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Eric Keith Miller

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Excessive Delegation of Power to the Convening Authority of Military Commissions in Guantanamo Bay, Cuba and its Implications on Public Policy

Eric K. Miller

I. INTRODUCTION

The military commissions system in Guantanamo Bay, Cuba has been an object of domestic and international criticism since its inception.¹ The Supreme Court in *Hamdan v. Rumsfeld* struck down the initial military commissions established by President George W. Bush because the commissions violated Article 36, Uniform Code of Military Justice (USMJ) and Common Article 3 of the Geneva Conventions.² Congress passed the Military Commissions Act of 2006 (“2006 MCA”) in response to *Hamdan* to provide the statutory authority for military commissions in Guantanamo. The 2006 MCA was amended by the Military Commissions Act of 2009³ (“MCA of 2009” or “the Act”), which authorizes the President to establish military commissions to try alien unprivileged enemy belligerents for violations of the law of war and other offenses provided in the Act.⁴ The Act further provides that the “Secretary of Defense or any officer or official designated by the Secretary” may convene a military commission authorized by the President.⁵ The Act grants the convening authority a tremendous amount influence over the commissions and removes from the President and Secretary of Defense the power to review certain decisions of the convening authority.⁶

Despite the vast power of the convening authority, there is little jurisprudence concerning the constitutionality of the office. The absence of such jurisprudence became apparent in the summer of 2012 during the military commission of Abd al-Rahim Hussein Muhammed Abdu al-

¹ See Lt. Col. David J. R. Frakt, *Military Justice Edition: The Practice of Criminal Law in the Guantanamo Military Commissions*, 67 A.F. L. Rev. 35, 37 (2011).

² See 548 U.S. 557 (2006).

³ 10 U.S.C. §§ 948 *et seq.*, Pub. L. 111 -84, 123 Stat. 2574 (Oct. 28, 2009).

⁴ 10 U.S.C. §§ 948b(a) and (b).

⁵ 10 U.S.C. § 948h.

⁶ See generally Military Commissions Act of 2009.

Nashiri (“Mr. Nashiri”), the alleged mastermind of the bombing of the U.S.S. Cole in the Yemen Port of Aden on October 12, 2000. On June 15, 2012, counsel for Mr. Nashiri filed a motion to dismiss the case because the creation of the Office of the Convening Authority and the Convening Authority’s assumption of authority violates the Appointments Clause of Article II, Section II, Clause II of the United States Constitution.⁷ The motion was denied, perhaps incorrectly, on October 4, 2012, by Judge James L. Pohl, who found the appointment of the Convening Authority by the Secretary of Defense to be constitutionally permissible under *Morrison v. Olson*, 487 U.S. 654 (1988).⁸

This note presents the argument that the appointment of and vesting of certain powers in the convening authority exemplifies how current Appointments Clause jurisprudence allows Congress to insulate from public opinion executive officers. Part II introduces the basics of the military commissions system in Guantanamo and the role of the convening authority. Part III discusses the legal basis of the Appointments Clause relevant to the convening authority. Part IV examines Judge Pohl’s denial of Mr. Nashiri’s motion and the shortcomings of the existing legal framework. Part V raises questions how the office of the convening authority draws into question how the doctrine of separation of powers may fail to prevent the aggrandizing of power in the Executive Branch. A governmental official is only subject to the Appointments Clause if he or she can be classified as an Officer, as opposed to a mere employee. The satisfaction of the Appointments Clause then differs depending on whether the Officer is a “principal officer” or an “inferior officer.” This framework is well settled; however, the classification of the convening

⁷ *Mr. Nashiri’s defense motion, Military Commissions Trial Judiciary, AE087 Motion*, “Defense Motion to Dismiss Because the Convening Authority Assumes the Responsibilities of an Officer of the Government Without the Minimal Procedures Required by the Appointments Clause that Ensure Democratic Accountability,” dtd. June 15, 2012.

⁸ *Ruling on Mr. Nashiri’s defense motion AE087, Military Commissions Trial Judiciary*, “AE087D Ruling,” dtd. October 4, 2012.

authority as an “inferior officer” is evidence of the deficiency in Appointments Clause jurisprudence and that insulating the convening authority from popular opinion, while constitutionally permissible, is a bad policy.

II. MILITARY COMMISSIONS AND THE ROLE OF THE CONVENING AUTHORITY

A military commission is a military court of law, and Congress has granted the President authority to create military commissions to hear cases against alien⁹ unprivileged enemy belligerents.¹⁰ An unprivileged enemy belligerent is defined as

[A]n individual (other than a privileged belligerent)¹¹ who (A) has engaged in hostilities against the United States or its coalition partners; (B) has purposefully and materially supported hostilities against the United States or its coalition partners; or (C) was part of al Qaeda at the time of the alleged offense under this chapter.¹²

Once created, a military commission may only “be convened by the Secretary of Defense or by any officer or official of the United States designated by the Secretary for that purpose.”¹³

The Office of the Convening Authority is one of five organizations of the Department of Defense tasked with administering the military commissions in Guantanamo. The other organizations include the Office of the Chief Prosecutor, the Office of the Chief Defense Counsel, the Military Commissions Trial Judiciary, and the United States Court of Military Commission Review (“USCMCR”).¹⁴ For purposes of this paper, only the Office of the Convening Authority and the USCMCR are relevant. The MCA of 2009 grants the USCMCR with jurisdiction to review findings of guilt for both factual sufficiency and sentence

⁹ “Alien” is defined as “an individual who is not a citizen of the United States.” 10 U.S.C. § 948a(1).

¹⁰ 10 U.S.C. §§ 948b(b) 948c.

¹¹ A “privileged belligerent” is defined as “an individual belonging to one of the eight categories enumerated in Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War.” 10 U.S.C. § 948a(6).

¹² 10 U.S.C. § 948a(7).

¹³ 10 U.S.C. § 948h.

¹⁴ UNITED STATES MILITARY COMMISSIONS, ORGANIZATION OVERVIEW (2012), *available at* <http://www.mc.mil/ABOUTUS/OrganizationOverview.aspx>.

appropriateness.¹⁵ The jurisdiction “mirrors that exercised by the military service Courts of Criminal Appeals in review of courts-martial in which the approved sentence includes death . . . or confinement for one year or more, an authority characterized as an ‘awesome, plenary, *de novo* power of review.’”¹⁶ The power of the USCMCR to review decisions of the military commissions, however, is not without limitation. Congress explicitly removed from the USCMCR jurisdiction to review any finding or sentence not approved by the convening authority, regardless of the reason.¹⁷ This limitation is problematic because it adds a procedural step between the finding of the commission and review by the USCMCR, which renders the convening authority immensely important.

The current convening authority¹⁸ is retired Vice Admiral Bruce MacDonald. Importantly, despite being a formerly commissioned officer, Vice Adm. MacDonald officially occupies a civilian position in the Department of Defense’s Senior Executive Service.¹⁹ During the pretrial proceedings and military commission, the convening authority has the exclusive authority to detail members of the armed forces to serve as members of the military commission.²⁰ The convening authority has final authority to “order that such investigative or other resources be made available to defense counsel . . . and the accused as deemed necessary . . . for a fair trial”²¹ and “[r]eviews requests from the prosecution and the defense for experts and

¹⁵ 10 U.S.C. § 950f(d).

¹⁶ *United States v. Al Bahlul*, 2011 U.S. CMCR Lexis 3, 11 (Sept. 9, 2011) (citing *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990) (in turn citing 10 U.S.C. §866)).

¹⁷ 10 U.S.C. 950f(d).

¹⁸ Actual position is referred to as director, Office of the Convening Authority, Immediate Office of the Secretary of Defense, Washington, D.C.

¹⁹ U.S. Department of Defense, Office of the Assistant Secretary of Defense (Public Affairs), News Release, “Senior Executive Service Appointments and Reassignments,” dtd. March 30, 2010.

<http://www.defense.gov/Releases/Release.aspx?ReleaseID=13418>

²⁰ 10 U.S.C. 948h.

²¹ Reg. T. Mil. Comm. § 2-3(a)(10) (2011).

determine[s] whether the experts sought are relevant and necessary.”²² Further, the convening authority has final authority to detail interpreters for the military commission, defense counsel, and for the accused.²³

The convening authority has extensive authority after the trial produces a verdict and sentence. Perhaps the greatest power possessed by the convening authority is his or her discretion in review the commission’s verdict and sentence. The MCA of 2009 provides that the convening authority has the “sole discretion . . . [to] approve, disapprove, commute or suspend the sentence in whole or in part.”²⁴ The authority to modify the findings of guilt or sentence of the accused “is a matter of the sole discretion and prerogative of the convening authority.”²⁵ The convening authority may also “[d]ismiss any charge or specification by setting aside a finding of guilty thereto.”²⁶

The convening authority’s exclusive authority to dismiss any charge or disapprove of a finding of guilt is significant because Congress only provides appellate review before the United States Court of Military Commission Review (“USCMCR”) for findings of guilt approved by the convening authority.²⁷ Similarly, the United States Court of Appeals for the District of Columbia Circuit is vested with the “exclusive jurisdiction to determine the validity of a final judgment rendered by a military commission” and approved by the convening authority and, where applicable, the USCMCR.²⁸ Therefore, the convening authority can unilaterally end the judicial proceedings for the accused by suspending the sentence in whole or by dismissing the charges by setting aside a guilty verdict.

²² *Id.* at § 2-3(a)(11).

²³ 10 U.S.C. § 948l(b).

²⁴ Reg. T. Mil. Comm. § 23-7 (2011); see also 10 U.S.C. § 950b(c)(3)(C).

²⁵ 10 U.S.C. § 950b(c)(1).

²⁶ 10 U.S.C. § 950(c)(2)(A).

²⁷ 10 U.S.C. § 950c.

²⁸ 10 U.S.C. § 950g(a).

III. THE LEGAL FRAMEWORK: THE APPOINTMENTS CLAUSE AND THE *MORRISON* FACTORS

The seminal case for Appointments Clause jurisprudence is *Morrison v. Olson*.²⁹ In *Morrison*, the Court articulated, *inter alia*, the legal framework for determining whether the particular officer in question must be nominated by the president and confirmed by the Senate. A government official is only subject to the Appointments Clause³⁰ if he or she is an officer, as opposed to an employee. “[A]ny appointee exercising significant authority pursuant to the laws of the United States is an Officer of the United States, and must, therefore, be appointed by in the manner prescribed by [the Appointments Clause].”³¹ For purposes of the Appointments Clause, the Constitution divides all officers into two classes.³² Thus, the first step is to determine whether the officer is an “inferior” or a “principal” officer.³³ The line between the types of officers is “far from clear, and the Framers provided little guidance into where it should be drawn.”³⁴

In *Morrison*, the Court addressed the distinction between inferior and principal officers. The issue before the Court was whether Title VI of the Ethics in Government Act³⁵ (“the Ethics Act”) violated the Appointments Clause. “Briefly stated, Title VI of the Ethics in Government Act . . . allows for the appointment of an ‘independent counsel’ to investigate and, if appropriate,

²⁹ 487 U.S. 654 (1980).

³⁰ “[The President] shall nominate, and, by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.” *U.S. Cons. Art II*, § 2, Cl. 2.

³¹ *Buckley v. Valeo*, 424 U.S. 1, at 126 (1976).

³² *Morrison v. Olson*, 487 U.S. 654, 670 (1988) (citing *United States v. Germaine*, 99 U.S. 508, 509 (1879)).

³³ *Id.* at 670-71.

³⁴ *Id.* at 671 (citing 2 J. Story, Commentaries on the Constitution § 1536, pp. 397-398 (3d ed. 1858)).

³⁵ 28 U. S. C. §§ 591-599 (1982 ed., Supp. V).

prosecute certain highranking Government officials for violations of federal criminal laws.”³⁶

Specifically,

The [Ethics] Act require[d] the Attorney General, upon receipt of information that he determines is ‘sufficient to constitute grounds to investigate whether any person covered by the Act may have violated any Federal criminal law,’ to conduct a preliminary investigation of the matter.³⁷

Upon completion of the investigation, if the Attorney General determines that no reasonable grounds exist to warrant further investigation, then he must notify the Special Division, a court created by the Act, of the fact.³⁸ If no reasonable grounds exist, the Special Division has no power to take further action.³⁹ However, if the Attorney General determines there to be reasonable grounds to warrant further investigation, then the Attorney General shall apply to the Special Division with sufficient information to the to assist the court in the appointment of independent counsel and in defining said counsel’s jurisdiction.⁴⁰ Upon receipt of the Attorney General’s application, the Special Division was required to appoint independent counsel and define that counsel’s prosecutorial jurisdiction.⁴¹

The Court, in upholding the constitutionality of office of independent counsel, expressly denied the creation of a brightline rule for determining whether the officer in question is an inferior or a principal officer.⁴² The independent counsel, in the Court’s opinion, was so clearly on the side of the line rendering him an inferior officer that the Court stated it “need not attempt to decide exactly where the line falls between the two types of officers. . . .”⁴³ The Court relied on four factors to reach this conclusion.

³⁶ *Morrison v. Olson*, 487 U.S. 654, 660 (1988) (quotations in original) (italics in original).

³⁷ *Id.* (quotations in original) (internal brackets removed).

³⁸ *Id.* at 661.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Morrison*, 487 U.S. at 661.

⁴² *Id.* at 671.

⁴³ *Id.*

First, the independent counsel is subject to removal by a higher Executive Branch official in the Attorney General.⁴⁴ Although the independent counsel possesses a degree of independent discretion, the fact that she can be removed by the Attorney General indicates that she is inferior in rank and authority.⁴⁵ Second, the Ethics Act limited the independent counsel's authority "to perform only certain, limited duties."⁴⁶ Although independent counsel had the authority to exercise all investigative and prosecutorial functions of the Department of Justice, independent counsel was not granted the authority to formulate policy for the Executive Branch nor was independent counsel granted "any administrative duties outside of those necessary to operate her office."⁴⁷ Third, the independent counsel's office is limited in jurisdiction.⁴⁸

Not only is the [Ethics] Act itself restricted in applicability to certain federal officials suspected of certain serious federal crimes, but an independent counsel can only act within the scope of the jurisdiction that has been granted by the Special Division pursuant to a request by the Attorney General.⁴⁹

Fourth, the independent counsel's office is limited in tenure, even though there is no particular time limit on the appointment, because independent counsel is appointed to accomplish a single task.⁵⁰ Upon completion of the task, the office is either self-terminated or terminated by the Special Division.⁵¹ Likewise, the responsibilities of the independent counsel are terminated when the task at hand is completed. In totality, "the ideas of tenure, duration [] and duties' of the independent counsel . . . are sufficient to establish that the [independent counsel] is an 'inferior' officer in the constitutional sense."⁵²

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Morrison*, 487 U.S. at 671.

⁴⁷ *Id.*

⁴⁸ *Id.* at 672.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Morrison*, 487 U.S. at 672.

⁵² *Id.* (internal quotations in original) (internal citations omitted).

Justice Scalia criticized the four factors relied upon by the majority because no prior legal authority recognized those particular factors as being determinative.⁵³ Additionally, Justice Scalia contended that each of the four factors as applied to independent counsel should have resulted in a determination that she was, in fact, a principal officer. Scalia's view was "that the independent counsel is not an inferior officer because she is not *subordinate* to any officer in the Executive Branch (indeed, not even to the President)."⁵⁴

In relying on the *Morrison* factors, Judge James K. Pohl denied Mr. Nashiri's motion to dismiss by concluding that the four factors as applied to the convening authority rendered the position to be one of an inferior officer. The reliance on these factors underscores the inadequacy of the legal framework – as addressed by Justice Scalia's dissenting opinion – by highlighting how current jurisprudence on the Appointments Clause allows for the insulation of executive authority from public opinion.

IV. THE DENIAL OF MR. NASHIRI'S MOTION AND THE SHORTCOMINGS OF THE APPOINTMENTS CLAUSE JURISPRUDENCE

1. Judge Pohl's Denial of Mr. Nashiri's Motion

Mr. Nashiri's motion to dismiss without prejudice the charges against him because the Convening Authority was improperly appointed was denied on October 4, 2012.⁵⁵ Judge Pohl needed less than two pages to rule against Mr. Nashiri. The Commission's findings were three fold: first, the convening authority was properly appointed by the Secretary of Defense; second, the convening authority is an inferior officer under the "controlling four-factor analysis" of *Morrison v. Olson*; and third, the convening authority properly exercised his authority to

⁵³ *Morrison*, 487 U.S. at 719 (Scalia, J., dissenting).

⁵⁴ *Id.* (italics in original) (parentheses in original).

⁵⁵ *Ruling on Mr. Nashiri's defense motion AE087, Military Commissions Trial Judiciary*, "AE087D Ruling," dtd. October 4, 2012, pg. 1.

convene the military commission.⁵⁶ The most important of these determinations is the finding of the convening authority to be an inferior officer under *Morrison*.

The first mishap in Judge Pohl's decision is the classification of *Morrison*'s four-factor analysis as being "controlling."⁵⁷ The Supreme Court has explicitly stated that the four factors addressed in *Morrison* were specific to that case and are not the only factors worthy of consideration when the circumstances are different.⁵⁸ Nevertheless, Judge Pohl's application of *Morrison* warrants further exploration. Applying the four-factor analysis, Judge Pohl made the following findings in reaching the conclusion that the convening authority is an inferior officer:

- (1) The Convening Authority is subject to removal by a higher Executive Branch official; namely, the Secretary of Defense.
- (2) The Convening Authority is empowered to perform only certain, limited duties. His authority extends *only* to cases charged by the prosecutor and nominated for trial by military commission. He enjoys no power to make Department of Defense policy or to prescribe Departmental administration beyond that necessary to effect the functioning of his office.
- (3) The Convening Authority's office is limited in jurisdiction. He is limited by statute to a narrowly defined set of duties pertaining exclusively to the convening of military commissions.
- (4) The Convening Authority's office is limited in tenure. His tenure extends only to the completion of the cases nominated for trial by military commission.⁵⁹

Each of these findings will be addressed in turn to demonstrate how the rigid application of *Morrison* is inappropriate and, where appropriate, how the consideration of certain powers granted to the convening authority should result in a contrary finding.

a. Subject to Removal by a Higher Office

The first factor in *Morrison* is that an officer is "inferior" if he or she is subject to removal by a higher Executive Branch officer. The flaws with using this criterion are twofold.

⁵⁶ *Id.* at pages 1-2.

⁵⁷ *Id.* at p. 1.

⁵⁸ See *Edmonds v. United States*, 520 U.S. 651, 661 (1997).

⁵⁹ *Ruling on Mr. Nashiri's motion*, pg. 2.

First, as Justice Scalia argued in his dissenting opinion in *Morrison*, a good cause limitation on the removal of an Officer necessarily removes from the President the ability to effectively control the Executive Branch.⁶⁰ If the independent counsel were removable at the Attorney General's will, as is the Attorney General to the President's will, then independent counsel would be inferior.⁶¹ However, Congress' requirement that independent counsel only be removed with good cause explicitly makes independent counsel not subordinate.⁶² Second, if being subject to removal for good cause renders one inferior, then it could be said that Congress' impeachment power of the President renders the President inferior.⁶³ Thus, focusing the inquiry on whether Congress allows for removal of the officer in question obfuscates the issue. Simply because one is removable does not mean that one is inferior, especially when one only becomes removable after failing to effectively perform his or her duties.

Like the independent counsel in *Morrison*, the convening authority for military commissions is vested with exclusive authority to perform certain tasks. Particularly problematic is the convening authority's sole discretion to approve or disapprove of charges brought against a defendant. The convening authority can, without fear of reprimand, dismiss any and all charges against an accused following a trial and verdict. Neither the President or the Secretary of Defense have any influence on this particular decision, and Congress has not provided the statutory authority for the President or Secretary of Defense to revisit what either of them to believe is an erroneous or malicious dismissal. Moreover, Congress provided the USCMCR jurisdiction to hear *only* cases where the findings of guilt and sentences were approved by the convening authority. Therefore, the convening authority has the sole power to

⁶⁰ *Morrison*, 487 U.S. at 717 (Scalia, J., dissenting).

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

dismiss an effective prosecution of an accused, thereby rendering the President unable to ensure the laws are faithfully executed.

b. Empowered to Perform only Certain, Limited Duties

The second factor in *Morrison* is that an officer is “inferior” if he or she is empowered to perform only certain, limited duties. The finding of the independent counsel to be an inferior officer was in spite of the fact that Congress vested the office with all the investigative and prosecutorial functions of the Department of Justice. Nevertheless, the inability of independent counsel to formulate policy or exercise administrative duties outside of those necessary to perform her statutory duties rendered her an inferior officer. Admittedly, restricting an officer to the performance of only certain, limited duties may be a relevant to determining whether he or she is an inferior officer.⁶⁴ However, the focus should be on the qualitative authority to perform those certain, limited duties – not the quantitative number of duties to be performed.⁶⁵ For Justice Scalia, the fact that the independent counsel had the “full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice” was sufficient to recognize independent counsel as a principal officer.⁶⁶ Additionally, the inability of independent counsel to formulate policy “could be said for all officers of the Government, with the single exception of the President.”⁶⁷

Similarly, the convening authority only performs certain, limited duties and does not have the power to formulate government policy. However, once appointed by the Secretary of Defense, the convening authority is vested with certain powers that the Secretary of Defense does not have. Namely, the convening authority micromanages the resources available to

⁶⁴ *Morrison*, 487 U.S. 716 (Scalia, J., dissenting).

⁶⁵ *See id.* at 716-17.

⁶⁶ *Id.* at 717.

⁶⁷ *Id.*

counsel during the military commission. Likewise, the convening authority's power to dismiss charges against an accused and end the military commission may be limited in scope, but it is nonetheless a grant of authority possessed by neither the President nor Secretary of Defense.

c. Limited Nature of the Jurisdiction and Tenure

The third and fourth factors in *Morrison* are the jurisdiction and tenure of an officer. The *Morrison* Court found independent counsel was an inferior officer because her tenure was limited to the completion of a particular task as dictated by the Special Division. Further, the Court found independent counsel to be an inferior officer because her investigative and prosecutorial jurisdiction was limited by the Special Division. The Court's reliance on these factors is improper because it obfuscates the importance of the office. First, the independent counsel "ha[d] already served more than two years, which is at least as long as many Cabinet officials."⁶⁸ Cabinet officials, who serve four year terms, are also limited in tenure, though it is widely understood that such officers are Principal Officers. Second, although independent counsel's jurisdiction is limited, her authority to act within her jurisdiction exceeds the grant of authority to the Attorney General.⁶⁹ Although jurisdiction may limit *when* an officer may exercise authority, jurisdictional limitations do not restrict the exercise of authority within the jurisdiction. For example, "The Ambassador to Luxembourg is not anything less than a principal officer, simply because Luxembourg is small. And the federal judge who sits in a small district is not for that reason "inferior in rank and authority."⁷⁰ Therefore, by looking at whether Congress has limited jurisdiction of a particular officer is improper if the officer nevertheless exercises power that would render the officer a principal officer.

⁶⁸ *Id.* at 718.

⁶⁹ *Id.*

⁷⁰ *Id.*

Here, the convening authority is limited in both jurisdiction and tenure and, thus, was held to be an “Inferior” officer by Judge Pohl. Interestingly, however, the tenure of the convening authority is limited to the completion of cases nominated for trial by military commission. This is problematic because there may always be a case awaiting trial by military commission. The MCA of 2009 explicitly allows for charges to be brought against any unprivileged enemy belligerent.⁷¹ Therefore, the convening authority occupies a potentially permanent office. Similarly, the jurisdiction of the convening authority, though limited to the oversight of military commissions, is downplayed by Judge Pohl. The quantitative number of decisions the convening authority is authorized to make is not a proper measurement of his status as an inferior officer. Rather, the fact that the convening authority’s jurisdiction affords him unreviewable discretion is significant. Congress’ granting of jurisdiction to the convening authority to disapprove of a finding of guilt, especially in the absence of factors guiding the convening authority’s decision, renders the convening authority the final decision maker. Essentially, the grant of authority to the convening authority functions as a removal of jurisdiction from the President and Secretary of Defense.

Assuming the four-factors of *Morrison* to be controlling, it is understandable how Judge Pohl reached the conclusion that the convening authority is an inferior officer. That is not to say, however, that such a decision is correct. The four-factors identified in *Morrison* were specific to that particular case because the determination of officer status is a case by case inquiry.⁷² However, Judge Pohl’s decision is void of specific factual references. As shown, the application of *Morrison* could result in a different determination of the convening authority’s officer status. Nevertheless, the discussion of how *Morrison* does not necessarily support a clear finding of the

⁷¹ See 10 U.S.C. §§ 948b and 948q.

⁷² See *Edmonds*, 520 U.S. at 661.

convening authority being either an “Inferior” or “Principal” officer is demonstrative of the shortcomings of jurisprudence on the subject.

2. The Alternative Approach under *Edmonds* and its Inherent Flaws

a. *The Edmonds Decision*

The Court’s decision in *Edmonds v. United States*⁷³ is instructive because the Court addressed a materially different situation in which the *Morrison* factors were not applicable. The *Edmonds* decision exemplifies the inherent problem with the legal framework currently used to determine the line between inferior and principal officers. At issue in *Edmonds* was whether judges of military Courts of Criminal Appeals are principal or inferior officers within the meaning of the Appointments Clause.⁷⁴ The Court recognized that “cases have not set forth an exclusive criterion for distinguishing between principal and inferior officers for Appointment Clause purposes.”⁷⁵ Nevertheless, the Court again declined to establish a bright-line rule and added to the confusion of what constitutes a principal or inferior officer.

In referencing *Morrison*’s four factor inquiry, the Court in *Edmonds* acknowledged that the tenure and jurisdiction of military judges are not limited, unlike the tenure and jurisdiction of independent counsel at issue in *Morrison*.⁷⁶ Further, the Court in *Edmonds* recognized military judges of the Court of Criminal Appeals exercise “significant authority” in reviewing courts martial proceedings that result in the most serious sentences and ensure that a court martial’s findings of guilt and sentencing is correct in law and fact.⁷⁷ Nevertheless, the Court concluded that military judges are inferior officers.

⁷³ 520 U.S. 651 (1997).

⁷⁴ *Id.* at 655-56.

⁷⁵ *Id.* at 661.

⁷⁶ *Id.*

⁷⁷ *Id.* at 662.

[I]n the context of a clause designed to preserve political accountability relative to important government assignments, we think it evident that “inferior officers” are officers whose work is directed and supervised at some level by others who were appointed by presidential nomination with the advice and consent of the Senate.⁷⁸

The military judges of the Court of Criminal Appeals are supervised by Judge Advocate General of the Coast Guard, who is subordinate to the secretary of Transportation, and the Court of Appeals for the Armed Forces.⁷⁹

The degree of supervision over military judges is highly relevant. The Judge Advocate General is able to prescribe uniform rules of procedure for the court and must formulate policies and procedure for review of court-martial cases.⁸⁰ The Judge Advocate General may also remove a judge from the Court of Criminal Appeals without cause.⁸¹ However, the Judge Advocate General may not “attempt to influence (by threat of removal or otherwise) the outcome of individual proceedings”⁸² and may not reverse a decision of the court.⁸³ Rather, the Court of Appeals for the Armed Forces “reviews every decision of the Courts of Criminal Appeals in which: (a) the sentence extends to death; (b) the Judge Advocate General orders such review; or (c) the court itself grants review upon petition of the accused.”⁸⁴ In concluding that military judges are inferior officers, the Court in *Edmonds* stated that “[w]hat is significant is that the judges of the Court of Criminal Appeals have no power to render a final decision on behalf of the United States unless permitted to do so by other executive officers.”⁸⁵

⁷⁸ *Id.* at 663 (emphasis added).

⁷⁹ *Id.* at 664.

⁸⁰ *Id.* (citing Art. 66(f), UCMJ, 10 U.S.C. §866(f)).

⁸¹ *Id.*

⁸² *Id.* (citing Art. 37, UCMJ, 10 U.S.C. §837).

⁸³ *Id.*

⁸⁴ *Id.* at 664-65 (citing Art. 67(a), UCMJ, 10 U.S.C. §867(a)).

⁸⁵ *Id.* at 665.

b. *The Flaw of Edmonds*

Regardless of Judge Pohl's over-reliance on *Morrison*, he would have likely reached the same conclusion that the convening authority is an inferior officer under *Edmonds*. The *Edmonds* inquiry of whether an officer is supervised at "some level" by a principal officer would have been satisfied because the Secretary of Defense does, in fact, supervise the convening authority at some level. Thus, there is a distinction to be drawn between *Morrison* and *Edmonds*. While *Morrison* emphasized a formalistic approach that identified four objective factors to determine that independent counsel was an inferior officer, *Edmonds* adopted a more functional approach that focused on the functional relationship between judges of military Courts of Criminal Appeals and the Attorney General to conclude that the degree of supervision exercised by the Attorney General, a principal officer, renders the judges inferior officers. The functional approach of *Edmonds* can be lauded for its emphasis on actual decision-making authority, a factor that *Morrison* obfuscated.

However, the functional inquiry of *Edmonds* has the potential to render an officer inferior based solely on his or her being supervised at "some level," regardless of actual authority.⁸⁶ As a result, both *Morrison* and *Edmonds* allow officers of the United States who have final decision-making power of on behalf of the Executive Branch to be insulated from public opinion. The resulting problem is that Congress can create an office within the Executive Branch and vest him or her with the executive power to oversee the execution of laws while removing from the President the ability to reprimand him or her for certain decisions made in fulfilling the duties of the office.

⁸⁶ See *id.* at 651.

V. THE IMPLICATIONS OF THE CONSTITUTIONAL INSULATION OF THE CONVENING AUTHORITY FROM PUBLIC OPINION

Categorizing the convening authority as an inferior officer means that the current appointment procedure satisfies the Appointments Clause. Satisfying this constitutional requirement, however, leads to two areas of concern. First, the aggrandizing of executive power in the hands of the convening authority raises questions of how the doctrine of Separation of Powers works to prevent intra-department distribution of authority. Second, the convening authority's ability to dismiss charges after a finding of guilt jeopardizes the rights of the accused.

1. The Doctrine of Separation of Powers is Intended to Ensure that the President can Faithfully see that the Laws are Executed

The doctrine of separation of powers is among the most fundamental principles upon which the Constitution is based. “The leading Framers of our Constitution viewed the principle of separation of powers as the central guarantee of a just government.”⁸⁷ Even recently, the Supreme Court has emphasized the importance of the doctrine. “The growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life, heightens the concern that it may slip from the Executive’s control, and thus from that of the people.”⁸⁸

Of particular relevance is the unique risk military commissions pose to the separation of powers.

Trial by military commission raises separation-of-powers concerns of the highest order. Located within a single branch, these courts carry the risk that offenses will be defined, prosecuted, and adjudicated by executive officials without independent review. Concentration of power puts personal liberty in peril of arbitrary action by officials, an incursion the Constitution’s three-part system is designed to avoid. It is imperative, then, that when military tribunals are established, full and proper authority exists for the Presidential directive.⁸⁹

⁸⁷ *Freytag v. Commissioner*, 501 U.S. 868, 870 (1991).

⁸⁸ *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 130 S. Ct. 3138, 3156 (2010) (hereinafter “PCAOB”).

⁸⁹ *Hamdan v. Rumsfeld*, 548 U.S. 557, 638 (2006) (Breyer, J., concurring).

Although the Court in *Hamdan* focused its separation of powers inquiry on whether the President was Congressionally authorized to establish the military commissions created to try Hamdan, a different separation of powers issue exists with regards to the convening authority; namely, whether the vesting of executive power in the convening authority impermissibly removes from the President the ability to faithfully see that the laws are executed. Even in legislative acts where Congress does not aggrandize power to itself, “it must refrain from impairing the performance of the Executive Branch.”⁹⁰

The Constitution provides that “[t]he executive Power shall be vested in a President of the United States of America.”⁹¹ It has long been settled that this vesting of executive power includes the power to remove executive officers.⁹² The President’s ultimate authority to ensure the laws are faithfully executed is critical because “[w]ithout a clear and effective chain of command, the public cannot ‘determine on whom the blame of punishment of a pernicious measure, or series of pernicious measures ought really to fall.’”⁹³ Thus, a Congressional act that eliminates the President’s oversight of executive decisions violates the separation of powers.⁹⁴

The Court reaffirmed the President’s inherent power to remove executive officers in *Myers v. United States*.⁹⁵ Subsequently, the Court clarified its holding in *Myers*, stating Congress may impose good-cause restrictions on the removal of principal officers of independent agencies that have either quasi-legislative or quasi-judicial in nature.⁹⁶

In *Morrison v. Olson*, the Court also addressed whether the Ethics in Government Act of 1978 violated the principle of separation of powers by “unduly interfering with the role of the

⁹⁰ PCAOB, 130 S. Ct. at 3156 (citing *Bowsher v. Synar*, 478 U.S. 714, 730 (1986)).

⁹¹ U.S. Const., Art. II, § 1, cl. 1.

⁹² PCAOB, at 3152 (citing *Ex Parte Hennen*, 38 U.S. 230 (1839)).

⁹³ *Id.* at 3155 (citing *The Federalist* No. 70, at 476 (J. Cooke ed. 1961) (A. Hamilton)).

⁹⁴ *Id.*

⁹⁵ 272 U.S. 52 (1926).

⁹⁶ *Humphrey’s Executor v. United States*, 295 U.S. 602, 627-29 (1935)

Executive Branch.”⁹⁷ The Court, rejecting the constitutional challenge, provided three justifications for its holding. First, the Act was not “an attempt by Congress to increase its own powers at the expense of the Executive Branch.”⁹⁸ No particular congressperson was empowered by the Act, and the Attorney General had no obligation to conduct an investigation.. Second, the Court found that the Act did not work “any *judicial* usurpation of properly executive functions” because the Special Division lacked the power to appoint an independent counsel *sua sponte* and did not retain any supervisory authority following an appointment.⁹⁹ Third, the Court did not find the Act to “impermissibly undermine[] the powers of the Executive Branch . . . or disrupt[] the proper balance between the coordinate branches by preventing the Executive Branch from accomplishing its constitutionally assigned functions.”¹⁰⁰ The reason for this final determination is that the Act, though conferring unto the Independent Counsel some independence from the Executive Branch, provided the Attorney General a means of controlling the prosecutorial powers of the counsel.¹⁰¹

Most importantly, the Attorney General retains the power to remove the counsel for "good cause," a power that we have already concluded provides the Executive with substantial ability to ensure that the laws are "faithfully executed" by an independent counsel. No independent counsel may be appointed without a specific request by the Attorney General, and the Attorney General's decision not to request appointment if he finds "no reasonable grounds to believe that further investigation is warranted" is committed to his unreviewable discretion. The Act thus gives the Executive a degree of control over the power to initiate an investigation by the independent counsel. In addition, the jurisdiction of the independent counsel is defined with reference to the facts submitted by the Attorney General, and once a counsel is appointed, the Act requires that the counsel abide by Justice Department policy unless it is not "possible" to do so.

Id. Thus, the Executive Branch partial retention of control over the independent counsel rendered the President able to perform his constitutional obligations. *Id.*

⁹⁷ 487 U.S. at 693.

⁹⁸ *Id.* at 694.

⁹⁹ *Id.* at 695 (italics in original).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 696.

Recently, in 2010, the Court once again considered the ability of Congress to limit the removal power of the President.¹⁰² The issue before the Court was whether Congress may restrict the President’s ability “to remove a principal officer, who is in turn restricted in his ability to remove an inferior officer, even though that inferior officer . . . enforces the laws of the United States.”¹⁰³ Neither removal restriction, standing alone, was alleged to be unconstitutional.¹⁰⁴ Rather, the question presented was whether the separate layers of protection may be combined.¹⁰⁵ The Court held that such multilevel protection “is contrary to Article II’s vesting of the executive power in the President.”¹⁰⁶ By insulating the President from the conduct of inferior officers, Congress removed from the President the ability to “ensure that the laws are faithfully executed.”¹⁰⁷

In *PCAOB*, Respondent Public Company Accounting Oversight Board (“Board”) was created by the Sarbanes-Oxley Act of 2002.¹⁰⁸ The Board, consisting of five members appointed by the Securities Exchange Commission (SEC), was tasked with regulating accounting firms that audit public companies under the securities law. The SEC could not remove the Board members except for good cause in accordance with certain procedures.¹⁰⁹ The President could not object to the Commissioner’s finding of good cause unless the Commissioner’s determination was “so unreasonable as to constitute ‘inefficiency, neglect of duty, or malfeasance in office.’” This double layer of protection is problematic because “[n]either the President, nor anyone directly responsible to him, nor even an officer whose conduct he may review only for good cause, has

¹⁰² *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 130 S. Ct. 3138, (2010) (hereinafter “*PCAOB*”).

¹⁰³ *Id.* at 3147.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *PCAOB*, 130 S. Ct at 3147.

¹⁰⁸ *Id.* at 3142.

¹⁰⁹ *Id.* (quoting *Humphrey’s Executor*, 295 U.S. at 620).

full control of the Board.”¹¹⁰ The restriction on the President’s removal power rendered him unable to ensure that the laws are faithfully executed in violation of Article II.¹¹¹ In curing the constitutional defect, the Court held invalid the removal restrictions limiting the Commission’s power to remove the Board members. Therefore, “the President [was] separated from Board members by only a single level of good-cause tenure” rendering the Commission “fully responsible for the Board’s actions, which are no less subject that the Commission’s own functions to Presidential oversight.”¹¹²

Thus, the jurisprudence of the Supreme Court establishes a few brightline rules for limiting the power of the President to oversee Executive officers. First, although the President’s Executive power inherently includes the power to remove executive officers¹¹³, Congress may limit the President’s power to remove principal officers.¹¹⁴ Second, Congress may not limit the President’s power to remove officers by imposing good-cause limitations on the President’s power to remove principal officers who are in turn restricted in removing inferior officers except for good cause.¹¹⁵ The latter of these rules is relevant for understanding the significance of the convening authority’s decision making authority. Although Congress has not imposed limitations on the President’s ability to remove the Secretary of Defense, Congress has removed from the Secretary of Defense the authority to remove the convening authority in certain circumstances. Unlike a good cause requirement where a showing of malfeasance can justify the removal of an inferior officer, the convening authority enjoys unfettered discretion to make certain determinations without fear of reprisal.

¹¹⁰ *Id.* at 3154.

¹¹¹ *Id.*

¹¹² *PCAOB*, at 3161.

¹¹³ *Myers*, 272 U.S. 52.

¹¹⁴ *Humphrey’s Executor*, 295 U.S. at 627-29.

¹¹⁵ *PCAOB*, at 3154.

2. The President has no Authority to Remove a Convening Authority for Improperly Dismissing Charges against an Accused

The MCA of 2009 does not provide any particular level of cause necessary for the Secretary of Defense to remove the convening authority. Even if there were a good cause limitation imposed upon the Secretary of Defense's removal power, such a limitation, alone, would not be unconstitutional.¹¹⁶ The Act does, however, vest the convening authority with the sole discretion make certain decisions that are unreviewable regardless of the merit of such decision.¹¹⁷ Additionally, the MCA of 2009 expressly forbids unlawful influence of the convening authority. The Act provides, "No person may attempt to coerce or, by any unauthorized means, influence . . . the action of any convening. . . . authority with respect to their judicial acts."¹¹⁸ Unlike a good cause provision limiting the removal power of the President or a principal officer of an inferior officer, which allows for removal in dereliction of duty, Congress appears to have removed from the President or Secretary of Defense any ability to remove the convening authority for dismissing a charge, for whatever reason, against an accused, even if the accused is found guilty by a military commission.¹¹⁹

Whether political pressures from the President or Secretary of Defense to dismiss a particular charge or affirm a finding of guilt constitutes unlawful command influence on the convening authority is critical. If, by virtue of the MCA of 2009, the convening authority shall have the *sole* discretion to approve a finding of guilt or dismiss a particular charge, then it is reasonable to assume that any political pressures that influence the convening authority's decisions are, in fact, prohibited by the Act. Unfortunately, the military commissions are

¹¹⁶ See *PCAOB*, at 3161.

¹¹⁷ See 10 U.S.C. § 950b(c)(2).

¹¹⁸ 10 U.S.C. § 949b(a)(2)(B).

¹¹⁹ 10 U.S.C. § 950b(c)(2).

inherently ripe with political influences. Lieutenant Colonel David J. R. Frakt¹²⁰ detailed the role that political connections play in the military commission process.

The atmosphere surrounding military commission cases is highly politically charged. Decisions to hold or release a detainee, to prosecute or not to prosecute, and to provide a favorable plea bargain are not influenced by a wide variety of diplomatic and political factors which may have little to do with the merits of the case.¹²¹

Consequently, it is reasonable to conclude that the convening authority, despite having the *sole* discretion to dismiss a charge or approve a finding of guilt, will make such a decision in light of competing political interests. Neither the Secretary of Defense nor President can influence the decision.

3. Vesting the Convening Authority with the Sole Decisionmaking Power to Dismiss an Accused's Case could lead to the Continued Indefinite Detention for the Accused

Regardless of the constitutionality of the MCA of 2009, the convening authority possesses the power to remove from the accused an opportunity for a decision on the merits of the case. Although the dismissal of an accused's case after a finding of guilt may initially seem like a layer of protection in favor of the accused, such authority may actually work against the best interests of the detainee. Once dismissed, the detainee would be sent back to detention, which could be highly problematic. Under the law of war detention, "no criminal charges need to be established" to justify the indefinite detention.¹²² As such, a criminal conviction and the serving of a sentence may be the only way certain detainees will be freed from Guantanamo prior to the end of the conflict.

The language of the MCA of 2009 does not indicate that the dismissal of a charge is the equivalent of entering a finding of "not guilty." Rather, the plain language of the MCA suggests

¹²⁰ Former Lead Defense Counsel, Office of the Chief Defense Counsel, Office of Military Commissions, from August 2008 to August 2009.

¹²¹ Lt. Col. David J.R. Frakt, *MILITARY JUSTICE EDITION: THE PRACTICE OF CRIMINAL LAW IN THE GUANTANAMO MILITARY COMMISSIONS*, 67 A.F. L. Rev. 35, 50-51 (2011).

¹²² David S. Dris, "Law Enforcement as a Counterterrorism Tool," 5 J. Nat'l Security L. & Pol'y 1, 59 (2011).

a dismissal simply places the accused in the same position he or she was before the trial – an accused unprivileged enemy belligerent.¹²³ As an accused enemy belligerent, a detainee can be detained indefinitely. Though detainees have a right to habeas¹²⁴, there is neither case law nor a positive statutory right that confers unto a detainee the right to be charged with a crime. Thus, the dismissal of a case may be a dramatic step backward in affording a detainee an opportunity to serve an appropriate sentence.

The MCA of 2009 does not prescribe a statute of limitations for charging alien unprivileged enemy belligerents for violations of the law of war and other offenses provided in the Act.¹²⁵ Further, the Act applies to offenses committed “before, on, or after September 11, 2001.”¹²⁶ Consequently, a detainee can be held indefinitely -- with no right to be charged and no time frame to force the government to charge him. Mr. Nashiri, for example, has been accused of crimes committed in 1996.¹²⁷ The convening authority could dismiss Mr. Nashiri’s case after the military commission returns a verdict. A dismissal of the charges automatically removes from the USCMCR any jurisdiction to hear the case.¹²⁸ Mr. Nashiri would have no recourse.

In some instances, it may be in the best interest of an accused to have his case dismissed. An unfavorable sentence following a finding of guilt could result in life in prison or capital punishment.¹²⁹ On the other hand, a finding of guilt could also result in a short sentence. Although the MCA removes from the convening authority the authority to make a sentence longer, the convening authority could nevertheless dismiss a charge because the sentence was not

¹²³ See 10 U.S.C. § 948a(7).

¹²⁴ See generally *Boumediene v. Bush*, 553 U.S. 723 (2008).

¹²⁵ 10 U.S.C. § 948d(a).

¹²⁶ *Id.*

¹²⁷ Charge Sheet, Abd Al-Rahim Hussein Muhammed Abdu Al-Nashiri, United States v. Al-Nashiri (Military Comm’n, Guantanamo Bay, Cuba June 30, 2008), available at <http://www.defense.gov/news/nashirichargesheet.pdf>.

¹²⁸ 10 U.S.C. § 950f(d).

¹²⁹ 10 U.S.C. § 948d.

agreeable.¹³⁰ Surely, Congress intended for the convening authority to exercise his decisionmaking power to ensure that a sentence was not overly harsh,¹³¹ but the authority that prevents an overly harsh sentence also allows for the dismissal of a case in which the convening authority believes the sentence is too lenient. A detainee who is thus sentenced to a few years of confinement may ultimately be detained for far longer if the charges are dismissed. Whether double jeopardy would be a potential hurdle for the government's re-prosecution of the accused remains to be seen. But one can speculate that if the finding of a commission is not finalized until the convening authority approves it, then the dismissal of charges by the convening authority is not the equivalent to a decision on the merits. As such, double jeopardy presumably would not be an issue.¹³²

It is entirely possible that a convening authority may never dismiss a case following a finding of guilt or otherwise abuse the unreviewable power of the office. It is also possible that the MCA of 2009 does not violate either the Appointments Clause or the Separation of Powers. However, traditional constraints on authority are *not* designed to prevent a particular person from accumulating or being improperly removed of authority – rather, the limitations are to protect the office itself.¹³³ The validity of granting excessive authority to a particular inferior officer or removing certain authority from the President should not depend on whether the Executive Branch approves of the legislation because successors to each respective office may use the authority in a manner not previously used or intended by Congress.¹³⁴ Likewise, the vesting of powerful executive authority in lower officials “cannot be permitted to turn on . . . whether an

¹³⁰ 10 U.S.C. § 950b(c)(2).

¹³¹ *See id.*

¹³² *See Ashe v. Swenson*, 397 U.S. 436, 443 (1970) (explaining the Fifth Amendment protection against double jeopardy includes protections against collateral estoppel, or issue preclusion, when an issue of ultimate fact has been determined by a final and valid judgment).

¹³³ *See PCAOB*, at 3155.

¹³⁴ *Id.*

officer exercising executive power is on good terms with Congress.¹³⁵ Thus, the convening authority's unchecked discretion to affect the legal status of an accused, while intended by Congress to prevent excessive punishments, may result in unintended and indefinite consequences.

VI. CONCLUSION

The Military Commissions Act of 2009 will continue to put the United States system of military justice in the spotlight for years to come. Not only does the system attract the attention of the international community, but it also presents new questions never before addressed by the legal community. The novelty of the military commissions system, combined with the minimal jurisprudence by which the commissions can follow, compound the difficulties faced by defense counsel in adequately representing the accused.

Although the MCA of 2009 may be constitutional, the vesting of unprecedented authority in the convening authority raises questions of how the current legal framework can be used to restrain the growth of executive power. The Appointments Clause, despite requiring a strict procedural process to ensure political accountability for principal officers, can be subverted by creating minimal oversight over a particular office. Likewise, the continued expansion of the Executive Branch raises questions of how well the doctrine of separation of powers prevents the aggrandizing of authority within a particular branch, as opposed to the infringement of one branch's authority by another.

In short, the MCA of 2009 vests an unrestricted, politically unwise amount of decisionmaking power in the convening authority. Without necessary safeguards in place, such as a statute of limitations and a statutory right to be charged with a crime, the convening authority can unilaterally throw out a guilty conviction and subject the accused to continued

¹³⁵ *Id.* (citing *Bowsher v. Synar*, 478 U.S. 714, at 730 (1986)).

indefinite detention. Removing this power from the convening authority is not imperative because of the threat the current convening authority poses; rather, it is imperative because the danger is the granting of authority itself. Subjecting the convening authority's power to dismiss charges to review by the President or Secretary of Defense would restore political accountability because the President and Secretary will be directly responsible for the convening authority's decision. Further, allowing for Presidential oversight will allow the electorate to express through voting its dissatisfaction with how the convening authority chooses to exercise his or her authority. The rationale behind *Morrison*, and most cases concerning the Appointments Clause, was to guarantee a clear chain of command between the President and all those who enforce the laws of the United States. When the President is no longer capable of providing effective oversight, the general populace is unable to hold an elected official accountable for executive abuses of power. Such a proposition is at odds with the American style of democratic government.