

No. 08-861

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 OF *AMICI CURIAE*
AMERICAN CIVIL RIGHTS UNION
AND MALLORY FACTOR
IN SUPPORT OF PETITIONERS**

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INTEREST OF THE *AMICI CURIAE*¹

The American Civil Rights Union (ACRU) is a non-partisan, non-profit legal/educational policy organization dedicated to defending all constitutional rights, not just those which might be politically correct or fit a particular ideology. It was founded in 1998 by long time Reagan policy advisor and architect of modern welfare reform Robert B. Carleson, and since then has filed *amicus curiae* briefs on constitutional law issues in cases nationwide.

Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General, Edwin Meese III; Pepperdine Law School Dean, Kenneth W. Starr; former Assistant Attorney General for Civil Rights, William Bradford Reynolds; John M. Olin Distinguished Professor of Economics at George Mason University, Walter E. Williams; former Harvard University Professor, Dr. James Q. Wilson; former Ambassador Curtin Winsor, Jr.; and Dean Emeritus of the UCLA Anderson School of Management, J. Clayburn LaForce.

This case is of interest to the ACRU because we seek to ensure that *all* constitutional rights are fully protected, not just those that may advance a particular ideology. That includes the protections for liberty embodied in the separation of powers.

¹ Peter Ferrara authored this brief for the American Civil Rights Union (ACRU). No counsel for either party authored the brief in whole or in part and no one apart from the ACRU made a monetary contribution to the preparation or submission of this brief.

Mallory Factor was Chairman of the Free Enterprise Fund when this case was first filed, where he initiated this lawsuit, though he is no longer affiliated with the organization. He is a member of the Council on Foreign Relations (CFR), recently serving as Vice-Chair of the CFR Task Force on Terrorism Financing. He currently serves as Chairman of the Chairman of the Joint Chiefs of Staff Economic Roundtable.

All parties consented to the filing of this brief, and were timely notified.

INTRODUCTION

The doctrine of separation of powers is not an arcane constitutional technicality. It provides the foundation for the system of checks and balances that the founders carefully crafted to protect American liberties from the danger of overreaching government. It also enforces accountability of public officials in our democracy. Separation of powers, therefore, is one of the fundamental bulwarks of liberty in the American system of government.

Buried in the details of the present case is a precedent for a fundamental change in this system of government. What we have here is not only an independent agency, itself pushing the envelope on separation of powers. We have an agency, the Public Company Accounting Oversight Board, which maintains independence from its only executive oversight authority, which is itself an independent agency, the Securities and Exchange Commission. Moreover, Congress created this scheme precisely to

remove the executive functions of the Board from the control and influence of the President.

We submit that this is an impermissible policy choice for the Congress under our Constitution, not an option Congress may choose when it seems to be “in the public interest.” The Constitution has already made the choice that the executive functions of our government shall be under the authority of the President. If members of Congress object to that, their only option is to amend the Constitution, not enact a statute redistributing the President’s constitutional authority.

This case involves a fundamental invasion of Presidential powers by an overreaching Congress. While the example here seems to involve a relatively technical Board with limited reach, if this executive function can be so thoroughly removed from the President, then others can be as well, with no apparent limiting principle. Ultimately, the President could be reduced to a functionary, with his powers redistributed to self-controlled and self-perpetuating boards and authorities subject only to the oversight of independent agencies, themselves removed from Presidential authority. Any step in this direction undermines the fundamental protections for the liberties of the American people embodied in the doctrine of separation of powers.

STATEMENT OF THE CASE

In response to highly publicized, major corporate failures involving accounting scandals, Congress passed the Sarbanes-Oxley Act (“Sarbox”)

in 2002. Included in that Act was the creation of the Public Company Accounting Oversight Board (“PCAOB”), granted “massive, unchecked power, by design,” to impose and enforce comprehensive regulatory requirements on accounting firms that audit public companies. The PCAOB is composed of five members authorized to carry out its duties by majority vote.

The PCAOB is separated and insulated from Presidential power and authority in the following ways:

--The five PCAOB members are not appointed by the President, but instead are appointed by a majority vote of the Commissioners of the Securities and Exchange Commission (“SEC”). Sarbox Sect. 101(e)(4), (6), 15 U.S.C. Sect. 7211(e)(4), (6). The SEC is itself an independent agency whose activities in carrying out its responsibilities are not subject to the supervision and oversight of the President. Consequently, the President has no supervisory or oversight authority over who the SEC appoints to the PCAOB.

--The President also has no authority to remove any of the members of the PCAOB. Only the SEC can remove a PCAOB member, and then only after notice and a hearing, and a finding that the member (i) “has willfully violated” Sarbox requirements, PCAOB rules or the securities laws, (ii) “has willfully abused [his] authority,” or (iii) “without reasonable justification or excuse, has failed to enforce compliance with any such provision or rule, or any professional standard.” Sarbox Sects. 101(e)(6) &

107(d)(3), 15 USC Sects. 7211(e)(6) & 7217(d)(3). Consequently, even the SEC cannot remove PCAOB members for policy disagreements.

--The President has no supervisory or oversight authority over the activities of the PCAOB, including the establishment of regulatory requirements *whose willful violation is classified and punished as a felony criminal offense*. Sarbox Sects. 103(a)(1), 15 U.S.C. Sect. 7213(a)(1), 3(b), 15 U.S.C. Sect. 7202(b); 15 U.S.C. Sect. 78ff(a).

--The President also has no supervisory or oversight authority, or even influence, over the budget or financing of the PCAOB. The PCAOB sets its own budget, *financed by a tax it is empowered to levy itself on publicly traded companies*. Sarbox Sect. 109(b)-(d), 15 U.S.C. Sect. 7219(b)-(d).

--Even the SEC's supervisory or oversight authority over the activities of the PCAOB is limited. The SEC has no control over the targets the PCAOB chooses to investigate, or how it conducts its investigations and regular inspections. Nor can it review the results of any investigation where no sanctions are imposed. Even where sanctions are imposed, the SEC can modify or cancel them only after notice and a hearing resulting in specific statutory findings. The SEC also has no authority over the PCAOB budget or the taxes it is empowered to impose under Sarbox.

--Moreover, the SEC is required to approve any PCAOB rule or regulation "if it finds that the rule is consistent with the requirements of the Act and the securities laws, or is necessary or appropriate in the

public interest or for the protection of investors.” Sarbox Sect. 107(b)(3), 15 U.S.C. Sect. 7217(b)(3). The SEC can change such a rule or regulation on policy grounds only through notice and comment rulemaking. Sarbox Sect. 107(b)(5), 15 U.S.C. Sect. 7217(b)(5); 15 U.S.C. Sect. 78s(c).

--The SEC does hold the power of nullifying or imposing limitations on the activities, functions, and operations of the PCAOB only if after notice and opportunity for a hearing, it finds specific statutorily designated wrongdoing. But the SEC cannot exercise this power either for simple policy disagreements.

--Finally, the President’s power over the SEC, as an independent agency, is limited as well. While the President does appoint SEC commissioners, he can remove them only for cause, which does not include policy disagreements. Moreover, since the President has no supervisory or oversight authority over the SEC, he has no such authority over how the SEC handles the powers it does have over the PCAOB.

Petitioners Beckstead and Watts, an accounting firm subject to injury by the PCAOB, and the Free Enterprise Fund, an organization with members subject to the PCAOB’s authority, brought this action seeking a declaratory judgment that the PCAOB is unconstitutional, and an injunction prohibiting the PCAOB from further operations. Pet. App. 8a, 109a-110a.

The district court granted summary judgment for respondents. Pet. App. 112a-117a. The D.C.

Circuit Court of Appeals affirmed 2-1, Judge Kavanaugh dissenting. Pet. App. 2a-111a. The full circuit voted 5-4 to deny rehearing *en banc*. Pet. App. 1a.

SUMMARY OF ARGUMENT

The Constitution's careful Separation of Powers structure is one of the fundamental bulwarks of American liberty. This is why faithfully maintaining the Constitution's Separation of Powers is so important.

Yet, under the statute at issue in this case, the President has no role or authority in either appointing or removing the five members of the PCAOB.

The President also has no supervisory or oversight authority over the day-to-day activities of the PCAOB in carrying out its functions, even though the PCAOB even has the power to establish and enforce regulatory requirements *whose willful violation is classified and punished as a felony criminal offense*.

The President also has no role or authority over the budget of the PCAOB, which is set solely by the PCAOB and financed by the power granted in Sarbox to impose, enforce, and administer a tax on publicly traded companies, a power over which the President again has no role or authority.

Even the SEC's supervisory or oversight authority over the activities of the PCAOB is limited.

But the President's power over the SEC, which is an independent agency, is sharply limited as well. In particular, since the President has no supervisory or oversight authority over the SEC, he has no such authority over how the SEC handles the powers it does have over the PCAOB.

Consequently, the President's power and authority over the PCAOB could not be more thoroughly removed. Judge Kavanaugh rightly characterized the PCAOB in his dissent below as "an independent agency appointed by and removable only for cause by another independent agency" (Pet. App. at 42a), saying also, "[T]his case is *Humphrey's Executor* squared...." (Pet. App. at 42a).

Such thorough removal of Presidential power and authority has not been previously countenanced in our system of government, and cannot be squared with the very concept of Separation of Powers.

Under the Appointments Clause, applying the test established in *Edmond v. United States*, 520 U.S. 651 (1997), the members of the PCAOB must be considered principal officers who must be appointed by the President with the advice and consent of the Senate, given their powers and their independence even from the SEC. Since PCAOB members are appointed by the SEC alone, Sarbox unconstitutionally violates the Appointments Clause as well.

Congress in this case expressly sought to test the outer limits of the Separation of Powers Doctrine, openly proclaiming the creation of a "Fifth Branch of

the Federal Government” (Pet. App. at 72) with sharply reduced Presidential control even as compared to “Fourth Branch” independent agencies. Yet, the PCAOB has been granted “massive power, unchecked by design.” 148 Cong. Rec. at S6334.

This case consequently presents a dangerous precedent for Congressional authority to rewrite the Constitution and its Separation of Powers, providing for sharply reduced Presidential power and control over its own Executive Branch.

ARGUMENT

I. THE PCAOB UNCONSTITUTIONALLY VIOLATES THE SEPARATION OF POWERS DOCTRINE AND THE APPOINTMENTS CLAUSE.

A. The Separation of Powers Doctrine is a Fundamental Bulwark of American Liberties.

As the Court explained in *Buckley v. Valeo*, 424 U.S. 1, 124 (1976),

“The principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787. Article I, s 1, declares: ‘All legislative Powers herein granted shall be vested in a Congress of the United States.’ Article II, s 1, vests the executive power ‘in a

President of the United States of America,' and Art. III, s 1, declares that "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

Article II further defines the Executive Power in stating that the President shall have the sole power and responsibility to "take care that the laws be faithfully executed."

To enable the President to carry out the Executive Power granted in Article II, Section 1, Article II, Section 2 includes the Appointments Clause, which states,

"(The President) shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other 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."

Moreover, the separation of the powers of the state into three separate branches provides the foundation for the system of checks and balances our founders also carefully crafted to protect American liberty. If the legislative branch seeks to adopt oppressive laws, the separate and independent Executive can oppose them and refuse to execute

them in an oppressive manner. The separate and independent Judiciary can also refuse to uphold and enforce them, and even strike them down.

Or a runaway Executive can be checked by restraining laws adopted by the Legislature, or by the rulings of the Judiciary. A runaway judiciary, in turn, can be checked by Congressional legislation or by future Presidential appointments.

By contrast, if all of these powers were combined in one force, then these checks and balances would be lost, and a single, oppressive impulse could invade the liberties of the American people. Consequently, the Constitution's careful Separation of Powers structure is one of the fundamental bulwarks of American liberty.

As the Court again explained in *Buckley*,

“The Framers regarded the checks and balances that they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other. As Madison put it in Federalist No. 51: ‘This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other that the private

interest of every individual may be a sentinel over the public rights. These inventions of prudence cannot be less requisite in the distribution of the supreme powers of the State.”

424 U.S. at 122-123.

Finally, with the three fundamental powers of government carefully separated, the conduct of public officials is far more transparent, and they can be far more readily held accountable for their misdeeds. Members of Congress can be held accountable for bad and oppressive laws they enact. Or the President can be held accountable for bad or oppressive execution of the laws, or, more to the point of the present case, for bad, incompetent, or oppressive appointments.

As Judge Kavanaugh wrote in dissent below,

“The Framers of our Constitution took great care to ensure that power in our system was separated into three branches, not concentrated in the Legislative Branch; that there were checks and balances among the three branches; and that one individual would be ultimately responsible and accountable for the exercise of executive power.”

Pet. App. at 46a.

This is why faithfully maintaining the Constitution’s Separation of Powers is so important.

**B. The Structure of the PCAOB
Unconstitutionally Violates the Separation
of Powers Doctrine.**

As discussed above, the President has no role in appointing the five members of the PCAOB. Sarbox specifically grants that power to the five commissioners of the SEC, itself an independent agency from the Executive Branch and the President. Since the President has no supervisory or oversight authority over the activities or policies of the independent SEC, he has no supervisory or oversight authority over who the SEC appoints to the PCAOB.

The President also has no authority to remove any of the five members of the PCAOB. Again, under Sarbox, only the SEC can remove a PCAOB member, and then only for specific, statutorily defined cause, found after notice and a hearing. Consequently, even the SEC cannot remove PCAOB members for policy disagreements.

The President also has no supervisory or oversight authority over the day-to-day activities of the PCAOB in carrying out its functions. Yet, the PCAOB even has the power to establish and enforce regulatory requirements *whose willful violation is classified and punished as a felony criminal offense*.

The President also has no role or authority over the budget of the PCAOB, which is set solely by the PCAOB and financed by the power granted in Sarbox to impose, enforce, and administer a tax on

publicly traded companies, a power over which the President again has no role or authority.

Even the SEC's supervisory or oversight authority over the activities of the PCAOB is limited. The SEC has no role or authority regarding the targets the PCAOB chooses to investigate, how it conducts its investigations and regular inspections, or the results of any investigation where no sanctions are imposed. The SEC can modify or cancel sanctions or penalties imposed by the PCAOB, but only after notice and a hearing resulting in specific statutory findings. The SEC also has no authority over the PCAOB budget or the taxes it is empowered to impose under Sarbox.

The SEC does have the power to change PCAOB rules and regulations on policy grounds after notice and comment rulemaking. It can nullify or impose limitations on the activities, functions, and operations of the PCAOB, but only after notice and opportunity for a hearing, which finds specific, statutorily designated, wrongdoing, so policy grounds are not sufficient for the exercise of this power.

But the President's power over the SEC, which is an independent agency, is sharply limited as well. While the President does appoint SEC commissioners, he can remove them only for cause, which does not include policy disagreements. Moreover, since the President has no supervisory or oversight authority over the SEC, he has no such authority over how the SEC handles the powers it does have over the PCAOB.

Consequently, the President's power and authority over the PCAOB could not be more thoroughly removed, except maybe if the power of appointment and removal had been granted to the Speaker of the House. Judge Kavanaugh rightly characterized the PCAOB in his dissent below as "an independent agency appointed by and removable only for cause by another independent agency" (Pet. App. at 42a, continuing:

"[T]his case is *Humphrey's Executor*² squared.... [U]nder this statute [Sarbox], the President is two levels of for cause removal away from Board [PCAOB] members, a previously unheard-of restriction on and attenuation of the President's authority over executive officers. This structure effectively eliminates any Presidential power to control the PCAOB, notwithstanding that the Board performs numerous regulatory and law enforcement functions at the core of the executive power."

Pet. App. at 42a-43a.

Kavanaugh continues,

"By restricting the President's authority over the Board, the Act renders this Executive Branch agency unaccountable and divorced from Presidential control to a degree not

² *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

previously countenanced in our constitutional structure.

Pet. App. at 45a. Kavanaugh recognized that removing all Presidential authority and control over the PCAOB was precisely Congress's purpose and intent in Sarbox, saying, "This was not inadvertent; Members of Congress designed the PCAOB to have 'massive, unchecked power.'" *Id.* But under our Constitution, this is an impermissible legislative purpose, as it expressly involves invasion of the President's Executive powers by the Congress. Kavanaugh explains,

"Our constitutional structure is premised, however, on the notion that such unaccountable power is inconsistent with individual liberty. 'The purpose of the separation and equilibration of powers in general, and of the unitary Executive in particular, was not merely to assure effective government but to preserve individual freedom.'"

Id. (Quoting Justice Scalia dissenting in *Morrison v. Olson*, 487 U.S. 654, 727 (1988)). *see also Clinton v. City of New York*, 524 U.S. 417, 450 (1998)(Kennedy, J. concurring) ("Liberty is always at stake when one or more of the branches seek to transgress the separation of powers.").

Judge Kavanaugh rightly concluded, "The PCAOB contravenes these bedrock constitutional principles, as well as long-standing Supreme Court

precedents, and it is therefore unconstitutional.” Pet. App. at 46a.

C. The PCAOB Unconstitutionally Violates the Appointments Clause.

The Appointments Clause, quoted above, is essential to the President’s Executive powers under the Constitution’s Doctrine of Separation of Powers. As the Court explained in *Myers v. United States*, 272 U.S. 52 (1926),

“The vesting of the executive power in the President was essentially a grant of the power to execute the laws. But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates....As he is charged specifically to take care that they be faithfully executed, the reasonable implication...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.”

Id. at 117. The Court continued,

“Our conclusion on the merits...is that article 2 grants to the President the executive power of the government i.e. the general administrative control of those executing the laws, including the power of appointment and removal of executive officers, a conclusion confirmed by his obligation to take care that the laws be faithfully executed....”

Id at 163-164.

Under the Appointments Clause, the members of the PCAOB must be considered principal officers who must be appointed by the President with the advice and consent of the Senate. *Edmond v. United States*, 520 U.S. 651 (1997). As Judge Kavanaugh explained below,

“They are not inferior officers because they are not ‘directed and supervised’ by the SEC: The PCAOB members are not removable at will by the SEC, the SEC does not have statutory authority to remove them for failure to follow substantive SEC direction or supervision; and the SEC does not have statutory authority to prevent and affirmatively command, and to manage the ongoing conduct of, Board inspections, Board investigations, and Board enforcement actions. Moreover, as the statutory text demonstrates, the very purpose of this statute was precisely to create an accounting board that would operate with some substantive independence from the SEC, not one that would be ‘directed and supervised’ by the SEC.”

Pet. App. at 44a-45a. Judge Kavanaugh rightly concluded,

“Because PCAOB members are principal officers under the *Edmonds* test, they must be appointed by the President with the advice and consent of the Senate. The Board members are appointed by the SEC alone;

therefore the statute [Sarbox] violates the Appointments Clause as well.”

Pet. App. at 45a.

Besides this definitive resolution of the issue, for all of the same reasons just noted above, the SEC cannot be considered the Head of a Department which includes the PCAOB, contrary to the inadequate analysis of the 2-1 majority opinion below. If the SEC were the Head of a Department including the PCAOB, the PCAOB would not have all the independence from the SEC noted by Judge Kavanaugh above.

Moreover, the “the Heads of Departments” referenced in the Appointments Clause clearly refers to senior officials of the President’s executive branch, not independent agencies removed from the President’s authority. As Judge Kavanaugh stated, “The Supreme Court has recognized that when the head of a department appoints inferior officers in that department, the President technically exercises his removal authority over those inferior officers through his alter ego, the department head.” Pet. App. 43a. *See Myers*, 272 U.S. at 133 (referring to “alter ego” of President); *Morrison*, 487 U.S. at 692 (describing the Attorney General as the President’s alter ego for removal of an inferior officer by the Attorney General); *Ex parte Hennen*, 38 U.S. 230, 259-60 (1839). But an independent agency like the SEC is transparently not the alter ego of the President. That is the whole point of an independent agency.

II. THE PCAOB ESTABLISHES A DANGEROUS PRECEDENT FOR CONGRESS TO NULLIFY THE PRESIDENT'S POWER OVER HIS OWN EXECUTIVE BRANCH.

Judge Kavanaugh was correct in stating this is “the most important separation-of-powers case regarding the President’s appointment and removal powers to reach the courts in the last 20 years.” Pet. App. 41a.

The Separation of Powers Doctrine at issue in this case is one of the fundamental bulwarks of American liberty, creating a basic structure of American government carefully designed to protect the people from oppression due to overreaching government, as discussed above. But in this case, Congress expressly sought to test the outer limits of this Doctrine, openly proclaiming the creation of a “Fifth Branch of the Federal Government” (Pet. App. at 72) with sharply reduced Presidential control even as compared to “Fourth Branch” independent agencies. Indeed, as discussed in detail above, the President, who is invested by our Constitution with the Executive powers of our government, has no significant control or authority over the PCAOB of any sort.

Yet, the PCAOB has been granted “massive power, unchecked by design.” 148 Cong. Rec. at S6334. These powers include the authority to establish and enforce regulatory requirements whose violations are criminal felonies punishable by imprisonment. It also includes the power to set its

own budget financed by special taxes which it has the power to impose.

This case consequently presents a dangerous precedent for Congressional authority to rewrite the Constitution and its Separation of Powers, providing for sharply reduced Presidential power and control over its own Executive Branch. If the PCAOB is approved, especially under the thoroughly inadequate analysis of the 2-1 majority below, then the Congress could remove Presidential authority and control over even more important areas of government, past the independent agencies of the “Fourth Branch” to the brave new world of the “Fifth Branch,” where the President is a mere figurehead with no significant role.

Once this trend is begun, there is no apparent limiting principle. Federal education programs could be removed from the President and granted to a remote Federal Board of Education. Then authority over international trade could be removed to a Federal Board of Trade. Authority over labor relations could be removed to a Federal Labor Board, insulated from the supposedly partisan pressures of Presidential power and authority. Even the prosecution of federal crimes could apparently be transferred to a new Criminal Justice Board. Or the imposition of federal taxes and the need for new federal revenues could be solved by transferring the power of taxation to a new Federal Revenue Board.

We respectfully submit that this Court cannot allow this new threatening development in our law to go forward.

CONCLUSION

For all of the foregoing reasons, we respectfully submit that this Court should reverse the court below and grant the Declaratory Judgment and Injunction requested by Petitioners.

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