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1 P R O C E E D I N G S

2 (10:03 a.m.)

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

7 Mr. Carvin.

8 ORAL ARGUMENT OF MICHAEL A. CARVIN

9 ON BEHALF OF THE PETITIONERS

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

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

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

21 JUSTICE GINSBURG: Why do you call it an
22 independent regulatory agency? I mean, Congress wanted
23 it to be independent of the profession. That much is
24 clear. It didn't want it to be independent of the SEC,
25 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 Tax Court.

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 know. I'm not interested
4 in that. 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.

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 agree with that, but
5 I mean, you do agree. I thought an independent agency
6 is a function of a number of different things: where
7 it is on the chart, what people's customs have grown up
8 to, expectations about it --

9 MR. CARVIN: And I will --

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

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

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

16 MR. CARVIN: Well --

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

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

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

25 MR. CARVIN: Well --

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

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

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

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

18 (Laughter.)

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

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

23 MR. CARVIN: Yes, because --

24 JUSTICE BREYER: If an executive appointee
25 who is a superior officer of the United States appoints

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

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

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

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

24 MR. CARVIN: Yes.

25 JUSTICE SCALIA: Thank you.

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

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

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

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

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

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

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

25 JUSTICE SCALIA: I hope your case doesn't

1 rest on Freytag.

2 (Laughter.)

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

7 (Laughter.)

8 CHIEF JUSTICE ROBERTS: And the brief.

9 (Laughter.)

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

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

1 over the people appointed to this board --

2 JUSTICE GINSBURG: Does that mean, Mr.

3 Carvin, that the SEC cannot appoint heads of -- heads of
4 its divisions? I assume that they would fit within the
5 characterization "inferior officers."

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

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

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

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

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

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

22 MR. CARVIN: Yes.

23 JUSTICE GINSBURG: -- that the head of the
24 department can appoint? So who can appoint such people
25 in the FEC, the FTC, the FCC, and so on?

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

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

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

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

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

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

23 JUSTICE SCALIA: Oh. Oh, I see.

24 MR. CARVIN: And the argument for them being
25 employees that the board has advanced is that they're --

1 that they're --

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

4 (Laughter.)

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

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

10 MR. CARVIN: Merely employees.

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

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

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

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

21 JUSTICE SCALIA: That would be a shame.

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

25 JUSTICE BREYER: Does the chairman serve as

1 a chairman for a fixed term?

2 MR. CARVIN: Not as chairman.

3 JUSTICE BREYER: No? Okay.

4 MR. CARVIN: He just has --

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

8 MR. CARVIN: Not --

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

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

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

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

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

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

25 JUSTICE BREYER: Okay.

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

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

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

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

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

1 of its work product, whereas the appeals court judges in
2 Edmond, all of their work product was subject to review.

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

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

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

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

22 And since it is an agency that has its own
23 revenue sources, its own statutory authority, it has to
24 be an agency composed of principal officers. Elsewise
25 very powerful agencies, including the CIA, for example,

1 would be considered inferior officers simply because in
2 an organizational chain they report to some others.

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

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

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

15 MR. CARVIN: Thank you.

16 CHIEF JUSTICE ROBERTS: General Kagan.

17 ORAL ARGUMENT OF GEN. ELENA KAGAN

18 ON BEHALF OF THE RESPONDENT UNITED STATES

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

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

1 control over the Accounting Board.

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

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

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

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

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

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

25 CHIEF JUSTICE ROBERTS: No. I thought the

1 employees were appointed by the chairman, not by the
2 commission.

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

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

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

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

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

18 GENERAL KAGAN: -- of its staff.

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

23 GENERAL KAGAN: The SEC has full control
24 over the investigative and inspection function of the
25 board. This was what Mr. Carvin -- was the one thing

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

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

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

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

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

22 GENERAL KAGAN: And I think that the SEC has
23 both. It certainly has the authority to take away
24 responsibility from the Accounting Board. The
25 rescission provision in 7217 makes that completely

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

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

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

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

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

23 GENERAL KAGAN: I think it is important,
24 Mr. Chief Justice, and I think that there were a few
25 reasons. First, Congress wanted to make sure that this

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

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

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

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

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

1 basic civil service laws regarding salary and so forth.

2 So, this was a way to -- to have both.

3 And it was also, I think --

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

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

23 And further, as I said before, that the SEC
24 can reach further back into the process and say, not
25 only do we have this kind of veto authority over any

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

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

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

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

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

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

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

1 grant that subpoena and whether to allow the kind of
2 investigation that the board wants.

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

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

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

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

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

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

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

1 the board's requests.

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

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

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

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

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

24 GENERAL KAGAN: Well, that's exactly right.
25 Any sanction, any final inspection --

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

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

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

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

17 JUSTICE SCALIA: No, that's --

18 JUSTICE ALITO: Well, why is that --

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

21 GENERAL KAGAN: And --

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

25 GENERAL KAGAN: Well, it's the commissioners

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

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

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

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

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

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

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

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

23 GENERAL KAGAN: I think he does everything
24 that he would do with respect to any other SEC function,
25 is that he or some member of his staff would call the

1 chair or would call other commissioners and say: I have
2 a problem with this.

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

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

7 (Laughter.)

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

10 JUSTICE SCALIA: I could do that.

11 (Laughter.)

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

16 CHIEF JUSTICE ROBERTS: Yes, yes.

17 GENERAL KAGAN: That's a 70-year-old
18 precedent.

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

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

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

7 (Laughter.)

8 GENERAL KAGAN: But -- but --

9 JUSTICE SCALIA: I did, I did.

10 (Laughter.)

11 GENERAL KAGAN: But this in --

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

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

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

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

24 CHIEF JUSTICE ROBERTS: All right. So there
25 is a limitation there. For cause does not include

1 failure to follow the policies of the President.

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

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

7 GENERAL KAGAN: I think --

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

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

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

1 remove the SEC commissioners, all of them, not just --
2 not just the chairman, and he can only do that for
3 cause.

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

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

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

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

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

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

25 CHIEF JUSTICE ROBERTS: Can they say --

1 GENERAL KAGAN: -- they can remove them.

2 CHIEF JUSTICE ROBERTS: -- you are fired?

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

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

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

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

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

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

23 CHIEF JUSTICE ROBERTS: He thinks -- he
24 thinks they -- the board should be getting the documents
25 from the other company, and the SEC thinks they can't.

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

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

7 CHIEF JUSTICE ROBERTS: Right.

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

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

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

16 CHIEF JUSTICE ROBERTS: Right. And then --

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

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

23 GENERAL KAGAN: You always have to rely on
24 the SEC to do anything, to supervise anybody in its
25 field of operations, whether it's the SEC's own staff or

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

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

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

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

19 JUSTICE BREYER: Well, what do -- what do
20 you say in response to their formal argument that heads
21 of departments are those people whom the President has
22 at-will control over, like the Secretary of Defense, and
23 Freytag is support for that. And these aren't those
24 people, so the SEC's members must be inferior officers,
25 and the Constitution says nothing about and implicitly

1 forbids inferior officers from appointing other inferior
2 officers beneath them.

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

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

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

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

21 JUSTICE BREYER: I see.

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

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

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

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

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

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

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

25 GENERAL KAGAN: Well, I think that the

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

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

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

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

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

22 JUSTICE SCALIA: Well, that's something
23 quite different. He makes the appointments. They can
24 overturn it, but the appointment must be made by the
25 head of the department, and the appointments are not

1 made by the commissioners. They are made by the
2 chairman.

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

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

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

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

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

22 CHIEF JUSTICE ROBERTS: Thank you, General.

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

25 CHIEF JUSTICE ROBERTS: Mr. Lamken.

1 ORAL ARGUMENT OF JEFFREY A. LAMKEN
2 ON BEHALF OF THE RESPONDENTS PUBLIC
3 COMPANY ACCOUNTING OVERSIGHT BOARD, ET AL.

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

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

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

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

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

22 MR. LAMKEN: Independent of the
23 congressional appropriations process, not independent of
24 the SEC. Section 7219 is clear as water that the SEC
25 controls the board budget, and the SEC in fact has used

1 that control to regulate down to the level of the board
2 members' salaries.

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

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

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

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

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

25 And so, yes, I think that's actually not an

1 uncommon feature, but the most -- but the most critical
2 aspect of this is, here, as in every other context, it
3 is the judgment and the decision of the SEC that
4 controls.

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

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

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

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

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

23 MR. LAMKEN: And the SEC staff can do
24 precisely the same thing. In fact, right now they can
25 issue subpoenas without asking the commission for

1 consent. And the -- and the answer is, if you don't
2 like it, you go to the principal officer, and you say,
3 rescind the board's authority -- threaten to rescind the
4 board's authority; this is out of line.

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

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

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

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

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

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

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

8 MR. LAMKEN: Oh --

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

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

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

22 MR. LAMKEN: -- 1,100 administrative law
23 judges, right now, which are for-cause removed operating
24 in independent agencies with for-cause removal by the
25 President. There's the Postal Service's IG's office,

1 with 1,100 employees and 90 offices nationwide,
2 removable for cause by an entity that is removable for
3 cause.

4 We list --

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

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

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

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

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

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

25 MR. LAMKEN: Right.

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

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

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

12 MR. LAMKEN: With --

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

19 MR. LAMKEN: But that -- that --

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

23 MR. LAMKEN: Which is what Humphrey's
24 -- Humphrey's Executor held up -- held up -- upheld
25 that. That is what Humphrey's Executor upheld, but this

1 adds nothing to Humphrey's Executor because the SEC --

2 JUSTICE KENNEDY: No, no, Humphrey's --

3 Humphrey's Executor was not a specific issue. It was
4 just the general qualifications.

5 MR. LAMKEN: I'm sorry. I believe

6 Humphrey's Executor was that he couldn't remove the --
7 the officers --

8 JUSTICE KENNEDY: I -- I --

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

11 JUSTICE KENNEDY: I -- I understand that.

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

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

20 CHIEF JUSTICE ROBERTS: The formulation --

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

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

25 MR. LAMKEN: I'm sorry.

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

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

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

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

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

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

25 MR. LAMKEN: I don't think he would be able

1 to enforce that in -- by removal, except --

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

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

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

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

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

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

23 MR. LAMKEN: Well, it issues
24 recommendations, for example, on how it wants the SEC to
25 handle, for example, international aspects. One of the

1 issues brought up here was the SEC's handling of
2 international things, and that's something that the SEC
3 -- its international bureau coordinates over --

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

6 MR. LAMKEN: Pardon.

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

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

12 JUSTICE SCALIA: I understand, but --

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

15 JUSTICE SCALIA: I understand, but --

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

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

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

24 JUSTICE BREYER: What's the reason --

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

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

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

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

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

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

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

19 MR. LAMKEN: Okay.

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

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

24 JUSTICE BREYER: That's right.

25 MR. LAMKEN: Right. And the answer to that

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

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

17 Thank you, Your Honor.

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

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

22 REBUTTAL ARGUMENT OF MICHAEL A. CARVIN

23 ON BEHALF OF THE PETITIONERS

24 MR. CARVIN: The first thing I'd like to
25 address is the Solicitor General's syllogism that

1 because the President can control the SEC, somehow he
2 can control those whom the SEC regulates.

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

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

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

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

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

25 JUSTICE GINSBURG: How about if they --

1 would it work if the board members were proposed by the
2 SEC, by SEC commissioners, subject to the approval
3 of the President? Would that be --

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

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

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

14 JUSTICE GINSBURG: So, you --

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

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

22 MR. CARVIN: In the same way they have
23 strong, effective oversight of the communications
24 industry and what the FTC does and the SEC. Just follow
25 the model for independent agencies that has been used

1 for over a hundred years. You make them appointed by
2 the President, removable by the President, and the
3 President gets to designate the chairman. The --

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

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

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

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

25 MR. CARVIN: So why have they created any

1 independence if they really wanted them to be
2 subordinate? And I really want to deal with that.

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

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

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

23 JUSTICE SCALIA: Say it again --

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

25 JUSTICE SCALIA: We don't assume that they

1 --

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

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

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

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

22 MR. CARVIN: I do have --

23 JUSTICE GINSBURG: Do you have another
24 instance where Congress set up a scheme, and without
25 having a particular case of an individual who has been

1 hurt, you come in and say: We might sometime be hurt by
2 this, so we want the whole thing knocked down in the
3 absence of any concrete case.

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

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

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

24 If this Court endorses this scheme, they
25 have literally offered no limiting principle why that

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

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

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

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

24 MR. CARVIN: Well, no. It is a very
25 serious -- yes, it is on my view absolutely dispositive

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

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

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

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

18 JUSTICE STEVENS: Yes.

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

1 President has the same control over the officers that he
2 has over the SEC, it would not be good.

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

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

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

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

14 JUSTICE STEVENS: Yes. Sure.

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

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.

20 The case is submitted.

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

23

24

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