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3	MICHAEL A. CARVIN, ESQ.
4	On behalf of the Petitioners
5	GEN. ELENA KAGAN, ESQ.
6	On behalf of the Respondent United States
7	JEFFREY A. LAMKEN, ESQ.
8	On behalf of the Respondents Public Company
9	Accounting Oversight Board, et al.
10	REBUTTAL ARGUMENT OF
11	MICHAEL A. CARVIN, ESQ.
12	On behalf of the Petitioners
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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 08-861, Free Enterprise Fund and Beckstead and Watts v. The Public Company Accounting Oversight Board.

Mr. Carvin.

ORAL ARGUMENT OF MICHAEL A. CARVIN

ON BEHALF OF THE PETITIONERS

MR. CARVIN: Mr. Chief Justice, and may it please the Court:

The board is unique among Federal regulatory agencies in that the President can neither appoint nor remove its members, nor does he have any ability to designate the chairman or review the work product, so he is stripped of the traditional means of control that he has over the traditional independent agencies.

On the other side of the balancing test, Congress provided no reason for stripping him of these traditional means of control.

JUSTICE GINSBURG: Why do you call it an independent regulatory agency? I mean, Congress wanted it to be independent of the profession. That much is clear. It didn't want it to be independent of the SEC, so why are you characterizing it as an independent

1 regulatory agency?

2 MR. CARVIN: Justice Ginsburg, by making it
3 public, it made it free of the accounting profession.
4 So then the next question is: Why didn't they have the
5 same relationship between this agency and the President
6 that the FCC and SEC have?

7 And, in those instances, the President can
8 appoint and remove the members. Now, why didn't they do
9 that here?

10 JUSTICE GINSBURG: But the --

11 MR. CARVIN: There was --

12 JUSTICE GINSBURG: The SEC doesn't have
13 another overseer. I mean, the SEC is set up like the
14 FCC, the other independent regulatory commissions, but
15 this is a board that has a relationship with the SEC,
16 where it can't do anything that doesn't have the SEC's
17 approval.

18 MR. CARVIN: There is a buffer between the
19 President and the board, and that's called the SEC, and
20 the board can do many things without the approval of the
21 SEC. Most notably, it can conduct inspections and
22 investigations. There is no statutory --

23 JUSTICE GINSBURG: It can't even issue a
24 subpoena without the SEC's approval.

25 MR. CARVIN: It actually can collect

1 information from anyone associated with the people they
2 regulate, the auditing committees. If it seeks to get a
3 subpoena from someone outside -- if it seeks information
4 from someone outside --

5 JUSTICE GINSBURG: So the SEC really could
6 stop anything?

7 MR. CARVIN: It cannot, for example, stop
8 what happened to the Petitioners here. There is no
9 mechanism in the statute, in any way, shape, or form,
10 for the SEC to stop an inspection or investigation as it
11 is ongoing.

12 JUSTICE GINSBURG: What happened to the
13 Petitioners here? I think, if you were challenging what
14 happened to the Petitioners here, certainly it would be
15 a question of how you would have to do that. You
16 ordinarily go through the internal proceedings. But
17 here you are bringing a facial challenge and you say,
18 never mind any particular proceedings; the whole thing
19 is no good.

20 MR. CARVIN: No, no, and I'm dealing with
21 the inspections issue at large, not for -- for
22 Petitioner or for anyone else, there is no mechanism --
23 no existing mechanism for the SEC, in any way, to say
24 stop the investigation. Equally important --

25 JUSTICE SCALIA: When you say "no existing

1 mechanism," could the SEC adopt a rule that would give
2 the SEC authority to -- to stop it?

3 MR. CARVIN: No, it couldn't, and -- but I
4 think the main point is, Your Honor, it hasn't, and
5 since it hasn't, it doesn't have that authority now.

6 JUSTICE SCALIA: Well, I'm --

7 MR. CARVIN: But I can tell you --

8 JUSTICE SCALIA: I'm not sure that's the
9 main point. I think the main -- the main point is
10 whether the FCC could stop it -- the SEC could stop it
11 if it wanted to.

12 MR. CARVIN: Yes, and right now it cannot,
13 and that's because --

14 JUSTICE SCALIA: Never mind "Right now, it
15 cannot." If it issued a rule that said you need our
16 approval --

17 MR. CARVIN: Yes, it cannot issue such a
18 rule.

19 JUSTICE SCALIA: It cannot issue such a
20 rule?

21 MR. CARVIN: Absolutely not.

22 JUSTICE SCALIA: Why not?

23 MR. CARVIN: Well, the provision they point
24 to, 7217(d)(1), says it can relieve the board of
25 responsibility, but there is nothing in the statute that

1 gives the SEC to conduct the board's statutory duties.

2 For example, it couldn't say, we will now
3 collect the fees that are going to the board, we will
4 now conduct the registration that's going to the board.

5 JUSTICE SCALIA: Well, why -- why isn't this
6 simply relieving the board of responsibility, saying,
7 you no longer have responsibility for -- for
8 investigation and inspection in these areas?

9 MR. CARVIN: But that --

10 JUSTICE SCALIA: They could do that,
11 couldn't they?

12 MR. CARVIN: No, it can't. But even if it
13 could, my major point is it can't --

14 JUSTICE SCALIA: Well, let's talk about
15 whether it can't or not. Why can't it?

16 MR. CARVIN: All right. If you turn to 39
17 and 40a of the board's appendix, at the back of the red
18 brief, the board's brief, it walks you through the
19 statutes we have been talking about.

20 And at the bottom of 39a, that's 7217(d)(1),
21 and that's where it says it can relieve the board of
22 responsibilities. And I have two points on that.

23 One is there's nothing in here that gives
24 the SEC the power to assume the responsibility. It
25 simply says the board need not comply with that

1 obligation.

2 My second point is: This doesn't stop the
3 board from doing something. If I relieve my associate
4 of the responsibility to give me a brief tomorrow, I
5 haven't told him he can't do it. If I want to impose a
6 limitation on him, if I want to say stop, I have to
7 enclose a limitation. And if you will turn to the very
8 next page --

9 JUSTICE SCALIA: Don't -- don't you think
10 that's what it means, though, realistically?

11 MR. CARVIN: You know, Your Honor, I think
12 that would be --

13 JUSTICE SCALIA: When you no longer have
14 responsibility to perform a government -- governmental
15 act, you no longer have authority to perform it.

16 MR. CARVIN: If you viewed it in isolation,
17 that would be an arguable principle. But if you turn to
18 the next page, 40a, you see a very specific provision in
19 the statute that talks about how they can impose
20 limitations on the board.

21 And this is when they want to censure --
22 impose limitations upon the activities, functions, and
23 operations of the board. And what do they need to do?
24 They have to have a hearing that the board has violated
25 or is unable to comply with any provision of this Act or

1 without reasonable justification or excuse.

2 So Congress has established very serious
3 barriers to the SEC even limiting the board's
4 responsibilities.

5 JUSTICE BREYER: Well, they don't have to --
6 they can't issue a subpoena without the board's
7 approval, I take it -- the commission's approval.

8 MR. CARVIN: They have very serious
9 information-gathering powers totally distinct from the
10 board.

11 JUSTICE BREYER: What?

12 MR. CARVIN: Any -- any person who is a
13 registered association or anyone who is associated with
14 them has to provide documents, witness testimony, wholly
15 apart from a subpoena, so anyone who is within the
16 regulatory --

17 JUSTICE BREYER: Or what?

18 MR. CARVIN: Or they will suffer the
19 sanctions that are listed in the statute.

20 JUSTICE BREYER: And the commission can't
21 change the sanctions?

22 MR. CARVIN: Well, not -- obviously the
23 commission can review the sanctions. But the --

24 JUSTICE BREYER: And it can't -- it can't
25 pass a rule saying, we don't want you to do that?

1 MR. CARVIN: Well, sanctions of course are
2 done with order. They get to review the sanctions
3 after the board has done it. I'm talk about the
4 prosecutorial, investigative techniques --

5 JUSTICE BREYER: So as far as -- if the
6 company was ever certain it was right and that the
7 Accounting Board was out of control, completely wrong,
8 the company would just say: I'm not complying --

9 MR. CARVIN: Well -- but --

10 JUSTICE BREYER: -- fine, do what you want.

11 MR. CARVIN: But --

12 JUSTICE BREYER: And then at that moment,
13 the group that would decide whether they were right or
14 the board was right would be the commission; is that
15 right?

16 MR. CARVIN: Well, I don't think there ever
17 would be a dispute about whether or not they would have
18 access to their documents and their testimony, because
19 it's written right in the statute --

20 JUSTICE BREYER: It says you don't -- you
21 can get it even without a subpoena?

22 MR. CARVIN: Yes, absolutely.

23 JUSTICE BREYER: Where does it say that? Or
24 I'll take your word for it. I'll look it up.

25 JUSTICE KENNEDY: What happens --

1 JUSTICE BREYER: I don't want to delay you,
2 so forget it. I'll look it up later.

3 JUSTICE KENNEDY: What happens to the
4 information that the board obtains? Can the board go
5 public with that --

6 MR. CARVIN: I think --

7 JUSTICE KENNEDY: -- or is it all
8 confidential?

9 MR. CARVIN: I think there are
10 certain confidentiality restrictions as part of their
11 investigative and inspection thing. It's -- it's the
12 normal kind of inspection, where you go through the
13 investigation and they would review the various
14 documents.

15 And my -- but my basic point is that that is
16 a very serious burden on American citizens. That is
17 something that is totally outside the SEC's control.

18 JUSTICE KENNEDY: The -- the burden of time
19 of compliance?

20 MR. CARVIN: I'm sorry.

21 JUSTICE KENNEDY: The burden is because it's
22 difficult and expensive to comply?

23 MR. CARVIN: That would be one. Number two
24 -- and I think probably more important -- since the SEC
25 doesn't review it, this board was created to make sure

1 that there was no more Enrons. So let's look at it from
2 the other perspective. Let's say the board was
3 negligent or sloppy in ferreting out the kind of
4 auditing standards and abuses that the statute was
5 enacted to do. The SEC would have no way of knowing
6 that, no way of --

7 JUSTICE KENNEDY: No -- but I'm -- I'm
8 talking about the harm to your client and to the --
9 those similarly situated.

10 MR. CARVIN: Yes.

11 JUSTICE KENNEDY: There's the cost of
12 compliance. What other harms or dangers or risks are
13 inherent in the power of the board unmonitored,
14 unchecked by the SEC, to investigate?

15 MR. CARVIN: You're right, Your Honor. The
16 burden here is the burden that Mr. Olson suffered in
17 Morrison v. Olson. He was never indicted. There was
18 never any sanctions subject to review. But he was
19 subject to a burdensome investigation and that is the
20 burden that affects American citizens that is beyond the
21 review of the SEC.

22 JUSTICE BREYER: But I've got one thing on
23 my list. I'm looking to what they control, can't
24 control -- the commission. And so far I've written that
25 in your view the commission can investigate people

1 without subpoenas, and the commission can do nothing
2 about it, okay? That's one.

3 MR. CARVIN: Yes.

4 JUSTICE BREYER: Now, what's two?

5 MR. CARVIN: Well, I think that that is the
6 main point.

7 JUSTICE BREYER: Okay. So we only have one
8 on our list.

9 MR. CARVIN: Well --

10 JUSTICE BREYER: Okay.

11 MR. CARVIN: But I do want to emphasize that
12 --

13 JUSTICE BREYER: I'm not saying it's good or
14 bad. I just want to be sure I have a complete list.

15 MR. CARVIN: If I might elaborate slightly,
16 Justice Breyer, I think it's important to understand
17 that they have the ability to inspect foreign auditing
18 firms, and the Cato Institute filed a brief that
19 described the adverse reaction of the 27 countries where
20 they are currently exercising this inspection power
21 abroad. That is totally beyond the control of the
22 President, obviously, as well as the SEC, to say how
23 these -- how these inspections and investigations are
24 going. The --

25 JUSTICE SOTOMAYOR: They can't pass rules?

1 MR. CARVIN: Again, they can pass rules, but
2 the Attorney General --

3 JUSTICE SOTOMAYOR: What -- what is the
4 difference between what you are talking about and an
5 employer who says: Look, I can't stick my nose in every
6 bit of business that goes on in my office because that's
7 impossible; otherwise I'd be doing all the work and
8 I just humanly can't. I'm delegating to you the
9 responsibility to do X, Y, and Z according to these
10 rules of conduct.

11 MR. CARVIN: There are three fundamental
12 differences, Justice --

13 JUSTICE SOTOMAYOR: What's the difference
14 between that and this scheme?

15 MR. CARVIN: In your hypothetical, the
16 principal has exactly the same powers as the
17 subordinate. Here the subordinate has statutory duties
18 and responsibilities totally distinct from what the SEC
19 can do. In addition to inspections, they can --

20 JUSTICE SOTOMAYOR: Well -- let's break down
21 each part of your argument, please. You are suggesting
22 that Congress doesn't have the power to determine that a
23 particular principal or agent of the government doesn't
24 have certain responsibilities?

25 MR. CARVIN: No, obviously they do. And

1 what I'm -- you were asking for -- I'm now trying to
2 describe the relationship between the SEC and the board,
3 and the one difference between the normal employer-
4 employee relationship is that the board has statutory
5 authority wholly distinct from the principal.

6 Number two, if that subordinate didn't do
7 things the way the principal wanted in the employment
8 situation, the principal could fire the subordinate.
9 When can the SEC fire the board in these circumstances?
10 Only when they have committed gross abuses and after
11 notice and opportunity for a hearing.

12 JUSTICE BREYER: And if you have a statute
13 that says each Department -- Commerce, Justice -- the
14 Attorney General of the United States or the secretary
15 shall appoint an inspector general who will in fact
16 inspect and find ethics violations and that office -- he
17 cannot be removed from that office without cause. In
18 your view, that's all -- and it would be
19 unconstitutional.

20 MR. CARVIN: No, no. In the Interior
21 Department, those are of course the President's alter
22 egos --

23 JUSTICE BREYER: Yes. Well, why? What's
24 the difference?

25 MR. CARVIN: Well, two differences. One is

1 the -- the Secretary of the Interior is the President's
2 alter ego, and so, therefore, the President --

3 JUSTICE BREYER: So you are saying that
4 the -- the chairman of the SEC does not under the
5 Constitution have the authority or the SEC does not have
6 the authority to appoint individuals who cannot be
7 removed without cause?

8 MR. CARVIN: Well, I think there is two
9 points.

10 JUSTICE BREYER: Or -- or you might
11 be saying they do not have the authority to appoint
12 inferior officers of the United States. I don't know
13 why they wouldn't have that authority if the Secretary
14 of the Interior has that authority.

15 MR. CARVIN: Well, because Freytag made it
16 clear that there's a difference between an independent
17 agency, like the --

18 JUSTICE BREYER: What's an independent
19 agency?

20 MR. CARVIN: Well, in that case was an
21 independent agency in the Executive Branch --

22 JUSTICE BREYER: Well, what is an
23 independent agency?

24 MR. CARVIN: One that is not subject to the
25 President's plenary control.

1 JUSTICE BREYER: But why isn't -- so why
2 aren't they subject to the President's plenary control?

3 MR. CARVIN: Because of Humphrey's Executor
4 and because of the removal provisions, which pose very
5 serious removal restrictions on the President's ability
6 to control the SEC.

7 JUSTICE SOTOMAYOR: But you just --

8 JUSTICE BREYER: The SEC. What -- what
9 restrictions? Because, interestingly enough, my law
10 clerks have been unable to find any statutory provision
11 that says that the President of the United States can
12 remove an SEC commissioner only for cause.

13 MR. CARVIN: It is silent, and -- but it
14 still --

15 JUSTICE BREYER: It's silent.

16 MR. CARVIN: Well --

17 JUSTICE BREYER: Then, in other words --

18 JUSTICE SCALIA: I don't think the
19 government will think it has achieved a great victory if
20 it comes out of this with the proposition that the SEC
21 is not an independent regulatory agency. And I don't
22 think the government is arguing that position.

23 MR. CARVIN: They have not taken that
24 position.

25 JUSTICE BREYER: But that was not what I

1 have asked.

2 MR. CARVIN: I know. They haven't taken --

3 JUSTICE BREYER: I'm not interested in that.

4 I'm interested in an answer to my question.

5 MR. CARVIN: Yes.

6 JUSTICE BREYER: And the answer to my -- my

7 question was --

8 MR. CARVIN: There is --

9 JUSTICE BREYER: -- is there anything in the
10 law, as far as you know, any statute, that says that the
11 President cannot remove a commissioner or the chairman
12 of the SEC but for cause?

13 MR. CARVIN: Yes.

14 JUSTICE BREYER: The answer is there is
15 something?

16 MR. CARVIN: Yes.

17 JUSTICE BREYER: Where -- where is that?

18 Would you refer me to that citation? Because we
19 couldn't find it.

20 MR. CARVIN: It's -- they're given 5-year
21 terms, so obviously if you have a term of 5 years, there
22 is no removal provision. Under this Court's precedent
23 in Wiener, if there is a term, you need to look at the
24 function of the agency. There was no removal
25 restriction in Wiener. The --

1 JUSTICE GINSBURG: I thought that both
2 sides --

3 MR. CARVIN: The Court --

4 JUSTICE GINSBURG: I thought that both sides
5 agreed that there is no statute, everybody agrees to
6 that. But I thought that the government, just as your
7 side, agreed that the President could dismiss an SEC
8 commissioner for cause.

9 MR. CARVIN: Yes, with -- pursuant -- yes,
10 for cause, but --

11 JUSTICE GINSBURG: Even though there's no
12 statute that says anything either way.

13 MR. CARVIN: And the reason we --

14 JUSTICE GINSBURG: For cause would be short
15 of the 5-year term.

16 MR. CARVIN: The reason we infer "for cause"
17 is because it was modeled after the FTC, and under
18 Wiener, you need to look at function of the agency to
19 determine the President's removal authority, and --

20 JUSTICE SCALIA: "For cause" doesn't mean
21 for failure to obey the President's instructions, does
22 it?

23 MR. CARVIN: Not under Humphrey's Executor,
24 which made it quite clear that the President had no --

25 JUSTICE SCALIA: That's why it's called an

1 independent regulatory agency, because it's not subject
2 to presidential control.

3 MR. CARVIN: Right.

4 JUSTICE BREYER: I don't any agree with
5 that, but, I mean, you do agree. I thought an
6 independent agency is a function of a number of
7 different things: where it is on the chart, what
8 people's customs have grown up to, expectations about it
9 --

10 MR. CARVIN: And I will --

11 JUSTICE BREYER: -- what the President might
12 expect he can do or not. But all those things are not
13 what I'd call hard law.

14 MR. CARVIN: It may not be hard law, but --

15 JUSTICE BREYER: Well but if it's not hard
16 law, then I wonder.

17 MR. CARVIN: Well --

18 JUSTICE BREYER: I mean, that's why I asked
19 the question. It's not what I have the answer to.

20 MR. CARVIN: Well, if Your Honor wants to
21 infer at-will removal of the SEC, that would be
22 effectively overruling Humphrey's Executor. And if you
23 want to make a --

24 JUSTICE BREYER: Why? In Humphrey's
25 Executor there was no provision that said --

1 MR. CARVIN: Well --

2 JUSTICE BREYER: There was a provision,
3 which we know, that said the President cannot remove an
4 FTC commissioner but for cause. Have I been wrong on
5 that all those years?

6 MR. CARVIN: No, you've been entirely right,
7 but Humphrey's Executor didn't focus on the removal
8 provision. It said that that removal provision was
9 constitutional, and the reason it was constitutional was
10 because you could make executive actors separate from
11 the chief executive. The SEC, like the FCC, has always
12 been lumped in with the FTC in terms of that. If this
13 Court wants to say that -- that those people are subject
14 to the President's plenary --

15 JUSTICE SCALIA: I'd love to say that.
16 That would be wonderful.

17 MR. CARVIN: I'm not going to stand in your
18 way, because that would obviously --

19 (Laughter.)

20 MR. CARVIN: That would obviously render the
21 board unconstitutional. I think the key point here --

22 JUSTICE BREYER: It would render the board
23 unconstitutional?

24 MR. CARVIN: Yes, because --

25 JUSTICE BREYER: If an executive appointee

1 who is a superior officer of the United States appoints
2 an inferior officer, which inferior officer can be
3 removed only for cause -- I mean, my goodness -- I can
4 -- there are lots of shapes and sizes. I can't imagine
5 what would be unconstitutional about that. What?

6 MR. CARVIN: Well, Your Honor, if the
7 President called up the head of the SEC and said, I want
8 you to seek sanctions against the chairman of Exxon,
9 under the traditional understanding of Humphrey's
10 Executor the SEC commissioner would not be beholden to
11 follow the President's direction.

12 The same would be true if he called him up
13 and said, fire the chairman of the PCAOB. And if that
14 is so, then the President has no ability to remove
15 somebody exercising a very important executive function,
16 and unless we are going to rewrite what has been
17 generally understood as the independence of -- of
18 independent agencies, then there is a fundamental
19 difference between the President's ability to fire an
20 inferior officer at the Justice Department and fire an
21 inferior officer at the independent agency.

22 JUSTICE SCALIA: This is not an argument you
23 have made anyway. Can we go on to the arguments that
24 you've made?

25 MR. CARVIN: Yes.

1 JUSTICE SCALIA: Thank you.

2 MR. CARVIN: And in terms of that basic
3 argument, he cannot control, for example, the
4 appointment of the board members, which he could with
5 respect to officers over whom he exercises. He can't
6 tell the SEC whom to appoint to the board.

7 And in terms of the question that Justice
8 Scalia asked earlier, I don't think it's a statutory
9 principle that you pretend --

10 JUSTICE SOTOMAYOR: Is it unconstitutional
11 for the President not to be able to appoint an inferior
12 officer?

13 MR. CARVIN: Not an inferior officer. But,
14 of course, these are principal officers for three
15 reasons --

16 JUSTICE SOTOMAYOR: Assuming we don't accept
17 your characterization of them?

18 MR. CARVIN: Then I have two other
19 arguments, Your Honor.

20 One is: The SEC cannot be a department
21 under Freytag, because it is an independent agency
22 indistinguishable from the Tax Court. And -- and what
23 the Freytag majority opinion said was, if you are unlike
24 a cabinet department because you are not subject to
25 political oversight, then --

1 JUSTICE SCALIA: I hope your case doesn't
2 rest on Freytag.

3 (Laughter.)

4 MR. CARVIN: So do I. I want to take an
5 opportunity to focus on the real point of Freytag, which
6 was made very eloquently in the Freytag dissenting
7 opinion, which was --

8 (Laughter.)

9 CHIEF JUSTICE ROBERTS: And the brief.

10 (Laughter.)

11 MR. CARVIN: The Appointments Clause is
12 designed to achieve accountability, and even when you
13 are not talking about presidential advice and consent
14 positions, the way we achieve that accountability is by
15 vesting it, in the words of the dissenting opinion, in
16 "the President's direct lieutenant." And that's very
17 important because it makes the President accountable for
18 those positions, and it also makes them able to resist
19 congressional encroachments.

20 And this scheme, besides, embodies precisely
21 the evil that was condemned by every member of the Court
22 in Freytag and in Edmond, which is it creates an
23 unaccountable system where a multi-member commission
24 beyond the President's political oversight and control
25 is making appointments. Not one elected representative,

1 in the President or the Senate, has any influence who --
2 over the people appointed to this board --

3 JUSTICE GINSBURG: Does that mean, Mr.
4 Carvin, that the SEC cannot appoint heads of -- heads of
5 its divisions? I assume that they would fit within the
6 characterization "inferior officers."

7 MR. CARVIN: That would be true, and --

8 JUSTICE GINSBURG: So -- but if the SEC
9 can't appoint --

10 MR. CARVIN: No, they can't appoint inferior
11 officers. Now, the board with the --

12 JUSTICE GINSBURG: Yes, so what are -- so
13 what are the heads of the various divisions of the SEC?

14 MR. CARVIN: The board and the SEC say they
15 are not inferior officers, because they do not under
16 Freytag have any specific statutory authorization. They
17 are not, in the words of the Appointments Clause,
18 "established by law." So if they are --

19 JUSTICE GINSBURG: Aren't there -- aren't
20 there people within the independent regulatory
21 commissions that have jobs comparable to people who are
22 in the departments --

23 MR. CARVIN: Yes.

24 JUSTICE GINSBURG: -- that the head of the
25 department can appoint? So who can appoint such people

1 in the FEC, the FTC, the FCC, and so on?

2 MR. CARVIN: There are two differences. One
3 is, for those lower-level people within the executive
4 departments, they have specific statutory creation of
5 those offices, the Solicitor General on down. There is
6 no statute saying that anybody below the commission
7 level at the SEC has any job.

8 That's totally up to the discretion of the
9 commission. They can vest them with whatever authority
10 they want or not.

11 JUSTICE KENNEDY: But -- but the question is
12 -- I assume it's the follow-up question that Justice
13 Ginsburg is interested in -- under your view of the
14 case, why is that lawful?

15 MR. CARVIN: No, it would only be unlawful
16 if they were inferior officers. And if the board is
17 correct that they are not inferior officers, there would
18 be no constitutional problem at all with the SEC, for
19 example, appointing a general counsel. I see --

20 JUSTICE SCALIA: I don't understand that.
21 It's okay for them to appoint principal officers, but
22 not inferior officers?

23 MR. CARVIN: No, no. Employees, Your Honor.

24 JUSTICE SCALIA: Oh. Oh, I see.

25 MR. CARVIN: And the argument for them being

1 employees that the board has advanced is that they're --
2 that they're --

3 JUSTICE SCALIA: I wish you had said that.
4 You really had me scared there.

5 (Laughter.)

6 MR. CARVIN: If I am scaring you, I'm not
7 doing my job.

8 JUSTICE SCALIA: You're saying they are not
9 inferior officers and also not principal officers, but
10 merely employees?

11 MR. CARVIN: Merely employees.

12 JUSTICE SCALIA: And who appoints -- who
13 appoints the inferior officers at the -- at the SEC?

14 MR. CARVIN: Well, that's my other point.
15 The chairman does, and so if you accept their view of
16 who the head of the department is, which is the
17 commission --

18 JUSTICE SCALIA: All those appointments are
19 presumably invalid.

20 MR. CARVIN: -- all those appointments are
21 unconstitutional, so under their theory --

22 JUSTICE SCALIA: That would be a shame.

23 MR. CARVIN: -- since the chairman didn't
24 appoint any -- the general counsel, the heads of any of
25 the departments, all of them are unconstitutional.

1 JUSTICE BREYER: Does the chairman serve as
2 a chairman for a fixed term?

3 MR. CARVIN: Not as chairman.

4 JUSTICE BREYER: No? Okay.

5 MR. CARVIN: He just has --

6 JUSTICE BREYER: So, therefore, what you had
7 said before would not apply to the chairman, that is
8 to say: The President can remove him at will --

9 MR. CARVIN: Not --

10 JUSTICE BREYER: There is no statute to the
11 contrary; he does not serve for a fixed term, and so you
12 cannot imply that. Since the chairman cannot --

13 MR. CARVIN: But this statute doesn't --

14 JUSTICE BREYER: -- can remove him at will
15 -- you do not have what you would call the gearing into
16 play, this somewhat mechanical jurisprudence, of what's
17 an independent agency.

18 MR. CARVIN: No, he can remove the chairman
19 at his pleasure, which -- but not a commissioner. And
20 that's our whole point. That's a very key point.

21 JUSTICE BREYER: So you are saying that the
22 chairman, not the commissioner, is the person who does
23 the appointing?

24 MR. CARVIN: We argue that. They argue the
25 opposite. Under the statute --

1 JUSTICE BREYER: Okay.

2 MR. CARVIN: -- the commissioner does the
3 appointing. And that's our key point. Because the
4 President exercises such extraordinary control over the
5 chairman and therefore is able to control the SEC staff,
6 Congress, in the statute, took away that traditional
7 enforcement mechanism.

8 All of the SEC staff you were referring to
9 earlier, Justice -- Justice Ginsburg, are the
10 chairman's alter egos. And since they are the
11 chairman's alter egos, they are completely
12 constitutional. And Congress, again, took away the
13 chairman's powers, which was a way of limiting the
14 President's ability to control the board.

15 And I think they -- but our basic
16 observation --

17 JUSTICE GINSBURG: So this whole thing would
18 be constitutional if, instead of giving the appointing
19 power to the commission, they had given it to the
20 chairman?

21 MR. CARVIN: No, because we believe they are
22 principal officers for three reasons under Edmond: They
23 run their own shop; the commission has no control over
24 the officers on the board, since it can only remove them
25 in these extraordinarily narrow situations; and as we

1 have discussed at length before, it can only review part
2 of its work product, whereas the appeals court judges in
3 Edmond, all of their work product was subject to review.

4 And I think the removal provision is
5 particularly important here. The board can pursue
6 policies that the SEC absolutely abhors and thinks are
7 completely counterproductive, but under this
8 extraordinarily narrow removal provision --

9 JUSTICE GINSBURG: Isn't that a highly
10 unlikely scenario? I mean, this thing won't work unless
11 these two are working in harmony.

12 MR. CARVIN: Well, it would work perfectly
13 if the board was an independent, autonomous entity that
14 was not subject to the plenary control of the SEC, and
15 that's exactly how the Senate report described it.

16 No, the New York Stock Exchange works
17 perfectly fine even though the SEC has oversight
18 responsibility over the New York Stock Exchange directly
19 analogous to the oversight responsibility it has over
20 the board. And so, no, it would work perfectly fine if
21 you followed the congressional scheme, which was an
22 agency with its own autonomy and power.

23 And since it is an agency that has its own
24 revenue sources, its own statutory authority, it has to
25 be an agency composed of principal officers. Elsewise

1 very powerful agencies, including the CIA, for example,
2 would be considered inferior officers simply because in
3 an organizational chain they report to some others.

4 And I would argue, to get back to my
5 original point, Justice Scalia, that that would
6 absolutely confound the accountability that the Framers
7 insisted upon, that either the President and the Senate
8 or a direct lieutenant of the President make the kinds
9 of appointments of inferior officers and that the
10 important officers go through the advice and consent
11 process.

12 If there are no further questions, I'd
13 like to reserve the remainder of my time.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 Mr. Carvin.

16 MR. CARVIN: Thank you.

17 CHIEF JUSTICE ROBERTS: General Kagan.

18 ORAL ARGUMENT OF GEN. ELENA KAGAN

19 ON BEHALF OF THE RESPONDENT UNITED STATES

20 GENERAL KAGAN: Mr. Chief Justice, and may
21 it please the Court:

22 Resolution of this case follows from a
23 simple syllogism, and it is this: The President has
24 constitutionally sufficient control over the SEC; the
25 SEC has comprehensive control over the Accounting Board;

1 therefore, the President has constitutionally sufficient
2 control over the Accounting Board.

3 Now, Mr. Carvin has suggested that there --

4 JUSTICE SCALIA: Excuse me. The President
5 has adequate control over the SEC only because he can
6 dismiss the chairman of the SEC. But the activity here
7 is not governed by the chairman of the SEC. There's no
8 role whatever for the chairmanship. The -- the
9 governance of this board is by the members of the SEC.
10 So that's quite different from saying -- you know, I --
11 I think your syllogism breaks down at that point.

12 GENERAL KAGAN: Well, I -- I think not,
13 Justice Scalia. Humphrey's Executor said 70 years ago
14 the President does have constitutionally sufficient
15 control over the SEC generally, including the chair.

16 Now, the SEC has constitutionally -- has
17 comprehensive control over the Accounting Board. There
18 is nothing that the Accounting --

19 JUSTICE SCALIA: The chairman, which is --
20 which is -- which is the -- what should I say -- the
21 knife that the President has into the SEC, has no role
22 in the control of this board.

23 GENERAL KAGAN: The -- the chair has the
24 same role that he has with respect to pretty much
25 everything else that the SEC does. The SEC --

1 CHIEF JUSTICE ROBERTS: No. I thought the
2 employees were appointed by the chairman, not by the
3 commission.

4 GENERAL KAGAN: Subject to the control --
5 subject to the approval of the commission. So --

6 CHIEF JUSTICE ROBERTS: So you think -- you
7 think a -- a veto power is the same as an original --
8 original power?

9 GENERAL KAGAN: Well, in fact, the
10 commission could do the exact same thing in this case.
11 The commission could delegate its control over the
12 Accounting Board to the chair, subject to the control of
13 the commission again.

14 So I think that there is no difference with
15 respect to the SEC's supervision of the board than there
16 is with respect to the SEC's supervision of any of its
17 other functions or any --

18 CHIEF JUSTICE ROBERTS: Well, let's say --

19 GENERAL KAGAN: -- of its staff.

20 CHIEF JUSTICE ROBERTS: Let's say that
21 the -- let's say that the board issues -- demands
22 documents from a particular company. Can the SEC direct
23 them not to do that?

24 GENERAL KAGAN: The SEC has full control
25 over the investigative and inspection function of the

1 board. This was what Mr. Carvin -- was the one thing
2 that Mr. Carvin said the SEC lacked, but in fact it does
3 not, because the board's investigations and the board's
4 inspections are all done according to rule. And the SEC
5 in a number of ways can change those rules.

6 The SEC can reach out and abrogate any board
7 rules, including rules relating to inspections and
8 investigations. The SEC also has power to promulgate
9 its own rules, if --

10 JUSTICE SCALIA: Excuse me, but, you know,
11 Congress -- Congress can change the statutory authority
12 of any agency just like that. Does that mean that
13 Congress is controlling the agency?

14 GENERAL KAGAN: Well, it's certainly part of
15 Congress's control mechanisms. And this, too, is part
16 of the SEC's control mechanisms with relation to the
17 Accounting Board. The Accounting Board can take no --

18 JUSTICE SCALIA: I'm not sure that -- that
19 the ability to take away responsibility for an agency --
20 from an agency is the same as controlling what
21 authority that agency does exercise. It seems to me
22 they are two different things.

23 GENERAL KAGAN: And I think that the SEC has
24 both. It certainly has the authority to take away
25 responsibility from the Accounting Board. The

1 rescission provision in 7217 makes that completely
2 clear. But it also has authority to set the ground
3 rules by which the Accounting Board does anything and
4 everything. It can say tomorrow -- it can promulgate a
5 rule and say all inspections have to be approved by us,
6 all investigations.

7 CHIEF JUSTICE ROBERTS: Will that be
8 consistent -- do you think that will be consistent with
9 the intent of Congress in establishing the PCAOB?

10 GENERAL KAGAN: I -- I do think it would be
11 consistent with the intent of Congress,
12 Mr. Chief Justice, because the intent of Congress was to
13 place the Accounting Board under the extremely close and
14 comprehensive supervision of the SEC. The references to
15 independence that one finds throughout the legislative
16 record here are almost all references to independence
17 from the accounting industry, not from the SEC.

18 Quite to the contrary, Congress made it
19 clear --

20 CHIEF JUSTICE ROBERTS: Why did -- just out
21 of -- I guess maybe it's not important, but why did
22 the -- why did Congress set up a separate board if it's
23 going to be entirely controlled by the SEC?

24 GENERAL KAGAN: I think it is important,
25 Mr. Chief Justice, and I think that there were a few

1 reasons. First, Congress wanted to make sure that this
2 board did not compete with the SEC's own resources.
3 Members of Congress thought that the SEC had been
4 resource-strapped and wanted to create something with
5 its own separate funding stream, which it was able to do
6 by declaring this a kind of quasi-governmental agency.

7 Second, it wanted to get the board outside
8 of the normal civil service laws, because it wanted to
9 attract people that it thought it could not attract on
10 normal civil service salaries.

11 And third, I think history and tradition
12 have a great role in -- in the question that you are
13 answering, because what -- the history and tradition of
14 SEC regulation of the financial industry in general
15 is -- is -- in -- in some part through the SROs, the
16 self-regulatory organizations. So --

17 CHIEF JUSTICE ROBERTS: Before we get --
18 before you get too far into that, of those first two
19 things, is there any reason Congress couldn't have
20 achieved those same objectives by establishing the PCAOB
21 as a division within the SEC?

22 GENERAL KAGAN: Well, I -- I think so. I
23 think it would have been harder to establish a separate
24 funding stream to take the Accounting Board out of the
25 civil service when the rest of the SEC is subject to

1 normal congressional appropriations and is subject to
2 basic civil service laws regarding salary and so forth.
3 So, this was a way to -- to have both.

4 And it was also, I think --

5 JUSTICE KENNEDY: But that's -- that's the
6 history and tradition of this board, which isn't very
7 long. But the history and tradition of boards like this
8 is that their investigative powers are independent.
9 Now, you say that there could be a rule, but that just
10 isn't the way it works. And if you refer us to history
11 and tradition for other purposes, we ought to look at
12 the operational principles, operational assumptions of
13 this board.

14 GENERAL KAGAN: Well, I -- I -- I do think,
15 Justice Kennedy, that -- that the way this board is set
16 up, the statutory scheme and structure, makes it clear
17 that the SEC has comprehensive authority not just over
18 the rulemaking, but over the investigative and
19 inspection activities of the board; that no -- no
20 sanction arising from an investigation can be issued
21 except if the board agrees; that no inspection report
22 can be issued except if the -- excuse me -- except if
23 the SEC agrees.

24 And further, as I said before, that the SEC
25 can reach further back into the process and say, not

1 only do we have this kind of veto authority over any
2 sanction that comes out of an investigation or over any
3 report that comes out of an inspection, but we can also
4 change the way those inspections and investigations are
5 conducted in the first place.

6 CHIEF JUSTICE ROBERTS: Does it have
7 consequences for public companies subject to the board
8 if it refuses to turn over documents requested by
9 this -- this board?

10 GENERAL KAGAN: Well, for -- for -- for
11 public companies for -- not for the accounting firms in
12 general, but for their public company clients, any
13 subpoena would have to come, as Justice Ginsburg rightly
14 said --

15 CHIEF JUSTICE ROBERTS: Oh, I know, but
16 presumably you only get a subpoena when people don't
17 cooperate.

18 GENERAL KAGAN: That -- that's correct.
19 And -- and certainly public companies could cooperate,
20 and certainly public companies have cooperated with the
21 board.

22 CHIEF JUSTICE ROBERTS: And what happens if
23 they don't?

24 GENERAL KAGAN: I -- I think that the board
25 would go to the -- to the SEC for a subpoena, ask the

1 SEC for a subpoena, and the SEC would choose whether to
2 grant that subpoena and whether to allow the kind of
3 investigation that the board wants.

4 CHIEF JUSTICE ROBERTS: Are there any
5 other -- are there any consequences from the company's
6 refusal short of -- that would not require the board to
7 get a subpoena?

8 GENERAL KAGAN: Are there any other
9 consequences for the public company?

10 CHIEF JUSTICE ROBERTS: In the absence of
11 the subpoena, if nothing happens?

12 GENERAL KAGAN: I -- I -- I believe that
13 that's the case. I believe that it's the choice of the
14 public company whether to comply or not. If the public
15 company chooses not to comply, the board has to go to
16 the SEC and to get a subpoena.

17 CHIEF JUSTICE ROBERTS: Is it -- does it
18 have a consequence as a practical matter for the company
19 if it doesn't comply with a request from this board?

20 GENERAL KAGAN: Well, the board does not
21 regulate the public companies themselves. The board
22 only regulates the accounting firms.

23 Now, the accounting firms do, as a condition
24 of their registration, have to present any documents
25 that the -- the -- the board wants. And so the

1 accounting companies have a real reason to comply with
2 the board's requests.

3 CHIEF JUSTICE ROBERTS: So there are in fact
4 collateral consequences that take place without any
5 involvement by the SEC?

6 GENERAL KAGAN: Well, I -- I -- I think
7 again the SEC could change any of the rules that govern
8 inspections, any of the rules that govern
9 investigations.

10 CHIEF JUSTICE ROBERTS: So if you had a
11 statute here that said, look, if you don't comply with
12 the board's request for documents, your authorities will
13 be suspended, and if that were the statute, you would
14 say, well, that's okay, because the SEC can always
15 change that rule.

16 GENERAL KAGAN: I think that -- that the
17 relationship between the SEC and the board has to be
18 looked at as a whole. And it's clear that the SEC has
19 control over everything that the board does or could
20 have control over everything the board does.

21 JUSTICE GINSBURG: General Kagan, I thought
22 that -- the Chief asked a question, he posed a sanction,
23 and I thought that any sanction the board wants to
24 impose has to be approved by the SEC?

25 GENERAL KAGAN: Well, that's exactly right.

1 Any sanction, any final inspection --

2 CHIEF JUSTICE ROBERTS: I'm sorry, I asked
3 you whether there were any consequences from the failure
4 of the company to turn over documents; and is your
5 answer that there are no consequences whatever?

6 GENERAL KAGAN: There are no consequences
7 with respect to the failure of public companies -- not
8 the accounting firms, but public companies -- to turn
9 over documents absent a subpoena, which the SEC needs to
10 issue.

11 JUSTICE ALITO: As a practical matter, does
12 the President have any ability to control what the board
13 does?

14 GENERAL KAGAN: I think, Justice Alito, the
15 President has the exact same ability that the President
16 has with respect to every other aspect of the SEC's
17 operations. So, the --

18 JUSTICE SCALIA: No, that's --

19 JUSTICE ALITO: Well, why is that --

20 JUSTICE SCALIA: But that's not true. He
21 can remove -- he can remove the chairman of the SEC.

22 GENERAL KAGAN: And --

23 JUSTICE SCALIA: And he cannot -- he cannot
24 remove the commissioners. And it's the commissioners
25 that govern the board, not the chairman.

1 GENERAL KAGAN: Well, it's the commissioners
2 that govern all aspects of the SEC's operations. The
3 chair only does what is delegated to him by the
4 commission or -- either -- or through the reorganization
5 plans.

6 JUSTICE ALITO: Well, let me give you an
7 example. Suppose the President objects to the -- the
8 very large salaries that the members of the board
9 receive. What are their salaries?

10 GENERAL KAGAN: Excuse me. They are over
11 \$500,000.

12 JUSTICE ALITO: And they -- did they decide
13 that themselves?

14 GENERAL KAGAN: Subject to the review of the
15 commission. And the commission has been active in this
16 area.

17 JUSTICE ALITO: Suppose the President reads
18 about this and he says: This is outrageous; I want to
19 change it. How can he do that? Remove --

20 GENERAL KAGAN: Well, I think he does --

21 JUSTICE ALITO: -- remove that -- remove the
22 SEC commissioners unless they take action against the
23 board?

24 GENERAL KAGAN: I think he does everything
25 that he would do with respect to any other SEC function,

1 is that he or some member of his staff would call the
2 chair or would call other commissioners and say: I have
3 a problem with this.

4 JUSTICE SCALIA: Would you please change it?
5 Right?

6 GENERAL KAGAN: Would you please change
7 it -- and -- and --

8 (Laughter.)

9 GENERAL KAGAN: -- and with respect to that,
10 that's exactly what --

11 JUSTICE SCALIA: I could do that.

12 (Laughter.)

13 GENERAL KAGAN: Justice Scalia, that's
14 Humphrey's Executor. Humphrey's Executor does indeed
15 say that the President can't order the SEC commissioners
16 in the same way that he might be able to --

17 CHIEF JUSTICE ROBERTS: Yes, yes.

18 GENERAL KAGAN: But that's a 70-year-old
19 precedent.

20 CHIEF JUSTICE ROBERTS: Right. That's
21 Humphrey's Executor. But you have to add to Humphrey's
22 Executor Perkins and Morrison. Humphrey's Executor says
23 you can limit the President's removal power. That
24 doesn't get you down to the board. You have to also say
25 the principal officers -- there can be limits on their

1 removal authority of the board members.

2 GENERAL KAGAN: I -- I understand the
3 temptation to say something like, well, we don't really
4 much like Humphrey's Executor, but we are stuck with it,
5 but not an inch further.

6 CHIEF JUSTICE ROBERTS: I didn't say
7 anything bad about Humphrey's Executor.

8 (Laughter.)

9 GENERAL KAGAN: But -- but --

10 JUSTICE SCALIA: I did, I did.

11 (Laughter.)

12 GENERAL KAGAN: But this in --

13 JUSTICE SCALIA: We did overrule it, by the
14 way, in -- in Morrison, didn't we?

15 GENERAL KAGAN: But two points. This in
16 fact does not go an inch further, and it doesn't go an
17 inch further because of the SEC's comprehensive control
18 over the board, which makes the board function --

19 CHIEF JUSTICE ROBERTS: What is -- I'm
20 sorry. What is the removal authority of the SEC with
21 respect to board officers?

22 GENERAL KAGAN: The removal authority of the
23 SEC with respect to -- with respect to board
24 officers is a for-cause removal limitation.

25 CHIEF JUSTICE ROBERTS: All right. So there

1 is a limitation there. For cause does not include
2 failure to follow the policies of the President.

3 GENERAL KAGAN: Let's assume that that's
4 correct.

5 CHIEF JUSTICE ROBERTS: So you need to rely
6 on Morrison to make the limitations on what the SEC can
7 do with respect to the board constitutional.

8 GENERAL KAGAN: I think --

9 CHIEF JUSTICE ROBERTS: And you need to rely
10 on Humphrey's Executor to make the limitations on what
11 the President can tell the SEC constitutional.

12 GENERAL KAGAN: Mr. Chief Justice, removal
13 is just a tool. Removal is not the ultimate
14 constitutional question. The ultimate constitutional
15 question is the level of presidential control, and the
16 presidential control here is exactly the same with
17 respect to the board's activities as it is with respect
18 to the SEC staff's activities.

19 CHIEF JUSTICE ROBERTS: Oh, no, no, because
20 you have got an extra layer there. Let's say, I mean,
21 that you have to have two violations of the for-cause
22 provision. You have got to have -- you have to meet the
23 requirement in two places. When the SEC wants to remove
24 the board member, they can only do that for cause. And
25 if they decide, well, there isn't cause, I'm not going

1 to do it, then the President under your theory has to
2 remove the SEC commissioners, all of them, not just --
3 not just the chairman, and he can only do that for
4 cause.

5 So you have got "for cause" squared, and
6 that's -- that's a significant limitation that
7 Humphrey's Executor didn't recognize and Morrison didn't
8 recognize.

9 GENERAL KAGAN: But that for-cause provision
10 is surrounded by a panoply of other control mechanisms.

11 CHIEF JUSTICE ROBERTS: Which one are we
12 talking about, the first one or the second one?

13 GENERAL KAGAN: The -- the for-cause
14 provision on the board members is surrounded by a
15 panoply of other control mechanisms which function as a
16 complete substitute, which give the SEC --

17 CHIEF JUSTICE ROBERTS: Well, let's just
18 talk -- a practical example. The board says I want to
19 get the documents of company X. The SEC thinks they
20 shouldn't do that. Okay? Can they remove them for that
21 situation -- in that situation?

22 GENERAL KAGAN: Well, they can pass a rule
23 that says no, you can't get the -- the documents of
24 company X, and then when the board members go ahead and
25 try to get the documents of company X --

1 CHIEF JUSTICE ROBERTS: Can they say --

2 GENERAL KAGAN: -- they can remove them.

3 CHIEF JUSTICE ROBERTS: -- you are fired?

4 Can they say, you are fired because we have control over
5 what you do and we don't think you should do that?

6 GENERAL KAGAN: I think that they
7 effectively can. They would have to do it by -- I think
8 that the easiest, quickest, most legally secure way
9 would be to -- to do it by -- by promulgating a rule
10 that says you can't do this. And then --

11 CHIEF JUSTICE ROBERTS: The easiest way to
12 do it is to pick up the phone, not by promulgating a
13 rule.

14 GENERAL KAGAN: I said the most legally
15 secure way to do it would be to do it that way. I think
16 that the fact that they have that formal mechanism means
17 that they could pick up the phone and accomplish the
18 exact same thing, because --

19 CHIEF JUSTICE ROBERTS: Can the President
20 pick up the phone and fire the SEC commissioners?

21 GENERAL KAGAN: The President can pick up
22 the phone and fire the SEC commissioners for cause,
23 however "cause" has been defined.

24 CHIEF JUSTICE ROBERTS: He thinks -- he
25 thinks they -- the board should be getting the documents

1 from the other company, and the SEC thinks they can't.
2 So the SEC tells the board, don't go after that company,
3 and because they do that the President fires the SEC.
4 Does that work under your theory?

5 GENERAL KAGAN: So now the SEC has given the
6 board one order and the President doesn't like the order
7 that the SEC has given to the board?

8 CHIEF JUSTICE ROBERTS: Right.

9 GENERAL KAGAN: Again, the President has the
10 same level of control over the SEC as he has with
11 respect to anything else. That's just Humphrey's
12 Executor.

13 CHIEF JUSTICE ROBERTS: I'm not worried if
14 it's the same. I'm worried if it's enough.

15 GENERAL KAGAN: Well, but that's Humphrey's
16 Executor. Humphrey's Executor said it was enough.

17 CHIEF JUSTICE ROBERTS: Right. And then --

18 GENERAL KAGAN: And the question is whether
19 this goes any further.

20 CHIEF JUSTICE ROBERTS: It goes further
21 because you've got to rely on the SEC to get to the
22 board. So there you've got to rely on Perkins and
23 Morrison.

24 GENERAL KAGAN: You always have to rely on
25 the SEC to do anything, to supervise anybody in its

1 field of operations, whether it's the SEC's own staff or
2 whether it's the board members, who stand in essentially
3 the same relationship to the SEC commissioners as the
4 own SEC staff does.

5 JUSTICE ALITO: Well, do you dispute the
6 proposition that the more layers of for-cause removal
7 you add, the -- the less control the President has?
8 Suppose there were five layers.

9 GENERAL KAGAN: Justice Alito, I think it
10 all depends. I mean, we are not saying that a double
11 for-cause provision is always constitutional, just as we
12 are not saying that a single for-cause provision is
13 always constitutional.

14 The question is, in what context does that
15 for-cause provision operate? And where it operates in a
16 context like this one, where it is surrounded by a
17 panoply of alternative and -- and equally effective
18 control mechanisms, it simply should not matter that
19 there's another for-cause provision.

20 JUSTICE BREYER: Well, what do -- what do
21 you say in response to their formal argument that heads
22 of departments are those people whom the President has
23 at-will control over, like the Secretary of Defense, and
24 Freytag is support for that. And these aren't those
25 people, so the SEC's members must be inferior officers,

1 and the Constitution says nothing about and implicitly
2 forbids inferior officers from appointing other inferior
3 officers beneath them.

4 All right, that's a formal argument, but I
5 got that out of their briefs, and I want to know what
6 you respond to it.

7 GENERAL KAGAN: Well, Justice Scalia, who
8 doesn't much like Humphrey's Executor, nevertheless
9 wrote a brilliant opinion in Freytag saying that in fact
10 independent agencies were departments, and -- and -- and
11 so that commissioners of the SEC would be principal
12 officers, their appointees would be inferior officers,
13 if -- if those appointees were subject to the direction
14 and supervision of the principals in exactly the way
15 Justice Scalia said was necessary in the Edmond case.
16 He is --

17 JUSTICE BREYER: Yes. So I -- so we have to
18 take the dissent there as opposed to taking the
19 majority?

20 GENERAL KAGAN: No, no, no. Freytag --
21 Freytag reserves the question --

22 JUSTICE BREYER: I see.

23 GENERAL KAGAN: -- whether the independent
24 agencies were departments for purposes of the
25 Appointments Clause and, indeed, in reserving that

1 question, suggested that they thought that the
2 independent agencies, so-called, were a very different
3 kind of creature than the small, specialized units such
4 as the Tax Court. So I think that the --

5 JUSTICE KENNEDY: I want to ask -- I want to
6 ask one thing: You want us to imply or find -- or you
7 want us to infer from the statute that there's a power
8 in the President to remove SEC commissioners for cause?
9 You want us to find that that is implied in the statute?

10 GENERAL KAGAN: Justice Kennedy, the
11 conventional understanding, really, ever -- ever since
12 Humphrey's Executor, is that SEC commissioners are
13 subject to a for-cause removal provision. And the
14 government --

15 JUSTICE KENNEDY: All right. What is --
16 what is the authority for us to find that there is an
17 implication in the statute to remove just for cause?
18 There's -- wouldn't that be unique in our precedents?

19 GENERAL KAGAN: I think that -- if I
20 understand the question correctly, I think that the --
21 the implication about --

22 JUSTICE KENNEDY: I mean, if there is a
23 removal power implied, why isn't it removal for all
24 purposes? How -- why can it be limited to just for
25 cause? What authority do we have to do that?

1 GENERAL KAGAN: Well, I think that the
2 understanding about the SEC commissioners is that the
3 SEC commissioners were, essentially, the same as the FTC
4 commissioners, which, under -- which, under Humphrey's,
5 were removable only for cause, and as I believe --

6 JUSTICE SOTOMAYOR: But that's because the
7 statute required it.

8 GENERAL KAGAN: Yes, but -- you're exactly
9 right, and it's a -- it's a perplexity of this law, but
10 for many, many decades, everybody has assumed that the
11 SEC commissioners are subject to the same for-cause
12 removal provision, and the government has not contested
13 that in this case, nor has Mr. Carvin.

14 JUSTICE SCALIA: General Kagan, the
15 government argues here that the head of department is
16 all of the commissioners. Elsewhere, it is the chairman
17 of the SEC who -- who appoints inferior officers. Now,
18 which is it? Are all those appointments by the chairman
19 invalid?

20 GENERAL KAGAN: No, they're not, because all
21 those appointments are made subject to the approval of
22 the commission.

23 JUSTICE SCALIA: Well, that's something
24 quite different. He makes the appointments. They can
25 overturn it, but the appointment must be made by the

1 head of the department, and the appointments are not
2 made by the commissioners. They are made by the
3 chairman.

4 GENERAL KAGAN: Well, I think practice in
5 this regard has changed in different administrations,
6 but if you look at the amicus brief that was filed by
7 the former chairmen of the SEC, they make clear that in
8 fact the commission has ultimate authority over each and
9 every appointment.

10 CHIEF JUSTICE ROBERTS: What do they have to
11 say about the theory that the SEC commissioners can be
12 removed by the President?

13 GENERAL KAGAN: I believe,
14 Mr. Chief Justice, that nobody has contested that
15 question.

16 CHIEF JUSTICE ROBERTS: And you are not
17 contesting it?

18 GENERAL KAGAN: And we are not contesting
19 the question that the SEC commissioners, themselves, are
20 removed by the President for cause under, I would say, a
21 very broad for-cause provision, in the way that Bowsher
22 suggested, not something that's niggling and technical.

23 CHIEF JUSTICE ROBERTS: Thank you, General.

24 GENERAL KAGAN: Thank you, Mr. Chief
25 Justice.

1 CHIEF JUSTICE ROBERTS: Mr. Lamken.

2 ORAL ARGUMENT OF JEFFREY A. LAMKEN

3 ON BEHALF OF THE RESPONDENTS PUBLIC

4 COMPANY ACCOUNTING OVERSIGHT BOARD, ET AL.

5 MR. LAMKEN: Thank you, Mr. Chief Justice,
6 and may it please the Court:

7 The SEC has pervasive authority over every
8 aspect of the board's operations. Board rules and
9 sanctions have no effect, except as the SEC allows, and
10 can be changed by the SEC at any time.

11 Board inspections and investigations are
12 subject to plenary SEC control. Not only are they
13 conducted under rules that the SEC must approve, but the
14 SEC can threaten or actually rescind the board's
15 enforcement authority any time it thinks that's
16 appropriate in the public interest.

17 It controls the board's budget and salaries,
18 and it can reassign matters to --

19 CHIEF JUSTICE ROBERTS: I thought -- so you
20 disagree with General Kagan? I thought she said one of
21 the reasons for taking the board outside the SEC is that
22 they'd have an independent funding stream.

23 MR. LAMKEN: Independent of the
24 congressional appropriations process, not independent of
25 the SEC. Section 7219 is clear as water that the SEC

1 controls the board budget, and the SEC in fact has used
2 that control to regulate down to the level of the board
3 members' salaries.

4 In addition, the SEC can impose rules
5 requiring getting -- requiring the board, for example,
6 to get SEC pre-approval for particular steps or
7 particular actions.

8 JUSTICE SCALIA: Do you know any other
9 agency composed of inferior officers that has the power
10 to acquire its own budget, as this board does, by simply
11 assessing a tax upon the people that it regulates?

12 MR. LAMKEN: In fact, this board doesn't
13 have that power, because it can only do so as the SEC
14 allows. Here, as in all other contexts, it is the will
15 of the SEC that controls.

16 JUSTICE SCALIA: The SEC can overturn it,
17 but it's up to the board -- the board can do it. Do you
18 know of any parallel situation where there is a,
19 supposedly, agency composed of inferior officers who
20 have the power to tax the public unless it's overturned
21 by somebody else?

22 MR. LAMKEN: Well, there's a bunch of other
23 similar entities, such as the SIPC and the like, that
24 assess fees, and many of their officers are appointed by
25 department heads, rather than the -- than the President.

1 And so, yes, I think that's actually not an
2 uncommon feature, but the most -- but the most critical
3 aspect of this is, here, as in every other context, it
4 is the judgment and the decision of the SEC that
5 controls.

6 The board can propose, but it's the SEC that
7 decides.

8 CHIEF JUSTICE ROBERTS: Well, the board can
9 act, and the SEC can, I suppose, retroactively veto
10 their actions, but the SEC doesn't propose what actions
11 the board takes, actions that can have significant,
12 devastating consequences for the regulated bodies.

13 MR. LAMKEN: Well, precisely the opposite.
14 With respect to rules, the board's rules are ineffective
15 --

16 CHIEF JUSTICE ROBERTS: I'm not talking
17 about rules. Agencies in the government do not act only
18 in implementing a particular rule. They have authority
19 to regulate.

20 And the board here, for example, can tell a
21 particular entity: You have to turn over these
22 documents. They don't have to have a rule that says,
23 this company must turn over the documents.

24 MR. LAMKEN: And the SEC staff can do
25 precisely the same thing. In fact, right now they can

1 issue subpoenas without asking the commission for
2 consent. And the -- and the answer is, if you don't
3 like it, you go to the principal officer, and you say,
4 rescind the board's authority -- threaten to rescind the
5 board's authority; this is out of line.

6 And the SEC has broad authority in
7 the public interest to rescind the -- the board's
8 authority to enforce the action, enforce the law in any
9 respect.

10 JUSTICE SCALIA: But you can say the same
11 -- you can say the same thing about Congress. I
12 mean, this is not the kind of control that an executive
13 officer normally is supposed to have over inferior
14 officers; when they do something, you can take away
15 their authority. Congress can do that.

16 MR. LAMKEN: Well, Congress would have to do
17 that by legislation, subject to veto by the President,
18 and in fact this is precisely the type of control that
19 powerful executives regularly exercise. If they don't
20 like the way an inferior is doing something, they can
21 take away that authority, and they can take away their
22 salary as well, which is so close to being fired that I
23 can't see any light between them, frankly, Your Honor.

24 So the board -- the SEC controls whether --
25 what the scope of the board's authority is and its

1 salaries --

2 CHIEF JUSTICE ROBERTS: Is there any
3 other --

4 MR. LAMKEN: -- and it can issue rules
5 requiring start, stop, or obey my commands. And --

6 CHIEF JUSTICE ROBERTS: Is there any other
7 situation in the vast federal bureaucracy, where you
8 have this two-level situation that we have here?

9 MR. LAMKEN: Oh --

10 CHIEF JUSTICE ROBERTS: In other words, the
11 President can't remove the SEC commissioners at will.
12 They can't remove the PCAOB commissioners at will. Or
13 even if you look at it from the for-cause perspective,
14 there has to be two layers of "for cause."

15 MR. LAMKEN: Mr. Chief Justice, of course,
16 we view rescinding an officer's authority and paycheck
17 as being exactly like rescinding the officer's position,
18 but if you are going to look at formal removal
19 authority, that exists throughout the United States
20 government. There are 1,100 administrative --

21 CHIEF JUSTICE ROBERTS: What -- well, give
22 me an example.

23 MR. LAMKEN: -- 1,100 administrative law
24 judges, right now, which are for-cause removed operating
25 in independent agencies with for-cause removal by the

1 President. There's the Postal Service's IG's office,
2 with 1,100 employees and 90 offices nationwide,
3 removable for cause by an entity that is removable for
4 cause.

5 We list --

6 JUSTICE KENNEDY: But we are talking -- we
7 are talking about independent or quasi-independent
8 agencies, and I understood Solicitor General Kagan to
9 say that it's quite all right with an independent
10 agency for the President to phone them on an ongoing
11 basis and say, do this, and do that.

12 Do you agree that that's what a President
13 ought to do with an independent agency?

14 MR. LAMKEN: Well, Your Honor, I would
15 think that --

16 JUSTICE KENNEDY: Call them on a routine
17 basis, to supervise what they are doing?

18 MR. LAMKEN: If the -- if the response from
19 the agency falled out -- falled out -- fell outside the
20 range of reasonable policy responses the agency could
21 adopt, then that might amount to inefficiency, neglect,
22 or malfeasance. And the SEC works --

23 JUSTICE KENNEDY: Well, they -- they -- this
24 board has authority to -- to tax those people it
25 regulates, to issue subpoenas, and so forth.

1 MR. LAMKEN: Right.

2 JUSTICE KENNEDY: But this isn't subject to
3 the operations of the President, if he has to go through
4 an independent agency. Are you encouraging the
5 President, on an ongoing, daily basis, to instruct an
6 independent agency what he wants done?

7 MR. LAMKEN: Your Honor, the President has
8 the same control over the SEC's supervision over the
9 board that he has over everything else that falls within
10 the SEC's jurisdiction.

11 JUSTICE SCALIA: Which is nothing, which is
12 nothing.

13 MR. LAMKEN: With --

14 JUSTICE SCALIA: I -- when I was OLC, I
15 would -- I advised the President, you can't interfere
16 with -- I think, if the President called up the FCC and
17 said, I want you to rule this way, I want this kind of a
18 rule from the FCC, I think there would be an impeachment
19 motion in Congress.

20 MR. LAMKEN: But that -- that --

21 JUSTICE SCALIA: Congress set up that agency
22 to be independent from the President. That was the
23 whole purpose of it, wasn't it?

24 MR. LAMKEN: Which is what Humphrey's
25 -- Humphrey's Executor held up -- held up -- upheld

1 that. That is what Humphrey's Executor upheld, but this
2 adds nothing to Humphrey's Executor because the SEC --

3 JUSTICE KENNEDY: No, no, Humphrey's --
4 Humphrey's Executor was not a specific issue. It was
5 just the general qualifications.

6 MR. LAMKEN: I'm sorry. I believe
7 Humphrey's Executor was that he couldn't remove the --
8 the officers --

9 JUSTICE KENNEDY: I -- I --

10 MR. LAMKEN: -- except for cause, and "for
11 cause" --

12 JUSTICE KENNEDY: I -- I understand that.

13 MR. LAMKEN: -- is traditionally understood
14 to be inefficiency, neglect, or malfeasance in office.

15 But this does not depart at all from that
16 standard, because the President has the same control
17 over the SEC that he has over any other independent
18 agency, and the SEC has pervasive control over the
19 board, and it simply makes no sense to say that Congress
20 can give the SEC or an independent agency --

21 CHIEF JUSTICE ROBERTS: The formulation --

22 MR. LAMKEN: -- regulatory authority, but
23 not the ability to choose its --

24 CHIEF JUSTICE ROBERTS: The formulation --
25 excuse me.

1 MR. LAMKEN: I'm sorry.

2 CHIEF JUSTICE ROBERTS: The formulation that
3 you use and your friend the Solicitor General have used
4 -- has used is that they have the same authority that
5 they have over every other independent agency, but I'm
6 -- it's very hard to find out exactly what that
7 authority is.

8 So what is your position about the authority
9 of the President? Is it more than for cause or only
10 for cause?

11 MR. LAMKEN: Our position is the same as the
12 Solicitor General's, because I represent inferior
13 officers whose positions are controlled by the SEC who
14 are principal officers, and their lawyer is the
15 Solicitor General. So --

16 CHIEF JUSTICE ROBERTS: What do you
17 understand that position to be?

18 MR. LAMKEN: The position I understand the
19 Solicitor General to have is that the traditional
20 understanding of the SEC is that it is an independent
21 agency. But --

22 CHIEF JUSTICE ROBERTS: So the President --
23 I guess I'm following up on Justice Kennedy's question
24 -- the President cannot call them and say, take this
25 particular action in this particular case.

1 MR. LAMKEN: I don't think he would be able
2 to enforce that in -- by removal, except --

3 JUSTICE SCALIA: But it's okay for him to
4 ask them? It's okay for him to suggest to an
5 independent regulatory agency that this is how he wants
6 something done?

7 MR. LAMKEN: Justice Scalia, the Treasury
8 Department --

9 JUSTICE SCALIA: Do you know of any instance
10 where that has happened?

11 MR. LAMKEN: -- works closely with the SEC
12 and tells the SEC precisely what it thinks the SEC
13 should do on a regular basis, but the difference is the
14 SEC turns around and can tell the board exactly what it
15 wants the board to do and back it up by taking away
16 their salaries, threatening to rescind the enforcement
17 authority, announcing rules that say you may start,
18 stop, alter investigations upon our direction or the
19 direction of the chief accountant.

20 The control of the SEC over the board is
21 plenary. This Court vindicated --

22 JUSTICE SCALIA: But what does the Treasury
23 Department tell the SEC to do?

24 MR. LAMKEN: Well, it issues
25 recommendations, for example, on how it wants the SEC to

1 handle, for example, international aspects. One of the
2 issues brought up here was the SEC's handling of
3 international things, and that's something that the SEC
4 -- its international bureau coordinates over --

5 JUSTICE SCALIA: It takes the initiative?
6 The SEC doesn't request that information?

7 MR. LAMKEN: Pardon.

8 JUSTICE SCALIA: The SEC does not request
9 that information; the Treasury Department just butts in?
10 Is that it?

11 MR. LAMKEN: It's one -- this is one
12 Executive Branch, Your Honor --

13 JUSTICE SCALIA: I understand, but --

14 MR. LAMKEN: -- and they work closely
15 together --

16 JUSTICE SCALIA: I understand, but --

17 MR. LAMKEN: -- and I can't tell you exactly
18 how they work, but --

19 JUSTICE SCALIA: It's one thing for the SEC
20 to ask the Treasury Department's view. It's another for
21 the Treasury Department to butt in. Does it butt in?

22 MR. LAMKEN: I -- I do believe that -- that
23 other agencies do butt in all the time, and the question
24 is --

25 JUSTICE BREYER: What's the reason --

1 MR. LAMKEN: -- what's the control?

2 JUSTICE BREYER: What is the reason for
3 this? Having read this enlightening opinion of Justice
4 Scalia in Freytag, which is enlightening to me if I've
5 read it correctly, I would say that the question --
6 there are two separate questions.

7 One question is: What is a department? And
8 this might well fit within that.

9 And the second question, which is separate
10 but mixed up in the cases, but not his, is: When is it
11 constitutional for Congress to limit the President in
12 his ability to dismiss a -- an officer of the United
13 States or -- inferior or superior -- for cause?

14 And -- and what's -- if you can answer it,
15 what are the justifications here for imposing that
16 requirement?

17 MR. LAMKEN: I think the first half is,
18 What's a department? And the answer --

19 JUSTICE BREYER: I'm not interested in that.

20 MR. LAMKEN: Okay.

21 JUSTICE BREYER: I'm interested in -- I'm
22 developing --

23 MR. LAMKEN: The justifications for the
24 limitations on the removal of the officers of the board?

25 JUSTICE BREYER: That's right.

1 MR. LAMKEN: Right. And the answer to that
2 is that these are the standard limitations -- the
3 standard removal provisions that exist throughout the
4 financial area where the SEC has a subordinate entity
5 under its control, and Congress presumed that because
6 the SEC's -- the SEC's control was so pervasive, it
7 didn't need to go back and revisit those standard
8 removal provisions, because -- precisely because -- the
9 SEC has power to rescind the board's enforcement
10 authority, establish rules requiring it to obey
11 commands, disobedience of which would be grounds for
12 removal, to withdraw the salaries.

13 The control is so pervasive that these
14 removal provisions did not have to be reconsidered. And
15 from the board's perspective, they're just another means
16 of control, one that actually taints them, as Shurtleff
17 points out, with having committed misconduct.

18 Thank you, Your Honor.

19 CHIEF JUSTICE ROBERTS: Thank you, Mr.
20 Lamken.

21 Mr. Carvin, to keep the time even here, you
22 have 8 minutes.

23 REBUTTAL ARGUMENT OF MICHAEL A. CARVIN

24 ON BEHALF OF THE PETITIONERS

25 MR. CARVIN: The first thing I'd like to

1 address is the Solicitor General's syllogism that
2 because the President can control the SEC, somehow he
3 can control those whom the SEC regulates.

4 Well, the New York Stock Exchange has
5 exactly the same relationship as the -- with the SEC as
6 does the board, and no one would argue, I don't think,
7 that he has any power -- the President, that is -- to
8 direct and supervise the New York Stock Exchange. In
9 response to your question, Justice Alito, he couldn't
10 complain about the excessive salary of Mr. Grasso at the
11 New York Stock Exchange.

12 I'd also like to knock down this myth --

13 JUSTICE GINSBURG: But there is -- there is
14 -- it was working okay with the Stock Exchange. It
15 wasn't working okay with the accountants.

16 And there's a problem. There's a problem
17 that Congress had to solve. It wanted to tighten the
18 oversight of the auditing function. And they wanted to
19 have people who were not beholden to the profession, but
20 who were knowledgeable and could command high salaries
21 to be doing this job.

22 MR. CARVIN: No, that's entirely true,
23 Justice Ginsburg, and the point is they could have
24 accomplished all that and made the board members
25 appointed and removable by the President, if -- if --

1 JUSTICE GINSBURG: How about if they --
2 would it work if the board members were proposed by the
3 SEC, by SEC commissioners, subject to the approval
4 of the President? Would that be --

5 MR. CARVIN: Well, I -- no, because the word
6 "approval," as earlier colloquy has suggested, is --

7 JUSTICE GINSBURG: But the nominee would be
8 -- by a nomination. The names would be presented.

9 MR. CARVIN: The President needs the
10 unfettered ability to appoint principal officers, not to
11 have some subordinate agency tell him who he can
12 appoint. That would be a severe restriction, far
13 greater, for example, than was at issue in Public
14 Citizen. And that's essentially my point.

15 JUSTICE GINSBURG: So, you --

16 MR. CARVIN: They can't give you -- I'm
17 sorry.

18 JUSTICE GINSBURG: You were -- I'm sorry,
19 then. I interrupted you, but I wanted you to give me
20 your full picture of how this could be done, how
21 Congress could accomplish its goal of having a strong,
22 effective oversight body?

23 MR. CARVIN: In the same way they have
24 strong, effective oversight of the communications
25 industry and what the FTC does and the SEC. Just follow

1 the model for independent agencies that has been used
2 for over a hundred years. You make them appointed by
3 the President, removable by the President, and the
4 President gets to designate the chairman. The --

5 JUSTICE GINSBURG: So it would be totally
6 separate. Then you would -- you'd say it would have to
7 be a totally separate independent regulatory agency. It
8 could not be put under the wing of the SEC.

9 MR. CARVIN: You could have exactly the same
10 relationship between the SEC and this agency, which I
11 think is not under the wing of the SEC now. The only
12 difference is, instead of having the commissioners
13 appoint them and remove them, you'd have the President
14 appoint them and remove them.

15 CHIEF JUSTICE ROBERTS: Well, I would have
16 -- Judge Kavanaugh has suggested there are two ways to
17 cure this problem: One, have the President appoint and
18 remove; and the other thing, make it truly subordinate
19 to the SEC. Now, I've heard the argument on the other
20 side, both from the government -- well, it's an issue
21 with the government -- the Solicitor General and the
22 board, that the agency, the board, is completely
23 subordinate to the SEC.

24 Well, if Congress -- Congress could fix this
25 problem by saying: The board is subordinate to the SEC.

1 MR. CARVIN: So why have they created any
2 independence if they really wanted them to be
3 subordinate? And I really want to deal with that.

4 This notion that they could pass rules to
5 govern the investigative activities of the board is a
6 myth. The attorney general in Morrison had the ability
7 to promulgate rules for prosecution, but he couldn't
8 tell Alexia Morrison how to proceed in that individual
9 case. He couldn't say: Anything she does with respect
10 to Mr. Olsen, I need to pre-approve.

11 Why? Because the independent counsel, under
12 that statute, had the prosecutorial authority. Under
13 this statute, the board has the prosecutorial authority,
14 and everyone knows you can't govern the kind of manifold
15 decisions that prosecutors need to make through some
16 kind of bulky notice-and-comment rulemaking. And that
17 is why it is utterly mythical to pretend that they have
18 this power.

19 Justice Scalia, we assume that people
20 exercise the powers they have, removal and the like. We
21 don't assume that they exercise powers that they don't
22 have simply because they can theoretically get it. What
23 if the statute said the SEC --

24 JUSTICE SCALIA: Say it again --

25 MR. CARVIN: Okay. Let's --

1 JUSTICE SCALIA: We don't assume that they
2 --

3 MR. CARVIN: That they have powers they
4 don't have simply because they can reach out and get it.

5 So let's assume the statute here said the
6 SEC could transfer the board's powers to the Treasury
7 instead of the SEC. Would we assume -- would we analyze
8 this case as if the Treasury was conducting the board's
9 powers simply because the SEC had the theoretical
10 ability to transfer it?

11 This Court has emphasized countless times
12 that you analyze separation of powers cases with respect
13 to the practical consequences, as *Mistretta* said it; as
14 *Plaut* said it, with respect to bright lines and high
15 walls; and as *Airport Authority* said it, with great
16 skepticism of Congress's subtle encroachments. You
17 don't create fictional realities which allow severe
18 usurpations of executive authority on the basis of
19 fictional --

20 JUSTICE GINSBURG: We don't know -- we don't
21 know what's fictional and what is not here, because you
22 came in, and you don't have a particular case.

23 MR. CARVIN: I do have --

24 JUSTICE GINSBURG: Do you have another
25 instance where Congress set up a scheme, and without

1 having a particular case of an individual who has been
2 hurt, you come in and say: We might sometime be hurt by
3 this, so we want the whole thing knocked down in the
4 absence of any concrete case.

5 MR. CARVIN: Justice Ginsburg, we know
6 exactly what the SEC and the Solicitor General think
7 about the interrelationship of the Constitution and the
8 statute, because they have expressed it in briefs from
9 the district court on up.

10 I am saying that even if you bend over
11 backwards to give them this power under the statute,
12 what you can't do is pretend that they have exercised
13 this power under the statute. The first might be a
14 doctrine of statutory construction. The second is
15 deciding separation of powers cases on the basis of
16 a fictional world that doesn't really exist.

17 And I would suggest that that would give
18 Congress an extraordinary blueprint for using the board
19 as a model for each and every executive department.
20 What would stop them tomorrow from transferring the
21 Transportation and Labor and Energy Departments to a
22 private corporation like the board, and creating some
23 bipartisan commission that's going to oversee this
24 board with these fictional hypothetical realities?

25 If this Court endorses this scheme, they

1 have literally offered no limiting principle why that
2 couldn't be applied to each and every executive
3 function. To the contrary, they have emphasized that
4 there is no constitutional distinction between alter
5 egos and these independent commissions, and they have
6 sought to justify this scheme on the basis of cases
7 involving poor executive functions, Perkins and
8 Morrison. So, again --

9 JUSTICE GINSBURG: If we took away -- I
10 mean, one big point was the double for-cause. So let's
11 say we have said that the SEC could fire board members,
12 period. Then that would remove the double for-cause.
13 Would this statute then be constitutional?

14 MR. CARVIN: Well, I don't think you can
15 sever that provision from the statute, because I
16 don't -- I think you'd be rewriting the statute and
17 re-striking the balance that Congress did. Moreover, of
18 course, it wouldn't solve the Appointments Clause
19 problem because, again, these are principal officers not
20 appointed by the President, and even if they are
21 inferior officers, the SEC is not a department. So --

22 JUSTICE GINSBURG: So, it's not the double
23 for -- the double for-cause isn't, in your judgment,
24 what sinks this statute?

25 MR. CARVIN: Well, no. It is a very

1 serious -- yes, it is on my view absolutely dispositive
2 of why the statute is no good. I'm saying merely fixing
3 that will not fix the entire statute, because in
4 addition to removal problems, we have very serious
5 appointment problems under the appointments clause --

6 JUSTICE STEVENS: May I ask one -- one
7 narrow question? If we assume that the members of the
8 board are inferior officers, and if we -- do -- would
9 you agree that if the board had unrestricted power to
10 discharge them at will, the statute would be
11 constitutional?

12 MR. CARVIN: Your -- I'm -- I'm to assume
13 that the Appointments Clause problem -- if they are
14 inferior officers, again, I have an Appointments Clause
15 problem, because they are appointed by somebody who is
16 not department head, i.e., the SEC commissioner.

17 Do you want me to take that out and assume
18 that that's okay as well?

19 JUSTICE STEVENS: Yes.

20 MR. CARVIN: Okay. So, if we are looking at
21 it strictly from a separation of powers perspective, it
22 is true that eliminating the for-cause removal provision
23 goes a long way towards fixing the problem, but it
24 doesn't go all the way and for one reason, which is we
25 think the SEC imposes -- is at the outermost limits of

1 constitutional acceptability. And so, unless the
2 President has the same control over the officers that he
3 has over the SEC, it would not be good.

4 JUSTICE STEVENS: But your answer to my
5 question is that even if they are inferior officers and
6 the other conditions have been met, if the Commission
7 had unrestricted power of removal, the statute would
8 still be unconstitutional.

9 MR. CARVIN: Principally because they are
10 not subject --

11 JUSTICE STEVENS: The answer is yes is what
12 I just --

13 MR. CARVIN: I'm sorry. Yes, Your Honor.
14 May I just --

15 JUSTICE STEVENS: Yes. Sure.

16 MR. CARVIN: They are not subject to the
17 chairman's control, unlike the SEC general counsel, and
18 they have statutory duties entirely distinct from the
19 commission. unlike the SEC general counsel.

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.

21 The case is submitted.

22 (Whereupon, at 11:13 a.m., the case in the
23 above-entitled matter was submitted.)

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