VANDERBILT LAW REVIEW
EN BANC

VOLUME 62 OCTOBER 2009

Free Enterprise Fund v. Public Company Accounting Oversight Board

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In the wake of the Enron and WorldCom accounting scandals, Congress created the Public Company Accounting Oversight Board ("PCAOB") under the aegis of the Securities and Exchange Commission ("SEC"), with President Bush's support. Its purpose was to replace deficient accounting industry self-regulation with effective external regulation. The choices it made in doing so engendered passionate arguments about constitutionally necessary presidential authority and separation of powers. These divided the D.C. Circuit 2-1[1] and will be rehearsed before the Supreme Court in the coming weeks. President Bush's administration defended those choices; Judge Rogers, writing for the majority, found no valid constitutional objection to them (albeit not without some difficulty). On the other side, petitioners the Free Enterprise Fund and Judge Kavanaugh in dissent marshaled strong arguments that, if accepted in their entirety,

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1. Free Enter. Fund v. PCAOB, 537 F.3d 667 (D.C. Cir. 2008).

would put the constitutionality of a wide range of government institutions in shadow. Starting with the constitutional text, and seeming almost to regard the cases as a nuisance to an intermediate court judge, Judge Kavanaugh's opinion is an open invitation to the originalists on the Court.[2] The grant of certiorari, after extensive filings venturing far more deeply into the merits of the case than, in the writer's experience, is generally supposed to happen, suggests that the newly reconstituted Court could well prove sympathetic.

Perhaps because both majority and dissent invoked my analysis of the constitutional issues respecting independent regulatory commissions published a quarter-century ago,[3] the editors of the *Vanderbilt Law Review* invited me to write this preliminary essay, setting before you the issues in the case. On or about November 2, you will find in this space four essays from law professors long associated with the constitutional issues in the case and chosen for the likelihood they will prove to be in intelligent disagreement: Harold Bruff (Colorado), Steven Calabresi (Northwestern), Gary Lawson (Boston), and Rick Pildes (NYU). In early December, all five of us will post responsive essays. Once the Court has published its opinion(s) on the case, some or all of us may also offer a brief appraisal. Our instructions are to limit our essays to no more than five thousand words—quite a challenge even for table-setting, when one considers that the D.C. Circuit opinions run almost fifty pages in the Federal Reporter, and the certiorari filings alone are almost four times as long.

While all the parties agree that the PCAOB is to be considered a "government entity," it is in many respects—and not only those that excited this litigation—an odd duck. Its five members each earn a salary considerably higher than is paid to *any* person we might usually think a government official, including our President.[4] Its employees are free of the salary restrictions and other characteristics of the civil service system. The expense of maintaining them, like the PCAOB's program generally, is not met by annual appropriations under the Constitution's arrangements for reserving to the legislature the "power of the purse." Rather, those expenses are paid by fees

2. Judge Kavanaugh appears to enjoy extending invitations to explore quiescent legal questions of large constitutional dimension. *See* SoundExchange, Inc. v. Librarian of Cong., 571 F.3d 1220, 1226-27 (D.C. Cir. 2009) (Kavanaugh, J., concurring) (constitutionality of the Copyright Royalty Board).

3. Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984).

4. The PCAOB Chair's annual salary is $673,000 and other members', $547,000, "roughly four times greater than those of their alleged 'superiors' at the SEC." Brief for Petitioners at 49-50, Free Enter. Fund v. PCAOB, No. 08-861 (U.S. July 27, 2009).

collected from both the accounting industry the PCAOB regulates and the public companies the industry audits, all in accordance with a budget approved not by Congress but by the SEC. If concededly a "government entity," the PCAOB is *not* a "government agency" whose activities are subject to, and made judicially reviewable by, the federal Administrative Procedure Act.

In some of these respects—one might add, respects that are *not* prominent in the litigation—the PCAOB is not alone. The Postal Service, the Federal Reserve and its member institutions, the Tennessee Valley Authority, and the Bonneville Power Authority are among the mixed-character "government entities" Congress has created over the years.

In certain respects, too, the PCAOB resembles quasi-public institutions that since 1938 have regulated investment activities in the shadow of the SEC, like stock exchanges and the National Association of Securities Dealers ("NASD"). In that year, the Maloney Act[5] permitted any securities association that registered with the SEC to discipline its members for violating the organization's rules, but such discipline was subject to the plenary supervision of the SEC.[6] This delegation of authority to these organizations was done in the interest of promoting self-regulation. Subsequent changes both expanded the self-regulatory organizations' authority, to permit their enforcement of SEC as well as their own regulations, and enhanced the SEC's oversight,[7] "to ensure that there is no gap between self-regulatory performance and regulatory need."[8] While these organizations control the bringing of disciplinary actions, any ultimate discipline they impose is subject to plenary review by the Commission, which is free to substitute its judgment as to both policy and facts.[9] Their activities are diverse and important and their expertise substantial, supplying disciplinary resources the federal government could not easily afford.[10] In many respects, the PCAOB-SEC

5. Pub. L. No. 75-719, 52 Stat. 1070 (1938).

6. R.H. Johnson & Co. v. SEC, 198 F.2d 690, 695 (2d Cir. 1952).

7. *E.g.*, Securities Acts Amendments of 1975, Pub. L. No. 94-29, 89 Stat. 97 (1975) (expanding the SEC's authority over self-regulatory organizations).

8. S. REP. NO. 94-75, at 2 (1975), *reprinted in* 1975 U.S.C.C.A.N. 179, 181.

9. For a general consideration of this scheme, see NASD v. SEC, 431 F.3d 803, 805-07 (D.C. Cir. 2005), on which this paragraph generally relies.

10. Consider the following language drawn from a graphic display from the 2008 Annual Report of the Financial Industry Regulatory Authority, which in 2007 displaced both the New York Stock Exchange and the NASD as the "self-regulatory organization" for their memberships:

> FINRA Regulatory Actions in 2008. FINRA is empowered by the federal government to protect American investors from fraud and bad practices. In 2008, FINRA took vigorous enforcement action against firms and brokers who harmed investors: [(1)]

relationship was modeled on these established institutional relationships. One might think differences were created in the interests of both closer SEC control and avoidance of self-interested self-regulation. It is these differences that fuel the constitutional issues in the PCAOB case.

The New York Stock Exchange, the NASD, and now the Financial Industry Regulatory Authority ("FINRA") operate under SEC review, but they control their officers and budget. Those institutions adopt their own rules of discipline and practice, albeit subject to standards the SEC will enforce on its review of individual disciplinary proceedings. The PCAOB is much more tightly under SEC control. Its budgets and the fees that support them must be approved by the Commission. The rules it enforces are subject to Commission approval and displacement. Its leadership is appointed by the Commission to fixed terms of office, and that leadership can be terminated prematurely by the Commission only on a finding of "cause" on one of three specified grounds, two of which require "willful" misconduct in office.

Yet the SEC itself, as an independent regulatory commission, has only a limited relationship with the President, who by our Constitution is vested with the executive power and is responsible to see that all federal laws "be faithfully executed." Its Commissioners, too, serve fixed terms and may be removed by him only "for cause." The President's capacity to supervise its policymaking is, at best, untested. If Congress in creating the PCAOB made it—unlike the New York Stock Exchange, the NASD, and the FINRA (or for that matter, the American Bar Association, lawyers' self-regulatory organization)—so close to the SEC as to have become "a government entity," did it fail to recognize the President's constitutionally required place in American government?

The Constitution's text expects that there will be government departments, but says nothing about them or their authority beyond requiring their heads to be appointed by the President with senatorial confirmation, and to have an obligation to give the President, on his demand, a "written opinion" about the manner in which they will exercise their (necessarily statutory) duties. One must stand in awe of

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> Collected more than $28 million in fines from individual brokers and firms[; (2)] Ordered or secured agreements to return more than $1 billion to investors[; (3)] Expelled or suspended 19 firms, barred 363 individuals from the industry and suspended 321 others[; and (4)] Reviewed nearly 100,000 individual communications from firms to investors, resulting in 476 investigations.

FINRA, REFORMING REGULATION TO BETTER PROTECT INVESTORS 4 (2009), http://www.finra.org/web/groups/corporate/@corp/@about/@ar/documents/corporate/p119061.pdf.

the variety of designs Congress has created over our history in fulfilling its need to create the "necessary and proper" institutions of American government—and, as well, of the infrequency and clumsiness with which the Supreme Court has addressed the propriety of its choices. The first Congress created officials in the Treasury Department whose statutory responsibilities were more to Congress than to the President. Congress soon had chartered the United States Bank—close to being, if it was not precisely, a "government entity"—with enormous sway over the national economy. By 1852, as the recent scholarship of Jerry Mashaw has called to our attention,[11] it had created a collective of Supervising Inspectors of steamships, also loosely connected with the Treasury Department, that effectively introduced the first essentially independent regulatory body to the government menagerie. There followed the Federal Reserve Bank with its dependencies, the alphabet soup of "independent regulatory commissions," powerful government corporations like the TVA or the Postal Service, single-headed agencies with fixed terms of office not coincident with presidential administrations (notably, the Social Security Administration), the independent special prosecutor, and so on.

Although these congressional structures answer often to congressional appreciation of the need for institutional distance from raw politics (but perhaps also to an impermissible congressional preference to substitute its own supervision of "faithful execution" for the President's), few of them have come to the Supreme Court, and fewer have been disapproved. Clearly established are some principles safeguarding against congressional aggrandizement of its own role. Congress cannot confer on itself a function in appointment to[12] or removal from[13] executive office beyond senatorial confirmation and impeachment, or create mechanisms for disapproving executive action other than by enacting statutes or withholding appropriations.[14]

What Congress is authorized to do in regulating the President's relationships with the agencies it creates is much less clear. In 1926, after holding the case over for reargument, a bare majority of the Supreme Court wrote *Myers v. United States*[15] using language that many have taken to support strong versions of the President's

11. Jerry L. Mashaw, *Administration and "The Democracy": Administrative Law from Jackson to Lincoln, 1829-1861*, 117 YALE L.J. 1568, 1638-41 (2008).

12. Buckley v. Valeo, 424 U.S. 1, 126-28 (1976).

13. Bowsher v. Synar, 478 U.S. 714, 725-27 (1986).

14. *See* INS v. Chadha, 462 U.S. 919, 952-59 (1983) (holding the one-House legislative veto unconstitutional).

15. 272 U.S. 52, 107, 122 (1926).

necessary role, but in a context in which the Senate had tried to require its own approval of the removal of an executive official from office. Not a decade later, in *Humphrey's Executor v. United States,*[16] the Court wrote unanimously (and promptly after argument) that Congress could make a Federal Trade Commission ("FTC") Commissioner's five-year term of office safe from earlier presidential termination unless "for cause," albeit while pretending that this was because the FTC performed no significant executive function.[17] Half a century later, in *Morrison v. Olson*,[18] seven of eight Justices, with only Justice Scalia dissenting, approved Congress's post-Watergate creation of the office of independent counsel. Appointed by a special judicial panel, and under only limited supervision by the Attorney General, the independent counsel was responsible for investigating and possibly prosecuting high executive officials—even the President—suspected of crime. No one could or did pretend that the independent counsel performed no significant executive function; the majority, rather, concluded that the possibility of the Attorney General's removing him "for cause," and his obligation ordinarily to be governed by general Department of Justice policies created a constitutionally sufficient relationship to the President—a totality-of-the-circumstances conclusion with which Justice Scalia violently disagreed. It is fair to say that *Humphrey's Executor* and *Morrison*—the latter especially—will be under significant pressure in the Supreme Court's consideration of this case.

Congress's authority to structure executive appointments (beyond the ban on its own participation other than Senate confirmation) is remarkably murky in the cases. "Principal" officers require presidential nomination and confirmation by the Senate. The Constitution permits Congress to assign the appointment of "inferior" officers "in the President alone, in the Courts of Law, or in the heads of Departments." This, of course, hardly describes the civil service system, which might initially have been thought a regime just for clerks and similarly powerless employees,[19] but which Congress also applied to powerful bureau chiefs.[20] Appointment of the independent counsel by a special judicial tribunal survived in *Morrison* when the

16. 295 U.S. 602, 627-29 (1935).

17. If they had to be characterized in "branch" terms, all of the FTC's functions save perhaps reporting to Congress would today be recognized as "executive" in nature.

18. 487 U.S. 654, 663-67, 685-93 (1988).

19. *See* United States v. Perkins, 116 U.S. 483, 483-85 (1886) (treating a naval cadet engineer as an inferior officer).

20. HERBERT KAUFMAN, THE ADMINISTRATIVE BEHAVIOR OF FEDERAL BUREAU CHIEFS 9 (1983).

majority found him an "inferior officer," again on an analysis Justice Scalia found insupportable.

Three years later, *Freytag v. Commissioner*[21] put before the Court the appointment of a relatively minor quasi-judicial official of the Tax Court (a body established by Congress under Article I and *not* an Article III court). This official was held to be an "inferior officer" in constitutional terms, not merely a constitutionally unspoken to "employee," because he exercised decisional authority. Justice Blackmun, for a bare majority, invoked an essentially originalist theme: given the Framers' apprehensions about "the most insidious and powerful weapon of eighteenth century despotism," the appointment power, the "heads of Departments" Congress could authorize to make appointments *must* be the heads of Cabinet-level departments. These departments, he reasoned, are "limited in number and easily identified. Their heads are subject to political oversight and share the President's accountability to the people."

Having announced this rationale—which the official in question escaped because the majority somehow associated his appointment with the "Courts of Law"—the Court appended a footnote as curious and muddling as the *Humphrey's Executor* Court's denial that the FTC exercised executive branch functions: "We do not address here any question involving an appointment of an inferior officer by the head of one of the principal agencies, such as the Federal Trade Commission, the Securities and Exchange Commission . . . and the Federal Reserve Bank of St. Louis."[22] If one believes this footnote, what has become of the majority's historically grounded insistence that the authority granted by the constitutional text be limited to Cabinet-level departments, small in number, and to "heads of Departments" who share the President's accountability to the people? Justice Scalia (who has been heard by your author to describe *Freytag* as the single worst opinion of his incumbency) concurred for four. He rejected the majority's "Courts of Law" rationale and simply took the constitutionality of the FTC in particular (and the great variety of federal agencies in general) to have become established. History trumped originalism in this case; given all the congressional water that had been permitted to flow under the bridge, a return to the text would simply be too disruptive.[23] If, dear reader, you are shaking your

21. 501 U.S. 868, 881-86 (1991).

22. *Id.* at 887 n.4.

23. One is reminded of a remarkable line from Justice White's dissent in another virtually impenetrable separation-of-powers case, N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 94 (1982): "Whether fortunate or unfortunate, at this point in the history of constitutional law [the question what limits may exist on Congress's ability to create

head by this point, it may not surprise you to learn that Justice Scalia's opinion, for four only, is taken by all the *PCAOB* parties to represent what *Freytag* stands for.

"Inferior officer" issues became somewhat clearer with *Edmond v. United States*,[24] which permitted the Secretary of Transportation to appoint civilian members of the Coast Guard's Court of Criminal Appeals. Justice Scalia wrote for all but Justice Souter that "in the context of a clause designed to preserve political accountability relative to important government assignments, we 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." The tension in this formulation, expanded on in the paragraphs below, was vigorously exploited by both of the lower court opinions in *PCAOB*, and is in an uneasy relationship to *Morrison*. One can read Judge Kavanaugh's dissent, in particular, as an invitation to the Court to overrule that case.

And now, the PCAOB. The challenge to it faces preliminary obstacles that *might* appeal to a Court disinterested in further roiling—or clarifying—these murky waters. Perhaps the Court will conclude that petitioners have not exhausted their administrative remedies (because they brought this action as a facial challenge, perhaps attempting to *force* a resolution of the difficult constitutional issues in the abstract), that there has as yet been no "final" agency action that would be requisite for judicial review, or that the importance of unresolved and important questions of statutory meaning make the constitutional questions not yet ripe for judicial resolution.[25]

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adjudicative institutions to carry out federal policy that are not Article III courts] can no longer be answered by looking only to the constitutional text."

Justice Scalia has expressed no great love for *Humphrey's Executor*, even if he has accepted that this particular horse has long since left the proverbial barn. His dissent in *Morrison*, for instance, refers to *Humphrey's Executor* as "gutting, in six quick pages devoid of textual or historical precedent for the novel principle it set forth, [the] carefully researched and reasoned 70-page opinion" of Chief Justice Taft in *Myers*, 487 U.S. at 725-26 (Scalia, J., dissenting). Just this Term, in *FCC v. Fox Television Stations*, 129 S. Ct. 1800, 1817 (2009), writing for himself and three others, he employed a grim simile identifying as "the lion's kill" the "power that Congress has wrested from the unitary Executive" via the creation of independent regulatory agencies, and recurred to *Freytag* in denying any "reason to magnify the separation-of-powers dilemma posed by the Headless Fourth Branch."

24. 520 U.S. 651, 663 (1997).

25. An earlier effort to raise similar separation-of-powers questions failed on these grounds at the court of appeals level by a vote of 3-0, but with each of the three deciding judges, strikingly, choosing a different one and rejecting both of the other two of these possible threshold rationales. Ticor Title Ins. Co. v. FTC, 814 F.2d 731, 732, 745, 754 (D.C. Cir. 1987).

But let us assume, as the essays to come almost certainly will, that the constitutional issues on which Judge Kavanaugh's dissent forcefully centered will prove decisive. Are the PCAOB's Members "principal officers" of the United States, whose appointment *must*, therefore, be made on presidential nomination and senatorial consent? Even if they are "inferior officers" of the United States, do the circumstances of the PCAOB violate the Constitution's arrangement for the appointment and removal of such officers because they are put entirely in the hands of the SEC, an independent regulatory commission, and thus beyond the effective reach of political (i.e., presidential) oversight?

Here one easily sees the disconnect between the two halves of the sentence just quoted from Justice Scalia's opinion in *Edmond*. *Freytag*'s originalist theme is preserved by "in the context of a clause designed to preserve political accountability relative to important government assignments"; but that theme does not so clearly live in "directed and supervised at some level by others who were appointed by presidential nomination with the advice and consent of the Senate." The PCAOB easily meets the latter criterion. But, given the independence of the SEC, does it meet the thrust of the former? To relate this question to constitutional text: by creating one "independent" authority within another, has Congress discovered a way impermissibly to delegate important executive "duties" to officials who are beyond the President's effective ability to command an "Opinion, in writing" on the manner in which those duties will be exercised? That is, if we assume that the President is able to command such an opinion from the SEC (which in turn, like the Secretary of the Interior, can deal with its inferior officers), can he do so with the PCAOB?

Those who take the strongest view of presidential authority read in the Constitution's text a commitment to a President who must be able to discipline any executive officer and whose powers include the right to command their performance of discretionary duty along the lines that he prefers. They may hope (as Judge Kavanaugh hinted he did) that the Court will reach as far back as *Humphrey's Executor* and undo the mischief done to that view by permitting Congress to establish agencies whose heads can be removed only "for cause." Or perhaps, resolving the tension in *Edmond*, the Court will conclude that the "heads of Departments" permitted to appoint and remove "inferior officers" must at the least be answerable to the President for their actions—alter egos he can himself remove at will. One could think such a conclusion is required to preserve "political accountability relative to important government assignments." The

fact that Board Members' work is "directed and supervised at some level by others who were appointed by presidential nomination with the advice and consent of the Senate" would on this reading prove to be a necessary, but not a sufficient, condition of constitutionality.

This condition might be satisfied if the authority to appoint and remove PCAOB heads were vested in a person, such as the SEC Chair (and the chairs of most independent regulatory commissions), whose tenure in that position—if not as a Commissioner *per se*—is subject to presidential termination at will. One might well think that Congress, in (typically) making the position of Chair subject to presidential termination at will, has been accommodating the demands of effective presidential oversight. Strikingly, this *is* the general position for the SEC—the Chair, and not the Commission, is formally responsible[26] for the internal appointment and control of important officials such as bureau heads. But for the PCAOB, it is the Commission as a whole, not the Chair, that holds appointment and removal authority. Since the Commissioners are not removable at will, the effect is to double the level of "for cause" protection.

Then there is possibly the question whether "for cause" has a constitutionally necessary minimum dimension—a question the Court has never yet had to answer, and that would perhaps serve us better resting in continued obscurity. Congress has usually not been so specific about what "cause" is to be. It was fairly specific in *Morrison*, but then (as may be evident) that opinion, already shadowed by *Edmond*, could well fall by the wayside in this case. The Court's current makeup is quite different than it was in 1988. And there are narrower possibilities. With respect to the PCAOB, Congress was unusually specific about what could constitute "cause" for a Board member's removal: to be established after notice and a hearing before the Commissioners, she must be shown "willfully" to have violated relevant law, "willfully" to have abused her authority, or "without reasonable justification or excuse, [to have] failed to enforce compliance with any such provision or rule, or any professional

26. A reorganization plan drawn up by President Truman, that in effect created the Chair's "chief executive" status, gave the Commissioners of the SEC authority over his appointments analogous to the Senate's power respecting the President's. That is, his appointment of "the heads of major administrative units under the Commission shall be subject to the approval of the Commission." Reorganization Plan No. 10 of 1950 § 1(b)(2), 64 Stat. 1265, 1266 (reproduced in the U.S. Code as an appendage to 15 U.S.C. § 78d (2006)). The Chair is thus compelled to consult with the other four Commissioners—and, indeed, the small numbers and their continuing relationship must make those consultations in practice, quite meaningful; yet, wishing to keep his vulnerable leadership position, he must also consult with the President, who needs no one else's agreement to appoint a different Commissioner as chair.

standard."[27] Though, as the majority below observed, "willfully" is a term to be interpreted in the shadow of constitutional requirements, and a concrete occasion for testing the meaning of these provisions has not yet arisen, one could believe they give the SEC less room to remove Board members than the President has to remove Commissioners.

Should the President demand an "Opinion, in writing" from the Commissioners of the SEC on a discretionary rulemaking[28] pending before them, it is not difficult to imagine that he would be permitted to treat their refusal to comply as insubordination, constituting cause. But can he make such a demand of the PCAOB, or require the SEC to? And would the PCAOB's refusal to comply with such a request constitute "cause"? While Sarbanes-Oxley gives the SEC plenary after-the-fact review authority over the merits of PCAOB actions of every kind, controls over its budget, etc., it does not appear as such to specify this kind of consultative role even for the Commission. If in practice, as appears to be the case, the SEC has on occasion demanded prior consultation in the course of approving PCAOB actions, would a Board refusal meet the statutory definitions of "cause" for removal? And even then, any such removal would come at the hand of the Commission, not the President. As petitioners emphasize, any oversight authority the President may have is only in relation to the SEC, and not to the PCAOB. The "second layer" of independence the PCAOB enjoys is a narrow way of understanding its arguable constitutional flaws, and it is at the heart of Judge Kavanaugh's strongest dissenting arguments. But, again, no one has yet tried to remove anyone, for any reason.

Beyond the considerations of abstraction and prematurity already suggested, respondents can be expected to rely on the several ways in which Congress has granted the SEC power to control the PCAOB. They will certainly emphasize that how the SEC has been using its authority in relation to the PCAOB in practice is largely missing from the record, and that it seems rather more complete than the authority the SEC has been entrusted with over stock exchanges and the NASD for almost seven decades. For strong presidentialists, again, the problem here is that this is *SEC* authority, not presidential authority, and hence is disconnected from Article II's placement of the responsibility for seeing to the laws' faithful execution in the

27. Sarbanes-Oxley Act of 2002 §§ 101(e)(6), 107(d)(3), 15 U.S.C. §§ 7211(e)(6), 7217(d)(3) (2006).

28. Put this way to eliminate the more difficult questions that would be presented by presidential efforts to consult about on-the-record adjudications, recognized as early as *Myers*.

President's hands. Is it a further constitutional problem that the SEC may not have a statutory obligation to supervise the PCAOB's preliminary actions—its decisions to investigate, to initiate disciplinary actions, etc.? Petitioners so argue; the government asserts and Judge Rogers concluded that the SEC *could* require its prior approval of decisions on investigation and enforcement. Moreover, it is perhaps here that the analogy to the self-regulatory organizations like FINRA will have its greatest purchase. They, too, are subject to complete SEC review of final actions, but not to decisions of this preliminary character. And the notion that the President's executive authority entails a capacity to control which individuals are investigated and prosecuted conveys a particularly dramatic view of his powers, one that may bring to mind the scandals of past "enemy lists" and other abuses of power a Court might hesitate to keep from Congress's protective control.

Asked by the editors merely to set the table for the essays to follow, I venture no views on the merits of these issues, beyond asserting their difficulty and observing that the Republic has survived for a long time without their resolution. Somehow the case brings to mind a remark I heard attributed to Prof. Alexander Bickel, a passionate proponent of "the passive virtues," and the man at whose feet I first encountered Administrative Law. Congratulated by a friend for his victory in the Pentagon Papers case, which he had briefed and argued, "Yes," he replied, "victory is sweet. But there are some questions better left undecided."