MASSIVE, UNCHECKED POWER BY DESIGN: THE UNCONSTITUTIONAL EXERCISE OF EXECUTIVE AUTHORITY BY THE PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD

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"If there is a principle in our Constitution. . . more sacred than another, it is that which separates the [L]egislative, [E]xecutive, and [J]udicial powers."[1] This tripartite structure is "the heart" of the Constitution,[2] and it is no matter of mere form. By separating the various exercises of the coercive power of the government, the Constitution guarantees that the people know whom they should reward for its fair and just exercise, and more importantly, whom they should punish for its abuse. As Alexander Hamilton explained, the Constitution's division of power provides "the two greatest securities [the people] can have for the faithful exercise of any delegated power"—"the restraints of public opinion" and "the opportunity of discovering with facility and clearness the miscon-

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* The views set forth herein are the personal views of the authors and do not necessarily reflect those of the law firm with which they are associated.

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1. 1 ANNALS OF CONG. 603 (Joseph Gales ed., 1834) [hereinafter ANNALS] (remarks of James Madison); *see also* Charles Pinckney, *Observations on the Plan of Government Submitted to the Federal Convention*, *reprinted in* 3 RECORDS OF THE FEDERAL CONVENTION OF 1787 108 (Max Farrand ed., 1911) [hereinafter RECORDS] ("In a government, where the liberties of the people are to be preserved . . . , the executive, legislative and judicial, should ever be separate and distinct, and consist of parts, mutually forming a check upon each other.").

2. Buckley v. Valeo, 424 U.S. 1, 119 (1976) (per curiam).

duct of the persons they trust."[3] The Founding-ordained structure of separated powers thus guarantees that the exercise of governmental authority is, in the end, always to be checked by the will of the people expressed through their republican institutions. As "[t]he Framers recognized, in the long term, [these] structural protections against abuse of power [are] critical to preserving liberty."[4]

Congress violated these fundamental precepts when, in reaction to headline-grabbing accounting scandals involving Enron, WorldCom and other companies, it hastily created the Public Company Accounting Oversight Board (PCAOB or Board) as part of the Sarbanes-Oxley Act of 2002 (SOX or Act).[5] Congress empowered the new entity to "oversee the audit of public companies that are subject to the securities laws" by granting it vast regulatory authority over accounting firms that audit public companies.[6] This authority includes the power to promulgate binding rules and auditing standards, to inspect and investigate accounting firms, to conduct disciplinary proceedings and impose sanctions, and to provide for the PCAOB's own funding by levying a tax on the nation's public companies. At the same time that it granted the PCAOB these enormous powers, however, Congress deliberately designed the Board to maximize its "independence"[7] and "insulate" it from "political" pressure[8] by, *inter alia*, placing the authority to

3. THE FEDERALIST No. 70, at 396-97 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

4. Bowsher v. Synar, 478 U.S. 714, 730 (1986); *see also* Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc., 501 U.S. 252, 272 (1991) ("The ultimate purpose of this separation of powers is to protect the liberty and security of the governed."); Mistretta v. United States, 488 U.S. 361, 380 (1989) (noting that it was "the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty").

5. Sarbanes-Oxley (SOX) Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 11 U.S.C., 15 U.S.C., 18 U.S.C., and other titles).

6. SOX § 101(a), 15 U.S.C. § 7211(a).

7. S. REP. NO. 107-205, at 6 (2002).

8. *Accounting Reform and Investor Protection: Hearings on the Legislative History of the Sarbanes-Oxley Act of 2002: Accounting Reform and Investor Protection Issues Raised by Enron and Other Public Companies Before the S. Comm. on Banking, Housing and Urban Affairs*, 107th Cong. 44 (2002) (testimony of Arthur Levitt, former Chairman of the SEC).

appoint and remove its members in the hands of the Securities and Exchange Commission (SEC), itself an independent agency resistant to political checks. Thus twice-removed from presidential influence and control, the PCAOB exercises vast governmental powers while being wholly unaccountable to any person whom the people may control or remove through the ballot box.

By divorcing governmental power from political accountability to an extent not previously known in American jurisprudence, the Sarbanes-Oxley Act runs afoul of vital aspects of the separation of powers doctrine. Part I of this article examines the congressional process that led to the Sarbanes-Oxley Act and demonstrates that Congress structured the PCAOB in an effort to circumvent the political checks that protect against the abuse of executive authority. Part II discusses the breadth of the PCAOB's effect on American businesses and the overall economy, and examines some of the criticisms leveled at the Board.

Parts III and IV detail the PCAOB's constitutional infirmities. Part III explains that, under our Constitution's separation of powers, the President must retain effective control over those government officials who wield the executive power on his behalf. This control requires, at a minimum, that the President have a broad authority to effectuate the removal of such officials. The Sarbanes-Oxley Act violates this requirement because it completely strips the President of this power to remove PCAOB members whose policy views and enforcement and investigative priorities are at odds with those of the Executive Branch.

Finally, in Part IV, we explain that, by conferring the authority to appoint the PCAOB's members to their public offices upon the SEC, an independent agency that is itself insulated from democratic accountability, the Act violates the Constitution's Appointments Clause. This is so if the members of the PCAOB are viewed, correctly, as principal officers who must be appointed by the President with the advice and consent of the Senate, or even if they are viewed as inferior officers who may be appointed by the Head of a Department without Senate approval.

I.
THE SARBANES-OXLEY ACT OF 2002 AND THE PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD

A series of accounting scandals at Enron, Adelphia Communications Corp., Quest Communications, Global Crossing, and Tyco International precipitated Congress's efforts to regulate the accounting profession.[9] The Sarbanes-Oxley Act came about remarkably quickly. The House of Representatives passed Representative Oxley's (R-Ohio) bill (H.R. 3763), titled "The Corporate and Auditing Accountability, Responsibility, and Transparency Act," on April 24, 2002, by a vote of 334 to 90.[10] Senator Sarbanes (D-Md.), Chairman of the Senate Banking Committee, introduced Senate Bill 2673 on June 25, 2002, the same day that WorldCom revealed that it had overstated its earnings by more than $3.8 billion because of improper accounting methods.[11] The Senate passed the bill by a vote of ninety-seven to zero on July 15, 2002.[12] After a "frenetic" two-week period of reconciling the bills,[13] both houses of Congress approved the new bill, the Sarbanes-Oxley Act of 2002, by a margin of 423 to 3 in the House and ninety-nine to zero in the Senate.[14] President George W. Bush signed the Act on July 30, 2002.[15]

The Public Company Accounting Oversight Board was a centerpiece of the new law. The accounting profession had historically engaged in self-regulation, and it was not clear at the outset what form this new regulatory body would take. Congress considered several alternative structures that would have placed the oversight powers eventually given to the PCAOB inside the SEC, such as requiring the SEC to establish an Office of Audit Review,[16] establishing within the SEC a Fed-

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9. *See* Robert Frank et al., *Scandal Scorecard*, WALL ST. J., Oct. 3, 2003, at B1.

10. 148 CONG. REC. H1592 (daily ed. Apr. 24, 2002).

11. *See* Frank et al., *supra* note 9, at B4.

12. 148 CONG. REC. S6779 (daily ed. July 15, 2002).

13. Donna M. Nagy, *Playing Peekaboo with Constitutional Law: The PCAOB and Its Public/Private Status*, 80 NOTRE DAME L. REV. 975, 1005 (2005).

14. Richard B. Schmitt et al., *Corporate-Oversight Bill Passes, Eases Path for Investor Lawsuits*, WALL ST. J., July 26, 2002, at A1.

15. Elisabeth Bumiller, *Bush Signs Bill Aimed at Fraud In Corporations*, N.Y. TIMES, July 31, 2002, at A1.

16. H.R. 5184, 107th Cong. (2002).

eral Bureau of Audits to conduct audits of all publicly registered companies,[17] and delegating to the SEC the power to identify and prohibit non-audit services that impair the independence of the auditor.[18] Numerous witnesses likewise urged Congress either to create a new body "housed within the SEC"[19] or to delegate the power to regulate the accounting profession directly to the SEC.[20]

Congress ultimately rejected these alternatives, however, because they would have made the new regulatory body *too* accountable to the democratic process. For "the myriad of constituent pressures" from which Congress sought to insulate the PCAOB to ensure that it could "make the tough decisions" included not only industry pressure, but that which might be brought by the SEC itself.[21] Specifically, the PCAOB's independence was intended to avert the "extraordinary amount of political pressure [that] was [previously] brought to bear on the [SEC]" when it attempted to limit the consulting work that

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17. H.R. 3795, 107th Cong. (2002).

18. S. 2056, 107th Cong. § 2 (2002); S. 1896, 107th Cong. § 3 (2002); *see also* Nagy, *supra* note 13, at 1001 (describing four alterative structures considered for regulating the accounting industry).

19. Letter from David M. Walker, Comptroller General, U.S. Gen. Accounting Office, to Sen. Paul S. Sarbanes (May 3, 2002), at 6, *reprinted in* U.S. GEN. ACCOUNTING OFFICE, GAO-02-411, THE ACCOUNTING PROFESSION: STATUS OF PANEL ON AUDIT EFFECTIVENESS RECOMMENDATIONS TO ENHANCE THE SELF-REGULATORY SYSTEM app. 6 (2002), *available at* http://www.gao.gov/new.items/d02411.pdf.

20. *See Accounting Reform and Investor Protection*, *supra* note 8, at 37 (testimony of Richard C. Breeden, former Chairman of the SEC) ("We do not need to go and invent another [body]. We need to invigorate the SEC . . . ."); *id.* at 874 (prepared statement of Robert E. Litan, Vice President and Director, Econ. Studies Program, The Brookings Inst.) ("I urge [Congress] at least to consider whether the SEC *itself* should be performing the oversight of auditors directly . . . .") (emphasis in original); *id.* at 208 (testimony of Walter P. Schuetze, former Chief Accountant of the SEC) ("I wouldn't have this board . . . .[D]o not create another board that is going to compete with the [SEC]."); *id.* at 745 (statement of Arthur R. Wyatt, CPA) ("I would . . . have [the SEC] assume the principal role in overseeing the effectiveness of the financial reporting process. Creation of a new agency to undertake this responsibility seems unnecessary in view of the record established by the SEC over the past 65 years.").

21. *Id.* at 195 (statement of Michael H. Sutton, former Chief Accountant of the SEC).

auditors could perform.[22] As one of the Act's supporters made clear, the PCAOB's "massive power" to "make decisions that affect all accountants and everybody they work for, which directly or indirectly is every breathing person in the country" would be "unchecked power, *by design*."[23]

As part of its effort to insulate the PCAOB from political checks, Congress made it a private, non-profit corporation, declaring that the Board is "not. . . an agency or establishment of the United States Government" and that its officials are not "officer[s] or employee[s] or agent[s] for the Federal Government."[24] While this means that the PCAOB will not be treated as a governmental entity under a wide range of federal statutes, such as the Administrative Procedure Act, the designation of the PCAOB as a private actor does not free the Board from the Constitution's structural and other limitations on government power. Rather, under *Lebron v. National Railway Passenger Corp.*, when "the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation"—as it did in creating the PCAOB—then "the corporation is part of the Government" for constitutional purposes.[25] Indeed, in their recent

22. *Id.* at 15 (statement of Arthur Levitt, former Chairman of the SEC); *see also id.* at 186 (comments of Sen. Debbie Stabenow) ("I am certainly concerned about finding a better way to insulate the establishment of accounting standards from politics and pressures, both from the industry and, frankly, from Congress."); *id.* at 794 (statement of Bevis Longstreth, former SEC Commissioner) ("The independence of the SEC, itself, was being challenged as the accounting firms did all they could, on Capitol Hill and throughout the business and legal communities, to bring political pressure to bear against a[n independence] proposal . . . that could not be defeated by argument on the merits."); 148 CONG. REC. S6331 (daily ed. July 8, 2002) (statement of Sen. Sarbanes) ("I believe, frankly, that we need to establish this oversight board in statute in order to provide an extra guarantee of its independence and its plenary authority to deal with this important situation.").

23. 148 CONG. REC. S6334 (statement of Sen. Gramm) (emphasis added).

24. Sarbanes-Oxley (SOX) Act of 2002 § 101(b), 15 U.S.C. § 7211(b) (2000 & Supp. II 2002).

25. 513 U.S. 374, 400 (1995); *see also* The Constitutional Separation of Powers Between the President and Congress, 20 Op. Off. Legal Counsel 124, 148 n.70 (1996) (memorandum from Assistant Attorney General Walter Dellinger) ("Congress may [not] evade the 'solemn obligations' of the doctrine

defense of its constitutionality, neither the Board nor the Department of Justice disputed that the PCAOB must be treated as a governmental entity for constitutional purposes.[26] As we presently discuss, Congress vested this new governmental agency with powers that are both "massive" and "unchecked."

Binding Auditing and Independence Standards — The Act gives the PCAOB broad authority to interpret and implement its mandate through the promulgation of rules, including auditing and attestation standards, quality-control standards, ethics standards, and auditor-independence requirements, "as may be necessary or appropriate in the public interest or for the protection of investors."[27] Through these powers, the PCAOB requires accounting firms to follow certain procedures and comply with specified standards when carrying out their audits of public companies. The PCAOB has exercised this authority by promulgating numerous rules and auditing standards that impose specific and substantial new duties on registered accounting firms.[28]

As described below, a registered entity's violation of the Board's rules and standards subjects that entity to disciplinary actions by the Board or the SEC.[29] In addition, the willful violation of the PCAOB's rules exposes a regulated entity to severe criminal sanctions. Specifically, the Act provides that a violation of any of the PCAOB's rules "shall be treated for all purposes in the same manner as a violation of the Securities Exchange Act of 1934. . . or the rules and regulations issued thereunder" and that the person committing such violation "shall be subject to the same penalties, and to the same extent, as for a violation of that Act or such rules and regulations."[30] These "same penalties" include the severe criminal sanctions, including up to twenty years imprisonment and $5 million in

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of separation of powers by resorting to the corporate form any more than it may evade the obligations of the Bill of Rights through this artifice.").

26. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., No. 06-0217 (JR), 2007 WL 891675, at *3 (D.D.C. Mar. 21, 2007), *appeal docketed*, No. 07-5127 (D.C. Cir. Apr. 18, 2007).

27. SOX § 103(a)(1), 15 U.S.C. § 7213(a)(1).

28. *See* PCAOB Auditing Standards, *available at* http://www.pcaob.org/Standards/Standards_and_Related_Rules/index.aspx.

29. *See* SOX § 105(c)(4), 15 U.S.C. § 7215(c)(4).

30. SOX § 3(b), 15 U.S.C. § 7202(b).

fines, that are imposed for willful violations of the Exchange Act and its implementing rules.[31]

Inspections — The PCAOB has been given the power to enforce the Sarbanes-Oxley Act and the PCAOB's auditing standards and other rules through a "continuing program of inspections" that involves the selective inspection and review of an accounting firm's audit engagements.[32] While the Act initially determines inspection frequency based upon the number of issuers for which the registered accounting firm provides audit reports,[33] the PCAOB has the power to change the frequency of inspections if it finds "that different inspection schedules are consistent with the purposes of th[e] Act, the public interest, and the protection of investors."[34] The PCAOB has inspected hundreds of registered firms and has posted reports of those inspections on its website.[35]

Investigations and Sanctions — The PCAOB has also been given the power to conduct formal investigations of any act or practice by a registered accounting firm that "may violate" the Act, the rules of the Board, the federal securities laws or professional standards.[36] The Board may begin such an investigation of any firm at its discretion and regardless of inspection results.[37] If the Board finds a violation, it "may impose such disciplinary or remedial sanctions as it determines appropriate."[38] Available sanctions include temporary suspension or permanent revocation of an accounting firm's registration or of an associated person's right to further association with any registered firm; civil monetary penalties of up to $15,000,000; and "any other appropriate sanction provided for in the rules of the Board."[39] The Board may also sanction firms for failure to supervise employees or other associated persons who violate Board rules, securities laws, or professional standards.[40]

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31. 15 U.S.C. § 78ff(a) (2000).

32. SOX § 104(a), 15 U.S.C. § 7214(a).

33. *Id.* § 104(b)(1), 15 U.S.C. § 7214(b)(1).

34. *Id.* § 104(b)(2), 15 U.S.C. § 7214(b)(2).

35. *See* PCAOB, Inspection Reports, *available at* http://www.pcaob.org/Inspections/Public_Reports/index.aspx.

36. SOX § 105(b)(1), 15 U.S.C. § 7215(b)(1).

37. *Id.*

38. *Id.* § 105(c)(4), 15 U.S.C. § 7215(c)(4).

39. *Id.* § 105(c)(4)(A)-(G), 15 U.S.C. § 7215(c)(4)(A)-(G).

40. *Id.* § 105(c)(6)(A), 15 U.S.C. § 7215(c)(6)(A).

Taxation — In addition to its broad rule-making, investigative and adjudicative power over the entire accounting profession, the Act also grants the PCAOB the extraordinary power to set its own budget and to fund its own activities by levying a tax on publicly traded companies. In particular, the Act gives the Board the power to establish a budget for each fiscal year, while providing no guidance as to, or statutory cap on, the size of the budget.[41] The Act then provides that funds to cover the Board's budget are to be payable from an annual tax, called an "accounting support fee," levied upon public companies pursuant to standards established by the Board.[42] The Board has acted under these provisions to promulgate a rule levying this tax on some, but not all, of the nation's public companies,[43] and to collect the tax from approximately 10,000 such companies.[44] These funds have been used, *inter alia*, to pay the exorbitant salaries that the Board has established for its own members: $556,000 for its Chairman and $452,000 for each of the other members.[45]

The PCAOB exercises these powers through its five full-time members, who are appointed for staggered five-year terms by a majority vote of the five commissioners of the SEC.[46] Only the SEC may remove a PCAOB member from office, and its ability to do so is severely restricted. The Act provides that "[a] member of the Board may be removed by [the SEC] from office, *in accordance with section 107(d)(3)*, for good cause shown before the expiration of the term of that member."[47] The cross-referenced subsection establishes the highly circumscribed bases upon which a finding of "good cause" must be predicated, and, because of the constitutional ramifications discussed in Part III, is worth setting forth in full:

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41. *Id.* § 109(b), 15 U.S.C. § 7219(b).

42. *Id.* § 109(c)-(d), 15 U.S.C. § 7219(c)-(d).

43. *See* PCAOB Rule 7101, *available at* www.pcaobus.org/Rules/Rules_of_the_Board/Section_7.pdf.

44. *See* PCAOB LIST OF ISSUERS WITH NO OUTSTANDING PAST-DUE SHARE OF THE ACCOUNTING SUPPORT FEE (2007), http://www.pcaob.org/Support_Fees/Issuers_Paid.pdf.

45. Rebecca Byrne, *Accountants Board Tin Ear Now Golden*, THESTREET.COM, Jan. 13, 2003, http://www.thestreet.com/markets/rebeccabyrne/10062297.html.

46. SOX § 101(e), 15 U.S.C. § 7211(e).

47. *Id.* § 101(e)(6), 15 U.S.C. § 7211(e)(6) (emphasis added).

> The Commission may, as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this Act or the securities laws, remove from office. . . any member of the Board, if the Commission finds, on the record, after notice and opportunity for a hearing, that such member—
> (A) has willfully violated any provision of this Act, the rules of the Board, or the securities laws;
> (B) has willfully abused the authority of that member; or
> (C) without reasonable justification or excuse, has failed to enforce compliance with any such provision or rule, or any professional standard by any registered public accounting firm or any associated person thereof.[48]

Thus, a PCAOB member may be removed by the SEC only for what is tantamount to a willful abuse of power.

The PCAOB's policy choices are further insulated from oversight—and its "independence" maintained—by procedural and substantive limitations on the SEC's ability to review and modify the PCAOB's actions.

The Act permits the PCAOB to conduct many of its day-to-day activities without any supervision at all. For example, the Act does not provide for SEC control over the conduct of the Board's regular inspections, including the Board's choices about which audits to inspect.[49] Likewise, the SEC does not oversee the Board's choice of firms to investigate, as the Board may commence an investigation whenever it appears to the Board that a violation "may" have occurred.[50] The Act also fails to give the SEC any power to oversee Board demands for documents or testimony from firms or associated persons during an investigation.[51] And the SEC has no authority to direct the PCAOB to impose sanctions on the target of an investigation when the PCAOB chooses not to.

Even where the Act provides for SEC oversight of PCAOB activities, that oversight frequently entails the use of cumber-

48. *Id.* § 107(d)(3), 15 U.S.C. § 7217(d)(3).
49. *See id.* § 104(d)(1), 15 U.S.C. § 7214(d)(1).
50. *Id.* § 105(b)(1), 15 U.S.C. § 7215(b)(1).
51. *See id.* § 105(b)(2)(A)-(B), 15 U.S.C. § 7215(b)(2)(A)-(B).

some notice-and-comment procedures. For example, although the SEC may amend the PCAOB's rules,[52] and rescind the PCAOB's authority,[53] it may do so only through notice-and-comment rulemaking. The same cumbersome procedural requirements govern the SEC's review of proposed PCAOB rules and standards.[54] And if the SEC wishes to reject a PCAOB rule or standard following this period of notice and comment, it must institute further proceedings, including notice of the grounds for disapproval and an opportunity for a hearing.[55]

Moreover, in these and other circumstances in which the SEC exercises oversight authority, the standard of review is generally so deferential that it provides no effective supervisory check on the PCAOB. Indeed, SEC review of PCAOB actions is often at least as deferential as the *Chevron* deference that appellate courts accord to agency action.[56] For example, the Act requires the SEC to approve any proposed rule, including auditing standards and budgetary decisions, that either is merely "consistent with the requirements" of the Act and the securities laws "or is necessary or appropriate in the public interest or for the protection of investors."[57]

SEC review of PCAOB sanctions is similarly circumscribed. The Act provides that SEC may modify or set aside a sanction only if "having due regard for the public interest and the protection of investors, [it] finds. . . that the sanction—(A) is not necessary or appropriate in furtherance of this Act or the securities laws; or (B) is excessive, oppressive, inadequate, or otherwise not appropriate to the finding or the basis on which the sanction was imposed."[58]

Finally, the SEC's power to rescind PCAOB authority may be invoked only if doing so is "consistent with the public inter-

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52. *See* 15 U.S.C. § 78s(c) (2000) (made applicable to the PCAOB by SOX § 107(b)(5), 15 U.S.C. § 7217(b)(5)).

53. SOX § 107(d)(1), 15 U.S.C. § 7217(d)(1).

54. *See id.* § 107(b)(2), 15 U.S.C. § 7217(b)(2); 15 U.S.C. § 78s(b) (2000) (made applicable to the PCAOB by SOX § 107(b)(4), 15 U.S.C. § 7217(b)(4)).

55. 15 U.S.C. § 78s(b)(2).

56. *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

57. SOX § 107(b)(3), 15 U.S.C. § 7217(b)(3).

58. *Id.* § 107(c)(3), 15 U.S.C. § 7217(c)(3).

est, the protection of investors, and the other purposes of the Act and the securities laws."[59] Similarly, the SEC's power to censure or limit the activities of the PCAOB may only be exercised if the SEC finds, on the record and after notice and opportunity for a hearing, that the Board "(A) has violated or is unable to comply with any provision of this Act, the rules of the Board, or the securities laws; or (B)without reasonable justification or excuse, has failed to enforce compliance [by a registered firm or associated person] with any such provision or rule, or any professional standard."[60]

II.
THE PCAOB'S CONTROVERSIAL POLICIES

The broad regulatory powers delegated to the PCAOB, coupled with its unique independence, ensures that this powerful entity is not accountable to the people.

In one recent survey, fifty-eight percent of corporate directors in the United States favored repealing or overhauling the Sarbanes-Oxley Act and, by extension, the PCAOB.[61] Business and economic groups have charged that the rules adopted by the PCAOB are, at a minimum, unnecessary and, at worst, affirmatively harmful to small business, entrepreneurship, and the overall economy. The brunt of this criticism has focused on Section 404 of the Act, which requires corporate management to assess its internal financial controls and requires independent accounting companies to audit and approve management's assessment "in accordance with attestation engagements issued or adopted by the Board."[62] Seventy-eight percent of surveyed companies reported that the costs of complying with Section 404 and the corresponding PCAOB regulations exceeded the benefits.[63] While it is difficult to separate the overall costs of the Sarbanes-Oxley Act from the costs imposed by the PCAOB alone, former congressman Michael

59. *Id.* § 107(d)(1), 15 U.S.C. § 7217(d)(1).

60. *Id.* § 107(d)(2), 15 U.S.C. § 7217(d)(2).

61. HENRY N. BUTLER & LARRY E. RIBSTEIN, THE SARBANES-OXLEY DEBACLE: WHAT WE'VE LEARNED; HOW TO FIX IT 86 (2006).

62. SOX § 404, 15 U.S.C. § 7262(b).

63. Press Release, Fin. Executives Int'l, FEI Survey: Mgmt. Drives Sarbanes-Oxley Compliance Costs Down by 23%, but Auditor Fees Virtually Unchanged (May 16, 2006), *available at* http://fei.mediaroom.com/index.php?s=press_releases&item=187.

Oxley, the co-sponsor of the Sarbanes-Oxley Act, attributes the onerous costs associated with complying with Section 404 to the regulations adopted by the PCAOB. According to Mr. Oxley, "99.9 percent [of all complaints about Sarbanes-Oxley] are about 404. It was two paragraphs long, but by the time the PCAOB was done, it was 330 pages of regulations."[64]

Analysts estimate the direct costs of PCAOB-directed Section 404 compliance to be in the billions. Financial Executives International surveyed two hundred companies in fiscal year 2006 and calculated the average Section 404 compliance cost per company to be about $2.9 million.[65] AMR Research estimated that companies would spend $6 billion overall to comply with Section 404 in 2006.[66] In response to these high costs, accounting companies raised their fees significantly. According to one study, the four largest accounting firms increased their fees by an average of 78 percent to 134 percent in 2004.[67] Financial Executives found that auditor attestation fees averaged $1.2 million in 2006.[68] At least a portion of these costs can be directly attributed to the rules promulgated by the PCAOB, which lay out what actions auditing firms must take to comply with Section 404.

Companies subject to the strictures of the PCAOB have responded by publicly criticizing the accounting standards promulgated by the PCAOB. In 2005, the Mortgage Bankers Association (MBA) submitted a letter to the SEC objecting to the PCAOB's rules. The MBA's strong language illustrates the serious concerns shared by many businesses:

> The guidance in the [Auditing Standard No. 2] and the increased penalties for inaccurate financial reporting imposed by the Act have created an atmosphere of "near paranoia" where auditors generally conclude that more testing and documentation is always better than less, regardless of cost/benefit considerations. Contrary to the intent of the Act, the

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64. Stephen Taub, *Oxley: I'm Not Happy with Sarbox*, CFO.COM, Apr. 6, 2007, http://www.cfo.com/printable/article.cfm/8985156/c_4314618.

65. Press Release, Fin. Executives Int'l, *supra* note 63.

66. BUTLER & RIBSTEIN, *supra* note 61, at 40.

67. Peter J. Wallison, *Sarbanes-Oxley and the Ebbers Conviction*, AEI FIN. SERVS. OUTLOOK, June 10, 2005, at 3, http://www.aei.org/docLib/20050610_FSOJune_g.pdf.

68. Press Release, Fin. Executives Int'l, *supra* note 63.

> high cost of reporting on internal control is sapping mortgage banking companies' resources to the detriment of investors who will experience lower investment returns and, thus, declines in the values of their investments.[69]

The PCAOB recently promulgated Auditing Standard No. 5 to replace Auditing Standard No. 2 and provide auditors with more flexibility.[70] While some believe that the new standard is an improvement, others suggest that it remains inadequate. According to NASDAQ, for instance, Auditing Standard No. 5 "has *not* provided the needed clarity or the tools to alleviate the root cause of unnecessarily onerous and costly auditing processes."[71] The Act's former sponsor, Mr. Oxley, similarly complained that Auditing Standard No. 5 "does not go far enough to help decrease regulatory complexity and reduce the risk [of] overzealous auditing."[72]

The PCAOB also has the power to fund its own budget—more than $135 million in 2007—entirely through accounting support fees and registration fees levied on public companies.[73] To put that number in perspective, the Securities and Exchange Commission requested just over $100 million for its entire corporate finance division in 2007.[74] The PCAOB issued invoices to over 10,000 firms in 2006, with nine of those firms being forced to pay a fee of over $1 million.[75] These fees

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69. Letter from Jonathan L, Kempner, President & CEO, Mortgage Bankers Ass'n, to Jonathan G. Katz, Secretary, SEC (Feb. 25, 2005) at 2, *available at* http://www.sec.gov/news/press/4-497/4497-6.pdf.

70. *SEC Approves PCAOB Auditing Standard No. 5*, ACCOUNTINGWEB.COM, July 25, 2007, http://www.accountingweb.com/cgi-bin/item.cgi?id=103817&d=526&h=524&f=525.

71. Press Release, NASDAQ, NASDAQ Recommends Further Refinement of Public Company Accounting Oversight Board's Auditing Standard No. 5 (July 24, 2007), *available at* http://files.shareholder.com/downloads/NDAQ/182312038x0x121226/8c7f2214-d2b7-444b-b0bc-e3ff501febe6/NDAQ_News_2007_7_24_General.pdf (emphasis added).

72. Ronald Fink, *The SarbOx: Happy Fifth? Hold the Party Favors*, FINANCIAL WEEK, July 30, 2007, *available at* http://www.financialweek.com/apps/pbcs.dll/article?AID=/20070730/REG/70727017.

73. PCAOB, PCAOB 2007 BUDGET, http://www.pcaobus.org/About_the_PCAOB/Budget_Presentations/2007.pdf.

74. U.S. SEC. & EXCH. COMM'N, FISCAL 2007 CONGRESSIONAL BUDGET REQUEST 26, http://www.sec.gov/about/secfy07budgetreq.pdf.

75. PCAOB, PCAOB 2006 ANNUAL REPORT 21, http://www.pcaobus.org/About_the_PCAOB/Annual_Reports/2006.pdf.

support all the activities of the PCAOB, including the salaries of its Board members, which in 2004 were $556,000 for the PCAOB's chairman and $452,000 for each of its four other members.[76] Business groups and Congress have expressed concern over the high salaries of the Board members, particularly in light of the PCAOB's unusual funding mechanism.[77]

The standards promulgated by the PCAOB have indirect financial consequences as well. Analysts estimate that Sarbanes-Oxley and the PCAOB have imposed net losses to financial markets of $1.1 trillion.[78] These indirect losses stem from a variety of factors. First, companies which might otherwise have gone public have remained private or moved abroad. For example, the London Stock Exchange conducted a survey of the international companies listed on its exchange following a record high of foreign company new issues in December 2005. According to a press report, "about 38 per cent of the international companies surveyed said they had considered floating in the United States. Of those, 90 per cent said the onerous demands of the new Sarbanes-Oxley corporate governance law had made London listing more attractive."[79] Another indirect cost of the PCAOB standards are opportunity costs. Board members and senior officers must now dedicate a significant amount of time to fulfilling the demands of Sarbanes-Oxley, rather than remaining focused on maximizing shareholder value.[80] As an example, Yellow Roadway, the largest trucking company in the U.S., had to divert two hundred employees to work on Sarbanes-Oxley issues and spend an additional $10 million on outside accountants and auditors.[81]

Despite the burdens and financial costs imposed by the PCAOB's regulations, there is a notable absence of transparency and statutorily safeguarded avenues for public partici-

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76. *See* Byrne, *supra* note 45.

77. *See* Rachel McTague, *Donaldson Answers Queries About Salaries of PCAOB Members in Appropriations Hearing*, BNA.COM, Mar. 17, 2003, http://corplawcenter.bna.com/pic2/clb.nsf/id/BNAP-5KLV4H.

78. BUTLER & RIBSTEIN, *supra* note 61, at 3.

79. Peter J. Wallison, *XBRL and U.S. Financial Market Leadership*, AEI ON THE ISSUES, Mar. 13, 2006, at 1, http://www.aei.org/docLib/20060313_0519774OTIWallison_g.pdf.

80. BUTLER & RIBSTEIN, *supra* note 61, at 50-51.

81. Wallison, *supra* note 67, at 3.

pation in its policymaking. As discussed above, Congress has characterized the PCAOB as a private entity. While this characterization is insufficient to free the PCAOB of constitutional constraints on its behavior, it means that the Board is treated as a private entity for all other purposes. As a result, the PCAOB is not subject to the checks on agency power set forth by Congress in statutes such as the Administrative Procedure Act, the Freedom of Information Act or the Sunshine Act.[82] By law, the PCAOB can enact rules and regulations without going through notice and comment procedures or providing any avenues for public input. This ability to set standards outside of the public eye is striking, especially considering the economic effects which flow from the PCAOB's choice of standards. While it is not legally bound to do so, the PCAOB has voluntarily chosen to adopt rulemaking procedures which allow for public notice and comment periods similar to other public agencies.[83] However, as one writer notes, "the public's 'right to know what their government is up to' and the public's right to participate in policymaking should not be dependent on a private regulator's good will or perceived self-interest."[84]

It is not within the scope of this article to analyze the wisdom of the regulations imposed by the PCAOB or to take sides in the cost/benefit debate. The point, rather, is that the PCAOB's policies are undeniably controversial and have serious and wide-ranging consequences for the economy and American businesses. As a result, there is a heightened need for democratic accountability and transparency. Any body with such ample policymaking authority ought ultimately to be accountable to the will of the people through their elected officials. Yet the Sarbanes-Oxley Act's procedures for appointment and removal of PCAOB members forecloses accountability, transparency and the democratic process. By denying the President *any* role in appointing and removing those members, or in overseeing the Board's enforcement actions and budget, Congress has created an entity that wields massive executive power but is unchecked by any politically accountable branch of government. As discussed below, this structure vio-

82. *See* Nagy, *supra* note 13, at 1062.

83. *See* graphical representation of PCAOB rulemaking process at http://www.pcaobus.org/art/rulemakingProcess.gif.

84. Nagy, *supra* note 13, at 1063.

lates both the Constitution's separation of powers and the Appointments Clause.

III.
THE PCAOB VIOLATES THE SEPARATION OF POWERS

The Constitution vests all of the "executive Power. . . in a President," and provides that "he shall take Care that the Laws be faithfully executed."[85] Through this simple command, "the executive power of the nation is vested in the President, subject only to the exceptions and qualifications, which are expressed in the instrument."[86] The President, of course, "alone and unaided could not execute the laws. He must execute them by the assistance of subordinates."[87] But in order to ensure that he is accountable for all exercises of the executive power, those who wield that power on his behalf must "act for him under his direction in the execution of the laws."[88] In the words of Hamilton, executive officers "ought to be considered the assistants or deputies of the chief magistrate. . . and ought to be subject to his superintendence."[89] For only then, as Madison put it, will "all those who are employed in the execution of the law. . . be in their proper situation, and the chain of dependence be preserved; the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community."[90]

This core structural principle is safeguarded through the Supreme Court's separation of powers doctrine. This doctrine requires that, at a minimum, the President exercise broad removal power over all government officers who exercise executive power. But even where such officials are subject to the President's removal authority, courts must undertake a searching inquiry to determine whether a statutory scheme "taken as a whole" unduly reduces "the President's ability to control" the

85. U.S. CONST. art. II, §§ 1, 3.

86. Myers v. United States, 272 U.S. 53, 138-39 (1926) (quoting remarks of Alexander Hamilton reprinted in 7 HAMILTON'S WORKS 80-81 (J.C. Hamilton ed., 1851)).

87. *Myers*, 272 U.S. at 117.

88. *Id.*

89. THE FEDERALIST No. 72, at 396 (Alexander Hamilton) (E.H. Scott, ed.).

90. ANNALS, *supra* note 1, at 499 (remarks of James Madison).

exercise of executive power.[91] The PCAOB runs afoul of both of these separation of powers principles.[92]

A. *The Act's Interference With the President's Removal Authority*

Since the early days of the Republic, it has not been doubted "that Article [II] grants to the President the executive power of the Government, *i.e.*, the general administrative control of those executing the laws, *including the power of appointment and removal of executive officers*—a conclusion confirmed by his obligation to take care that the laws be faithfully executed."[93] Indeed, this was recognized by the very First Congress in the so-called "decision of 1789."[94] There, following a heated debate, the First Congress deleted from a proposed bill creating the Department of Foreign Affairs language providing that the Secretary of Foreign Affairs was "to be removable from office by the President."[95] It did so not because it wished to deny the President that power, but out of fear that the bill's "original text implied"—wrongly—"the absence of a constitutionally conferred power of the President to effect removal."[96] But the President's "duty to see the laws faithfully executed" was intended to encompass "that species of power which is necessary to accomplish that end," including a broad power of removal.[97] This removal power was vital to preserve "that great

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91. Morrison v. Olson, 487 U.S. 654, 685 (1988).

92. As explained above, notwithstanding the Sarbanes-Oxley Act's characterization of the PCAOB as a private entity, the Board is part of the United States government for constitutional purposes. *See supra* p. 204. There is also no question that the PCAOB exercises executive (as opposed to legislative or judicial) power. *See* Bowsher v. Synar, 478 U.S. 714, 733 (1986) (holding that the Comptroller General exercises executive power because he is charged with "[i]nterpreting a law enacted by Congress to implement the legislative mandate" and with "exercis[ing] judgment concerning facts that affect the application of the [Balanced Budget and Emergency Deficit Control] Act"); Buckley v. Valeo, 424 U.S. 1, 140-41 (1976) (per curiam) (holding that the FEC exercises executive power because it wields "broad administrative powers," such as rulemaking and enforcement, "of kinds usually performed by independent regulatory agencies or by some department in the Executive Branch").

93. *Myers*, 272 U.S. at 163-64 (emphasis added).

94. *See id.* at 111-32.

95. *See* Synar v. United States, 626 F. Supp. 1374, 1395 (D.D.C.) (three-judge district court), *aff'd*, Bowsher v. Synar, 478 U.S. 714 (1986).

96. *Id.*

97. ANNALS, *supra* note 1, at 516 (remarks of James Madison).

principle of unity and responsibility in the executive department, which was intended for the security of liberty and the public good."[98] And only "[i]f the President should possess *alone* the *power of removal* from office, [would] those who are employed in the execution of the law. . . be in their proper situation, and the chain of dependence be preserved; the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community."[99]

"This 'Decision of 1789' provides 'contemporaneous and weighty evidence' of the Constitution's meaning since many of the Members of the First Congress had taken part in framing that instrument."[100] It accordingly "has ever been considered as a full expression of the sense of the Legislature on this important part of the American Constitution."[101] And ever since the decision of 1789, the nation's Presidents have vigorously asserted, and jealously guarded, the power to remove from office all those who exercise executive power.[102]

The Supreme Court, too, has repeatedly reaffirmed the centrality of the President's removal power to his ability to perform his constitutional duty of exercising the "executive power" and "tak[ing] care that the laws be faithfully executed." The seminal case is *Myers v. United States*, where the Court struck down a statute conditioning the President's removal of a postmaster on the advice and consent of the Senate. Article II of the Constitution, explained the Court, "grants to the President the executive power of the government—*i.e.*, the general administrative control of those executing the laws, *including the appointment and removal of executive*

98. *Id.* at 518.

99. *Id.* (emphasis added).

100. Bowsher v. Synar, 478 U.S. 714, 723-24 (1986) (internal quotation marks and citation omitted).

101. 5 JOHN MARSHALL, THE LIFE OF GEORGE WASHINGTON 200 (photo. reprint 2005) (1807).

102. For a comprehensive historical overview of presidential assertions of the removal power, *see* Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 CASE W. RES. L. REV. 1451 (1997); Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the Second Half-Century*, 26 HARV. J.L. & PUB. POL'Y 667 (2003); Christopher S. Yoo et al., *The Unitary Executive During the Third Half-Century, 1889-1945*, 80 NOTRE DAME L. REV. 1 (2004); Christopher S. Yoo et al., *The Unitary Executive in the Modern Era, 1945-2004*, 90 IOWA L. REV. 601 (2005).

officers."[103] And "his power of removing those for whom he cannot continue to be responsible," held the Court, is "*essential* to the execution of the laws by him."[104]

More recently, in *Bowsher v. Synar*, the Court invalidated a provision of the Gramm-Rudman-Hollings Act that made the Comptroller General removable by Congress.[105] "Once an officer is appointed," the Court explained, "it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey."[106] By placing removal authority in the Congress, it was the Congress, and not the President, that the Comptroller General would "fear" and "obey." The Court held this was constitutionally intolerable: "The structure of our Constitution does not permit the Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess."[107] In short, because the Comptroller General exercised executive power, the Constitution demanded that he be removable by the President.

To be sure, where Congress has relied on the Excepting Clause to permit the head of an Executive Branch department to appoint and remove his own subordinates,[108] the President must, absent statutory direction otherwise, exercise his authority to remove those subordinates "through" that department head.[109] This mechanism fully preserves the President's removal authority, however, because a department head is the President's "alter ego" and subject to his unfettered control.[110] As a result, it is quite simple for the President to remove an officer "through" a department head; he simply directs his "alter ego" to do so. Thus, the President retains both the unfet-

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103. 272 U.S. 53, 163-64 (emphasis added).

104. *Id.* at 117 (emphasis added).

105. 478 U.S. 714 (1986).

106. *Id.* at 726 (internal quotation marks and citation omitted).

107. *Id.*

108. *See infra* Part IV (discussing the Excepting Clause of the Constitution's Appointments Clause).

109. *See In re* Hennen, 38 U.S. 230, 259 (1839); Morrison v. Olson, 487 U.S. 654, 692 (1988) (President may remove the independent counsel, an inferior officer, "through" the Attorney General).

110. Myers v. United States, 272 U.S. 53, 133 (1926); *see also infra* Part IV.B.1-2 (discussing the meaning of the term "Heads of Departments" in the Excepting Clause).

tered authority to effectuate, and the political accountability for effectuating, such a removal.[111]

There are also circumstances in which the Constitution does not require the relevant officer to be removable *at will* by the President. Rather, as in *Morrison v. Olson*, Congress may sometimes limit the President's removal authority by prohibiting removal except "for cause." *Morrison* upheld the constitutionality of the independent counsel statute, which authorized the President, acting through the Attorney General, to remove an independent counsel "for good cause."[112] The Court concluded that where an official exercises "limited jurisdiction and tenure" and "lack[s] policymaking or significant administrative authority," a broad "for cause" removal provision might not unduly inhibit "the President's need to control the exercise of [the official's] discretion."[113] At the same time, however, *Morrison* makes clear that, at least in many cases, " 'purely executive' officials. . . *must* be removable by the President *at will* if he is to be able to accomplish his constitutional role."[114]

A for-cause removal provision, with "cause" broadly defined, allows the President to remove a government official for, among other things, failure to accept supervision or obey a lawful order.[115] And where, as in *Morrison*, the Attorney General established the policies which the independent counsel was statutorily obliged to follow if "possible," and the official's duties were otherwise narrow and temporary, the "power to remove the counsel for 'good cause,'. . . provides the Executive with substantial ability to ensure that the laws are 'faithfully executed."[116] The *Morrison* Court made equally clear, however, that it *would* be unconstitutional for Congress to "completely strip[ ] from the President" "the power to remove

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111. *See, e.g.*, Carroll Kilpatrick, *President Abolishes Prosecutor's Office; FBI Seals Records*, WASH. POST, Oct. 21, 1973, at A1.

112. 487 U.S. at 692.

113. *Id.* at 691.

114. *Id.* at 690 (citing *Myers*, 272 U.S. at 132-34) (emphasis added).

115. *See* Elrod v. Burns, 427 U.S. 347, 366 (1976) (noting that "discharge[ ] for good cause" includes "insubordination or poor job performance"); United States v. Perkins, 116 U.S. 483, 485 (1886) (upholding statute that provided that a Navy cadet could only be removed in peacetime pursuant to a court-martial); *Morrison*, 487 U.S. at 724 n.4 (Scalia, J., dissenting) (citing *Perkins* and stating that removal for cause "would include, of course, the failure to accept supervision").

116. 487 U.S. at 696.

an executive official,. . . thus providing *no means* for the President to ensure the 'faithful execution' of the laws."[117] The Supreme Court has thus *never* endorsed a restriction upon the President's removal power more intrusive than a requirement that such removal be "for cause."[118]

In short, the bare constitutional minimum requires that the President have, either directly or "through" an "alter ego," broad "for cause" removal authority over all government officials who wield "executive power" on his behalf. For only if such officials "act for him under his direction in the execution of the laws,"[119] and "subject to his superintendence,"[120] will "all those who are employed in the execution of the law. . . be in their proper situation, and the chain of dependence be preserved; the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community."[121]

The removal provisions governing PCAOB members are irreconcilable with these fundamental constitutional principles. Unlike the statutes at issue in *Morrison* and *Humphrey's Executor*, and like the ones at issue in *Myers* and *Bowsher*, the President has no power to remove members of the PCAOB, "for cause" or otherwise. This is patently unconstitutional.

First, the President has no authority to remove PCAOB members *at all*. As explained above, members of the PCAOB are removable only by the SEC. But the SEC does not stand in the President's shoes, as did the Attorney General in *Morrison*. To the contrary, whereas the Attorney General serves pursuant to the plenary authority of the President, the "independent regulatory agencies such as. . . the Securities and Exchange Commission" "are specifically designed *not* to have the quality. . . of being 'subject to the exercise of political oversight

117. *See id.* at 692 (emphasis added).

118. *See, e.g.*, *id.* at 663 (upheld statute permitting Attorney general to remove independent counsel "for good cause, physical disability, or any other condition that substantially impairs the performance of such independent counsel's duties" (internal quotation marks omitted)); Humphrey's Ex'r v. United States, 295 U.S. 602 (1935) (upheld statute authorizing President to remove Commissioners of the Federal Trade Commission for "inefficiency, neglect of duty, or malfeasance in office").

119. Buckley v. Valeo, 424 U.S. 1, 135 (1976) (per curiam).

120. THE FEDERALIST No. 72, *supra* note 89, at 396.

121. ANNALS, *supra* note 1, at 518 (remarks of James Madison).

and sharing the President's accountability to the people.'"[122] Indeed, the President's power to remove SEC Commissioners is itself restricted to instances of "inefficiency, neglect of duty, or malfeasance in office,"[123] a standard that would permit the President to remove an SEC commissioner for failing to remove a PCAOB member only if the commissioner had a *duty* to remove the Board member—a duty that will never arise, as will be shown below. And, of course, removal of an SEC commissioner by the President would not cause the removal of the miscreant Board member; that could potentially be accomplished only if the President removed and replaced a *majority* of the commissioners, who then *might* take the President's view of the Board member's transgressions.

While this stripping of presidential removal authority (through an "alter ego") is fatal, we nonetheless note that even the SEC lacks the authority to remove PCAOB members "for cause," as that term was used in *Morrison*. The SEC can remove members "for good cause shown" *only* "in accordance with section 107(d)(3)" of the Act.[124] And Section 107(d)(3) authorizes removal only for what amounts to a willful abuse of power: it provides that the SEC may remove a PCAOB member only if, after notice and hearing, it concludes that the member: "(A) has *willfully violated* any provision of this Act, the rules of the Board, or the securities laws; (B) has *willfully abused* the authority of that member; or (C) without reasonable justification or excuse, has *failed to enforce* compliance with any such provision or rule, or any professional standard."[125]

Thus, under Section 107(d)(3), the SEC may not remove a PCAOB Member for *negligently* abusing his authority—as, for example, the overzealous regulator who launches deep and onerous investigations into what he erroneously perceives as violations of PCAOB rules. Certainly the SEC may not remove

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122. Freytag v. Comm'r, 501 U.S. 868, 916 (1991) (Scalia, J., concurring) (emphasis in original) (internal citation omitted); *see also* Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 398 (1995); Mistretta v. United States, 488 U.S. 361, 387 n.14 (1989) (describing the SEC as one of the "independent agencies"); *see infra* Part IV (explaining that the SEC is not a "Department" within the meaning of the Appointments Clause).

123. MFS Sec. Corp. v. SEC, 380 F.3d 611, 619 (2d Cir. 2004).

124. Sarbanes-Oxley (SOX) Act of 2002 § 101(e)(6), 15 U.S.C. § 7211(e)(6) (2000 & Supp. II 2002).

125. *Id.* § 107(d)(3), 15 U.S.C. § 7217(d)(3).

a member who pursues an interpretation of the law, or otherwise exercises his enforcement discretion, in a manner about which reasonable people could disagree. Accordingly, the PCAOB may adopt any view of the securities laws and enforcement policies supported by a rational basis without fear of removal, even if those policies are wholly at odds with the SEC's firm view of the law and proper enforcement.

Needless to say, the power to remove those who violate the law, knowingly abuse their authority or unreasonably fail to enforce the law permits, at most, removal only of those PCAOB members who egregiously and deliberately flout their duties or engage in serious misconduct. But firing such obvious wrongdoers does not enable even the SEC, even indirectly, to require the PCAOB to pursue what the SEC views as the *best* enforcement policies and the *best* view of the securities laws. There are obviously a wide range of perfectly *lawful* ways to enforce the securities laws, just like enforcement of civil rights or antitrust laws, which vary substantially upon a change of an administration. Indeed, the range of enforcement and legal interpretation choices available to the Board that could be viewed as reasonable is virtually limitless. Any policy choice about which Congress has not spoken directly—and which the agency has unfettered authority to flesh out under *Chevron's* second prong—would be left completely to the Board, free from any threat of SEC removal.[126] Further, the President has *no* ability to effectuate *his* enforcement and regulatory policies—and thus no ability to fulfill his duty to "take care that the law is faithfully executed." Consequently, there will be no democratic check if the Board embarks on policies that the vast majority of Americans believe are completely misguided, because the polity would be unable to affect those policies or Board membership through presidential elections.

Where a governmental position "involve[s] decision making on issues where there is room for political disagreement on goals or their implementation,"[127]— as is plainly true of

126. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 986 (2005) (Under *Chevron* "step two [we defer] to the agency's interpretation so long as the construction is 'a reasonable policy choice for the agency to make.'").

127. Ruiz-Casillas v. Camacho-Morales, 415 F.3d 127, 132 (1st Cir. 2005).

the PCAOB's policies[128]—a "new administration is justified in replacing policymaking employees with members of its own party in order to ensure 'that representative government not be undercut by the tactics obstructing the implementation of policies of the new administration.'"[129] Indeed, in *Morrison*, the independent counsel's "lack[ ] [of] policymaking or significant administrative authority" was one of the primary reasons why the broad for-cause removal provision withstood constitutional scrutiny.[130] By contrast, the President's reactive ability to nudge the SEC to stop the Board from blatantly flouting the law hardly amounts to any realistic ability to influence how the Board exercises its broad discretion to enforce the federal securities laws. The removal provision of the Sarbanes-Oxley Act "taken by itself, [therefore] impermissibly interferes with the President's exercise of his constitutionally appointed functions," and, for that reason, is unconstitutional.[131]

B. *The Act's Interference with the Executive Function Taken as a Whole*

"[I]n a representative republic," our Founding Fathers recognized, it is the encroaching power of the Legislature that poses the greatest threat to liberty, because the Legislature's "constitutional powers [are] at once more extensive and less susceptible of precise limits."[132] As James Madison presciently observed, the legislature "can with greater facility, mask under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments."[133] It was, therefore, "against the enterprising ambition of [the Legislative] department that the people ought to indulge all their jealousy and exhaust all their precautions."[134]

This legislative encroachment can occur either when Congress "assumes a function that more properly is entrusted to another [branch]" or by "interfer[ing] impermissibly with [an-

128. *See supra* Part II.

129. Farber v. City of Paterson, 440 F.3d 131, 142 n.12 (3d Cir. 2006) (quoting Elrod v. Burns, 427 U.S. 347, 367-68 (1976)).

130. Morrison v. Olson, 487 U.S. 654, 691 (1988).

131. *Id.* at 685.

132. THE FEDERALIST No. 48, at 242 (James Madison) (Terence Ball ed., 2003).

133. *Id.*

134. *Id.*

other branch's] performance of its constitutionally assigned function."[135] Thus, Congress may not either aggrandize unto *itself* the power to decide cases or controversies[136] or interfere with the judiciary's ability to do so.[137] In other words, even where "a branch does not arrogate power to itself. . . the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties."[138]

Under *Morrison v. Olson*, the question is whether the statutory scheme "taken as a whole," impermissibly "reduc[es] the President's ability to control the [executive] powers wielded by" government officials, or otherwise "deprives the President of control over the [exercise of executive power as] to interfere impermissibly with his constitutional obligation to ensure the faithful execution of the laws."[139] The Sarbanes-Oxley Act divests the President of all "ability to control the [executive] powers wielded by" the PCAOB.[140] And the Act therefore impermissibly "interfer[es] with the President's exercise of the 'executive power' and his constitutionally appointed duty to 'take care that the laws be faithfully executed' under Article II."[141]

In *Morrison*, the Court held that the Ethics in Government Act, "taken as a whole," did not violate the separation of powers doctrine. In so holding, however, the Court emphasized the Independent Counsel's "limited jurisdiction and tenure and lack[ ] [of] policymaking or significant administrative authority."[142] Indeed, throughout its opinion, the Court repeatedly relied upon the fact that the Independent Counsel was "empowered. . . to perform only certain, limited duties" and that her tenure was "limited in nature" and "'temporary' in the sense that an independent counsel is appointed to essen-

135. INS v. Chadha, 462 U.S. 919, 963 (1983) (Powell, J., concurring).

136. *See, e.g.*, N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 76 (1982).

137. *See, e.g.*, Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218-19 (1995); INS v. St. Cyr, 533 U.S. 289, 300 (2001).

138. Loving v. United States, 517 U.S. 748, 757 (1996); *see also* THE FEDERALIST No. 70, *supra* note 3.

139. 487 U.S. 654, 685, 693 (1988).

140. *Id.* at 685.

141. *Id.* at 690.

142. *Id.* at 691.

tially accomplish a single task, and when that task is over the office is terminated."[143]

In light of this temporary, limited authority, the Court held that "the Executive Branch [had] sufficient control over the independent counsel to ensure that the President [was] able to perform his constitutionally assigned duties."[144] Indeed, "the Act [gave] the Attorney General several means of supervising or controlling the prosecutorial powers that may be wielded by an independent counsel."[145] The first and "[m]ost important[ ]" of these means of "supervisi[on] and control[ ]" was, of course, the Attorney General's "power to remove the counsel for 'good cause,' a power that. . . provide[d] the Executive with substantial ability to ensure that the laws are 'faithfully executed' by an independent counsel."[146] Second, the Court noted that an independent counsel would have no power at all but for the action of the Attorney General, since "[n]o independent counsel [could] be appointed without a specific request by the Attorney General"—a decision "committed to [the Attorney General's] unreviewable discretion."[147] Third, the Attorney General had the power to shape the scope of the independent counsel's authority from the outset because "the jurisdiction of the independent counsel [was] defined with reference to the facts submitted by the Attorney General."[148] And finally, "the Act requir[ed] that the [independent] counsel abide by Justice Department policy unless it was not 'possible' to do so."[149]

The PCAOB exercises far greater power than did the independent counsel in *Morrison*. Whereas the independent counsel was tasked with investigating a single matter, the PCAOB is charged with overseeing the entire accounting in-

143. *Id.* at 671-72; *see also id.* at 679 (describing the independent counsel as "a temporary 'office' the nature and duties of which will by necessity vary with the factual circumstances").

144. *Id.* at 696.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*; *see also id.* at 679 (noting that "the jurisdiction that the [Special Division] decides upon must be demonstrably related to the factual circumstances that gave rise to the Attorney General's investigation and request for the appointment of the independent counsel").

149. *Id.* at 696.

dustry and, indeed, virtually every publicly traded company in America. Whereas the independent counsel's office was temporary, terminating upon the completion of the single task to which she was assigned, the PCAOB is a permanent agency created by law. And whereas the independent counsel lacked any policy making authority and any administrative authority (save that directly needed to conduct a single investigation), the PCAOB exercises broad policy-making, administrative, investigative and other regulatory authority on a permanent and ongoing basis.

Thus, the need to hold the PCAOB accountable for its exercise of governmental power is *far greater* than it was for the independent counsel. Yet the PCAOB is not subject to greater presidential supervision and control than was the independent counsel in *Morrison*, but, indeed, to *far less* supervision and control. Unlike the Independent Counsel statute, the Sarbanes-Oxley Act *completely divests* the President of *all* authority to control the PCAOB.

First, and dispositively, the President is, as discussed in the preceding section, stripped of the very removal power that the Court in *Morrison* deemed to be the "most important" means of supervision and control. This absence of removal power, moreover, is compounded by the other restrictions on the President's ability to control the PCAOB. Neither the President nor any subordinate removable by him at will exercises any control or oversight of the PCAOB at all. To the extent that any entity has oversight authority, it is the SEC, an independent agency. Moreover, even the SEC's oversight is limited. The SEC, for example, does not exercise *any* day-to-day oversight of PCAOB activities. Rather, the PCAOB decides, on its own, how to conduct its regular inspections, whether to commence an investigation, how that investigation should proceed, and whether or not to seek sanctions for any violation of the applicable laws, rules and regulations. It is only after the PCAOB has effectively concluded its investigation, and, most significantly, after it has decided whether to impose sanctions, that its enforcement operations are subject to any oversight. This appellate-like review of the PCAOB's final decisions by an independent agency, however, simply does not amount to the presidential "supervision and control" demanded by the Constitution.

Even where the SEC exercises oversight authority, it does so through cumbersome procedures that cannot amount to "supervision and control" in any meaningful sense. For example, the SEC's oversight of PCAOB rulemaking, including its authority to approve or reject such rules, to amend them, and to rescind PCAOB authority, may be effected only through formalized notice and comment rulemaking. No one, however, would contend that the Secretary of State could effectively supervise and control her subordinates if she had to undergo notice-and-comment rulemaking every time she orders her desk officers to issue a State Department directive. The same, of course, is true of the SEC's lack of authority to supervise the PCAOB.

Finally, even this oversight is largely under a statutory standard of review so deferential that it fails to impose any significant restraint upon the PCAOB's exercise of discretion. For example, the authority to establish auditing standards through rulemaking is essential to the PCAOB's mission. Yet the SEC must approve PCAOB rules so long as it finds them "consistent with the requirements of th[e] Act and the securities laws, *or*. . . necessary or appropriate in the public interest or for the protection of investors."[150] Thus, even if a Board rule were *inconsistent* with the requirements of the Act and the securities laws, the SEC would have to approve it if it was nonetheless *appropriate in the public interest.* At a minimum, the SEC must approve any rule that is "consistent" with these laws *and* appropriate in the public interest. In either event, this standard of review is analogous to that applied by federal courts when reviewing agency rules under *Chevron*, where courts must defer to an implementing agency's reasonable construction of a statute.[151] Yet no one would suggest that the federal courts supervise and control agency rule-making power by virtue of *Chevron* review.

Accordingly, in addition to the limitations on the President's removal authority—limitations that standing alone render the PCAOB unconstitutional—the PCAOB's structure

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150. Sarbanes-Oxley (SOX) Act of 2002 § 107(b)(3), 15 U.S.C. § 7217(b)(3) (2000 & Supp. II 2002) (emphasis added).

151. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005); Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843-44 & n.11 (1984).

"taken as a whole" unconstitutionally deprives the President of the ability to effectively supervise and control the PCAOB's exercise of governmental power.

IV.
THE PCAOB VIOLATES THE APPOINTMENTS CLAUSE

The Appointments Clause is one of the Constitution's specific manifestations of the separation of powers principle. It is not mere "etiquette or protocol."[152] Nor does it serve solely as "a bulwark against one branch aggrandizing its power at the expense of another branch."[153] Rather, as the Supreme Court has held, "it is more: it 'preserves another aspect of the Constitution's structural integrity by preventing the diffusion of the appointment power.'"[154] The Clause thus provides:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.[155]

As the Supreme Court has explained, "[t]he Framers understood. . . that by limiting the appointment power, they could ensure that those who wielded it were accountable to political force and the will of the people."[156] Thus, the Clause requires that principal officers be appointed by the President with the advice and consent of the Senate.[157] And with respect

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152. Ryder v. United States, 515 U.S. 177, 182 (1995).

153. *Id.*

154. *Id.* (quoting Freytag v. Comm'r, 501 U.S. 868, 878 (1991)).

155. U.S. CONST. art. II, § 2, cl. 2.

156. *Freytag*, 501 U.S. at 884.

157. The Appointments Clause makes presidential appointment and Senate confirmation the default rule for "all" officers of the United States, while providing, in the Excepting Clause, that Congress may permit the appointment of "inferior Officers" by certain alternative means. Those officers who are not inferior (and hence not subject to the Excepting Clause) are conventionally referred to as "principal officers" *See, e.g.*, Edmond v. United States, 520 U.S. 651, 659-60 (1997).

to inferior officers, "the Clause forbids Congress to grant the appointment power to inappropriate members of the Executive Branch."[158] Rather, the Clause limits the delegation of the appointment power (as relevant here) to the heads of executive departments who are themselves directly accountable to the President.

By vesting extraordinary governmental power in an entity wholly immune from political accountability, the PCAOB violates both the letter and spirit of this Clause. Members of the PCAOB are principal officers who must be, but are not, appointed by the President with the advice and consent of the Senate.[159] But even if PCAOB members were viewed as "inferior Officers," their appointments would still violate the Clause because the SEC is not a "Department" and the SEC Commissioners, in whom the appointment power is vested, are not the SEC's "Head."

A. *PCAOB Members As Principal Officers*

The Appointments Clause provides that principal officers must be appointed by the President with the advice and consent of the Senate. As a result, if the members of the PCAOB are principal officers, then their appointment by the SEC violates the express requirements of the Appointments Clause.

The line demarcating principal and inferior officers must be drawn with reference to the Appointments Clause's core purpose of preserving political accountability. In its earliest pronouncement on the distinction between principal and inferior officers, the Supreme Court described "inferior commissioners and bureau officers" as "mere aids and subordinates of the heads of the departments."[160] More recently, the Court has explained 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 of-

158. *See Freytag*, 501 U.S. at 880.

159. PCAOB members are undoubtedly "officers of the United States" under the Appointments Clause. Any "appointee [who] exercise[s] significant authority pursuant to the laws of the United States is an 'Officer of the United States.'" Buckley v. Valeo, 424 U.S. 1, 126 (1976) (per curiam). And the PCAOB's extensive investigatory, enforcement, rule-making, and other regulatory authority plainly amounts to "significant authority." *See id.*

160. United States v. Germaine, 99 U.S. 508, 511 (1879).

ficers 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."[161] Only through such chain of command can the inferior officer's exercise of authority be democratically checked.

Supervision requires, at a minimum, two basic components. First, an inferior officer must be subject to effective discipline through the removal power, which the Supreme Court has regularly described as a "powerful tool" of supervision and control.[162] In *Edmond v. United States*, for example, the Supreme Court relied upon the Judge Advocate General's power to remove military judges *without cause* as a principal factor in concluding that these judges were inferior officers.[163] Similarly, in *Morrison v. Olson*, the Attorney General's authority to remove the independent counsel for cause was one of the key factors supporting the independent counsel's characterization as an inferior officer.[164] By contrast, as the Department of Justice has correctly concluded, members of the Regional Fishery Management Council are *not* "subject to the supervision of" the Secretary of Commerce within the "ordinary meaning of supervision" precisely because the relevant statute "severely limits the Secretary's removal power and is [therefore] designed to constrain narrowly the Secretary's ability to supervise and control the Council members he appoints."[165] The power to remove, these authorities make clear, is the *sine qua non* of direction and supervision.

The second essential component of supervision is the authority of a superior officer to guide an inferior officer's actions at the outset, through ongoing, day-to-day supervision and direction of the inferior officer's execution of his duties. In *Edmond*, for instance, the Supreme Court emphasized the

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161. *Edmond*, 520 U.S. at 663 (emphasis added).

162. *Id.* at 664.

163. *Id.* at 666; *see also id.* at 667 (Souter, J., concurring in part and concurring in the judgment) (emphasizing that administrative supervision "*combined with* [the Judge Advocate General's] power to control [the judges] by *removal* from a case, establishes that the [judges] have the necessary superior" (emphasis added)).

164. 487 U.S. 654, 671 (1988).

165. Applicability of Executive Order No. 12674 to Personnel of Regional Fishery Management Councils, 17 Op. Off. Legal Counsel 150, 155-57 (1993).

Judge Advocate General's significant ongoing, day-to-day supervision of the Coast Guard Judges, noting in particular that the Judge Advocate General exercised administrative oversight of the judges' court, was charged with the responsibility to prescribe uniform rules of procedure for the court, and was required to meet periodically with other Judge Advocates General to formulate policies and procedure regarding review of court-martial cases.[166] Critically, effective supervision requires instead that the superior officer have the authority to "direct" the inferior officer's actions from the outset.[167] The power to "review" decisions already made, by contrast, is insufficient to constitute supervision because it "does not extend to [the members] personally, but is limited to their judgments."[168]

Measured against these standards, the members of the PCAOB are principal, rather than inferior, officers. As discussed in detail in the preceding section, PCAOB members—unlike the inferior officers in *Edmond*, *Freytag*, and *Morrison*—may only be removed for what is, in effect, the willful abuse of authority.[169] Not only that, but the SEC's minimal oversight of the PCAOB's rules and sanctions is insufficient to make the Board members inferior. While the SEC possesses authority akin to appellate review over the PCAOB's rules and sanctions, this type of oversight, as noted, does not constitute direction and supervision.[170] Because the SEC conducts an after-the-fact review of PCAOB actions through notice-and-comment rulemaking, it cannot be said that the SEC may *direct* PCAOB decisions before they are made. Indeed, to conclude that the SEC directs and supervises these and other duties of the PCAOB ignores the legislative purpose of insulating the PCAOB from SEC authority.[171]

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166. *Edmond*, 520 U.S. at 664.

167. *See id.* at 664-65; *Morrison*, 487 U.S. at 671-79.

168. *Edmond*, 520 U.S. at 667 (Souter, J., concurring in part and concurring in the judgment).

169. *See supra* Part III.

170. *See Edmond*, 520 U.S. at 667 (Souter, J., concurring in part and concurring in the judgment). Nor does anything else in the Act give the SEC sufficient authority to supervise PCAOB members "personally." The SEC's power to remove or "censure" PCAOB members is limited under the Act to willful abuse of authority. *See* Sarbanes-Oxley (SOX) Act of 2002 § 107(d), 15 U.S.C. § 7217(d) (2000 & Supp. II 2002).

171. *See supra* Part I.

In short, the SEC has virtually no authority to exercise meaningful supervision and control over the PCAOB's investigatory, enforcement, rule-making, and adjudicative authority. The Act only permits the SEC to prevent the PCAOB's rules from exceeding the boundaries of rational policy choices and does not provide any oversight regarding the initiation of investigations, settlements, and other matters relating to enforcement. Moreover, the SEC's lack of supervisory authority is underscored by the Act's provision limiting the sort of "administrative oversight" that was critical to the Court's conclusion in *Edmond* that the officers were inferior.[172] Indeed, the breadth and independence of PCAOB members is indistinguishable from the commissioners or members of other U.S. agencies with extensive regulatory powers over specialized subject matters, virtually all of whom are appointed by the President with the advice and consent of the Senate.[173] The PCAOB exercises, in short, "massive power, unchecked power, *by design*."[174] This is the very definition of a principal officer who must be, but in this instance is not, appointed by the President with the advice and consent of the Senate.[175]

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172. *Edmond*, 520 U.S. at 664. Specifically, the Act provides that PCAOB rules "concerned solely with the administration" of the PCAOB take effect *without* prior approval by the SEC. 15 U.S.C. § 78s(b)(3)(A), (C) (2000); SOX § 107(b)(4), 15 U.S.C. § 7217(b)(4). In order to overturn such a rule, the SEC would have to actively abrogate it and subject it to the ordinary rule approval process, pursuant to which the SEC would then be required to approve it as long as it was "consistent" with law.

173. *See, e.g.*, 42 U.S.C. § 2996c(a) (2000) (Legal Services Corporation); 49 U.S.C. § 24302(a) (Amtrak); 47 U.S.C. § 154(a) (2000) (Federal Communications Commission); 15 U.S.C. § 2053(a) (2000) (Consumer Product Safety Commission); *id.* § 41 (2000) (Federal Trade Commission); *id.* § 78d(a) (2000) (Securities Exchange Commission); 12 U.S.C. §§ 2, 1812(a)(1), 1462a(c)(1) (2000) (Federal Deposit Insurance Corporation); *id.* § 241 (2000) (Federal Reserve Board).

174. 148 CONG. REC. S6334 (daily ed. July 8, 2002) (statement of Sen. Gramm) (emphasis added).

175. Other indicia, too, support the conclusion that PCAOB members are principal officers. *See Edmond*, 520 U.S. at 667 (Souter, J., concurring in part and concurring in the judgment) ("[h]aving a superior officer is necessary for inferior officer status, but not sufficient to establish it"); Morrison v. Olson, 487 U.S. 654, 722 (1988) (Scalia, J., dissenting) ("To be sure, it is not a *sufficient* condition for 'inferior' officer status that one be subordinate to a principal officer. Even an officer who is subordinate to a department head can be a principal officer."). For one, the PCAOB members exercise broad regulatory jurisdiction over an entire industry, including the power to enact

B. *PCAOB Members As Inferior Officers*

The Sarbanes-Oxley Act's mechanism for appointment of PCAOB members would also be unconstitutional even if those members were deemed to be inferior officers subject to the Excepting Clause. This is so because the SEC is not a Department and, even if it were, its five commissioners are not its Head.

1. *Department*

The Appointments Clause as a whole is intended to ensure political accountability: through the chain of command, the President will ultimately be accountable for the exercise of all executive power. It is true that the Excepting Clause authorizes Congress to lodge the appointment of inferior officers in the "Heads of Departments." But it is equally true that the Excepting Clause, like the Appointments Clause as a whole, is intended to ensure that those who exercise the appointment power over policy-making offices are ultimately subject to the will of the people. Indeed, throughout most of the debates surrounding the adoption of the Appointments Clause, the draft under consideration required the President to appoint *all* officers of the United States with the advice and consent of the Senate. The Excepting Clause was added only at the end of the debate as an administrative convenience, and in particular, to quell George Mason's fear that requiring Senate concurrence in the appointment of every government official would be so cumbersome as to prevent the Senate from doing any-

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rules and standards that are binding as criminal law, conduct a continuing program of inspections, and conduct disciplinary proceedings. Further, the PCAOB members set their own budget and fund that budget through a tax levied on all publicly traded companies, or on whatever subset of those public companies the PCAOB deems appropriate. *See Edmond*, 520 U.S. at 668 (Souter, J., concurring in part and concurring in judgment) (status determined in part by a "detailed look at the powers and duties of" the officers in question); *cf. Morrison*, 487 U.S. at 671-72 (holding independent counsel to be inferior officer because of limited responsibilities). Even the salaries of PCAOB members—which, at more than $450,000 for members and over $550,000 for the Chairman, far exceed the salaries of SEC Commissioners and even the President of the United States—point to principal officer status. *See* 5 U.S.C. §§ 5314-15 (2000); U.S. OFFICE OF PERS. MGMT., SALARY TABLE NO. 2005-EX: RATES OF BASIC PAY FOR THE EXECUTIVE SCHEDULE (EX) (2005), *available at* http://www.opm.gov/oca/05tables/pdf/ex.pdf; 3 U.S.C. § 102 (2000).

thing else.[176] It was "perfectly obvious. . . both from the relative brevity of the discussion [the Excepting Clause] received, and from the content of that discussion, that it was intended merely to make clear. . . that those officers appointed by the President with Senate approval could on their own appoint their subordinates, who would, of course, by chain of command still be under the direct control of the President."[177]

In light of the historical underpinnings of the Appointments Clause, the Supreme Court has emphasized that the Excepting Clause is an "administrative convenience."[178] And, from its earliest pronouncements on the matter, the Court has recognized the limited scope of the "Heads of Departments" upon whom the appointment power could be devolved, holding consistently that the "Departments" referenced in the Clause include only those entities that resemble the cabinet departments and, in particular, those entities that, like the cabinet departments, are directly accountable to the President.[179] For only then, "[t]he Framers understood," could it be ensured that "those who wielded [the appointment power] were accountable to political force and the will of the people."[180] The Excepting Clause thus reflects the understanding that the President must retain ultimate responsibility and political accountability for his appointees. It does not permit appointments by independent agencies that are not heads of departments, because Congress is not authorized to vest appoint-

176. *See* 2 RECORDS, *supra* note 1, at 539.

177. *Morrison*, 487 U.S. at 720-21 (Scalia, J., dissenting).

178. *Edmond*, 520 U.S. at 660 (citing United States v. Germaine, 99 U.S. 508 (1879)).

179. *See* Buckley v. Valeo, 424 U.S. 1, 127 (1976) (per curiam) ("The phrase 'Heads of Departments,' used as it is in conjunction with the phrase 'Courts of Law,' suggests that the Departments referred to are themselves in the Executive Branch or at least have some connection with that branch."); Cunningham v. Neagle, 135 U.S. 1, 63 (1890) (describing "the recognition in the constitution, and the creation by [A]cts of [C]ongress, of executive departments, which have varied in number from four or five to seven or eight, the heads of which are called 'cabinet ministers'"); United States v. Mouat, 124 U.S. 303, 307 (1888) ("the heads of departments" consisted of "what are now called the members of the cabinet"); *Germaine*, 99 U.S. at 510 (referring to the Executive "departments" as "a part or division of the executive government, as the Department of State, or of the Treasury") (internal quotation marks omitted).

180. Freytag v. Comm'r, 501 U.S. 868, 884 (1991).

ment power in an entity insulated from the President's direct oversight.

In its most recent case in this area, *Freytag v. Commissioner of Internal Revenue*, the Supreme Court embraced and explained at length the rationale for this understanding of "Department." The Court made clear that the *sine qua non* of a "Department"—the feature that was necessary to render an entity sufficiently similar to a cabinet department so as to qualify it as a "Department" under the Appointments Clause—is that the Department be directly accountable to the President and, through him, the people. At issue in *Freytag* was whether the Tax Court, an Article I court, was a "Department" under the Appointments Clause. In holding that it was not, the Court concluded that the term "Department" was confined only to those agencies that resemble a cabinet department and, most significantly, only those the "heads [of which] are subject to the exercise of political oversight and share the President's accountability to the people."[181] As the Court explained, "[c]onfining the term 'Heads of Departments' in the Appointments Clause to executive divisions like the Cabinet-level departments constrains the distribution of the appointment power. . . . The Cabinet-level departments are limited in number and easily identified. Their heads are subject to the exercise of political oversight and share the President's accountability to the people."[182]

Indeed, to hold otherwise, the Court explained, would frustrate "the Framers' determination to limit the distribution of the power of appointment":

> The Appointments Clause prevents Congress from distributing power too widely by limiting the actors in whom Congress may vest the power to appoint. The Clause reflects our Framers' conclusion that widely distributed appointment power subverts democratic

181. *Id.* at 886.

182. *Id.* In concluding that the Tax Court was not a "Department," the Supreme Court in *Freytag* also discussed Congress's 1969 decision to "mak[e] the Tax Court an Article I court rather than an executive agency." *Id.* at 887 (internal quotation marks omitted). But this discussion was *in the alternative to* the Court's principal holding discussed in the text. *See id.* ("Even if we were not persuaded [by the "Heads of Departments" argument], we still could not accept [the Commissioner's] treatment of the intent of Congress, which enacted [the 1969] legislation . . .").

> government. *Given the inexorable presence of the administrative state, a holding that every organ of the Executive Branch is a department would multiply indefinitely the number of actors eligible to appoint.* The Framers recognized the dangers posed by an excessively diffuse appointment power and rejected efforts to expand that power.[183]

Thus, "[e]ven with respect to 'inferior Officers,' the Clause allows Congress only limited authority to devolve appointment power on the President, *his* heads of department, and the courts of law."[184] And because, unlike the cabinet departments, the Tax Court was an independent agency beyond the President's supervisory control, "[t]reating the Tax Court as a 'Department' and its Chief Judge as its 'Head' would," the Court concluded, "defy the purposes of the Appointments Clause" and "the meaning of the Constitution's text."[185] The Court's conclusion in *Freytag* is reinforced by other provisions in the Constitution, which likewise used the term "executive department" in reference to the cabinet departments, including the Opinion Clause,[186] and the Twenty-Fifth Amendment.[187]

With respect to the appointment of PCAOB members, the SEC clearly is not a "Department" as the term is used in the Appointments Clause. To the contrary, the SEC was "specifically designed *not* to have the quality. . . of being 'subject to the exercise of political oversight and sharing the President's

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183. *Id.* at 885 (emphasis added).

184. *Id.* at 884 (emphasis added); *see also* Weiss v. United States, 510 U.S. 163, 187 (1994) (Souter, J., concurring) ("[A]lthough they allowed an alternative appointment method for inferior officers, the Framers still structured the alternative to ensure accountability and check governmental power: any decision to dispense with Presidential appointment and Senate confirmation is Congress's to make, not the President's, but Congress's authority is limited to assigning the appointing power to the highly accountable President or the heads of federal departments, or, where appropriate, to the courts of law.").

185. *Freytag*, 501 U.S. at 888.

186. *See* U.S. CONST. art. II, § 2, cl. 1 (The President "may require the Opinion, in writing, of the principal Officer in each of the executive Departments").

187. *See id.* amend. XXV, § 4 (empowering the Vice President, together with a majority of the "principal officers of the executive departments," to declare the President "unable to discharge the powers and duties of his office").

accountability to the people.' "[188] Indeed, independent agencies like the SEC, occupying as they do the "headless Fourth Branch" of our government, are the diametrical opposites of the cabinet departments.[189] To conclude that such independent agencies are "Departments" within the meaning of the Appointments Clause would not only contravene *Freytag*; it would contravene the very purpose of the Appointments Clause, allowing the appointment power to be "diffused" across entities that are, by design, immune "to political force and the will of the people."[190] Accordingly, even if PCAOB members were "inferior Officers," their appointment by the SEC would still violate the Appointments Clause.

2. *"Head"*

Another, independent constitutional impediment to the SEC's appointment of PCAOB members is the fact that the SEC as a whole is charged with the appointment responsibility. The historical record demonstrates that one basic purpose of the Appointments Clause was to avoid such diffusion of the appointment authority among multi-member committees. Thus, the "Framers recognized the dangers posed by an excessively diffuse appointment power and rejected efforts to expand that power" beyond a single person.[191] Alexander Hamilton, for example, explained the benefits of lodging the appointment power in a single individual:

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188. *Freytag*, 501 U.S. at 916 (Scalia, J., concurring); *see also supra* note 122 and accompanying text. Although *Freytag* declined to address "any question involving an appointment of an inferior officer by the head of one of the principal agencies, such as the Federal Trade Commission, Securities and Exchange Commission, the Federal Energy Regulatory Commission, the Central Intelligence Agency, and the Federal Reserve Bank of St. Louis," read in context, it is clear that the Court was simply stating that the term "Department" was not "limit[ed] . . . to those departments named in 5 U.S.C. § 101." *Freytag*, 501 U.S. at 887 n.4. The Court did not, however, purport to limit its reasoning, which, as explained in the text, makes clear that the so-called independent agencies are not "Departments" within the meaning of the Appointments Clause.

189. Synar v. United States, 626 F. Supp. 1374, 1398 (D.D.C.), *aff'd*, Bowsher v. Synar, 478 U.S. 714 (1986); *see also* Humphrey's Ex'r v. United States, 295 U.S. 602, 628 (1935) (holding that an independent agency "cannot in any proper sense be characterized as an arm or an eye of the executive").

190. *Freytag*, 501 U.S. at 884.

191. *Id.* at 885.

> The sole and undivided responsibility of one man will naturally beget a livelier sense of duty and a more exact regard to reputation. He will, on this account, feel himself under stronger obligations, and more interested to investigate with care the qualities requisite to the stations to be filled, and to prefer with impartiality the persons who may have the fairest pretensions to them. He will have *fewer* personal attachments to gratify, than a body of men who may each be supposed to have an equal number; and will be so much the less liable to be misled by the sentiments of friendship and affection. *A single, well directed man by a single understanding, cannot be distracted and warped by that diversity of views, feelings, and interests, which frequently distract and warp the resolutions of a collective body.*[192]

And he explained the particular dangers of lodging such power in a collective body:

> The choice which may at any time happen to be made under such circumstances, will of course be the result either of a victory gained by one party over the other, or of a compromise between the parties. In either case, the intrinsic merit of the candidate will be too often out of sight. . . . In the last, the coalition will commonly turn upon some interested equivalent—"Give us the man we wish for this office, and you shall have the one you wish for that." This will be the usual condition of the bargain. And it will rarely happen that the advancement of the public service will be the primary object either of party victories or of party negotiations.[193]

As Justice Story would later observe, "one man of discernment is better fitted to analyze and estimate the peculiar qualities, adapted to particular offices, than any body of men of equal, or even superior discernment."[194] These historical authorities demonstrate that the aversion to appointments-by-committee was not limited to appointments made by the Presi-

192. THE FEDERALIST No. 76, at 492 (Alexander Hamilton) (Sherman F. Mittell ed., 1938) (emphasis added).

193. *Id.*

194. Joseph Story, 3 COMMENTARIES ON THE CONSTITUTION § 1523 (1833).

dent, but rather extended to any appointment, including that of an inferior officer by a department head.

The meaning of the phrase "Heads of Departments" is spelled out in early Supreme Court precedent. The Supreme Court has stated that "under the constitution of the United States, all its officers were appointed by the president, by and with the advice and consent of the senate, or by a court of law, or the head of a department; *and the heads of the departments were defined in that opinion to be what are now called the members of the cabinet.*"[195] Similarly, in *Cunningham v. Neagle*, the Supreme Court recognized that the President "is further enabled to perform" his duties with the assistance of the executive departments, "who are familiarly called cabinet ministers."[196] "Heads of Departments" were thus thought of as cabinet secretaries, and not committees contained within the cabinet departments. The idea that departments of the Executive Branch could be run by committees would have been alien to the Framers. The Appointments Clause therefore does not permit the appointment of an inferior officer by a multi-member commission such as the SEC.[197]

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195. United States v. Mouat, 124 U.S. 303, 307 (1888) (emphasis added).

196. 135 U.S. 1, 63 (1890).

197. That the Excepting Clause provides for certain appointments to be made by "courts of law" is not inconsistent with the Framers' aversion to Executive Branch appointments by multi-member committees. With narrow exceptions, this provision applies only to Judicial Branch appointments. *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 676 n.13, 677 (1988) (recognizing "constitutional limitation on 'incongruous' interbranch appointments" that prohibits Congress from vesting courts with "power to appoint an officer in an area in which they have no special knowledge or expertise, as in, for example, a statute authorizing the courts to appoint officials in the Department of Agriculture or the Federal Regulatory Commission"); *Ex parte* Siebold, 100 U.S. 371, 398 (1879). The Framers' concerns about the loss of political accountability engendered by appointments-by-committee obviously do not apply to the appointment of inferior officers in the Judicial Branch, given that the Constitution seeks to insulate judicial officers from political accountability. If anything, the Excepting Clause's reference to courts of law—as opposed to, say, the chief judges of the courts of law—demonstrates that the Framers understood the difference between vesting the appointment power in a collective body and vesting it in the head of a collective body. And, with respect to inferior officers appointed by another officer of the Executive Branch, the Framers deliberately and expressly chose to require the latter.

Moreover, if there is a head of the SEC, it is the SEC's Chairman. In 1950, the President exercised his statutorily defined power to "provide for the appointment and pay of the *head*. . . of any agency"[198] by delegating to the Chairman of the SEC "the executive and administrative functions of the Commission, including functions of the Commission with respect to (1) the appointment and supervision of personnel employed under the Commission, (2) the distribution of business among such personnel and among administrative units of the Commission, and (3) the use and expenditure of funds."[199] As a result of thus "control[ling] key personnel, internal organization and the expenditure of funds, the chairman [of the SEC] exerts far more control [over the SEC] than his one vote would seem to indicate."[200] Indeed, the SEC itself recognizes on its website that the Chairman is "the SEC's top executive."[201] Viewing the Chairman as the head of the SEC also reinforces the political accountability required by the Appointments Clause, because the Chairman, unlike the SEC commissioners, serves at the pleasure of the President. The Chairman is therefore politically accountable to the President for his appointment of PCAOB members, whereas the SEC commissioners are not.

Indeed, if the Chairman is not the "head" of the SEC, then numerous important SEC supervisors below the commission level—such as the Directors of the SEC's four main divisions and the agency's General Counsel—have all been unconstitutionally appointed. All of these individuals are inferior officers who were appointed to their positions by the Chairman rather than by the Commission as a whole.[202] If the Chairman

198. Reorganization Act of 1949 §2(2), 5 U.S.C. § 904(2) (2000) (emphasis added).

199. Reorganization Plan No. 10 of 1950, 15 Fed. Reg. 3175 (1950), *reprinted in* 5 U.S.C. app. at 114-15 (2000), *and in* 64 Stat. 1265 (1950).

200. SEC v. Blinder, Robinson & Co., 855 F.2d 677, 681 (10th Cir. 1988).

201. U.S. Securities and Exchange Commission, *Current SEC Commissioners*, http://www.sec.gov/about/commissioner.shtml (last visited Aug. 6, 2007).

202. *See* Reorganization Plan No. 10 of 1950, *supra* note 199 (providing for appointment of SEC personnel by the Chairman); *see, e.g.*, Press Release, SEC, SEC Chairman Christopher Cox Appoints Andrew Donohue to Be the Commission's Next Director of the Division of Investment Management (Apr. 10, 2006), *available at* http://www.sec.gov/news/press/2006/2006-52.htm. *See also supra* Part IV (discussing the Excepting Clause of the Constitution's Appointments Clause).

is not the "head" of the SEC, then these officers were not appointed by the "Head of a Department" in accordance with the Excepting Clause—thus casting a significant constitutional cloud over all of their enforcement actions and other exercises of executive authority.

A District of Columbia district court recently agreed that the SEC commissioners are not the head of the SEC for purposes of the Appointments Clause.[203] The court held, however, that private plaintiffs could not obtain relief because the Chairman had participated in the appointment process and concurred in each of the SEC's appointments to date, thereby rendering the constitutional violation harmless.[204] This latter holding is clearly incorrect. The Chairman's participation and concurrence does not change the fact that it was the *majority* of the *Commission*, not the Chairman, who appointed the Board members. Common sense tells us that concurring in a group decision is quite different than exercising unfettered individual decisionmaking, such that it is impossible to assume that the same persons would have been appointed to the PCAOB had the Chairman been acting alone. And, indeed, courts have held that even the *non*-voting presence of constitutionally improper persons in a decisionmaking process will have, as a matter of law, a constitutionally prohibited impact.[205]

There is no need to speculate on this score here, as an investigation by the Government Accountability Office (GAO) determined that the SEC's selection process for the PCAOB's original members was marred by disputes between the Chairman and the other commissioners, who "wanted more involve-

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203. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., No. 06-0217, 2007 WL 891675, at *4-5 (D.D.C. Mar. 21, 2007), *appeal docketed*, No. 07-5127 (D.C. Cir. Apr. 18, 2007).

204. *Id.* at *5.

205. *See, e.g.*, FEC v. NRA Political Victory Fund, 6 F.3d 821, 826-27 (D.C. Cir. 1993); *see also id.* at 825 (presence of additional, improperly present members "during the [agency's] deliberations" will necessarily "have some impact (even though the extent of which may be impossible to measure) on how the [agency] decides matters before it"); Andrade v. Lauer, 729 F.2d 1475, 1496 (D.C. Cir. 1984) ("it cannot be assumed that action in accord with the correct procedures would have produced the same result"); *cf.* United States v. Jones, 763 F.2d 518, 523 (2d Cir. 1985) ("[w]hen alternate jurors are present during the deliberations, the possible prejudice is that defendants are being tried not by a jury of 12, as is their right, but by a larger group").

ment in the process and thought it best for each Commissioner independently to do due diligence on the potential candidates."[206] These disputes had a demonstrable effect on the Chairman's choices: "[a]s Commissioners raised concerns, the SEC Chairman. . . would adjust the process to accommodate the[ir] input."[207] Pressure by other Commissioners, who felt as if they were being cut out of the process, even forced the SEC Chairman to abandon his preferred choice for chairman of the PCAOB.[208] The GAO explained the result:

> [The appointment] strategy broke down when the Commission was unable to agree upon and attract a consensus candidate to serve as PCAOB chairman. As the statutory deadline [for the appointment] approached, SEC was ultimately forced to appoint members to the PCAOB that had not been adequately vetted.[209]

In short, the actual experience of the SEC in choosing the initial members of the PCAOB belies the district court's assertion that the involvement of the other Commissioners was harmless, and vividly illustrates Hamilton's concern that appointments of federal officers not be tainted by "that diversity of views, feelings, and interests, which frequently distract and warp the resolutions of a collective body."[210] In ignoring that concern here and vesting the appointing power in a multimember body, Congress further violated the Appointments Clause.

V.
CONCLUSION

The PCAOB wields enormous regulatory power over the accounting profession. Congress, however, deliberately designed this agency to insulate and isolate it from all political influence. In doing so, Congress has impeded the President's

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206. GOVERNMENT ACCOUNTABILITY OFFICE, SECURITIES AND EXCHANGE COMMISSION, ACTIONS NEEDED TO IMPROVE PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD SELECTION PROCESS 9 (2002), *available at* http://www.gao.gov/new.items/d03339.pdf.

207. *Id.* at 21.

208. *See id.* at 9-10.

209. *Id.* at 3.

210. THE FEDERALIST No. 76, *supra* note 192, at 492.

constitutional duty to faithfully execute the laws. The Sarbanes-Oxley Act strips the President of all removal and other supervisory authority, thereby rendering him powerless to influence the direction of the PCAOB's policy and enforcement decisions. Further, the Act entrusts the appointment of PCAOB members to a multi-member committee of commissioners of an independent agency, rather than to the President or to the head of an executive department. The structure and function of the PCAOB thus plainly violates basic constitutional provisions designed to prevent abuses of power and deprivations of individual liberty by subjecting those vested with the state's coercive power to the control of a democratic system in which the people retain ultimate sovereignty.