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IN THE
Supreme Court of the United States

FREE ENTERPRISE FUND AND
BECKSTEAD AND WATTS, LLP,
Petitioners,
v.

PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD
AND UNITED STATES OF AMERICA,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit**

**BRIEF *AMICI CURIAE* OF WILLIAM P. BARR,
EDWIN MEESE III, RICHARD THORNBURGH,
AND WASHINGTON LEGAL FOUNDATION
IN SUPPORT OF PETITIONERS**

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INTEREST OF AMICI CURIAE[1]

The Honorable William P. Bar served as Attorney General of the United States from 1991 to 1993. He also served as Assistant Attorney General for the Office of Legal Counsel from 1989 to 1990 and Deputy Attorney General from 1990 to 1991. The Honorable Edwin Meese III served as Attorney General of the United States from 1985 to 1988. He served as Counselor to President Ronald Reagan from 1981 to 1985. The Honorable Richard Thornburgh served as Attorney General of the United States from 1988 to 1991. He also served as Assistant Attorney General for the Criminal Division from 1975 to 1977 and Governor or Pennsylvania from 1979 to 1987.

As former Executive Branch officials, they have a substantial interest in this case, which involves the Constitution's allocation of executive power and thus the President's duty to "take Care that the laws be faithfully executed." U.S. Const., art. 2, § 3. The President's constitutional obligation to faithfully execute the laws requires that he hold the power to remove officials who exercise executive power. These former Attorneys General believe that preserving this structural design maintains proper lines of authority through the Executive Branch and ultimately ensures that the Executive will remain accountable to the American people.

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amici curiae, or their counsel, made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

The Washington Legal Foundation ("WLF") is a non-profit public interest law and policy center based in Washington, D.C., with supporters nationwide. WLF has devoted substantial resources to litigating constitutional and statutory cases over the last 30 years in support of the free enterprise system and in opposition to unlawful and excessive government regulation of business due to the detrimental effects such actions have on American businesses, workers, and consumers, as well as the economy as a whole. In particular, WLF has appeared as amicus curiae before this Court and lower federal courts (including the circuit and district courts in this case) in cases raising important constitutional issues—including separation of powers cases—and statutory questions.

With regard to securities law and regulation, WLF has instituted an Investor Protection Program designed to ensure that shareholders' interests are protected in the judicial and regulatory process. For example, WLF opposes abusive securities class action cases, *Dura Pharmaceuticals Inc. v. Broudo*, 544 U.S. 336 (2005), and has supported recommendations to relieve smaller public companies from the regulatory burden of Section 404 of the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 ("Sarbanes-Oxley") because the prohibitive costs of compliance decrease profitability and the share value of such companies. *See* WLF Comments to SEC's Advisory Committee on Smaller Public Companies (filed Apr. 3, 2006). In addition, WLF's Legal Studies Division publishes and distributes policy papers addressing the negative effects of Sarbanes-Oxley on businesses and the economy. These are available on WLF's website, www.wlf.org.

INTRODUCTION AND SUMMARY OF ARGUMENT

In the wake of the Enron and WorldCom accounting scandals, Congress sought to pass legislation to supervise the auditing of American public companies as a means of preventing similar incidents in the future. Congress therefore enacted the Sarbanes-Oxley Act, which created the Public Company Accounting Oversight Board ("PCAOB")—a purportedly independent private entity that is, by design, unchecked by the political branches and unresponsive and unaccountable to the public. Those speaking in favor of the Sarbanes-Oxley Act, which created the PCAOB, touted this fact as one of its virtues: "This board is going to have *massive power, unchecked power, by design*. . . . We are setting up a board with massive power that is going to make decisions that affect all accountants and everybody they work for, which directly or indirectly is every breathing person in the country. They are going to have *massive unchecked powers*." 148 Cong. Rec. S6334 (daily ed. July 8, 2002) (statement of Sen. Gramm) (emphasis added).[2]

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[2] Congress sought to create an entity that would be insulated from "the myriad of constituent pressures" of the political arena, Accounting Reform and Investor Protection hearings Before the S. Comm. on Banking, Housing, and Urban Affairs, 107th Cong. 44 (2002) (statement of former SEC Chief Accountant Michael H. Sutton), such as the "extraordinary amount of political pressure . . . brought to bear on the [SEC]" in its previous attempts to restrict the consulting work that auditors could perform. *Id*. (statement of former SEC Chairman Arthur Levitt).

In creating the PCAOB, Congress ignored the Supreme Court's warning that "[e]xtraordinary conditions do not create or enlarge constitutional power." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 528 (1935); *see also Panama Refining Co. v. Ryan*, 293 U.S. 388, 430 (1935) ("The question is not of the intrinsic importance of the particular statute before us but of the constitutional processes of legislation which are an essential part of our system of government."). Indeed, even during a time of war, in conditions that are surely more extraordinary than a crisis of public accounting, the Supreme Court has vigorously enforced the separation of powers. *See, e.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 589 (1952) ("The Founders of this Nation entrusted the law making power to the Congress alone in both good and bad times.").

To achieve this lack of accountability, Congress stripped the President of all removal authority over PCAOB members, making them removable only by the SEC and even then removable only for a very limited set of reasons. *See* Sarbanes-Oxley § 101(e)(6).[3] This is both illegal and unwise. It is constitutionally impermissible for the reasons stated by the Petitioners, including because the PCAOB's unique double for-cause limitation on the President's ability to remove goes beyond any previously sanctioned limits on presidential removal power, because the SEC's purported control

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[3] PCAOB members also collect salaries greater than that of the President. *See* Ian Katz, Sarbanes-Oxley Auditing Board Chairman Olson Resigns, Bloomberg.com (June 8, 2009) (salaries are currently $673,000 for the Chairman and $547,000 for each of the other members).

over the PCAOB is not a proper substitute for the President's control, and because Sarbanes-Oxley violates the Appointments Clause. *See* Brief of Petitioners, *Free Enterprise Fund v. Public Company Accounting Oversight Board* (No. 08-861) (filed July 27, 2009). Moreover, the lack of political oversight over the PCAOB has had deleterious effects: Sarbanes-Oxley's requirements have raised substantially the direct costs of public companies for accounting and auditing services;[4] the burden of compliance has kept numerous companies from going public and has even compelled increasing numbers of public companies to go private;[5] and the Act has aided the very accounting firms it sought to restrain.[6]

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[4] Cost estimates demonstrate that the SEC grossly underestimated the cost of the PCAOB. *See* American Electronics Association, Sarbanes-Oxley Section 404: The 'Section' of Unintended Consequences and Its Impact on Small Business (Feb. 2005), *available at* http://www.aeanet.org/governmentaffairs/AeASOXPaperFinal021005.asp ("The implementation cost is approximately $35 billion—more than 20 times greater than the SEC estimated in 2003.").

[5] *See* Peter J. Wallison, *Sarbanes-Oxley and the Ebbers Conviction*, Financial Services Outlook at 16, AEI Online (June 10, 2005), *available at* http://www.aei.org/publications/pubID.22648/pub_detail. asp (citing Ellen Engel, Rachel Hayes, & Xue Wang, *The Sarbanes-Oxley Act and Firms' Going-Private Decisions* (Paper, Graduate School of Business, University of Chicago, May 6, 2004)).

[6] Although Sarbanes-Oxley contains restrictions on the consulting work that can be performed by accounting firms, the Big Four accounting firms all reported double digit increases in profitability in 2004, largely because of substantial—reportedly, 78 to 134 percent—fee increases. *See* Wallison, *supra*, p.16 (arguing that Sarbanes-Oxley and the PCAOB are unnecessary and overly

(continued...)

Amici write separately to emphasize that the President's inability to remove members of the PCAOB runs directly counter to both the Framers' vision for the proper structure of government and over two centuries of historical precedent with regard to the removal power. As revealed by the debates and votes in the first Congress now known as the "Decision of 1789," those who framed the Constitution and were the closest to its enactment understood that the President was to have the power to remove, and that Congress could not devolve that power to itself or anyone else. Following that decision, the Executive Branch—through words and actions—has consistently reaffirmed this basic understanding and jealously defended the President's removal power despite continual congressional attempts to weaken it.

Protecting the President's removal power is fundamentally a question of the separation of powers. The Framers built structural protections into the Constitution in order to preserve liberty. *See* THE FEDERALIST No. 47 ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, . . . may justly be pronounced the very definition of tyranny."). Chief among these structural protections was (and is) the separation of powers: "[I]f there is a principle in our Constitution, indeed in any free Constitution more sacred than another, it is that which separates the legislative, executive, and judicial powers." *Myers v.*

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[6](...continued)
burdensome and that the longstanding threat of criminal conviction was sufficient to deter fraudulent accounting practices).

United States, 272 U.S. 52, 116 (1926) (quoting 1 Annals of Congress, 581); *see also id.* ("Their union under the Confederation had not worked well, as the members of the convention knew. Montesquieu's view that the maintenance of independence, as between the legislative, the executive and the judicial branches, was a security for the people[,] had their full approval."). Because the executive power is "vested in a President of the United States of America," the President's powers must be separated from those of the legislature and the judiciary. This separation ensures that each branch is ultimately responsible to the people, and that the people know whom to hold responsible for the failings within that branch. *See Bowsher v. Synar*, 478 U.S. 714, 722 (1986); *Freytag v. Comm'r*, 501 U.S. 868, 884 (1991). Indeed, where more than one person might be said to have been responsible for a particular action, "[i]t often becomes impossible, amidst mutual accusations, to determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall." THE FEDERALIST No. 70 (Hamilton).

The power to supervise those exercising executive authority—particularly the ability to remove—is therefore one of the key powers that must remain with the President at all times. *See Myers*, 272 U.S. at 117 (stating that because the President's "selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he cannot continue to be responsible"); *Loving v. United States*, 517 U.S. 748, 757-58 (1996) (stating that the Constitution "allocate[ed] specific powers and responsibilities to a branch fitted to the

task" thereby "allow[ing] the citizen to know who may be called to answer for making, or not making, those delicate and necessary decisions essential to governance").

However, under the structure Congress created, the removal power is not vested in the President, although to the public he appears to remain responsible for the Board's actions given its exercise of executive authority. Indeed, PCAOB members are in effect subject to removal without cause only by Congress, as Congress can simply pass a new law dissolving the board altogether or taking any other adverse actions that do not run afoul of the Bill of Attainder Clause. Accordingly, the PCAOB is more beholden to Congress than to the President, or even the SEC, despite its exercise of executive authority.

This Court has warned that such disregard of the Constitution's careful division of governmental authority among the coordinate branches will lead to disastrous results: "To disregard structural legitimacy is wrong in itself—but since structure has purpose, the disregard also has adverse practical consequences." *Mistretta v. United States*, 488 U.S. 361, 421 (1989) (Scalia, J. dissenting). "[I]n the long run the improvisation of a constitutional structure on the basis of currently perceived utility will be disastrous." *Id.* at 427.

"It remains one of the most vital functions of this Court to police with care the separation of the governing powers. That is so even when . . . no immediate threat to liberty is apparent. When structure fails, liberty is

always in peril." *Pub. Citizen v. United States Dep't of Justice*, 491 U.S. 440, 468 (1989) (Kennedy, J. concurring). This Court must vindicate the Executive's removal power in this case in order to prevent the PCAOB from continuing to wreak havoc on public companies, small businesses, and shareholders—indeed, on the economy as a whole—because the PCAOB is unresponsive and unaccountable to the body politic.

ARGUMENT

I. STRIPPING THE PRESIDENT OF HIS POWER TO REMOVE MEMBERS OF THE PCAOB IS INCONSISTENT WITH THE DECISION OF 1789

Any analysis of the removal power must begin with the Decision of 1789.[7] In 1789, the First Congress debated whether to adopt a bill creating the Department of Foreign Affairs. The original draft of that bill provided that the Secretary of Foreign Affairs could "be removed from office by the President of the United States." *See* Daily Advertiser (June 17, 1789), *reprinted in Debates in the House of Representatives, First Session: June-September 1789*, 11 Documentary History of the First Federal Congress, 1789-1791, at 842 (Charlene Bangs Bickford et al. eds., 1992) ("*Debates*"). Representative Alexander White of Virginia moved that this language be deleted, and the House of Representatives debated the issue extensively over a

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[7] *See, e.g.*, *Parsons v. United States*, 167 U.S. 324, 328-30 (1897); *Myers v. United States*, 272 U.S. 52, 111-136 (1926); *Bowsher v. Synar*, 478 U.S. 714, 723-24 (1986).

four-day period. *Id.* The motion was rejected by a 34-20 vote. *Id.* at 999, 1024; *see also Myers*, 272 U.S. at 112.

Representative Egbert Benson of New York proposed a new amendment that "would more fully express the sense of the committee" regarding the power to remove. *Id.* at 1027. That proposal provided that the Chief Clerk of the Department of Foreign Affairs would have custody of papers "[w]henever the said principal officer [] shall be removed by the President, or a vacancy in any other way shall happen." *Id.* If this amendment passed, Benson announced that he would move to strike the provision stating that the Secretary would be removable by the President, since that text implied a grant of removal power from Congress to the President (a concept with which, he believed, most members of the House disagreed). *Id.* at 1028; *see also id.* at 1027 (stating that Benson thought this implication was improper "because it would be admitting the house to be possessed of an authority which would destroy [the Constitution's] checks and balances"); *Myers*, 272 U.S. at 113. The goal, Rep. Benson stated, was to "establish a legislative construction of the constitution."[8] *Id.* at 1028.

Both amendments passed, and the bill was ultimately enacted into law without further modification. Journal of the First Session of the House

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[8] Indeed, this Court has found that the Decision of 1789 was such a legislative interpretation of the Constitution. *See Myers*, 272 U.S. at 114 ("[T]here is not the slightest doubt, after an examination of the record, that the vote was, and was intended to be, a legislative declaration that the power to remove officers appointed by the President and the Senate vested in the President alone.").

of Representatives of the United States (June 22, 1789), *reprinted in House of Representatives Journal*, 3 Documentary History of the First Federal Congress, 1789-1791, at 91-95 (Charlene Bangs Bickford et al. eds., 1992); Foreign Affairs Bill, H.R. 8, 1st Cong. (1789), *reprinted in Legislative Histories*, 4 Documentary History of the First Federal Congress, 1789-1791, at 696-97 (Charlene Bangs Bickford & Helen E. Veit eds., 1986).

Madison was one of the chief proponents of the view of Benton and others that the power to remove was granted to the President by the Constitution itself because the Constitution grants the executive power to the President alone. *Debates*, at 868. As the Constitution set forth specific limits on executive authority, including the requirement of the Senate's advice and consent in appointments, Congress could not "diminish or modify" the President's executive authority any further. *Id.*; *see also Myers*, 272 U.S. at 113 ("Gentlemen have all along proceeded on the idea that the Constitution vests the power in the President, and what arguments were brought forward respecting the convenience or inconvenience of such disposition of the power were intended only to throw light upon what was meant by the compilers of the Constitution.") (quoting 1 Annals of Congress, 578, 579 (Madison)).

The power of removal, Madison thought, was quintessentially executive: "I conceive that if any power whatsoever is in its nature executive it is the power of appointing, overseeing, and controlling those who execute the laws." *Debates*, at 868. Presidential control, recognized Madison and others, required the threat of

removal.[9] *See id.* (Rep. Madison, stating that where the President has the power to remove, "the chain of dependence [will] be preserved; the lowest officers, the middle grade, and the highest will depend, as they ought on the President"); *Debates*, at 880 (Rep. Ames stating that, in order for the President to be "responsible to his country, he must have a choice in selecting his assistants, a control over them, with power to remove them when he finds the qualifications which induced their appointment cease to exist"). Any other result would be "subject[] to legislative instability," *Debates*, at 1029-30, which was not desirable given the fact that the "union [of executive and legislative powers] under the Confederation had not worked well," *Myers*, 272 U.S. at 116.

It was precisely for this reason that most found the original text of the Foreign Affairs Act to be problematic—it could be read "as a grant of authority rather than a confirmation of constitutional authority." Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021, 1042 (2006) (citing *Debates*, at 1029); *see also Debates*, at 1029 (Rep. Madison commenting that the original language of the bill could be understood as a legislative grant of removal power

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[9] "As he is charged specifically to take care that they be faithfully executed, the reasonable implication, even in the absence of express words, was that, as part of his executive power, he should select those who were to act for him under his direction in the execution of the laws. The further implication must be, in the absence of any express limitation respecting removals, that, as his selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he cannot continue to be responsible." *Myers*, 272 U.S. at 117.

rather than confirming pre-existing removal power); *Myers*, 272 U.S. at 112 (summarizing Rep. Benson's statements). By contrast, "it is extremely difficult to read the final Foreign Affairs bill that emerged from the House . . . as somehow containing an implicit grant of removal authority to the President." *Id.* at 1046.

Indeed, evidence suggests that even those who voted *against* Rep. Benson's amendments believed that the Constitution granted the President the power to remove. For example, Rep. Fitzsimons voted against the second amendment (to eliminate the language that the Secretary could "be removed from office by the President of the United States") precisely because he thought that the Constitution granted the President such authority, and he believed it was important for Congress to affirmatively recognize that fact. *See Correspondence, First Session: June-August 1789*, 16 Documentary History of the First Federal Congress, 1789-1791, at 819-20 (Charlene Bangs Bickford et al. eds., 2004) ("*Correspondence*"). The Gazette of the United States reported that others also held this view. *See Debates*, at 1026, 1028; *see also* Prakash, 91 Cornell L. Rev. at 1052 (noting four other representatives who believed that removing this language would undermine the notion that the Constitution granted removal power to the President).

Two other acts, debated and enacted in the wake of the enactment of the Foreign Affairs Act, contained language nearly identical to that introduced into the Foreign Affairs Act by Benson. Each provided for the custody of all departmental papers "whenever [the agency head] shall be removed from office by the

President of the United States." *See* An Act to Establish the Treasury Department, ch. 12, § 7, 1 Stat. 65, 67 (1789); An Act to Establish an Executive Department, to be Denominated the Department of War, ch. 7, § 2, 1 Stat. 49, 50 (1789). Madison explained in letters to Jefferson that the operative language used in all three statutes was specifically selected to confirm that the Constitution granted removal power to the President, and that this interpretation of the Constitution was the truest to that document's "policy of mixing the Legislative and Executive Departments as little as possible, and to the requisite responsibility and harmony in the Executive Department." *Correspondence*, at 890, 893.

The Decision of 1789 thus established that the removal "power was vested in the president alone." *Parsons*, 167 U.S. 324, 331 (1897). This determination, reached both by those who voted in favor of Benson's amendments and against them, provides unique insight into the Framers' understanding of the origin and proper scope of the presidential removal power. An act "passed by the first Congress assembled under the constitution, many of whose members had taken part in framing that instrument, . . . is contemporaneous and weighty evidence of its true meaning." *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888). Thus, this Court has recognized that the Decision of 1789 is especially probative of the Framers' intent because it

> was the decision of the First Congress on a question of primary importance in the organization of the government made within two years after the Constitutional Convention and within a much

> shorter time after its ratification, and . . . because that Congress numbered among its leaders those who had been members of the convention. It must necessarily constitute a precedent upon which many future laws supplying the machinery of the new government would be based and, if erroneous, would be likely to evoke dissent and departure in future Congresses.

Myers, 272 U.S. at 136; *see also id.*, 272 U.S. at 114 (stating that eight members of the House of Representatives had been in the Constitutional Convention, and of those six voted in favor of the bill); *Bowsher*, 478 U.S. at 723-724 (stating that the "Decision of 1789 provides contemporaneous and weighty evidence of the Constitution's meaning since many of the Members of the First Congress had taken part in framing that instrument") (quotations omitted).[10]

Later presidential administrations have agreed with this Court's repeated pronouncements regarding the significance of the Decision of 1789. President Taft observed that "[i]t was settled, as long ago as the first Congress, . . . that even where the advice and consent of the Senate was necessary to the appointment of an officer, the President had the absolute power to remove

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[10] That the Decision of 1789 was a construction of the Executive's constitutional authority made by the Congress—and thus a statement against interest made by the coordinate branch most likely to aggrandize its power at the expense of another branch, *see N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 83 (1982)—only adds to its significance and further demonstrates that it accurately reflects the Constitution's original public meaning.

him without consulting the Senate. This was on the principle that the power of removal was incident to the Executive power and must be untrammeled." William H. Taft, *Our Chief Magistrate and His Powers* 56 (1916). President Tyler's administration held the same view: "It is according to [the settled construction of 1789], from the very nature of executive power, absolute in the President, subject only to his responsibility to the country (his constituent) for a breach of such a vast and solemn trust." 4 Op. Att'y Gen. 1, 1-2 (1842).

In short, the Decision of 1789 made clear that the power to remove is inherently executive in nature, a power necessary to "take Care that the laws be faithfully executed," U.S. Const. art. 2, § 3, and accordingly "vested in a President of the United States of America," U.S. Const. art. 2, § 1. *See Myers*, 272 U.S. at 117; *Buckley v. Valeo*, 424 U.S. 1, 136 (1976); *Bowsher*, 478 U.S. at 723. Moreover, that decision, which focused on the nature of executive power and the relationship between removal and control was not limited to the President's power over principal officers only, but would apply equally to the President's power to remove inferior officers as well or indeed any other officer executing executive authority. *See* Prakash, 91 Cornell L. Rev. at 1069-70.

The Decision of 1789 makes clear that the Framers never could have envisioned, much less endorsed, the Sarbanes-Oxley Act's "unique and apparently unprecedented double for-cause removal" scheme. *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 537 F.3d 667, 704 (D.C. Cir. 2008) (Kavanaugh, J., dissenting). As the Court below explained, "the [SEC]

has sole removal authority under the Act." *Free Enterprise Fund*, 537 F.3d at 675. Like the President's ability to remove SEC commissioners, *see SEC v. Blinder, Robinson & Co.*, 855 F.2d 677, 681 (10th Cir. 1988), the SEC's power to remove PCAOB members is subject to for-cause restrictions. Worse still, "the statutory restriction on the SEC's removal of the Board is far more stringent than the typical for-cause removal restriction." *Id.* at (Kavanaugh, J., dissenting). *See* 15 U.S.C. § 7217(d)(3)(A)-(C) (permitting removal only where a member has "willfully" violated the law, "willfully abused" his or her authority, or "failed to enforce compliance" "without reasonable justification or excuse"). Having rejected statutory provisions that would have implied that the President's removal authority might be subject to congressional oversight, the First Congress clearly would not have countenanced Sarbanes-Oxley's stripping of all the President's removal power over the members of the PCAOB.

II. THE RESTRICTIONS ON THE PRESIDENT'S ABILITY TO REMOVE PCAOB MEMBERS ARE INCONSISTENT WITH TWO CENTURIES OF HISTORICAL PRECEDENT

For more than two centuries, the Executive Branch has consistently asserted that the Framers deliberately (and wisely) decided not to place any check on the President's exercise of the removal power and has resisted Congressional attempts to do so. This historical analysis is highly relevant because this Court has instructed that the judiciary's constitutional analysis ought to be informed by the interpretation of

constitutional law regularly adhered to by a coordinate branch of the government. Indeed, this Court has employed such an approach as part of its interpretive methodology. *See, e.g.*, *INS v. Chadha*, 462 U.S. 919 (1983) (striking down the legislative veto because, *inter alia*, eleven Presidents who had been presented with the issue went on record challenging its constitutionality); *Myers*, 272 U.S. at 148, 150 (holding that Congress could not limit the removal power because, *inter alia*, the Executive Branch viewed the power as "unrestricted").

Sarbanes-Oxley's severe restrictions on the President's removal authority are inconsistent with this historical precedent. Moreover, the regrettable consequences of past congressional attempts to intrude upon the removal power serve only to vindicate the Executive Branch's long-held view of the removal power.

A. The Executive Branch Consistently Has Interpreted the Removal Power Broadly and Resisted Congressional Efforts to Limit That Power

Ever since the Decision of 1789, the Executive Branch has staunchly defended the removal power—with regard to both principal and inferior officers—against congressional encroachments. James Madison, for example, stated that the Constitution's text prohibits the Senate from conditioning the President's removal power:

> If the constitution has invested all executive power in the President, I venture to assert that the

> Legislature has no right to diminish or modify his executive authority.
>
> The question now resolves itself into this, Is the power of displacing, an executive power? *I conceive that if any power whatsoever is in its nature executive, it is the power of appointing, overseeing, and controlling those who execute the laws.*

1 Annals of Cong. 481-82 (emphasis added).

President Jackson repeatedly clashed with Congress over proposed restrictions on his removal power. Members of Congress introduced at least four separate measures in the 1830s aimed at limiting his removal power. In a communication to the Senate defending his unconditional power of removal, President Jackson made plain that because the Executive Vesting Clause and the Take Care Clause made him "responsible for the entire action of the executive department, it was but reasonable that the power of appointing, overseeing, and controlling those who execute the laws—a power in its nature executive—should remain in his hands." Andrew Jackson, Message to the Senate Protesting Censure Resolution (Apr. 15, 1834), *available at* www.presidency.ucsb.edu/ws/index.php?pid=67039&st=st1=. As President Jackson explained, the "whole executive power being vested in the President, who is responsible for its exercise, it is a necessary consequence that he should have a right to employ agents of his own choice to aid him in the performance of his duties, *and to discharge them when he is no longer willing to be responsible for their acts*." *Id.* (emphasis added). Therefore, "[i]n strict accordance with this principle,

the power of removal, . . . [an] executive power, *is left unchecked by the Constitution in relation to all executive officers*." *Id.* (emphasis added). Significantly, Congress ultimately rejected all of these attempts to limit President Jackson's removal power. *See* Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During The First Half-Century*, 47 CASE WEST. RES. L. REV. 1451, 1534 (1997).

Less than two decades later, President Fillmore directed his Attorney General to draft an opinion regarding the propriety of removing the Chief Justice of the Territory of Minnesota "for very serious charges of incapacity, unfitness, and want of moral character." Executive Authority to Remove the Chief Justice of Minnesota, 5 U.S. Op. Atty. Gen. 288, 288-89 (Jan. 23, 1851); *see also Parsons*, 167 U.S. at 333-34 (discussing this opinion). The opinion found that the territorial court was a "legislative court" rather than an Article III court, and noted that the justices of that court "shall hold their offices during the period of four years." *Id.* at 289. Citing the Decision of 1789, Attorney General John J. Crittenden opined that, "[b]eing civil officers, . . . they are not exempted from that executive power which, by the constitution, is vested in the President of the United States over all civil officers appointed by him; and whose tenures of office are not made by the constitution itself more stable than during the pleasure of the President of the United States." *Id.* at 290. "That the President has, by the constitution of the United States, the power of removing civil officers appointed and commissioned by him . . . has been long since settled, and has ceased to be a subject of controversy or doubt." *Id.* Summarizing his advice to

President Fillmore, General Crittenden noted that "the power of removal is vested by the constitution in the President of the United States to promote the public welfare, to enable him to take care that the laws be faithfully executed, to make him responsible if he suffers those to remain in office who are manifestly unfit and unworthy of public confidence," and advised that the President had the power to remove the chief justice "for any cause that may, in your judgment, require it." *Id.* at 291.

President Cleveland continued this defense of the removal power by removing United States Attorney Parsons, an inferior officer,[11] from his office despite a federal statute providing that his appointment was "for four years." *Parsons*, 167 U.S. at 326. Cleveland's administration defended the President's removal power all the way to this Court, which flatly rejected Parsons' argument that the federal act could limit the President's removal power. The Court observed that, beginning with the Decision of 1789, the Executive Branch strongly defended the unrestricted nature of the removal power in a number of significant cases and that Congress had eventually acquiesced in the view that the Legislature could not impose any conditions on the President's removal power. *See id.* at 328-334.

President McKinley also firmly defended the removal power against congressional intrusion. The Customs Administration Act provided that the

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[11] *See* United States Attorneys—Suggested Appointment Power of the Attorney General, 2 Op. Off. Legal Counsel 58, 59 (Feb. 28, 1978) ("U.S. Attorneys can be considered to be inferior officers").

President could remove certain civil officers "for inefficiency, neglect of duty, or malfeasance in office[.]" *Shurtleff v. United States*, 189 U.S. 311, 313 (1903). When the President removed one of these inferior officers (Shurtleff) without providing a reason for his action, Shurtleff filed suit. *See id.* at 315-16. This Court agreed with President McKinley and rejected the "for cause" removal language because a contrary result "would involve the alteration of the universal practice of the government for over a century." *Id.* at 316.

President Coolidge's administration ranks as one of the most ardent defenders of the removal power, most notably due to its position in *Myers v. United States*. There, this Court addressed "whether under the Constitution the President has the exclusive power of removing executive officers"—a question the Court answered in the affirmative. *Myers*, 272 U.S. at 106. In the administration's brief to this Court, President Coolidge's Solicitor General explained the history of the President's plenary removal power, starting with the Decision of 1789 and continuing through over one hundred years of government practice. Solicitor General Beck wrote that, "[f]rom the Beginning of the Government removal has been recognized as essentially an executive function," and drew the Court's attention to the numerous Attorney General opinions defending the unilateral nature of the Executive removal power. Brief of the United States, *reproduced in Myers*, 272 U.S. at 99, 104-106.

Presidents also have opposed congressional attempts to force particular executive officers out of their positions by disqualifying them from their offices.

For example, President Truman argued that allowing Congress to effectively remove officers by arbitrarily enacting new qualifications would impinge on his removal powers. *See* Statement by the President on the Interior Department Appropriation Act (June 30, 1948), *available at* www.presidency.ucsb.edu/ws/index.php?pid=12949 ("This rider is designed to effect the removal of two men now holding such positions who have supported the public power policy of the Government and the 160-acre law which assures that Western lands reclaimed at public expense shall be used for the development of family size farms. . . . This type of legislation does great harm to our democratic principles. It is contrary to the spirit, if not the letter, of those provisions of the Constitution which guarantee the separation of legislative and executive functions"). President Truman continued to defend the removal power until Congress finally yielded and deleted the changes in the qualifications for the posts. *See* Interior Department Appropriation Act, 63 Stat. 765, 778-79 (1949).

President Nixon likewise opposed congressional efforts to throw his executive officers out of their offices. He vetoed a bill that attempted to remove two inferior officers—the Director and Deputy Director of OMB—from their offices by abolishing their positions and at the same time recreating them as positions subject to Senate confirmation. President Nixon found the bill to be nothing more than a congressional attempt to circumvent the Executive's removal power. *See* Veto of a Bill Requiring Senate Confirmation of the Director and Deputy Director of the Office of Management and

Budget (May 18, 1973), *available at* www.presidency.ucsb.edu/ws/index.php?pid=3851&st= &st1= ("This legislation would require the forced removal by an unconstitutional procedure of two officers now serving in the executive branch. This step would be a grave violation of the fundamental doctrine of separation of powers. In view of my responsibilities, it is my firm duty to veto this bill."). Congress failed to override his veto.

More recently, the Executive Branch has stood its ground to defend against congressional attacks on the removal power through agency overhauls. In particular, President Clinton opposed a congressional attempt to limit the President's authority to remove the Administrator of the Social Security Administration. As part of legislation transforming the SSA into an independent agency, Congress made the Administrator removable only for "neglect of duty or malfeasance in office." 42 U.S.C. § 902(a)(3) (2000). While signing the bill, President Clinton stated that these limitations on his removal authority were constitutionally problematic, and he recommended "a corrective amendment to resolve this constitutional question." *See* Statement on Signing the Social Security Independence and Program Improvements Act of 1994 (Aug. 15, 1994), *available at* www.presidency.ucsb.edu/ws/index.php?pid=48981.

Likewise, President George W. Bush strongly asserted his removal authority during the creation of the Department of Homeland Security. *See, e.g.*, Statement of Administration Policy: H.R. 5005 - Homeland Security Act of 2002 (July 25, 2002), *available at* http://www.presidency.ucsb.edu/ws/index.

php?pid=24644 (expressing support for the House bill, which "preserved the President's long-standing authority to exempt the [Department of Homeland Security] from the operation of the Federal Labor Relations Management Act"). President Bush insisted upon having unfettered power to dismiss lower-level department employees and ultimately defeated Congress on the issue. *See* Christopher S. Yoo, Steven G. Calabresi, and Anthony J. Colangelo, *The Unitary Executive in the Modern Era*, 1945-2004, 90 IOWA L. REV. 601, 727 (2005).[12]

B. The Regrettable Consequences of Intrusions Upon the Removal Power Serve Only to Vindicate the Executive Branch's Long-Held View of the Removal Power

As shown above, our nation's Presidents have uniformly rebuffed congressional efforts to interfere

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[12] In modern times, the Executive Branch has made clear that the President must have the power to remove an official exercising executive power "regardless of who appointed" that official. *See Removal of Court-Appointed U.S. Attorney*, 3 Op. Off. Legal Counsel 448, 450 (1979) ("[T]he President is responsible for the conduct of a U.S. Attorney's Office and therefore must have the power to remove [the U.S. Attorney, an inferior officer, if the President] believes [the U.S. Attorney] is an unsuitable incumbent, regardless of who appointed him." (emphasis added)); *see also Statute Limiting the President's Authority To Supervise the Director of the Centers for Disease Control in the Distribution of an AIDS Pamphlet*, 12 Op. Off. Legal Counsel 47 (1988) (arguing that Congress may not constitutionally interfere with President's authority to supervise and remove the director of the Centers for Disease Control, an inferior officer appointed by a department head).

with the Executive removal power. The circumstances surrounding two congressional acts in particular—the Tenure In Office Act and the Ethics In Government Act—deserve special consideration because in both cases, regrettable consequences ultimately forced Congress to accept the Executive Branch's long-held view of the removal power.

1. The Tenure in Office Act

In 1867, Congress passed the Tenure In Office Act, under which no civil officers appointed by the President with the advice and consent of the Senate could be removed from office unless the Senate confirmed a successor. After Congress passed this legislation, however, President Andrew Johnson mounted one of the most vigorous defenses of the removal power in history. President Johnson determined that the text of the Constitution and the unbroken practices of both Congress and the Executive Branch prohibited Congress from interfering with the removal power in the manner attempted. *See* Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During The Second Half-Century*, 26 HARV. J.L. & PUB. POL'Y 667, 748 (2003). Accordingly, President Johnson vetoed the legislation.

In a message accompanying his veto, President Johnson made his position clear: "That the power of removal is constitutionally vested in the President of the United States is a principle which has been not more distinctly declared by judicial authority and judicial commentators than it has been uniformly practiced upon by the legislative and executive departments of the government." Andrew Johnson, Veto Message to the

Senate (Mar. 2, 1867), *available at* www.presidency.ucsb.edu/ws/index.php?pid=72071&st=&st1=. Notwithstanding President Johnson's robust defense of the removal power, Congress overrode the President's veto and enacted the Tenure In Office Act. Remaining steadfast in his position, President Johnson removed his Secretary of War without complying with the Tenure In Office Act. In response, Congress voted to impeach the President of the United States for the first time in our nation's history. However, the Senate voted not to remove President Johnson from office, implicitly acknowledging that he was not wrong to disregard what Congress later conceded was an unconstitutional statute.

After President Johnson left office, Presidents Grant and Cleveland maintained Johnson's defense of the removal power. *See* Ulysses S. Grant, First Annual Message (Dec. 6, 1869), *available at* www.presidency.ucsb.edu/ws/index.php?pid=29510&st=&st1=. Congress acceded to President Grant's view and partially repealed the Tenure In Office Act. *See* Act of Apr. 5, 1869, ch. 10, § 2, 16 Stat. 6, 7. President Cleveland declared that "the power to remove or suspend such officials is vested in the president alone by the Constitution." Grover Cleveland, Special Message to the Senate (Mar. 1, 1886), *available at* www.presidency.ucsb.edu/ws/index.php?pid=71867&st=&st1=. Public opinion eventually turned against the Tenure in Office Act and Congress repealed the Act in its entirety. *See* Act of Mar. 3, 1887, ch. 353, 24 Stat. 500.

2. The Ethics in Government Act

The Ethics In Government Act charted much the same course as the Tenure In Office Act. The Carter administration opposed the creation of a judicially appointed independent counsel[13] designed to ferret out misconduct at the highest levels of the Executive Branch, but it lacked the political power to defeat passage of the Act. President Reagan's subsequent administration, however, launched a vigorous attack on the Act. Executive Branch officials repeatedly challenged the constitutionality of the Act in hearings before Congress, and President Reagan himself challenged the Act's limits on his removal power. *See* Statement on Signing the Independent Counsel Reauthorization Act of 1987 (Dec. 15, 1987), *available at* www.presidency.ucsb.edu/ws/index.php?pid=33827 &st=&st1=.

The Reagan administration ultimately launched a full-scale attack on the Act, challenging its constitutionality in court in connection with the Independent Counsel's investigation of then-Assistant Attorney General Theodore Olson. Although the Reagan administration's judicial challenge ultimately was unsuccessful in this Court, *see Morrison v. Olson,* 487

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[13] The independent counsel provisions of the Act were reenacted by the Ethics in Government Act Amendments of 1982, Pub. L. 97-409, 96 Stat. 2039, the Independent Counsel Reauthorization Act of 1987, Pub. L. 100-191, 101 Stat. 1293, and the Independent Counsel Reauthorization Act of 1994 Pub. L. 103-270, 108 Stat. 732. It has been referred to popularly as the Independent Counsel Act.

U.S. 654 (1988),[14] President Reagan's Solicitor General vigorously defended his removal power: "Whatever limits Congress may constitutionally impose on the President's various means of holding other officers to account, it may not deny his power to remove purely executive officers like an independent counsel." Brief for the United States as Amicus Curiae Supporting Appellees at 29, *Morrison v. Olson,* 487 U.S. 654 (1988) (No. 87-1279).

President George H.W. Bush and Attorney General William Barr reiterated the Executive Branch's view that the Act was unconstitutional, and President Bush repeatedly threatened to veto any attempt to extend the Act past its scheduled sunset in 1992.

Then, during President Clinton's administration, the Ethics In Government Act engendered a constitutional crisis that ultimately resulted in the death of the Act. Attorney General Janet Reno authorized an investigation of President Clinton by Independent Counsel Kenneth Starr, which culminated in a decision by the House to impeach the President. Like President Johnson, President Clinton was acquitted by the Senate. But by then, even initial champions of the Ethics In Government Act recognized that the Act rested on an unconstitutional foundation. Some even campaigned for its demise: "In 1993, as many of you know, I testified in support of the statute . . . . However, after working with the Act, I have come

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[14] Notably, the removal provisions at issue in *Morrison* did not impinge on the Executive's removal power nearly as much as the double for-cause limitations at issue here. *See* Pet. at 18-23.

to believe . . . that the Independent Counsel Act is structurally flawed and that those flaws cannot be corrected within our constitutional framework." *Future of the Independent Counsel Act: Hearings Before the Senate Comm. On Governmental Affairs*, 106th Cong. 243, 247-48 (1999) (statement of Attorney General Janet Reno). In light of the bipartisan recognition of the Act's failures—both in practice and as a constitutional matter—Congress allowed the Act to sunset.

Both the Tenure In Office Act and the Ethics In Government Act remain in the legislative dustbin. The demise of these statutes highlights the "adverse practical consequences" of disregarding the Constitution's structural principles. *Mistretta*, 488 U.S. at 421 (Scalia, J., dissenting). Moreover, that these statutes were ultimately considered unconstitutional by some of their initial supporters demonstrates that the constitutional crises they engendered might well have been avoidable, had the text and history of Article II been properly considered at the outset.

Like the Tenure in Office Act and the Ethics in Government Act, Sarbanes-Oxley's severe restrictions on the President's removal power have regrettable consequences, including heavy burdens on public companies and reductions in the enterprise value of public companies on the whole. *See supra* nn. 4-6 and accompanying text. With the President powerless to prevent the PCAOB from lording over American public companies with a heavy hand, even the laudable goals of

Sarbanes-Oxley no longer support this structure.[15] Like the Tenure in Office Act and the Ethics in Government Act, Sarbanes-Oxley's "improvisation of a constitutional structure on the basis of currently perceived utility" is disastrous, and it should be discarded immediately. *See Mistretta*, 488 U.S. at 427 (Scalia, J. dissenting).

* * *

The fundamental problem with Sarbanes-Oxley and the PCAOB is a matter of first principles. The government derives its powers from the People: "Governments are instituted among Men, deriving their just powers from the consent of the governed." The Declaration of Independence para. 2 (U.S. 1776); *see also United States v. Lara*, 541 U.S. 193, 212 (2004) (Kennedy, J., concurring) ("The Constitution is based on a theory of original, and continuing, consent of the governed."); *Nevada v. Hall*, 440 U.S. 410, 426 (1979) ("In this Nation each sovereign governs only with the consent of the governed."). It is clear that Congress lost sight of this basic, fundamental truth in enacting Sarbanes-Oxley. Indeed, Congress went to great lengths to ensure that the PCAOB was unaccountable to the people, granting it "massive powers" that would be "unchecked" by the political process, Gramm Statement, *supra*, p.2.

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[15] Indeed, Rep. Michael Oxley, one of the two sponsors of Sarbanes-Oxley, has acknowledged the negative consequences of the law: "Frankly, I would have written it differently, and [Sen. Paul Sarbanes] would have written it differently." Liz Alderman, "Spotlight: Michael Oxley," New York Times (March 2, 2007), *available at* http://www.nytimes.com/2007/03/02/business/world business/02iht-wbspot03.4773621.html?_r=1.

The faithful execution of the laws is the responsibility of the President. *See* U.S. Const. art. 2, § 3 ("[H]e shall take Care that the Laws be faithfully executed."). And the President's responsibility to the people requires that he hold the power to remove officials who exercise executive power. *See Myers*, 272 U.S. at 117; *Debates*, at 868, 880 (statements of Madison and Ames). The Framers intended for this structure in order to maintain proper lines of authority through the Executive Branch. Adhering to this structure would ensure that the Executive would remain accountable to the people, *see Bowsher*, 478 U.S. at 722, in whom power ultimately resides. *See Broadrick v. Oklahoma*, 413 U.S. 601, 620 (1973) (Douglas, J., dissenting) ("'[W]e the people' are the sovereigns, not those who sit in seats of the mighty.").[16]

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[16] Importantly, because the questions of Executive power at issue in this case implicate the individual liberty of the people, the Executive Branch's support of the mechanisms for the appointment and removal of PCAOB members cannot save them. As Justice Blackmun recognized in *Freytag*, "[t]he structural principles embodied in the Appointments Clause do not speak only, or even primarily, of Executive prerogatives[.]" *Freytag*, 501 U.S. at 880. Violations of the clause are therefore not within the power of the Executive to waive. "The structural interests protected by the Appointments Clause are not those of any one branch of Government, but of the entire Republic." *Id*.; *see also New York v. United States*, 505 U.S. 144, 182 (1992) ("The Constitution's division of power among the three branches is violated where one branch invades the territory of another, whether or not the encroached-upon branch approves the encroachment."); *id.* ("The constitutional authority of Congress cannot be expanded by the 'consent' of the governmental unit whose domain is thereby narrowed.").

By stripping the President of all power to remove the members of the PCAOB, Congress made them unaccountable to the Executive and thus unaccountable to the body politic. In creating this dangerous pairing of power and lack of accountability, Congress all but assured that the PCAOB would run roughshod over public companies, small businesses, and shareholders without being held responsible for such conduct. This Court should not hesitate to vindicate first principles, preserve the Constitution's sacred structure, and return power to its rightful place—the coordinate branches to which the Constitution assigns it, and more importantly, to the People.

CONCLUSION

For the reasons set forth herein, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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