ORAL ARGUMENT HELD ON APRIL 15, 2008

No. 07-5127

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

FREE ENTERPRISE FUND, *ET AL.*,
Plaintiffs-Appellants,

v.

PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD, *ET AL.*,
Defendants-Appellees.

On Appeal from the U.S. District Court
for the District of Columbia

RESPONSE OF APPELLEES PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD*, ET AL.*, TO PETITION FOR REHEARING AND REHEARING *EN BANC*

J. Gordon Seymour
Mary I. Peters
PUBLIC COMPANY ACCOUNTING
OVERSIGHT BOARD
1666 K Street, N.W.
Washington, D.C. 20006
(202) 207-9100 (telephone)
(202) 862-8435 (facsimile)

Jeffrey A. Lamken
Counsel of Record
Joe Robert Caldwell, Jr.
James R. Doty
Robert K. Kry
BAKER BOTTS L.L.P.
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2400
(202) 639-7700 (telephone)
(202) 639-7890 (facsimile)

Aaron M. Streett
BAKER BOTTS L.L.P.
One Shell Plaza, 910 Louisiana Street
Houston, TX 77002-4995
(713) 229-1234 (telephone)
(713) 229-1522 (facsimile)

Counsel for Defendants-Appellees Public Company Accounting Oversight Board, et al.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Parties and Amici. All parties, intervenors, and amici appearing before the district court and in this Court are listed in appellants' petition for rehearing and rehearing *en banc*.

Ruling Under Review. The ruling under review is listed in appellants' petition for rehearing and rehearing *en banc*.

Related Cases. The case under review was not previously before this Court. No related cases are currently pending.

CORPORATE DISCLOSURE STATEMENT

Appellee Public Company Accounting Oversight Board is a nonprofit corporation established by Congress to oversee the audit of public companies that are subject to the securities laws and related matters. The Board has no parent company, and no publicly held company owns 10% or more of the Board's stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTIONAL PROVISIONS AND STATUTES

EXECUTIVE MATERIALS

OTHER AUTHORITIES

Defendants-Appellees Public Company Accounting Oversight Board (the "Board"), *et al.*, respectfully submit this response to plaintiffs' petition for rehearing and rehearing *en banc*.

INTRODUCTION

This case does not warrant *en banc* review. Plaintiffs' contrary contentions rest on contrived interpretations of Sarbanes-Oxley and ignore governing Supreme Court precedent. Despite plaintiffs' attempt to cast the Board as a rogue agency with unchecked powers, the panel correctly held that the Act grants the SEC "explicit and comprehensive" control. *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 537 F.3d 667, 669 (D.C. Cir. 2008). In establishing a framework to protect investors through the regulation of public-company auditing, the Act gave the SEC pervasive control over "every significant Board function"—rulemaking, registration, inspections, investigations, disciplinary proceedings, and sanctions. *Id.* at 674 n.4. The SEC also approves the Board's budget, chooses the Board's members, and can remove them for cause. It can withdraw the Board's enforcement authority entirely whenever doing so is in the public interest. And the SEC, the panel concluded, can use its rulemaking powers to exercise even further control, including starting and stopping particular investigations. *Id.* at 675-76.

That comprehensive control forecloses plaintiffs' claim that Board members are principal officers under the Appointments Clause. Because Board members are "directed and supervised" by the SEC, they clearly are inferior officers. *Edmond v. United States*, 520 U.S. 651, 663 (1997). That control also forecloses plaintiffs' separation-of-powers claim. The Constitution vests the "executive power" in the President and charges him to "take care that the laws be faithfully executed." Art. II, §§ 1, 3. The President has sufficient control over the SEC to discharge those duties; plaintiffs have not challenged the constitutionality of that entity. And the SEC, in turn, has pervasive control over the Board. There simply is no "law" the Board can "execute" free from the SEC's oversight and control (even apart from the SEC's removal authority).

Plaintiffs' suggestion that the panel should have examined the SEC's removal authority in the abstract—to the exclusion of other means of control—is unsupported by precedent. And for more than a century the Supreme Court has held that, when Congress exercises its constitutional authority to vest appointment power in a department head, it can grant exclusive removal power to that department head, *In re Hennen*, 38 U.S. (13 Pet.) 230, 258-60 (1839), and can "'limit and restrict the power of removal as it deems best for the public interest,'" *United States v. Perkins*, 116 U.S. 483, 485 (1886). Congress did no more than that here.

Plaintiffs' contrary arguments rest largely on parsimonious constructions of the SEC's powers under the Act. But plaintiffs ignore the principle that courts must construe statutes to avoid rather than create constitutional problems, *Morrison v. Olson*, 487 U.S. 654, 682 (1988), and must reject facial challenges to ambiguous statutes where the entity charged with interpreting the statute (here the SEC) has had "no occasion . . . to accord the law a limiting construction," *Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1190-91 (2008). So long as the Act *can* be reasonably construed to afford the SEC sufficient control, plaintiffs' suit must fail. Plaintiffs' disagreements with the panel's interpretation of the Act, moreover, present only case-specific questions of statutory construction that do not warrant *en banc* review.

ARGUMENT

I. THE PANEL'S APPOINTMENTS CLAUSE RULING DOES NOT WARRANT *EN BANC* REVIEW

The panel's Appointments Clause ruling reflects a straightforward application of *Edmond v. United States*, 520 U.S. 651 (1997). It does not warrant *en banc* review.

A. Board Members Are Inferior Officers Because They Are Subject to Comprehensive Supervision and Control by the SEC

All officers, principal or inferior, exercise "significant authority." *Edmond*, 520 U.S. at 662. The line that separates the two is supervision and control: "'[I]nferior 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." *Id.* at 663. Board members are plainly inferior officers under that standard because they are subject to comprehensive oversight by the presidentially appointed Commissioners of the SEC.

Sarbanes-Oxley declares that "[t]he Commission shall have oversight and enforcement authority over the Board, as provided in this Act." 15 U.S.C. § 7217(a). The Act then sets forth pervasive means for the exercise of that control. Board rules have *no effect* unless and until they are approved by the SEC (except for internal "housekeeping" rules that the SEC can abrogate summarily). *Id.* § 7217(b)(2)-(4) (incorporating 15 U.S.C. § 78s(b)(1)-(3)). The SEC can modify Board rules at any time to ensure "fair administration." *Id.* § 7217(b)(5). The SEC can review all Board inspection reports and sanctions. *Id.* §§ 7214(h), 7217(c). Sanctions are stayed pending review unless the SEC orders otherwise, are reviewed *de novo*, and can be modified whenever the SEC finds them not "appropriate." *Id.* §§ 7215(e)(1), 7217(c)(3); *NASD v. SEC*, 431 F.3d 803, 804 (D.C. Cir. 2005).

The SEC appoints Board members and can remove them, censure them, or limit their activities for cause. 15 U.S.C. §§ 7211(e)(4), (6), 7217(d)(2)-(3). It can impose record-keeping and reporting requirements on the Board and inspect the Board's records. *Id.* § 7217(a) (incorporating 15 U.S.C. § 78q(a)(1), (b)(1)). It reviews the Board's budget and, pursuant to detailed SEC rules, can condition approval on specific changes. *Id.* § 7219(b); 71 Fed. Reg. 41,998, 42,000 (July 24, 2006). It has used that authority to regulate Board member salaries. 72 Fed. Reg. 73,051, 73,052 (Dec. 26, 2007).

The SEC also has broad authority over Board inspections, investigations, and disciplinary proceedings. All of those functions must be conducted under rules approved by the SEC. 15 U.S.C. §§ 7214(c), 7215(a). The SEC can modify those rules at any time, and can promulgate its

own rules in furtherance of the Act. *Id.* §§ 7202(a), 7217(b)(5). Those provisions, the panel concluded, empower the SEC to start or stop particular investigations or otherwise "modify the Board's investigative authority as it sees fit." 537 F.3d at 675-76.

The SEC, moreover, is expressly empowered to "relieve the Board of *any* responsibility to enforce compliance with [the] Act" whenever doing so is "consistent with the public interest, the protection of investors, and the other purposes of th[e] Act and the securities laws." 15 U.S.C. § 7217(d)(1) (emphasis added). Thus, the SEC can rescind the Board's authority to conduct an investigation and—invoking its independent power to enforce the Act, *see id.* § 7202(b)(1)—reassign the investigation to its own staff.

The SEC's control is far more extensive than the oversight that made Coast Guard judges inferior officers in *Edmond*. Every factor the Supreme Court relied on there is present here: Just like the Judge Advocate General, the SEC can exercise "administrative oversight" and prescribe "rules of procedure." 520 U.S. at 664. Just like the Judge Advocate General, the SEC can remove the inferior officers. *Id.* And just like the Coast Guard judges, Board members "have no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers." *Id.* at 665. In that respect, Board members are subject to far *greater* control: In *Edmond*, review of findings was limited to whether there was "some competent evidence in the record to establish each element of the offense." *Id.* The SEC, by contrast, exercises independent judgment in its oversight and may review Board actions *de novo*. 537 F.3d at 672.

As the panel concluded, the SEC's oversight and control powers are not merely "explicit and comprehensive," but "extraordinary." 537 F.3d at 669. "[E]very significant Board function is subject to significant Commission oversight." *Id.* at 674 n.4. Congress left "no instance in which the Board can make policy that the Commission cannot override." *Id.* at 685. Given the SEC's far-reaching oversight powers, Board members are inferior officers.

B. Plaintiffs' Contrary Arguments Ignore Precedent and Misread the Statute

1. Plaintiffs urge that Board members must be principal officers because they are not removable at will. Pet. 12-13. That argument is contrary to precedent. The Supreme Court has repeatedly found for-cause removal provisions consistent with inferior-officer status. *See Morrison v. Olson*, 487 U.S. 654, 663, 671 (1988) (treating authority to remove "for good cause" as a factor *in favor of*, not against, inferior-officer status); *United States v. Perkins*, 116 U.S. 483, 485 (1886). So has the Executive Branch. *See Applicability of Executive Order No. 12674 to Personnel of Regional Fishery Management Councils*, 17 Op. Off. Legal Counsel 150, 156 & n.19 (1993) ("[C]ase law clearly supports the view that 'for cause' limitations on removal power can be compatible with the continuing power and duty to supervise.").

Under *Edmond*, removal authority (at-will or otherwise) is *one factor*, 520 U.S. at 664-65, but nothing in *Edmond* suggests that at-will removal authority is indispensable where other control mechanisms exist. The SEC has far more control here than the superiors did in *Edmond*. The principal officers there could not rescind their inferiors' authority whenever the public interest required it. Nor could they review their inferiors' decisions *de novo*. The SEC, by contrast, has both those powers. The SEC's pervasive control over the Board's rules, inspections, investigations, disciplinary proceedings, sanctions, and budget is more than sufficient to ensure that the Board cannot "pursu[e] policies at odds with the [SEC's] desired policies" (Pet. 13), even apart from the SEC's removal power.

In any event, the panel correctly held that the SEC could construe its removal authority expansively. 537 F.3d at 683-84. The Act allows removal for "willful[]" misconduct. 15 U.S.C. § 7217(d)(3). This Court has broadly defined "willful" in the securities context to require only volitional conduct, not knowing violation of the law. *See Wonsover v. SEC*, 205 F.3d 408, 413-15 (D.C. Cir. 2000). Plaintiffs' assertion that Board members can be removed only for "im-

peachable offenses" (Pet. 5) is thus a wild exaggeration. And plaintiffs err in claiming that Board members "cannot be removed for pursuing policies at odds with the [SEC's] desired policies." Pet. 13. The SEC can entrench its "desired policies" by modifying the Board's rules to reflect them. 15 U.S.C. § 7217(b)(5). Refusal to follow those rules is grounds for removal. *Id.* § 7217(d)(3)(A) (allowing removal for "willful[] violat[ion] [of] . . . the rules of the Board").

2. Plaintiffs also argue that Board members are principal officers because the SEC can only "veto mistakes," not "direct" the Board's work. Pet. 13. But the SEC's "veto" powers under the Act give it power to "direct" the Board. The SEC, for example, can threaten to withdraw the Board's enforcement authority or cut its budget proposal unless the Board follows directions. Those "veto" powers thus afford the SEC the same ability to "direct" as at-will removal authority: They allow the principal officer to "direct" inferior officers because failure to follow directions can result in adverse consequences. Directing inferiors is always accomplished that way.

The panel, moreover, read the Act to authorize precisely the sort of "direction" plaintiffs deem impossible. The SEC, it held, could promulgate rules authorizing it to "'affirmatively command' an investigation," "modify the Board's investigative authority as it sees fit," and "mandate that all decisions regarding investigation or enforcement actions against a firm be approved by the Commission." 537 F.3d at 675-76. "If the public interest demands increased micromanaging of Board operations," the panel explained, "the Act empowers the Commission to respond accordingly." *Id.* at 676 n.6. That is the essence of "direction."[1]

[1] Plaintiffs erroneously argue (Pet. 10-11) that the SEC's power to promulgate a rule allowing direct control over inspections and investigations is irrelevant until the SEC adopts such a rule. But the SEC's *power* to control the Board is what matters. An inferior officer does not get promoted to principal officer simply because his superior finds it unnecessary to exercise the full range of available oversight powers.

Challenging the panel's construction of the Act, plaintiffs assert that 15 U.S.C. § 7217(d)(2)—which requires a hearing and a finding of Board misconduct—is the exclusive means by which the SEC may "impose limitations" on the Board. Pet. 11. But that provision merely authorizes the SEC to limit Board functions *as a sanction for Board misconduct*; it does not purport to restrict the SEC's express authority to regulate the Board's functions pursuant to its other oversight powers. *Cf. Shurtleff v. United States*, 189 U.S. 311, 317-18 (1903). Congress expressly required the Board to conduct its inspections and investigations in accordance with SEC-approved rules that the SEC can modify at any time. 15 U.S.C. §§ 7214(c), 7215(a), 7217(b)(5). Surely Congress contemplated that the SEC could use its authority over Board rules to "impose limitations" on how the Board conducts those functions. Besides, Congress gave the SEC power to rescind the Board's enforcement authority *entirely* whenever it finds rescission to be in the "public interest." *Id.* § 7217(d)(1). Congress would not have allowed the *elimination* of the Board's authority based on such a discretionary finding if it meant to prohibit the SEC from merely *limiting* the Board's functions absent a finding of Board misconduct.

In any event, plaintiffs' disdain for the SEC's "veto" authority cannot be squared with *Edmond*. In that case, the principal officers reviewed decisions *only* after the fact, 520 U.S. at 664-65, and were prohibited from attempting to "influence . . . the outcome of individual proceedings" by other means, *id.* at 664. Thus, even if the SEC's control mechanisms were less extensive than the panel concluded, Board members would still be inferior officers.[2]

[2] Plaintiffs' assertion that the Board lacks the "normal, common-sense attributes of an 'inferior' " (Pet. 13) is also meritless. The Board is "inferior" because it is subject to comprehensive direction and supervision by the SEC. Its statutorily private status does not alter that fact. And the claim that the Board "does not report under any organizational plan to the SEC" is both irrelevant and wrong—the statute itself is just such a "plan," and it requires the Board to "report[]" to the SEC as the SEC directs. 15 U.S.C. § 7217(a) (incorporating 15 U.S.C. § 78q(a)(1)).

3. Plaintiffs express concern that the panel's decision threatens inferior officers at the SEC. Pet. 14. That argument, however, has nothing to do with whether Board members are principal or inferior officers. It relates solely to plaintiffs' separate contention that the Chairman rather than the Commission is the "head" of the SEC. But plaintiffs confine that issue to a footnote in which they assert, with virtually no analysis, that the panel's conclusion on that point (and its conclusion that the SEC is a "department") is "plainly erroneous." Pet. 13 n.4. That claim of "plain error" is hard to credit when even the dissent deemed plaintiffs' arguments on that point "inconsistent with current Supreme Court precedents." 537 F.3d at 712 n.24.[3]

II. THE PANEL'S SEPARATION-OF-POWERS HOLDING DOES NOT WARRANT *EN BANC* REVIEW

The panel's separation-of-powers ruling likewise does not warrant review. The Act's removal provisions in no way impair the President's ability to ensure faithful execution of the law. To the contrary, the Act's extensive oversight mechanisms give the SEC (and through it, the President) more than sufficient control. Even viewing the removal restrictions in isolation, Supreme Court precedent compels the panel's conclusion.

A. The Act's Removal Provisions Are Constitutional Because the Act Provides Ample Mechanisms To Ensure Faithful Execution of the Law

The Constitution vests the President with the "executive power" and charges him to "take care that the laws be faithfully executed." Art. II, §§ 1, 3. Sarbanes-Oxley does not intrude on that authority. There simply is no "law" the Board can "execute"—or refuse to execute—free from the SEC's pervasive oversight and control. And the SEC is accountable to the President, who can remove SEC Commissioners for any neglect of their duty to supervise the Board.

[3] Plaintiffs also express concern that the panel decision will render *Board* staff positions unconstitutional. Pet. 13-14. But Board staff are employees, not inferior officers, and thus need not be appointed by a department head. *See Landry v. FDIC*, 204 F.3d 1125, 1130-34 (D.C. Cir. 2000).

Plaintiffs insist that the panel erred by not considering the Act's removal restrictions in isolation. But "[t]he analysis contained in [the Supreme Court's] removal cases is designed . . . to ensure that Congress does not interfere with the President's exercise of the 'executive power' and his constitutionally appointed duty to 'take care that the laws be faithfully executed' under Article II." *Morrison*, 487 U.S. at 689-90. Removal is "*a* powerful tool of control" in discharging that duty. *Edmond*, 520 U.S. at 664 (emphasis added). But it is not the *only* tool for ensuring faithful execution of the laws. The SEC can prevent an errant exercise of Board authority in myriad ways: by disapproving a proposed rule; by canceling a sanction; by cutting the Board's budget proposal; by modifying the Board's rules to allow the SEC to assert direct control over an investigation; or by rescinding the Board's enforcement authority. *See* pp. 3-4, *supra*. Those mechanisms in the aggregate are fully equivalent to at-will removal authority. As the panel noted, the Act "essentially grant[s] at-will removal power over Board functions if not Board members." 537 F.3d at 683.

Precedent confirms the sufficiency of that authority. In *In re Sealed Case*, 829 F.2d 50 (D.C. Cir. 1987), for example, this Court rejected a separation-of-powers challenge to the Iran/Contra Independent Counsel because the Attorney General could rescind the regulation creating and empowering the Counsel's office. *Id.* at 56-57 & n.34. In *United States v. Libby*, 429 F. Supp. 2d 27 (D.D.C. 2006), the district court held that a Special Counsel was "essentially removable at will" because "the Deputy Attorney General delegated his authority to the Special Counsel, [and] has complete discretion to take that authority away." *Id.* at 44. Finally, in *Morrison*, Justice Scalia contrasted the independent counsel to the Watergate Special Prosecutor on the ground that "the Attorney General could have removed [the Special Prosecutor] at any time, *if by no other means than amending or revoking the regulation defining his authority*." 487 U.S. at 721 (Scalia, J., dissenting) (emphasis added). As those authorities make clear, there is no consti-

tutionally significant difference between the power to remove someone from office and the power to abolish the authority of his office. And that latter power is precisely what the SEC has here—the power to "relieve the Board of *any responsibility* to enforce" the Act whenever the public interest so warrants. 15 U.S.C. § 7217(d)(1) (emphasis added).

Plaintiffs' reliance on *Morrison* is misplaced. That case *upheld* the independent-counsel statute under a pragmatic analysis that looked to whether the restriction "unduly trammel[ed] on executive authority." 487 U.S. at 685-96. Ignoring that standard and *Morrison*'s inconvenient result, plaintiffs insist that *Morrison* supports their highly *un*pragmatic theory that a court must decide whether a removal restriction violates separation of powers while ignoring equivalent control mechanisms. But *Morrison* does not support that approach. *Morrison* noted that a statute could violate separation of powers either because its removal restrictions *plus other limitations* on oversight, in the aggregate, impermissibly interfered with the President's functions, or because the removal restriction, even apart from the other *limitations*, had that effect. *See id.* at 685. That does not mean that, in analyzing the effect of a removal restriction, a court must ignore affirmative mechanisms of oversight and control provided by the statute, much less do so when those other mechanisms give the principal officer the functional equivalent of at-will removal authority. No such mechanisms were present in *Morrison*. They are present here.

Similarly irrelevant is *Bowsher v. Synar*'s statement that " 'it is only the authority that can remove [an officer], and not the authority that appointed him, that he must fear.' " 478 U.S. 714, 726 (1986). *Bowsher* was merely making the point that *appointment* power is not a complete substitute for removal power. *See id.* It had no occasion to consider whether *other* pervasive control mechanisms are relevant. Surely an inferior officer would "fear" the authority that can strip him of all enforcement power and reduce his salary, no less than he would fear the authority that can strip him of his formal title.

Consequently, this case is not "*Humphrey's Executor* squared"; nor does it involve a "double for-cause removal provision[]" in any relevant sense. 537 F.3d at 686, 697 (Kavanaugh, J., dissenting). The SEC has just as much control over the Board's power to execute the law as if it had formal at-will removal authority. And although the President can only remove SEC Commissioners for cause, *that* restriction was upheld 70 years ago in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). The SEC's control over the Board's exercise of its authority is comprehensive, and the President's control over the SEC's exercise of *its* authority is no less extensive here than in any other area under the SEC's jurisdiction. The panel's holding thus stands only for the unremarkable proposition that Congress can grant removal protections to inferior officers of independent agencies so long as it provides comprehensive control mechanisms that are the functional equivalent of at-will removal authority.

B. Even Viewed in Isolation, the Act's Removal Restrictions Are Constitutional Under Binding Supreme Court Precedent

Even if *Morrison* stood for the improbable principle that a court must evaluate the constitutionality of a removal restriction by ignoring everything else, the panel's decision still would not warrant *en banc* review. While the Supreme Court often subjects removal restrictions on *presidential appointees* to close scrutiny, it has repeatedly reaffirmed that different standards apply to officers of the sort at issue here—*inferior officers appointed by a department head*. Over 160 years ago, in *In re Hennen*, 38 U.S. (13 Pet.) 230 (1839), the Supreme Court ruled that the President has "no power" to remove inferior officers appointed by department heads; rather, sole removal power rests with the appointing department head. *Id.* at 258-60. And, more than 120 years ago, in *United States v. Perkins*, 116 U.S. 483 (1886), the Supreme Court held that " 'when congress, by law, vests the appointment of inferior officers in the heads of departments, it may *limit and restrict the power of removal as it deems best for the public interest*.' " *Id.* at 485 (em-

phasis added). Those rules foreclose plaintiffs' argument. Under *Hennen*, Congress need not have granted the President *any* authority to remove Board members, so long as the appointing department head (the SEC) has that power. And, under *Perkins*, Congress could "limit and restrict the power of removal as it deems best for the public interest"—which is what Congress did by determining that Board members should be removable only for cause.[4]

The petition offers no valid reason for disregarding those precedents. It argues that the panel's "astonishing interpretation of *Perkins*" is "squarely foreclose[d]" by *Morrison*. Pet. 7-8. But the panel relied on the *verbatim holding* of *Perkins*, *see* 537 F.3d at 674, and the petition identifies nothing in *Morrison* that conflicts with that earlier decision. Instead, the petition argues that, if *Perkins* were still good law, *Morrison* would have been a shorter opinion. Pet. 8. That argument is doubly flawed. First, *Perkins* by its terms applies only where Congress "vests the appointment of inferior officers in the *heads of departments*." 116 U.S. at 485 (emphasis added); *accord Morrison*, 487 U.S. at 723-24 (Scalia, J., dissenting). The independent counsel in *Morrison* was not appointed by a department head, but by a three-judge court *outside* the executive branch. 487 U.S. at 661. That inter-branch appointment obviously presents additional separation-of-powers concerns; it is thus hardly surprising that *Morrison* undertook a broader analysis. That does not undermine *Perkins*' binding force in cases where its holding squarely applies.

[4] *Hennen* and *Perkins* have ample support in the historical record. *See* PCAOB Br. 42 & n.6, 48. And both cases have been repeatedly reaffirmed. *See, e.g.*, *Morrison*, 487 U.S. at 689-90 nn.27 & 29; *Sampson v. Murray*, 415 U.S. 61, 70 n.17 (1974); *Burnap v. United States*, 252 U.S. 512, 515 (1920); *Shurtleff v. United States*, 189 U.S. 311, 316 (1903); *Reagan v. United States*, 182 U.S. 419, 424 (1901); *Keim v. United States*, 177 U.S. 290, 293-94 (1900); *United States v. Allred*, 155 U.S. 591, 594 (1895); *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. Off. Legal Counsel 124, 166 (1996). As the panel notes (537 F.3d at 674), even *Myers v. United States*, 272 U.S. 52 (1926)—the high-water mark of presidential removal power—accepted those earlier decisions, distinguishing them on the ground that Myers was a presidential appointee. *See id.* at 119, 161; *Morrison*, 487 U.S. at 689 n.27 ("*Myers* itself expressly distinguished cases in which Congress had chosen to vest the appointment of 'inferior' executive officials in the head of a department.").

Second, any putative tension between the express holding of *Perkins* and purported methodological implications from *Morrison* is no basis for disregarding *Perkins*. "If a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). *A fortiori*, this Court cannot deem *Perkins* overruled where plaintiffs do not even claim that *Morrison* "rejected" any of *Perkins*' premises—only that *Morrison*'s analysis was more circuitous than *Perkins* required.[5]

While plaintiffs cite *Morrison* for the proposition that the President's removal power may not be "completely stripped" (Pet. 4), the panel correctly held that his removal power was not "completely stripped" here. 537 F.3d at 682-83. The SEC can remove Board members for cause under a standard that could be construed broadly. *See* 15 U.S.C. § 7217(d)(3); pp. 5-6, *supra*. If the Commissioners abused their discretion in failing to remove a Board member, the President would have grounds to remove the Commissioners. *See Inefficiency or Misconduct of Deputy or*

[5] The dissenting opinion's efforts to avoid *Hennen* and *Perkins* are equally unavailing. The dissent described *Hennen* as a "technical[ity]" that applies only where a department head is a presidential "alter ego" removable at will. 537 F.3d at 686-87 n.1. But nowhere does *Hennen* mention the "alter ego" concept—that phrase is wrenched from an unrelated discussion in *Myers*, 272 U.S. at 133. *Hennen*'s rationale was simply that the power to remove is an incident of the power to appoint, and thus the President has "no power" to remove officers he did not appoint—a rationale that does not in any way depend on whether the appointing officer is a presidential alter ego. 38 U.S. (13 Pet.) at 258-60. The dissent also criticized *Perkins* as "short and unexplained." 537 F.3d at 696 n.6. But the precedential force of a Supreme Court decision is not proportional to its length, and *Perkins* was *not* unexplained: The Court reasoned that "'[t]he constitutional authority in congress to . . . vest the appointment [of inferior officers in department heads] implies authority to limit, restrict, and regulate the removal by such laws as congress may enact in relation to the officers so appointed.'" 116 U.S. at 485; *accord* 3 J. Story, *Commentaries on the Constitution of the United States* § 1531, at 388 (1833). The dissent also asserted that *Perkins* "goes no further than *Morrison* in allowing restrictions" on the President's removal power, citing two footnotes in *Morrison* that cite *Perkins* with approval. 537 F.3d at 696 n.6. But the fact that *Morrison* cited *Perkins* does not mean the Court *limited Perkins*.

Subordinate as Ground for Removal of Public Officer, 143 A.L.R. 517 (1943) (collecting cases). The President's mere threat to exercise that power would weigh heavily on any Commissioner deciding whether to remove a Board member. *See Bowsher*, 478 U.S. at 727 n.5. For that reason, plaintiffs' claim that the President has "no power to direct the SEC to exercise its discretion to remove a Board member" (Pet. 5) is neither "undisputed" nor correct. The President's removal power remains a potent tool of control.

For over 120 years, Congress has exercised broad discretion in granting removal protections to inferior officers appointed by department heads. And, far from being " 'previously unheard-of' " (Pet. 2), such protections have been applied to inferior officers in independent agencies in the past.[6] No one to our knowledge has ever suggested that any of those restrictions is constitutionally problematic. Plaintiffs' argument essentially amounts to the claim that, although Congress routinely grants job protections to inferior officers in cabinet agencies, it cannot grant those same protections to inferior officers in independent agencies—it must either make those officers removable at will by the agency head, or removable by the President himself (even

[6] The Inspector General of the Postal Service is an inferior officer. *See* 5 U.S.C. App. 3 § 8G(f); *About the USPS OIG*, *at* http://www.uspsoig.gov/about.htm. But he is removable only for cause by the Governors of the Postal Service, who in turn are removable only for cause. 39 U.S.C. § 202(a)(1), (e)(3). Likewise, the Chief Actuary of the Social Security Administration is an inferior officer. *See* 42 U.S.C. § 902(c)(1); *Office of the Chief Actuary*, *at* http://www.ssa.gov/OACT/actuaries/organization.html. He too is removable only for cause, and the Commissioner to whom he reports is removable only for cause. 42 U.S.C. § 902(a)(3), (c)(1). Finally, many independent agencies have administrative law judges (ALJs) who are subject to for-cause removal protections. Although some are mere employees, others are clearly inferior officers. ALJs in the Federal Mine Safety and Health Review Commission, for example, are inferior officers because their decisions are final rather than recommendatory and are subject only to limited review. *See* 30 U.S.C. § 823(d)(1), (2)(A)(ii)(I); *Landry*, 204 F.3d at 1133-34. All of those ALJs, however, are removable only for cause by officers who in turn are removable only for cause. 30 U.S.C. § 823(b)(1), (2) (incorporating 5 U.S.C. § 7521); 5 U.S.C. § 1202(d). (ALJs cannot be distinguished on the grounds that agencies can choose whether to use them, and that their decisions are subject to agency review. *See* 537 F.3d at 699 n.8 (Kavanaugh, J., dissenting). The SEC likewise can withdraw the Board's jurisdiction and enforce the Act itself, and Board decisions are subject to SEC review. *See* pp. 3-4, *supra*.)

though the President has no direct role in supervising their work). As Justice Scalia has warned, however, "adjusting the remainder of the Constitution to compensate for *Humphrey's Executor* is a fruitless endeavor." *Freytag v. Commissioner*, 501 U.S. 868, 921 (1991) (Scalia, J., concurring in judgment). That "fruitless endeavor" is precisely what plaintiffs propose.

CONCLUSION

As the panel explained, this case is not the separation-of-powers "mountain" plaintiffs make it out to be, but the proverbial "molehill." 537 F.3d at 681 n.11. It turns not so much on broad issues of constitutional law as on narrow issues of statutory construction. And the panel decision hardly supports plaintiffs' overwrought hypotheticals, like the claim that Congress can now "vest the authority to investigate and prosecute crimes in a 'Criminal Prosecution Board' whose members would be appointed and removable for cause by an independent 'Criminal Justice Commission.'" Pet. 14. This case involves regulation of public-company auditing—precisely the sort of technical subject-matter long assigned to independent agencies and their subordinates.[7] The panel opinion addresses only *inferior* officers, and even then it permits removal restrictions only when the principal officer can strip the inferior of all enforcement authority whenever the public interest so requires. That, again, is the functional equivalent of at-will removal authority, and the SEC has no lesser authority here.

The petition for rehearing and rehearing *en banc* should be denied.

October 22, 2008

Respectfully submitted,

Jeffrey A. Lamken

[7] Contrary to plaintiffs' assertion (Pet. 14-15), nothing in the panel's reliance on *Morrison* and *Perkins* suggests approval of an independent "Criminal Justice Commission" headed by *principal* officers removable only for cause. Although the officers in *Morrison* and *Perkins* exercised purely executive functions, they were *inferior* officers.

J. Gordon Seymour
Mary I. Peters
PUBLIC COMPANY ACCOUNTING
OVERSIGHT BOARD
1666 K Street, N.W.
Washington, D.C. 20006
(202) 207-9100 (telephone)
(202) 862-8435 (facsimile)

Joe Robert Caldwell, Jr.
James R. Doty
Robert K. Kry
BAKER BOTTS L.L.P.
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2400
(202) 639-7700 (telephone)
(202) 639-7890 (facsimile)

Aaron M. Streett
BAKER BOTTS L.L.P.
One Shell Plaza, 910 Louisiana Street
Houston, TX 77002-4995
(713) 229-1234 (telephone)
(713) 229-1522 (facsimile)

Counsel for Defendants-Appellees Public Company Accounting Oversight Board, Bill Gradison, Daniel L. Goelzer, and Charles Niemeier

CERTIFICATE OF SERVICE

I certify that today, October 22, 2008, the original and 19 copies of the foregoing were filed with the clerk by hand delivery, and that two copies were served by Federal Express upon the following:

Viet D. Dinh
BANCROFT ASSOCIATES PLLC
601 13th St., N.W.
Suite No. 930 South
Washington, D.C. 20005
(202) 234-0090

Kenneth W. Starr
24569 Via De Casa
Malibu, CA 90265
(310) 506-4621

Mark B. Stern
Mark R. Freeman
Civil Division, Appellate Staff
U.S. DEPARTMENT OF JUSTICE
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001
(202) 514-5089

Michael A. Carvin
Noel J. Francisco
Christian G. Vergonis
JONES DAY
51 Louisiana Avenue, N.W.
Washington, DC 20001-2113
(202) 879-3939

Sam Kazman
Hans Bader
COMPETITIVE ENTERPRISE INSTITUTE
1001 Connecticut Avenue, N.W.
Suite 1250
Washington, D.C. 20036
(202) 331-1010

Jeffrey A. Lamken
Counsel of Record