ORAL ARGUMENT HELD ON APRIL 15, 2008

No. 07-5127

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FREE ENTERPRISE FUND ET AL.,

Plaintiffs-Appellants,

v.

PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Columbia (D.D.C. No. 06cv0217 (JR))

PETITION FOR REHEARING AND REHEARING *EN BANC*

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to Circuit Rule 35(c), Appellants certify as follows:

A. Parties and Amici

Parties appearing in the district court were Free Enterprise Fund and Beckstead and Watts, LLP, plaintiffs, and Public Company Accounting Oversight Board ("PCAOB"), and, in their official capacities as members of the PCAOB, Bill Gradison, Kayla J. Gillan, Daniel L. Goelzer, and Charles Niemeier, defendants. The United States of America intervened as a defendant in the district court. Amici in the district court were Washington Legal Foundation, American Federation of Labor and Congress of Industrial Organizations, California Public Employees' Retirement System, California State Teachers' Retirement System, Council of Institutional Investors, Los Angeles County Employees Retirement Association, Public Employees' Retirement Association of Colorado, Sacramento County Employees' Retirement System, Teachers Insurance and Annuity Association-College Retirement Equities Fund, and seven former chairmen of the Securities and Exchange Commission (G. Bradford Cook, Roderick M. Hills, Harold M. Williams, David S. Ruder, Arthur Levitt, Jr., Harvey L. Pitt and William Donaldson).

Parties appearing in this Court are Free Enterprise Fund and Beckstead and Watts, LLP, Plaintiffs-Appellants, the Public Company Accounting Oversight Board, Bill Gradison, Kayla J. Gillan (dismissed from case on April 14, 2008), Daniel L. Goelzer, and Charles Niemeier, Defendants-Appellees, and the United States of America, Intervenor-Appellee. Amici appearing in this Court are Washington Legal Foundation, Mountain States Legal Foundation, Council of Institutional Investors, and seven former chairmen of the Securities and Exchange Commission

(G. Bradford Cook, Roderick M. Hills, Harold M. Williams, David S. Ruder, Arthur Levitt, Jr., Harvey L. Pitt and William Donaldson).

Appellant Free Enterprise Fund is a non-profit public-interest organization under Section 501(c)(4) of the Internal Revenue Code with the purpose of promoting economic growth, lower taxes and limited government. Free Enterprise Fund has no parent corporation and no publicly held corporation has a 10% or greater ownership interest in Free Enterprise Fund.

Appellant Beckstead and Watts, LLP, is a Nevada public accounting firm. Beckstead and Watts, LLP has no parent corporation and no publicly held corporation has a 10% or greater ownership interest in Beckstead and Watts, LLP.

B. Ruling Under Review

The ruling under review in this petition is the decision by a divided panel of this Court, dated August 22, 2008, and reported at 537 F.3d 667, affirming the district court's memorandum opinion and final order dated March 21, 2007, which granted defendants' and the United States' motions for summary judgment, *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, No. 06-0217, 2007 WL 891675 (D.D.C. Mar. 21, 2007) (Robertson, J.).

C. Related Cases

This case was not previously before this Court or any other court, and there are no related cases within the meaning of Circuit Rule 28(a)(1)(C).

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RULE 35 STATEMENT

This Court should grant rehearing *en banc* to correct the panel's erroneous disposition of two exceptionally important constitutional questions:

1. Whether the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified at 15 U.S.C. §§ 7201 *et seq.*) ("SOX" or "Act") violates the Constitution's separation of powers by vesting members of the Public Company Accounting Oversight Board ("PCAOB" or "Board") with far-reaching executive power while completely stripping the President of the authority to appoint or remove those members or otherwise supervise or control their exercise of that power; and

2. Whether the Act's provision for appointment of PCAOB members by the SEC violates the Appointments Clause.

BACKGROUND

The PCAOB, created by the Sarbanes-Oxley Act, is a five-member agency charged with regulating all accounting firms that engage in the business of auditing publicly traded companies. *See* SOX §§ 2(a)(7), 101(a), 102(a), 15 U.S.C. §§ 7201(a)(7), 7211(a), 7212(a).[1] Its five members, who are each paid between $530,000 and $655,000, are not appointed or removable by the President. Instead, they are appointed and removable only by the SEC, itself an agency that is "independent of the Executive in [its] day-to-day operations." *Buckley v. Valeo*, 424 U.S. 1, 133 (1976). The SEC's removal power, moreover, is itself highly constrained. In order to remove a Board member, the SEC must find "on the record, after notice and opportunity for a hearing, that [the] member": (1) "*has willfully violated* any provision of [the] Act, the rules of the Board, or the securities laws"; (2) "*has willfully abused* [his] authority"; or (3) "*without reasonable justification or excuse*, *has failed to enforce compliance* with [the Act, the Board's

[1] Although Congress declared that the Board is a private corporation rather than a federal agency, *see* SOX § 101(a), (b), 15 U.S.C. § 7211(a), (b), all parties agree that, for purposes of constitutional analysis, PCAOB members are government officers exercising executive authority. *See Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 400 (1995); *Bowsher v. Synar*, 478 U.S. 714, 732-34 (1986).

rules, or professional standards].” SOX §§ 101(e)(6), 107(d)(3), 15 U.S.C. §§ 7211(e)(6), 7217(d)(3) (emphases added). Notwithstanding these removal restrictions, the PCAOB has broad authority to execute the law, including authority to promulgate rules and standards, inspect and investigate whether firms are in compliance, and punish violations. *See* SOX §§ 103(a)(1), 104(a), 105(b)(1), (c)(4), 15 U.S.C. §§ 7213(a)(1), 7214(a), 7215(b)(1), (c)(4).

Appellants, subject to regulation by the PCAOB under the Act's unprecedented scheme, challenged the Act's provisions creating and empowering the Board, seeking a declaratory judgment that those provisions are unconstitutional and an injunction prohibiting the Board from carrying out its statutorily-conferred powers. *See Free Enterprise Fund v. PCAOB*, 537 F.3d 667, 670 (D.C. Cir. 2008) (“*FEF*”). The district court rejected these arguments and granted summary judgment in favor of the Board and the United States, which had intervened to defend the constitutionality of the Act. *Id.* A divided panel of this Court affirmed, with Judge Kavanaugh issuing a vigorous and thoroughly reasoned 58-page dissent. *Id.* at 668-69.

ARGUMENT

As Judge Kavanaugh recognized, this is “the most important separation-of-powers case regarding the President's appointment and removal powers to reach the courts in the last 20 years.” 537 F.3d at 685 (dissenting opinion). The Act imposes “a previously unheard-of restriction on and attenuation of the President's authority over executive officers,” *id.* at 686, and so, in “upholding the PCAOB here,” the panel majority has “green-li[t] Congress to create a host of similar entities” and to “splinter executive power to a degree not previously permitted,” *id.* at 699. Under the PCAOB's statutory model, Congress could lodge the President's authority to “take Care that the Laws be faithfully executed” in “a series of independent bipartisan boards appointed by independent agencies and removable only for cause by such independent agencies.” *Id.* at 685, 700. In short, under the separation-of-powers analysis adopted by the panel, Congress

could cripple the President's ability to perform his constitutionally appointed functions by creating "a new 'Fifth Branch' of the Federal Government." *Id.* at 700. The Supreme Court's separation-of-powers precedents, however, foreclose the panel majority's radical and far-reaching answer to this "question of first impression," *id.* at 679 (majority opinion). Consequently, this Court should grant rehearing *en banc* to correct the panel majority's fundamental errors in this unprecedented and exceptionally important case.

I. THE PANEL ERRONEOUSLY DECIDED THE EXCEPTIONALLY IMPORTANT QUESTION WHETHER THE ACT VIOLATES THE SEPARATION OF POWERS

"'[A]rticle [II] grants to the President the executive power of the Government, *i.e.*, the general administrative control of those executing the laws, including the power of appointment and removal of executive officers ….'" *Buckley*, 424 U.S. at 136 (quoting *Myers v. United States*, 272 U.S. 52, 117 (1926)). This power is granted to the President "to protect the liberty and security of the governed," *MWAA v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991), by ensuring that the potentially tyrannical executive power is wielded by an official democratically accountable to the people. To achieve that accountability, all government officers who wield the President's executive power must "act for him under his direction in the execution of the laws." *Buckley*, 424 U.S. at 136; *see also Bldg. & Constr. Trades Dep't, AFL-CIO v. Allbaugh*, 295 F.3d 28, 32-33 (D.C. Cir. 2002) ("'[Those who] manage[] [executive] matters … ought to be considered as the assistants or deputies of the chief magistrate … and ought to be subject to his superintendence.'" (citation omitted)). Congress thus violates the separation of powers when it "impermissibly burdens the President's power to control or supervise … an executive official[] in the execution of his or her duties." *Morrison v. Olson*, 487 U.S. 654, 692 (1988).

Under *Morrison*, whether this "power to control or supervise" has been unduly burdened is analyzed under two tests. The "first [question] is whether the provision of the Act restricting the … power to remove[,] … taken by itself, impermissibly interferes with the President's exercise of his constitutionally appointed functions." *Id.* at 685. Of course, that will be the case when "the power to remove an executive official has been completely stripped from the President," for then there is "*no means* for [him] to ensure the 'faithful execution' of the laws." *Id.* at 692 (emphasis added). This is so because "'[o]nce an officer is appointed, it is only the authority that can remove him … that he must fear and, in the performance of his functions, obey.'" *Bowsher*, 478 U.S. at 726 (quoting *Synar v. United States*, 626 F. Supp. 1374, 1401 (D.D.C.) (three-judge court)). In cases in which the removal restriction, "taken by itself," is not unconstitutional, *Morrison*'s "second [question] is whether, taken as a whole, the Act violates the separation of powers by reducing the President's ability to control the … powers wielded by" the federal officer. 487 U.S. at 685. The Act clearly fails both of *Morrison*'s tests.

1. Here, the President has been "completely stripped" of his removal power. Rather, the Act leaves the authority to remove Board members, in limited circumstances, in the discretion of the *SEC*. *See* SOX 107(d)(3), 15 U.S.C. § 7217(d)(3) ("[t]he Commission *may* … remove from office … any member of the Board [in limited circumstances]" (emphasis added)). Nor is the SEC the President's "alter ego"—an officer who is subject to the President's unfettered control, *Myers*, 272 U.S. at 133, and thus can be fired for refusing the President's order to fire a subordinate, *NTEU v. Reagan*, 663 F.2d 239, 248 (D.C. Cir. 1981)—as were the Attorney General in *Morrison* and the Secretary of the Navy in *United States v. Perkins*, 116 U.S. 483 (1886). *See In re Sealed Case*, 838 F.2d 476, 528 n.30 (D.C. Cir. 1988) (R.B. Ginsburg, J., dissenting) ("Attorney General is 'the hand of the President'" (citation omitted)),

rev'd sub nom. Morrison, 487 U.S. 654. Rather, the SEC is "independent of the Executive in [its] day-to-day operations," *Buckley*, 424 U.S. at 133, since the President may remove an SEC Commissioner only for "'inefficiency, neglect of duty, or malfeasance in office,'" *FEF*, 537 F.3d at 680 n. 8. Indeed, "independent regulatory agencies" like the SEC were "specifically designed *not* to have the quality … of being 'subject to the exercise of political oversight and sharing the President's accountability to the people.'" *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 916 (1991) (Scalia, J., concurring in part and concurring in the judgment). Thus, "it is universally accepted that [such agencies] are independent of … the President in performing their official duties." *Bowsher*, 478 U.S. at 739 (Stevens, J., concurring in the judgment).

In light of this independent policy discretion, it is clear—and undisputed by both the panel majority and Appellees—that the President has no power to direct the SEC to exercise its discretion to remove a Board member, any more than he could direct the SEC to follow his wishes on the "countless other discretionary decisions" it makes. *See* PCAOB Br. at 46. Thus, placing the removal power in such an independent agency, unlike in an "alter ego" under the President's plenary control, does "completely strip" the President of removal authority.

Moreover, even if the SEC's discretionary authority to remove a Board member could somehow be converted into a "duty" to remove—the "neglect" of which gave rise to cause for removal by the President—there would still be a series of daunting obstacles preventing removal of the Board members. First, the SEC is *permitted* to remove a PCAOB member *only* if it finds, after a hearing on the record, that the member willfully violated the Act or Board rules, willfully abused his or her authority, or unreasonably failed to enforce compliance with the Act or Board rules. Thus, removal is precluded for even fundamental policy disagreements and authorized only for actions tantamount to impeachable offenses. *See* SOX §§ 101(e)(6), 107(d)(3),

15 U.S.C. §§ 7211(e)(6), 7217(d)(3).[2] If this enormous barrier is cleared, the President would have to remove *all* the recalcitrant commissioners and nominate new ones who committed, in advance, to effect the removal. And then the Senate would have to *confirm* such commissioners, in contravention of the established principle that "the Constitution prevents Congress" from "gain[ing] a role in the removal of executive officials," *Morrison*, 487 U.S. at 686. The notion that this two-tiered scheme of for-cause removal is sufficient to permit *the President* to control or supervise the PCAOB is absurd. *See FEF*, 537 F.3d at 697-98 (Kavanaugh, J., dissenting).

The panel majority nonetheless blithely asserted, citing a law review article, that the President had "sufficient Executive influence over the Board" through his ability to appoint "[l]ike-minded [SEC] Commissioners," *id.* at 682-83, and his unilateral ability to appoint and remove at will the SEC Chairman, who "often 'dominates commission policymaking'" and "directs 'the administrative side of commission business,'" *id.* at 680 (quoting Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573, 591 (1984)). These alleged means of indirectly influencing the SEC are quite exaggerated,[3] and, in any event, plainly provide no means of influencing decisions about

[2] The panel attempts to blunt the magnitude of this constraint by speculating that the SEC *might* interpret the Act to permit broader removal authority than its plain text allows. *See* 537 F.3d at 683-84. But the SEC is not free to ignore a statute's unambiguous text, which permits removal only in accordance with the statutory procedures and standards enumerated therein.

[3] The President's ability to "appoint" does not confer influence over how *independent* agencies exercise their discretionary power, any more than the power to appoint federal judges or the Comptroller General (*Bowsher*) influences how the duties of those offices are performed, because it is not coupled with the power to remove for failure to follow his policy wishes. Further, his ability to have "like-minded" individuals on the SEC is significantly diminished by the requirement to name two Commissioners from an opposing party, the fact that their five-year terms may exist well into the new President's tenure, and the need to secure Senate confirmation. *See* 15 U.S.C. § 78d(a). And while control over the SEC Chairman is *normally* a significant means of influencing inferior officers at the SEC, Congress here specifically denied the President this powerful tool by stripping the Chairman of his heretofore exclusive power to appoint and

removing Board members. Equally important, even if the President could totally control the *SEC* through his indirect influence, that still would not enable him to exert any policy influence over *Board* members who were executing the law in a way he viewed as destructive, since the statute plainly does not allow the SEC to remove a Board member based on policy disagreements with the SEC. In sum, the President has no more indirect influence over Commission removal decisions than does Congress, which, among other things, confirms Commissioners and controls the SEC's budget. *See Freytag*, 501 U.S. at 907 (Scalia, J., concurring in part and concurring in the judgment) (agencies are not "able to resist congressional encroachment" unless "they are directly answerable to the President"). Consequently, even under the panel majority's understanding of the President's purported influence over the SEC, "the power to remove an executive official has been completely stripped from the President," *Morrison*, 487 U.S. at 692, if that phrase is to have any meaning at all.

No doubt recognizing that to be the case, the panel majority puts forward two breathtaking theories for why it is constitutionally permissible to completely strip the President of removal power. Both of these theories, however, are at war with *Morrison* and the Supreme Court's other separation-of-powers precedents.

First, the panel majority repeatedly interpreted *Perkins* to hold that Congress can enact *any* restriction on the President's authority to remove an inferior officer "it deems best for the public interest." 537 F.3d at 674, 683. Consequently, the panel majority claimed that "no case prescrib[es] the ways in which Congress can restrict a principal officer's removal of his

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(continued…)

remove subordinates at the SEC and vesting that power in the whole Commission instead. *Compare* SOX § 101(e)(4), 15 U.S.C. § 7211(e)(4), *with* Reorganization Plan No. 10 of 1950, § 1(a), 15 Fed. Reg. 3175, 64 Stat. 1265 (May 24, 1950), *reprinted in* 5 U.S.C. app.

inferiors." *Id.* at 675. But, contrary to the panel majority's assertion that "nothing in *Morrison* suggests that Congress cannot restrict removal of inferior officers in independent agencies," *id.* at 682, *Morrison* squarely forecloses the panel majority's astonishing interpretation of *Perkins*. Under the panel majority's view, *Morrison*'s entire analysis of the removal issue, *see* 487 U.S. at 685-93, was irrelevant, since, having determined that the independent counsel was an "inferior officer," *id.* at 670-73, the Court should have simply asked whether Congress "deem[ed] [the for-cause removal restriction] best for the public interest." Instead, the Court asked whether the removal restriction "impermissibly burden[ed] the President's power to control or supervise … an executive official[] in the execution of his or her duties." *Id.* at 692. Since removal is the "[m]ost important[]" Presidential "means of supervising or controlling," the dispositive "question … is whether the removal restrictions … impede the President's ability to perform his constitutional duty," *not* whether Congress thinks they serve the public interest. *Id.* at 691, 696. Indeed, *Perkins* is fully compatible with *Morrison* because it merely "allow[ed] restrictions on removal of *inferior* officers by the head of an executive agency, at least where the agency was headed by a principal officer removable at will by the President." *FEF*, 537 F.3d at 696 n.6 (Kavanaugh, J., dissenting); *see also Morrison*, 487 U.S. at 724 n.4 (Scalia, J., dissenting).

Moreover, numerous other cases confirm *Morrison*'s instructions on the centrality of the President's removal power: *Bowsher* held that "'[o]nce an officer is appointed, it is *only* the authority that can *remove* him … that he must fear and, in the performance of his functions, obey,'" *Bowsher*, 478 U.S. at 726 (emphases added, citation omitted); *Edmond v. United States* observed that "[t]he power to remove officers … is a powerful tool for control," 520 U.S. 651, 664 (1997); and *Meyer v. Bush* recognized that the "presidential power to remove executive branch officials [is] crucial to presidential control," 981 F.2d 1288, 1295 (D.C. Cir. 1993).

These cases reflect Madison's prescient observation that "'[i]f the President should possess alone the power of removal from office, those who are employed in the execution of the law will be in their proper situation, and the chain of dependence preserved; the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community.'" *Myers*, 272 U.S. at 131 (quoting 1 Annals of Congress 496, 499 (Madison)).

Second, the panel majority claims that "Supreme Court precedent … does not support [a] singular focus on removal powers as the be-all and end-all of Executive authority, but rather compels a more nuanced approach." 537 F.3d at 669. To repeat, this is flatly inconsistent with *Morrison*, which asked whether the Act "taken as a whole … violates the separation of powers" *only* in those cases in which "the provision of the Act restricting the … power to remove[,] … taken by itself" *does not* "impermissibly interfere[] with the President's exercise of his constitutionally appointed functions." 487 U.S. at 685. In any event, *none* of the non-removal factors that *Morrison* found relevant to the separation-of-powers analysis is present here to *mitigate* the elimination of the President's ability to control the Board through removal. As discussed above, the President lacks the ability to appoint Board members. And, unlike the independent counsel in *Morrison*, who only had "limited jurisdiction and tenure and lack[ed] policymaking or significant administrative authority," *id.* at 691, the Board exercises broad policymaking authority on a permanent basis. Finally, the limited intrusion in *Morrison* served the compelling interest of avoiding "conflicts of interest that could arise in situations when the Executive Branch is called upon to investigate its own high-ranking officers." *Id.* at 677. The panel majority simply dismissed these factors and offered *no* reason, analogous to the conflict of interest in *Morrison*, why the Board's functions could not be performed by an independent agency appointed and removable by the President. *See* 537 F.3d at 682. Since *every* factor

identified in *Morrison* supports the Board's *invalidity*, it is impossible to understand how the "more nuanced" general approach *ameliorates* the removal deprivation, even if it were curable.

2. Recognizing that there is no convincing argument that the *President* can supervise or control the PCAOB, the panel majority strains mightily to exaggerate the SEC's power to supervise or control the Board. Specifically, the panel majority asserts that the Board is just a "heavily controlled component of [the SEC]" because the SEC allegedly has plenary authority over the Board's regulations and sanctions and could use its rulemaking power to completely control the Board's inspections and investigations, or, indeed, to take over the Board's functions altogether. *See* 537 F.3d at 680-81.

Even assuming *arguendo* that enhanced *SEC* control over the Board could somehow ameliorate stripping the *President* of *his* Article II power, the panel's assertion that the SEC *could* take over all of the Board's functions is legally both irrelevant and incorrect. It is irrelevant because, regardless of whether the SEC *could* promulgate regulations giving it control over the Board's inspections and investigations, the simple fact remains that it *has not done so and the President cannot force it to do so*. Thus, appellants are being subjected to regulation by an agency—the Board—without the constitutional authority to do so because it is not "control[led] or supervise[d]" by the President. *Morrison*, 487 U.S. at 692. Even if the SEC could somehow transfer that investigative power to itself in the future, this does not change the fact that an unconstitutional actor *is* exercising that executive power, and the President is powerless to switch that power to an agency over which he exercises sufficient control. Accordingly, "no set of circumstances exists" in which the *Board*'s exercise of this executive power is constitutional, *United States v. Salerno*, 481 U.S. 739, 745 (1987), given the Board's "here-and-now [lack of] subservience" to the President, *Bowsher*, 478 U.S. at 727 n.5 (internal

quotation marks omitted). There is nothing to the panel majority's notion that this current injury is somehow cured because the Board's functions might be transferred to a constitutional actor in the future. That is as ludicrous as arguing that litigants could not "facially" challenge having their Article III cases adjudicated by agency ALJs because the Department Head had the unexercised statutory option to transfer the cases to the Article III judges who rightfully possess that judicial power.

In all events, the panel majority's contention that the SEC can "at any time" take over, or require preapproval of, the Board's core investigative function, 537 F.3d at 681, is plainly wrong. The Act has a specific provision (ignored by the panel) controlling when the SEC may "impose limitations upon the activities, functions, and operations of the Board"; it may do so *only* if the SEC finds, after a hearing, that the Board has "violated" the Act or the federal securities laws, is "unable to comply" with those laws, or "without reasonable justification or excuse" has failed to enforce those laws. SOX § 107(d)(2), 15 U.S.C. § 7217(d)(2). Contrary to the panel's impression, the powers "*preserve[d]*" to the SEC by Section 3 of the Act, 537 F.3d at 675 (emphasis added), are not the *new* powers given to the *PCAOB* by the Act, but rather the SEC's existing powers under the federal securities laws. SOX § 3(c)(3), 15 U.S.C. § 7202(c)(3).

The panel majority's other efforts to characterize the PCAOB as a mere "component" of the SEC, *see* 537 F.3d at 675, 680, or, even more absurdly, as "an entity within the Executive Branch," *id.* at 682, mangle the statutory scheme beyond recognition. For one thing, Congress *rejected* proposals that would have made the PCAOB a division of the SEC, *see id.* at 709 n.18 (Kavanaugh, J., dissenting) (citing H.R. 3763, 107th Cong. § 2(b) (2002)), opting instead to make the PCAOB a *private* corporation independent from the SEC, *see supra* at 1 n.1; 148 Cong. Rec. S6327-06, S6331 (daily ed. July 8, 2002) (statement of Sen. Sarbanes ("[W]e need to

establish this oversight board … to provide an extra guarantee of its independence."). More importantly, the SEC lacks all authority over the PCAOB's most significant exercise of core executive power: the power to initiate and conduct, or refrain from initiating and conducting, investigations and inspections. *See Cmty. for Creative Non-Violence v. Pierce*, 786 F.2d 1199, 1201 (D.C. Cir. 1986) ("[The] power to decide when [and how] to investigate … lies at the core of the Executive's duty to see to the faithful execution of the laws."). Specifically, the SEC exercises no control over which firms are subjected to the Board's "continuing program of inspections" or whether a more formal, burdensome "investigation" is warranted because a violation "may" have occurred. *See* SOX §§ 104(a), 105(b)(1), 15 U.S.C. §§ 7214(a), 7215(b)(1). And the SEC has no authority to direct the PCAOB to *impose* sanctions on the target of an investigation when the PCAOB chooses not to. Thus, regardless of the scope of the SEC's ability to review or alter rules after the Board passes them, the obvious reality is that no form of notice-and-comment *rulemaking* can cabin or direct how an agency *investigates* individual cases. In short, the SEC exercises no control over the PCAOB's daily exercise of prosecutorial discretion, and it is only after the PCAOB has effectively concluded its investigation and decided to impose sanctions that its enforcement operations are subject to any oversight at all. *See FEF*, 537 F.3d at 687 (Kavanaugh, J., dissenting).

II. THE PANEL ERRONEOUSLY DECIDED THE EXCEPTIONALLY IMPORTANT QUESTION WHETHER THE ACT VIOLATES THE APPOINTMENTS CLAUSE

For essentially the same reasons, the PCAOB members are principal officers who, under the Appointments Clause, must be appointed by the President with the advice and consent of the Senate. *See* U.S. CONST. art. II, § 2, cl. 2. An executive official is an inferior officer only if his work is "directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." *Edmond*, 520 U.S. at 663. And, for

Appointments Clause purposes, the most "powerful tool for control" is "[t]he power to remove" an executive officer. *Id.* at 664. Where, as here, an officer cannot be removed for pursuing policies at odds with the agency's desired policies, then he is not subject to "direction and supervision" under any intelligible understanding of that phrase.

Further, the SEC's after-the-fact review of certain Board actions does not allow the SEC to "*direct*" the Board's work product, but only to veto mistakes. *See id.* at 664-65. Thus, the SEC cannot "prevent and affirmatively command, and … manage the ongoing conduct of, Board inspections, investigations, and enforcement actions." *FEF*, 537 F.3d at 709 (Kavanaugh, J., dissenting). Moreover, such review "does not extend to the [members] personally, but is limited to their judgments." *Edmond*, 520 U.S. at 667 (Souter, J., concurring in part and concurring in the judgment), unlike the Judge Advocate General's control over the judges in *Edmond*, *id.* at 664 (majority opinion).

Finally, at the most basic level, the Board has none of the normal, common-sense attributes of an "inferior." As noted, the Board is literally outside the government, having been deliberately designed as a private entity that does not report under any organizational plan to the SEC, so as to insulate the Board from the political pressure brought to bear on the SEC.[4]

Lastly, it is important to note that the panel opinion renders unconstitutional *both* all inferior officers at the PCAOB *and* all inferior officers at the SEC. The PCAOB appoints its own inferior officers (such as the Board's Chief Auditor). But if PCAOB members are inferior

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[4] The Act violates the Appointments Clause even if Board members are inferior officers. As an independent agency, the SEC is identical in all relevant aspects to the Tax Court, which the Supreme Court has held is not a Department under the Appointments Clause. *See Freytag*, 501 U.S. at 886. And, as a multimember body, the five SEC commissioners are not the "Head" of the SEC. Rather, the "Head" of the SEC is its Chairman, who, as the panel recognized, controls the Commission's administrative actions, *FEF*, 537 F.3d at 680. The panel majority's holdings to the contrary, *see id.* at 676-78, are plainly erroneous.

officers, as the panel held, then their appointment of other inferior officers violates the Appointments Clause. And inferior officers at the SEC (such as the heads of the SEC's four main enforcement divisions) are appointed not by the Board as a whole, but by the Chairman. *See* Reorganization Plan No. 10 of 1950, § 1(a). If, as the panel held, the SEC as a whole, rather than the chairman, is the "Head" of the SEC, then all of these inferior officers at the SEC have been unconstitutionally appointed. These severe and unavoidable consequences of the panel majority's holding make this case particularly appropriate for *en banc* review.

CONCLUSION

The sweeping implications of the panel majority's opinion underscore the Act's patent unconstitutionality and the need for *en banc* review. As Judge Kavanaugh explained, and the panel did not contest, under the majority's rationale, "Congress would have license to create a series of independent bipartisan boards appointed by independent agencies and removable only for cause by such independent agencies." 537 F.3d at 700 (dissenting opinion). The panel's opinion thus would countenance placing virtually *any* Executive function under such a structure. Congress could vest the authority to investigate and prosecute crimes in a "Criminal Prosecution Board" whose members would be appointed and removable for cause by an independent "Criminal Justice Commission." The panel majority offers no principle whatsoever that would prevent its reasoning from being so applied, or applied to myriad other cabinet agencies—from State to Education.

Most obviously, the panel majority cannot exclude from its holding so-called "purely" or "core" executive functions, even if the Supreme Court had not downplayed the relevance of that distinction in *Morrison*, *see* 487 U.S. at 689-90. After all, the panel principally relied on *Morrison*, which involved criminal prosecution, and *Perkins*, which involved the Secretary of the Navy, and if those are not "core" executive functions, then nothing is. Moreover, it is clear that

the panel majority would uphold the transfer of *all* criminal prosecutions to an independent "Criminal Justice Commission" because, as noted above, the factors that differentiate such a Commission from the independent counsel in *Morrison*—namely, limited tenure, jurisdiction, and policymaking authority, as well as Presidential conflict of interest—were treated by the panel majority as inconsequential to the separation-of-powers analysis. *See* 537 F.3d at 682. And given that the panel majority viewed Congress's action in *Morrison* as *more* of an "intrusion . . . on the Executive power" than this one, *see id.* at 681 n.11, it follows *a fortiori* that the panel majority would not object if the functions of the independent "Criminal Justice Commission" were transferred to the "Criminal Prosecution Board," as described above.

In *MWAA*, the Supreme Court, mindful of the Framers' fundamental concern that Congress will continually seek to "mask under complicated and indirect measures[] the encroachments which it makes on the co-ordinate departments," praised this Court's vigilance in striking down an encroachment that was seemingly "innocuous." 501 U.S. at 276, 277 (internal quotation marks omitted). This Court's vigilance is needed once again, for "th[is] statutory scheme … provides a blueprint" for Congress to eliminate the President's constitutionally mandated role in the execution of the laws, and thus imperils "the liberty and security of the governed." *See id.* at 272, 277. The only difference this time is that there is nothing "innocuous" about what Congress has done: as Justice Scalia once presciently observed, "this wolf comes as a wolf." *Morrison*, 487 U.S. at 699 (dissenting opinion).

For the foregoing reasons, this Court should grant rehearing *en banc*.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of September, 2008, two copies of the foregoing PETITION FOR REHEARING AND REHEARING *EN BANC* were served upon the following counsel by dispatch to a commercial carrier for next-business-day delivery:

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