"The Commodity Futures Trading Commission (CFTC) opened a record 419 investigations over the last year, into things as diverse as small-time Ponzi schemes and claims of market manipulation."

Julie Creswell and Graham Bowley, "Once on Sleepy Beat, Regulator is Suddenly Busy," *The New York Times*, November 4, 2010.

and business practices of any corporation or industry engaged in commerce to determine whether there has been a violation of any law. In exercising their investigative functions, agencies may use the subpoena power and require reports, examine witnesses under oath, and examine and copy documents, or they may obtain information from other governmental offices. This power of investigation complements the exercise of the agency's other powers, especially the power to adjudicate.

As discussed in Chapter 13, it is a crime to make any false or fraudulent statement in any matter within the jurisdiction of a federal agency. A person may be guilty of a violation without proof that he or she had knowledge that the matter was within the jurisdiction of a federal agency. As a result, information furnished to an agency must be truthful.

9. ORGANIZATION OF AGENCIES

Administrative agencies, boards, or commissions usually consist of five to seven members, one of whom is appointed as chair. Laws creating the regulatory body usually specify that no more than a simple majority of the members (three of the five or four of the seven) may belong to the same political party. Appointments at the federal level require Senate confirmation, and appointees are not permitted to engage in any other business or employment during their terms. They may be removed from office by the president only for inefficiency, neglect of duty, or malfeasance in office.

The following case highlights the constitutional requirements related to the appointment of administrative officials.

case **15.3** >>

FREE ENTERPRISE FUND v. PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD
130 S. Ct. 3138 (2010)

As a part of the Sarbanes-Oxley Act, Congress created the Public Company Accounting Oversight Board (PCAOB or Board). This Board consists of five members who are appointed by the Securities and Exchange Commissioners. Board members serve 5-year, staggered terms and are not considered Government officers or employers. This allows the recruitment from the private sector since the Board members' salaries are not subject to governmental limitations. These members can be removed by the SEC Commissioners only "for good cause" if the Board member:

"(A) has willfully violated any provision of the 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."

This arrangement concerning the appointment and potential removal of Board members makes the PCAOB a Government-created, Government-appointed entity with expansive powers to govern an entire industry (public accounting firms). It further makes the Board members insulated from the direct supervision of the SEC Commissioners.

Following the Board's release of a negative report about Beckstead and Watts, LLP, a public accounting firm, this lawsuit was filed by that firm and The Free Enterprise Fund challenging the constitutionality of the Sarbanes-Oxley Act at least as far as the

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creation and operation of the PCAOB. The basis of this challenge is the Board members are not subject to the appointed powers of the President of the United States. The United States Government joined the suit to defend the Sarbanes-Oxley Act and the PCAOB. The District Judge granted summary judgment in favor of the United States, and the D.C. Circuit Court of Appeals affirmed. Certiorari was granted to review the constitutional issue.

ROBERTS, C.J.: . . . We hold that the dual for-cause limitations on the removal of Board members contravene the Constitution's separation of powers.

The Constitution provides that "[t]he executive Power shall be vested in a President of the United States of America." Art. II, §1, cl. 1. As Madison stated on the floor of the First Congress, "if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws."

The removal of executive officers was discussed extensively in Congress when the first executive departments were created. The view that "prevailed, as most consonant to the text of the Constitution" and "to the requisite responsibility and harmony in the Executive Department," was that the executive power included a power to oversee executive officers through removal; because that traditional executive power was not "expressly taken away, it remained with the President." . . .

The landmark case of *Myers* v. *United States* reaffirmed the principle that Article II confers on the President "the general administrative control of those executing the laws." It is *his* responsibility to take care that the laws be faithfully executed. The buck stops with the President, in Harry Truman's famous phrase. As we explained in *Myers*, the President therefore must have some "power of removing those for whom he cannot continue to be responsible."

Nearly a decade later in *Humphrey's Executor*, this Court held that *Myers* did not prevent Congress from conferring good-cause tenure on the principal officers of certain independent agencies. That case concerned the members of the Federal Trade Commission, who held 7-year terms and could not be removed by the President except for "inefficiency, neglect of duty, or malfeasance in office." The Court distinguished *Myers* on the ground that *Myers* concerned "an officer [who] is merely one of the units in the executive department and, hence, inherently subject to the exclusive and illimitable power of removal by the Chief Executive, whose subordinate and aid he is." By contrast, the Court characterized the FTC as "quasi-legislative and quasi-judicial" rather than "purely executive," and held that Congress could require it "to act . . . independently of executive control." Because "one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will," the Court held that Congress had power to "fix the period during which [the Commissioners] shall continue in office, and to forbid their removal except for cause in the meantime."

Humphrey's Executor did not address the removal of inferior officers, whose appointment Congress may vest in heads of departments. If Congress does so, it is ordinarily the department head, rather than the President, who enjoys the power of removal. This Court has upheld for-cause limitations on that power as well. . . .

We have previously upheld limited restrictions on the President's removal power. In those cases, however, only one level of protected tenure separated the President from an officer exercising executive power. It was the President—or a subordinate he could remove at will—who decided whether the officer's conduct merited removal under the good-cause standard. The Act before us does something quite different. It not only protects Board members from removal except for good cause, but withdraws from the President any decision on whether that good cause exists. That decision is vested instead in other tenured officers—the Commissioners—none of whom is subject to the President's direct control. The result is a Board that is not accountable to the President, and a President who is not responsible for the Board. The added layer of tenure protection makes a difference. Without a layer of insulation between the Commission and the Board, the Commission could remove a Board member at any time, and therefore would be fully responsible for what the Board does. The President could then hold the Commission to account for its supervision of the Board, to the same extent that he may hold the Commission to account for everything else it does. A second level of tenure protection changes the nature of the President's review. Now the Commission cannot remove a Board member at will. The President therefore cannot hold the Commission fully accountable for the Board's conduct, to the same extent that he may hold the Commission accountable for everything else that it does. The Commissioners are not responsible for the Board's actions. They are only responsible for their own determination of whether the Act's rigorous good-cause standard is met. And even if the President disagrees with their determination, he is powerless to intervene—unless that determination is so unreasonable as to constitute inefficiency, neglect of duty, or malfeasance in office.

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This novel structure does not merely add to the Board's independence, but transforms it. Neither the President, nor anyone directly responsible to him, nor even an officer whose conduct he may review only for good cause, has full control over the Board. The President is stripped of the power our precedents have preserved, and his ability to execute the laws—by holding his subordinates accountable for their conduct—is impaired.

That arrangement is contrary to Article II's vesting of the executive power in the President. Without the ability to oversee the Board, or to attribute the Board's failings to those whom he *can* oversee, the President is no longer the judge of the Board's conduct. He is not the one who decides whether Board members are abusing their offices or neglecting their duties. He can neither ensure that the laws are faithfully executed, nor be held responsible for a Board member's breach of faith. This violates the basic principle that the President cannot delegate ultimate responsibility or the active obligation to supervise that goes with it, because Article II makes a single President responsible for the actions of the Executive Branch.

Indeed, if allowed to stand, this dispersion of responsibility could be multiplied. If Congress can shelter the bureaucracy behind two layers of good-cause tenure, why not a third? At oral argument, the Government was unwilling to concede that even *five* layers between the President and the Board would be too many. The officers of such an agency—safely encased within a Matryoshka doll of tenure protections—would be immune from Presidential oversight, even as they exercised power in the people's name.

Perhaps an individual President might find advantages in tying his own hands. But the separation of powers does not depend on the views of individual Presidents, nor on whether the encroached-upon branch approves the encroachment. The President can always choose to restrain himself in his dealings with subordinates. He cannot, however, choose to bind his successors by diminishing their powers, nor can he escape responsibility for his choices by pretending that they are not his own.

The diffusion of power carries with it a diffusion of accountability. The people do not vote for the Officers of the United States. They instead look to the President to guide the assistants or deputies . . . subject to his superintendence. Without a clear and effective chain of command, the public cannot determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall. That is why the Framers sought to ensure that those who are employed in the execution of the law will be in their proper situation, and the chain of dependence be preserved; the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community.

By granting the Board executive power without the Executive's oversight, this Act subverts the President's ability to ensure that the laws are faithfully executed—as well as the public's ability to pass judgment on his efforts. The Act's restrictions are incompatible with the Constitution's separation of powers. . . .

This case presents an even more serious threat to executive control than an "ordinary" dual for-cause standard. Congress enacted an unusually high standard that must be met before Board members may be removed. A Board member cannot be removed except for willful violations of the Act, Board rules, or the securities laws; willful abuse of authority; or unreasonable failure to enforce compliance—as determined in a formal Commission order, rendered on the record and after notice and an opportunity for a hearing. The Act does not even give the Commission power to fire Board members for violations of *other* laws that do not relate to the Act, the securities laws, or the Board's authority. The President might have less than full confidence in, say, a Board member who cheats on his taxes; but that discovery is not listed among the grounds for removal. . . .

The rigorous standard that must be met before a Board member may be removed was drawn from statutes concerning private organizations like the New York Stock Exchange. While we need not decide the question here, a removal standard appropriate for limiting Government control over private bodies may be inappropriate for officers wielding the executive power of the United States. . . .

Petitioners' complaint argued that the Board's "freedom from Presidential oversight and control" rendered it "and all power and authority exercised by it" in violation of Constitution. We reject such a broad holding. Instead, we agree with the Government that the unconstitutional tenure provisions are severable from the remainder of the statute.

Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem, severing any problematic portions while leaving the remainder intact. . . . Concluding that the removal restrictions are invalid leaves the Board removable by the Commission at will, and leaves the President separated from Board members by only a single level of good-cause tenure. The Commission is then fully responsible for the Board's actions, which are no less subject than the Commission's own functions to Presidential oversight.

The Sarbanes-Oxley Act remains fully operative as a law with these tenure restrictions excised. We therefore must sustain its remaining provisions

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"[u]nless it is evident that the Legislature would not have enacted those provisions . . . independently of that which is [invalid]." Though this inquiry can sometimes be elusive, the answer here seems clear: The remaining provisions are not incapable of functioning independently, and nothing in the statute's text or historical context makes it evident that Congress, faced with the limitations imposed by the Constitution, would have preferred no Board at all to a Board whose members are removable at will.

It is true that the language providing for good-cause removal is only one of a number of statutory provisions that, working together, produce a constitutional violation. In theory, perhaps, the Court might blue-pencil a sufficient number of the Board's responsibilities so that its members would no longer be "Officers of the United States." Or we could restrict the Board's enforcement powers, so that it would be a purely recommendatory panel. Or the Board members could in future be made removable by the President, for good cause or at will. But such editorial freedom—far more extensive than our holding today—belongs to the Legislature, not the Judiciary. Congress of course remains free to pursue any of these options going forward. . . .

It is so ordered.

>> CASE QUESTIONS

1. What was Congress's purpose in creating the Public Company Accounting Oversight Board?
2. As stated in the Sarbanes-Oxley Act, what are the restrictions on removing the Board members?
3. What conclusion does the Supreme Court reach concerning the constitutionality of the PCOAB members' powers?
4. How does this decision impact the validity of the Board and other provisions of the Sarbanes-Oxley Act?

Regulatory agencies require staffs to carry out their duties. While each agency has its own distinctive organizational structure to meet its responsibilities, most agencies have persons performing certain functions common to all agencies. Because agencies have quasi-legislative and quasi-judicial functions as well as the usual executive ones, the organizational chart of an agency usually embraces the full range of governmental duties. Figure 15.2 shows an organizational chart outlining the general functions and duties of administrative agencies.

In General The chairperson is designated as such at the time of nomination by the president and is the presiding officer at agency meetings. The chairperson usually belongs to the same political party as the president and, while an equal in voting, is somewhat more important than the other agency members because of visibility and the power to appoint staff. For example, the chairman of the Federal Reserve Board is often in the news, while the other board members are relatively unknown.

The secretary is responsible for the minutes of agency meetings and is legal custodian of its records. The secretary usually signs orders and official correspondence and is responsible for publication of all actions in the *Federal Register*. The secretary also coordinates the activities of the agency with others involved in the regulatory process.

The office of **general counsel** is so important in many agencies that the appointment usually requires Senate approval. The general counsel is the