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The Unaccountability of the Accounting Regulators: Analyzing the Constitutionality of the Public Company Accounting Oversight Board, 42 J. Marshall L. Rev. 1019 (2009)

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THE UNACCOUNTABILITY OF THE ACCOUNTING REGULATORS:

ANALYZING THE CONSTITUTIONALITY OF THE PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD

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I. INTRODUCTION

With the fall-out of major investment companies such as Freddie Mac and Fannie Mae, issues of financial security and economic stability have never been more important.[1] Currently, twenty-six major companies are under investigation following the recent market collapse, and authorities are looking into accounting fraud concerns.[2] With the financial market in an uproar, it is easy to see the significant power held by government agencies that regulate financial matters.[3] With more companies being accused of fraudulent activity, the need to regulate and enforce penalties on these companies is greater than ever.[4]

The Securities and Exchange Commission ("SEC" or

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1. *See* Former President Bush's Remarks on the National Economy, 44 WEEKLY COMP. PRES. DOC. 1225, 1226 (Sept. 19, 2008), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2008_presidential_documents&docid=pd22se08_txt-24.pdf (emphasizing the seriousness of the current financial crisis and the need for confidence to be restored in the market); Jeff Cox, *Bailout Failure Intensifies Fear in Stock Market*, Sept. 29, 2008, http://www.cnbc.com/id/26945122 (reporting that the fall in financial giants such as Lehman Brothers and other investment companies has led to a financial emergency).

2. Alan Zibel, *Fannie, Freddie Disclose Subpoenas, Investigations*, Sept. 29, 2008, http://www.usatoday.com/money/economy/housing/2008-09-29-fannie-freddie_N.htm.

3. *See* Press Release, Bob Barr, Congress Should Vote No on Bailout (Sep. 29, 2008), *available at* http://www.lp.org/news/press-releases/congress-should-vote-%E2%80%98no%E2%80%99-on-bailout-says-bob-barr (expressing concern that the cause of the recent financial instability is the government's failure to adequately investigate fraud or adjust accounting rules to account for the numerous markets within the financial industry).

4. *See* Kelli Arena, *FBI Probing Bailout Firms*, Sept. 24, 2008, http://money.cnn.com/2008/09/23/news/companies/fbi_finance/index.htm (showing that the FBI is looking into possible mortgage fraud in the recent bankruptcies of Fannie Mae, Lehman Brothers, and AIG).

"Commission") and the Public Company Accounting Oversight Board ("PCAOB" or "Board") are two agencies with significant power over the regulation and enforcement of financial and accounting standards.[5] Together, both the SEC and PCAOB hold considerable power in the current financial crisis.[6] Unlike the SEC, the PCAOB is completely shielded from presidential control, leading some to wonder whether a government agency possesses too much control.

An issue of first impression recently reached the United States Court of Appeals for the District of Columbia Circuit ("District of Columbia Circuit") regarding the constitutionality of an independent agency having the sole authority to remove members of another independent agency only after a finding of "good cause."[7] In *Free Enterprise Fund v. Public Company Accounting Oversight Board*,[8] an accounting firm[9] brought suit against the PCAOB, claiming the structure of the Board unconstitutionally restricted the president's power to remove officers of the Board.[10] In a 2-1 decision, the District of Columbia Circuit found the PCAOB to be constitutional, affirming[11] the district court's decision.[12] Recently, in a 5-4 decision, the District of Columbia Circuit denied an en banc rehearing, and the Free Enterprise Fund subsequently filed an appeal to the United States Supreme Court.[13] The Supreme Court granted certiorari on May

5. Steve Seidenberg, *Suit Challenges Sarbanes Audit COP*, 5 No. 7 A.B.A. J. E-REPORT 3 (Feb. 17, 2006).

6. *Id.*

7. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667, 674 (D.C. Cir. 2008).

8. *Id.*

9. The accounting firm Beckstead & Watts had previously been reviewed by the PCAOB in 2004 and was found to have not acted in conformity with accounting standards on eight prior occasions. Jane B. Quinn, *Lawsuit Threatens Sarbanes-Oxley Act*, WASHINGTON POST, July 20, 2008, http://www.washingtonpost.com/wp-dyn/content/article/2008/07/19/AR2008071900106.html. Specifically, Beckstead & Watts had failed to disclose and look into the transactions of companies they were auditing on eight separate occasions. *Id.* The PCAOB, therefore, filed suit against Beckstead & Watts. *Id.* Thereafter, Beckstead & Watts brought this lawsuit against the PCAOB seeking declaratory and injunctive relief, as well as the halt of the PCAOB's investigation against Beckstead & Watts. *Free Enter. Fund*, 537 F.3d at 670.

10. *Free Enter. Fund*, 537 F.3d at 670.

11. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., No. 06-0217(JR), 2007 WL 891675, at *1 (D.D.C. Mar. 21, 2007).

12. *Free Enter. Fund*, 537 F.3d at 685. Notably, Justice Kavanaugh, in his dissent, considered this case to be the "most important separation-of-powers case regarding . . . removal powers to reach the courts in the last 20 years." *Id.* In addition to expressing the significance of the majority's decision, Justice Kavanaugh included a thirty page dissent expressing his concern with the outcome of the case. *Id.* at 685-715.

13. Petition for a Writ of Certiorari, Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., (U.S. Jan. 5, 2009) (No. 08-861), 2009 WL 52297.

18, 2009, and is set to hear the case before June 2010.[14]

This Comment will argue against the constitutionality of the PCAOB, enacted under the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley Act" or "Act").[15] Part II will give a brief history of the executive's power to remove government officers, explaining the importance of allowing the president to have authority over the removal of government officials, as well as where the removal power stands today. Part II will also describe the Sarbanes-Oxley Act and the purpose for its enactment. It will further explain the creation of the PCAOB under the Sarbanes-Oxley Act and the powers conferred to the Board members. In addition, Part II of this Comment will discuss the SEC's role in governing the board members of the PCAOB.

In Part III, this Comment will analyze the District of Columbia Circuit's recent decision[16] regarding the constitutionality of the PCAOB, as well as Justice Kavanaugh's dissenting opinion.[17] Also, the Comment will compare this decision with other Supreme Court cases to examine the decision's conformity with precedent. Additionally, Part II will explain why the structure of the PCAOB unduly restricts the president's removal power. In Part IV, the Comment will propose an amendment to the structure of the PCAOB to avoid any constitutional issues as well as additional amendments to the PCAOB to ease criticisms over its setup.

The petition argues that the case warrants Supreme Court review because the issue goes "to the heart of the relationship between the Legislative and Executive Branch." *Id.* at *7.

14. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667 (D.C. Cir. 2008), *cert. granted*, 129 S. Ct. 2378 (U.S. May 18, 2009) (No. 08-861).

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

16. *Free Enter. Fund*, 537 F.3d at 685.

17. Although this Comment is focused on the removal issue presented within the case, the plaintiff's also brought a claim against the PCAOB stating that the Appointments Clause of the Constitution had been violated as well. *Id.* at 668-69. This was based on the fact that members of the PCAOB are appointed by the SEC, and heads of offices are not allowed to appoint unless the position is one that is considered an inferior office. *Id.* at 671-72. This Comment will show that the PCAOB is not an inferior office, and therefore the president also must appoint members of the PCAOB with the advise and consent of the Senate. *See* Comment *infra* Section III (analyzing the PCAOB under the *Edmond's* test). This Comment, however, focuses on the PCAOB's restrictions on the president's removal power, rather than a potential Appointments Clause violation.

II. BACKGROUND

A. The Purpose and History of Executive Removal Power

Article II Section II of the Constitution vests the appointment power of governmental officials in the executive branch.[18] Although not explicitly provided for in the Constitution, the president's power to remove officers[19] of the government has been inherently found in Article II Section II, following the Congressional Convention of 1789.[20] The authority of the president to remove government officers is important in order to ensure separation of powers between the legislative and executive branches, and to emphasize the purpose of vesting the executive power in one person to create a unified democracy.[21]

The first Supreme Court case to thoroughly analyze the scope of the president's power to remove government officers was *Myers v. United States*.[22] There, the Court found that the president had

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18. U.S. CONST. art. II, § 2, cl. 2. This clause reads as follows:
> [The President] shall have power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he 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 . . . ."

19. The Supreme Court has interpreted "officers" of the government to include persons who hold executive positions under the government and exercise significant authority as a result of the position. Buckley v. Valeo, 424 U.S. 1, 125-26 (1976).

20. 1 ANNALS OF CONG. 481-82 (Joseph Gales ed., 1789). During the Convention, James Madison found that the power of removal was "incident[al] to the power of appointment." *Id.* Madison also declared that in order for the president to act in his fullest capacity, he must also have the power to remove government officials. *Id.* This would allow for the president to ensure that the laws were being faithfully executed. *Id.* at 482. Madison's opinion is in conformity with the framers' intention on setting up a strong unitary executive branch. STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE 33-34 (Yale University Press ed., New Haven & London 2008).

21. Myers v. United States, 272 U.S. 52, 116 (1926). The argument in support of the president's power to remove officials came from the Constitution's language which vests the "executive power in the President." *Id.* at 117. Congressional members believed that this language gave the president a grant of power to execute the laws of the land. *Id.* Therefore, in order to execute these laws, the president needed the authority to appoint officials to assist him as well as remove them when the president no longer had confidence in their abilities or judgments. *Id.*

22. *Id.* at 109. There, the president was required by statute to receive consent from the Senate before removing first-, second-, and third-class postmasters from their official capacity. *Id.* at 107. However, the issue of the president's removal power had previously been briefly discussed in dicta within past Supreme Court cases. *See, e.g.*, Shurtleff v. United States, 189 U.S. 311, 317 (1903) (finding that under article II section 4 the president may

exclusive authority to remove officers[23] of the government, and Congress could not impede on that authority.[24] The Court found that the president's removal power extended to all officers appointed and given executive authority by the president, including those who were also responsible for quasi-judicial duties.[25] Therefore, the Court found that the postmaster in *Myers* could only be removed by the President.[26] Following the Court's decision in *Myers*, numerous decisions have reiterated and re-emphasized the importance of giving the president the authority to remove government officials.[27]

Following *Myers*, the first case to limit the president's removal power was *Humphrey's Executor v. United States*.[28] There, the Court allowed Congress to limit the president's removal power over the Federal Trade Commissioner[29] ("FTC") by requiring the president to find just cause before removal.[30] In its

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remove executive officers for other causes than treason, bribery, and high crimes and misdemeanors if he deems the cause sufficient); Parsons v. United States, 167 U.S. 324, 340 (1897) (stating debates and opinions showed a continued practice of providing unlimited removal power to the president); *In Re* Hennan, 38 U.S. (1 Pet.) 230, 233 (1839) (finding the removal power belongs exclusively to the president).

23. The postmaster's functions, powers, and duties were transferred to the United States Postal Service in 1970. Postal Reorganization Act, Pub. L. No. 91-375, 84 Stat. 719 (1970).

24. *Myers*, 272 U.S. at 114.

25. *Id.* at 135. Quasi-judicial refers to a position that is essentially judicial in character, but not constitutionally prescribed to the role. Kevin T. Abikoff, *The Role of the Comptroller General in Light of Bowsher v. Synar*, 87 COLUM. L. REV. 1539, 1542 (1987). Examples include members of the board of county commissioners, and city councils. Carolyn M. Van Noy, *The Appearance of Fairness Doctrine: A Conflict in Values*, 61 WASH. L. REV. 533, 535 (1986).

26. *Myers*, 272 U.S. at 163-64.

27. *See* Bowsher v. Synar, 478 U.S. 714, 731-33 (1989) (emphasizing the importance of allowing the president to remove those with significant authority); Springer v. Philippine Islands, 277 U.S. 189, 201-02 (1928) (stating that unless the removal power is specifically provided for, the president retains sole authority to remove officers of the government); Morgan v. Tenn. Valley Auth., 115 F.2d 990, 992-93 (6th Cir. 1940) (finding absent a specific removal provision, the president retains the power to remove government official pursuant to his duty to make sure "the laws are faithfully executed").

28. 295 U.S. 602, 629 (1935). There, President Roosevelt attempted to remove a member of the Federal Trade Commission after deciding that the member did not share his same beliefs and goals. *Id.* at 618-19. The commissioner refused to resign, stating that under the Federal Trade Commission Act, the president may only remove a commissioner for "inefficiency, neglect of duty, or malfeasance in office." *Id.* at 619.

29. The FTC was enacted in order to regulate unfair trade and practices in commerce. Dirs. of the Colum. L. Rev. Ass'n, Inc., *The Federal Trade Commission and Reform of the Administrative Process*, 62 COLUM. L. REV. 671, 672 (1962). The FTC was formed in accordance with the Federal Trade Commission Act of 1914. 15 U.S.C. §§ 41-58 (2006).

30. *Humphrey's*, 295 U.S. at 629. Although this decision did not overrule

opinion, the Court distinguished *Myers*, stating that unlike the postmaster who was a "purely" executive officer, the FTC needed independence[31] from executive authority because of its roles in both the judicial and legislative branches, as well as the executive.[32] Therefore, the Court in *Humphrey's* concluded that the ability of the president to have exclusive removal power only extends to purely executive officers.[33] In contrast, for positions such as the FTC, where impartiality justified independence from the president, Congress is able to limit the president's removal authority to an extent.[34]

Finally, the Supreme Court in *Morrison v. Olson* again limited the president's removal power.[35] There, the Court found Congress' good cause restriction on removing an inferior[36] executive officer by the attorney general, who is an alter ego[37] of the president, constitutional.[38] The Court emphasized that the

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the holding in *Myers*, it raised doubt as to the scope of the decision. *Id.* at 630-31.

31. The term independent agency is used to describe any governmental regulatory body created by statute that is outside of the executive branch's departments. Dominique Custos, *The Rulemaking Power of Independent Regulatory Agencies*, 54 AM. J. COMP. L. 615, 615-16 (2006). Examples include the Federal Communications Commission ("FCC") and the United States Environmental Protections Agency ("EPA"). *Id.* at 616 n.7.

32. *Humphrey's*, 295 U.S. at 629. Specifically, the Court stated that the FTC was responsible for making investigations and reports for Congress as a legislative agency, as well as acting as a master in chancery under the judicial system by conducting investigations. *Id.* at 628.

33. *Id.* at 631-32. The Supreme Court's holding in *Humphrey's* shifted the government's view that there were three formal branches of government into a more functionalist approach aimed at flexibility. Peter P. Swire, *Incorporation of Independent Agencies Into the Executive Branch*, 94 YALE L.J. 1766, 1767-68 (1985). *See also* Mistretta v. United States, 488 U.S. 361, 374 (1989) (holding constitutional a requirement that the president may only remove a member of the Sentencing Commission for good cause); Weiner v. United States, 357 U.S. 349, 353 (1958) (affirming Congress' ability to restrict the president's removal power when independence from the executive branch is needed).

34. *Humphrey's*, 295 U.S. at 629.

35. 487 U.S. 654, 657 (1988).

36. An inferior officer is a position with limited executive duties, and Congress may by law "vest the appointment of such inferior Officers . . . in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. CONST. art. II, § 2, cl. 2.

37. The attorney general of the United States is in charge of the Department of Justice, which is an executive branch department. U.S. Department of Justice: Office of the Attorney General, http://www.usdoj.gov/ag/about-oag.html (last visited Sept. 24, 2009).

38. *Morrison*, 487 U.S. at 658. The Act in question allowed for the attorney general to appoint an independent counsel to investigate officers of the United States when he perceived wrongdoings in governmental roles, such as the Justice Department in this case. *Id.* at 654. In *Morrison*, independence from the president was needed because the target of the investigations conducted by the independent counsel included the president, vice president, and other

critical question in deciding whether limits on the president's removal power were constitutional is to analyze if the removal restrictions hamper the president's ability to perform his constitutional duties.[39]

B. The Removal Power as It Stands Today

Although the cases interpreting the extent of the president's removal power are at times unclear, a few principles have been established. First, the president has the power to remove government officials who are deemed "purely executive," and Congress may not impose any limitations on this power.[40] In contrast, Congress may limit the president's removal power if it is an office where independence from the president is necessary.[41] But Congress may never completely extinguish the president's ability to remove government officials.[42] Although the Supreme Court has composed general rules outlining the president's removal power, commentators and analysts still find the limitations on removal power controversial.[43]

C. The SEC and the Enactment of the Sarbanes-Oxley Act

One of the most important delegations of power by the president is the ability to regulate the financial markets and the economy.[44] The SEC was enacted under the Securities Exchange Act of 1934[45] and provided the Commission with authority to oversee the financial and securities markets in the United

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high-ranking officials within the executive branch. *Id.* at 661. The Sentencing Committee was also a temporary agency and only lasted for the duration of the lawsuit. *Id.*

39. *Id.* at 691. The Court found that the president's power over the independent counsel was not completely stripped away since the president retained ample authority over the attorney general. *Id.* at 692.

40. *Myers*, 272 U.S. at 109.

41. *Humphrey's*, 295 U.S. at 628.

42. *See id.* at 631-32 (finding that the president may remove the federal trade commissioner for cause).

43. *Compare* Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 83-84 (1994) (stating that Congress enacts independent agencies in order to diminish presidential control); *with* PHILLIP J. COOPER, BY ORDER OF THE PRESIDENT: THE USE & ABUSE OF EXECUTIVE DIRECT ACTION 224 (University Press of Kansas 2002) (finding that the ability of the president to take any action he wishes as to the removal of governmental officials is far too broad).

44. *See Free Enter. Fund*, 537 F.3d at 677-78 (stating that the president gave the SEC authority to make rules and investigate the financial industry).

45. 15 U.S.C. § 78d (2006). The Securities Exchange Act of 1934 was enacted to empower the SEC to have broad authority over all aspects of the securities industry. U.S. Securities and Exchange Commission, http://www.sec.gov/about/laws.shtml (last visited Sept. 24, 2009).

States.[46] With the advice and consent of the Senate, the president has the ability to appoint the five members of the SEC and has the sole authority to remove its members for cause.[47] Because the president appoints the SEC commissioners and the SEC is an independent agency overseeing financial aspects typically controlled by the government, the SEC is an extension of the president's control.[48]

In response to major corporate company accounting scandals[49] during 2002, the legislature enacted the Sarbanes-Oxley Act.[50] Companies such as Enron eventually collapsed, after years of inaccurate accounting reporting that led to massive misstatements within financial reports.[51] The purpose of the Sarbanes-Oxley Act was to establish new and enhanced accounting standards for public firms as well as to provide extra security to shareholders and investors in the financial markets.[52] The Sarbanes-Oxley Act also created new regulations among auditors and other accounting

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46. U.S. Securities and Exchange Commission, http://www.sec.gov/about/laws.shtml (last visited Sept. 24, 2009).

47. 15 U.S.C. § 78d(a). This for-cause restriction on the president's removal power makes the SEC an independent agency. *See* MFS Sec. Corp. v. SEC, 380 F.3d 611, 619 (2d Cir. 2004) (finding the president had an implied right to remove SEC commissioners for cause).

48. *See* Roberta S. Karmel, *Creating Law at the Securities and Exchange Commission: The Lawyer as Prosecutor*, 61 LAW & CONTEMP. PROBS. 33, 38 (1998) (stating that the "SEC is an independent federal agency organized as a commission").

49. For example, Enron was involved in a fraudulent reporting scandal with its accounting firm Arthur Anderson, which resulted in the dissolution of the company as well as criminal charges for fraud in financial reporting. Bruce Nussbaum, *Can You Trust Anyone Anymore?*, BUSINESSWEEK, Jan. 28, 2002, http://www.businessweek.com/magazine/content/02_04/b3767701.htm. These scandals were a direct result of a company's failure to separate ownership of the company from control of the company. HENRY N. BUTLER & LARRY E. RIBSTEIN, THE SARBANES-OXLEY DEBACLE 1 (The AEI Press 2006).

50. Sarbanes-Oxley Act § 1. *See also* Christine N. Parise, *Sarbanes-Oxley Act*, 22 ANN. REV. BANKING & FIN. L. 33, 33 (2002) (finding that the Sarbanes-Oxley Act was enacted hastily to combat problem in corporate corruption scandals). Since its enactment, many commentators have expressed skepticism and disagreement over the benefits of enacting the Sarbanes-Oxley Act. *See, e.g.*, BUTLER & RIBSTEIN, *supra* note 49, at 6 (illustrating the negative effects Sarbanes-Oxley has on the market value of companies and questioning the ability of the Act to prevent future scandals).

51. Kristin Kenny, *Sarbanes-Oxley Act: Balancing the Rights of Investors and the Rights of Corporate Officers*, 13 TEMP. POL. & CIV. RTS. L. REV. 151, 161-62 (2003).

52. Parise, *supra* note 50, at 33-35. Legislatures believed the Sarbanes-Oxley Act was necessary in order to restore confidence in the nation's capital markets after the risks Enron had exposed to potential investors. *See* 148 CONG. REC. S6327–06, S6327 (2002) (finding that the public's distrust in the financial market posed a threat to the health of the economy). Legislatures also believed the Act would improve the quality of independent accounting services and strengthen the independence of auditing firms as well. *Id.*

professionals to protect against future accounting disasters.[53]

In order to ensure that the Sarbanes-Oxley Act was faithfully executed, legislators required the creation of the PCAOB.[54] They found that the previous self-governing policies of the accounting standards had failed,[55] and public corporations now needed an independent board to investigate, regulate, and punish violators of accounting and financial fraud.[56]

The PCAOB is composed of five full-time members[57] who

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53. For example, the Sarbanes-Oxley Act requires an auditing firm to rotate its lead auditor every five years in an attempt to catch any irregular accounting practices by a previous auditing firm. Robert A. McTamaney, *The Sarbanes-Oxley Act of 2002: Will it Prevent Future "Enrons?"*, LEGAL BACKGROUNDER, Aug. 9, 2002, at 2. Additionally, an auditor may not accept any consulting or advisory compensation fees because an auditor is only allowed to perform auditing procedures on a company. *Id.*

54. *See* 15 U.S.C. § 7211(a) (2006) (stating that "[t]here is established the Public Company Accounting Oversight Board, to oversee the audit of public companies that are subject to the securities laws, and related matters, in order to protect the interests of investors."). Besides the creation of the PCAOB, the Sarbanes-Oxley Act is aimed at enhancing financial disclosure, regulating securities conflicts of interest, regulating corporate governance, and enhancing the SEC's ability to regulate the financial market. *See* Lyman P.Q. Johnson & Mark A. Sides, *The Sarbanes-Oxley Act and Fiduciary Duties*, 30 WM. MITCHELL L. REV. 1149, 1149 (2004) (examining the provisions and implications of the Sarbanes-Oxley Act).

55. Prior to the regulations imposed by the Act, accounting standards were self-regulated, and auditors were not required to maintain complete independence from companies. Jeremy S. Blocher, *Inspection and Investigation of Public Accounting Firms Under the Sarbanes-Oxley Act: Real Reform?*, 110 PENN ST. L. REV. 741, 745-46 (2000). Problems arose when companies began misrepresenting corporate earnings in order to give the false impression of revenue growth to potential investors. BUTLER & RIBSTEIN, *supra* note 49, at 7-11.

56. 148 CONG. REC. S6327-06, S6330 (statement of Mr. Sarbanes). However, during the Congressional debate, Senator Gramm voiced his concern with the PCAOB's ability to create too many regulations concerning accounting standards without supervision. 148 CONG. REC. S6327-06, S6334. Instead, Mr. Gramm found that accounting standards should not be able to fit into a "one-size-fits-all" category and should be subjected to individual rather than government regulation. 148 CONG. REC. S6327-06, S6335.

57. 15 U.S.C. § 7211(e)(1). Each board member of the PCAOB has to satisfy the following criteria: (1) be a prominent individual of integrity and reputation; (2) be able to demonstrate commitment to public interest and interest of investors; (3) understands issuer's responsibilities for financial disclosure under the securities laws; and (4) understands the obligations of auditors in reporting on financial statements. HAROLD S. BLOOMENTHAL, SARBANES-OXLEY IN PERSPECTIVE 23 (Subrata Paul ed., West Group 2002). Of the five members, two members of the Board have to be certified public accountants. 15 U.S.C. § 7211(e)(2). But there cannot be more than two certified accountants either. *Id.* This is troubling considering that these Board members are in charge of all accounting regulations for public companies, and three of the members are not experienced in accounting practices.

serve five-year terms, not exceeding a ten-year maximum.[58] The SEC has the authority to appoint the chairperson and other board members of the PCAOB.[59] Further, the Sarbanes-Oxley Act gives the Commission the ability to remove members of the PCAOB only for good cause.[60] When creating the PCAOB, Congress determined that the Board needed to be separated from the SEC in order to provide "an extra guarantee of its independences and its plenary authority" to deal with accounting concerns.[61] Among other duties,[62] the PCAOB is given the power to establish rules and standards for accounting firms relating to the preparation of audit reports, to conduct investigations and disciplinary proceedings, as well as to conduct inspections of registered public accounting firms.[63] Although the SEC must approve rules written by the PCAOB, the Board's investigatory and enforcement powers remain virtually isolated from SEC control.[64] The SEC also retains authority in reviewing and, more importantly, modifying disciplinary actions taken by the PCAOB during the course of investigations.[65] These restrictions are the most important

58. 15 U.S.C. § 7211(e)(5).

59. 15 U.S.C. § 7211(e)(4).

60. 15 U.S.C. § 7211(e)(6). The SEC's good-cause removal power is limited to a finding that a PCAOB board 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.

15 U.S.C. § 7217(d)(3) (2006).

61. 148 CONG. REC. S6327-06, S6331 (statement by Mr. Sarbanes). It is interesting to note that before enacting the Sarbanes-Oxley Act, Congress debated over the need for an independent board. *See* 148 CONG. REC. S6327-06, S6335 (stating that some legislators did not find a need for the Board, and instead believed the SEC should handle such an important responsibility to allow for more regulation from the executive branch).

62. 15 U.S.C. § 7211(c).

63. 15 U.S.C. § 7211(c)(2)(3)(4).

64. 15 U.S.C. § 7211(g). Members of Congress who disagreed with the setup of the PCAOB found that this restriction was meaningless, instead arguing that the board members would be given "massive unchecked authority." 148 CONGR. REC. S6327-06, S6334.

65. 15 U.S.C. § 7217(c)(3). Additionally, although not expressly written in the statute, final SEC decisions on PCAOB disciplinary proceedings are reviewable by a federal circuit court. *See* Donna M. Nagy, *Playing Peekaboo with Constitutional Law: The PCAOB and Its Public/Private Status*, 80 NOTRE DAME L. REV. 975, 977 (2005) (arguing that the PCAOB is a public actor for purposes of state law and constitutional issues because it registers accounting firms that audit public companies, enacts rules for auditing, and imposes discipline on accounting firms). Included in the statute creating the PCAOB was a section stating that "[n]o member . . . [of] the Board shall be deemed to be an officer . . . of the Federal Government." 15 U.S.C. § 7211(b). But the Supreme Court has previously disagreed in other contexts, finding

regulations given to the SEC to monitor and control the PCAOB's actions.[66]

Since the creation and enforcement of the Sarbanes-Oxley Act, many criticisms have been voiced by those affected by the new regulations.[67] For instance, commentators claim that the Sarbanes-Oxley Act has kept many companies from going public and also caused previously public companies to go private.[68] Further, studies have concluded that many provisions of the Sarbanes-Oxley Act do not benefit investors, deviating from the original intention of the bill.[69] Lastly, the PCAOB also was given the ability to regulate foreign firms attempting to do business in the United States, causing some global firms not to register as a company in the United States.[70]

In the end, the PCAOB has been given broad authority to regulate, investigate, and discipline public companies.[71] Essentially, the PCAOB has become "an agency that is at once the

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that when the government creates a corporation by a federal law for the furtherance of governmental objectives, the entity is considered governmental regardless of the statute. *See* Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 400 (1995) (holding that Amtrak was a government entity for First Amendment purposes). As a result of Supreme Court precedent, the PCAOB, like Amtrak, was also found to be a government entity. *Free Enter. Fund*, 537 F.3d at 668.

66. 15 U.S.C. § 7217(c).

67. The Sarbanes-Oxley Act has contributed to numerous problems, including the substantial costs incurred by companies in keeping up with the new regulations as well as the government's intrusion into previously private aspects of public companies. BUTLER & RIBSTEIN, *supra* note 49, at 43-44. *But see id.* at 2-3 (discussing the benefits derived from the enactment of the Sarbanes-Oxley Act, such as increased information and disclosures and corporations taking responsibility for its actions).

68. Brief of Amicus Curiae Washington Legal Foundation et al. in Support of Plaintiffs-Appellants Free Enter. Fund and Beckstead and Watts, LLP Urging Reversal, (Aug. 3, 2009), (No. 08-861), 2007 WL 4973853.

69. *See* Roberta Romano, *The Sarbanes-Oxley Act and the Making of a Quack Corporate Governance*, 114 YALE L.J. 1521, 1529-43 (2005) (reviewing approximately fifty empirical studies and finding the Sarbanes-Oxley Act's provisions to be largely ineffective in improving corporate governance or performance that would protect investors).

70. *See* Tzung-bor Wei, *The Equivalence Approach to Securities Regulation*, 27 NW. J. INT'L L. & BUS. 225, 277-80 (2007) (stating that the PCAOB's power over international companies created constitutional and legal concerns in foreign countries).

71. *See* Perry E. Wallace, *Accounting, Auditing and Audit Committees After Enron, Et. Al.: Governing Outside the Box Without Stepping Off the Edge in the Modern Economy,* 43 WASHBURN L.J. 91, 117 (2003) (finding that the Sarbanes-Oxley Act vested the PCAOB with significant authority to effectuate accounting rules and regulations); *See also* JAMES HAMILTON & TED TRAUTMANN, SARBANES-OXLEY ACT OF 2002: LAW AND EXPLANATION 20 (CCH Incorporated 2002) (stating that the purpose of the PCAOB was to establish a board that had broad powers to set regulatory standards for accounting principles).

lawmaker, the tax collector, the inspector, the sheriff, the prosecutor, the judge, and the jury—yet without the political accountability that normally constrains even independent agencies."[72] With the continuation of problems facing financial reporting, the PCAOB will continue to have significant unchecked power within the government.[73]

III. ANALYSIS

In upholding the constitutionality of the PCAOB, the majority opinion is anything but clear. While stressing the importance of relying upon Supreme Court precedent, the majority fails to cite one case in which a court has upheld the constitutionality of an independent agency's ability to appoint and remove members of another independent agency for cause.[74]

A. The Rationale Underlying the Majority Opinion

The court's opinion, written by Justice Rogers, began by recognizing that in order for the Free Enterprise Fund's facial challenge to succeed, the Fund faced a heavy burden in showing that the "provisions of which it complains are unduly severe in all circumstances and cannot be constitutionally applied."[75] After explaining the burden of proof, the majority looked to the president's power to remove government officers and accepted that the inherent power to remove is encompassed within Article II of the Constitution.[76] The court then employed three methods to find that the PCAOB's structure is sound and therefore constitutionally permitted: (1) by classifying the PCAOB as an inferior office

72. Brief of The Cato Institute et al. as Amici Curiae Supporting Petitioner, Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., (Aug. 3, 2009) (No. 08-861).

73. In fact, SEC Inspector David Kotz recently sent a letter to Congressman Paul E. Kanjorski, urging Congress to expand the jurisdiction of the PCAOB from solely regulating publicly traded companies to also regulating broker-dealers and money managers. Ian Katz, *SEC Investigator Asks for Bigger Bounty Program to Detect Fraud*, THE COMPLIANCE EXCHANGE, July 2, 2009, http://compliancex.typepad.com/compliancex/2009/07/sec-investigator-asks-for-bigger-bounty-program-to-detect-fraud-.html. As a result, Congressman Kanjorski recently drafted a bill stating that greater regulatory control by the PCAOB would allow for risks to be reduced. H.R. 1212, 111th Cong. (2009) (proposed by Congressman Paul E. Kanjorski).

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

75. *Id.* at 670. This standard was originally set forth in *United States v. Salerno*, where the Court stated that a facial challenge to a legislative act is "the most difficult challenge to mount successfully." 481 U.S. 739, 745 (1987). This is apparent because the showing of one set of facts leading to the act being unconstitutional is not enough to overcome the heavy burden of a facial challenge. *Id.* Rather, every conceivable circumstance has to lead to the act being unconstitutional. *Id.*

76. *Free Enter. Fund*, 537 F.3d at 678-79.

located within the SEC; (2) by looking at the Supreme Court's decision in *Morrison*; and (3) by de-emphasizing the importance of the SEC's for-cause removal limitation.

First, the court characterized the PCAOB as an inferior office of the SEC,[77] rather than its own independent agency of the government.[78] This distinction was critical to the majority's conclusion because if the PCAOB was classified as an inferior office, the SEC would be constitutionally permitted to exercise authority regarding appointment and removal of the members of the PCAOB.[79] Furthermore, the president's ability to remove members of the PCAOB would not be as crucial because inferior offices are not seen as possessing significant power in comparison to independent agencies.[80] In fact, the majority conceded that if the PCAOB was classified as an independent agency, then the Board's structure would be unconstitutional.[81]

In labeling the PCAOB, the court defined an inferior office as a position that answers to a higher-ranking official of the executive branch, using the definition set forth in *Edmond v. United States*.[82] The court classified the PCAOB as an inferior office because it found that the PCAOB lacked expansive decision-making power, as the Board is regulated by the SEC.[83] Looking to *Edmond,* the court found this "lack" of authority as decisive in determining the PCAOB's inferior status.[84] Although the court acknowledged that removal authority was a factor used in *Edmond* to determine the inferior status of an individual, it de-emphasized the importance of this factor.[85] Therefore, the majority found that the PCAOB was not so far independent as to classify it as its own agency.[86]

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77. Notably, even if the Court were to find the PCAOB to be an inferior officer, neither the PCAOB nor the United States as intervener were able to find a case where inferior officers of an independent agency are removable only for cause. Transcript of Record at 4, *Free Enter. Fund*, 537 F.3d 667 (2008) (No. 07-5127). The lack of precedent on this structure further supports characterizing the PCAOB as an independent agency.

78. *Free Enter. Fund*, 537 F.3d at 672.

79. *See id.* (stating that the Board is composed of inferior officers subject to SEC control).

80. *See* U.S. CONST. art. II, § 2 (stating that "Congress may by Law vest the Appointment of such inferior Officers, as they think proper . . . or in the Heads of Departments.").

81. *Free Enter. Fund*, 537 F.3d at 681 n.9.

82. *Id.* at 672 (citing Edmond v. United States, 520 U.S. 651, 662 (1997)).

83. *Id.*

84. *Id.*

85. *Id.* at 674. The Court stated that removal power "is not the linchpin of the analysis; rather, an officer is inferior as long as he is 'statutorily subject to direction and supervision in all significant activities.'" *Id.* at 674 n.4.

86. *See Free Enter. Fund*, 537 F.3d at 673-74 (declaring that the Free Enterprise Fund overinflated the restrictions imposed by the SEC's removal limitations).

Second, the court rationalized the constitutionality of the PCAOB by comparing the present case to the Supreme Court's prior holding in *Morrison*.[87] The court claimed that all functions performed by the PCAOB are subject to oversight by the SEC,[88] giving the president indirect authority in maintaining control over the PCAOB through the SEC under his Article II powers.[89] The Court explained that if the president wanted to influence the PCAOB's affairs, he could nominate SEC commissioners who shared his same goals and ideologies.[90] The commissioners could then appoint PCAOB members with these same goals creating a board with the same ideals as the president. Further, the court noted that unlike the independent counsel's significant powers in *Morrison*,[91] the PCAOB is not able to bring cases to court or issue final decisions without the SEC's permission.[92] The court also emphasized that the decision in *Morrison* was not intended as a rigid test in defining the parameters of officers subject to removal by the president.[93] Rather, the court asserted that the test should look to whether Congress' enactment of the PCAOB impeded the president's duty to execute the laws of the land.[94] In this case, the court found that the president still possessed ample authority over

87. *See Free Enter. Fund*, 537 F.3d at 681 (finding when the structure of the PCAOB is analyzed within the context of *Morrison*, the president's powers "extend comfortably beyond the minimum required to 'perform his constitutionally assigned duties'").

88. However, this is debatable because under the Sarbanes-Oxley Act, the PCAOB enjoys independence in determining the direction of which investigations are undertaken, which firms are investigated, and who ultimately testifies at trial. Harold S. Bloomenthal, *Existence of PCAOB and Future of Sarbanes-Oxley Threatened*, 30 No. 9 SEC. & FED. CORP. L. REP. 1, 3 (2008). Further, if the PCAOB chooses not to impose a sanction on a public firm, the SEC does not have the authority to create a sanction on a company on its own initiative. *Id.* Additionally, although the PCAOB needs approval from the SEC before enacting a law, the statute does not allow for the SEC to create laws on its own initiative. *Id.*

89. *Free Enter. Fund*, 537 F.3d at 680-81. In analyzing cases where the PCAOB and the SEC have disagreed over proposed regulations, the powers the PCAOB possess seem far more significant than the majority contends. For example, in a recent dispute over a proposed regulation to an accounting standard, the SEC did not agree with the PCAOB over an amendment and lobbied hard to leave the standard unchanged. Tammy Whitehouse, *A Behind-the-Curtain Look at AS5*, COMPLIANCE WEEK, Feb. 26, 2008, http://www.complianceweek.com/index.cfm. However, the PCAOB refused to follow the SEC's guidance, and the standard was ultimately amended. *Id.*

90. *Free Enter. Fund*, 537 F.3d at 682-83.

91. In that case, the independent counsel was given the power to appoint a special prosecutor. *Morrison*, 487 U.S. at 657. The special prosecutor then had limited duties concerning investigating and prosecuting certain crimes committed by government officials during his tenure in office. *Id.* at 655.

92. *Free Enter. Fund*, 537 F.3d at 681.

93. *Id.* at 673 n.3.

94. *Id.* at 682.

the PCAOB.[95] Therefore, because the court found that the PCAOB did not impede the president's power, it upheld the constitutionality of the Board.

Lastly, the court downplayed the for-cause limitation that restricts the SEC's power to remove members of the PCAOB.[96] The majority stated that this limitation, by itself, was insignificant because the Sarbanes-Oxley Act gave the SEC such pervasive overall authority over the Board.[97] Therefore, although the majority acknowledged that the PCAOB limits the president's removal power to an extent, it found this not to be significant enough to invalidate the Board because other parts of the statute contravene the for-cause restriction's strength.[98]

In discussing the removal power, the majority seemingly indicated that hindering the president's removal power by itself is not significant enough to warrant the court rendering the statute unconstitutional.[99] The court proceeded on the notion that although the limits on the executive's removal power may not be constitutional, the court would not invalidate the PCAOB because the SEC is still able to regulate parts of the Board.[100] The court ultimately seemed concerned that invalidating the PCAOB would lead to constitutional problems with other existing independent agencies and did not want this to occur.[101] As it stands now, the future of the PCAOB is unclear. With the Supreme Court granting review, the court's decision will ultimately have significant impacts on the regulatory industry.[102]

B. Analyzing the Court's Opinion and the Reasoning Employed

In analyzing the reasoning underlying the court's opinion in

95. *Id.* at 683-85.
96. *Id.* at 674 n.4.
97. *Id.* at 673-75.
98. *Id.*
99. *See id.* at 682 (stating that the plaintiff's contentions were an exaggerated response to a "relatively insignificant innovation").
100. *Id.* at 683-84.
101. *Id.* at 683.
102. *Id.* Commentators have indicated that Justice Scalia may take this as an opportunity to expand again the broad grant of removal power in the executive branch as he has openly voiced his disapproval in his dissenting opinion in *Morrison*. *See* Stephen Bainbridge, *Peekaboo, the Constitution Doesn't See You*, TCS DAILY, Feb. 14, 2006, http://www.tcsdaily.com/article.aspx?id=021406B (analyzing Scalia's opinion on limiting the President's removal power in the context of the PCAOB's structure). It is also interesting to note that Justice Kavanaugh clerked for Justice Kennedy who very well might be the deciding vote if this case were to reach the Supreme Court. United States Court of Appeals for the District of Columbia Circuit Homepage, http://www.cadc.uscourts.gov/internet/home.nsf/content/VL+-+Judge+-+BMK (last visited Sept. 24, 2009).

Free Enterprise Fund, it is important to remember the impact of the majority's decision.[103] In allowing independent agencies like the PCAOB to exercise coercive power[104] over companies and individuals, it simultaneously deprives citizens from exercising control over these agencies due to the inability to elect members of the PCAOB.[105] The majority's reasoning is flawed in four critical aspects: (1) the PCAOB should have been defined as an independent agency, rather than an inferior office; (2) the opinion goes against the PCAOB's legislative history and congressional intent; (3) the opinion contravenes well established Supreme Court precedent; and (4) the court underestimated the harmful impact its decision may have.

1. *The PCAOB Is an Independent Agency Rather than an Inferior Office*

First, the PCAOB should have been defined by the court as an independent agency, rather than an inferior office. In defining the PCAOB as an inferior office, the court failed to consider in its analysis the significant power prescribed to the PCAOB through the Sarbanes-Oxley Act. Rather, in determining whether the PCAOB is an independent agency, the court should have looked at the four-factor test, as articulated in *Edmond*[106]: (1) whether the Board is subject to removal by a higher executive branch official; (2) whether the Board performs limited duties, with involvement

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103. Some have been skeptical about finding the PCAOB to be unconstitutional because of the failure to add a severability clause within the Sarbanes-Oxley Act, which would lead to the entire act being struck down if found unconstitutional. BUTLER & RIBSTEIN, *supra* note 49, at 6. Nevertheless, this could be beneficial because Congress would be able to scrutinize and possibly restructure the Act, because the original act was created quickly in an effort to curtail the effects of Enron. Forrest Whitesides, *PCAOB Constitutional Suit Gets Underway*, THE TRUSTED PROFESSIONAL, Feb. 1, 2007, http://www.nysscpa.org/trustedprof/207/tp2.htm.

104. These powers include the ability to enact regulatory provisions for public companies that, among other consequences, impose significant costs on companies. BUTLER & RIBSTEIN, *supra* note 49, at 1-3.

105. *Free Enter. Fund*, 537 F.3d at 686 (Kavanaugh, J., dissenting). This potential threat to the liberty and security of the governed was why Congress emphasized the importance of keeping the three branches of government separated. *Id.* In fact, Justice Scalia has repeatedly expressed his concern over independent agencies in general because the president is isolated from the ability to control public policy issues addressed by independent agencies. KENNETH F. WARREN, ADMINISTRATIVE LAW IN THE POLITICAL SYSTEM 205 (4th ed. 2004).

106. *Edmond*, 520 U.S. at 661-62. Although the majority opinion mentioned *Edmond*, it failed to analyze the PCAOB in terms of all four factors, instead stating merely that Judge Kavanaugh's test was unfounded. *See Free Enter. Fund*, 537 F.3d at 675 (claiming that "our dissenting colleague's two-part test for determining inferior status . . . sets up a new paradigm in order to reach a desired result.").

in minimal administrative tasks; (3) whether the Board has limited jurisdiction; and (4) whether the Board has limited tenure.[107]

Here, although the PCAOB is subject to removal by a "higher authority" in a sense, the SEC is not collectively a member of the executive branch and instead is an independent agency.[108] This is important because the SEC is not a part of the executive branch and consequently does not give the president power over it by default, especially considering the for-cause limitations on the ability to remove SEC commissioners.[109] Next, the PCAOB does not perform limited governmental duties. Instead, the PCAOB not only enforces laws and regulations imposed on public companies in a regulatory sense but also enacts rules governing accounting standards and essentially taxes public companies by creating a supporting fee payable to the Board.[110] Therefore, the Board's powers reach far beyond performing limited duties or minimal administrative tasks. As to the third factor, the PCAOB does not have limited jurisdiction. Instead, the PCAOB affects a far-reaching majority of the country, considering its ability to regulate every public company and accounting firm doing business in the United States.[111] The PCAOB also seems to gain power as the size of both companies and accounting firms increases. Last, the PCAOB was not enacted under the Sarbanes-Oxley Act for a limited tenure.[112] Instead, the PCAOB was created by Congress to have a permanent role within the accounting regulatory and

107. *Edmond*, 520 U.S. at 661-62. A test similar to the *Edmond* test was used in *Morrison* to differentiate between an inferior and principal officer, and the same test would be used in deciding independent agency status. *Morrison*, 487 U.S. at 672-73. This is the same test because finding the PCAOB to be a principal officer would then qualify it as an independent agency because the SEC is not considered a part of the executive branch. *Id.* The Supreme Court in *Morrison* found that the independent counsel was an inferior officer after finding that his appointment was for a limited tenure, was only for violations of the government, and the counsel had no authority to perform administrative functions. *Id.*

108. *See Free Enter. Fund*, 537 F.3d at 701 n.9 (Kavanaugh, J., dissenting) (stating that the majority's attempt to categorize the PCAOB as an inferior officer "defies long-accepted terminology and does not account for the meaning and effect of for-cause removal restrictions").

109. When a government office is part of the executive branch, the president has at-will removal power and has the ability to influence these officers into acting in conformity with his beliefs. CALABRESI & YOO, *supra* note 20, at 16.

110. As stated above, the PCAOB is in charge of enacting new regulations, enforcing those regulations through investigations, and prosecuting companies if necessary. 15 U.S.C. § 7211(c).

111. 15 U.S.C. § 7211(a). Recently, the SEC is asking Congress to increase the reach of the PCAOB by allowing the Board to audit reports regarding issuers, brokers, dealers, and any other companies that are subject to securities laws. H.R. 1212.

112. 148 CONG. REC. S6327-06, S6630 (statement of Sen. Sarbanes).

enforcement process. Therefore, when analyzed under the *Edmond* test employed by the Supreme Court, the majority should have categorized the PCAOB as an independent agency rather than an inferior office.[113]

The for-cause limitation is also problematic for the majority's contention that the PCAOB is an inferior office. The SEC's true inferior officers, such as the SEC general counsel, are removable at will by the SEC and perform minimal tasks in comparison to the PCAOB.[114] In contrast, the SEC is only given authority to remove a PCAOB member after a finding of willful misconduct.[115] This removal limitation does not allow the SEC to remove a board member with whom they disagree, or a member who fails to act in a particular way.[116] Ultimately, when analyzed under the *Edmond* test, and taking into account the for-cause removal limitation, the PCAOB is an independent agency rather than an inferior office of the SEC.[117]

2. *The Majority Opinion Conflicts with Legislative History and Congressional Intent*

Second, the court's finding that the president is not stripped of his power to regulate the PCAOB because the SEC maintains control over the Board and the president in turn has power over the SEC is far-reaching.[118] In determining Congress' intent in assigning the SEC with the power to appoint and remove members of the PCAOB, the legislative history of the Sarbanes-Oxley Act is

113. *See Free Enter. Fund*, 537 F.3d at 709-10 (Kavanaugh, J., dissenting) (finding that the majority incorrectly analyzed the PCAOB by looking solely at whether or not the PCAOB was monitored by the SEC).

114. *Id.* at 703.

115. 15 U.S.C. § 7217(d)(3).

116. *Id.*

117. The majority seems to concede that if a court were to define the PCAOB as an independent office, then the PCAOB's removal structure would be unconstitutional. *See Free Enter. Fund*, 537 F.3d at 681 n.9 (stating that "[i]ndeed, with that premise [that the Board is itself an independent agency], the dissent's conclusion that the Board's structure is unconstitutional conveniently follows.").

118. In fact, the SEC chairman has criticized the PCAOB because of the excessive and overburdening internal governance regulations enacted by its members. David M. Katz, *Sarbox on Ice?*, CFO, Feb. 1, 2007, http://www.cfo.com/article.cfm/8628974/c_8649159. This further calls into doubt the ability of the SEC to monitor and control the PCAOB effectively. *Id.* Former President Bush also commented on the implementation of accounting rules enacted under the PCAOB, stating that there needed to be a change in the way the PCAOB implemented its laws. *Id.* This statement came as a response to the high costs imposed on businesses due to the rules enacted by the PCAOB under the Act. *Id.* However, under its current structure, President Obama is unable to use his executive power to fix these problems. *Id.*

informative.[119] Throughout the debates over the enactment of the PCAOB and the Sarbanes-Oxley Act, the congressional record includes a discussion on the importance of the independence of the Board numerous times.[120] In fact, when the Act was brought to Congress, Senator Gramm emphasized that the purpose of the Act was to give the PCAOB powerful, unchecked authority that affected everyone in the country one way or another.[121] Therefore, the majority cannot contend that the PCAOB is not powerful, when the senators involved in the creation of the statute directly stated otherwise and stressed the importance of allowing the PCAOB to be independent and powerful.[122] Instead, looking at the legislative history surrounding the enactment of the Sarbanes-Oxley Act provides us with the roles Congress expected the PCAOB to have.[123]

Further support for Congress' intention in creating the PCAOB as a powerful entity is granting the Board with the ability to tax and generate its own revenue.[124] In order to register with the PCAOB there is a support fee, which becomes part of the Board's annual budget.[125] This stands in sharp contrast to other

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119. *See Free Enter. Fund*, 537 F.3d at 687-88 (Kavanaugh, J., dissenting) (stating that the decision to isolate the PCAOB from executive control was not inadvertent).

120. *See* 148 CONG. REC. S6327-06, S6330-38 (categorizing and emphasizing the need for the PCAOB's independence fifteen times throughout Congress' proposal of the Sarbanes-Oxley Act).

121. *See* 148 CONG. REC. S6327-06, S6333-34 (statement by Sen. Gramm) (stating that "I would have to say the board . . . I set up in our bill has massive unchecked power . . . . [T]hat is the nature of what we are trying to do here."). Further, Senator Sarbanes, when introducing the structure of the PCAOB, labeled it a "strong independent board." 148 CONG. REC. S6327-06, S6330.

122. *Compare Free Enter. Fund*, 537 F.3d at 681 (explaining that the Board is made up of inferior officers and the SEC has complete and absolute authority over the PCAOB), *with* 148 CONG. REC. S6327-06, S6331 (emphasizing that the Board was created to be independent from the SEC).

123. In fact, Senator Gramm urged Congress to "think long and hard . . . about this board exerting tremendous, unbridled, unchecked power." 148 CONG. REC. S6327-06, S6334. Senator Gramm ultimately voted for enacting this law, knowing that the PCAOB would have substantial power in the decision making of the United States. *The U.S. Congress Votes Database*, WASHINGTON POST, http://projects.washingtonpost.com/congress/ (last visited Sept. 8, 2009).

124. *See* 15 U.S.C. § 7219(d)(1) (explaining that the Board is allowed to charge a reasonable accounting support fee to establish and maintain the PCAOB). The PCAOB sets fees for public companies based upon the company's equity market capitalization. 15 U.S.C. § 7219(g).

125. Sarbanes-Oxley Act § 1. It is estimated that the rules set up by the PCAOB cost public companies a total of thirty-five billion dollars per year. John Berlau, *Puts & Calls: Sarbanes-Oxley 'Reform' Harming Economy*, COMPETITIVE ENTERPRISE INSTITUTE, Nov. 15, 2005, http://cei.org/gencon/019,04988.cfm. Additionally, members of the PCAOB make an average of $515,500 a year, far higher than other governmental

governmental entities where both Congress and the president have a role in setting up the agency's budget and limiting the particular agency's spending, inherently giving the president power over those agencies.[126] Rather, the PCAOB's fee revenue generating ability allows independence in creating a massive budget with limitless opportunities, including excessive wages. Therefore, the PCAOB's ability to generate an unlimited surplus of revenue further separates the president from the ability to monitor the PCAOB through budgetary regulations.[127]

3. *Supreme Court Precedent Contravenes the Majority's Reasoning*

Third, Supreme Court precedent runs contrary to the reasoning employed by the majority.[128] When contemplating the scope of the president's authority to remove government officers, *Myers* emphasized the broad ranging power the president possessed.[129] Since that decision, the Supreme Court has only allowed Congress to limit the president's removal power on two occasions[130] and only with skepticism.[131] Thus, the limitations in the case should not be used to expand the circumstances in which

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entities. PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD 2008 BUDGET 1 (2008), http://www.pcaobus.org/About_the_PCAOB/Budget_Presentations/2008.pdf. In fact, Aiken, the SEC chairman, stated that members of the PCAOB make more per year than three SEC commissioners combined. Sarah Johnson, *SEC Rails Against PCAOB Salary Hike*, CFO, Dec. 18, 2007, http://www.cfo.com/article.cfm/10327975. Therefore, the court should not have found that the PCAOB are "inferior officers" of the SEC when, among others reasons, they make triple the salary of a commissioner.

126. In fact, the majority states one of the ways in which the president usually controls independent agencies is his budgetary influence. *Free Enter. Fund*, 537 F.3d at 680. However, this is not the case here as the Board does not need any type of budget from the president due to the fees charged to public companies when regulating accounting standards. 15 U.S.C. § 7219(d).

127. For instance, the PCAOB's budget was $103 million in 2004 which was twice that of other regulatory agencies such as the National Association of Securities Dealers. PETER J. WALLISON, AMERICAN ENTERPRISE INSTITUTE FOR PUBLIC POLICY RESEARCH, REIN IN THE PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD (Feb. 2005), http://www.aei.org/docLib/20050124_FSO February2005.pdf.

128. *Free Enter. Fund*, 537 F.3d at 697 (Kavanaugh, J., dissenting) (stating that the text, history, and precedent of the president's removal power indicate that the PCAOB is unconstitutional).

129. *Myers*, 272 U.S. at 121-22.

130. *Morrison*, 487 U.S. at 686 (allowing limitations on removal power when an alter ego of the president retained the power); *Humphrey's*, 295 U.S. at 629 (restricting the president's removal power by allowing Congress to impose a good-cause limitation on removal of members of the FTC).

131. *See, e.g.*, *Morrison*, 487 U.S. at 705 (Scalia, J., dissenting) (stating that the statute had deprived the president of the powers granted to him in the Constitution and hampered on separation of powers within the government).

Congress may limit the executive's removal power even further.[132] Both *Humphrey's* and *Morrison* were narrow and limited exceptions to the general principle that the president retains full-ranging authority in removing officers of the government, including the PCAOB.[133]

Moreover, even if the court were to compare *Morrison's* removal limitation to the case at hand, the PCAOB remains unconstitutional. In *Morrison*, the Court reiterated the constitutionality of a for-cause limitation on the attorney general's removal power only because the attorney general was a direct part of the executive branch and removable *at will* by the president.[134] In contrast, members of the PCAOB are only removable for cause by the SEC, which is already shielded from the president by its for-cause removal restriction.[135] Therefore, the amount of control indirectly given to the president through the attorney general in *Morrison* is far greater than the control given in the present case.[136] In addition, the independent counsel at issue in *Morrison* did not come into existence until the attorney general decided that the counsel was needed and then only for a temporary period of time.[137] By contrast, the PCAOB is continuously operating, and the president does not control when the Board chooses to regulate or investigate and prosecute companies.

Another distinction between *Morrison* and the present case is that in the former, the president with the help of the attorney general set out all enforcement procedures and policies to be followed by the independent counsel. In contrast, the PCAOB has enacted its own regulations and policies from the beginning, without help from the president, any executive official, or the SEC

132. *See Free Enter. Fund*, 537 F.3d at 686 (Kavanaugh, J., dissenting) (claiming that the PCAOB's structure provides for a previously unheard of restriction on the president's ability to control executive officials).

133. *Morrison* even adds support to the claim against the constitutionality of the PCAOB because the Court there noted that removal restrictions cannot impede the executive branch's ability to perform constitutional duties. 487 U.S. at 691. The Court then noted that independent agencies, such as the FTC, or the SEC are not an "arm or an eye of the executive." *Id.* at 688 n.25 (quoting *Humphrey's*, 295 U.S. at 628). Therefore, the PCAOB cannot argue that the ability of the SEC to monitor its actions is sufficient presidential control, when independent agencies such as the SEC are considered independent themselves.

134. *Id.* at 696.

135. It has been implied that the President may only remove members of the SEC for cause. *Id.* at 697 n.7 (citing 44 U.S.C. § 3502(5) (2000)). This creates a double for-cause limitation that has never previously been allowed. *Id.* at 686.

136. As Justice Kavanaugh noted in his dissent, here, unlike in *Morrison*, the "power to remove an executive official has been completely stripped from the President." *Id.* at 698 (Kavanaugh, J., dissenting) (quoting *Morrison*, 487 U.S. at 692).

137. *Morrison*, 487 U.S. at 666-67.

that supposedly substantially regulates the Board.[138] To the extent that the majority used the Supreme Court's holding in *Morrison*, it should have found that the case stressed the importance of allowing the president to regulate agencies that execute the laws of the land by giving removal authority. Instead, the PCAOB is operating as an executor of the laws without any sort of presidential regulation. Therefore, when analyzed under *Morrison*, the PCAOB's removal restrictions have greatly expanded those limitations granted by the Supreme Court.

4. *The Majority De-emphasizes the Harmful Impact of the PCAOB's Structure Which Has Never Previously Been Allowable*

Fourth, the majority denounces the significance of the lack of precedent concerning the structure similar to that of the PCAOB.[139] The absence of case law to support this type of for-cause removal limitation on the president's removal power suggests that the PCAOB's structure is unconstitutional because the Court has already articulated the farthest-reaching limitations allowable. The Supreme Court has always strictly adhered to the text of Article II and the limitations of the removal power by continuously rejecting other governmental structures that have contravened longstanding separation of powers principles.[140]

Additionally, the majority's declaration that the SEC's for-cause limitation on removal is not of importance because the PCAOB is heavily regulated and monitored by the SEC[141] is unpersuasive. Although the SEC was given power under the Sarbanes-Oxley Act to monitor certain activities performed by the PCAOB, this alone is not enough to circumvent a finding of unconstitutionality. The majority points to the fact that the SEC is able to review decisions and sanctions authorized by the PCAOB as evidence that the PCAOB is heavily regulated.[142] Under this reasoning one could then argue that entities like the Supreme Court are heavily regulated because Congress may pass laws circumventing a judicial opinion. Instead, the ability to review opinions and sanctions of another agency should be seen as a protective measure to uphold the integrity of an entity, such as the

138. 15 U.S.C. § 7211(g).

139. *Free Enter. Fund*, 537 F.3d at 673-74.

140. *See* Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc., 501 U.S. 252, 277 (1991) (explaining the power to legislate is encroaching in nature, and courts should keep that in mind when determining the evasiveness of a statute); *Bowsher*, 478 U.S. at 733-34 (finding that Congress' encroachment into the executive's removal power is impermissible).

141. *See Free Enter. Fund*, 537 F.3d at 680-81 (declaring that the SEC has substantial control over the powers given to the PCAOB by Congress).

142. *Id.* at 680-83.

PCAOB in this case.

The Supreme Court has always stressed the importance of separation of powers and has had no difficulty invalidating statutes because of a failure to comply.[143] Here, the court should not have upheld the constitutionality of the PCAOB's structure merely because of the fear that this would invalidate the Sarbanes-Oxley Act or affect other independent agencies.[144] Instead, by allowing for the PCAOB's for-cause removal limitation within the PCAOB's framework, the majority has opened the floodgates for Congress to enact other independent agencies that no longer need to be accountable to the president.[145]

IV. PROPOSAL

Although the PCAOB as it stands cannot be constitutionally permitted, there are many ways Congress could potentially change its structure to avoid more legal problems. If the PCAOB was struck down, Congress could revise the Sarbanes-Oxley Act and bring the PCAOB out from under the SEC's "power." Because the entire Act would be struck down due to the lack of a severability clause, Congress should also take the time to redraft several other provisions of the Sarbanes-Oxley Act to create a less controversial and more workable regulatory environment.[146]

143. *See* INS v. Chadha, 462 U.S. 919, 957-58 (1983) (emphasizing the importance of maintaining separation of powers between the alternate branches of government).

144. *See Free Enter. Fund*, 537 F.3d at 714 (Kavanaugh, J., dissenting) (articulating that although finding the PCAOB unconstitutional may invalidate the Sarbanes-Oxley Act, an important statute cannot allow the judiciary to ignore the constitutional limits that have been put into place to safeguard the three branches of government).

145. *Id.* at 700 (Kavanaugh, J., dissenting). Justice Kavanaugh explained the slippery slope argument stating that the Supreme Court has normally "refused to take even a few steps down the hill," in contexts of upholding unconstitutional statutes. *Id.* The dissent also reassured the public that finding the PCAOB unconstitutional would not call into question all other independent agencies as agencies such as the FTC and SEC are removable for cause by the president. *Id.* at 688. This structure is exactly what was permissible in *Humphrey's*, and is therefore constitutional. *Id.*

146. Proponents in favor of invalidating the PCAOB, and by implication the Sarbanes-Oxley Act, see it as an opportunity to amend other parts of the Act, which have had less than desirable effects. BUTLER & RIBSTEIN, *supra* note 49, at 86. Further, the Act could be changed by exempting small businesses and corporations due to the extremely harsh financial burden that is placed on these companies. *Id.* at 90. Lastly, proponents for the invalidation of the Sarbanes-Oxley Act feel that some regulating should be left up to the states, rather than the federal government. *Id.* at 93.

A. Create the PCAOB as an Independent Agency Independent of SEC Control

In order to ensure that the PCAOB is structured consistent with the Constitution, the Sarbanes-Oxley Act should be amended to bring the Board out from the SEC's informal control. In doing so, the PCAOB would stand as its own independent agency, rather than an independent agency within another agency.[147] The current positions on the PCAOB would then be up for presidential nomination, and would be subject to appointment hearings, analogous to other independent entities.

By amending the Sarbanes-Oxley Act in this manner, it would then subject the PCAOB to constitutional limitations, such as appointment by the president with the advice and consent of the Senate, as well as the president's power to remove members of the PCAOB.[148] This amendment would also eliminate all potential problems with the PCAOB's current structure and allow the president to have significant authority as needed under the Article II of the Constitution.[149] Further, taking the PCAOB out from under the SEC's wing would not harm the Board, because the very reason for the PCAOB's existence was to separate the Board's powers from those handled by the SEC.[150]

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147. *See* Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2654 (codified in scattered sections of 12 U.S.C.)(creating a new independent federal agency to regulate Fannie Mae and Freddie Mac). This new agency was appointed by the president with the advice and consent of the Senate. *Id.* Consequently, because the PCAOB's regulatory functions are much like this new independent agency created, the PCAOB should be considered independent prior to any potential amendments.

148. The PCAOB as its own independent agency could still retain its for-cause limitation currently set in place under the Sarbanes-Oxley Act as the Supreme Court has previously allowed for limited restrictions on the executive removal power. *Morrison*, 487 U.S. at 692.

149. Advocates for upholding the PCAOB have argued that Former President Bush signed the act into law himself and would not have done so if he believed that the PCAOB hampered his executive authority. John Carney, *Short Sarbanes-Oxley's Accounting Board*, DEALBREAKER, Aug. 26, 2008, http://dealbreaker.com/2008/08/short_sarbanes-oxleys_accounti.php. However, presidents can benefit from a private entity insulated from presidential control because if problems occur, the executive branch can escape accountability by showcasing his lack of ability to control these independent agencies. *Id.* With President Obama in office, the country may see a switch to a more controlled financial industry, including the accountability of the PCAOB.

150. Analysts have mentioned that taking the PCAOB away from the SEC's governance could indirectly harm the SEC. *See* WALLISON, *supra* note 127 at 3-4 (finding that the PCAOB's ability to generate its own revenue was the answer to the SEC's prayers). Because the PCAOB is able to generate its own budget through fees paid by public firms, the SEC is able to use the PCAOB to confer tasks on the Board that may be too costly for the SEC to handle. *Id.* at 4. The SEC, itself being controlled by the appropriations process of the president, does not have the ability to conduct all of the activities that it would like, but the PCAOB has been useful in this respect. *Id.* This frees up the

In recreating the PCAOB as an independent agency directly accountable to the president, many provisions of the Sarbanes-Oxley Act would need to be changed, including eliminating any mention of the SEC overseeing any aspect of the PCAOB, the removal authority, how members are appointed, and the private sector clause. Additionally, other aspects of the Sarbanes-Oxley Act should be amended to undo the controversial effects the Act has had on companies in general.

1. *Changes Necessary for the PCAOB to Operate as a Constitutional Independent Agency*

First, section 101(e)(4) and 107(d)(3) of the Sarbanes-Oxley Act dealing with the appointment and removal powers over members of the PCAOB need to be amended. The new requirements should be drafted similar to those regulating the SEC. The president would appoint members of the Board, with approval by the Senate, as well as have the ability to remove members for cause.[151] A confirmation hearing would be conducted before members of the PCAOB are appointed into office so that various members of Congress would have the chance to question potential Board members in order to ensure that they were qualified for the job.[152] Because both the president and Congress would determine how the Board positions are filled, they would also be subject to public criticism if the PCAOB's performance was subsequently substandard. Ultimately, this would indirectly allow PCAOB members to be more responsible to the public, because Congress would face public criticism if a Board member was approved by Congress, yet was not doing their job sufficiently.

In allowing the PCAOB to be directly accountable to the president, there may be concern over its effect on lessening the extra guarantee of independence that Senators sought when creating the PCAOB under the Sarbanes-Oxley Act. The president's removal power would therefore be subject to a for-cause removal restriction. The for-cause restriction would be similar to the one currently set up for the PCAOB under 107(d)(3), except that the SEC would no longer be responsible for implementation. Therefore, because the president would still not be able to remove a member of the Board without cause, this

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SEC to allocate funds to higher priority projects.

151. Under the Securities and Exchange Act, commissioners are appointed by the president with the advice and consent of the Senate. 15 U.S.C. § 78d (a). But no more than three members may be of the same political party, and members of different political parties are to be appointed alternately as much as possible. *Id.*

152. This authority is found inherent within Art. II of the Constitution, giving the Senate the right to review a presidential appointment. U.S. CONST. art. II, § II.

would give the additional independence that traditionally independent agencies receive, while still giving the president the powers mandated under the Constitution.

Next, section 101(b) of the Sarbanes-Oxley Act would need to be amended to eliminate the non-government structure that Congress attempted to create. Instead, the status of the Board could be amended to explicitly state that the PCAOB is a government actor.[153]

Although the PCAOB could be altered in other ways, recreating the PCAOB as a true independent agency would be most beneficial and would not require repealing the entire Sarbanes-Oxley Act.[154]

2. *Additional Changes that Would Be Beneficial to the Sarbanes-Oxley Act*

Once Congress alters the Sarbanes-Oxley Act to conform to constitutional principles, lawmakers could take this opportunity to make other changes to the Act as well, creating a more efficient and workable regulatory agency.

Support for redrafting provisions of the Sarbanes-Oxley Act if the PCAOB is found unconstitutional is shown by the many criticisms that have appeared since the creation of the Act. For example, a 2005 study showed that provisions of the Sarbanes-Oxley Act, enforced by the PCAOB, have cost the United States economy over one trillion dollars.[155] At the same time, the PCAOB has made it extremely difficult for small companies to go public by imposing fees as well as costly compliance regulations, in an

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153. For example, the text of Section 101(b) could be changed as follows:
(b) STATUS — The Board shall be considered an independent agency of the United States government and shall be subject to, and have all the powers conferred upon an agency of the government. Members of the PCAOB shall be deemed an officer, or employer of, or agent for, the federal government by the reason of such service.

154. Alternatively, the PCAOB could be rolled into the SEC, allowing the SEC to take over the regulations currently conducted by the PCAOB. In fact, when Representative Oxley first wrote the Sarbanes-Oxley law, the PCAOB was located within the confines of the SEC. *Free Enter. Fund*, 537 F.3d at 709 n.18. The House unanimously approved this structure; however, the Senate ultimately enacted Senator Sarbanes' proposal, which provided for an oversight Board independent of the SEC. H.R. 3763, 107th Cong. § 2(b) (2002). These proposals overlook the fact that the SEC is finding it difficult to regulate its own powers efficiently, this would not be the best option for Congress. *See* Marcy Gordon, *SEC Bungled Madoff Probes, Agency Watchdog Says*, THE BOSTON GLOBE, Sept. 2, 2009 http://www.boston.com/business/articles/2009/09/02/sec_bungled_madoff_probes_agency_watchdog_says/ (stating that the SEC missed several chances to discover Madoff's fraud).

155. IVY XIYING ZHANG, AEI-BROOKINGS JOINT CTR. FOR REGULATORY STUDIES, ECONOMIC CONSEQUENCES OF THE SARBANES-OXLEY ACT OF 2002 25 (2005), http://aei-brookings.org/admin/authorpdfs/Redirect-safely.php?fname=../pdffiles/phpEG.pdf.

economy that is already struggling.[156] Additionally, many foreign companies have refrained from listing with the United States due to the conflicting requirements imposed by the PCAOB with their own country's laws.[157]

First, the PCAOB's ability to generate its own income has been a cause for concern since the creation of the Sarbanes-Oxley Act.[158] If declared its own independent agency outside of the SEC, the PCAOB may have a harder time ensuring Congress that the ability to generate its own revenue through fees is permissible, since independent agencies typically rely on a budget created by Congress. Therefore, section 106 of the Sarbanes-Oxley Act should be amended to have the PCAOB depend upon Congress and the president for their budget authority.[159] More specifically, the PCAOB should be subject to the Annual Appropriations Budget Process,[160] where Congress has the authority to determine the reasonableness of an independent agency's budget. Also, the "tax" imposed by the PCAOB from its supporting fees should be amended so that the revenue is not solely for the PCAOB's operating budget. Instead, they would be allotted a reasonable amount to use in order to effectively run its agency. This would also have the effect of creating more reasonable salaries to the members of the PCAOB, instead of paying them amounts well exceeding any other governmental body, including the president.

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156. Beckstead and Watts, LLP Homepage, http://www.becksteadwatts.com/ (last visited Sept. 25, 2009).

157. *Sarbanes-Oxley Act Aims to Fix Old Problems, Poses New Ones*, WHAT COUNTS (R.I. Soc'y of Certified Pub. Accountants.org, R.I.) Winter 2003, at 1, 10.

158. Commentators have previously expressed concern over the PCAOB's ability to generate fee income in the first place, finding that it should not be permissible to do so. Brief of the Cato Institute, *supra* note 72.

159. Section 109(b) would need to be amended, which currently allows the PCAOB to essentially create its own budget. Instead of being subject to the SEC's approval, the PCAOB's budget should be overseen by Congress and should read as follows:

> (b) ANNUAL BUDGETS — The Board shall establish a budget for each fiscal year which shall be reviewed and approved according to their respective internal procedures not less than 1 month prior to the commencement of the fiscal year to which the budget pertains for at the beginning of the Board's first fiscal year. The budget of the Board shall be subject to approval by Congress.

Additionally, Sections 109(d) and (e) would need to be amended, allowing Congress to receive the money generated from accounting support fees and monetary penalties, rather than the PCAOB being able to keep the profits. This would create a structure similar to other government agencies, and the money could be used to fund several different agency budgets throughout the year. This would limit the ever-expanding scope that the PCAOB seems to take.

160. Steven A. Ramirez, *Depoliticizing Financial Regulation*, 41 WM. & MARY L. REV. 503, 516-17 (2000).

Another potential concern with the Sarbanes-Oxley Act was that the PCAOB and SEC at times overlapped. Therefore, when separating the PCAOB from the SEC, the two independent agencies would be concurrently regulating the same general industry, and their roles may overlap and could counteract one another.[161] This could cause further strain when dealing with economic issues, as both would be in charge of financial regulations within the United States.

In order to overcome this concern, the Sarbanes-Oxley Act should be amended to clearly separate the powers that both the SEC and PCAOB have within the Act. For example, because the original Sarbanes-Oxley Act states that the Commission is also in charge of regulating accounting principles, a firm line needs to be drawn between the two agencies to ensure that efforts are not being wasted by both the SEC and PCAOB by doing the same exact tasks.[162] Congress could decide to separate the SEC and PCAOB, allowing the PCAOB to concentrate on examining and disciplining auditors, while the SEC could control the broader requirements of creating general financial and accounting regulations. This would get rid of the potential of a company being sanctioned by both the SEC and PCAOB for a similar offense.

Lastly, the provisions dealing with the PCAOB's ability to regulate foreign companies should be redrafted to alleviate the conflicting burdens on foreign companies looking to register within the United States.[163] Instead of allowing the PCAOB to expand its scope internationally, foreign forms should be given the choice to opt out of particular provisions of the Sarbanes-Oxley Act, so that they are not facing conflicting regulations and forced to withdraw from registering within the United States. Additionally, with the PCAOB held more accountable to the president, the executive branch could work with the PCAOB to ensure that U.S. and foreign firms are able to work together coherently because foreign

161. The SEC is already given authority from Congress to protect investors in the financial market. Michael K. Wolensky & David J. Gellen, *Understanding Securities Laws: The Securities Exchange Act of 1934*, 1198 P.L.I./CORP 395, 399 (2000). Despite this, protecting investors was one of the main concerns leading up the enactment of the Sarbanes-Oxley Act. Robert Romano, *The Sarbanes-Oxley Act and the Making of Quick Corporate Governance*, 114 YALE L.J. 1521, 1592 (2005). Therefore, there are multiple areas of law where the SEC and PCAOB could potentially overact.

162. *See* Sarbanes-Oxley Act § 7218 (stating that nothing in the Sarbanes-Oxley Act limits or impairs the authority to create other securities and accounting regulations).

163. For example, local privacy laws in international countries often prevent firms from disclosing all of the information required by the PCAOB. Stavros Gadinis, *The Politics of Competition in International Financial Regulation*, 49 HARV. INT'L L.J. 447, 488 (2008). Although the PCAOB has accommodated foreign companies to an extent, more work needs to be done to insure a workable regulatory system. *Id.*

diplomatic relations are important to an efficiently run government.

In the end, amending the PCAOB to create an independent agency, as well as providing additional changes, would not only create a constitutional agency, but also would add additional efficiency and value. With the PCAOB's chairman, Mark Olson, announcing his retirement in July[164] perhaps it is time for the rest of the Board to "retire" as well.[165]

V. CONCLUSION

Although skeptics are concerned that invalidating the PCAOB would negatively affect independent agencies and would impact the economy due to investor's concerns, these reasons alone do not support upholding an unconstitutional statute.[166] Instead, by allowing for an unconstitutional agency structure to remain, it will continue to chip away at the president's executive power, which is central to the founder's idea of democracy.

With a democratic President faced with a struggling economy, there is no doubt that the government will see a need for more regulatory control and accountability. It seems as if a perfect opportunity has been set forth to allow the next president to

164. Additionally, both senator Sarbanes and Representative Oxley have retired from the Senate. *See* David D. Kirkpatrick, *Senator Sarbanes, Maryland Democrat Will Retire in '06*, N.Y. TIMES, Mar. 12, 2005, at A10, *available at* http://www.nytimes.com/2005/03/12/politics/12sarbanes.html (last visited Sept. 24, 2009) (reporting that Senator Sarbanes will not seek reelection in 2006); William A. Niskanen, *Enron's Last Victim: American Markets*, Cato Institute, Jan. 3, 2007, http://www.cato.org/pub_display.php?pub_id=6879 (stating that Senator Oxley retired before the 2007 term).

165. Legislative history also shows that when the Sarbanes-Oxley Act was passed, Congress was under enormous political pressure to make changes to the financial industry. D. Skyler Rosenbloom, Note, *Take it Slow: A Novel Concept in the Life of Sarbanes-Oxley*, 63 WASH. & LEE L. REV. 1185, 1192 (2006). In creating this law as a quick fix to a substantial problem without a lot of research, critics forewarned that Sarbanes-Oxley would have unintended consequences in the future. *See* Anthony Lin, *One Year After Sarbanes-Oxley Act, Many Officers See Need, but Grumble Nonetheless*, 230 N.Y. L.J. 1, 1 (2003) (declaring the Sarbanes-Oxley Act the most far-reaching reform ever passed).

166. Ultimately, if the PCAOB is upheld as to this facial constitutional challenge, future lawsuits could potentially be on the horizon. If the facial constitutional challenge does not succeed, a future plaintiff may be able to bring an as applied challenged to the PCAOB's structure, if a public company is adversely affected by the independence of the PCAOB. An "as applied" challenge may also be easier to prove than a facial challenge, as a party would only have to show that the statute is unconstitutional as to this specific case, and not in all circumstances. *See* Nathaniel Stewart, Note, *Turning the Commerce Clause Challenge "on Its Face": Why Federal Commerce Clause Statutes Demand Facial Challenges*, 55 CASE W. RES. L. REV. 161, 176 (2004) (stating that an as-applied challenge allows for the court to find a statute unconstitutional with *de minimis* actions).

regain control of the financial market by finding the PCAOB to be an unconstitutional restraint in the president's executive power. In the end, to ensure that the core Article II powers remain intact, the PCAOB should be invalidated, once again reaffirming the power of the executive branch.