IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FREE ENTERPRISE FUND, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civ. A. No. 06-217 (JR)
	)	
THE PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD, et al.,	)	
	)	
	)	
Defendants.	)	
	)	

MEMORANDUM OF PROPOSED INTERVENOR UNITED STATES IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF UNITED STATES' CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION AND SUMMARY

The United States respectfully submits this memorandum of points and authorities in opposition to plaintiffs' motion for summary judgment and in support of the United States' cross-motion for summary judgment. After a series of devastating accounting scandals, Congress enacted the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, to restore public confidence in the securities markets by, among other things, instituting a new regime to govern public accounting firms. This new regime involved the creation of a new entity, the Public Company Accounting Oversight Board ("PCAOB" or "Board"), subordinate to the Securities and Exchange Commission ("SEC"). Under the statute, the PCAOB is charged with registering public accounting firms, issuing auditing standards, inspecting public accounting firms, and disciplining such firms and their associated persons. All of these functions are subject to the pervasive oversight of the SEC, which also appoints the members of the PCAOB and has authority to remove them for good cause shown. For example, the proposed rules of the PCAOB and, if appealed, its disciplinary sanctions, do not even become effective until after approval by the SEC based on an independent review. Further, the SEC is broadly empowered to relieve, by rule, the PCAOB of any of its enforcement responsibilities.

Plaintiffs challenge the constitutionality of the PCAOB on three grounds. First, under the Appointments Clause of the Constitution, they urge that PCAOB members are "Principal" officers who must be appointed by the President. Alternatively, assuming that Board members are "Inferior" officers, they argue that their appointment by the SEC is not appointment by the "Heads of Departments" within the meaning of the Appointments Clause.

These contentions are without doctrinal foundation. As the Supreme Court has explained, "the term 'inferior officer' connotes a relationship with some higher ranking officer or

officers below the President: Whether one is an 'inferior' officer depends on whether he has a superior." Edmond v. United States, 520 U.S. 651, 662 (1997). The SEC's pervasive oversight authority leaves no doubt of the existence of a "superior/inferior" relationship for purposes of the Appointments Clause, and the degree of oversight is at least as significant as that involved in Edmond itself, where judges of the Coast Guard Court of Criminal Appeals were held to be "Inferior" officers. Plaintiffs similarly err in urging that the SEC should be treated as a headless non-Department. In many crucial respects, the SEC functions analogously to a Cabinet-level agency, and neither the text nor the purpose of the Appointments Clause requires that appointments be made by an individual head rather than by the governing Commissioners as a body.

Plaintiffs' second challenge, brought under the general separation-of-powers principle, fails for many of the same reasons as their Appointments Clause contentions. The SEC's broad and pervasive oversight renders implausible plaintiffs' insistence that the Board, by its nature, impermissibly derogates Executive Branch authority. Their arguments based on the provisions governing removal of Board members fare no better. The Constitution does not require that the President be able to remove "Inferior" officers, such as PCAOB members, directly; such officers may be removed by those who appointed them in the first instance. Nor does a requirement that removal of an "Inferior" officer be for good cause violate the relevant constitutional standards. At bottom, plaintiffs' argument offers little more than a series of unfounded speculations premised on unlikely readings of statutory terms. Their invitation to engage in this type of reasoning should be rejected.

Plaintiffs' third and final challenge is equally without merit. The non-delegation doctrine requires merely that Congress provide an "intelligible principle" in conferring discretionary authority, and the Supreme Court has "found the requisite 'intelligible principle' lacking" on only two occasions, both over seven decades ago. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474 (2001). Plaintiffs fail to distinguish any grant of authority vested in the PCAOB from the dozens of similar grants of authority upheld by the courts.

In sum, if the Court denies defendants' pending motion to dismiss,[1] it should grant the motion of the United States for summary judgment and deny plaintiffs' motion for summary judgment.

STATUTORY BACKGROUND

In 2002, Congress passed and the President signed into law the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745. "The Act adopt[ed] tough new provisions to deter and punish corporate and accounting fraud and corruption, ensure justice for wrongdoers, and protect the interests of workers and shareholders." Statement on Signing the Sarbanes-Oxley Act of 2002, 38 Weekly Comp. of Pres. Docs. 1286 (July 30, 2002). The Act was a response to a series of devastating corporate scandals and implosions in 2001 and 2002 involving Enron, WorldCom, and other publicly traded companies. Many of these scandals involved aggressive and/or fraudulent accounting practices, and in several instances the audit firms were faulted for failing

[1] On June 2, 2006, the United States filed a Statement of Interest in support of defendants' motion to dismiss (dkt. no. 19). The United States continues to believe that this case must be dismissed because, among other things, plaintiffs have failed to bring their claims through the Sarbanes-Oxley Act's exclusive statutory review mechanism. Indeed, we believe that examination of the constitutional issues, as set forth herein, will underscore why pre-merits dismissal is appropriate.

to detect the underlying conduct. As a result, many believed a central body with adequate resources and independence from the profession was needed to oversee the audit profession.[2]

The Sarbanes-Oxley Act incorporated a number of different reforms in a variety of areas. One of its significant components was Title I, which created and installed the PCAOB to fill the previous void in regulation and oversight of public accounting firms. Under the umbrella of the SEC's authority, the PCAOB was vested with the functions of registration of public accounting firms, promulgation of rules and standards relating to public company audits; periodic inspections of registered accounting firms; and investigation and discipline of registered accounting firms. See 15 U.S.C. §§ 7212, 7213, 7214, 7215. In situating the PCAOB as a subordinate body reporting to the SEC, Congress drew on a longstanding model in securities regulation of having specific regulatory functions carried out by industry bodies, known as "self-regulatory organizations" ("SROs"), under the SEC's oversight and supervision. See generally NASD v. SEC, 431 F.3d 803, 804 (D.C. Cir. 2005) ("A statutory system authorizing self-regulatory organizations to act as quasi-governmental agencies in disciplining members for federal securities law violations has existed for almost 70 years.").

The SEC was given overarching supervisory authority over the PCAOB. The SEC appoints the PCAOB's members. 15 U.S.C. § 7211(e)(4)(A). It approves the PCAOB's budget. 15 U.S.C. § 7219(b). Replicating the SEC's authority over the SROs, the statute gives the SEC

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[2] The United States' system of securities regulation depends on the financial statements that publicly traded companies file with the Securities and Exchange Commission ("SEC") being audited by an independent certified public accountant in accordance with generally accepted auditing standards. United States v. Arthur Young & Co., 465 U.S. 805, 810-11 (1984). The Supreme Court has described independent auditors as "public watchdogs" who "owe[] ultimate allegiance to the corporation's creditors and stockholders, as well as to the investing public." Id. at 817-18.

general "oversight and enforcement authority over the Board," including the authority to impose recordkeeping requirements on the PCAOB and to examine those records at any time. 15 U.S.C. § 7217(a) (incorporating 15 U.S.C. §§ 78q(a)(1), (b)(1)). The SEC must approve the conduct of any litigation by the PCAOB. 15 U.S.C. § 7211(f)(1). The PCAOB does not have its own subpoena authority in its investigations; rather, it needs to seek issuance by the Commission of a subpoena. See 15 U.S.C. § 7215(b)(2)(D). Nor may it refer an investigation to the Department of Justice or state attorneys general except pursuant to the direction of the SEC. See 15 U.S.C. § 7215(b)(4)(B)(iii). The PCAOB is required to submit an annual report, including audited financial statements, to the SEC. See 15 U.S.C. § 7211(h).

The SEC is empowered to remove any member of the PCAOB "in accordance with section 7217(d)(3) of this title, for good cause shown before the expiration of the term of that member." 15 U.S.C. § 7211(e)(6). Section 7217(d)(3) provides that the SEC may remove any member of the PCAOB from office if it finds, on the record after notice and an opportunity for a hearing, that the member "(A) has willfully violated any provision of this Act, the rules of the Board, or the securities laws; (B) has willfully abused the authority of that member; or (C) without reasonable justification or excuse, has failed to enforce compliance with any such provision or rule, or any professional standard by any registered public accounting firm or any associated person therewith." 15 U.S.C. § 7217(d)(3). The SEC may also censure PCAOB members for the same reasons and in the same manner. Id.

Moreover, apart from its authority to remove individual PCAOB members outright or censure them for the reasons described above, the SEC is empowered to "censure or impose limitations upon the activities, functions, and operations of the Board" if it finds, on the record

after notice and an opportunity for a hearing, that the PCAOB "(A) has violated or is unable to comply with any provision of this Act, the rules of the Board, or the securities laws, or (B) without reasonable justification or excuse, has failed to enforce compliance with any such provision or rule, or any professional standard by any registered public accounting firm." 15 U.S.C. § 7217(d)(2). And, the SEC "by rule, consistent with the public interest, the protection of investors, and the other purposes of this Act and the securities laws, may relieve the Board of any responsibility to enforce compliance with any provision of this Act, the securities laws, the rules of the Board, or professional standards." 15 U.S.C. § 7217(d)(1).

Further, as previously explained in detail in the United States' Statement of Interest, the statute vests the SEC with specific review power over every final legal action the PCAOB takes. This is accomplished by making the pre-existing framework for SEC review over actions of SROs applicable to the PCAOB, with enhancements that give the SEC even greater power over the PCAOB than it possesses over the SROs. The PCAOB promulgates rules governing auditors of public company financial statements and internal controls and the conduct of public company audits, but all such proposed rules must be approved by the SEC, and do not go into effect until so approved. 15 U.S.C. § 7217(b). Such review includes the rules the PCAOB adopts to govern its own functions such as, for example, rules governing the registration of public accounting firms, 15 U.S.C. § 7212, rules governing the periodic inspections of accounting firms, 15 U.S.C. § 7214, rules governing the investigation, hearing, and disciplinary sanction process, 15 U.S.C.

§ 7215, and rules governing the process of allocating, assessing, and collecting annual support fees, 15 U.S.C. § 7219.[3]

The statute also gives the SEC supervisory authority over the PCAOB's conduct of regular inspections. If a registered accounting firm disagrees with the assessments contained in the PCAOB's final inspection report, after having previously responded to the PCAOB concerning the issues in question, the firm may seek review of the final inspection report by the SEC. 15 U.S.C. § 7214(h)(1)(A). A firm may also seek review if it disagrees with a determination of the Board that criticisms or defects identified in an inspection report have not been addressed to the satisfaction of the Board within 12 months of the date of the inspection report. 15 U.S.C. § 7214(h)(1)(B).

Likewise, any disciplinary sanction that the PCOAB imposes on an accountant must be reported to the SEC, 15 U.S.C. § 7217(c)(1), and is then subject to SEC review either on application of the disciplined person or on the SEC's own motion, 15 U.S.C. § 7217(c)(2) (incorporating 15 U.S.C. § 78s(d)(2)). Unlike the comparable provisions with regard to SEC review of SRO disciplinary sanctions, a PCAOB disciplinary sanction is automatically stayed upon the initiation of SEC review. 15 U.S.C. § 7215(e); compare 15 U.S.C. § 78s(d)(2). The SEC's review of a PCAOB disciplinary sanction is de novo. 15 U.S.C. § 7217(c) (incorporating 15 U.S.C. § 78s(e)(1)). In addition, upon making certain findings the SEC is empowered to

[3] In addition to the SEC's automatic review of all proposed rules of the PCAOB as they come up, the SEC has separate authority at any time to abrogate, delete, or add to the rules of the PCAOB, by rule of the SEC, as it may deem necessary or appropriate "to assure the fair administration of the [PCAOB], conform the rules promulgated by [the PCAOB] to the requirements of title I of the Sarbanes-Oxley Act of 2002, or otherwise further the purposes of that Act, the securities laws, and the rules and regulations thereunder applicable to the [PCAOB]." See 15 U.S.C. § 7217(b)(5) (incorporating by reference 15 U.S.C. § 78s(c)).

"enhance, modify, cancel, reduce, or require the remission of [the] sanction," powers broader than the comparable provision for SROs, which does not include enhancement authority and is triggered by a narrower set of findings. 15 U.S.C. § 7217(c)(3); compare 15 U.S.C. § 78s(e)(2). The SEC's review of PCAOB disciplinary sanctions also applies to any denial by the PCAOB of registration of a public accounting firm, which is treated as a form of disciplinary sanction. See 15 U.S.C. § 7212(c)(2). Thus, between the provisions governing rules, those involving final inspection reports, and those pertaining to disciplinary sanctions, the SEC is vested with review of any final legal action that the PCAOB may take. See generally Statement of Interest of the United States (dkt. no. 19) at 4-8.[4]

Finally, the SEC possesses general rulemaking authority under the Sarbanes-Oxley Act. See 15 U.S.C. § 7202(a) ("The Commission shall promulgate such rules and regulations, as may be necessary or appropriate in the public interest or for the protection of investors, and in furtherance of this Act."). Such general rulemaking authority affords the SEC significant additional means of control over the PCAOB. For example, the SEC could adopt rules that would enable it to take immediate action to require the PCAOB to stop or start a PCAOB inspection, investigation, or disciplinary proceeding. The statute also expressly states that nothing in it detracts from the SEC's pre-existing authority over many of the same matters that are the subject of the PCAOB's work. See 15 U.S.C. § 7202(c).[5] Thus, apart from the formal

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[4] As described more fully in the Statement of Interest, the statute also provides for judicial review of the orders of the SEC approving or disapproving PCAOB rules or disciplinary sanctions. 15 U.S.C. § 78y(a); see generally Statement of Interest at 4-8.

[5] 15 U.S.C. § 7202(c) provides as follows:

(continued...)

legal mechanisms through which the SEC directly exercises oversight over the PCAOB, the SEC fully retains its own authority to engage directly in regulation and oversight of public accounting firms.

ARGUMENT

I. THE PCAOB FULLY COMPORTS WITH THE APPOINTMENTS CLAUSE

The statutory method for appointing the members of the PCAOB is consistent with the Appointments Clause because the members of the PCAOB are Inferior Officers who may be appointed by Heads of Departments, including the SEC.[6] Therefore, plaintiffs' motion for

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[5](...continued)
EFFECT ON COMMISSION AUTHORITY. Nothing in this Act or the rules of the Board shall be construed to impair or limit --

(1) the authority of the Commission to regulate the accounting profession, accounting firms, or persons associated with such firms for purposes of enforcement of the securities laws;

(2) the authority of the Commission to set standards for accounting or auditing practices or auditor independence, derived from other provisions of the securities laws or the rules or regulations thereunder, for purposes of the preparation and issuance of any audit report, or otherwise under applicable law; or

(3) the ability of the Commission to take, on the initiative of the Commission, legal, administrative, or disciplinary action against any registered public accounting firm or any associated person thereof.

[6] A threshold concern in this case is whether the PCAOB is part of the government for Appointments Clause and other constitutional purposes. The statute provides that "[t]he Board shall not be an agency or establishment of the United States Government" and that "[n]o member or person employed by, or agent for, the Board shall be deemed to be an officer or employee of or agent of the Federal Government by reason of such service." 15 U.S.C. § 7211(b). While this provision is entitled to some weight, it is not dispositive for constitutional purposes. Cf. Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 392-93 (1995) (holding that federally created corporation was subject to the restrictions imposed by the First Amendment where the government "creates a corporation by special law, for the furtherance of governmental objectives, (continued...)

summary judgment on this claim should be denied and the United States' cross-motion for summary judgment should be granted.

The Appointments Clause provides in pertinent part:

> [The President] . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const., art. II, § 2, cl. 2. In operation, the Clause divides all "Officers of the United States" into two categories: Principal Officers and Inferior Officers.[7] See United States v. Germaine, 99 U.S. (9 Otto) 508, 509 (1879). Principal Officers must be appointed through nomination by the President with the advice and consent of the Senate. See Buckley v. Valeo, 424 U.S. 1, 132 (1976). However, Congress is permitted to make Inferior Officers appointable by the President alone, Courts of Law, or Heads of Departments. Id.

The members of the PCAOB are appointed by the SEC. See 15 U.S.C. § 7211(e)(4). The constitutional validity of this method of appointment thus involves two questions: (1) whether the members of the PCAOB are Inferior Officers, as opposed to Principal Officers; and (2)

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[6](...continued)
and retains for itself permanent authority to appoint a majority of the directors of that corporation"). The Court need not resolve the question whether the PCAOB is a governmental entity for separation-of-powers purposes, because whether or not it is, the PCAOB is constitutional for the reasons set forth herein.

[7] We capitalize "Principal Officer(s)" and "Inferior Officer(s)" herein to make clear that the terms are used in their specialized constitutional sense.

whether the SEC constitutes a Department with its Commissioners as Head. Both questions should be answered in the affirmative.

A. The Members of the PCAOB Are Inferior Officers

Under the relevant Supreme Court precedents, the members of the PCAOB must be considered Inferior Officers.[8]

"The Constitution does not use the term 'inferior' 'in the sense of petty or unimportant' but in the sense of a subordinate to a principal officer." United States v. Gantt, 194 F.3d 987, 999 (9th Cir. 1999) (quoting Collins v. United States, 14 Ct. Cl. 568, 574 (1878)); see also Edmond v. United States, 520 U.S. 651, 663 (1997) (even Inferior Officers "exercise significant authority pursuant to the laws of the United States"). In Edmond, the Court articulated the standard as follows:

> Generally speaking, the term "inferior officer" connotes a relationship with some higher ranking officer of officers below the President: Whether one is an "inferior" officer depends on whether he has a superior. . . . [W]e think it evident that "inferior officers" are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.

Id. at 662-63. Applying this standard, the Court held in Edmond that civilian judges of the Coast Guard Court of Criminal Appeals were Inferior Officers, and thus could be permissibly appointed by the Secretary of Transportation, because the work of those judges was supervised in two distinct respects. First, the Judge Advocate General for the Coast Guard, a subordinate of the Secretary of Transportation, had administrative oversight over the judges, prescribed the court's

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[8] We assume arguendo that the members of the PCAOB are "Officers of the United States," as opposed to mere employees. If they were only employees, their appointments would plainly be constitutional. See Freytag v. Commissioner, 501 U.S. 868, 880 (1991).

rules of procedure, and could remove a judge from his judicial assignment without cause, albeit not in a manner to influence the outcome of individual proceedings. Id. at 664. Second, the Court of Appeals for the Armed Forces had substantive oversight over the judges' output: they reviewed decisions by the Court of Criminal Appeals (a) involving a death sentence, (b) where the Judge Advocate General ordered such review, or (c) where the court granted review upon petition of the accused. Id. at 665. That such review was less than plenary and did not include reassessment of factual matters was of no moment; rather, "[w]hat is significant is that the judges of the Court of Criminal Appeals have no power to render a final decision on behalf of the United States unless permitted to do so by other Executive Officers." Id.

Under Edmond, the members of the PCAOB are Inferior Officers because "their work is directed and supervised at some level," indeed, comprehensively, by the SEC, the members of which "were appointed by Presidential nomination with the advice and consent of the Senate." Edmond, 520 U.S. at 663. The SEC has review power over every final legal action the PCAOB takes. Indeed, the PCAOB's rules and, if appealed, disciplinary sanctions do not even go into effect without SEC approval. See 15 U.S.C. § 7215(e) (disciplinary sanctions); 15 U.S.C. § 7217(b)(2) (rules). Thus, as in Edmond, the PCAOB members "have no power to render a final decision on behalf of the United States" unless permitted by the SEC. Edmond, 520 U.S. at 665. Moreover, the SEC approves the PCAOB's budget, has general "oversight and enforcement authority" over the Board, including authority to impose recordkeeping requirements on the PCAOB and to examine the PCAOB's records, and must approve the conduct of any litigation by the PCAOB. 15 U.S.C. §§ 7211(f)(1), 7217(a) (incorporating 15 U.S.C. § 78q(a)(1), (b)(1)), 7219(b). In conducting investigations, the PCAOB lacks its own subpoena authority and is

limited to applying to the SEC for a subpoena "in a manner established by the Commission," 15 U.S.C. § 7215(b)(2)(D), and is obligated to notify the Commission of any pending PCAOB investigation involving a potential violation of the securities laws and thereafter coordinate as necessary to protect any parallel SEC investigation, id. § 7215(b)(4)(A). The SEC can "relieve the Board of any responsibility to enforce compliance with any provision of this Act, the securities laws, the rules of the Board, or professional standards," 15 U.S.C. § 7217(d)(1), and can "censure or impose limitations upon" its "activities, functions, and operations," 15 U.S.C. § 7217(d)(2). And, significantly, the SEC has authority under the Sarbanes-Oxley Act to make its own rules "as may be necessary or appropriate in the public interest or for the protection of investors, and in furtherance of this Act," 15 U.S.C. § 7202(a), which would enable it adopt rules providing an even greater degree of control over PCAOB activities than directly under the statute.

Indeed, the level of supervision exercised by the SEC over the PCAOB not only meets, but exceeds, the level of supervision exercised over the Coast Guard judges deemed sufficient in Edmond. Whereas the Court of Appeals for the Armed Forces reviewed only a subset of decisions of the Coast Guard judges, Edmond, 520 U.S. at 665-66, the SEC reviews all PCAOB rules and all appealed PCAOB disciplinary sanctions, as well as final PCAOB inspection reports if duly challenged. See 15 U.S.C. § 7217(b), (c); 15 U.S.C. § 7214(h). Moreover, the SEC's standard of review is significantly more probing than the Court of Appeals for the Armed Forces' standard of review of decisions of the Coast Guard Court of Criminal Appeals.[9] Indeed, the D.C.

[9] To the extent plaintiffs question the SEC's standard of review of PCAOB actions, that would only militate in favor of requiring plaintiffs' claims to be brought through the exclusive (continued...)

Circuit recently described the SRO-review scheme, which the Sarbanes-Oxley Act incorporates and applies to the PCAOB (with some modifications that make SEC review of PCAOB sanctions even more rigorous), as follows:

> The congressional scheme, in short, establishes a system in which the Commission not only closely supervises and approves the processes by which NASD brings disciplinary action, but in which the Commission fully revisits the issue of liability, and can completely reject or modify NASD's decision as it deems appropriate. NASD's disciplinary process essentially supplants a disciplinary action that might otherwise start with a hearing before an ALJ. And NASD's authority to discipline its members for violations of federal securities law is entirely derivative. The authority it exercises ultimately belongs to the SEC, and the legal views of the self-regulatory organization must yield to the Commission's view of the law.

NASD v. SEC, 431 F.3d 803, 806 (D.C. Cir. 2005) (emphasis added). The Court of Appeals repeatedly used the word "plenary" to characterize the review of the SEC over "adjudications conducted by self-regulatory organizations like NASD." Id. at 807, 808; see also, e.g., Gold v. SEC, 48 F.3d 987, 990 (2d Cir. 1995) (interpreting same statutory scheme as providing for de novo SEC review of disciplinary sanctions imposed by the New York Stock Exchange); Shultz v. SEC, 614 F.2d 561, 568 (7th Cir. 1980) ("In reviewing a decision of the Exchange, the Commission makes a de novo determination of the facts and the law."); compare Edmond, 520 U.S. at 665 ("so long as there is some competent evidence in the record to establish each element of the offense beyond a reasonable doubt, the Court of Appeals for the Armed Forces [would] not

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[9](...continued)
review mechanism in the statute, which would give the Court a concrete record to show how the SEC conducted its review in a particular case. See generally Statement of Interest of the United States (dkt. no. 19).

reevaluate the facts").[10] The SEC's supervision is also enhanced by the fact that all aspects of supervision, as well as appointment power, are concentrated in the SEC, whereas in Edmond, supervision of the work of the Coast Guard Court of Criminal Appeals judges was split between the Judge Advocate General for the Coast Guard and the Court of Appeals for the Armed Forces, and appointment power was vested in a third actor, the Secretary of Transportation. Thus, to an even greater extent than the Coast Guard Court of Criminal Appeals judges, the PCAOB is supervised by superior officers.

Plaintiffs' assertion that "the breadth and independence of PCAOB Members is indistinguishable from the commissioners or members of other U.S. agencies with extensive regulatory powers over specialized subject matters," such as the Federal Communications Commission, Consumer Product Safety Commission, Federal Trade Commission, and others (Pls' Mem. at 34 & n.8) rings hollow. The distinctions are many and obvious. None of those agencies is subordinate to a supervising agency that may at any time rescind its enforcement

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[10] Moreover, the SEC is not limited to affirming or reversing the PCAOB's disciplinary sanction; rather, its broad remedial powers include the ability to "enhance, modify, cancel, reduce, or require the remission" of such a sanction. 15 U.S.C. § 7217(c)(3). Further, the statute gives the SEC various other tools for exerting its supervisory control over the PCAOB, from its authority to abrogate, delete, or add to the PCAOB's rules as it deems necessary or appropriate, 15 U.S.C. § 7217(b)(5), to its power to "relieve the Board of any responsibility to enforce compliance with any provision," 15 U.S.C. § 7217(d)(1), to its ability to "impose limitations upon the activities, functions, and operations of the Board," 15 U.S.C. § 7217(d)(2), to its approval power over the PCAOB's budget, 15 U.S.C. § 7219(b), to its general rulemaking authority under the Sarbanes-Oxley Act, 15 U.S.C. § 7202(a). Such capacious authority reinforces that the PCAOB members are Inferior Officers. Cf. United States v. Nixon, 418 U.S. 683, 696 (1974) (stating that the Special Prosecutor was a "subordinate office[r]" because the President or the Attorney General could have removed him at any time, if by no other means than amending or revoking the regulations defining his authority); In re Sealed Case, 829 F.2d 50, 56 (D.C. Cir. 1987) (noting that the Attorney General could rescind the regulation that delegated the Independent Counsel his authority and "thereby abolish[] the Office of the Independent Counsel: Iran/Contra").

authority in whole or in part. None of those agencies must send its rules and challenged disciplinary sanctions for review by a supervising agency in order for such actions to take effect. None of those agencies is subject to being censured or having limitations imposed upon its activities, functions, and operations by a supervising agency. Equally without foundation is plaintiffs' insistence that Edmond rested on the Judge Advocate General's "ongoing, day-to-day" supervision of "significant daily oversight" of the Coast Guard judges. See Pls' Mem. at 29, 31, 32. Edmond is devoid of any such characterization, which is also belied by the statute the Court cited to describe the relationship. See Edmond, 520 U.S. at 664 (supervision consisted of (a) authority to prescribe rules of procedure, (b) authority to consult with other JAGs to formulate court-martial policies and procedures, and (c) removal power); 10 U.S.C. § 866(f).

In both Edmond and the instant case, the officers in question are removable by officials subordinate to the President. It is true that the members of the PCAOB are removable for "good cause shown," 15 U.S.C. § 7211(e)(6), while in Edmond, the Coast Guard Court of Criminal Appeals judges could be removed by the Judge Advocate General from their judicial assignment without cause (although such removal could not be used "to influence . . . the outcome of individual proceedings"), see Edmond, 520 U.S. at 664. This distinction, however, is not controlling because removal without cause is not a sine qua non for Inferior Officer status. In Morrison v. Olson, 487 U.S. 654 (1988), all of the participating Justices agreed on this proposition; even Justice Scalia, in dissent, apparently would have considered the independent counsel an Inferior Officer if, even though removable only for good cause, she had been subject to the Attorney General's supervision in the conduct of her duties. See id. at 723-24 & n.4 (Scalia, J., dissenting); compare id. at 671 (majority opinion); see also United States v. Perkins,

116 U.S. 483, 484-85 (1886). The scope of removal power is simply one factor relevant to whether the officer is "directed and supervised at some level" by Presidential appointees. See Edmond, 520 U.S. at 663.[11] Here, in light of all of the features of the statute that overwhelmingly and cumulatively demonstrate plenary control by the SEC over the PCAOB, the PCAOB members are plainly Inferior Officers.

B. Congress May Vest Power to Appoint Inferior Officers in the SEC

Because the members of the PCAOB are Inferior Officers, Congress was permitted to vest their appointment "in the President alone, in the Courts of Law, or in the Heads of Departments." The statute clearly complies with this provision because the SEC is a Department, with the Commissioners as its Head or Heads. Plaintiffs challenge this conclusion, arguing that (1) the SEC is not a Department, and (2) a Head of a Department can only be an individual and therefore the Commissioners together cannot be a Head. Neither argument withstands scrutiny.

1. The SEC clearly is a Department within the meaning of the Appointments Clause. The word "Department" as used in the Appointments Clause "has reference to the subdivision of the power of the Executive into departments, for the more convenient exercise of that power."

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[11] We recognize that in Morrison, the Court looked at a set of considerations that varied somewhat from those in Edmond in concluding that the independent counsel under the Ethics in Government Act of 1978 was an Inferior Officer. 487 U.S. at 671-72 (considering that (1) she was subject to removal by a higher officer; (2) she performed only limited duties, (3) her jurisdiction was narrow, and (4) her tenure was limited). In Edmond, however, the Court clarified that these four factors were geared to the specific situation in Morrison and were not intended as universal criteria to govern every future Appointments Clause analysis. See Edmond, 520 U.S. at 661-62 ("Morrison did not purport to set forth a definitive test for whether an office is 'inferior'"). For example, the fact that the third and fourth Morrison factors did not describe Coast Guard Court of Criminal Appeals judges did not cause the Edmond Court any hesitation in concluding that such judges were Inferior Officers. Id. at 661.

enforce compliance with any provision of this Act, the securities laws, the rules of the Board, or professional standards." 15 U.S.C. § 7217(d)(1); see also 15 U.S.C. § 7217(d)(2) (empowering SEC to "censure or impose limitations upon the activities, functions, and operations of the Board" in certain other circumstances). Thus, the SEC could withdraw enforcement authority, in a class of cases or even a particular case, if it believed in the exercise of its regulatory oversight that the PCAOB was being too aggressive or not aggressive enough in its inspections, investigations, or disciplinary proceedings. The SEC also has the ability, either through an amendment of the PCAOB's rules, see 15 U.S.C. § 7217(b)(5), or by promulgating its own rules under its general authority, see 15 U.S.C. § 7202(a), to direct the PCAOB to notify it about preliminary matters such as the institution of particular inspections, investigations, or disciplinary proceedings, and require the SEC's advance approval in order for the PCAOB to initiate or cease such an undertaking.[20]

This extensive power of the SEC to supervise and control the PCAOB's activities on a number of fronts refutes plaintiffs' depiction of the PCAOB as a rogue agency exercising unchecked power, even without taking into account the SEC's power to remove members of the PCAOB. Plaintiffs generally challenge the adequacy of the various mechanisms through which the SEC has supervisory authority over the PCAOB. See Pls' Mem. at 26-28. But these attacks are not only misguided coming from plaintiffs who have circumvented those very mechanisms and thereby eluded any concrete test of their adequacy, they also are legally flawed. For instance, plaintiffs decry the SEC's lack of "day-to-day" oversight of the PCAOB activities, complain that

[20] Moreover, the PCAOB's enforcement authority is not exclusive and is not in derogation of the SEC's own enforcement authority. See 15 U.S.C. § 7202(c).

which would include, of course, the failure to accept supervision" (emphasis in original)). For example, in Perkins, the Court upheld a statute barring removal of an Inferior Officer except pursuant to court martial for the reasons specified by statute, such as failure to accept supervision. 116 U.S. at 485.

Moreover, the language in this statute establishing certain grounds for removability of PCAOB members, appropriately construed, does not "unduly trammel[] on executive authority," Morrison, 487 U.S. at 691, 692, particularly in light of the SEC's myriad other supervisory powers over the PCAOB. Plaintiffs take issue with the adverb "willfully" in two of the three provisions describing situations that may trigger removal. See 15 U.S.C. §§ 7217(d)(3)(A) ("has willfully violated any provision of this Act, the rules of the Board, or the securities laws"), (B) ("has willfully abused the authority of that member"). Plaintiffs contend that "willfully" sets the bar too high, theorizing that an "honest but overzealous regulator who launches deep and onerous investigations into what he erroneously perceives as violations of PCAOB rules" would be immune from removal because his abuse of authority would be merely "negligent." Pls' Mem. at 22.

Plaintiffs' hypothetical scenario, however, is predicated on layers of supposition and disregards ordinary legal meanings.[23] It depends on the proposition that a good-faith mistake of

[23] Among other things, plaintiffs' argument assumes that the SEC would be constrained to read the categories delineated in § 7217(d)(3) as implicitly defining the exclusive circumstances of "good cause shown" as that term is used in § 7211(e)(6). While an argument to that effect could be made, it is also the case that the statute does not explicitly state that the § 7217(d)(3) categories are exclusive; § 7217(d)(3) does not use the term "good cause shown"; the qualifier "in accordance with section 7217(d)(3)" in § 7211(e)(6) need not be read as a matter of grammar to modify the term "good cause shown"; and it is at least "arguable" whether "the enumeration of certain specified causes of removal excludes the possibility of removal for other causes," Bowsher v. Synar, 478 U.S. 714, 729 (1986) (citing Shurtleff v. United States, 189 U.S. 311, (continued...)