

ALL ARGUMENT NOT YET SCHEDULED

No. 07-5127

FREE ENTERPRISE FUND, *et al.*,

*Plaintiffs-Appellants,*

v.

THE PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD, *et al.*,

*Defendants-Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA  
Hon. James Robertson, United States District Judge

BRIEF OF AMICUS CURIAE WASHINGTON LEGAL FOUNDATION  
IN SUPPORT OF PLAINTIFFS-APPELLANTS FREE ENTERPRISE FUND AND  
BECKSTEAD AND WATTS, LLP URGING REVERSAL

Daniel J. Popeo  
Paul D. Kamenar  
WASHINGTON LEGAL FOUNDATION  
2009 Massachusetts Avenue, N.W.  
Washington, D.C. 20036  
TEL: 202.588.0302  
FAX: 202.588.0386

Helgi C. Walker  
Thomas R. McCarthy  
Brendan T. Carr  
WILEY REIN LLP  
1776 K Street, N.W.  
Washington, D.C. 20006  
TEL: 202.719.7000  
FAX: 202.719.7049

*Attorneys for Amicus Curiae Washington  
Legal Foundation*

December 31, 2007

**CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

In accordance with D.C. Cir. R. 28(a)(1), counsel for amicus curiae Washington Legal Foundation hereby certifies as follows:

**A. Parties and Amici**

All parties, intervenors, and amici appearing before the District Court and in this Court are listed in the Brief of Appellants.

**B. Rulings Under Review**

References to the rulings at issue appear in the Brief of Appellants.

**C. Related Cases**

Counsel is unaware of any related cases pending in any court.

  
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Helgi C. Walker

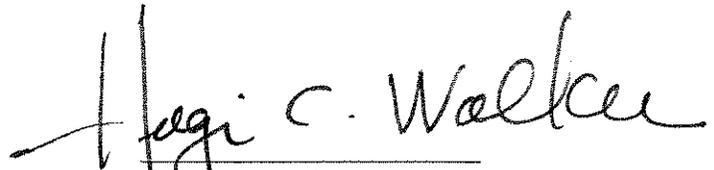
## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Fed. R. App. P. 26.1 and D.C. Cir. Rule 26.1, Amicus Curiae Washington Legal Foundation hereby states that it is a non-stock, non-profit corporation organized under Section 501(c)(3) of the Internal Revenue Code, and therefore, there are no parent corporations or publicly held corporations that own stock of amicus.

**CERTIFICATE OF COUNSEL PURSUANT TO D.C. CIR. RULE 29(d)**

On June 27, 2007, the Court granted Washington Legal Foundation's ("WLF") unopposed motion for leave to file an amicus curiae brief in support of Plaintiffs-Appellants. *See Order, Free Enterprise Fund, et al. v. The Public Company Accounting Oversight Board, et al.*, No. 07-5127 (D.C. Cir. June 27, 2007). On August 31, 2007, the Court granted Mountain States Legal Foundation ("MSLF") permission to file a joint brief with WLF. *See Order, Free Enterprise Fund, et al. v. The Public Company Accounting Oversight Board, et al.*, No. 07-5127 (D.C. Cir. Aug. 31, 2007).

Undersigned counsel hereby certifies that, pursuant to D.C. Cir. Rule 29(d), it is not practicable for WLF to file a joint amicus brief with MSLF and that a separate amicus brief is necessary to state the views of the WLF. Paul Kamenar of WLF has consulted with Elizabeth Gallaway of MSLF regarding the feasibility of filing a joint amicus brief. MSLF and WLF wish to present different views on the constitutional problems created by the federal statute under review. MSLF has represented that it intends to focus on the Appointments Clause of Article II of the U.S. Constitution, whereas WLF will argue that the statute unlawfully interferes with the President's Article II removal power. Because WLF and MSLF wish to present different views on the federal statute under review, WLF respectfully submits that it is impracticable to file a joint amicus brief with MSLF.

  
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Helga C. Walker

**TABLE OF CONTENTS**

	<b>Page</b>
CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES.....	i
CORPORATE DISCLOSURE STATEMENT .....	ii
CERTIFICATE OF COUNSEL PURSUANT TO D.C. CIR. RULE 29(d).....	iii
TABLE OF CONTENTS.....	iv
TABLE OF AUTHORITIES .....	v
GLOSSARY .....	x
STATUTES AND REGULATIONS.....	xi
INTEREST OF AMICUS CURIAE .....	1
SUMMARY OF THE ARGUMENT .....	2
ARGUMENT.....	5
I.    HISTORICAL ANALYSIS OF THE EXECUTIVE BRANCH’S REMOVAL POWER SUPPORTS THE CONCLUSION THAT SARBANES-OXLEY’S RESTRICTIONS ON THE REMOVAL POWER ARE UNCONSTITUTIONAL.....	5
A.    The Executive Branch For Over Two Centuries Has Consistently Interpreted The Removal Power Broadly And Resisted Congressional Efforts To Limit The Removal Power .....	5
B.    History Demonstrates That The Courts Should Not Endorse Congressional Intrusions Upon The Executive’s Removal Power .....	13
II.   THE HARMFUL EFFECTS OF SARBANES-OXLEY AND THE BOARD’S ACTIONS ON AMERICAN ENTERPRISE DEMONSTRATE THE DANGERS OF ENDORSING CONGRESSIONAL INTRUSIONS ON THE REMOVAL POWER.....	18
CONCLUSION.....	24
CERTIFICATE OF COMPLIANCE.....	25
CERTIFICATE OF SERVICE .....	26

TABLE OF AUTHORITIES

Page

FEDERAL CASES

*A.L.A. Schechter Poultry Corp. v. United States*,  
295 U.S. 495 (1935).....18

*Bowsher v. Synar*,  
478 U.S. 714 (1986).....6

*Buckley v. Valeo*,  
424 U.S. 1 (1976).....2

*In re Hennen*,  
38 U.S. 230 (1839).....2

*INS v. Chadha*,  
462 U.S. 919 (1983).....3, 5

*Mistretta v. United States*,  
488 U.S. 361 (1989).....23

*Morrison v. Olson*,  
487 U.S. 654 (1988).....3, 17

\**Myers v. United States*,  
272 U.S. 52 (1926).....2, 3, 5, 6, 10, 11

*Panama Refining Co. v. Ryan*,  
293 U.S. 388 (1935).....18

*Parsons v. United States*,  
167 U.S. 324 (1897).....6, 9

*Public Citizen v. United States Department of Justice*,  
491 U.S. 440 (1989).....23

*Shurtleff v. United States*,  
189 U.S. 311 (1903).....10

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343 U.S. 579 (1952)..... 18-19

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**TABLE OF AUTHORITIES**  
(continued)

**Page**

**CONSTITUTION AND STATUTES**

*U.S. Const. art. II, § 1 .....	2
42 U.S.C. § 902(a)(3).....	12
Act of Apr. 5, 1869, ch. 10, 16 Stat. 6 .....	15
Act of Mar. 3, 1887, ch. 353, 24 Stat. 500.....	15
Interior Department Appropriation Act, 62 Stat. 1112 (1948) .....	11
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**TABLE OF AUTHORITIES**  
(continued)

	<b>Page</b>
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Letter from James Madison to Edward Coles (October 15, 1834) .....	7
President’s Statement on Signing the Social Security Independence and Program Improvements Act of 1994 (August 15, 1994), <i>available at</i> <a href="http://www.presidency.ucsb.edu/ws/index.php?pid=48981&amp;st=&amp;st1=">www.presidency.ucsb.edu/ws/index.php?pid=48981&amp;st=&amp;st1=</a> .....	12
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Statement on Signing the Independent Counsel Reauthorization Act of 1987, (December 15, 1987), <i>available at</i> <a href="http://www.presidency.ucsb.edu/ws/index.php?pid=33827&amp;st=&amp;st1=">www.presidency.ucsb.edu/ws/index.php?pid=33827&amp;st=&amp;st1=</a> .....	16
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**TABLE OF AUTHORITIES**  
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**Page**

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**TABLE OF AUTHORITIES**  
(continued)

	<b>Page</b>
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## GLOSSARY

Board	Public Company Accounting Oversight Board
Br. of App.	Brief of Appellants, <i>Free Enterprise Fund, et al. v. The Public Company Accounting Oversight Board, et al.</i> , No. 07-5127 (D.C. Cir. Dec. 14, 2007)
MSLF	Mountain States Legal Foundation
PCAOB	Public Company Accounting Oversight Board
SEC	Securities and Exchange Commission
SSA	Social Security Administration
WLF	Washington Legal Foundation

## STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the Brief of Appellants.

## INTEREST OF AMICUS CURIAE

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 the Supreme Court and lower federal courts (including this Court and the district court 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](http://www.wlf.org).

Plaintiffs-Appellants argue on appeal that granting Executive powers to the Public Company Accounting Oversight Board ("PCAOB"), while placing the appointment and removal of its members with the Securities and Exchange Commission, violates the President's removal

power, appointment power, and the separation of powers. On appeal, WLF devotes its attention to the removal power issue and, in particular, provides the Court with a historical account of our Presidents' views on the removal power. WLF's Amicus Brief also presents a discussion of the PCAOB's impact on American business more generally to assist the Court in resolving the important issues presented in this case. Accordingly, although WLF supports Plaintiffs-Appellants' constitutional claims, it will focus on the removal power issue.

Pursuant to Fed. R. App. P. 29(c)(3), WLF hereby states that the source of its authority to file this amicus brief is the order of this Court, dated June 27, 2007, granting WLF's unopposed motion to participate in this case as amicus curiae.

### **SUMMARY OF THE ARGUMENT**

The text of the Constitution denies Congress any authority to limit the President's removal power. Under Article II of the Constitution, "The executive power shall be vested in a President of the United States of America." U.S. Const. art. II, § 1, cl. 1. The Supreme Court has long recognized that the executive Vesting Clause grants the President those powers that were traditionally wielded by executives. *See Myers v. United States*, 272 U.S. 52, 117-18 (1926). And the power to remove executive officers is undoubtedly one of these powers. *See In re Hennen*, 38 U.S. 230, 234-35 (1839); *Buckley v. Valeo*, 424 U.S. 1, 136 (1976).

The Supreme Court has also made it unmistakably clear that no constitutional provision authorizes Congress to limit the President's removal power. *See Myers*, 272 U.S. at 176 (holding that the removal power is an "unrestricted power"). Indeed, "the fact that no express limit was placed on the power of removal by the executive was convincing indication that none was intended." *Id.* at 118.

Notwithstanding this lack of constitutional authority, Congress attempted to limit the President's Article II removal power through Sarbanes-Oxley. In particular, Sarbanes-Oxley created the PCAOB—a five-member board that exercises executive authority—and provided that PCAOB members can be removed only by the SEC. Moreover, even the SEC's ability to remove PCAOB members is limited.

As Plaintiffs-Appellants ably demonstrate in their opening brief, *see* Brief of App. at 14-30, Sarbanes-Oxley's restrictions on the Executive's removal power are unconstitutional. They cannot be squared with the considered decisions of the Supreme Court, including *Morrison v. Olson*, 487 U.S. 654 (1988).

As WLF explains herein, the Executive Branch's long-standing understanding of the removal power supports Plaintiffs-Appellants' position. This historical analysis is highly relevant because the Supreme Court has taught that such an interpretation of constitutional authority by a coordinate branch of government should inform the judiciary's constitutional analysis. Indeed, the Supreme Court has employed such an approach as part of its interpretive methodology. *See, e.g., 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"); *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). This approach makes eminent sense because each coordinate branch of government has a duty to interpret and uphold the Constitution.

History demonstrates that our nation's Presidents have vigorously and continuously defended their right to exercise the removal power, free from any congressional interference. 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. Indeed, far from acquiescing in congressional efforts to limit the removal power, our nation's Presidents have steadfastly asserted that the Constitution denies Congress any authority to limit the removal power.

Moreover, history demonstrates that this Court should be quite wary of congressional experimentation with the President's removal power. Most notably, the constitutional crises engendered by the 1867 Tenure In Office Act and the 1978 Ethics In Government Act highlight the dangers of congressional encroachments on the Executive's removal power. Congress enacted each of these statutes over the objection of the Executive Branch and they resulted in constitutional crises of extraordinary magnitude, *viz.*, the only two times a President has ever been impeached. More importantly to the present analysis, in each case Congress realized its constitutional error, removed the restrictions it had imposed, and restored the constitutional balance with regard to the Executive's removal power. Sarbanes-Oxley should similarly be put to rest.

Indeed, the short history of Sarbanes-Oxley demonstrates that it deserves the same fate as the Tenure In Office Act and the Ethics In Government Act. Sarbanes-Oxley has had a harmful effect on our businesses and economy. Sarbanes-Oxley's requirements have raised substantially the costs of obtaining accounting and auditing services. And small businesses have been forced to bear a disproportionate share of this burden. Simply put, the practical effect of Sarbanes-Oxley has been to harm public companies, small businesses, and shareholders.

## ARGUMENT

### I. HISTORICAL ANALYSIS OF THE EXECUTIVE BRANCH'S REMOVAL POWER SUPPORTS THE CONCLUSION THAT SARBANES-OXLEY'S RESTRICTIONS ON THE REMOVAL POWER ARE UNCONSTITUTIONAL.

In *Myers* and *Chadha*, the Supreme Court highlighted the importance of historical analysis as an aid to constitutional interpretation. *Myers*, 272 U.S. at 148, 150; *Chadha*, 462 U.S. at 941-42, n.13. Here, history makes plain that the Executive Branch, throughout our entire constitutional history, has vigorously asserted and jealously guarded the President's power to remove all officers who exercise executive power. As explained below, the Presidents have consistently asserted the position taken by the Supreme Court in *Myers*: the text of the Constitution does not authorize Congress to impose *any* conditions on the President's removal power. Coupled with Plaintiffs-Appellants' persuasive jurisprudential analysis of the removal power, this historical analysis demonstrates that Sarbanes-Oxley's interference with the Executive's removal power is unconstitutional.

#### A. The Executive Branch For Over Two Centuries Has Consistently Interpreted The Removal Power Broadly And Resisted Congressional Efforts To Limit The Removal Power.

Any historical account of the removal power must begin with the "Decision of 1789." In 1789, the First Congress debated whether to adopt legislation that included a provision expressly authorizing the President to remove certain executive officials. *See, e.g.*, 1 Annals of Cong. 499 (Joseph Gales ed., 1789). After exhaustive debate, both houses of Congress passed—and President Washington signed—a version of the bill that did not include the phrase "removable by the President." This language was rejected because its inclusion would have suggested—contrary to the text of the Constitution—that the President's removal power: (1) could be exercised only pursuant to an express legislative grant; and (2) could be conditioned by

Congress. See, e.g., *Parsons v. United States*, 167 U.S. 324, 328-29 (1897); *Myers*, 272 U.S. at 112-116; *Bowsher v. Synar*, 478 U.S. 714, 723-24 (1986).

The Decision of 1789 thus established that the removal “power vested in the president alone.” *Parsons*, 167 U.S. at 331. As the Supreme Court has explained, 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.” *Bowsher*, 478 U.S. at 724 (quotation marks omitted). Commenting on the significance and meaning of that event, 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 him without consulting the Senate. This was on the principle that the power of removal was incident to the Executive power and must be untrammelled.” William H. Taft, *Our Chief Magistrate and His Powers* 56 (1925). President William H. Harrison’s administration held the same view: “It is according to that construction, 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).

Ever since the Decision of 1789, the Executive Branch has staunchly defended the Executive removal power against congressional encroachments. President Madison, for example, authoritatively 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 Madison clashed with Congress over his removal power. In one instance, the Senate debated whether to pass a resolution requiring Madison “to inform the Senate whether his office of Postmaster General be now vacant, and, if vacant, in what manner the same became vacant.” See Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 Case W. Res. L. Rev. 1451, 1508 (1997) [hereinafter *First Half-Century*]. In the face of opposition from the Executive Branch, the Senate quickly abandoned its attempt to interfere with the President’s free exercise of the removal power, rejected the resolution, and “conclud[ed] that it did not have the right to make such an inquiry.” *Id.* Congress thus recognized early on in our constitutional history that it lacked authority to impose limits on the removal power.

Even after leaving office, President Madison continued to steadfastly defend the removal power. President Madison wrote that Congress’s “claim, on *constitutional* ground, to a share in the removal as well as appointment of officers, is in direct opposition to the uniform practice of the Government from its commencement.” Letter from James Madison to Edward Coles (Oct. 15, 1834), in *First Half-Century*, at 1510. Madison further observed that “[i]t is clear that the innovation would not only vary, essentially, the existing balance of power, but expose the Executive, occasionally, to a total inaction, and at all times to delays fatal to the due execution of the laws.” *Id.*

Of the first few Presidents, however, probably none defended the presidential removal power with more vim and vigor than President Andrew Jackson. One of the most important early debates over the scope of the removal power (perhaps only second in importance to the Decision of 1789) occurred in 1833 when President Jackson removed Treasury Secretary

William Duane. President Jackson had asked the Secretary to withdraw the federal government's deposits from the Second Bank of the United States. After Secretary Duane refused to follow the President's direction, the President removed Secretary Duane from office.

Perhaps most relevant to this Court's consideration of Sarbanes-Oxley, members of Congress introduced at least four separate measures in the 1830s aimed at limiting President Jackson's removal power. Significantly, Congress ultimately rejected all of these attempts to limit the removal power. *See First Half-Century*, at 1534. Moreover, 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](http://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).

When the Senate eventually passed a resolution asking President Jackson to provide Congress with information about his removal of an executive officer, President Jackson refused to comply with the Senate's request. He explained that the "President in cases of this nature

possesses the *exclusive power of removal from office.*” Andrew Jackson, Special Message to the Senate (Feb. 10, 1835), *available at* [www.presidency.ucsb.edu/ws/index.php?pid=66704&st=&st1=](http://www.presidency.ucsb.edu/ws/index.php?pid=66704&st=&st1=) (emphasis added). To allow the Senate to interfere with the removal power “would ultimately subject the independent constitutional action of the Executive in a matter of great national concernment to the domination and control of the Senate.” *Id.* He thus opposed the Senate resolution, as it was his “duty [to] . . . resist[] to the utmost any further encroachment on the rights of the Executive.” *Id.*

President Cleveland continued the Presidents’ staunch defense of the removal power. During his second term, President Cleveland removed United States Attorney Parsons, an inferior officer, *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”), from his office even though a federal statute provided that his appointment was “for four years,” *Parsons*, 167 U.S. at 327-38. Parsons claimed that, in passing the federal statute, Congress prevented the President from removing him before the expiration of his four year term. *Id.* at 325-36. Maintaining the position staked out by prior Presidents, Cleveland’s administration defended the President’s removal power all the way to the Supreme Court. And the Supreme Court flatly rejected Parson’s 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 William McKinley also firmly defended the removal power against congressional encroachment. The Customs Administration Act provided that the President could

appoint no more than five persons to the position of general appraiser of merchandise and that the President could remove those 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 arguing that the federal law prevented the President from removing him except on the grounds of inefficiency, neglect of duty, or malfeasance. *See id.* at 315-16. The Supreme Court agreed with President McKinley and rejected Shurtleff’s argument that the “for cause” removal language could limit the President’s removal power. According to the Supreme Court, a contrary result “would involve the alteration of the universal practice of the government for over a century.” *Id.* at 316.

Showing his strong support for the removal power, President Wilson vetoed the Budget and Accounting Act of 1920. The Act would have established a General Accounting Office headed by the Comptroller General—a civil officer with executive functions. The Act purported to strip the President of all removal power over the Comptroller General. In his veto message, President Wilson wrote that “Congress is without constitutional powers to limit . . . the power of removal derived from the Constitution.” Woodrow Wilson, Veto Message (June 4, 1920), in Christopher Yoo, Stephen Calabresi, & Laurence Nee, *The Unitary Executive During The Third Half-Century, 1889-1945*, 80 *Notre Dame L. Rev.* 1, 53 (2004).

President Calvin Coolidge’s administration ranks as one of the most ardent defenders of the removal power, most notably due to its position in the seminal case of *Myers v. United States*. There, the Supreme 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 the Supreme Court,

President Coolidge's Solicitor General explained the history of the President's plenary removal power, starting with the Decision of 1789 and the ten plus decades of government practice. Solicitor General Beck wrote that "[f]rom the Beginning of the Government removal has been recognized as essentially an executive function." Brief of the United States, *reproduced in Myers*, 272 U.S. at 99. And that President Coolidge's administration "do[es] not concede that a law, which . . . subjects the power of removal to congressional conditions, is constitutional . . ." *Id.* at 90. Solicitor General Beck also drew the Court's attention to the numerous Attorney General opinions defending the unilateral nature of the Executive removal power. *Id.* at 104-106.

Presidents also have opposed congressional attempts to legislate executive officials out of office. Although Congress has the power to abolish offices entirely, the Executive Branch has opposed congressional action taken to force particular executive officers out of their positions by disqualifying them from their offices. For example, when Congress tried to force two officials of the Bureau of Reclamation—Michael Straus and Richard Boke—out of office by arbitrarily enacting new qualifications for their positions, *see* Interior Department Appropriation Act, 62 Stat. 1112, 1126 (1948), President Truman immediately opposed this legislative act. President Truman argued that allowing Congress to effectively remove Straus and Boke from office 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&st=st1=](http://www.presidency.ucsb.edu/ws/index.php?pid=12949&st=st1=). Although Truman felt compelled to sign the relevant legislation for political reasons, he 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. Congress 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. While acknowledging Congress’s power to abolish offices, President Nixon vetoed the bill because he found it 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=](http://www.presidency.ucsb.edu/ws/index.php?pid=3851&st=&st1=). Nixon won this interbranch skirmish as Congress failed to override his veto.

More recently, Presidents have stood their ground to defend congressional attacks on the removal power through agency overhauls. In particular, President Clinton opposed the 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). When President Clinton signed the bill into law, he stated that these limitations on his removal authority were constitutionally problematic. *See President’s 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&st=&st1=](http://www.presidency.ucsb.edu/ws/index.php?pid=48981&st=&st1=).

Likewise, President George W. Bush strongly asserted his removal authority during the creation of the Department of Homeland Security. President Bush and the Democratic Congress were at loggerheads over whether lower-level department employees should be entitled to the typical job protections enjoyed by federal employees. 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).

In short, from 1789 to the present, the Executive Branch has vigorously and consistently protected its removal authority from congressional intrusions thereon.

**B. History Demonstrates That The Courts Should Not Endorse Congressional Intrusions Upon The Executive's Removal Power.**

As shown above, our nation's Presidents have uniformly rebuffed congressional efforts to interfere with the Executive removal power. The debates surrounding two congressional acts in particular—the Tenure In Office Act and the Ethics In Government Act—deserve special consideration because in both cases Congress eventually accepted the Presidents' view of the removal power and conceded that the cost of interfering with the Executive's Article II removal power was not in our nation's interest.

**The Tenure In Office Act.** In 1867, Congress succeed in passing a measure that limited the President's removal power. Under the Tenure In Office Act, 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=](http://www.presidency.ucsb.edu/ws/index.php?pid=72071&st=&st1=).

In his Third Annual Message, President Johnson observed that “*the framers of the Constitution left the power of removal unrestricted*, while they gave the Senate a right to reject all appointments which in its opinion were not fit to be made.” Andrew Johnson, Third Annual Message (Dec. 3, 1867), *available at* [www.presidency.ucsb.edu/ws/index.php?pid=29508&st=&st1=](http://www.presidency.ucsb.edu/ws/index.php?pid=29508&st=&st1=) (emphasis added).<sup>1</sup> Notwithstanding President Johnson’s robust defense of the removal power, Congress overrode the President’s veto and enacted the Tenure In Office Act. Continuing his defense of the removal power, 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. President Johnson came within one vote of being thrown out of office for disregarding what Congress later conceded was an unconstitutional statute.

After President Johnson left office, President Ulysses S. Grant maintained Johnson’s defense of the removal power. In his first annual message, President Grant questioned the constitutionality of the Tenure In Office Act: “It could not have been the intention of the framers of the Constitution, when providing that appointments made by the President should receive the

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<sup>1</sup> Echoing the convictions of President Johnson, President Woodrow Wilson would later remark that the Tenure In Office Act was “repugnant . . . to the original theory of the Constitution.” Woodrow Wilson, *Congressional Government: A Study In American Politics* 52 (Meridian 1956) (1885).

consent of the Senate, that the latter should have the power to retain in office persons placed there by Federal appointment against the will of the President.” Ulysses S. Grant, First Annual Message (Dec. 6, 1869), *available at* [www.presidency.ucsb.edu/ws/index.php?pid=29510&st=&st1=](http://www.presidency.ucsb.edu/ws/index.php?pid=29510&st=&st1=). And President Grant “earnestly recommend[ed] [its] total repeal.” *Id.* Retreating from the unconstitutional position it staked out in the Tenure In Office Act, Congress acceded to President Grant’s request and partially repealed the Tenure In Office Act. *See* Act of Apr. 5, 1869, ch. 10, § 2, 16 Stat. 6, 7.

President Grover Cleveland continued the Executive Branch’s attack on the Tenure In Office Act. Focusing on the text of the Constitution, President Cleveland declared that “the power to remove or suspend such officials is vested in the president alone by the Constitution, which in express terms provides that ‘the executive power shall be vested in a President of the United States of America’ and that ‘he shall take care that the laws be faithfully executed.’” Grover Cleveland, Message to the Senate (Mar. 1, 1886), *available at* [www.presidency.ucsb.edu/ws/index.php?pid=71867&st=&st1=](http://www.presidency.ucsb.edu/ws/index.php?pid=71867&st=&st1=). Continuing, President Cleveland noted that “the Constitution by express provision [had] superadded to . . . [the Senate’s] legislative duties the right to advise and consent to appointments to office and to sit as a court of impeachment,” but that this “express and special grant of such extraordinary powers” were “a departure from the general plan of our Government, [and thus] should be held, under a familiar maxim of construction, to exclude every other right of interference with Executive functions.” *Id.*

In light of President Cleveland’s textualist defense of the removal power, public opinion turned against the law and Congress repealed the Tenure In Office Act in its entirety. *See* Act of Mar. 3, 1887, ch. 353, 24 Stat. 500. According to at least one commenter, with the repeal of the Tenure In Office Act, “Congress formally abrogated its claim to control presidential discretion in

suspending or removing officials in the executive branch.” Richard E. Welch, Jr., *The Presidencies Of Grover Cleveland* 55 (1988) (quotation marks omitted). Reflecting on the repeal of the Tenure In Office Act, President Cleveland noted: “thus was an unpleasant controversy happily followed by an expurgation of the last pretense of statutory sanction to an encroachment upon constitutional Executive prerogatives, and thus was a time-honored interpretation of the Constitution restored to us.” Grover Cleveland, *Presidential Problems* 76 (1904).

**The Ethics In Government Act.** The Ethics In Government Act charted much the same course as the Tenure In Office Act. Like the Tenure In Office Act, the Ethics In Government Act was the product of Congress flexing its political muscles in the face of a weakened President. Although the Carter administration opposed the creation of a judicially appointed independent counsel designed to ferret out misconduct at the highest levels of the Executive Branch, it lacked the political power to defeat the Ethics In Government Act.

President Reagan’s subsequent administration launched a vigorous attack on the Ethics In Government Act, however. Executive Branch officials repeatedly challenged the constitutionality of the Act in hearings before Congress. Indeed, President Reagan himself challenged the Act’s limits on his removal power: “An officer of the United States exercising executive authority in the core area of law enforcement necessarily, under our constitutional scheme, must be subject to executive branch appointment, review, and removal. There is no other constitutionally permissible alternative.” 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=](http://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 at the Supreme Court, *see Morrison*, 487 U.S. at 654,<sup>2</sup> 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 his 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. Indeed, President Bush's administration managed a small victory against the Ethics In Government Act by successfully preventing all attempts to reauthorize it during his administration.

It was during President Clinton's administration that the Ethics In Government Act engendered a constitutional crisis that resulted in the death of the Act. Acting as independent counsel, Kenneth Starr's investigation of President Clinton culminated in a decision by the House to impeach President Clinton. Like President Johnson, President Clinton ultimately was acquitted by the Senate. By then, Congress had come to realize that the Ethics In Government Act rested on an unconstitutional foundation. Former supporters of the Act, such as Attorney General Janet Reno, 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 to believe-- after much reflection and with great reluctance--that *the Independent Counsel Act is structurally flawed and that those flaws cannot be corrected within our constitutional framework . . .*"

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<sup>2</sup> As Appellants demonstrate, even under *Morrison*, Sarbanes-Oxley unconstitutionally interferes with the Executive's removal power. Br. of App. at 14-23.

*Future of the Independent Counsel Act: Hearings Before the Senate Comm. on Governmental Affairs*, 106th Cong. 247-50 (1999) (statement of Attorney General Janet Reno). Democrats and Republicans alike, as well as former independent counsels under the Act, lobbied for the end of the Independent Counsel Act. 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.

Thus the Ethics In Government Act and the Tenure In Office Act remain in the legislative dustbin. The demise of these statutes highlights the folly of congressional efforts to limit the removal power. And that these statutes were ultimately considered unconstitutional by many 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. Their controversial histories should stand as warnings against judicial endorsement of congressional experimentation with limits on the Executive's removal power.

## **II. THE HARMFUL EFFECTS OF SARBANES-OXLEY AND THE BOARD'S ACTIONS ON AMERICAN ENTERPRISE DEMONSTRATE THE DANGERS OF ENDORSING CONGRESSIONAL INTRUSIONS ON THE REMOVAL POWER.**

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. But, in doing so, 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). Even during a time of war, in conditions that are surely more extraordinary than is 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.”).

In the case of Sarbanes-Oxley, Congress failed to heed these warnings. Instead, 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). Indeed, Congress created the PCAOB with the intention that it would be unresponsive and unaccountable to the public: “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). To this end, Congress completely stripped the President of his removal authority, making members of the PCAOB removable only by the SEC and even then removable only for a very limited set of reasons. *See* Sarbanes-Oxley § 101(e)(6); *see also* Br. of App. at pp. 14-23.

The PCAOB, unchecked by political will, has run amok among the accounting industry and our nation’s public companies. *See* Bob Merritt, *The Sarbanes-Oxley Act: A Personal View*, Washington Legal Foundation Legal Opinion Letter, Vol. 15, No. 21 (Oct. 21, 2005) [hereinafter Merritt] (“This under-supervised and overzealous group of bean counters [the PCAOB] has generated countless regulations and has taken a gun-and-badge attitude toward public company managements, their financial executives, and their auditors.”). Sarbanes-Oxley’s requirements have raised substantially the direct costs of public companies for accounting and auditing

services. As an example, Yellow Roadway, the largest trucking company in the nation, was forced to divert 200 employees to work on Sarbanes-Oxley issues and to spend an additional \$10 million on outside accountants and auditors. See Peter J. Wallison, *Sarbanes-Oxley and the Ebberts Conviction*, AEI Online, June 10, 2005 [hereinafter Wallison], available at [http://www.aei.org/publications/pubID.22648/pub\\_detail.asp](http://www.aei.org/publications/pubID.22648/pub_detail.asp).

In its first year alone, the PCAOB has inflicted almost immeasurable damage on the economy, costing American businesses some \$35 billion. This figure demonstrates 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*, February 2005, available at [www.aeanet.org/governmentaffairs/AeASOXPaperFinal021005.asp](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.”); Robert Novak, *Threat of the Auditors*, CNN.com, April 7, 2005, available at [www.cnn.com/2005/POLITICS/04/07/threat.auditors](http://www.cnn.com/2005/POLITICS/04/07/threat.auditors) (“Non-government estimates put the cost for publicly traded companies at \$35 billion.”). These costs are likely to be passed on to public companies’ customers and shareholders. See David A. Kotler & Rick Swedloff, *Sarbanes-Oxley’s Impact on State Corporate Governance*, Washington Legal Foundation Legal Opinion Letter, Vol. 13, No. 16 (July 25, 2003). Even Congressman Michael Oxley is now on record as criticizing the “enormous cost[s]” imposed by Sarbanes-Oxley, in general, and the PCAOB, in particular. See, e.g., Stephen Taub, *Oxley: I’m Not Happy with Sarbox*, Apr. 6, 2007 available at <http://www.cfo.com/article.cfm/8985156?f=insidecfo> (“Retired Congressman Michael Oxley blames the PCAOB for starting ‘all the problems’ with the Sarbanes-Oxley Act.”); accord Thomas E. Hartman, *The Cost of Being Public in the Era of Sarbanes-Oxley* (Aug. 2, 2007) (“[C]ompanies of all sizes have experienced a significant

increase in Sarbanes-Oxley Act compliance costs, with costs associated with compliance with Section 404 of the Act responsible for most of that increase.”).

And these are just the direct costs. Market data demonstrates that the shareholder public envisioned the costs of Sarbanes-Oxley and the PCAOB as outweighing their benefits: the Dow Jones Industrial Average dropped 179 on the day when the president spoke on Wall Street and called for regulation and then fell another 283 points the next day when the Senate adopted the Sarbanes bill in a unanimous vote. *See* Wallison.<sup>3</sup>

Market evidence demonstrates that the burden of the sharp increases in accounting and auditing expenses has fallen mostly on small businesses. Indeed, the burden of compliance has kept numerous companies from going public and has even compelled increasing numbers of public companies to go private. *See* Wallison (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)); *see also* John Berlau, *SOXing it to the Little Guy: How Sarbanes-Oxley Hurts Small Investors and Entrepreneurs*, June 7, 2007, available at [www.cei.org/pdf/5954.pdf](http://www.cei.org/pdf/5954.pdf). In addition, “[s]ome non-American companies have threatened not to list in New York because of the cost of the legislation; others that have recently delisted from an American stock exchange are said to have done so partly because of Sarbanes-Oxley.” *Sarbanes-Oxley: A Price Worth Paying?*, *The Economist* (May 19, 2005) [hereinafter *A Price*

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<sup>3</sup> A study conducted by Ivy Xiying Zhang of the William E. Simon Graduate School of Business at the University of Rochester attempts to assess Sarbanes-Oxley’s impact on share value. The Zhang study concludes that the cumulative effect of the President’s July 9, 2002 speech on Wall Street; the Republican House abandonment of efforts to tone down the bill on July 18, 2002; and the Senate-House conference report on the bill on July 24, 2002 was a \$1.4 trillion loss for shareholders of public companies. *See* Ivy Xiying Zhang, *Economic Consequences of the Sarbanes-Oxley Act of 2002* (Paper, William E. Simon Graduate School of Business Administration, University of Rochester, Feb. 2005), available at [http://w4.stern.nyu.edu/accounting/docs/speaker\\_papers/spring2005/Zhang\\_Ivy\\_Economic\\_Consequences\\_of\\_S\\_O.pdf](http://w4.stern.nyu.edu/accounting/docs/speaker_papers/spring2005/Zhang_Ivy_Economic_Consequences_of_S_O.pdf); *see also* Wallison (discussing the Zhang study).

*Worth Paying?*], available at [http://www.economist.com/business/displayStory.cfm?story\\_id=3984019](http://www.economist.com/business/displayStory.cfm?story_id=3984019).

Thus, Sarbanes-Oxley and the PCAOB may in fact be working against their intended purposes: “It would be regrettable if a law intended to improve the quantity and quality of financial information available to investors led many companies to seek relatively unregulated forms or jurisdictions—but that does seem to be happening.” *Id.*; see also Merritt (“In the final analysis, the environment created by the Act and its implementation have resulted in a misallocation of managements’ time and attention from real shareholder value creation to regulatory risk avoidance that will not improve the chances of avoiding future public company abuses and failures.”).

In the same vein, the PCAOB has aided the very accounting firms it sought to restrain. Studies show that “despite the media and legislative clamor to ‘get’ the big accounting firms after Enron imploded, it’s the Big Four accounting firms that have turned out to be the big winners from Sarbanes-Oxley.” John Berlau, *A Tremendously Costly Law*, National Review, April 11, 2005; see *A Price Worth Paying?* (“[SOX] has provided a bonanza for accountants and auditors—a profession thought to be much at fault in the scandals that inspired the law, and which the statute sought to rein in and supervise.”). 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 (arguing that Sarbanes-Oxley and the PCAOB are unnecessary and overly burdensome and that the longstanding threat of criminal conviction was sufficient to deter fraudulent accounting practices). By inflating the profitability of the Big Four, Congress has upset competition in the accounting industry.

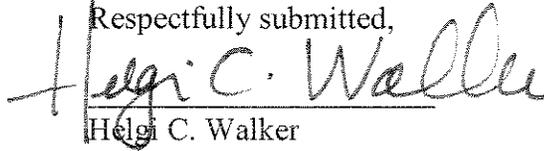
Thus, the practical effect of Sarbanes-Oxley and the PCAOB has been to impair public companies, small businesses, and shareholders—that is, the American people—at the expense of the biggest accounting firms. So Congress has crippled its intended beneficiaries while aiding its intended targets. This itself is bad enough. But worse still is that the people have no recourse because Congress has ensured that the PCAOB is not politically accountable to anyone.

The Supreme Court has warned that disregard of the Constitution’s careful division of governmental authority among the coordinate branches would lead to such 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; *see also Pub. Citizen v. United States Dep’t of Justice*, 491 U.S. 440, 468 (1989) (Kennedy, J., concurring) (“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.”). This Court’s failure to vindicate the Executive’s removal power in this case will allow the PCAOB to continue to wreak havoc on public companies, small businesses, and shareholders—indeed, on the economy as a whole—because the PCAOB remains unresponsive and unaccountable to the body politic.

**CONCLUSION**

For the reasons set forth herein and in the Brief of Appellants, the Court should reverse the judgment below.

Daniel J. Popeo  
Paul D. Kamenar  
**WASHINGTON LEGAL FOUNDATION**  
2009 Massachusetts Avenue, N.W.  
Washington, D.C. 20036  
TEL: 202.588.0302  
FAX: 202.588.0386

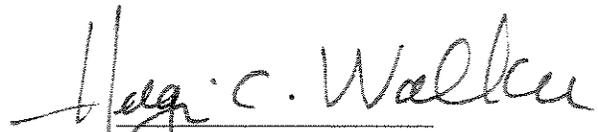
Respectfully submitted,  
  
Helgi C. Walker  
Thomas R. McCarthy  
Brendan T. Carr  
**WILEY REIN LLP**  
1776 K Street, N.W.  
Washington, D.C. 20006  
TEL: 202.719.7000  
FAX: 202.719.7049

*Attorneys for Amicus Curiae Washington  
Legal Foundation*

## CERTIFICATE OF COMPLIANCE

The undersigned counsel for amicus curiae Washington Legal Foundation certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6), as modified by Circuit Rule 32(a)(1). This brief contains 6,888 words, excluding the Corporate Disclosure Statement, Table Of Contents, Table Of Authorities, Certificates, and Glossary and is printed in a proportionally spaced typeface, 12-point Times New Roman, utilizing Microsoft Office WORD 2003.

Dated: December 31, 2007

  
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Helgi C. Walker

## CERTIFICATE OF SERVICE

I hereby certify that, on this 31st day of December 2007, I caused an original and 14 true and correct copies of the foregoing Amicus Brief to be filed with the Court. I further certify that I caused two copies of the foregoing Amicus Brief to be sent via Federal Express for overnight delivery on each party separately represented:

Kenneth W. Starr  
24569 Via De Casa  
Malibu, CA 90265

Viet D. Dinh  
Bancroft Associates PLLC  
601 13th St., N.W.  
Suite No. 930 South  
Washington, D.C. 20005

Sam Kazman  
Hans Bader  
Competitive Enterprise Institute  
1001 Connecticut Avenue, N.W.  
Suite 1250  
Washington, D.C. 20036

Mark B. Stern  
Mark R. Freeman  
U.S. Department of Justice  
Civil Division, Appellate Staff  
950 Pennsylvania Avenue, N.W.  
Room 7228  
Washington, DC 20530

Jeffrey A. Lamken,  
Joe Robert Caldwell, Jr.,  
Baker Botts LLP  
1299 Pennsylvania Avenue, N.W.  
Washington, DC 20004

Michael A. Carvin  
Noel J. Francisco  
Christian G. Vergonis  
Jones Day  
51 Louisiana Avenue, N.W.  
Washington, DC 20001-2113

R. Craig Lawrence,  
U.S. Attorney's Office  
Civil Appellate  
555 4th Street, NW  
Washington, DC 20530

Robert J. Katerberg  
U.S. Department of Justice  
Civil Division, Federal Programs  
20 Massachusetts Avenue, NW  
Washington, DC 20530

Christian J. Ward  
Yetter & Warden  
221 W 6th Street  
Suite 750  
Austin, TX 78701

Richard Howard Pildes  
New York University School of Law  
Room 507  
40 Washington Square, South  
New York, NY 10012

Elizabeth Gallaway  
William Perry Pendley  
Mountain States Legal Foundation  
2596 South Lewis Way  
Lakewood, Colorado 80227

  
\_\_\_\_\_  
Helgi C. Walker

