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Obama's Equivocal Defense of Agency Independence

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OBAMA'S EQUIVOCAL DEFENSE OF AGENCY INDEPENDENCE

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You can't judge a President by his view of Article II. At the very least, only looking to a President's construction of Article II gives a misleading portrait of the actual legal authority recent Presidents have asserted.

President Obama is no exception, as revealed by his defense of the constitutionality of an independent agency from challenge under Article II in *Free Enterprise Fund v. Public Company Accounting Oversight Board*[1] (PCAOB) in the Supreme Court this term. The PCAOB is an independent agency, located inside the Securities Exchange Commission (SEC), created to regulate accounting of public companies in the wake of the WorldCom and Enron accounting scandals by the Sarbanes-Oxley Act of 2002.[2] The Supreme Court's decision to review the constitutionality of the PCAOB required the Obama Administration, in its first year, to take a stance on several issues that are viewed as litmus tests for theories of Article II, including

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1. 78 U.S.L.W. (U.S. 2010). This essay on the implications of the Obama Administration's arguments in the PCAOB case for the Administration's construction of presidential power was written prior to the Supreme Court's decision in the case. For a helpful analysis of the issues and arguments raised in this case, see the Roundtable in the *Vanderbilt Law Review* En Banc, including Peter L. Strauss, Free Enterprise Fund v. Public Company Accounting Oversight Board, 62 VAND. L. REV. EN BANC 51 (2009); Richard H. Pildes, *Putting Power Back into Separation of Powers Analysis: Why the SEC-PCAOB Structure is Constitutional*, 62 VAND. L. REV. EN BANC 85 (2009); Gary Lawson, *The "Principal" Reason Why the PCAOB is Unconstitutional*, 62 VAND. L. REV. EN BANC 73 (2009); Steven G. Calabresi & Christopher S. Yoo, *Remove* Morrison v. Olson, 62 VAND. L. REV. EN BANC 103 (2009); Harold H. Bruff, *On Hunting Elephants in Mouseholes*, 62 VAND. L. REV. EN BANC 127 (2009); Peter L. Strauss, *Our Twenty-First Century Constitution*, 62 VAND. L. REV. EN BANC 121 (2009); Steven G. Calabresi & Christopher S. Yoo, *Why Professors Bruff and Pildes are Wrong about the* PCAOB *Case*, 62 VAND. L. REV. EN BANC 133 (2009); Gary Lawson, *It Depends*, 62 VAND. L. REV. EN BANC 139 (2009).

2. Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28, & 29 U.S.C. (2006)).

whether the appointments clause permits the agency's appointment to be vested in the SEC[3] and whether the "good cause" restriction on its removal by the SEC[4] violates Article II and separation-of-powers principles.

At the level of constitutional doctrine, the fact of President Obama's defense of the constitutionality of the PCAOB might suggest his acquiescence in isolating executive officials from presidential supervision. At the very least, it appears to place his Administration at the opposite end of the spectrum on executive power from the Reagan Administration, which actively sought a Supreme Court ruling overturning the removal restrictions on independent agencies as violating the President's power under Article II. But the contrast between President Obama's and President Reagan's constitutional positions on independent agencies is revealing, I shall argue in this early reflection on President Obama's views on executive power, in part because it vastly overstates the differences in the powers these Presidents claimed to possess.

A deeper look at President Obama's defense of the PCAOB, as reflected in his Solicitor General Elena Kagan's arguments to the Supreme Court, shows that it is premised on an assertion of a level of control over the agency, despite its independent status, that is roughly equivalent to what President Reagan's lawyers sought to achieve through a constitutional decision striking down congressionally-imposed good cause restrictions on the removal of independent agency officials. Presidents Obama and Reagan, in other words, claim a similar level of control over independent agencies, just on different legal grounds. For President Reagan, this control was warranted by Article II, and achievable only through constitutional invalidation of removal restrictions; for President Obama, the statutory good cause removal protections do not impede near-plenary presidential supervision of the agency.

What explains both this shift from constitutional to statutory ground—and basic convergence on the level of control these President's viewed as warranted? To be sure, Presidents face tremendous incentives to assert control over the federal bureaucracy.[5] As Congress delegates more and more power to

3. 15 U.S.C. § 7211(e)(4)(A) (2006).
4. *Id.* § 7211(e)(6).
5. *See* DAVID E. LEWIS, PRESIDENTS AND THE POLITICS OF AGENCY DESIGN 4 (2003).

federal agencies, including independent agencies, control over the federal bureaucracy is vital to a President's capacity to implement his policies.[6] That shared interest might help explain the rough convergence between President Obama's and President Reagan's views on the level of control they assert. It does not explain, however, the shift in the legal grounds on which that control is asserted. The way in which President Reagan's lawyers litigated these issues, I argue, set in motion that shift in legal grounds; in particular, their litigation opening the door to the broad interpretation of good cause provisions that President Obama adopts. The shift might be seen as the Obama Administration capitalizing on the precedent created during the Reagan era. In that respect, it offers a cautionary tale for reading too much into the constitutional stance of a President without attention to underlying questions of statutory interpretation. At another level, Obama's lodging of his control on statutory grounds may suggest a different vision of the constitutional allocation of authority between Congress and the Executive.

I. THE REAGAN LEGACY

To appreciate the meaning of President Obama's defense of the PCAOB, it makes sense to look back to the Reagan-era precedent with which President Obama's defense engages, and in particular *Morrison v. Olson*.[7] The Reagan Administration hoped to overturn the constitutionality of independent agencies, but in their attempt to avoid Supreme Court review of the independent counsel statute, which they thought would be a bad case to advance this challenge, the Reagan Administration lawyers ended up helping to establish the grounds for an analogy between the President's control over independent and executive agencies that President Obama makes central to his defense of the PCAOB.[8]

President Reagan, we recall, campaigned on a broadly deregulatory platform.[9] While implementing any presidential

6. *Id.*

7. 487 U.S. 654 (1988).

8. In other writing, I examine how these and other choices made by the Reagan Administration's top lawyers influenced the outcome and meaning of *Morrison v. Olson*. *See* Kevin M. Stack, *The Story of* Morrison v. Olson*: The Independent Counsel and Independent Agencies in Watergate's Wake*, *in* PRESIDENTIAL POWER STORIES (Christopher H. Schroeder & Curtis A. Bradley eds., 2009).

9. *See, e.g.*, DAVID A. STOCKMAN, THE TRIUMPH OF POLITICS: HOW THE

agenda requires asserting control over the vast administrative state, implementing a platform based on deregulation makes that control all the more important. President Reagan made enduring strides in this direction, including centralizing review of significant regulatory activities of executive agencies in the Office of Management and Budget.[10] In the Administration's effort to centralize regulatory policy within the White House, Reagan officials viewed independent agencies as a serious problem. As President Reagan's Solicitor General Charles Fried writes, their "independence of presidential authority was considered the extreme example, a kind of emblem, of one of the biggest obstacles to the administration's program."[11] This view that independent agencies were critical barriers to the President's agenda helps explain the legal positions and strategies taken by President Reagan's Department of Justice—and also contrasts sharply with President Obama's view as represented in the *PCAOB* litigation.

Among the various routes to reducing or overcoming the resistance of these agencies to President Reagan's policies, top lawyers at the Department of Justice focused on their constitutionality.[12] In particular, they sought a Supreme Court decision that "would hold that agency commissions served at the pleasure of the President, and that statutory limitations on their removal were unconstitutional."[13] This approach was premised on two legal grounds—statutory construction of good cause removal restrictions, and the powers Article II of the Constitution grants the President.

The statutory construction question posed by good cause restrictions is what grounds for removal they allow: Mere lack of confidence in the office-holder? Policy disagreement? Misapplication of the law? Insubordination? Complete neglect of duty or ineptitude? It is clear that the Reagan Administration took good cause restrictions as providing significant protection from removal, including, it appears, protection from removal

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REAGAN REVOLUTION FAILED 103 (1986) ("Sweeping deregulation was another pillar of the supply-side platform.").

10. *See* Exec. Order No. 12,291, 3 C.F.R. 127 (1981), *reprinted in* 5 U.S.C. § 601 (1988). The basic structure of regulatory review initiated by Executive Order 12,291 has endured since the Executive Order was issued.

11. CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT 154–55 (1991).

12. Executive Order 12,291 did not apply to independent agencies. *See* Exec. Order No. 12,291, § 2.

13. FRIED, *supra* note 11, at 157.

based on policy disagreements. Indeed, if the Reagan Administration had believed that a policy disagreement was a sufficient ground for removal of an officer protected by a good cause restriction, then, at least in principle, independent agencies would not have posed such a significant a legal obstacle to the Administration's program. Of course, they still would pose a significant political obstacle, requiring a potentially distracting removal of officials perceived to be isolated from the President's policy preferences.

By construing the good cause provisions as providing protection from removal based on a policy disagreement, the Reagan Administration took a relatively conventional view of the protections these removal restrictions provide, and one consistent with *Humphrey's Executor v. United States*,[14] the leading decision on removal of principal officers at the time. In *Humphrey's Executor*, the Supreme Court made clear that the good cause restriction protecting the Federal Trade Commission (FTC) protected the Commissioners from termination at will, and held that these restrictions did not unconstitutionally infringe the President's executive power. The Federal Trade Commission Act granted Commissioners of the FTC seven-year terms, and vested the President with the right to remove them "for inefficiency, neglect of duty, or malfeasance in office."[15] President Roosevelt removed Commissioner Humphrey without a reason,[16] and did not claim that his termination of Humphrey was based on one of the enumerated grounds of the removal provision.[17] The Supreme Court held that the combination of the statute's specification of fixed terms in office and for cause provision limited the executive's power to terminate to "the causes enumerated, the existence of which none is claimed here."[18] By implication, it is clear from *Humphrey's Executor* that simply terminating officer for no reason, as one could with an officer that served at the President's pleasure, does not constitute cause. But *Humphrey's Executor* itself left open the question of what constitutes cause, and specifically did not foreclose the possibility that policy disagreement could

14. 295 U.S. 602 (1935).

15. *See id.* at 622.

16. President Roosevelt wrote to Commissioner Humphrey: "You will, I know, realize that I do not feel that your mind and my mind go along together on either the policies or the administering of the Federal Trade Commission, and frankly, I think it is best for the people of this country that I should have a full confidence." *Id.* at 619.

17. *Id.* at 626.

18. *Id.*

constitute cause.[19] In any event, given the ambiguity about what would constitute cause, the Reagan Administration appeared to adopt the conventional view that policy disagreement alone did not constitute cause.

That statutory conclusion created the grounds for a serious constitutional question—namely, whether such a restriction constituted an unconstitutional infringement on the President's Article II power. On that question, the Reagan Administration sought to create the foundations for a Supreme Court decision that would overturn the constitutional holding of *Humphrey's Executor*. *Humphrey's Executor* had justified the good cause restrictions on doctrinally weak grounds. The Court rested the constitutionality of these removal restrictions on the characterization of the FTC as acting "in part quasi legislatively and in part quasi judicially."[20] With regard to such officers, as opposed to those performing executive functions, the Court reasoned, Congress could constitutionally impose removal restrictions. This reasoning had two notorious problems. First, it was very hard to distinguish the functions the FTC served from those performed by many agencies. Second, it suggested that by virtue of the FTC's functions, it must exist somehow outside the executive branch (and thus presidential control).

President Reagan's lawyers sought to implement a view of Article II under which there was no place for a set of officers that existed outside of the President's direct control. The theory of executive power that supported this view had several key elements. Although it is uncontroversial that Article II vests executive power in a unitary President,[21] the question is what follows from that choice as to Congress's authority to structure the executive branch. The Reagan Administration's lawyers argued that Article II's vesting of "executive power" in the President[22] combined with the President's authority to "take Care that the Laws be faithfully executed"[23] required that the President have power to supervise and control the implementation of all federal law, and barred Congress from imposing restrictions on his power to fire executive officers at will. Aspects of that position appeared in opinions of the Office

19. *See, e.g.*, Peter L. Strauss, *The Place of Agencies in Government*, 84 COLUM. L. REV. 573, 609 (1984).

20. *Humphrey's Ex'r*, 295 U.S. at 628.

21. U.S. CONST. art. II, § 1; *see also* Strauss, *supra* note 19, at 599.

22. U.S. CONST. art. II, § 1, cl. 1.

23. *Id.* art. II, § 3, cl. 4.

of Legal Counsel in the early 1980s.[24] Under that construction of Article II, there was simply no place for removal restrictions on executive officers. In short, the Reagan Administration accepted the implied statutory construction of *Humphrey's Executor* under which the removal provisions prevented firing independent agency heads for policy disagreements, but sought to overturn *Humphrey's Executor's* constitutional validation of this restriction.

The Reagan Administration's effort to implement this constitutional vision, however, foundered in the Supreme Court on two occasions. The first setback came in *Bowsher v. Synar*,[25] in which the Court reviewed the Gramm-Rudman-Hollings Act. The Act granted the Comptroller General power to make binding decisions concerning budget reductions.[26] Power to remove the Comptroller General, however, was vested in Congress.[27] The Comptroller could be removed only by impeachment or by a joint resolution of Congress on the grounds of good cause.[28] Because these removal provisions included a good cause restriction and vested removal authority in Congress, they were open to two different grounds for challenge, both of which the Justice Department asserted.[29] The narrower ground was that Congress could not grant itself a role in the removal of executive officials. That ground would invalidate the removal provisions in the Act, but do little to advance the Reagan Administration's interest in a constitutional challenge to the removal restrictions applicable to most independent agencies.

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24. Removal of Members of the Advisory Council on Historic Preservation, 6 Op. Off. Legal Counsel 180, 180 (1982) (arguing the primary functions of the Advisory Council on Historic Preservation were "executive in nature, and thus not such as would permit Congress constitutionally to insulate its members from the President's removal power," despite the Council's statutory designation as independent); Litigation Authority of the Equal Employment Opportunity Commission in Title VII Suits Against State and Local Governmental Entities, 7 Op. Off. Legal Counsel 57, 64 (1983) (EEOC could not take a contrary litigation position to the Attorney General because the "whole of the Executive power . . . is vested exclusively in the President"); Constitutionality of Statute Requiring Executive Agency to Report Directly to Congress, 6 Op. Off. Legal Counsel 632, 632 (1982) ("Separation of powers requires that the President have ultimate control over subordinate officials who perform purely executive functions, which includes the right to supervise and review the work of such officials.").

25. 478 U.S. 714 (1986).

26. *Id.* at 718.

27. *See* 31 U.S.C. § 703(e)(1)(B) (1982); *see also Bowsher*, 478 U.S. at 727–28.

28. *Bowsher*, 478 U.S. at 720, 728.

29. *See* Brief for the United States at 31–32, 48, *Bowsher*, 478 U.S. 714 (Nos. 85-1377, 85-1378 & 85-1379).

The broader ground was that the President must have authority to remove the Comptroller General at will because the Comptroller General exercises executive power. "Whatever may be the nature and scope of the functions that Congress constitutionally may remove from the general administration of the laws and assign to an agency composed of members who are independent of the President's control," Solicitor General Charles Fried argued in *Bowsher*, "Congress clearly cannot vest in such an officer the authority to intrude upon and effectively direct the execution of the laws by the President."[30] Embracing that position would open the door to a direct challenge to the constitutionality of independent agencies, many of which engage in execution of the law.

The Supreme Court, as we know, opted for the narrower ground, namely, that "Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws."[31] The Court also held that the removal power of Congress, even though restricted to good cause, rendered the Comptroller General "subservient to Congress."[32] In the end, the *Bowsher* decision, although a technical victory for the Reagan Justice Department, represented a setback for the Department's broader interest in implementing a strongly unitary conception of the President's powers. The Court had an opportunity to establish a critical building block for that larger constitutional vision, and it declined. *Bowsher*'s treatment of the Comptroller as subservient to Congress despite the good cause protection, however, suggested the possibility that these restrictions might be construed to provide little restraint on the President's power to remove an official for a policy disagreement.[33]

The Supreme Court took up that suggestion, a suggestion which becomes central to President Obama's defense in PCAOB, in *Morrison v. Olson*, but used it to deal the Reagan Administration a second set-back in its effort to overturn the constitutionality of removal restrictions. Prior to the actual litigation of the independent counsel statute in the case that became *Morrison v. Olson*, the Reagan Justice Department

30. *Id.* at 48.
31. *Bowsher*, 478 U.S. at 726.
32. *Id.* at 730.
33. In 1986, Professor Geoffrey Miller elaborated the possibility of a President construing a good cause provision to permit removal for failure to comply with the President's instructions. *See* Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 44.

devised a strategy aimed at thwarting review of the independent counsel statute while allowing pending investigations to continue.[34] It was that strategy that prepared the ground in unanticipated ways for the Supreme Court's decision in *Morrison v. Olson* to uphold the independent counsel statute, and ultimately for President Obama's defense of the PCAOB.

The Reagan lawyers understood that it was important to avoid Supreme Court review of the independent counsel statute for a variety of reasons. To begin with, unlike almost every other independent agency, the independent counsel had strong public appeal as a symbol of Watergate reforms. Moreover, the fact that Lt. Col. Oliver North brought the first significant constitutional challenge to the independent counsel statute compounded the Administration's general misapprehension about litigating good cause removal provisions in the context of the independent counsel statute. While Reagan Administration officials surely wished for the independent counsel statute to disappear, even among independent counsel cases, the *North* litigation was the worst vehicle to mount a challenge. The Iran-Contra investigation had captured public attention and would be a "terrible case[] in which to challenge a law that the public was told guaranteed impartial justice."[35]

In hopes of avoiding review, the Attorney General offered independent counsels "parallel" appointments within the Department of Justice as special prosecutors, under the same statutory authority that had been used to create the Watergate special prosecutor. The regulations establishing the parallel appointment granted the counsel identical authority and jurisdiction to that as provided by the independent counsel statute,[36] but were issued under the Attorney General's statutory authority to appoint *ad hoc* special prosecutors, who could be removed at will. If independent counsels accepted these parallel

34. Office of Independent Counsel, General Powers and Establishment of Independent Counsel—Iran/Contra, 52 Fed. Reg. 7270, 7270 (March 10, 1987) (codified at 28 C.F.R. §§ 600 & 601 (1988)) (Attorney General Meese introduced the parallel appointment regulations with a summary saying, "I have found it advisable to assure the courts, Congress and the American people that this investigation will proceed in a clearly authorized and constitutionally valid form regardless of the eventual outcome of the North litigation [challenging the independent counsel statute.]").

35. FRIED, *supra* note 11, at 137.

36. *See* General Powers and Establishment of Independent Counsel—Iran/Contra, 52 Fed. Reg. at 7270–273. On the provisions for removal protection, compare 28 U.S.C. § 596 (2006) with the parallel provisions of 28 C.F.R. § 600.7(c)–(d) (2009); *see also In re* Sealed Case, 829 F.2d 50, 52–53 (D.C. Cir. 1987) (noting the parallel in removal protection).

appointments, the Department reasoned, they could render moot the question of the constitutionality of the independent counsel statute, because the investigation had a separate authorization furnished by the parallel appointments.

With regard to the *North* investigation, the strategy worked. Independent Counsel Lawrence Walsh accepted the parallel appointment the day it was offered.[37] The United States then argued that North's challenge to the constitutionality of the independent counsel statute was not reviewable. The D.C. Circuit agreed with the United States.[38] At the center of the D.C. Circuit's reasoning was its conclusion that there was no difference in the actions Walsh would take if he were acting solely on the basis of the authority vested in him by the Attorney General and those he would take with the addition of the protections of the independent counsel statute, and therefore no point in review.[39]

This is a startling conclusion, as Judge Stephen Williams' partial dissent recognized.[40] To reach it, the D.C. Circuit had to take the view that statutory good cause restrictions did not provide additional, or at least significant, independence. Indeed, based on the D.C. Circuit's decision, the position of an independent counsel, removable by the Attorney General only for good cause, becomes the rough equivalent of a special prosecutor, removable by the Attorney General at will. But once that is true, it is unclear how much protection or insulation from presidential influence statutory good cause removal provisions provide. As a result, this position undermines the starting premise of the Reagan Administration's legal challenge to independent agencies—that agencies protected by good cause removal provisions were the "biggest obstacle" to the implementation of presidential policy. But it also suggests that the President has much of the control the Reagan Administration's lawyers had sought, just not through an express constitutional overruling of good cause restrictions.

When the independent counsel in a separate investigation of Theodore Olson declined the Attorney General's parallel appointment, and the D.C. Circuit held that the independent counsel statute was unconstitutional, the Supreme Court review

37. *In re* Sealed Case, 829 F.2d at 52–53.
38. *Id.* at 62.
39. *Id.* at 59–62.
40. *Id.* at 63–69 (Williams, J., concurring and dissenting).

of the statute became inevitable. Interestingly, in the Supreme Court's decision in *Morrison v. Olson*, the Court embraced the analogy between special prosecutor and independent counsel, despite their different removal protections. This analogy first arose in the Court's analysis of Olson's challenge to the statute under the appointments clause. Among other things, Olson argued that the independent counsel was a principal officer under the appointments clause, and therefore her appointment must be vested in the President.[41] The Court concluded that the independent counsel was an inferior, not principal officer, supporting this conclusion with a comparison to the Watergate Special Prosecutor. The Court noted that the Watergate Special Prosecutor, "whose authority was similar to that of appellant," was considered in *United States v. Nixon* to be a "subordinate officer."[42] The Watergate Special Prosecutor was (notoriously) removable at will. Thus, by suggesting that the Watergate Special Prosecutor's inferior officer status was consistent with the conclusion that the independent counsel was also an inferior officer, the Court declined to read the good cause removal provision as creating a sharp distinction between the two prosecutors. The fact that they were both removable by the Attorney General mattered more than the statutory good cause removal protection that the independent counsel enjoyed. The parallel appointments (and the D.C. Circuit's conclusion in the *North* litigation that the parallel appointment prevented constitutional review of the Act) appeared to domesticate the very aspect of the independent counsel—statutory independence based on good cause removal protection—most likely to distinguish the counsel from the constitutionally uncontroversial special prosecutor.

When the Court turned to consider whether the good cause protections were unconstitutional infringements on the President's power, it flatly rejected the view that the exercise of executive power itself prohibits Congress from imposing good cause removal restrictions. Casting aside the doctrine suggested by its previous decisions in *Myers v. United States*[43] and *Humphrey's Executor v. United States*[44] that the validity of removal restrictions turned on whether or not the officer engaged in purely executive functions, or quasi-legislative quasi-

41. Morrison v. Olson, 487 U.S. 654, 673 (1988).
42. *Id.* at 673 (quoting United States v. Nixon, 418 U.S. 683, 694 n.8 (1974)).
43. 272 U.S. 52 (1926).
44. 295 U.S. 602 (1935).

adjudicative functions,[45] the Court took the central question to be whether "the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty."[46] Applying this functional test, the Court rejected the idea that good cause removal restrictions amounted to much of a constraint on the President. Even with the good cause removal restriction, the Court ventured that the Attorney General retains "ample authority to assure that the counsel is competently performing his or her statutory responsibilities in a manner that comports with the provisions of the Act."[47] At this point, one can hear in the background the analogy between the special prosecutor and the independent counsel. If the Attorney General's authority over both prosecutors make them subordinate, as suggested by the Court's reasoning under the appointments clause, then it would be difficult to conclude that the removal provision itself obstructs the Attorney General's control over the independent counsel (putting aside, of course, that that was the point of the provision).[48]

What emerges from *Morrison v. Olson*, the ultimate outcome of the Reagan Administration's litigation of the statute of independent agencies, is a constitutional validation of the good cause removal provisions, but a validation that undermines much of the protection those provisions were thought to ensure. Indeed, following *Morrison*, it would be hard to imagine that Reagan officials would still view independent agencies as the most significant legal obstacle to the implementation to their program. Rather, the Court has suggested that even with good cause protections, the President retains "ample" authority over them. It is that victory for presidential influence that frames the Obama Administration's defense of the PCAOB.

II. OBAMA'S DEFENSE OF AGENCY INDEPENDENCE

When a President defends the constitutionality of a statute that imposes restrictions on his powers, it is worth carefully

45. *Id.* at 689.

46. *Id.* at 691. For an earlier, quite similar articulation of this view, see Peter Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 609–616 (1984).

47. *Morrison*, 487 U.S. at 692.

48. *See* S. REP. No. 95-170, at 65–66, *reprinted in* 1978 U.S.C.C.A.N. 4216, 4281–82 (stating that the independent counsel statute aimed to create a prosecutor who is "independent, both in reality and appearance, from the President and the Attorney General").

attending to the way in which he or she does so. President Obama's defense of the constitutionality of the PCAOB, as revealed by Solicitor General defense in the brief of the United States and also in oral argument in the Supreme Court in *PCAOB*, is no exception. Solicitor General Kagan's defense of the PCAOB's removal protections takes up the invitation of both *Bowsher* and *Morrison* to construe good cause removal provisions very broadly.[49] The extent of her equivocation as to what protection removal provisions provide is most clearly revealed in her argument that seeks to bring the PCAOB's under the mantel of *Morrison*.

Solicitor General Kagan's first line of defense for the PCAOB's removal protections was to rely on *Humphrey's Executor*, in essence saying that *Humphrey's Executor* is sufficient to validate the PCAOB. This argument has two basic premises. The first is relatively uncontroversial: *Humphrey's Executor* clearly validates the good cause restrictions that are presumed to apply to the President's ability to remove the SEC Commissioners.[50] Indeed, *Humphrey's Executor* held that a good cause restriction preserves a constitutionally sufficient level of control by the President. The second step turns on the scope of the SEC's control over the PCAOB. Solicitor General Kagan argued that, despite the good-cause restriction protecting the PCAOB, the SEC has extremely broad control over the Board, a view invited by the broad powers granted by the statute over the PCAOB to the SEC.[51] She specifically argued that the good cause restriction governing the PCAOB itself "affords the Commission broad authority over individual Board members for conduct at the heart of their statutory responsibilities."[52] Solicitor General Kagan puts these two premises together to reach the conclusion that the double good-cause removal provision is constitutional because it provides ample authority for the President to take care that the laws are faithfully

49. With regard to the independent counsel statute, John Manning has suggested that, in order to avoid serious constitutional questions about the President's control over the independent counsel, there are grounds to construe that good cause provision to allow substantial presidential supervision (or at least to hesitate before construing the removal provision more restrictively). *See* John F. Manning, *The Independent Counsel Statute: Reading "Good Cause" in Light of Article II*, 83 MINN. L. REV. 1285, 1288, 1335 (1999). In a sense, President Obama's defense of PCAOB takes this same approach to the removal provisions in protecting PCAOB.

50. Brief for the United States at 48, Free Enterprise Fund v. Public Company Accounting Oversight Board, No. 08-861 (Oct. 13, 2009).

51. *Id.*

52. *Id.* at 51 (commenting on § 7217(d)(3)).

executed:[53] If the President has constitutionally sufficient control over the SEC, and the SEC has plenary control over the Board, then the President should have sufficient control over the Board.

As Solicitor General Kagan anticipates in her brief for the United States, *Morrison v. Olson* poses a difficulty for this position. *Morrison* is the Supreme Court's most extensive recent consideration of a good-cause provision that vests removal in an officer *other than the President*. Framed in this way—as a judgment about good cause provision that vest removal in a officer other than the President—the application of *Morrison* is difficult to avoid. Chief Justice Roberts made precisely this point in oral argument, suggesting that *Humphrey's Executor* alone is not sufficient to validate the good cause provision in PCAOB. Speaking to Solicitor General Kagan, the Chief Justice commented, "But you have to add to *Humphrey's*, *Perkins*[54] and *Morrison*. *Humphrey's* says you can limit the President's removal power. That doesn't get you down to the Board. You have to also say the principal officers, there can be limits on their removal authority over the board members."[55] It is the application of *Morrison*, in other words, that "get[s] you down to the Board."[56]

But once the analysis in comparison to *Morrison* is launched on those terms, *Morrison* creates a larger challenge for defending the PCAOB. Whereas the removal power over the independent counsel was vested in the Attorney General, the paradigm of an officer serving at the President's pleasure, PCAOB's removal is vested in the SEC, itself an independent agency. This difference confronted Solicitor General Kagan with a stark choice. On the one hand, she could simply jettison *Morrison*, an unappealing prospect. Or she could try to fit the PCAOB under *Morrison*.

To take the second course, however, would require likening the President's authority over the Attorney General to the President's authority over the SEC. That is what Solicitor General Kagan did. Addressing *Morrison*,[57] Solicitor General

53. *Id.* at 48.

54. United States v. Perkins, 116 U.S. 483 (1886) (upholding Congress's power to impose good cause restrictions on removal of inferior officers whose appointments are vested in heads of departments).

55. Transcript of Oral Argument at 42, *Free Enterprise Fund*, No. 08-861; *see also id.* at 47 ("It goes further [than *Humphrey's Executor*] because you have got to rely on the SEC to get to the Board. So there you have got to rely on Perkins and Morrison.").

56. *Id.*

57. 487 U.S. 654 (1988).

Kagan argued in the brief for the United States, "just as the Attorney General had the power to remove an independent counsel for good cause (487 U.S. at 663), the SEC has the power to remove members of the PCAOB for 'good cause shown.'"[58] The strategic motivation for this analogy is clear. If the analogy holds, then *Morrison v. Olson* provides strong support for the constitutionality of the removal restrictions applicable to the PCAOB: If good cause removal of an inferior officer may be constitutionally vested in the Attorney General (which *Morrison* establishes), and the President has authority over the SEC that is analogous to his authority over the Attorney General (Solicitor General Kagan's implication), then the removal restrictions for the PCAOB are unproblematic.

But the Solicitor General's implication is an important and revealing one. If the President's control over independent agencies is substantially similar to his control over at-will appointees, the thrust of the distinction between independent and executive agencies which Reagan Administration lawyers sought to overturn has dissipated. Solicitor General Kagan's arguments in the *PCAOB* litigation reach nearly that far. At oral argument, Chief Justice Roberts asked Solicitor General Kagan how much protection good cause protections provide. Her answers were equivocal:

> CHIEF JUSTICE ROBERTS: Can the President pick up the phone and fire the SEC commissioners?
>
> GENERAL KAGAN: The President can pick up the phone and fire the SEC commissioners for cause, however 'cause' has been defined.
>
> . . .
>
> CHIEF JUSTICE ROBERTS: What do they have to say about the theory that the SEC Commissioners can be removed by the President?
>
> GENERAL KAGAN: I believe, Mr. Chief Justice, that nobody has contested that question.
>
> CHIEF JUSTICE ROBERTS: And you are not contesting it?
>
> GENERAL KAGAN: And we are not contesting the question that the SEC commissioners, themselves, are

58. Brief for the United States, *supra* note 50, at 49.

> removable by the President for cause under, I would say, a very broad for cause provision, in the way that *Bowsher* suggested, not something that is niggling and technical.[59]

In view of the comparison between the Attorney General and the SEC in the brief for United States, it is easy to understand how Chief Justice Roberts could have taken the Solicitor General to be putting into issue the grounds for removal of SEC commissioners. The Solicitor General's comparison between the SEC and the Attorney General does just that. Moreover, her emphasis on the "plenary control" the SEC has over the PCAOB,[60] despite the good cause removal provision, also supports the idea that the President has similar plenary authority over the SEC. If one good cause provisions allows plenary control, why wouldn't another, especially where, as in the case of the SEC, good cause protection has to be implied from the fixed terms of the Commissioners?[61]

Solicitor General Kagan's account of the good cause provision protecting the PCAOB ultimately takes the position that *Morrison* suggested: while good cause protections are not unconstitutional, they must be construed to provide significant authority for the President to terminate (and thus to practically direct) the officials they protect. The seeds of this position appear in *Bowsher*, where the Court read the Congress's power to terminate the Comptroller General for cause as creating a subservience on the part of the Comptroller General.[62] But it was the analogy between special prosecutor and independent counsel created in the Regan Administration's attempt to avoid review of the independent counsel statute, that put good cause restrictions and at-will appointment on a similar footing. The Court's decision in *Morrison v. Olson* amplified that parity, but did so only as to the independent counsel's protections, not those of an independent agency. *Morrison* left open the question of whether that same broadening of what constitutes good cause applies, not just to the Attorney General's supervision of the independent counsel, but also to the construction of good cause provisions more generally.

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59. Transcript of Oral Argument, *supra* note 55, at 46, 52.

60. Brief for the United States, *supra* note 50, at 42.

61. No statutory provision grants the Commissioners of the SEC good-cause removal protection. The SEC Commissioners are appointed for fixed, staggered terms. See 15 U.S.C. § 78d(a) (2006).

62. Bowsher v. Synar, 478 U.S. 714, 727 (1986).

Solicitor General Kagan provides a positive answer. On the one hand, her answer contradicts the conventional understanding, shared by the Reagan Department of Justice, of these provisions. Indeed, as Justice Scalia noted in the oral argument of the *PCAOB* case, advisers to President Reagan, of which he was one, took good cause provisions to impose a serious constraint on presidential influence:

> MR. LAMKEN: Your Honor, the President has the same control over the SEC's provision over the Board as he has over everything else that falls within the SEC's jurisdiction.
>
> JUSTICE SCALIA: Which is nothing, which is nothing. I—when I was—I advised the President, you can't interfere with—I think, if the President called up the FCC and said, I want you to rule this way, I want this kind of rule from the FCC, I think there would be an impeachment motion in Congress.[63]

On the other hand, Solicitor General Kagan's answer also results in roughly the same practical authority for the President over independent agencies as a constitutional invalidation of good cause provisions might. It reaches this result, however, through statutory construction. President Obama's defense of the constitutionality of the PCAOB thus simultaneously contradicts the Reagan Administration's view that independent agencies infringe the President's Article II powers and embraces the position they sought to establish that the President retains substantial, almost plenary, control over agencies despite their "independent" status.

III. CONCLUSION

What are we to make of this shift? To be sure, it could be well explained by a variety of considerations of legal strategy and the context of the case. The Supreme Court's decision to review the case thrust the Obama Administration in the position of having to take a view on this controversial issue. Given that the Administration was not inclined politically or legally to see the PCAOB invalidated, it made sense for Solicitor General Kagan to emphasize the scope of authority *Bowsher* and *Morrison* seemed to suggest removal provisions allow the President. Moreover, the Sarbanes-Oxley Act of 2002 provided

63. Transcript of Oral Argument, *supra* note 55, at 58–59.

truly broad powers to the SEC with regard to its supervision of the PCAOB, including requiring the SEC's approval before PCAOB's rules become effective,[64] requiring the PCAOB to conduct investigations of registered accounting firms in accordance with SEC rules,[65] making disciplinary sanctions of the PCAOB subject to *de novo* review by the SEC, vesting the SEC with authority to rescind the PCAOB's enforcement authority,[66] among other things.

But Solicitor General Kagan's position may also reflect a deeper view about the relative allocation of power between Congress and the President. By defending the scope of the President's control under statute, in principle Solicitor General Kagan provides a space for congressional dialogue as to the structure of relations among the executive branch that would not be allowed by most constitutional rulings invalidating the good cause restriction. A construction of the Sweeping Clause[67] generous to congressional power may underpin Solicitor General Kagan's statutory defense of the PCAOB. That view might be political expedient for a political party that has had greater influence over Congress than the Presidency in recent decades. Solicitor General Kagan's defense of the PCAOB's, while consistent with a reading of the Sweeping Clause that grants Congress wide latitude in structuring the executive branch, does not require it. As a result, a conclusion about the Obama Administration's view of the balance between executive and legislative authority under the Constitution will have be supported on other grounds.

In the end, we can see that *Morrison* and *PCAOB* hold parallel lessons for the Reagan and Obama Administrations. The Reagan Administration sought to avoid litigating *Morrison* precisely because the independent counsel statute held too strong a prospect for a Supreme Court decision validating removal restrictions. While the Reagan Administration did lose in *Morrison*, the Court ruled in a way that granted the Administration much of the legal grounds for presidential control that it sought to exercise.

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64. 15 U.S.C. § 7217(b)(2) (2006).
65. *Id.* § 7215(b)(1).
66. *Id.* § 7217(d)(1).
67. *See* U.S. CONST., art. 1, § 8, cl. 18 ("Congress shall have Power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.").

The *PCAOB* litigation was also uninvited by President Obama. The Obama Administration sought to avoid a Supreme Court hearing in *PCAOB* in part because it is difficult to see a clear path to upholding the agency based on the Supreme Court's precedent. Moreover, the agency, staffed by highly paid accountants, had little public appeal. The Obama Administration's defense of PCAOB embraces the full scope of flexibility in interpreting good cause restrictions that *Morrison* invited. But, like the Reagan Administration, the Obama Administration may well also face defeat in this unwelcome litigation.