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It Depends

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Response

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IT DEPENDS

Peter Strauss stated at the outset of this Symposium that the participants were chosen in part for the likelihood that they would generate "intelligent disagreement." By that standard, I may have been a poor choice--and if that is the case, I will leave it to the reader to determine whether it is a function of the first or second term in the quoted phrase.

At first glance, it looks as though I sharply disagree with Rick Pildes and Harold Bruff about whether the PCAOB's members are principal officers who must be appointed by the President with the advice and consent of the Senate. In my First Take article in this Symposium, I argued on three different grounds that they are indeed principal officers and their appointments by the SEC are therefore unconstitutional. On the other hand, Professor Bruff says that "the inferior officer issue should not long detain the Court" because the conclusion "that the PCAOB is at least minimally supervised by members of the SEC for constitutional purposes ... is easy to reach." [1] Professor Pildes similarly argues that "the constitutional challenges to the PCAOB should be rejected" and specifically says, "Because the SEC exercises pervasive authority, control, and oversight over Board members, they are not [principal officers]." [2] How much farther apart could we be?

I suggest that this seeming disagreement is a bit of an illusion (though perhaps only a bit). I do not mean that Professors Pildes and Bruff and I *agree* on anything here, but I am not sure that we disagree either. My sense is that we are asking and answering different questions, so that comparing and contrasting our answers simply makes no sense.

Professors Pildes and Bruff spend much, and even most, of their energy explaining how viewing the PCAOB members as inferior ***140** officers would best cohere with established judicially and politically validated administrative structures and would produce a sensible system of governance. If one views constitutional analysis as an aspect of real-world governance, I suppose that all of this makes sense. At the very least, I am not prepared to say that it *does not* make sense, simply because I am not prepared to say anything seriously meaningful about real-world governance. That is a matter that calls for expertise in, inter alia, political science, political theory, and moral theory, and I have no claim to expertise in any of the above. (Indeed, it is debatable whether, given the dubious provenance of my degree, I have any claim to expertise in law.) Good governance may well call for exactly what Professors Pildes and Bruff maintain; I am in no position to contest the point with any authority. And as for coherence with established structures, again they may be right. I am simply not much intellectually focused on coherence with established structures, especially when virtually all of the established structures are themselves flagrantly unconstitutional. Notwithstanding the fact that I filed an amicus brief in this case, my scholarly interest lies in figuring out what the Constitution says--not in figuring out whether what the Constitution says is wise or whether the prior course of institutional development prescribes a different outcome.

To be clear: I am not intimating, much less suggesting, that there is anything remotely wrong or odd about the kind of analysis pursued by Professors Pildes and Bruff. Quite to the contrary, my project is the bizarre one. As even a casual observer of constitutional jurisprudence recognizes, any relationship between what the Constitution says and how constitutional cases are decided is strictly coincidental, and the vast bulk of modern constitutional scholarship regards that as a good thing. Professors Pildes and Bruff are the normal folks here; I am the one running off the field with the ball. The consequence, however, is that

because we approach constitutional issues looking for answers to very different kinds of questions, we are largely ships passing in the night.

Professor Pildes, for example, introduces his study by declaring that "[s]eparation-of-powers analysis of administrative structures does not, and should not, take place in a legal vacuum that ignores the reasons Congress designs agencies in particular ways and the institutional context in which those agencies actually function."[3] Actually, I rather think that it should--*if* the goal of the enterprise is to figure out what the Constitution prescribes rather than what two centuries of constitutional law or sound governance principles in 2009 ***141** would yield. In order to determine what the Constitution says about the appointment of PCAOB members, one should indeed proceed in a legal vacuum while completely ignoring the reasons Congress designs agencies in particular ways and the institutional context in which they function. All one needs to figure out the correct constitutional answer is the original meaning of the word "Department" and some intratextual analysis of the Appointments Clause--which is why a humble law degree is sufficient for the enterprise. At the end of the day, one may or may not *care* about the correct constitutional answer--there is a very good chance that a majority of the Supreme Court that decides *Free Enterprise Fund*, whatever that majority turns out to be, will not care--but the meaning is what it is

Professor Bruff argues, somewhat similarly, that it would make sense in the current institutional framework to declare the PCAOB an appendage of the SEC and then bring the SEC under a bit more presidential control. Could very well be. The Constitution, however, does not really ask about such things. It asks whether a particular institution is a "Department," whether someone is a head of a department, or whether that someone has so much power, or significant enough unsupervised power, to qualify them as "inferior" within the meaning of a particular late eighteenth-century instruction manual.

Regarding that meaning, I stand by what I said: The PCAOB members are heads of departments who must be principal officers; or, alternatively, they exercise significant executive powers, such as investigative powers, that are not supervised by other federal officers and are principal officers for that reason; or, as a second alternative, they exercise such substantial executive powers that they are principal officers whether or not they are supervised by other officers.

To be sure, at least one of these three arguments is directly challenged by Professor Bruff, who insists that the investigative and enforcement decisions of the PCAOB need not constitutionally be supervised by principal officers because "executive supervision of these activities is quite sensitive ... and hence can appropriately be insulated from plenary political oversight. Here, due process considerations counterweight claims for presidential supervision."[4]

Investigation and enforcement may well be sensitive, but they are the heart and soul of law execution. When the Constitution declares in the first sentence of Article II that "[t]he executive Power shall be vested in a President of the United States," it deals with that sensitivity, for good or ill, by giving all of the executive power to the ***142** President. And it deals with the unavoidable "ill" of entrusting such authority to political actors by making the President stand for election in four years and by giving Congress power to impeach and remove the President and other executive officials. Nor did the ratification of the Fifth Amendment in 1791 change the consequences of the Article II Vesting Clause. If the President tried to put someone in prison or take their property without statutory authorization or by using some novel procedure unknown to the Anglo-American tradition, that would be a violation of due process. But the notion that presidential supervision of law enforcement itself violates due process seems unlikely. And if it does not, softer notions of "due process" are unavailing because the Article II Vesting Clause declares a rule, not a balancing test: as long as something is properly identified as executive power, the President gets to exercise it and therefore to control the exercise of that power by anyone subordinate to the President.

For Appointments Clause purposes, this means that one cannot put out of the picture the investigative and enforcement powers of the PCAOB. If no principal officer has directorial power over those functions, the PCAOB members must be principal officers, and no gravitational force (or emanations and penumbras) from the Due Process Clause can alter that conclusion.

To paraphrase a former President: Whether the PCAOB is unconstitutional **depends** on what the meaning of "unconstitutional" is. And that is the question on which Professors Pildes, Bruff, and I really disagree.

Footnotes

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1 Harold H. Bruff, *Bringing the Independent Agencies in from the Cold*, 62 VAND. L. REV. EN BANC 63, 69, 70 (2009).

2 Richard H. Pildes, *Putting Power Back Into Separation of Powers Analysis: Why the SECPCAOB Structure is Constitutional*, 62 VAND. L. REV. EN BANC 85, 87, 100 (2009).

3 *Id.* at 86.

4 Bruff, *supra* note 1, at 70.

62 VNLRENB 139