

On Hunting Elephants in Mouseholes

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Should the Supreme Court take the occasion of deciding a relatively minor case involving the constitutionality of the Public Company Accounting Oversight Board (“PCAOB”) to address very large issues concerning the structure of the executive branch of the federal government? Justice Scalia once remarked that Congress “does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.”¹ By analogy, neither should the Supreme Court peer into the mousehole of a single and unique federal agency in search of elephants in the form of new elemental principles of separation of powers. To do so would cast aside root principles of parsimony in constitutional adjudication to which the Court always announces its fidelity, and to which it often adheres.² Still, if the need be urgent enough and the opportunity to correct past error plain enough, why stand on principle when the millennium beckons? This last question identifies the seductive offer that Professors Calabresi and Yoo make the Court in their appeal to overrule the landmark decision in *Morrison v. Olson*³ and to enshrine the theory of the unitary executive at the heart of Article II of the Constitution.⁴ I write to argue that neither the need nor the error they identify exists, and that the PCAOB can be upheld under normal analysis—without bagging any elephants, as it were.

Calabresi and Yoo invoke the Vesting Clause at the start of Article II to support their claim that Presidents must enjoy unfettered power to remove at will all those who execute the laws. I concede that the clause should be read to do more than establish that the presidency itself is single, not plural. The nation needs a broad power

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1. *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001).

2. The classic discussion is by Justice Brandeis in *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 341-56 (1936) (Brandeis, J., concurring).

3. 487 U.S. 654 (1988).

4. They develop the theory fully in STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* (2008).

in its Presidents to take action not clearly authorized by statute. However, asserting the existence of executive power that cannot be limited by Congress is different because it threatens “the equilibrium [of] our constitutional system.”⁵ Moreover, the unitary executive theory clashes with numerous provisions of the Constitution that clearly contemplate that the architecture of the executive branch will be statutory, not constitutional, in origin.

The Framers briefly considered creating various executive departments in the Constitution itself, but wisely chose not to.⁶ Instead, they empowered Congress under the Necessary and Proper Clause to create the subordinate institutions of both the executive and the judiciary. Having no model of a successful chief executive to describe in Article II and no experience with the large and active kind of government that we know today, the Framers said what they could and left the rest to politics and history. The most important substantive grant of power in Article II is the Commander in Chief Clause, although its reach is uncertain. Aside from the plenary pardon power, most of the other grants are shared with Congress in some way. Thus, the Senate confirms nominees and ratifies treaties, and the Take Care and Opinions Clauses assume that someone other than the President is executing many powers conferred by statute. The notion that the President must have plenary supervisory power over everyone in the executive branch is refuted by implication in the Inferior Officers Clause, which uses classic discretionary terms (“as they think proper”) in granting Congress the power to assign the appointment of inferior officers to the “Heads of Departments.” Long ago the Supreme Court took the natural next step from this text, concluding that, when Congress places appointment in department heads, it can restrict the President’s power to remove the officers.⁷

If one simply reads through the text of Article II, it is hard to escape the impression that its authors were searching for useful things to say. Justice Robert Jackson once rejected a broad interpretation of the Vesting Clause on grounds of its inconsistency with the presence in Article II of some “trifling” specifics that “would seem to be inherent in the Executive if anything is.”⁸ He nominated the Opinions Clause and the clause allowing the President to commission federal officers. Because I find some uses for the Opinions

5. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 638 (1952) (Jackson, J., concurring).

6. HAROLD H. BRUFF, *BALANCE OF FORCES: SEPARATION OF POWERS LAW IN THE ADMINISTRATIVE STATE* 24 (2006).

7. *United States v. Perkins*, 116 U.S. 483, 485 (1886).

8. *Youngstown*, 343 U.S. at 641 & n.9 (Jackson, J., concurring).

Clause, I will nominate as its replacement in the category of obvious fillers the power to give Congress information on the state of the Union.⁹ Given so sketchy and incomplete a catalogue of powers as Article II provides, the natural way to fill it out is through the legislative process, in which the President participates by possessing the qualified veto (which is very powerful in practice). And that, of course, is what has occurred. Over the years, as Calabresi and Yoo amply demonstrate, Presidents have consistently stated objections to legislation that restricts their powers of removal. Nevertheless, what Presidents consistently have *done* is to sign and live with such legislation—for example, the civil service laws and the statute creating the PCAOB. A clearer case of constitutional acquiescence in fact would be hard to find.

Nevertheless, perhaps the Court should save Presidents from themselves by voiding all of the existing removal restrictions, thus making wholesale changes in the government's organization chart. The Court does sometimes intervene to prevent a branch from giving away its power, as in the Court's invalidations of the legislative veto¹⁰ and the statutory line-item veto.¹¹ But since there is nothing in the Constitution's text or history to support such an action in this case, what would justify it? Calabresi and Yoo offer four policy justifications for the unitary executive theory, hoping to promote them to constitutional law. First, "energy in the executive . . . [is] essential to good government."¹² Second, clear lines of political accountability promote political accountability.¹³ Third, by shielding some agencies from presidential oversight, Congress unfairly increases its own.¹⁴ And fourth, the existing judicial test for determining the constitutionality of a removal restriction (from *Morrison*) is the kind of standardless balancing that courts should avoid.¹⁵ There is merit to each of these policy values, but each is subject to competing values that should not be ignored in crafting constitutional rules. Let us consider them in turn.

9. The Opinions Clause provides some support for the executive order programs that manage federal regulation. See BRUFF, *supra* note 6, at 467-74. The authorities cited there mention the Clause episodically.

10. *I.N.S. v. Chadha*, 462 U.S. 919 (1983).

11. *Clinton v. City of New York*, 524 U.S. 417 (1998).

12. Steven G. Calabresi & Christopher S. Yoo, *Remove Morrison v. Olson*, 62 Vand. L. Rev. En Banc 103, 116 (2009).

13. *Id.*

14. *Id.*

15. *Id.* at 118.

An energetic executive is surely necessary amid the perils of the modern world, but do we really want an executive that is “all sail and no anchor”?¹⁶ The misadventures of the recent Bush Administration due to executive unilateralism should be enough to sound a note of caution. In particular, administration of the nation’s finances has been shielded from the operation of presidential politics since the days of the First Bank of the United States.¹⁷ The PCAOB is part of a complex web of financial regulatory agencies, some of which are independent, some not. The value of a stable financial system offsets that of energy in the executive. This is the kind of policy choice we typically assign to Congress and the President, acting together in the legislative process. The Supreme Court, on the other hand, is ill-suited to make it.

Clear lines of political accountability are a fine thing, but our constitutional system compromises them by choosing a presidential, not parliamentary, system. That is, a single party does not enjoy control of the government whenever it captures the people’s house of the legislature. The recent prevalence of divided government in our nation was lamented by many; others noted its tendency to check excesses. The rejoinder that at least there should be clear lines within the executive branch assumes that the President should be directly politically responsible for everything occurring within the branch. Again, competing values exist. Examples abound. There are clear needs to keep powerful political hands off the money supply or the regulation of such sensitive matters as elections and mass communications. There is a due process need to protect the integrity of administrative adjudication.

Congress does indeed aggrandize itself somewhat whenever it shackles presidential oversight of an agency. The various values that compete with executive unitariness can justify such a step, however, at least if the courts are prepared to check the congressional judgments involved, as the *Morrison* test calls on them to do. The test does ask the right question—whether a restriction impairs the President’s constitutional functions—but it is as yet largely devoid of concrete content. That is a disadvantage, but not a fatal one.

16. The quotation is Lord Macaulay’s famous (mis)characterization of our government as a whole. Letter from T.B. Macaulay to H.S. Randall (May 23, 1857), in 2 THE LIFE & LETTERS OF LORD MACAULAY, at 409 (G. Otto Trevelyan ed., 1877). There are indeed plenty of anchors, and Calabresi and Yoo would pitch overboard only those that restrain the executive.

17. Brief for Constitutional and Administrative Law Scholars as *Amici Curiae* in Support of Respondents, filed in the PCAOB case. Although I signed the brief, I did not write it. That distinction belongs to Professors Gillian Metzger and Henry Monaghan of the Columbia Law School.

Particular cases, like the *PCAOB* case, can provide the needed content, over time and with the grounding of factual context.

What then should the Court do in this case? I think it should invoke the familiar avoidance canon that supports reading statutes to avoid constitutional issues when it is reasonable to do so. As Professor Richard Pildes has explained, the statute that creates the PCAOB can certainly be interpreted to give the Securities and Exchange Commission sufficient power over the Board to make its members inferior officers for purposes of the Appointments Clause.¹⁸ On the removal issue, as I have explained, there are sufficient ways to articulate a limited but effective removal power in the President to allow the Court to uphold the statutory scheme.¹⁹ If the Court follows my advice, it will peer into the two legal mouseholes at the PCAOB and will find no elephants, but only mice—and not very fierce ones at that.

18. 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, 94-100 (2009).

19. Harold H. Bruff, *Bringing the Independent Agencies in from the Cold*, 62 Vand. L. Rev. En Banc 63, 70-71 (2009).