ORAL ARGUMENT NOT YET SCHEDULED

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))

BRIEF OF APPELLANTS

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to Circuit Rules 26.1 and 28(a)(1), 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, 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, Western 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. Rulings Under Review

The ruling under review is the district court's memorandum opinion and final order dated March 21, 2007, granting 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.) (A37-A52).

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).

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

Page

CONSTITUTION, STATUTES AND RULES

TABLE OF AUTHORITIES
(continued)

Page

LEGISLATIVE MATERIALS

EXECUTIVE MATERIALS

MISCELLANEOUS

TABLE OF AUTHORITIES
(continued)

Page

GLOSSARY

A__	Appendix
Act	Sarbanes-Oxley Act of 2002
Beckstead	Beckstead and Watts, LLP
Board	Public Company Accounting Oversight Board
Commission	Securities and Exchange Commission
FEF	Free Enterprise Fund
GAO	Government Accountability Office
PCAOB	Public Company Accounting Oversight Board
SEC	Securities and Exchange Commission
SOX	Sarbanes-Oxley Act of 2002

STATEMENT OF JURISDICTION

The district court's jurisdiction over this case, which seeks prospective injunctive relief to remedy ongoing constitutional violations, was based upon 28 U.S.C. § 1331. *See also* A43. This Court's jurisdiction is based upon 28 U.S.C. § 1291, as Appellants filed a timely appeal on April 13, 2007, from the district court's final order (entered March 21, 2007) and judgment (entered March 26, 2007) disposing of all claims. *See* A8.

STATEMENT OF THE ISSUES

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.

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

STATUTES AND REGULATIONS

The pertinent statutes and regulations are set forth in an addendum to this Brief.

STATEMENT OF THE CASE

This case is an appeal from the district court's grant of summary judgment rejecting Appellants' claims that, by stripping the President of all power to appoint, remove or otherwise supervise the members of the PCAOB, the Sarbanes-Oxley Act violates the Constitution's separation of powers and Appointments Clause.

A. The Statutory Framework

Congress enacted the Sarbanes-Oxley Act in reaction to high-profile accounting scandals involving Enron and other companies. The Act subjects accounting firms who audit public companies to the broad regulatory authority of a new organization, the PCAOB. The PCAOB was specifically designed to be free from any and all political influence—including that of both the President and the already independent SEC.[1] In the words of one of the Act's supporters, the PCAOB has "massive power, unchecked power, by design," and will "make decisions that affect all accountants and everybody they work for, which directly or indirectly is every breathing person in the country." 148 Cong. Rec. at S6334 (statement of Sen. Gramm).

1. Appointment and Removal of PCAOB Members

The PCAOB exercises its authority through five full-time members, who are appointed for staggered five-year terms. SOX § 101(e), 15 U.S.C. § 7211(e). These members are neither appointed nor removable by the President. Instead, they are appointed and removable by a majority vote of the SEC—an independent agency that is itself designed to be immune from political pressure. *Id.* §§ 101(e)(6) & 107(d)(3), 15 U.S.C. §§ 7211(e)(6) & 7217(d)(3).

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[1] *See, e.g.*, 148 Cong. Rec. S6327-06, S6331 (daily ed. July 8, 2002) (statement of Sen. Sarbanes) ("we need to establish this oversight board . . . to provide an extra guarantee of its independence"); S. Rep. No. 107-205, at 6 (2002) (PCAOB designed to maximize "independence"); *Accounting Reform and Investor Protection Hearings Before the S. Comm. on Banking, Housing and Urban Affairs*, 107th Cong. 44 (2002) (testimony of Arthur Levitt, former SEC Chairman) (Act will "insulate" PCAOB from political pressure); *id.* at 195 (statement of Michael H. Sutton, former SEC Chief Accountant) (PCAOB designed to "make the tough decisions" without regard to "myriad of constituent pressures"); *id.* at 15 (statement of Arthur Levitt) (Act intended to avert the "extraordinary amount of political pressure [that] was [previously] brought to bear on the [SEC]"); *id.* at 186 (comments of Sen. Stabenow) (expressing "concern[] about finding a better way to insulate the establishment of accounting standards from politics and pressures"); *id.* at 793 (statement of Bevis Longstreet, former SEC Commissioner) ("[t]he independence of the SEC, itself, was being challenged as the accounting firms did all they could . . . to bring political pressure to bear").

The SEC's removal power is severely constrained. The Act allows removal *only after notice and a hearing*, and then only for what amounts to a willful abuse of power. Specifically, the Act provides that "[a] member of the Board may be removed by [the SEC] from office, *in accordance with section 107(d)(3)*, for good cause shown before the expiration of the term of that member." SOX § 101(e)(6), 15 U.S.C. § 7211(e)(6) (emphasis added). The cross-referenced subsection then sets forth the circumscribed bases upon which a finding of "good cause" must be predicated:

> The Commission may, as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this Act or the securities laws, remove from office or censure any member of the Board, *if the Commission finds, on a record, after notice and opportunity for a hearing*, that such member –
>
> (A) has *willfully violated* any provision of this Act, the rules of the Board, or the securities laws;
>
> (B) has *willfully abused* the authority of that member; or
>
> (C) *without reasonable justification or excuse, has failed to enforce compliance* with any such provision or rule, or any professional standard by any registered public accounting firm or any associated person thereof.

Id. § 107(d)(3), 15 U.S.C. § 7217(d)(3) (emphases added).

2. The PCAOB's Unchecked Executive Powers

The PCAOB exercises significant governmental authority free from any meaningful oversight by either the President or the SEC.

a) Wide-Ranging Government Powers

The Act delegates to the PCAOB, on a permanent basis, substantial regulatory authority over all accounting firms that engage in the business of auditing publicly traded companies. *See*

SOX §§ 2(a)(7) & 102(a), 15 U.S.C. §§ 7201(a)(7) & 7212(a).[2] This authority includes the power to promulgate binding rules and auditing standards, to inspect and investigate accounting firms, to conduct disciplinary proceedings and impose sanctions, and to provide for the PCAOB's own funding by levying a tax on the nation's public companies.

Binding Auditing and Independence Standards — The PCAOB has broad authority to interpret and implement the Act through the promulgation of rules, including auditing and attestation standards, quality-control standards, ethics standards, and auditor-independence requirements, "as may be necessary or appropriate in the public interest or for the protection of investors." SOX § 103(a)(1), 15 U.S.C. § 7213(a)(1). Through these powers, the PCAOB requires accounting firms to follow certain procedures and comply with specified standards when carrying out their audits of public companies. The PCAOB has exercised this authority by promulgating numerous rules and standards imposing specific and substantial new duties on registered accounting firms. *See* PCAOB Auditing Standards, *available at* http://www.pcaob.org/Standards/Standards_and_Related_Rules/index.aspx (last visited Dec. 13, 2007).

An accounting firm's violation of the Board's rules and standards subjects that entity to disciplinary actions by the Board or the SEC. *See* SOX § 105(c)(4), 15 U.S.C. § 7215(c)(4). In addition, the willful violation of the PCAOB's rules exposes a regulated entity to severe criminal sanctions, including up to twenty years imprisonment and $5 million in fines. *See* 15 U.S.C. § 78ff(a) (made applicable by SOX § 3(b), 15 U.S.C. § 7202(b)).

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[2] Accounting firms are made subject to the PCAOB's authority through a system of mandatory registration. *See* SOX §§ 2(a)(7) & 102(a), 15 U.S.C. §§ 7201(a)(7) & 7212(a). According to its website, the Board had registered 1,820 accounting firms as of November 19, 2007. *See* PCAOB, *Registered Public Accounting Firms*, http://www.pcaob.org/Registration/Registered_Firms.pdf (last visited Dec. 13, 2007).

Inspections — The Act empowers the PCAOB to enforce the Act and the PCAOB's auditing standards and other rules through a "continuing program of inspections" that involves the selective inspection and review of an accounting firm's audit engagements. SOX § 104(a), 15 U.S.C. § 7214(a). While the Act determines initial inspection frequencies, *id.* § 104(b)(1), 15 U.S.C. § 7214(b)(1), the PCAOB may change the frequency of inspections if it finds "that different inspection schedules are consistent with the purposes of th[e] Act, the public interest, and the protection of investors." *Id.* § 104(b)(2), 15 U.S.C. § 7214(b)(2). The PCAOB has inspected hundreds of firms (including Appellant Beckstead) and has posted inspection reports on its website. *See* PCAOB, *Inspection Reports*, *available at* http://www.pcaob.org/Inspections/Public_Reports/index.aspx (last visited Dec. 13, 2007).

Investigations and Sanctions — The Act empowers the Board to conduct formal investigations of any act or practice by a regulated accounting firm that "may violate" the Act, the rules of the Board, the federal securities laws or professional standards. SOX § 105(b)(1), 15 U.S.C. § 7215(b)(1). The Board may begin such an investigation of any firm at its discretion and regardless of inspection results. *Id.* If the Board finds a violation, it "may impose such disciplinary or remedial sanctions as it determines appropriate." *Id.* § 105(c)(4), 15 U.S.C. § 7215(c)(4). Available sanctions include temporary suspension or permanent revocation of an accounting firm's registration; civil monetary penalties of up to $15,000,000; and "any other appropriate sanction provided for in the rules of the Board." *Id.* § 105(c)(4)(A)–(G), 15 U.S.C. § 7215(c)(4)(A)-(G).

Taxation — In addition to its broad regulatory power over the entire accounting profession, the PCAOB also has the extraordinary power to set its own budget and fund its own activities through a tax on publicly traded companies. Specifically, the Act empowers the Board to establish an annual budget, but provides neither guidance nor a statutory cap. SOX § 109(b), 15 U.S.C. § 7219(b). Funds to cover the budget are payable from an annual tax, called an "accounting support fee," levied upon public companies pursuant to standards established by the Board. *Id.* § 109(c)-(d), 15 U.S.C. § 7219(c)-(d). The Board has acted under these provisions to promulgate a rule levying this tax on some, but not all, of the nation's public companies, *see* PCAOB Rule 7101, and to collect the tax from approximately 10,000 such companies, *see* PCAOB, *List of Issuers with No Outstanding Past-Due Share*, http://www.pcaob.org/Support_Fees/Issuers_Paid.pdf (last visited Dec. 13, 2007). These funds have been used to pay the exorbitant and rapidly escalating salaries that the Board has established for its own members: most recently $615,000 for its Chairman and $500,000 for each of the other members. *See* Nicholas Rummell, *The SarBOX: Accounting czar is a $600,000 man*, Financial Week, Aug. 20, 2007, *available at* http://www.financialweek.com/apps/pbcs.dll/article?AID=/20070820/REG/70817024 (last visited Dec. 13, 2007).

b) Restrictions on Oversight

Notwithstanding these significant government powers, the Act gives the President absolutely no oversight over PCAOB activities, either through the power of removal or otherwise. The Act also imposes numerous constraints on the independent SEC's ability to exercise any meaningful oversight:

Removal — As discussed above, the Act eviscerates the SEC's ability to control or oversee the PCAOB through the removal power.

Lack Of Enforcement Oversight — The SEC exercises virtually no oversight over the PCAOB's day-to-day enforcement activities. For example, the SEC has no control over the conduct of the Board's regular inspections, including the Board's choices about which audits to inspect. *See* SOX § 104(d)(1), 15 U.S.C. § 7214(d)(1). Likewise, the SEC does not supervise the Board's choice of firms to investigate, as the Board may commence an investigation whenever it appears to the Board that a violation "may" have occurred. *Id.* § 105(b)(1), 15 U.S.C. § 7215(b)(1). The SEC also has no power to oversee Board demands for documents or testimony from firms or associated persons during an investigation. *See id.* § 105(b)(2)(A)-(B), 15 U.S.C. § 7215(b)(2)(A)-(B). 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. SEC review occurs only if and when the PCAOB opts for sanctions, at which point the SEC may modify or cancel the sanctions only if it makes specific statutory findings after notice and a hearing. SOX § 107(c)(2)-(3), 15 U.S.C. § 7217(c)(2)-(3).

Restricted Rulemaking Oversight — The Act provides for highly deferential SEC review of PCAOB rulemaking by requiring that the SEC "*shall approve* a proposed rule, if it finds that the rule is consistent with the requirements of this Act and the securities laws, *or* is necessary or appropriate in the public interest or for the protection of investors." SOX § 107(b)(3), 15 U.S.C. § 7217(b)(3) (emphasis added).

Censure or Limitations — The Act restricts the SEC's ability to "censure or impose limitations upon the activities, functions, and operations of the Board." The SEC may take such steps only if—*after notice and opportunity for a hearing*—it finds on the record that the Board:

> (A) has *violated* or is *unable to comply* with any provision of this Act, the rules of the Board, or the securities laws; or
>
> (B) *without reasonable justification or excuse, has failed to enforce compliance* with any such provision or rule, or any professional standard by any registered public accounting firm or an associated person thereof.

SOX § 107(d)(2), 15 U.S.C. § 7217(d)(2) (emphases added).

Assumption of Responsibilities — In the end, the SEC's only real authority over the PCAOB is its theoretical power to take over the Board's functions and displace the Board entirely. Thus, the SEC may "abrogate, delete, or add to" a PCAOB rule, 15 U.S.C. § 78s(c) (made applicable to the PCAOB by SOX § 107(b)(5), 15 U.S.C. § 7217(b)(5)), and "relieve the Board of any responsibility to enforce compliance" with the laws, SOX § 107(d)(1), 15 U.S.C. § 7217(d)(1). But to do so, the SEC must engage in notice-and-comment rulemaking. *See* 15 U.S.C. § 78s(b) (made applicable to the PCAOB by SOX § 107(b)(4), 15 U.S.C. § 7217(b)(4)); SOX § 107(d)(1), 15 U.S.C. § 7217(d)(1).

B. Statement of Facts

Beckstead & Watts is an accounting firm subject to PCAOB's onerous auditing requirements. A25. Its efforts to comply with those requirements caused increases in the time and expense of Beckstead's audits and the loss of clients and profits. A26. In May 2004, PCAOB inspectors conducted an inspection of Beckstead and concluded that there were weaknesses and deficiencies in Beckstead's audit engagements and quality control system. A26. Beckstead undertook to improve its compliance with PCAOB rules by reducing the number of its audit clients, leading to further loss of revenue and profits. A26-A27. The Board nevertheless commenced a formal investigation (which it has since terminated), thereby subjecting Beckstead to additional costs and burdens, and published a redacted version of its inspection report on its website, thereby damaging Beckstead's professional reputation. A27. At no point during these interactions with the PCAOB did Beckstead have available to it any administrative mechanism for contesting the Board's authority.

FEF is a non-profit public-interest organization that promotes economic growth, lower taxes and limited government. A12-13, A35. FEF's membership includes companies subject to the PCAOB's powers, including Beckstead and public companies that are subject to and have been forced to pay the Board's accounting support fee. A35.

C. The Proceedings Below

Appellants filed this facial challenge to the provisions of the Act creating and empowering the Board, seeking a declaratory judgment that those provisions are unconstitutional and an injunction prohibiting the Board and its members from carrying out any of the powers granted to them. A31. The complaint does *not* challenge any decisions of the Board or the manner in which the Board has carried out its authority, but rather contests the constitutional authority of the Board to act at all. A27-A30.

Following argument on Appellees' motion to dismiss for lack of subject-matter jurisdiction, the parties, agreeing that fact discovery was unnecessary, filed cross-motions for summary judgment. After holding that it had subject-matter jurisdiction and Appellants have standing, A43, the district court granted summary judgment to Appellees. Without addressing Appellants' principal arguments about the Act's interference with *the President's* authority, the court concluded that Appellants' separation of powers claim failed because the Act's further limitations on *the SEC's* power to remove PCAOB members are not "unduly severe in all circumstances." A48. With respect to the Appointments Clause, the district court held that PCAOB members are inferior officers who may be appointed by the Head of a Department, and that Appellees were likely to succeed on their argument that the SEC is a Department for purposes of the Clause. A45-A46. The court concluded, however, that the Act's provision for appointment of PCAOB members by the SEC as a whole, rather than by the Chairman of the SEC, violated the Appointments Clause because the five commissioners are not the Head of the SEC. A46. But, the court held, Appellants lack standing to obtain relief on this point: in the court's view, Appellants' injuries are not traceable to this constitutional infirmity because the SEC Chairman voted for each member of the Board. A47.

SUMMARY OF ARGUMENT

The PCAOB separates governmental power from political accountability to an extent not before known to American law. Its officials are vested, "by design," with "massive unchecked powers." 148 Cong. Rec. at S6334. Yet the PCAOB's exercise of "unchecked power" is shielded from all political accountability. Unlike independent agencies, whose commissioners are appointed and removable by the President, the President has no power either to appoint or remove PCAOB members, and no other ability to influence their exercise of executive power by reviewing their work or even their budget. While certain constraints on the President's power to appoint or remove or oversee officers exercising significant government authority are permissible, here, *all* three of these basic control mechanisms have been taken from the Executive. No such complete break between the Executive and the executive power can be squared with separation of powers or the Appointments Clause if they are to have any meaning.

A statute violates separation of powers if it "impermissibly burdens the President's power to control or supervise [an executive officer] in the execution of his or her duties." *Morrison v. Olson*, 487 U.S. 654, 692 (1988). Here, neither the President nor his Executive Branch subordinates have any say in selecting or removing Board members and no ability to review their policies. He therefore has absolutely no ability to "control or supervise" the Board's membership or activities, and thus no recourse if the Board enforces the securities laws in an unwise or even corrupt manner.

The Board was deliberately created in this manner in order to render it "independent" of "politics." *See supra* p. 2 & note 1. But because the people exercise ultimate control over government officials through the political process, this renders the Board "independent" of the people who are supposed to exercise ultimate sovereignty. So vesting government agencies with coercive power over the citizenry, and simultaneously depriving the citizenry of any ability to control or check those exercising such potentially tyrannical authority, is precisely the fundamental threat to the "liberty and security of the governed" that separation of powers principles were designed to prevent. *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991) ("*MWAA*").

Specifically, the bare minimum required by the Constitution is that the President have broad removal authority over those who wield significant "executive power" and take care that the law is "faithfully executed." U.S. Const. art. II, §§ 1, 3. Members of the PCAOB, however, are not removable by the President *at all*. Rather, they are removable only by the SEC—an entity itself independent of the President—and, even then, only for a willful abuse of power. And the statutory scheme as a whole eliminates all other means by which the President might influence the PCAOB's exercise of executive authority and severely circumscribes even the SEC's review.

The PCAOB also violates the Appointments Clause. The members of the PCAOB exercise widespread, unsupervised governmental power, by virtue of which they are principal officers who must be appointed by the President with the Senate's advice and consent. But even assuming they are inferior officers, the Appointments Clause requires that they be appointed by the "Head" of a "Department." Independent agencies like the SEC, however, are not "Departments" under the Appointments Clause, which, the Supreme Court has held, include only those cabinet-like entities within the Executive Branch that are under the President's control. Moreover, as the district court concluded, PCAOB members are not appointed by the "Head" of the SEC—its Chairman—but rather collectively by the five-member commission as a whole. Indeed, any conclusion that the Chairman is *not* the SEC's head would render unconstitutional the appointments of all "inferior officers" within the SEC, because all of those officers were appointed by the Chairman.

ARGUMENT

I. CONGRESS VIOLATED THE SEPARATION OF POWERS BY INSULATING THE PCAOB FROM PRESIDENTIAL SUPERVISION AND CONTROL

As the Supreme Court has repeatedly noted, "'[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—a conclusion confirmed by his obligation to take care that the laws be faithfully executed.'" *Buckley v. Valeo*, 424 U.S. 1, 136 (1976) (quoting *Myers v. United States*, 272 U.S. 52, 117 (1926)); *see also Myers*, 272 U.S. at 138-39 ("'the executive power of the nation is vested in the President; subject only to the exceptions and qualifications, which are expressed in the instrument'" (quoting remarks of Alexander Hamilton reprinted in 7 *Hamilton's Works* 80-81 (J.C. Hamilton ed., 1851))). The President, of course, "'alone and unaided could not execute the laws. He must execute them by the assistance of subordinates.'" *Buckley*, 424 U.S. at 135 (quoting *Myers*, 272 U.S. at 117). Thus, in order to ensure that he is accountable for all exercises of the "executive power," all government officials who wield that power on his behalf must "'act for him under his direction in the execution of the laws.'" *Id.* at 136 (quoting *Myers*, 272 U.S. at 117); *see also Bldg. & Constr. Trades Dep't, AFL-CIO v. Allbaugh*, 295 F.3d 28, 32 (D.C. Cir. 2002) ("the President's power necessarily encompasses general administrative control of those executing the laws" (internal quotation marks omitted)). Therefore, as this Court has made clear, 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.'" *Allbaugh*, 295 F.2d at 32-33 (quoting *The Federalist* No. 72, at 463 (Hamilton) (second ellipsis in *Allbaugh*)).

Thus, "the Founders chose to risk the potential for tyranny inherent in placing power in one person, in order to gain the advantages of accountability fixed on a single source." *Sierra Club v. Costle*, 657 F.2d 298, 405 (D.C. Cir. 1981). This reflects the general purpose of separation of powers, which is to "ensure that those who wield[government power are] accountable to the political force and will of the people." *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 884 (1991).

In determining whether a law impermissibly interferes with the President's ability to supervise those exercising executive power, the Supreme Court has instructed that "[t]wo related issues must be addressed." *Morrison*, 487 U.S. at 685. The "first 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.* The "second 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. *Id.* Sarbanes-Oxley flunks both tests because it *completely strips* the President of the power to remove and otherwise deprives him of *any* means of influencing, much less supervising, the PCAOB's implementation of its important executive functions.[3]

[3] Although the Act states that the PCAOB is "not . . . an agency or establishment of the United States Government," and its officials are not "officer[s] or employee[s] or agent[s] for the Federal Government," SOX § 101(b), 15 U.S.C. § 7211(b), it nonetheless is a governmental entity for constitutional purposes, as the Board and the United States conceded below. A45; *see also Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 400 (1995); *MWAA*, 501 U.S. at 269-70; *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. Off. Legal Counsel 124, 148 n.70 (1996). In addition, Appellees do not dispute that PCAOB members exercise *executive* authority. Nor could they, for the PCAOB's rulemaking and enforcement powers are far broader and more "executive" in nature than those previously found by the Supreme Court to be executive. *See Bowsher v. Synar*, 478 U.S. 714, 732-43 (1986); *Buckley*, 424 U.S. at 139.

A. The Act's Limitations On Presidential Removal Authority Violate Separation Of Powers

Whether a removal restriction is constitutional turns on whether it "impermissibly burdens the President's power to control or supervise [an officer] in the execution of his or her duties." *Morrison*, 487 U.S. at 692. While the Supreme Court has not yet provided specific guidance on what limitations on removal authority are impermissible because they "sufficiently deprive[] the President of control over the" executive official, it has confirmed the obvious point that when "the power to remove an executive official has been completely stripped from the President," this provides "*no means* for the President to ensure the 'faithful execution' of the laws." *Id.* at 692-93 (emphasis added). Since a removal provision is unconstitutional if it "interfere[s] impermissibly with the President's constitutional obligation to insure the faithful execution of the laws," and since depriving him of *all* removal authority provides him "no means" to fulfill that constitutional obligation, it is clear that the Act here is unconstitutional because it "completely strip[s]" the removal power from the President and his direct subordinates. *Id.*

As noted, since the early days of the Republic, it has not been doubted "'that [A]rticle [II] grants to the President . . . *the power of appointment and removal of executive officers*.'" *Buckley*, 424 U.S. at 136 (quoting *Myers*, 272 U.S. at 163-64) (emphasis added). Indeed, this was recognized by the very first Congress in the so-called "Decision of 1789." *See Myers*, 272 U.S. at 112-32. "This 'Decision of 1789' provides contemporaneous and weighty evidence of the Constitution's meaning since many of the Members of the First Congress had taken part in framing that instrument." *Bowsher*, 478 U.S. at 723-24 (internal quotation marks omitted). There, "the First Congress, after heated debate, deleted from a proposed bill creating the Department of Foreign Affairs language which provided that the Secretary of Foreign Affairs was ‘to be removable from office by the President.’” *Synar v. United States*, 626 F. Supp. 1374, 1395 (D.D.C.) (three-judge district court), *aff’d*, *Bowsher v. Synar*, 478 U.S. 714 (1986). It did so not because it wished to deny the President that power, but out of fear that “the original text implied”—wrongly—“the absence of a constitutionally conferred power of the President to effect removal.” *Id.* But the President’s “duty to see the laws faithfully executed” was intended to encompass “that species of power which is necessary to accomplish that end,” including the broad power of removal. 1 *Annals of Cong.* 499 (Joseph Gales ed., 1834) (remarks of Madison). This removal power was vital to preserve “‘that great principle of unity and responsibility in the executive department, which was intended for the security of liberty and the public good.’” *Myers*, 272 U.S. at 131 (quoting 1 *Annals of Congress* 499 (remarks of Madison)). And only “‘[i]f the President should possess *alone* the *power of removal* from office, [would] those who are employed in the execution of the law . . . be in their proper situation, and the chain of dependence be preserved; the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community.’” *Id.* (quoting 1 *Annals of Congress* 499 (remarks of Madison)).

In addition to this powerful historical evidence, there are obvious and important reasons why the President must retain the exclusive removal authority over those executing the laws. As this Court has repeatedly noted:

> The ordinary duties of officers prescribed by statute come under the general administrative control of the President by virtue of the general grant to him of the executive power, and he may properly supervise and guide their construction of the statutes under which they act in order to secure that unitary and uniform execution of the law which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone.

Allbaugh, 295 F.2d at 32 (quoting *Sierra Club*, 657 F.2d at 406 n.524 (quoting *Myers*, 272 U.S. at 135)). And, as we know from the normal employment context, one cannot "properly supervise and guide" others unless he can remove them in some circumstances. "'Once 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*, 626 F. Supp. at 1401); *see also Meyer v. Bush*, 981 F.2d 1288, 1295 (D.C. Cir. 1993) ("presidential power to remove executive branch officials crucial to presidential control"). Since it is the "President *alone*" who has the power and responsibility to execute the laws, that removal power cannot be transferred to another. *Allbaugh*, 295 F.3d at 32 (emphasis added). As Judge Wald (joined by then-Judge Ginsburg) aptly put it, "[t]he executive power under our Constitution, after all, is not shared, it rests exclusively with the President." *Sierra Club*, 657 F.2d at 405.

To be sure, in order to competently perform his constitutional duties, the President's power to remove need not be *unlimited* for "*all* executive officials." *Morrison*, 487 U.S. at 689 n.27 (emphasis in original). While "there are some 'purely executive' officials who must be removable by the President at-will if he is able to accomplish his constitutional role," some other officials are sufficiently subordinate or peripheral that some restrictions on the President's removal power "are of such a nature that they [would not] impede the President's ability to perform his constitutional duty." *Id.* at 690-91. Thus, in *Morrison,* the Court upheld a "good cause" removal restriction on the Independent Counsel, who was an inferior officer. *Id.* at 671. Specifically, the Court concluded that where an inferior officer exercises "limited jurisdiction and tenure" and "lack[s] policymaking or significant administrative authority," *id.* at 691, a broad "for cause" removal provision does not "impermissibly burden[] the President's power to control or supervise the independent counsel . . . in the execution of his or her duties under the Act." *Id.* at 692.

But the Court need not resolve the somewhat murky question of what removal *limitations* impermissibly constrain the President's ability to supervise those who exercise broad authority because the President's removal power here has not been limited—it has been completely eliminated. The President's power to remove Board members has been "completely stripped," and he therefore has "*no means*" to supervise or influence their execution of the law. *Id.* Since the constitutional test for a removal provision is whether the President retains sufficient supervisory control to perform his constitutional functions, a provision which strips the President of *all* removal authority and control over those performing an important executive function necessarily flunks it.[4]

The district court nevertheless conclusorily asserted, without elaboration, that the *President* retained sufficient removal and supervisory authority over *PCAOB members* because "*SEC Commissioners* can be removed for cause . . . and *PCAOB members* can be removed *by the SEC*." A47. This is a non sequitur. The fact that a multi-member agency designed to be *independent* of the President has some power to remove hardly vests the *President* with such power or, as a consequence, with any derivative ability to even influence the Board's execution of the laws. The "idea of a 'plural executive,' . . . was considered and rejected by the Constitutional Convention." *Sierra Club*, 657 F.2d at 405. It is the *President's* constitutional duty, and he cannot hope to perform it if he has "no means" of removing those who are executing the laws improperly or even corruptly.

[4] The members of traditional independent agencies, by contrast, *are* subject to the President's removal power. *See, e.g.*, 15 U.S.C. § 2053(a) (CPSC); 12 U.S.C. § 242 (Federal Reserve Board); 15 U.S.C. § 41 (FTC).

To be clear, vesting the removal power in an Executive Branch department head removable at will by the President does not cognizably impede the President's ability to remove or control subordinates of the department head. Such a department head is the President's "alter ego" and is subject to his unfettered control. *Meyers*, 272 U.S. at 133. It is therefore quite simple for the President to remove an officer "through" a department head: he simply "order[s]" his "alter ego" to effectuate the removal, "and can fire the [department head] if he refuses to" do so. *Nat'l Treasury Employees Union v. Reagan*, 663 F.2d 239, 248 (D.C. Cir. 1981) ("*NTEU*"). The only difference is that the President does not call the inferior officer directly to fire him, but calls his department head to have him do it. Thus, the vesting of the power to remove an inferior officer in a removable-at-will alter ego such as the Attorney General in *Morrison*, the Secretary of Defense in *NTEU* or the Secretary of the Navy in *United States v. Perkins*, 116 U.S. 483 (1886), does not create any cognizable separation of powers concerns.

To belabor the obvious, however, the SEC, unlike at-will Cabinet officers, is an "independent agenc[y]." *Mistretta v. United States*, 488 U.S. 361, 387 n.14 (1989); *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 33 n.3 (D.C. Cir. 1987). And "independent regulatory agencies such as . . . the [SEC]" "are 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*, 501 U.S. at 916 (Scalia, J., concurring in the judgment) (citation omitted; emphasis in original); *see also Lebron*, 513 U.S. at 398. The SEC, like the FTC, simply "cannot in any proper sense be characterized as an arm or an eye of the executive." *Humphrey's Ex'r v. United States*, 295 U.S. 602, 628 (1935).

As even the Board forthrightly acknowledged below, an independent agency like the SEC need not and should not follow Presidential "enforcement policies" or his "view of the securities laws." PCAOB Reply Br. Supp. Mot. Sum. J. at 24. As the case relied on by the district court noted, it is "commonly understood that the President may remove a [SEC] Commissioner only for 'inefficiency, neglect of duty, or malfeasance in office.'" A47 (citing *SEC v. Blinder, Robinson & Co.*, 855 F.2d 677, 681 (10th Cir. 1988)); *accord MFS Sec. Corp. v. SEC*, 380 F.3d 611, 619 (2d Cir. 2004). The PCAOB has forthrightly stated that such a "good cause" standard does "'not [authorize] removal because of the appointee's failure to accept presidential instructions.'" PCAOB Br. Supp. Mot. Sum. J. at 36 n.21 (quoting *Synar*, 626 F. Supp. at 1398-99).

Thus, Commissioners are free to ignore the President's directives on discretionary judgments. And since the President "has the *same* power over the SEC's removal decisions as he has over *any other* discretionary SEC decision," PCAOB Reply Br. at 24, he cannot dictate the removal of a Board member any more than he could dictate how the SEC implemented another discretionary policy. Certainly neither the Justice Department nor the SEC has suggested anywhere, including in this lawsuit, that the SEC is somehow obliged to pay any heed to the President's policies or enforcement standards, much less that a Commissioner could be subject to removal if he failed to follow Presidential directives or policies.

In short, since the SEC, unlike a Presidential "alter ego," is concededly not bound by Presidential commands or desires concerning either enforcement policies or removal of Board members, vesting the SEC with removal power plainly does not somehow preserve the *President's* removal authority, much less allow him to use that authority to insure that the Board is following his enforcement policies. Indeed, the great irony of the district court's attempt to equate this independent agency with a Presidential alter ego in order to uphold the PCAOB's unprecedented independence from the President is that its analogy, if accepted, would destroy the well-recognized independence of agencies like the SEC by reducing them to a mere "arm and eye of the executive."

For these reasons, even if the *SEC* could remove PCAOB members on the ground that they were negligent or pursued wrong-headed policies, this would not enable the *President* to influence the Board's execution of the law. This is an even easier case, however, because the SEC "may" remove a PCAOB member *only* if a member "(A) has *willfully violated* any provision of this Act, the rules of the Board, or the securities laws; (B) has *willfully abused* the authority of that member; or (C) without reasonable justification or excuse, has *failed to enforce* compliance with any such provision or rule, or any professional standard." SOX § 107(d)(3), 15 U.S.C. § 7217(d)(3) (emphasis added). This extraordinarily restrictive removal standard clearly eliminates any plausible contention that the President can exercise any indirect influence over the PCAOB through the removal power.

First, it reinforces that there are *no* circumstances where the President can remove an SEC Commissioner for the Commissioner's refusal to fire a Board member. The SEC has no "duty" to remove even a Board member that is engaged in the most egregious conduct, because the decision to remove is always discretionary. *See id.* (SEC "may" remove a Board member). So the failure by a Commissioner to remove a Board member who has, say, "willfully violated" the law is not a "neglect of duty" by the Commissioner, and the President therefore cannot remove the Commissioner under the standard for removing Commissioners. In addition, there will virtually never be a circumstance where the case for removal of a PCAOB member under the Act's niggardly standard is unequivocal, since it could always be reasonably argued that, for example, a Board member's concededly complete "failure to enforce" the law was "reasonably excused" by personal issues distracting the member.

More importantly, the removal provision makes clear that the *SEC* cannot remove a Board member who incompetently pursues wrong-headed policies, but permits, at most, removal only of those members who egregiously and deliberately flout their duties or engage in serious misconduct. For example, the SEC may not remove a member for *negligently* abusing authority or for *overzealously* "enforc[ing] compliance" by, for example, launching onerous investigations into actions that the member erroneously perceives as violative of PCAOB rules. Moreover, it is entirely undisputed that the Act's removal standards prohibit the SEC from removing a member so long as he enforces securities laws in a *rational* manner, even if those rational actions are completely at odds with the SEC's *preferred* interpretation or policy. *See, e.g.*, PCAOB Reply at 22 n.19 ("the remedy for *reasonable* misinterpretations of the law is reversal, not removal" (emphasis in original)). Since the "reasonable" choices available to the Board under the quite open-ended provisions of the securities laws are virtually limitless, this deprives the SEC of any ability to use the removal power to shape the Board's policy or enforcement standards. Surely any policy choice about which Congress has not spoken directly, that the agency has unfettered authority to flesh out under *Chevron*'s second prong, would be left completely to the Board, free from any threat of SEC removal. *See Nat'l Cable & Television Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 985 (2005).

Finally, even if the President could somehow justify removing an SEC Commissioner for failure to fire a miscreant Board member, this would not, of course, result in removal of the miscreant. If a Presidential alter ego refuses a Presidential order to fire a subordinate, that department head will be removed and the firing of the subordinate will be carried out either by the next-in-line or by whomever the President designates as "acting" department head. But in the case of a multi-member commission composed of at least two members of a different political party than the President, *see* 15 U.S.C. § 78d(a), the President would have to both fire and *replace* a sufficient number of Commissioners to constitute a majority in favor of the Board member's removal. The President could do this only if the Senate confirmed the replacement Commissioner in the face of this politically charged dispute over the Board member *and* if the new Commissioner fortuitously agrees with the President on removal. The replacement Commissioner obviously would not be able to form or express any views on removing the Board member during the confirmation process because that would violate the due process rights of the Board member, who is entitled to an *unbiased* "hearing" before removal. *See* SOX § 107(d)(3), 15 U.S.C. § 7217(d)(3); *Sierra Club*, 657 F.2d at 407 & n.527; *ATX, Inc. v. Dep't of Treasury*, 41 F.3d 1522, 1527 (D.C. Cir. 1994).

In sum, all agree that neither the President nor the SEC has any power to remove a Board member pursing "reasonable" policies even if those policies are anathema to both the SEC and the President. The President also has no power to remove an SEC Commissioner even for a completely unjustified refusal to fire a Board member, except perhaps in the extraordinarily rare case where a member's willful abuse of power is uncontestable. And even the removal of an SEC Commissioner can result in the removal of an offending Board member only after a time-consuming process and fortuitous circumstances entirely beyond the President's control. Since the President's power to remove Board members is therefore less direct, and no greater, than Congress's ability to impeach "officers" (*see* U.S. Const. art. II, § 4), the notion that this hypothetical, indirect removal potential gives the President any ability to influence the Board's execution of the securities laws borders on the comical.

Consequently, the removal provision of the Act, "taken by itself, impermissibly interferes with the President's exercise of his constitutional assigned function," and for that reason alone is unconstitutional. *Morrison*, 487 U.S. at 685.

B. The PCAOB Taken As A Whole Violates Separation Of Powers

Even if the removal provision is insufficient in isolation to violate separation of powers, the Act as a whole plainly does, because it strips the President of all other potential means of indirectly influencing how the Board effectuates its broad policy mandate. Indeed, the very factors establishing that the President has sufficient control over the execution of the law by independent counsels and independent agencies demonstrate that the President does not have remotely sufficient authority with respect to the PCAOB.

First, and most obviously, the President is completely deprived of the "most important" means of control—removal—whereas the Attorney General's "power to remove the counsel for 'good cause' . . . provide[d] the Executive with substantial ability to ensure that the laws are 'faithfully executed' by an independent counsel." *Morrison*, 487 U.S. at 696.

Second, unlike every independent agency or "corporation" exercising any executive authority, the President has no power to appoint members of the PCAOB. It is well-established that a key "part of [the President's] executive power [is that] he should select those who were to act for him under his direction in the execution of laws." *Buckley*, 424 U.S. at 135-36 (internal quotation marks omitted). Thus, even cases upholding restrictions on Presidential removal "carefully emphasize[] that although the members of such agencies were to be independent of the Executive in their day-to-day operations, the Executive was not excluded from selecting them." *Id.* at 133. This power to select his own people obviously provides the President with some cognizable measure of influencing execution of the laws since "the President will tend to appoint those persons who are sympathetic to his own views." *Blinder*, 855 F.2d at 681. Again, the fact that the SEC appoints Board members does not in any way assuage this Presidential deprivation because it is undisputed that appointments are committed to the Commissioners' unfettered discretion, free from any Presidential authority.

Indeed, in order to eliminate any conceivable indirect Presidential control over appointments, the Act strips the Chairman of the SEC of his heretofore exclusive power to appoint all inferior officers at the SEC. *Compare* SOX § 101(e)(4), 15 U.S.C. § 7211(e)(4) (Commission appoints PCAOB members) *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. (Chairman appoints all personnel). The Chairman is selected by the President, serves (as Chairman) at the pleasure of the President and is in charge of virtually all administrative and personnel policies for the Commission. *See infra* pp. 40-41. Accordingly, the President's unfettered power to appoint and remove the Chairman provides the Chairman with an obvious incentive to cooperate with Presidential goals and thus affords the President indirect influence over the Chairman's personnel selections. Congress's novel and unexplained decision to strip the Chairman of the appointment power serves no purpose other than eliminating any remaining shred of Presidential influence over appointments.

While the Independent Counsel in *Morrison* was not appointed by the President, the scope of her duties and her very existence were dependent on the President. "No independent counsel [could] be appointed without a specific request by the Attorney General"—a decision "committed to [the Attorney General's] unreviewable discretion"—and "the jurisdiction of the independent counsel [was] defined with reference to the facts submitted by the Attorney General." *Morrison*, 487 U.S. at 679, 696.

Third, the Board exercises extraordinarily broad and very significant authority, equivalent to that of an independent agency and exponentially greater than that of the Independent Counsel. This is obviously a central issue because the greater an officer's authority to form important policy, the greater the impact he has on the execution of the laws. In contrast, the President can fulfill his constitutional functions even if he loses direct control over those who are simply implementing a narrow slice of policy or enforcement standards developed by their superiors. Thus, for example, Congress could not constitutionally create an "Independent Criminal Division" responsible for setting and establishing criminal enforcement policies if its head was appointed and removable in the same manner as the Independent Counsel, because the division would exercise far greater executive power than the narrow responsibility given to an Independent Counsel. As the Supreme Court repeatedly emphasized in *Morrison*, the restriction on the President's removal authority was justified because of the Independent Counsel's "limited jurisdiction and tenure and lack [of] policymaking or significant administrative authority." 487 U.S. at 691; *see also id.* at 671-72 (emphasizing that the counsel was "empowered . . . to perform only certain, limited duties" and that her tenure was "limited in nature" and "temporary"). Equally important, "the Act requir[ed] that the counsel abide by Justice Department policy" unless it was literally "not 'possible' to do so," and, as noted, this limitation on the counsel was enforceable through removal for cause. *Id.* at 696. Consequently, the sum total of the Independent Counsel's authority was to follow the Attorney General's enforcement policies for a single matter, thus serving the government's compelling interest in ensuring that the President's closest allies were subjected to the same neutral law enforcement standards as others. This deprivation of the President's power to create or tolerate a dual standard for his cronies was not an impermissible interference with his authority to generally execute the law.

In stark contrast, the PCAOB is a permanent agency charged with overseeing virtually every publicly traded company in America through broad policymaking, investigative and other regulatory authority.

Appellees maintained below that the SEC exercises direct oversight over the Board's enforcement and rulemaking authority. This is plainly untrue for the reasons detailed below (*see infra* pp. 32-35) and, in any event, irrelevant. Again, the fact that an agency specifically designed to make policy "independent" of the President may somehow influence the Board's policy judgments hardly preserves the *President's* ability to influence the Board's policy judgments. And certainly no one could suggest that the Board's authority is remotely comparable to the narrow task assigned to the Independent Counsel.

Fourth, while Congress had obvious and ample reason to believe, particularly in the wake of Watergate, that the "independence" of the counsel was "necessary" and "essential" to ensure neutral prosecution of the President's closest allies given his obvious conflict of interest, *Morrison*, 487 U.S. at 693, there is no legitimate *reason*, much less need, to insulate the PCAOB from Presidential control to a far greater extent than is done for the independent agencies. Neither the defendants nor the district court has even attempted to explain why the functions performed by PCAOB could not have been assigned to the SEC or why the PCAOB could not have been created in the same manner as a traditional independent agency. The only conceivable reason, confirmed by the legislative history, *see supra* p. 2 & note 1, is the facially illegitimate one of ensuring that the Board is not at all accountable to any elected representative accountable to the public. Thus, in addition to those features already described, the PCAOB (unlike any other federal regulatory entity) was made a "private corporation" and authorized to raise its own revenue through taxes on publicly traded companies, with no review of its budget by either the

President or Congress. SOX §§ 101(b), 109, 15 U.S.C. §§ 7211(b), 7219. This exemption from the budget process eliminates the President's and Congress's ability to influence the Board's actions, and the Board's "private" designation exempts it from the normal constraints on agencies—such as FOIA, whistle-blower and civil service protections—thus eliminating direct examination by, or accountability to, the public. Such complete immunity from all public accountability undoubtedly explains the Board members' arrogant decision to pay themselves exorbitant salaries of $615,000 for the chairman and $500,000 for the other members, *see supra* p. 6—amounts substantially higher than that of the President himself, *see* 3 U.S.C. § 102.

In sum, even if Board members are incorrectly viewed as "inferior officers," *but see infra* Part II.A, the Board cannot satisfy *any* separation of powers analysis that provides *any* meaningful protection of the President's constitutional authority against congressional encroachment. If the PCAOB is constitutional, this means that Congress has full constitutional authority to transfer *all* cabinet functions to government corporations like the PCAOB, overseen only by independent agencies. For example, Congress could create independent, multi-member "Law Enforcement," "Foreign Policy" and "Energy" commissions, whose members are removable only for good cause. Since, according to the district court and Appellees, such independent commissions are "no different" than alter egos such as the Attorney General and are "Heads" of "Departments," vesting such commissions with appointment and removal authority over "inferior officers" in a "corporate" board like the PCAOB would offend neither separation of powers nor the Appointments Clause. Under Appellees' regime, then, the President's role in enforcing the law and performing other executive functions could constitutionally be reduced to appointing members of independent, bi-partisan commissions removable only for cause, and then sitting by and watching those commissions' general "oversight" of independent corporate boards, whose members can only be removed in extraordinarily narrow circumstances. While this point was made repeatedly below, Appellees have been wholly unable to offer any principled basis for distinguishing the PCAOB from the Commissions hypothesized above, for there is none. Indeed, upholding the PCAOB against constitutional challenge would be a direct invitation for Congress to create a "Law Enforcement Commission" to eliminate the "politics" that purportedly continue to plague the Justice Department, or an "Energy Commission" to end the "politics" that has purportedly deterred an effective response to global warming.

The Supreme Court has counseled judicial vigilance against even subtle, "innocuous" congressional interference with executive prerogatives because they can provide a "blueprint" to "use similar expedients" to increase the "legislative power." *MWAA*, 501 U.S. at 277. Indeed, it is *presumed* that Congress will seek such "enormous expansion" because, as "James Madison presciently observed," its broadly-defined legislative "power is of an encroaching nature" and Congress "'can with greater facility, mask under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments.'" *Id.* at 277 (quoting *The Federalist* No. 48 (Madison)). Thus, "it is against the enterprising ambition of this [legislative] department, that the people ought to indulge all their jealousy and exhaust all their precautions." *Id.* at 273 (internal quotation marks omitted).

The district court did not dispute, or even discuss, any of the foregoing. Indeed, the district court did not even determine when Board members are removable by the SEC, concluding instead that *United States v. Salerno*, 481 U.S. 739, 745 (1987), somehow requires courts to defer to any "plausible" reading of the statute that enhances the SEC's removal power. A48. But *Salerno* has nothing to do with statutory interpretation, and certainly does not suggest acceptance of any "plausible" view of the alleged constitutional violator. It simply holds that, in the context of a facial constitutional challenge, "if the statute's provisions may be constitutionally applied in some circumstances, a plaintiff must demonstrate that the statute is unconstitutional as applied." A48 (citing *Steffan v. Perry*, 41 F.3d 677, 693 (D.C. Cir. 1994) (en banc)). Here, Appellants allege that the Act is unconstitutional *both* as applied to them *and* in all circumstances, because *any* assertion of regulatory power by this unconstitutional body violates separation of powers and the Appointments Clause. Thus, Appellants plainly satisfy *Salerno*, even as understood by the district court.

Further, even if *Salerno* had anything to do with how courts should interpret statutory provisions, it surely does not suggest that courts should interpret them in a manner which enhances the President's (or independent agencies') power. There is simply no reason for the judiciary to choose the President's (or Congress's) side in a dispute between the two branches. To the contrary, "where the issue pertains to the separation of powers . . . neither [branch] can be presumed correct," and "[t]he playing field for the . . . case [must be] a level one." *Morrison*, 487 U.S. at 704-05 (Scalia, J., dissenting). This is why *every* separation of powers case has interpreted removal and other relevant provisions as written, without favoring or disfavoring removal or any other executive prerogative.

In all events, the district court's misuse of *Salerno* to misconstrue the SEC's removal powers is of no real consequence since it merely caused the court to accept the Board's erroneous view that a "negligent," rather than "willful," abuse of authority authorizes SEC removal. *But see Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000) (squarely holding that "willful" means that the member "knows what he is doing"). Even if this were correct, it does not somehow render the removal provision constitutional because it still would not allow the

SEC to remove a Board member for any "reasonable" construction of the statute and thus would prevent the SEC from using removal to impose its preferred policy views.

II. CONGRESS VIOLATED THE APPOINTMENTS CLAUSE BY LODGING THE POWER TO APPOINT PCAOB MEMBERS IN AN INDEPENDENT AGENCY THAT IS ITSELF INSULATED FROM PRESIDENTIAL CONTROL

The Appointments Clause "preserves another aspect of the Constitution's structural integrity by preventing the diffusion of the appointment power." *Freytag*, 501 U.S. at 878. As the Supreme Court has explained, "[t]he Framers understood . . . that by limiting the appointment power, they could ensure that those who wielded it were accountable to political force and the will of the people." *Id.* at 884. Thus, the Clause requires that principal officers be appointed by the President with the advice and consent of the Senate. And with respect to inferior officers, the Clause limits the delegation of the appointment power (as relevant here) to the heads of executive departments who are themselves directly accountable to the President.

Members of the PCAOB are principal officers who must be, but are not, appointed by the President with the advice and consent of the Senate. But even assuming *arguendo* that PCAOB members are "inferior Officers," the Appointments Clause still demands political accountability through appointment by a principal officer who is, in turn, accountable to the President. The Act fails this test because the SEC is not a "Department" and—as the district court recognized—the Chairman, not all of SEC commissioners, is the SEC's "Head." Any conclusion that the Chairman is *not* the SEC's head, moreover, would render unconstitutional the appointments of all "inferior officers" at the SEC—from the General Counsel to the director of the Division of Enforcement—because all of them were appointed by the *Chairman*.

A. PCAOB Members Are Principal Officers Who Must Be Appointed by the President and Confirmed by the Senate

The Supreme Court has identified two central inquires to determine whether an "officer" is principal or inferior under the Appointments Clause. The first is whether the official enjoys broad authority to "formulate policy" or is "empowered . . . to perform only certain limited duties," particularly in an office "limited in tenure." *Morrison*, 487 U.S. at 672. Second, "in the context of a Clause designed to preserve political accountability relative to important Government assignments, [it is] 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." *Edmond v. United States*, 520 U.S. 651, 663 (1997) (emphasis added). For the reasons already established, PCAOB wields very broad authority and, as we presently discuss, is not subject to meaningful direction or supervision by the SEC.

Supervision requires, at a minimum, two basic components. First, an inferior officer must be subject to effective discipline through the power of removal—a power that the Supreme Court has regularly described as the "most important" means and a "powerful tool" of supervision and control. *Id.* at 664. In *Edmond*, for example, the Supreme Court relied upon the Judge Advocate General's power to remove military judges *without cause* as a principal factor in concluding that these judges were inferior officers. *Id.* at 666; *see also id.* at 668 (Souter, J., concurring in part and concurring in the judgment). Similarly, in *Morrison*, the Attorney General's authority to remove the independent counsel for cause was one of the key factors supporting the independent counsel's characterization as an inferior officer. 487 U.S. at 671. By contrast, as the Department of Justice has correctly concluded, members of the Regional Fishery Management Council are *not* "subject to the supervision of" the Secretary of Commerce within the "ordinary meaning of supervision" precisely because the relevant statute "severely limits the

Secretary's removal power and is [therefore] designed to constrain narrowly the Secretary's ability to supervise and control the Council members he appoints." *Applicability of Executive Order No. 12674 to Personnel of Regional Fishery Management Councils*, 17 Op. Off. Legal Counsel 150, 155-57 (1993). As these authorities make clear, the removal power is the central component of direction and supervision.

The second essential component of supervision is the authority of a superior officer to guide an inferior officer's actions at the outset, through ongoing, day-to-day supervision and direction of the inferior officer's execution of his duties. In *Edmond*, for instance, the Supreme Court emphasized the Judge Advocate General's significant ongoing, day-to-day supervision of the Coast Guard Judges, noting in particular that the Judge Advocate General exercised administrative oversight over the court on which these judges sat, was charged with the responsibility to prescribe uniform rules of procedure for the court, and was required to meet periodically with other Judge Advocates General to formulate policies and procedure in regard to review of court-martial cases. *See* 520 U.S. at 664. As this reflects, effective supervision requires that the superior officer have the authority to "direct" the inferior officer's actions from the outset. *See id.* at 664-65; *Morrison*, 487 U.S. at 671-79.

Measured against these standards, it is clear that PCAOB members are principal, rather than inferior, officers. *First*, at the most basic level, the Board has none of the normal, common sense attributes of an "inferior." As noted, Congress deliberately designed the Board as a private, autonomous entity which does not report under any organizational plan to the SEC or anyone else, precisely to "insulate" the Board from the "political pressure" brought to "bear" against the SEC and other agencies. *See supra* p. 2 & note 1. The Board also finances itself through its own taxation. *See supra* pp. 5-6. Given this extraordinary autonomy from the normal budgetary and administrative process, it plainly would be contrary to congressional intent and the logic of the statutory scheme to relegate this free-standing independent corporation to a mere component of the SEC.

Second, as discussed in detail in the preceding section, PCAOB members—unlike the inferior officers at issue in *Edmond*, *Freytag*, and *Morrison*—may be removed only for willful abuse of authority, but not for pursuing policies disliked by the SEC. *See supra* pp. 20-21. Where, as here, a subordinate 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.

Third, the Act authorizes only facially incomplete and severely restricted supervision by the SEC. First, the PCAOB exercises vast prosecutorial authority that is subject to no SEC oversight at all. 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 supra* pp. 5-7. 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. In short, the SEC exercises no control over the PCAOB's daily exercise of prosecutorial discretion. 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.

The SEC can review PCAOB rulemaking and sanctions through cumbersome notice-and-comment procedures, but this passive veto power over mistakes by the Board does not proactively prescribe how the Board should act and thus is not "direction and supervision." *See Edmond*, 520 U.S. at 664-65. After all, the fact that OMB may review and return proposed regulations by the heads of cabinet departments, *see* Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993), does not render those officers "inferior" or suggest that they are "directed or supervised" by OMB.

This is particularly true since the standard of review for the vast majority of the Board's rules, including those establishing the essential auditing standards, is severely circumscribed. The SEC "*shall*" approve PCAOB rules so long as it finds them "consistent with the requirements of th[e] Act and the securities laws, *or* . . . necessary or appropriate in the public interest or for the protection of investors." SOX § 107(b)(3), 15 U.S.C. § 7217(b)(3) (emphasis added). This standard of review is the functional equivalent of that applied by a federal court to an agency's rules, where the court must defer to the "implementing agency's [reasonable] construction." *Chevron U.S.A., Inc. v. Nat'l Res. Defense Council, Inc.*, 467 U.S. 837, 843-44 & n.11 (1984). Yet no one would suggest that a federal court supervises or controls an agency's rulemaking power by virtue of *Chevron* review. Conversely, no one would suggest that an agency official or a judge would be directing or supervising his subordinates or clerks if the only power he had over those subordinates was the ability to engage in notice-and-comment rulemaking or adjudication to reject their ill-advised work-product.

Moreover, SEC review cannot constitute direction or supervision because it "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); *see also id.* ("'lower federal judges . . . are principal officers' because they are 'not subject to personal supervision'" (quoting *In re Sealed Case*, 838 F.2d 476, 483 (D.C. Cir.), *rev'd sub nom*. *Morrison v. Olson*, 487 U.S. 654 (1988)) (alteration in *Edmond*)).

Similarly, the SEC's limited power to "abrogate" the Board's rules or (perhaps) issue its own rules, *see supra* pp. 7-8, does not direct or supervise PCAOB activity; it *supplants* it. This no more constitutes the power to supervise the agency's enforcement conduct than does Congress's ability to amend or provide a new substantive statute. In all events, the wholly unexercised, theoretical power of the SEC to take over certain powers from an unconstitutional Board hardly suggests that the Board's continued exercise of those powers is permissible.

These stark limitations on the SEC's review, standing alone, render inapposite the district court's analogy to the Coast Guard appellate judges at issue in *Edmond*. A45. There, the judges could not affect or exercise control over the public *except* through their "final decisions," which were always subject to review by other "executive officers." *Edmond*, 520 U.S. at 665. Here, in contrast, the Board plainly can and does make decisions that directly affect the public—inspections, investigations, "no sanction" decisions—without any oversight by the SEC, and its other decisions are subject to only limited review. Thus, even if *Edmond* were not clearly distinguishable because the Judge Advocate General exercised *at-will* removal authority and direct administrative oversight of the appellate judges, it would still not lend any support to the notion that Board members are inferior officers.

In sum, because the PCAOB exercises power analogous to the commissioners of other agencies with extensive regulatory authority over particular subject matters, all of whom are appointed by the President with the advice and consent of the Senate,[5] its members are principal officers.

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[5] *See, e.g.*, 42 U.S.C. § 2996c(a) (LSC); 49 U.S.C. § 24302(a) (Amtrak); 47 U.S.C. § 154(a) (FCC); 15 U.S.C. § 2053(a) (CPSC); *id.* § 41 (FTC); *id.* § 78d (SEC); 12 U.S.C. §§ 2, 1812(a), 1462a(c)(1) (FDIC); *id.* § 241 (Federal Reserve Board).

B. Appointment of PCAOB Members By the SEC Violates the Appointments Clause Even If Those Members Are Inferior Officers

Even if PCAOB members are inferior officers whose appointment may be lodged in the "Heads of Departments," independent agencies like the SEC are not "Departments" because they are not directly accountable to the President. In any event, the five commissioners are not the "Head" of the SEC—the Chairman is.

1. The SEC Is Not A "Department"

The Excepting Clause, which permits inferior officers to be appointed by the Heads of Departments, was added only at the end of the constitutional debate as an "administrative convenience," to quell George Mason's fear that requiring Senate concurrence in the appointment of every government official would be so cumbersome as to prevent the Senate from doing anything else. *Edmund*, 520 U.S. at 660; *see also* 2 Max Farrand, *The Records of the Federal Convention of 1787*, at 539 (1911). In light of this modest purpose, it makes no sense to interpret the Clause in a manner inconsistent with the Appointment Clause's purpose of Presidential accountability through a chain-of-command. *See infra* pp. 39-40. Thus, from its earliest pronouncements on the matter, the Supreme Court has recognized the limited scope of the "Heads of Departments" upon whom the appointment power could be devolved, holding consistently that the "Departments" referenced in the Clause include only those entities that resemble the cabinet departments and, in particular, those entities that, like the cabinet departments, are directly accountable to the President. *See, e.g., United States v. Mouat*, 124 U.S. 303, 307 (1888) ("the heads of Departments" consist of "what are now called the members of the cabinet").[6]

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[6] *See also United States v. Germaine*, 99 U.S. 508, 510 (1878) (referring to the Executive "departments" as "a part or division of the executive government, as the Department of State, or

Indeed, in its most recent case in this area, *Freytag*, the Supreme Court embraced and explained at length this rationale for this understanding of "Department." The Court made clear that the *sine qua non* of a "Department" is that the entity be directly accountable to the President. At issue in *Freytag* was whether the Tax Court, an Article I court, was a "Department" under the Appointments Clause. In holding that it was not, the Court concluded that the term "Department" was confined only to those agencies that resemble a cabinet department and, most significantly, only those the "heads [of which] are subject to the exercise of political oversight and share the President's accountability to the people." 501 U.S. at 886. As the Court explained, "[c]onfining the term 'Heads of Departments' in the Appointments Clause to executive divisions like the Cabinet-level departments constrains the distribution of the appointment power . . . . The Cabinet-level departments are limited in number and easily identified. Their heads are subject to the exercise of political oversight and share the President's accountability to the people." *Id.*

The Court recognized that "[g]iven the inexorable presence of the administrative state, a holding that every organ of the Executive Branch is a department would multiply indefinitely the number of actors eligible to appoint." *Id.* at 885. Such a holding, the Court explained, would frustrate "the Framers' determination to limit the distribution of the power of appointment" in a manner that "ensure[s] that those who wield[] it [a]re accountable to political force and the will of the people." *Id.* at 884. Thus, "[e]ven with respect to 'inferior Officers,' the Clause allows

(continued…)

of the Treasury" (internal quotation marks omitted)); *Cunningham v. Neagle*, 135 U.S. 1, 63 (1890) (describing "the recognition in the constitution, and the creation by Acts of Congress, of executive departments, which have varied in number from four or five to seven or eight, the heads of which are called 'cabinet ministers'"); *Buckley*, 424 U.S. at 127 ("[t]he phrase 'Heads of Departments,' used as it is in conjunction with the phrase 'Courts of Law,' suggests that the Departments referred to are themselves in the Executive Branch or at least have some connection with that branch").

Congress only limited authority to devolve appointment power on the President, *his* heads of department, and the courts of law." *Id.* (emphasis added); *see also Weiss v. United States*, 510 U.S. 163, 187 (1994) (Souter, J., concurring). And because, unlike the cabinet departments, the Tax Court was an independent agency beyond the President's supervisory control, "[t]reating the Tax Court as a 'Department' and its Chief Judge as its 'Head' would," the Court concluded, "defy the purpose of the Appointments Clause" and "the meaning of the Constitution's text." *Id.* at 888. In short, the Excepting Clause reflects the understanding that the President must retain ultimate responsibility and political accountability for his appointees.[7]

Here, as noted, agencies like the SEC are the diametrical opposites of the cabinet departments because they are specifically designed not to be accountable to the President. *See supra* pp. 18-20. To conclude that such independent agencies are "Departments" would thus contravene both *Freytag* and the very purpose of the Appointments Clause, by allowing the appointment power to be "diffused" across entities that are, by design, immune "to political force and the will of the people." *Freytag*, 501 U.S. at 884.[8] Accordingly, even assuming *arguendo*

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[7] This conclusion is reinforced by other provisions in the Constitution, which likewise used the term "executive department" in reference to the cabinet departments, including the Opinion Clause, *see* U.S. Const. art. II, § 2, cl. 1 (The President "may require the Opinion, in writing, of the principal Officer in each of the executive Departments"), and the Twenty-Fifth Amendment, *see id.* amend. XXV, § 4 (empowering the Vice President, together with a majority of the "principal officers of the executive departments," to declare the President "unable to discharge the powers and duties of his office"). *See Freytag*, 501 U.S. at 886-87.

[8] Although *Freytag* declined to address "any question involving an appointment of an inferior officer by the head of one of the principal agencies, such as the Federal Trade Commission, Securities and Exchange Commission, the Federal Energy Regulatory Commission, the Central Intelligence Agency, and the Federal Reserve Bank of St. Louis," 501 U.S. at 887 n.4, read in context, it is clear that the Court was simply stating that the term "Department" was not "limit[ed] . . . to those departments named in 5 U.S.C. § 101." *Id.* The Court did not, however, purport to limit its reasoning, which, as explained above, makes clear that the so-called independent agencies are not "Departments" within the meaning of the Appointments Clause.

that PCAOB members are "inferior Officers," their appointment by the SEC would still violate the Appointments Clause.

2. The Five-Member SEC As A Whole Is Not The SEC's "Head"

Another independent constitutional impediment to the SEC's appointment of PCAOB members is the fact that the SEC *as a whole* is charged with the appointment responsibility. As noted, however, the "Framers recognized the dangers posed by an excessively diffuse appointment power," and "rejected efforts to expand that power" beyond a single person. *Freytag*, 501 U.S. at 885. Hamilton, for example, explained the benefits of lodging the appointment power in a single individual, who would have "a livelier sense of duty" and "fewer personal attachments to gratify" and would not "be distracted and warped by that diversity of views, feelings, and interests, which frequently distract and warp the resolutions of a collective body." *The Federalist* No. 76. As Justice Story would later observe, "one man of discernment is better fitted to analyze and estimate the peculiar qualities, adapted to particular offices, than any body of men of equal, or even superior discernment." 3 Joseph Story, *Commentaries on the Constitution* § 1522 (1833).

The Framers intended the Appointments Clause as a whole, including the Excepting Clause, to further this purpose. That is why they carefully limited the power to appoint inferior officers to "the *highly accountable* President or the *heads* of departments, or, where appropriate, to the courts of law." *Weiss*, 510 U.S. at 187 (Souter, J., concurring) (emphasis added); *see also Freytag*, 501 U.S. at 886 (noting that the "Heads of Departments . . . share the President's accountability to the people"); *id.* at 880 ("the [Excepting] Clause forbids Congress to grant the appointment power to inappropriate members of the Executive Branch"). Had the Framers wished to allow appointment by committee, they would almost certainly not have used the phrase "*Heads* of Departments," since a "head" was well-known to be "[a] chief; a principal person; a leader; a commander; *one* who has the *first* rank or place, and to whom others are subordinate; as the *head* of an army; the *head* of a sect or party." Noah Webster, *An American Dictionary of the English Language* (New York, S. Converse 1828) (second and third emphases added).[9]

Indeed, the meaning of the phrase "Heads of Departments" was well known at the time of the framing and is spelled out in early Supreme Court precedent. It was understood to encompass the cabinet secretaries—single individuals all—who would supervise their respective departments and answer directly to the President and, therefore, share his accountability. *See, e.g.*, *Mouat*, 124 U.S. at 307 ("the heads of the departments were defined in [*United States v. Germaine*] to be what are now called the members of the cabinet"); *Cunningham*, 135 U.S. at 63 (noting that President is aided by "executive departments, which have varied in number from four or five to seven or eight, who are familiarly called 'cabinet ministers.'"). Here, therefore, as the district court held below, the five-member SEC as a whole cannot be considered the "Head" of the SEC. That collective body simply is not the "chief," "principal person," "leader," "commander," or "*one who has the first rank or place*" at the SEC.

Rather, if there is a head of the SEC, it is the SEC's Chairman. In 1950, the President exercised his statutorily defined power to "provide for the appointment and pay of the *head* . . . of any agency," Reorganization Act of 1949, 5 U.S.C. § 904(2) (emphasis added), by delegating to the Chairman of the SEC "the executive and administrative functions of the Commission, including . . . the appointment and supervision of personnel employed under the Commission."

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[9] *See also* Samuel L. Johnson, *A Dictionary of the English Language* 121 (Baltimore, Fielding Lucas, Jr. 1814) (defining "head" as "a chief, principal; the top"); Noah Webster, *A Compendious Dictionary of the English Language* 140 (Philip B. Gove ed., facsimile 1970) (1806) (defining "head" as "a chief, the top, what contains the brain").

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. By "control[ling] key personnel, internal organization and the expenditure of funds, the chairman [of the SEC] exerts far more control [over the SEC] than his one vote would seem to indicate." *Blinder, Robinson & Co.*, 855 F.2d at 681. Indeed, the SEC itself recognizes on its website that the Chairman is "the SEC's top executive." U.S. Securities and Exchange Commission, *Current SEC Commissioners*, http://www.sec.gov/about/commissioner.shtml (last visited Dec. 13, 2007). Viewing the Chairman as the head of the SEC also reinforces the political accountability required by the Appointments Clause, because the Chairman, unlike the SEC commissioners, serves as Chairman at the pleasure of the President. The Chairman is therefore somewhat politically accountable to the President, whereas the SEC commissioners are not.

Indeed, if the Chairman is not the "head" of the SEC, then numerous important SEC supervisors below the Commission level—such as the Directors of the SEC's four main divisions and the agency's General Counsel—have all been unconstitutionally appointed. All of these individuals are inferior officers who were appointed to their positions by the Chairman *alone* rather than by the Commission as a whole, *see* Reorganization Plan No. 10 of 1950, § 1(a), and each performs functions vital to the SEC's mandate, *see, e.g.*, 17 C.F.R. §§ 200.18, .19a-b, .20b, .21. If the Chairman is not the "head" of the SEC, then these officers were not appointed by the "Head of a Department" in accordance with the Excepting Clause—thus casting a debilitating constitutional cloud over all of their enforcement actions.

The court below agreed that the SEC commissioners are not the head of the SEC for purposes of the Appointments Clause. A46. It held, however, that appellants "lack standing" because the Chairman "has voted for each PCAOB member," so appellants' "injury is not traceable to [the] infirmity" of depriving the Chairman of his constitutional appointment power. A47. This assertion is meritless. Appellants "injury" *is* precisely the "infirmity" of being regulated by Board members who have not been appointed in a constitutional manner because they were selected by all of the Commissioners, rather than the Chairman. It is black-letter law that plaintiffs bringing such structural challenges need not speculate that a "lawfully constituted" authority would have made a different decision. *Comm. for Monetary Reform v. Bd. of Governors of Fed. Reserve Sys.*, 766 F.2d 538, 543 (D.C. Cir. 1985); *see also Glidden Co. v. Zdanok*, 370 U.S. 530, 533 (1962); *Fed. Election Comm'n v. NRA Political Victory Fund*, 6 F.3d 821, 825 (D.C. Cir. 1993) ("*NRA*"). "Instead, litigants need only demonstrate that they have been 'directly subject to the authority of the agency,'" which appellants have done here. *NRA*, 6 F.3d at 824 (quoting *Committee*, 766 F.2d at 543). With respect to the Appointments Clause in particular, this Court has emphasized that asking whether different appointments would have resulted from a constitutionally proper actor is "precisely the wrong question." *Andrade v. Lauer*, 729 F.2d 1475, 1495 (D.C. Cir. 1984). Indeed, the "clause would be nullity if it could be assumed that these very officials *would* in fact have been properly appointed." *Id.* (emphasis in original).

Thus, it was plainly improper for the district court to assume that PCAOB membership would have been the same if the Chairman had made the relevant decisions, simply because he voted in favor of the Commission's decision. This Court and the Supreme Court have consistently emphasized that plaintiffs have standing to challenge the mere *presence* of an unconstitutional actor in the decisionmaking process even if, unlike here, the unconstitutional actors are not responsible for the challenged decision. Thus, the designation of purely *advisory ex officio* members to the FEC could be challenged because their "mere presence . . . offends the

Constitution" and because "advice implies influence." *NRA*, 6 F.3d at 827. Similarly, although the unconstitutional "Board of Review" in *MWAA* only had "veto power" over the challenged decision made by the properly constituted Board of Directors, this sufficed to bestow standing because "knowledge that the master plan was subject to the [Board's] veto power undoubtedly influenced MWAA's Board of Directors when it drew up the plan." *MWAA*, 501 U.S. at 265. Thus, it is constitutionally irrelevant what decisions the Chairman would have made in isolation, just as it would be irrelevant if the President voted in favor of the pardon decisions made by a five-member "Pardon Commission" created by Congress with the President as one member. In both cases, the constitutional evil is that a decision is being made by an entity other than that designated by the Constitution.[10]

As a practical matter, moreover, as anyone who has ever witnessed a congressional committee vote knows, individual support for collective decisions does not mimic the decisions the individual would have made on his own, free from compromise or horse-trading. Indeed, the undisputed factual record here establishes that the participation of SEC Commissioners other than the Chairman in the appointment of PCAOB members *did in fact* affect who the SEC appointed. An investigation by the Government Accountability Office determined that "[a]s Commissioners raised concerns [about the appointments process], the SEC Chairman . . . would adjust the process to accommodate the[ir] input." Government Accountability Office, *Securities and Exchange Commission, Actions Needed to Improve Public Company Accounting Oversight*

[10] Nothing in *NTEU*, relied on by the district court, is remotely to the contrary. There, this Court suggested in *dicta* that the proper "appointment authorities" could *delegate* their authority to an inferior officer provided that they continued to "exercise *their* discretion in making *the appointment*." *NTEU*, 663 F.2d at 246 n.9 (emphasis added). Here, the proper appointment authority—the Chairman—never possessed the appointment power, the Commission did. Thus, this case has nothing to do with whether delegating appointment authority is permissible.

Board Selection Process 21 (Dec. 2002), *available at* http://www.gao.gov/new.items/d03339.pdf (last visited Dec. 13, 2007); *id.* at 9 (describing dispute between Chairman and other commissioners, who "wanted more involvement in the process and thought it best for each Commissioner independently to do due diligence on the potential candidates"). The GAO concluded that such pressure not only "ultimately forced [the SEC] to appoint members to the PCAOB that had not been adequately vetted," *id.* at 3, but likewise forced the Chairman to abandon his preferred choice for chairman of the PCAOB, *see id.* at 9-10.

In short, the actual experience of the SEC in choosing the initial members of the PCAOB belies the district court's assertion that the involvement of the other Commissioners was harmless, and vividly illustrates Hamilton's concern that appointments of federal officers not be tainted by "that diversity of views, feelings, and interests, which frequently distract and warp the resolutions of a collective body." *The Federalist* No. 76. In ignoring that concern here and vesting the appointing power in a multi-member body, Congress further violated the Appointments Clause.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision below.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because the brief contains 13,932 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) and Circuit Rule 32, as determined by the Microsoft Office Word 2003 program used to prepare this brief.

/s/

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of December, 2007, the foregoing BRIEF OF APPELLANTS was served upon the following counsel by electronic mail, pursuant to the written consent of all parties, with dispatch of two bound copies to a commercial carrier for next-business-day delivery:

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