacted appropriations our Constitution calls for to justify the spending of public moneys, but from fees collected from both the accounting industry it is responsible to regulate and the public companies they audit, in accordance with a budget approved not by Congress but by the SEC. If concededly a "government entity," the PCAOB is *not* a "government agency," with the result that its activities are not subject to, and made judicially reviewable by, the federal Administrative Procedure Act. It is useful to realize that in some or all of these respects, respects that were *not* prominent in the litigation, it is not alone. The Postal Service, the Federal Reserve and its member institutions, the Tennessee Valley Authority, and the Bonneville Power Authority are among the mixed-character "government entities" Congress has created over the years.

In certain respects, too, the PCAOB resembles quasi-public institutions like the stock exchanges and the National Association of Securities Dealers, that since 1938⁴⁵ have regulated investment activities in the shadow of the SEC. These institutions regulate professional activities and discipline members for violations of the SEC's or the organization's rules, in the interest of

⁴³ Free Enterprise Fund v. PCAOB, 537 F. 3d 667 (D.C. Cir. 2008).

⁴⁴ The PCAOB Chair's annual salary is \$673,000 and other members', \$547,000, "nearly four times greater than that of SEC Commissioners." Petitioners Brief 49-50.

⁴⁵ Maloney Act, Pub. L. No. 719, 52 Stat. 1070.

promoting self-regulation, but subject to the plenary supervision of the SEC.⁴⁶ Over the years, this relationship has been expanded⁴⁷ “to ensure that there is no gap between self-regulatory performance and regulatory need.”⁴⁸ The activities of these organizations are diverse and their expertise substantial, supplying disciplinary resources the federal government could not easily afford.⁴⁹ Operating under SEC review, they control their officers and budget, and adopt their own rules of discipline and practice (albeit subject to standards the SEC will enforce on its review of individual disciplinary proceedings).

Congress, then, was building on reasonably familiar models in creating the PCAOB. Yet in the interests of both closer SEC control and avoidance of self-interested self-regulation, it placed the PCAOB much more tightly under SEC control. Its budgets and the fees that support them must be approved by the Commission. The rules it enforces are subject to Commission approval and displacement. Its leadership is appointed by the Commission to fixed terms of office, which can be terminated prematurely by the Commission only on a finding of “cause” on one of three specified grounds, two of which require “willful” misconduct in office.

Just these differences, compounded by the role of the SEC, fueled the constitutional controversy. The SEC itself, as an independent regulatory commission, has only a limited relationship with the President. Its Commissioners, too, serve fixed terms and may be removed by him only “for cause.” The President’s capacity to oversee the policymaking of independent regulatory commissions like the SEC is, at best, untested. If Congress in creating the PCAOB made it, unlike the New York Stock Exchange, the NASD, FINRA – or for that matter the American Bar Association, lawyers’ SRO – so close to the SEC as to have become “a government entity,” did it fail to recognize the President’s constitutionally required place in American government?

A Brief Look at the Limits on Congress’s Structural Choices

Congress unquestionably has the legislative responsibility to create the institutions of American government. Its choices in creating the structures of government over the years have been highly varied, as particular problems appear to call for particular approaches, and they have often answered to its appreciation of the need for institutional distance from raw politics. Yet there is also the risk that they embody an impermissible preference to substitute its own supervision of “faithful execution” for the President’s. Assessing that risk – protecting the President’s exclusive and unconditional responsibility to oversee the faithful execution of the laws it enacts – characterizes American separation of powers jurisprudence, and was accepted by all the Justices in the PCAOB case as their responsibility. The dispute between majority and dissent lay in that risk assessment, and its relation to the Constitution’s text and the existing,

⁴⁶ For a general consideration of this scheme, see *NASD v. SEC*, 431 F.3d 803 (D.C. Cir. 2005), on which this paragraph generally relies.

⁴⁷ E.g., Securities Acts Amendments of 1975, Pub. L. No. 94-29, 89 Stat. 97.

⁴⁸ S. REP. NO. 94-75, at 2 (1975).

⁴⁹ Some detail is supplied by a graphic display from the 2008 Annual Report of the Financial Industry Regulatory Authority (FINRA), which in 2007 displaced both the New York Stock Exchange and the National Association of Securities Dealers as the “self-regulatory organization” for their memberships, available at <http://www.finra.org/web/groups/corporate/@corp/@about/@ar/documents/corporate/p119061.pdf> (visited July 15, 2009).

well-established framework of laws structuring the President's relationship to the bureaucracy.

Few such issues have come to the Supreme Court, and few of Congress's choices have been disapproved. A few principles safeguarding against congressional aggrandizement of its own role are clearly established: Congress cannot confer on itself a function in appointment to⁵⁰ or removal from⁵¹ executive office beyond senatorial confirmation and impeachment. Nor may it create mechanisms for disapproving executive action other than by enacting statutes or withholding appropriations.⁵²

What Congress is authorized to do in regulating the President's relationships with the agencies it creates, rather than its own, is much less clear. The leading cases often reason in ways not readily connected to their underlying facts. In 1926, for example, a closely divided Court decided *Myers v. United States* with great difficulty (the case had to be argued twice, and the opinions in it were lengthy), finding unconstitutional a statutory constraint on the removal of city postmasters. The case is written as if, and is often said to have held that, with the exception of civil service members and officers whose role is the adjudication of contested matters, the President must have an unfettered right to remove executive officers at will. Yet the restraint it found unconstitutional was a congressional effort to require *senatorial approval* of the removal of the postmaster (an executive official) from office – that is to say, the Senate's participation in the President's executive action.⁵³ Not a decade later, in *Humphrey's Executor v. United States*, the Court unanimously and peremptorily held that Congress could make an FTC Commissioner's five-year term of office safe from earlier presidential termination unless "for cause." Here Congress had not attempted to preserve its own participation in the removal decision, but that was not the basis for distinguishing *Myers*. Rather, the Court pretended that the FTC performed no significant "executive" function.⁵⁴ This rationale's apparently complete removal of the Commission from the executive branch gave birth to decades of concern about a "headless fourth branch." No one today doubts – all nine Justices in the PCAOB case agreed – that the SEC and other independent regulatory commissions are elements of the executive branch, having to have an oversight relationship with the President, simply a less powerful one than may exist with executive agencies whose heads do not enjoy protected tenure.

Where Congress has placed appointment power in the President alone, the courts, or the head of a department, it has generally been found free to specify the terms on which the office will be held, including removal protections. It was largely on this basis that the civil service was sustained. But this gives importance to the question who is an "inferior officer," for whom

⁵⁰ *Buckley v. Valeo*, 424 U.S. 1 (1976)

⁵¹ *Bowsher v. Synar*, 478 U.S. 714 (1986).

⁵² *INS v. Chadha*, 462 U.S. 919 (1983).

⁵³ *Myers v. United States*, 272 U.S. 52 (1926). A much more dramatic provision enacted when Andrew Johnson became President on Abraham Lincoln's assassination, the Tenure of Office Act, had attempted to provide similar protection to the members of the Cabinet, and President Johnson was nearly impeached after he purported to remove Secretary of War Stanton from office. *Myers* is well understood as a repudiation of that statute.

⁵⁴ *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). Here too there were political overtones; the decision was announced during President Roosevelt's first term in office, at a time when the Court seemed often to be opposing executive authority.

Congress can make such a judgment. And, until the PCAOB case, the Court had never confronted the question whether “for cause” protection could be afforded to an “inferior officer” if the Department head who appointed and might remove her was itself protected from removal except “for cause.”

Three cases, two problematic and the third somewhat enigmatic, addressed this question. In *Morrison v. Olsen*,⁵⁵ half a century after *Humphrey’s Executor*, seven of eight Justices approved Congress’s post-Watergate creation of the Office of Independent Counsel – an official responsible for investigating and possibly prosecuting high executive officials suspected of crime, even the President, after appointment by a special judicial panel, and under only limited supervision by the Attorney General. No one could or did pretend that the independent counsel performed no significant executive function; the majority, rather, concluded that the possibility of the Attorney General’s removing him “for cause,” and his obligation ordinarily to be governed by general Department of Justice policies, made him an “inferior officer” with a constitutionally sufficient relationship to the President – a totality-of-the-circumstances conclusion with which the lone dissenter, Justice Scalia, violently disagreed. Neither majority nor dissent in the PCAOB case raised any question about the continuing validity of these opinions.

In 1991, *Freytag v. Commission of Internal Revenue*⁵⁶ appeared to raise a significant question whether independent regulatory commissions could constitutionally be authorized to appoint “inferior officers,” as of course they regularly were. The case put before the Court the appointment of a relatively minor quasi-judicial official of the Tax Court (a body established by Congress under Article I and *not* an Article III court), who because he exercised decisional authority was nonetheless an “inferior officer.” Justice Blackmun, for a bare majority, invoked an essentially originalist theme: given the Framers’ apprehensions about “the most insidious and powerful weapon of eighteenth century despotism,” the “heads of departments” Congress could authorize to make appointments must be the heads of *Cabinet-level* departments, “limited in number and easily identified. Their heads are subject to political oversight and share the President’s accountability to the people.”

What, then, about people like the General Counsel of the Nuclear Regulatory Commission (a position to which I had earlier been appointed by that Commission)? The General Counsel, essentially independent in his responsibility for litigating on behalf of the Commission and giving commissioners legal advice, is clearly an “inferior officer,” and just as clearly the NRC is not one of those Cabinet-level departments, “limited in number and easily identified.” Having announced its rationale (which the official in question in *Freytag* escaped because the majority somehow associated his appointment with the “Courts of Law”), the Court appended a footnote as curious and muddling as had been the Court’s decades-earlier denial in *Humphrey’s Executor* that the FTC exercised executive branch functions:⁵⁷ “We do not address here any question involving an appointment of an inferior officer by the head of one of the principal agencies, such as the Federal Trade Commission, the Securities and Exchange Commission ... and the Federal Reserve

⁵⁵ *Morrison v. Olson*, 487 U.S. 654 (1988).

⁵⁶ 501 U.S. 868 (1991).

⁵⁷ Note 54 above.

Bank of St. Louis.”⁵⁸ If one believes this footnote, what has become of the text’s history-grounded insistence on the necessity of limitations on number, and on “heads of Departments” who share the President’s accountability to the people?

Justice Scalia (who has been heard by your author to describe *Freytag* as the single worst opinion of his incumbency) concurred for four, rejecting the majority’s “Courts of Law” rationale, and simply taking the constitutionality of the FTC in particular, and the great variety of federal agencies in general, to have become established. History had to be taken to trump originalism in this case; given all the congressional water that had been permitted to flow under the bridge, return to the text would simply be too disruptive.⁵⁹ Perhaps it will not be surprising to learn that Justice Scalia’s opinion, for four only, was taken by all the PCAOB parties to represent what *Freytag* stands for, and that the Court’s opinions unanimously endorsed this position.

“Inferior officer” issues became somewhat clearer with *Edmond v. United States*,⁶⁰ which permitted the Secretary of Transportation to appoint civilian members of the Coast Guard’s Court of Criminal Appeals. Now Justice Scalia wrote, for all but Justice Souter, that “in the context of a clause designed to preserve political accountability relative to important government assignments, we think it evident that ‘inferior officers’ are officers whose work is directed and supervised at some level by others who were appointed by presidential nomination with the advice and consent of the Senate.” There is a tension in this formulation, however. *Freytag*’s originalist theme, and so perhaps its apparent limits on congressional delegation to department heads of the appointment power, is preserved by “in the context of a clause designed to preserve political accountability relative to important government assignments.” On the other hand, that theme does not so clearly live in “directed and supervised at some level by others who were appointed by presidential nomination with the advice and consent of the Senate.”

The PCAOB decision

⁵⁸ 501 U.S. at 887 n.4.

⁵⁹ Justice Scalia has expressed no great love for *Humphrey’s Executor*, even if he has accepted that this particular horse has long since left the proverbial barn. His dissent in *Morrison v. Olson*, for instance, refers to *Humphrey’s Executor* as “gutting, in six quick pages devoid of textual or historical precedent for the novel principle it set forth, [the] carefully researched and reasoned 70-page opinion” of Chief Justice Taft in *Myers*, 487 U.S. at 725-26 (Scalia, J., dissenting). Just last year, writing for himself and three others in *FCC v. Fox Television Stations*, 129 S.Ct. 1800, 1817 (2009), he employed a grim simile, identifying as “the lion’s kill” the “power that Congress has wrested from the unitary Executive” via the creation of independent regulatory agencies, 129 S.Ct. at 1817; he recurred to *Freytag* in denying any “reason to magnify the separation-of-powers dilemma posed by the Headless Fourth Branch.” [One may remark that with the PCAOB decision and others, there has ceased to be a “Headless Fourth Branch.” The independent regulatory commissions are accepted as departments having a necessary relationship to the President, and their actions are now properly characterized as executive actions. See Strauss, op. cit. n. 9 above. There remains an issue about what having a “unitary Executive” means, but it is not that functions of executive government have been placed beyond presidential reach.]

One is reminded of a remarkable line from Justice White’s dissent in another virtually impenetrable separation of powers case, *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 94 (1982): “Whether fortunate or unfortunate, at this point in the history of constitutional law [the question what limits may exist on Congress’s ability to create adjudicative institutions to carry out federal policy that are not Article III courts] can no longer be answered by looking only to the constitutional text.”

⁶⁰ 520 U.S. 651 (1997)

These cases, in very brief compass, set the backdrop against which the PCAOB case was argued and decided. Drawing on the first phrase in *Edmonds*, for example, petitioners strongly argued, as did some commentators, that the importance of the PCAOB's responsibilities required that its members be regarded as "principal officers" of the United States, whose appointment *must*, therefore, be made by presidential nomination and senatorial consent. Not a Justice found merit in that contention. They were unanimous that the SEC's considerable authority over their actions rendered them "inferior officers" within the *Edmonds* formulation. As the SEC is a constitutional "department" for appointments clause purposes, then, *Freytag* notwithstanding, it could constitutionally be given the power of appointing inferior officers, including for these purposes the members of the PCAOB.⁶¹

As to the question of removal, however, the majority found that the "preservation of political accountability" – that is, preservation of the effectiveness of the President's constitutional position at the head of executive government – precluded protecting the tenure of PCAOB members by the provision for "for cause" removal. The members of the SEC, it asserted, were themselves protected from removal from office except "for cause." To say that they were in charge of removing Board members, but themselves could do so only if stringent "for cause" provisions were satisfied – to permit Congress to create one "independent" authority within another – would be to allow the delegation of important executive "duties" to officials beyond the President's effective ability to oversee their conduct of office.

This conclusion did not, however, imperil the general statutory scheme. The majority found that this flaw in the statute could easily be cured by severing the offensive "for cause" removal provisions from the statute, leaving the PCAOB's affirmative responsibilities and authority unimpaired. It is simply that its members would now perform their functions under the same possibility of discipline as direct SEC employees face, leaving "the President separated from Board members by only a single level of good-cause tenure. The Commission is then fully

⁶¹ This seemingly straightforward conclusion leaves two difficulties in relating it to the constitutional text, however:

First, since they are outside what we might conventionally regard as the federal government (heads of a government entity but not of an agency for APA purposes) and since they are paid at levels unthinkable for government officials in the conventional sense, what is it that makes the members of the PCAOB "inferior officers" of the SEC? While the argument that they must be regarded as "principal officers" having to be appointed by presidential nomination and senatorial confirmation was easily rejected by all, given the SEC's tight control over their activities, is it only the parties' "government entity" concession that makes them governmental officers at all? Of course the drafters of the Constitution did not anticipate such variety in government "entities" – the TVA or AMTRAK any more than the PCAOB – and issues like this, rather impossible of textual resolution, illustrate the continuing challenges of fitting an eighteenth century doctrine to modern times.

Second, in footnote 11 of its opinion, the majority reserves the question whether the SEC should be considered an "executive department" from the head(s) of which the President is given constitutional authority, as an explicit element of his executive power, to demand an opinion in writing about their exercise of their statutory responsibilities, see n. 5 above. With no doubt about their status as heads of a "department" in the executive branch, how can SEC Commissioners fall outside this authority? It is difficult to believe that references to "Departments" could mean different things when both references appear in the same Article, separated by only a few lines. The Court has unanimously characterized the SEC as a department and its actions as "executive." The President's right to demand an opinion in writing about its exercise of its duties is the only stated relationship he is given to departments, once the moment of appointment has passed. Thus, it appears to be an essential element of presidential oversight authority respecting the faithful execution of the laws by those to whom Congress has entrusted them. It is precisely the President's oversight authority respecting the SEC on which the majority opinion heavily relies in *accepting* the PCAOB's affirmative powers, once the hurdle of removal "for cause" protection has been removed..

responsible for the Board's actions, which are no less subject than the Commission's own actions to Presidential oversight."⁶²

Because it is so accepting of a single level of "for cause" protection, the result is unlikely to satisfy those who take the strongest view of presidential authority – that our President must be able to discipline any executive officer, and command their performance of discretionary duty along the lines that he prefers. For them, even a single level of "for cause" protection should be found impermissible. They had hoped that the Court would reach back to undo the mischief they believe had been done to that view when in *Humphrey's Executor* a unanimous Court permitted Congress to establish agencies whose heads could be removed only "for cause."⁶³ No Justice suggested such a view. Strikingly, *every* reference in the majority opinion to the President's constitutional authority invoked his necessary prerogative to oversee, not to decide, the actions of executive departments.

The flaw in the argument of the strong presidentialists, 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 once appointed 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 as holder of "the executive power" it seems he must have over the SEC as well as the EPA,⁶⁴ 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. 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.

Justice Breyer's strident dissent for the (relatively) liberal wing of the Court suggested two problems with the majority's "single level" limitation. First, it is not at all clear that it is violated by the "for cause" protection of PCAOB members; the SEC statute, quite deliberately at the time of its enactment, did not provide "for cause" protection to the members of the SEC. Second, if one looks past the PCAOB to the enormous variety of statutory provisions respecting government employment, one easily finds hundreds if not thousands of government employees who can only be removed "for cause" by superiors who themselves can only be removed "for cause." The majority deals with the first problem by bold assertion, and with the second – reminiscent of the *Freytag* footnote that produced the effective overruling of that case in this one⁶⁵ – by leaving such questions to another day.

The majority's handling of the first of these issues is quite astonishing, particularly coming from conservative Justices who repeatedly assert that it is for Congress, not the courts, to make law, that the courts are obliged to take statutes as Congress has written them. Justice Breyer

⁶² End of the 2nd paragraph of IV.

⁶³ See n. 54 above.

⁶⁴ But see n. 61 above.

⁶⁵ See text at n. 16

observed in his dissent that the SEC statute had been written after the decision in the *Myers* case (recall that the conventional reading of *Myers* was that it recognized as a matter of constitutional necessity an unfettered presidential right to remove executive officers⁶⁶), but before *Myers*' qualification by *Humphrey's Executor*.⁶⁷ Congress had enacted the FTC's "for cause" provision before *Myers*. Now it omitted a similar provision from the SEC statute out of fear that if that provision was found unconstitutional, the result would be to jeopardize the whole scheme. Unwilling to take that risk, its members perhaps understood that presidential interference with such a commission would generate enough political heat to dissuade any President from dismissing a commissioner without an articulable, apolitical reason.⁶⁸ Would it be proper for a court to insert a protection of tenure that the legislature did not enact, even *inadvertently*? The opinion in *Myers* suggested the possibility of limits to the President's removal power for officials serving as adjudicators; – and this reservation has been picked up in subsequent cases.⁶⁹ But the *Myers* opinion, the Court's general jurisprudence before and after it, and the ready implication of the President's constitutional duty to assure the faithful execution of the laws, all establish rather clearly that the *default* position is that the President may remove any Department head, and Department heads may remove any officers inferior to them, at will. It took a statute to create the civil service system; congressional practice is to specify those higher offices from which incumbents may be removed only "for cause." Since there is no such statute for the SEC Commissioners, even though custom and political realities doubtless support such a constraint, one would think that as a matter of law SEC commissioners must serve at the President's pleasure. And, if so, the two-level proposition on which the majority opinion turns is irrelevant, because *only* PCAOB Members are protected from removal unless "for cause."

The majority's *entire* discussion of the point, in response to Justice Breyer's argument?

The parties agree that the Commissioners cannot themselves be removed by the President except under the *Humphrey's Executor* standard of "inefficiency, neglect of duty, or malfeasance in office." 295 U. S., at 620 (internal quotation marks omitted); see Brief for Petitioners 31; Brief for United States 43; Brief for Respondent Public Company Accounting Oversight Board 31 (hereinafter PCAOB Brief); Tr. of Oral Arg. 47, and we decide the case with that understanding.

That is, the majority decided a question of law, on which their holding that the PCAOB "for cause" removal provision was unconstitutional depended, by bare assertion – relying on party choices how to argue the case. A brief filed *amicus curiae*, not mentioned by the majority, had informed the Court of the problem. The failure of any party to argue it, as Professor Richard Pierce has remarked, can be ascribed to self-interested motives of a kind that usually are taken as a signal of *improper* litigation about constitutionality.

The petitioners did not want to take the position that the SEC statute authorizes at will removal because that would undermine their argument about dual insulation from

⁶⁶ See n. 53 above

⁶⁷ See n. 54 above.

⁶⁸ President Roosevelt had removed Commissioner Humphrey from his FTC office solely because their politics differed, and he wanted a Commissioner more sympathetic to his views.

⁶⁹ E.g., *Weiner v. United States*.

presidential control. The SEC did not want to take that position because it wanted to preserve the option of making an argument ... that the structure of the statute suggests a congressional intent to insulate the Commissioners from at will removal. ... I have it on good authority that PCAOB wanted to make that argument but that SEC overruled it. That alone suggests that SEC could control PCAOB even before the majority eliminated the limits on the SEC's power to remove Board members.⁷⁰

As Professor Funk remarked on the same informal internet forum, that we both participate in, “To decide the constitutionality of a statutory provision based upon an ‘understanding’ agreed to by the parties as to the meaning of another relevant statutory provision ... is, I believe, as unique as the PCAOB itself.”⁷¹

If one turns to the *merits* of the two-level proposition, one can find a certain tension in the majority opinion, one element of which forcefully animates Justice Breyer’s dissent. At places, the majority appears to be objecting to Congress’s creation of a “for cause”-protected *institution* (the PCAOB) within another “for cause”-protected *institution* (the SEC). In this respect, the PCAOB is, to the author’s knowledge, virtually unique. The other such institutions of which the author is aware, for example the Atomic Safety and Licensing Appeals Board of the Nuclear Regulatory Commission, have only adjudicatory responsibilities. While their actions are nominally to be regarded as executive actions, because they occur in an element of the executive branch in which they reside, nonetheless these “quasi-adjudicatory” actions fall within the reservation noted in *Myers* and drawn on in later cases,⁷² that presidential oversight of adjudicatory functions is properly limited in the interest of their quasi-judicial character and attendant considerations of fairness. The PCAOB, on the other hand, is not a committed adjudicator. It has the same full range of responsibilities other government agencies commonly possess – rulemaking and enforcement in addition to adjudication. For an entity operated over that full range the argument for presidential oversight is considerably stronger. Had the majority clearly held only that Congress could not constitutionally create one fully-functioned, “for cause”-protected agency within another such agency, there would have been little to write about. It is hard to imagine such a conclusion doing much mischief.⁷³

In some of its discussion, the majority embraces such a limitation, viz.:

The only issue in this case is whether Congress may deprive the President of adequate

⁷⁰ Adminlaw listserv, email from Richard Pierce received June 30, 2010 and on file with the author. The larger problem, Prof. Pierce remarked, is what any court should “do when it becomes aware that the parties are colluding to further their own goals? ... I think it is entirely appropriate for SEC to litigate that question, and it is possible that the Court would rely on dicta in Wiener and Humphrey’s to hold that the President can only remove Commissioners for cause. What I find indefensible is the majority’s reliance on the parties’ collusive but dubious “understanding” that SEC Commissioners can be removed only for cause as the foundation for its holding that the removal provision applicable to PCAOB is unconstitutional.” One could add that for the Court’s *conservative* wing to be doing this is especially remarkable.

⁷¹ Adminlaw listserv, email from William Funk received June 30 2010 and on file with the author.

⁷² See n. 69 above.

⁷³ Here, however, the author must confess to not knowing enough about the structures, powers, and interrelationships of the Federal Reserve and its constituent Federal Reserve banks to say whether they might be threatened even by so limited a proposition.

control over the Board, which is the regulator of first resort and the primary law enforcement authority for a vital sector of our economy. We hold that it cannot.⁷⁴

Yet in other passages, the majority's reasoning appears to be about the removability *vel non* of *individual* PCAOB members as "inferior officers," evoking the *Edmonds* test. For example, Chief Justice Roberts' opinion asserts

we have previously upheld limited restrictions on the President's removal power. In those cases, however, only one level of protected tenure separated the President from an officer exercising executive power. It was the President – or a subordinate he could remove at will – who decided whether the officer's conduct merited removal under the good-cause standard.⁷⁵

If Congress can shelter the bureaucracy behind two layers of good-cause tenure, why not a third?⁷⁶

In responding to the dissent's elaboration of the thousands of government officials who meet *Edmonds*' "inferior officer" test, the majority does not say that it is dealing with the status of an institution, but rather responds as if those cases are to be resolved on other grounds, grounds consistent with a standard governing individual "officers" like each of the Board's members, rather than institutions like the PCAOB.

... [M]any civil servants within independent agencies would not qualify as "Officers of the United States," who "exercis[e] significant authority pursuant to the laws of the United States," *Buckley*, 424 U. S. [1], at 126.⁹ ... We do not decide the status of other Government employees, nor do we decide whether "lesser functionaries subordinate to officers of the United States" must be subject to the same sort of control as those who exercise "significant authority pursuant to the laws." *Buckley*, *supra*, at 126, and n. 162.

Nor do the employees referenced by the dissent enjoy the same significant and unusual protections from Presidential oversight as members of the Board. ... [M]embers of the Senior Executive Service may be reassigned or reviewed by agency heads Nothing in our opinion ... should be read to cast doubt on the use of what is colloquially known as the civil service system within independent agencies.¹⁰

Finally, the dissent wanders far afield when it suggests that today's opinion might

⁷⁴ End of III

⁷⁵ III - B - start

⁷⁶ Text following n. 4

⁹ "One 'may be an agent or employé working for the government and paid by it, as nine-tenths of the persons rendering service to the government undoubtedly are, without thereby becoming its office[r].' *United States v. Germaine*, 99 U. S. 1879)"

¹⁰ For similar reasons, our holding also does not address that subset of independent agency employees who serve as administrative law judges. ... [U]nlike members of the Board, many administrative law judges of course perform adjudicative rather than enforcement or policymaking functions, ... or possess purely recommendatory powers. The Government below refused to identify either "civil service tenure-protected employees in independent agencies" or administrative law judges as "precedent for the PCAOB." 537 F. 3d 667, 699, n. 8 (CADCA 2008) (Kavanaugh, J., dissenting)

increase the President's authority to remove military officers. ... The President and his subordinates may ... convene boards of inquiry or courts-martial to hear claims of misconduct or poor performance by those officers. ... Here, by contrast, the President has no authority to initiate a Board member's removal for cause.

Perhaps the citation to *Buckley* is indeed a signal that the majority holding is limited to the heads of discrete institutions. That case involved an Appointments Clause challenge to the members of the Federal Election Commission, a freestanding body lacking any such relationship as the PCAOB has with the SEC. At the place Chief Justice Roberts referred to one finds this text and footnote:

If "all persons who can be said to hold an office under the government about to be established under the Constitution were intended to be included within one or the other of these modes of appointment," *United States v. Germaine*, supra, it is difficult to see how the members of the Commission may escape inclusion. If a Postmaster first class, *Myers v. United States*, 272 U.S. 52 (1926), and the clerk of a district court, *Ex parte Hennen*, 13 Pet. 230 (1839), are inferior officers of the United States within the meaning of the Appointments Clause, as they are, surely the Commissioners before us are at the very least such "inferior Officers" within the meaning of that Clause.¹⁶²

¹⁶² "Officers of the United States" does not include all employees of the United States, but there is no claim made that the Commissioners are employees of the United States rather than officers. Employees are lesser functionaries subordinate to officers of the United States, see *Auffmordt v. Hedden*, 137 U.S. 310, 327 (1890); *United States v. Germaine*, supra, *whereas the Commissioners, appointed for a statutory term, are not subject to the control or direction of any other executive, judicial, or legislative authority.* (Emphasis added).

Saying only that the FEC Commissioners were "at the very least ... 'inferior Officers'" perhaps reflected a compromise needed to secure an opinion "for the Court" in *Buckley*; as it is, the majority opinion stretches well over 100 pages in US Reports. Nonetheless, the failure to agree that Officers "not subject to the control or direction of any other executive, judicial, or legislative authority" are, indeed, principal officers, who must be appointed with the Senate's advice and consent, is remarkable. One supposes, indeed, that, like the Commissioners of the SEC, FEC Commissioners *must* be appointed by the President with the advice and consent of the Senate *and* that their actions are executive actions, with the necessary continuing role of presidential oversight the PCAOB majority insists that conclusion entails.

As noted above, one of the petitioners' major arguments had been that the members of the PCAOB must be regarded as principal officers and, given the SEC's strong "control or direction" over their actions, *that* argument did not attract a single vote.⁷⁵ Whatever may be the case for FEC Commissioners, the members of the PCAOB, fitting the *Edmonds* formula, are "inferior officers." On the other hand, they do head a discrete body with a full range of administrative responsibilities and a distinct legal personality. What is curious, then, is that the *PCAOB* majority did not make explicit that this institutional character was an element of its reasoning, limiting its holding to the heads of discrete institutions. Rather, it seems to have indicated that it would treat the "inferior officer" question case by case.

This is what makes the *Buckley* signal ambiguous. If, as in *Freytag*, a minor quasi-judicial actor is an "officer of the United States," or if, as in *Edmonds*, a Coast Guard officer is, then the

⁷⁵ Cf. n. 61 above.

implications of denying the possibility of two-level “for cause” protection at the level of the individual rather than the institution are enormous, as Justice Breyer’s dissent principally argues. The majority’s failure to be explicit about this is regrettable; its promise to take the matter up case by case is what recalls the tensions created by the *Freytag* footnote.

Justice Breyer, exploiting this seemingly intentional irresolution in the majority opinion, details at length the variety of government officials who meet the *Edmonds* test. Persons appointed to leadership positions in independent agencies, and removable *by their agency head* only “for cause” enjoy the same two levels of “for cause” protection as the members of the PCAOB. When the majority reasons that by striking the “for cause” protection of PCAOB members it renders them subject to the same level of presidential control as any inferior officer of the SEC, it elides the possibility that some of those inferior officers – for example, its Inspector General⁷⁶ or its Administrative Law Judges – are themselves removable only for cause, by an agency itself enjoying “for cause” protection. The members of the Nuclear Regulatory Commission and the Commissioner of the Social Security Administration are protected by “for cause” removal restrictions; and, as Justice Breyer details, so are a great many of the officials who head their various bureaus and subdivisions. It might suffice to say – but this is what the majority surprisingly did not say – that those bureaus and subdivisions are merely parts of the larger agency, lacking the full range of administrative powers or a separate legal personality. But it does not suffice to say that if they are members of the Senior Executive Service [SES], they “may be reassigned or reviewed by agency heads.” Not all of them *are* members of the SES – the NRC’s chief officers, for example – and all of them *do* have quite a significant level of authority, easily meeting the *Edmonds* test.⁷⁷ Nor is the power of reassignment and review in the SES the equivalent of removal.

The uncertainties seemingly cultivated by the majority opinion illustrate just how hard it is to accommodate the governmental structures Congress has created for the Twenty-First Century to a Constitution created in the Eighteenth. *Freytag* had seemed to doom independent agencies’ powers of appointment with its impeccable originalist reasoning about the necessity strictly to limit the dispersal of appointment powers to a handful of cabinet-level bodies. After *Freytag*, as General Counsel of the Nuclear Regulatory Commission, appointed by the Commission, I had to wonder if my commission had been legally valid. With one hand the PCAOB majority has lifted that shadow – 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 in the way *Freytag* seemed to say. But the NRC General Counsel’s office is one that appears in Justice Breyer’s extensive appendices; the General Counsel is *not* a member of the Senior Executive Service; and his authorities to represent the Commission, to write and file its briefs, etc., clearly mark him as an “inferior officer.” With its other hand, the majority may have said that the NRC’s General Counsel – or the SEC’s Inspector General – may not serve under the protection of “for cause” removal. As in *Freytag*, only the promise of decision case-by-case in the future – not the sort of promise one would

⁷⁶ 5 U.S.C. App. §8G.

⁷⁷ Historically, before the creation of the SES, bureaucrats with remarkable levels of authority – the heads of the Forest Service and of the Social Security Administration – were civil servants, under the protections of the civil service system. Herbert Kaufman, *The Administrative Behavior of Federal Bureau Chiefs* (1983).

ordinarily expect to be acceptable to the conservative side of the Court's bench⁷⁸ – preserves the possibility of that protection's survival.

The underlying issue, as both opinions recognize, is finding a way of accommodating the prolixity of government structures Congress 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.

A Testing Future Case? The Copyright Royalty Tribunal

Issues like this are likely continually to recur, and sometimes in contexts that will not be so easily remedied. 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*,⁷⁹ Judge Kavanaugh (whose articulate dissent in PCAOB 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.”

The PCAOB case is no formal obstacle to this arrangement, as the Librarian is appointed by the President with the advice and consent of the Senate and, so far as appears, may be removed by him from office for any reason (or no reason at all). Nonetheless, one could question whether the Librarian is, in constitutional terms, the “Head of [a] Department” in the executive branch, appropriately invested with the authority to appoint “inferior officers” responsible for law-execution (which the members of the Copyright Tribunal certainly are). His office is the *only* link between the CRT and the President. Yet also within its purview, doubtless considered by Congress the more important *and* sacrosanct elements of its responsibilities, are such clearly *non*-executive bodies as the Congressional Research Service. What political controls can the President effectively exercise over the administrator responsible for that congressional resource? The realities make it hard to think that the *Library of Congress* will be regarded as a constitutional “Department,” in the Head of which the appointment of officials with functions like the CRT's may constitutionally be vested. Else Congress *would* have learned its dangerous lesson.

It is clear enough that the Librarian is not your ordinary politically responsible subordinate of the President. Although (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). Not arguably a department during its first century, then. 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 the first President George Bush. His extended tenure since then reflects the proposition, celebrated on the Library's web site, that “in the twentieth century the precedent seems to have been established

⁷⁸ Cf. [Justice Scalia's dissent in *Mead*].

⁷⁹ 571 F.3d 1220 (D.C. Cir. 2009).

that a Librarian of Congress is appointed for life.”⁸⁰

“One level of ‘for cause’ removal protection,” then, seems likely to fail as a *sufficient* condition, just as it cannot be, considered in relation to individual officers and not the institutions of which they may be members, a *necessary* test. Because we are committed to a unitary executive, we will always have to be able to demonstrate effect lines of communication and influence between executive department actors and the President that are supportive of the President’s responsibility to take care that the laws be faithfully executed. Nonetheless, having only one level of “for cause” protection does not establish that those lines are present, and – in relation to individual officers – having two levels does not establish that they are absent. Inspectors General must and will survive, as will administrative law judges, and bureau chiefs with tenure protection but lacking the institutional status of a PCAOB. These are enduring, long-established constraints that neither aggrandize the Congress nor prevent effective law-execution. More than a century’s practice has established that they do not deny the President’s necessary role.⁸¹ In this respect the situation of the Library and the Librarian *of Congress* is quite different.⁸²

CONCLUSION

In the end, the majority’s solution in *PCAOB* appears to have avoided large disruptions to the institutions whose responsibilities were immediately before them, rescuing every element of the PCAOB’s authority save the formal tenure protection of its members. Treating the SEC Commissioners as protected from removal save “for cause,” however surprising for Justices usually disposed to leave the writing of laws to Congress, is itself a beneficial step. One would have to look long and hard to find developed systems anywhere in the world that deliver financial institutions into politicians’ direct control. Control of the markets and of 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 the Court avoided the least suggestion otherwise.

As to the general question what the Constitution provides about the relationship between President and the Departments of executive government, in some respects matters are more settled than they had been at the beginning of the year. Looking at the propositions on which all nine Justices agree, one can see the independent regulatory commissions now clearly placed where they should be – not a “headless fourth branch,” but elements of the executive branch in a different – but necessary – oversight relationship with the President. 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 marginal element of congressional choice fails the test, that has far less significance than a judgment pulling the string on an extraordinary range of long-established institutions.

But of just what does that necessary relationship consist? Between the majority’s strange refusal to say, flat out, that its conclusion entailed a presidential right to demand “Opinions in

⁸⁰ Jefferson’s Legacy; A Brief History of the Library of Congress, <http://www.loc.gov/loc/legacy/librs.html>, visited October 31, 2009.

⁸¹ See generally Peter L. Strauss, *op. cit. supra* n. 9.

⁸² Compare *Bowsher v. Synar*, 478 U.S. 714 (1986) (roles assigned the General Accounting Office).

writing” from the SEC⁸³ and the ambiguities of its two-level formulation, much remains unresolved.

⁸³ See note 61 above.