

Why Professors Bruff and Pildes Are Wrong about the PCAOB Case

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In their opening contribution to this online forum, Professors Hal Bruff and Rick Pildes concede that the PCAOB is exercising executive power. They do not even attempt to argue that the PCAOB is a quasi-legislative or quasi-judicial entity.¹ Indeed, since the PCAOB does not act through bicameralism and presentment and does not decide cases or controversies, it obviously cannot be exercising legislative or judicial power.² There is thus no question in this case but that the PCAOB exercises executive power. Professors Bruff and Pildes also concede, as they must, that the Constitution vests all and not some of the executive power in the President.³ But, Bruff and Pildes nonetheless challenge our claim that the Constitution mandates that the President be able to remove at will *any* policymaking official exercising executive power. With all due respect, Bruff and Pildes are simply wrong.

Let's start with Professor Bruff's view on the removal issue.⁴ (We will leave the Appointments Clause issues to our friend, Gary Lawson, with whose analysis we agree.) Professor Bruff concedes that the removal issue is difficult, and he calls for a middle-ground, moderate approach whereby the courts would review removals on a case-by-case basis to determine in particular factual settings whether particular removal limits in particular cases impermissibly affect the President's ability to control exercises of executive power. With all due

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1. The phrases "quasi-legislative" and quasi-judicial" date back to the Supreme Court's decision in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

2. Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 559-70 (1994).

3. *Id.*

4. All references to Professor Bruff refer to his arguments in Harold H. Bruff, *Bringing the Independent Agencies in from the Cold*, 62 VAND. L. REV. EN BANC 63 (2009).

respect, saying that sometimes the President can remove at will and sometimes he cannot has all the appeal of swimming halfway across a river. The problem with doing that is that you will drown.

To put our disagreement with Professor Bruff in context, we feel obliged to say up front that we consider ourselves to be moderates on the issue of presidential power.⁵ For example, we do not disagree with the *Youngstown* Steel Seizure decision, nor do we concur in all of John Yoo's arguments about inherent executive foreign policy and military powers.⁶ The executive power is a power to "execute" statutory and constitutional provisions. It does not include inherent foreign policy and military powers, and it is not as broad a concept as the royal power of King George III. There is no presidential prerogative analogous to the royal prerogative. Moreover, we think there are many circumstances where vigorous and even *de novo* judicial review of executive and agency legal conclusions may be appropriate. The federal courts do and ought to play a role in mediating between many legislative and presidential claims of power. The metaphor of Newtonian balance that Professor Bruff favors is not only appealing. It accurately captures what the Framers thought about the separation of powers in a variety of contexts.

The disagreement we have with Professor Bruff is thus not a disagreement about whether there should be a court-mediated balance of power between the President and Congress, but over whether the balance the Framers struck is one in which the President has the removal power. No one, including Professor Bruff, would ever say that because (1) the Framers intended that there be a balance of power between the President and Congress that in some circumstances is mediated by courts and (2) the veto and pardon powers are formidable power that can be seriously misused, therefore (3) all presidential vetoes and pardons must be made reviewable by Article III courts on a case-by-case basis to see if they are a good idea.

Such an argument would be and must be dismissed out of hand. Of course, the veto and pardon power can be abused. Congress's power to set the salaries and pensions of its members can also be abused, as can be the federal courts' power of judicial review. It does not follow, however, that because a power can be abused, the remedy is always judicial review (which is itself a power that can be abused). The remedy for presidential abuse of the removal power is the same

5. Our views are fully set out in STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* (2008).

6. See JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11* (2005).

remedy that prevents Presidents from abusing the veto power, the pardon power, the appointment power, and all other presidential powers. That remedy is the check of public opinion, the check of future elections, and the threat of impeachment or congressional oversight hearings. Where power is exercised in a way that violates the Constitution, the courts can—in a case or controversy that they have jurisdiction over—disallow any specific unconstitutional presidential act that deprives someone of life, liberty, or property. But the courts have no general power to review the appropriateness of presidential removals. Would Professor Bruff argue that “moderation” requires that we let the federal courts pass on the appropriateness case-by-case of presidential vetoes, pardons, or cabinet nominations? We think not.

There is nothing “moderate” or “balanced” about taking a power which the text, original history, and 220 years of practice of the Constitution give to the President and making it subject to a judicial review that allows life-tenured, unaccountable judges to tell Presidents whether they have done their homework well. Professor Bruff makes a policy argument that there are some quasi-judicial functions—like those of the Comptroller of the Treasury in 1789—that are best done by executive officials who are not removable by the President. That may be right as a matter of policy in some circumstances. But even if Bruff were right that Presidents could, in theory, fire executive branch legislative court judges improperly, why on earth would the remedy for that problem be stringent judicial review of such firings? Why isn’t the remedy a political one that will come from Congress and the political process?

Consider the scandal involving former President Bush’s dismissal of seven U.S. Attorneys for allegedly improper partisan reasons. We doubt Professor Bruff thinks the courts ought to have reviewed those dismissals and no one in either party thought so at the time. Does that mean that Bush “got away” with the making of those removals? Of course not. The Bush Administration paid a high price for those allegedly improper removals. Attorney General Alberto Gonzales was forced to resign in disgrace because he had not prevented the removals from happening. No one in either party defended Gonzales. A new Attorney General with impeccable qualifications and no prior ties to Bush at all was brought in. The new Attorney General launched a criminal investigation of the firings that is still ongoing. Individuals may yet be prosecuted as a result. And that does not even factor in the loss in public support that Bush experienced as a result of arguably abusing the removal power, a loss which led to stunning defeat for Bush’s party in the 2008 presidential and congressional elections.

The reaction to the Bush U.S. Attorney firings shows that Professor Bruff's concern that Presidents might get away with abusing the removal power is farfetched. On the other hand, the unitary executive concerns that independent agencies like the Interstate Commerce Commission ("ICC") may be captured by special interests that need to be checked by our nationally elected President are quite real.⁷ Thus, even if policy concerns were all that mattered here, Professor Bruff would be wrong to oppose an overruling of *Morrison v. Olson* and *Humphrey's Executor*. But policy concerns are *not* all that matters. There is also fidelity to constitutional text, original meaning, and longstanding internal executive branch practice. Making the President's removal power subject to judicial correction is as absurd textually as would be making vetoes, pardons, and nominations subject to judicial scrutiny. For all of these reasons, we disagree with Professor Bruff that his position is a moderate one. We fear instead that he has swum halfway across a river.

Our disagreement with Professor Pildes is equally profound.⁸ Professor Pildes argues that because (1) the PCAOB is supervised and controlled in great detail by the Securities and Exchange Commission and thus is inferior to the SEC in every important way, then (2) the PCAOB is thus no more unconstitutional than the SEC, which has been around as an independent agency since the 1930s and (3) that whatever Congress's power to limit presidential removal of principal officers, there can be no constitutional concern at all about congressional limits on presidential removal of inferior officers. Professor Pildes claims to have defended the PCAOB on the ground that seventy years of experience with public-private partnerships in the regulation of the accounting industry and the views of numerous former SEC Chairmen show us that independence for the PCAOB "works well" and ought not thus to be disturbed.

We cannot help but to begin by noting that Professor Pildes's paean to public-private partnerships makes us reach for our wallets, because government and business all too often work together to form monopolies that may be good for them, but are harmful to the public welfare. Ironically, Professor Pildes's own essay suggests that this is precisely what went wrong over the last seventy years in the accounting industry in particular. The PCAOB was created by the

7. Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23 (1995); Steven G. Calabresi & Nicholas Terrell, *The Fatally Flawed Theory of the Unbundled Executive*, 93 MINN. L. REV. 1696 (2009).

8. All references to Professor Pildes refer to his arguments in 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).

Sarbanes-Oxley Act precisely because public-private partnership over the last seventy years had led to capture and to the extraction of monopoly rents. For this very reason, the PCAOB was made more independent of the accounting industry in particular. That was a great first step. What Professor Pildes totally fails to explain, however, is why it follows from the conclusion that the PCAOB ought to be independent of the accounting industry that it ought also to be independent of the President of the United States.

Rendering the PCAOB subordinate to the SEC and to the congressional oversight committees that totally dominate the SEC makes the PCAOB more likely to be captured. Presidential oversight is a backstop against capture, because it is harder and more expensive to capture the presidency than it is to capture a congressional oversight committee or an independent regulatory agency.⁹ Suppose that a group of railroads and shippers set out to capture the old ICC and the congressional committees that oversaw it. Most members of the general public and even of Congress will have little awareness of who serves on the relevant commission and oversight committees, let alone what their policy views might be. Truckers, railroads, and other shipping companies, in contrast, will be acutely aware of these matters because their livelihood and profitability will depend on it. The same goes for farmers who must ship their produce to market. Over time, one would expect these interests to capture the ICC and its congressional oversight committees. And that is exactly what happened.

So what backstop exists against special interest capture? What institution has an incentive to speak for what Mancur Olson¹⁰ and Richard Nixon called the silent majority? Majorities are often silent because they have little to gain from a particular policy coming out the right way. Presidents, however, must by the nature of their office be attentive to majority interests. Getting elected or reelected to the presidency almost always requires a 51 percent national majority. For this reason, Presidents work hard to keep their job approval ratings above 50 percent. When those ratings drop below that level presidential clout in Congress tends to evaporate. One does not maintain a 51 percent national electoral coalition without devising policies that take account of the preferences of some silent majorities. That is why Presidents always move toward the center and moderate their congressional party coalitions.

9. Calabresi, *supra* note 7; Calabresi & Terrell, *supra* note 7.

10. MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1971).

Presidential removal power over PCAOB members is desirable for the same reason it was desirable to try to make the PCOAB independent of the accounting industry. Public-private partnerships are, contrary to Professor Pildes's essay, dangerous and likely to go awry. What the court ought to do in the PCAOB case is to hold that the good cause removal provisions in the statutes setting up the PCAOB and the SEC itself allow the President to remove for cause whenever there is a policy or philosophical disagreement between the President and a commissioner.

We applaud Professor Pildes's desire to write a Brandeis brief, but we think his own account of the seventy-year history of public-private partnerships in this area is itself a refutation of his argument against presidential control of the PCAOB. If Professor Pildes were just a bit more of a realist, he would realize that enhanced presidential control over PCAOB activity is warranted not only because of constitutional text, original meaning, and practice, but also by the very policy concerns about which Professor Pildes cares the most.