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**

AMICUS CURIAE BRIEF ON THE MERITS OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS, FREE ENTERPRISE FUND AND BECKSTEAD AND WATTS, LLP

J. SCOTT DETAMORE
Counsel of Record
MOUNTAIN STATES LEGAL
FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021

*Attorney for Amicus Curiae
Mountain States Legal Foundation*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

AMICUS CURIAE BRIEF ON THE MERITS OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS, FREE ENTERPRISE FUND AND BECKSTEAD AND WATTS, LLP

Mountain States Legal Foundation ("MSLF") respectfully submits this amicus curiae brief on the merits on behalf of itself and its members in support of Petitioners, Free Enterprise Fund and Beckstead and Watts, LLP.[1]

INTEREST OF AMICUS CURIAE

MSLF is a nonprofit, public-interest law firm organized under the laws of the State of Colorado with more than 5,000 members. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, the free enterprise system, and limited and ethical government.

MSLF has long been active in litigation aimed at ensuring that the Constitution is interpreted in

[1] Pursuant to Supreme Court Rule 37.3(a), counsel of record states that the parties have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part, and no person or entity, other than the amicus curiae, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

accordance with its text, the intent of the Founders, and the political theories informing that intent. MSLF believes that the United States Court of Appeals for the District of Columbia Circuit has departed from that principle. In this brief, MSLF will attempt to persuade this Court that it should return to this principle of constitutional construction by overruling a line of cases that has departed from this principle. In so doing, this Court must reverse the District of Columbia Circuit Court of Appeals and hold that the Congress unconstitutionally created the Public Company Accounting Oversight Board ("PCAOB") in violation of the Doctrine of Separation of Powers.

INTRODUCTION

The plain language of the United States Constitution vests all federal executive power in the President of the United States, subject only to specific constitutional limitations. That power is plenary. The intent of the Founders and the political theory of their day support that conclusion. The Constitution provides no power to Congress to control or condition the removal of officers or employees who implement, administer, or carry out the laws of the United States; that power is vested solely in the President. Certain cases of this Court that do not support this principle should be overruled and the decision of the District of Columbia Circuit Court of Appeals in the case at issue should be reversed.

MSLF does not believe that this Court *must* overrule any prior cases in order to find that Congress's creation of the PCAOB violates either the Doctrine of Separation of Powers or the Appointments Clause. In that regard, MSLF agrees with Petitioners. MSLF believes, however, that the jurisprudence of this Court has for many years departed from both the constitutional text and the intent of the Founders regarding Congress's power to create independent agencies and to limit the executive power of the President with respect thereto.

This case presents this Court with a prime opportunity to revisit the issue of independent agencies and to correct the wrong constitutional turn taken by this Court in prior years. Under current law, all Congress need do is determine that an agency executing the laws of Congress should be independent of the President and it may make it so. Under that jurisprudence, the President becomes no more than a minion of Congress, acting in accordance with Congress's directives. This Court must end the current practice of unguided, ad hoc determinations, lacking justiciable standards, to decide the constitutionality of Congress's incursions into executive authority through its creation of independent agencies.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE UNITED STATES CONSTITUTION VESTS ALL EXECUTIVE POWER IN ONE PERSON, THE PRESIDENT.

The first three Articles of the Constitution of the United States delineate the structure of the government of the United States. The Founders believed that all governmental power consist of only three categories – legislative, executive, and judicial – that is reflected in the Constitution, which vests these powers in three separate, distinct, and co-equal divisions of government:

> All legislative Powers *herein granted*, shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

U.S. Const. art. I, § 1 (emphasis added).

> The executive Power *shall be vested* in *a* President of the United States of America.

U.S. Const. art. II, § 1 (emphasis added).

> The judicial Power of the United States *shall be vested* in one Supreme Court and such inferior Courts as the Congress may from time to time ordain and establish.

U.S. Const. art. III, § 1 (emphasis added).

At issue here is the nature and the extent of the power vested by the Constitution in the executive

branch and the degree to which, if at all, Congress may intrude upon that power. The Constitution of the United States unambiguously vests *all* executive power in one person, the President of the United States. This plenary power must, of necessity, include the power to execute, enforce, administer, carry out, and implement the laws of the United States enacted by Congress, and to appoint, remove, control, and supervise the officers, inferior officers, and employees who engage in those functions. In contrast, the Constitution vests Congress with legislative powers only as "herein granted." Unlike the President, Congress "can exercise only the powers granted to it" in other sections of the Constitution. *McCulloch v. Maryland,* 4 U.S. (4 Wheat) 316, 405 (1819).

Looking at the first three Articles together is informative in understanding the constitutional structure. Articles II and III resemble one another more than either resembles Article I. Neither of those Articles contains a "herein granted" provision, and both are vested with complete power in their respective spheres of government. Section 2 of these Articles differs, however. Section 2 of Article III begins with the limiting phrase, "The judicial power shall extend to. . . ." This phrase makes it clear that the enumerated jurisdictional powers that follow are exclusive. No such limiting phrase exists in Section 2 of Article II, however. Rather, that Section merely places limits on particular executive powers granted by Section 1 of Article II but does not otherwise limit the plenary executive power granted by Section 1. For

example, certain presidential appointments and treaties require the consent of the Senate, the power of pardon does not extend to impeachment, only Congress may declare war or issue letters of marquee and reprisal, and Congress may vest appointment of inferior executive officers, without Senate consent, in the President, Judiciary, or department heads. U.S. Const. art. II, § 2.

These limits constitute the exclusive powers of Congress to check the plenary executive power of the President, which necessarily includes all power over removal, or the conditions of removal, of executive officers and employees, principal or inferior, irrespective of who may have appointed them. Thus, all power to control and supervise after appointment is solely executive and vested in the President.

This clear and unambiguous constitutional structure does not provide for or contemplate the burgeoning "independent agencies" that owe their existence and the tenure of their officers to Congress rather than the President. Indeed, in some cases, as here, these agencies are essentially independent of any of the three branches of government. Nor does the Constitution's plain language permit the creation of so-called "quasi" powers, such as quasi-judicial or quasi-legislative power. Under the Constitution's clear language, there are only three powers, which the Constitution divides solely among the three separate and distinct branches of government, subject only to the very limited blending of powers specifically provided for to allow each branch the

ability to check and moderate the others, as discussed infra.

Thus, the plain language does not allow a governmental body to be part of more than one branch of government. The Constitution provides Congress with no power to vest implementation of its laws in any other than the executive branch, the sole person responsible for which is the President, even though the legislation contemplates some rule-making or adjudication. Under the plain language of the Constitution, a power is executive if it enforces, carries out, implements, or executes congressional legislation or controls and supervises those who do so.

II. THE POLITICAL THEORY ON WHICH THE FOUNDERS BASED THE STRUCTURE OF THE CONSTITUTION SUPPORTS AND REINFORCES THE PLAIN LANGUAGE OF THE CONSTITUTION.

The political theories of government employed by the Founders support and reinforce the plain language of the Constitution. The concept of government and political theory employed by the Founders in drafting the Constitution is set forth in *The Federalist*:

> [T]he authors of the Publius letters set forth more comprehensively, and in a form more nearly final than is elsewhere found, theories reflective of the course of constitutional government and theory in this country up to 1787.

The Federalist at 77 (Benjamin Fletcher Wright ed., 1961). Central to this understanding is the concept that government must be composed of separate and balanced departments, whose powers are blended just enough that each will check and moderate the others, thus endowing the people with a maximum degree of liberty.

A. The Legislative Branch Is The Most Powerful Branch And The One Most Likely To Encroach On The Powers Of The Others, Requiring More Checks And Balances On Its Power.

The Founders believed that concentration of governmental power leads to tyranny and that dispersal of this power is necessary to preserve liberty. But the Founders also believed that, because complete separation of the branches could lead to tyranny, there must be a limited blending of powers among the branches, thus allowing each branch to check and moderate the others. The branch most capable and most likely to draw power to itself and, therefore, requiring more checks from the other branches, is the legislative. This is demonstrated in discussions in *The Federalist* Nos. 47, 48, and 51 (James Madison).

Madison wrote that "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." *The Federalist* No. 47 at 336 (James Madison)

(Benjamin Fletcher Wright ed., 1961). "The powers that properly belong to one of the departments ought not to be directly and completely administered by either of the other departments" because "*power is of an encroaching nature, and . . . ought to be effectually restrained from passing the limits assigned to it.*" *The Federalist* No. 48 at 343 (James Madison) (Benjamin Fletcher Wright ed., 1961) (emphasis added).

Madison then laid out the structure by which the Constitution "maintain[s] . . . the necessary partition of power among the several departments. . . ." *The Federalist* No. 51 at 355 (James Madison) (Benjamin Fletcher Wright ed., 1961). The Constitution, Madison explained, recognizes that the "separate and distinct exercise of the different powers of government . . . is . . . essential to the preservation of liberty." *Id.* Indeed, "each department should have a will of its own [and] should be so constituted that the members of each should *have as little agency as possible in the appointment of the members of the others.*" *Id.* (emphasis added).

Therefore, in setting up these independent co-equal departments, the Constitution so "contriv[es] the interior structure of government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places." *Id.* Thus, "the great security against a gradual concentration of the several powers in the same department consists in *giving those who administer each department the necessary constitutional means and personal motives to resist the*

encroachments of the others." *Id.* at 356 (emphasis added). In other words, to control and moderate each other the branches must "be so far connected as to give to each a constitutional control over the others." *The Federalist* No. 48 at 343 (James Madison) (Benjamin Fletcher Wright ed., 1961). Because some branches of government are more powerful than others, "some more adequate defense is indispensably necessary for the more feeble, against the more powerful, members of the government." *Id.*

Madison identified the legislative branch as the most powerful, stating, "The legislative department is *everywhere extending the sphere of its activity*, and *drawing all power into its impetuous vortex*." *Id.* (emphasis added). In fact "it is *against the enterprising ambition* of [the legislative] department that the people ought to indulge all their jealousy and *exhaust all their precautions*." *Id.* at 344 (emphasis added). Madison believed that the executive branch required protection and self-defense mechanisms against an overreaching legislative branch:

> Its constitutional powers being at once more extensive, and less susceptible of precise limits it can, with the greater facility, *mask, under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments*. . . . Nor is this all: as the legislative department alone has access to the pockets of the people, and has in some constitutions full discretion, and in all a prevailing influence, over the pecuniary rewards of those who fill the other

> departments, a dependence is thus created in the latter, which gives still greater facility to encroachments of the former.

Id. at 344-45 (emphasis added).

The case before this Court demonstrates just how overreaching and enterprising Congress is and the foresight of the Founders. In establishing the PCAOB, Congress engaged in unconstitutional encroachment on the executive branch through a complicated and indirect measure that attempts to draw executive power into its "impetuous vortex." Congress attempted to eviscerate the power of the President by the creation of not only the PCAOB, but of all other agencies independent of the President's supervision and control.

These power grabs demonstrate unequivocally why the provisions for self-defense of the executive must "be made commensurate to the danger of attack." *The Federalist* No. 51 at 356 (James Madison) (Benjamin Fletcher Wright ed., 1961). Because "ambition must be made to counteract ambition" the Constitution puts in place a system "of opposite and rival interests. . . ." *Id.* "[T]he 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." *Id.*

Madison, once again recognizing the predominance of the legislative branch, opined, "It is not possible to give each department an equal power of

self-defense, [because] in republican government, the legislative authority predominates." *Id.* He explained that the "the remedy for this inconveniency is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions . . . will admit." *Id.* at 357. But even more precautions may be needed "against still further dangerous encroachments [by the legislature]." Accordingly, "as the weight of the legislative authority requires that it should be thus divided, the weakness of the executive may require . . . that it should be fortified." *Id.* Thus, it is the aim of the Constitution that "different governments will control each other, at the same time that each will be controlled by itself." *Id.*

Madison's writings demonstrate that the Founders greatly distrusted the legislative branch and its ability to, and predilection for, restricting executive power and drawing all power to itself. They make clear that legislation that in any way intrudes upon the power of the President must be examined carefully and with skepticism to determine whether the legislature is encroaching on the executive power.

B. The Constitution Vests All Executive Power In One Person.

The protection of the executive power requires vesting all such power in one person, the President. Alexander Hamilton discusses the reasons therefor in

The Federalist Nos. 69, 70, 71, and 76 (Alexander Hamilton). He first explains that Article II, § 2, by providing limitations on the executive power, distinguishes the President from the King of Great Britain, who possessed far more formidable powers. *The Federalist* No. 69 (Alexander Hamilton). Hamilton also emphasizes the need to rigidly control the Congress, using the strongest, most emphatic language found in *The Federalist* to describe the corruptive and intrusive nature of the power in the legislature:

> To what purpose separate the executive . . . from the legislative, if . . . the executive . . . [is] so constituted as to be at the absolute devotion of the legislative? . . . The *tendency of the legislative authority to absorb every other*, has been fully displayed and illustrated by examples in some preceding numbers. In governments purely republican, this tendency is almost irresistible. The *representatives of the people, in a popular assembly, seem sometimes to fancy that they are the people themselves*, and betray strong *symptoms of impatience and disgust at the least sign of opposition* from any other quarter; as if the exercise of its rights, by either the executive or judiciary, were a breach of their privilege and an outrage to their dignity. They often appear disposed to exert an *imperious control over the other departments*; and as they commonly have the people on their side, they always *act with such momentum as to make it very difficult*

> *for the other members of the government to maintain the balance of the Constitution*.

The Federalist No. 71 at 460 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961) (emphasis added).

C. One Person Promotes The Necessary Energy Needed By The Executive Branch And The Responsibility To The People That Is Critical To Preserve Liberty.

1. The executive branch requires energy.

In *Federalist* No. 70 Hamilton explains that it is essential to vest all the executive power in one person because that promotes both energy and safety, or responsibility, the two most important and necessary characteristics of executive power. "Energy in the Executive is a leading character of the definition of good government." *The Federalist* No. 71 at 451 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961). Energy equates to "decision, activity, secrecy, and dispatch." *Id.* at 452.

"Unity [of executive power] is conducive to energy." *Id.* at 451-52. The elements of energy "will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished." *Id.* at 452. This is so because "wherever two or more

persons are engaged in any common enterprise . . . there is always the danger of difference of opinion." *Id.* at 453. Such dissension "counteracts those qualities in the Executive which are the most necessary ingredients in its composition, vigor and expedition. . . ." *Id.* at 454.

2. Responsibility of the President to the people is an essential element of executive power.

Safety is the other ingredient the executive branch must provide and requires, "in a republican sense . . . a due dependence on the people, and secondly a due responsibility [to the people]." *Id.* at 452. The "weightiest objections to a plurality of the Executive . . . is that it *tends to conceal faults and destroy responsibility*." *Id.* at 455 (emphasis added). Hamilton explained the criticality of responsibility placed in a single executive:

> It is evident from these considerations, that the plurality of the Executive tends to deprive the people of the *two greatest securities they can have for the faithful exercise of any delegated power, first*, the *restraints of public opinion*, which lose their efficacy . . . ; and, *secondly*, the *opportunity of discovering with facility and clearness the misconduct of the persons they trust*, in order either to their removal from office or to their actual punishment. . . .

Id. at 456 (emphasis added).

Thus, "in a republic . . . every magistrate ought to be personally responsible for his behavior in office. . . ." *Id*. "In the American republic . . . responsibility that does not rest on the shoulders of a single person . . . would serve to destroy . . . the necessary responsibility of the Chief Magistrate himself." *Id.* at 457. Accordingly, "the executive power is more easily confined to one [and] it is *far more safe there should be a single object for the jealousy and watchfulness of the people*." *Id.* (emphasis added).

Hamilton then explained the great danger to political responsibility when all power is not concentrated in one person, as exemplified and demonstrated by the PCAOB:

> When power . . . is placed in the hands of so small a number of men as to admit of their views being easily combined in a common enterprise . . . it *becomes more liable to abuse, and more dangerous when abused, that if it be lodged in the hands of one man; who from the very circumstances of this being alone, will be more narrowly watched and more readily suspected*. . . .

Id. (emphasis added). The PCAOB is just such a body in which great powers are concentrated and in which no responsibility can be assigned by the people for its abuse.

Thus, the structural components of the Constitution require that all exercise of all executive power be vested in one person who is politically accountable to

the people. The PCAOB violates this critical principle of liberty by concentrating power in a few, not responsible to any branch of government, even the President.

D. Independent Agencies Are Anathema To Constitutional Structure.

The concept of independent agencies, plural bodies of persons wielding executive power, over whom the President exercises little if any control or supervision, is anathema to the structure of the Constitution. The Founders intended that no executive activity be "independent" of or free from political accountability. However laudable the goals for independence from the President may arguably be, the plain language of the Constitution, supported by the political theories on which it is based, does not allow it. Consequently, there is no place under the Constitution for the Securities and Exchange Commission ("SEC"), much less the PCAOB, which the SEC appoints and "supervises," unless the President has the power of removal from those bodies at will.

Thus, whenever Congress creates an executive agency to exercise any executive function, it unconstitutionally transfers executive power from the President and thereby brings executive functions under its own domination and control, or at least removes them from control of the President. This is a clear violation of the Doctrine of Separation of Powers and flies in

the face of the constitutional structure so meticulously spelled out in the Constitution.

III. CASE LAW SUPPORTS THE PROPOSITION THAT ALL EXECUTIVE POWER IS VESTED IN THE PRESIDENT BUT UNACCOUNTABLY RECOGNIZES MORE POWER IN CONGRESS THAN IS SUPPORTED BY THE CONSTITUTIONAL TEXT.

A. *Myers v. United States* Correctly Holds That Section 1 Of Article II Vests All Executive Power, Including Removal Power, In The President, And That The Blended Powers Of Congress, Contained In Section 2 Of Article II, Should Be Strictly Construed And Not Be Extended By Implication.

The case of *Myers v. United States*, 272 U.S. 52 (1926) presented this Court with an opportunity to confirm that the executive power is plenary and vested in the President by Section 1 of Article II of the Constitution. It also established that removal power is included within that power. At issue was whether the President could remove at will a postmaster appointed to a four-year statutory term by the President with the advice and consent of the Senate. Chief Justice Taft, writing for the Court, stated the issue before the Court: "This case presents the question whether under the Constitution the President has the exclusive power of removing the

executive officers of the United States whom he has appointed by and with the advice and consent of the Senate." *Id.*, at 60. The Court answered this question in the affirmative.

In his analysis, the Chief Justice engaged in a lengthy and detailed examination of the powers of the President based on the legislative history, *The Federalist* and other writings of the Founding Fathers, actual practice and opinions of various Attorneys General, and case law. He also reviewed extensively the impeachment trial of President Andrew Johnson for removing executive officer contrary to the will of Congress. His analysis resulted in a thoroughly reasoned 70-page opinion. Finding little history of the discussion of the removal power in the records of the Constitutional Convention, the Chief Justice resorted to an intensive and thorough examination of a debate in the First Congress, a debate characterized as "one of the ablest constitutional debates which has taken place in congress since the adoption of the constitution." *Parsons v. United States*, 167 U.S. 324, 329 (1897). Further elaborating on what is often referred to as the "Legislative Decision of 1789," *Parsons* found:

> [The debate] lasted many days, and all arguments that could be thought of by men, many of whom had been instrumental in the preparation and adoption of the constitution were brought forward in the debate for and against that construction of the instrument

> which reposed in the President alone the power to remove from office.

Id.

James Madison occasioned this debate when he moved in the House of Representatives to create certain offices answerable to the President. Included in his motion was the statement that these officers were "removable by the President." *Myers*, 272 U.S. at 112. A discussion then ensued concerning whether to strike the clause referring to the President's removal power. *Id.* Congress retained the language, voting 34-20. *Id.* Some time later, a Member objected to the clause vesting removal power in the President because that Member believed that inclusion might be construed to imply that the removal power was derived from the legislature when, in fact, it is granted in the Constitution by Section 1 of Article II. *Id.* James Madison, on hearing this objection, agreed with the reasoning and constitutional interpretation of that Member. *Id*. at 113. The House also agreed with this interpretation, deleted the removal clause by a vote of 31-19, and referred the bill to the Senate, where the vote was 10-10; Vice President Adams provided the vote necessary to pass it. *Id.* at 114-15.

In the course of his opinion, Chief Justice Taft had occasion to review statements made by James Monroe and Alexander Hamilton, among many others. For example, "Mr. Madison insisted that Article 2, by vesting the executive power in the

President, intended to grant to him the power of appointment and removal of executive officers except as thereafter expressly provided in that article." *Id.* at 115. This strongly supports the plain language of the Constitution, and his own writings in *The Federalist*, that Section 1 of Article II vests all executive power in the President, whereas Section 2 merely places some limitations on certain powers so granted by blending very limited blended powers of Congress in that Article.

Chief Justice Taft noted that Hamilton, during his tenure as Secretary of the Treasury in Washington's cabinet, strongly believed in Monroe's interpretation.[2] *Id.* at 137. Indeed, Hamilton wrote that a complete list of executive powers were too many to grant other than in a very general, plenary grant. Hamilton's writings are sufficiently persuasive to require setting out extensively here, as did Chief Justice Taft:

> The *second article of the Constitution of the United States section first, establishes this general proposition, that "the Executive Power shall be vested in a President* of the United States of America."

[2] Undeniably, Hamilton wrote in *The Federalist* No. 71 (Alexander Hamilton) that he believed the power to consent to appointments included the power to consent to removals; but he changed his mind.

The same article in the succeeding section proceeds to delineate particular cases of executive power. . . .

It would *not consist with the rules of sound construction, to consider this enumeration of particular authorities as derogating from the more comprehensive grant in the general clause*, further than as may be coupled with the express restrictions or limitations, as in regard to the co-operation of the Senate in the appointment of officers and the making of treaties, which are *plainly qualifications of the general executive powers*. . . . The *difficulty of a complete enumeration of all the cases of executive authority would naturally dictate the use of general terms*, and would render it improbable that a specification of certain particulars were assigned as a substitute for those terms, when antecedently used. . . .

The enumeration ought therefore to be considered, as intended merely to specify the principal articles implied in the definition of executive power, leaving the rest to flow from the general grant of that power. . . .

The general doctrine of our Constitution is that the executive power of the nation is vested in the President, subject only to the exceptions and qualifications, which are expressed in the instrument. Two of those have already been noticed, the participation of the Senate in the appointment of officers, and in the making of treaties. A third

> remains to be mentioned: the right of the Legislature to declare war and grant letters of marquee and reprisal. *With these exceptions, the executive power of the United States is completely lodged in the President*.

Id. at 137-39 (quoting 7 *The Works of Alexander Hamilton*, 80-81 (John C. Hamilton ed., 1851)) (emphasis added).

Furthermore, James Madison argued directly for Presidential control of *all* executive officers, including power of removal at will, as essential to placing responsibility in one person, who is in turn responsible to the people:

> If the President should possess alone the power of removal from office those who are employed in the execution of the law will be in their proper situation, the chain of dependence being preserved; the *lowest officers, the middle grade, and the highest will depend, as they ought, on the President, and the President on the community*.

Myers, 272 U.S. at 132 (quoting 1 *Annals of Cong.* 499 (1789)) (emphasis added).

Chief Justice Taft found that the Constitution required that "the branches should be kept separate in all cases in which they were not expressly blended" and that "the Constitution should be expounded to blend no more than it affirmatively requires." *Myers*, 272 U.S. at 116. He also held that "[t]he vesting of the executive power in the President was essentially a

grant of the power to execute the laws." *Id*. at 117. Therefore, he concluded, Section 1 of Article II is a general grant of the executive power and Section 2 merely provides some narrow limitations on that power:

> The *executive power was given in general terms*, *strengthened by specific terms* where emphasis was regarded as appropriate *and was limited by direct expressions where limitation was needed*, and the fact that *no express limit was placed on the power or removal* by the executive was convincing indication that none was intended.

Myers, 272 U.S. at 118 (emphasis added).

Chief Justice Taft concluded that Article II, § 2, provides the President with the power to appoint and remove executive officers:

> 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. . . .
>
> * * *
>
> [T]he provisions of the second section or article 2, which blend action by the legislative branch or by part of it, in the work of the executive, are limitations *to be strictly*

> *construed, and not to be extended by implication*.

Id. at 163 (emphasis added). Thus, Taft held that the President's executive power is plenary.

B. Cases Inconsistent With The Conclusions Set Forth Above, The Plain Language Of The Constitution, And The Intent Of The Founders Should Be Overruled.

1. *United States v. Perkins* should be overruled.

Surprisingly, given its constitutional holding, *Myers* recognized that *United States v. Perkins*, 116 U.S. 483 (1886), held that Congress could condition the terms under which the President could dismiss inferior officers. It could do so if the officers were appointed without Senate consent, pursuant to the Congress's delegation of appointment to the President or department heads, under Article II, § 2. *Id.* at 127, 161-63. *Myers* should have overruled *Perkins* because it is inconsistent with the plain language of the Constitution, the political precepts upon which the Constitution is based, and the principal holding of *Myers*.

Perkins dealt with the removal by the President, through the Secretary of the Navy, of a naval cadet, contrary to a law passed by Congress. The United States argued that the law unconstitutionally infringed upon the power of the President to remove

an inferior executive officer. The Court disagreed in a one-paragraph discussion, without examination of the plain language of the Constitution, the political precepts on which the Constitution is based, legislative history, or other cases. That Court simply proclaimed by judicial fiat:

> We have no doubt that when congress, by law, vests the appointment of inferior officers in the heads of departments, it may limit and restrict the power of removal as it deems best for the public interest. The *constitutional authority in congress to thus vest the appointment implies authority to limit*, restrict, and regulate the *removal* by such laws as congress may enact in relation to the offers so appointed.

Perkins, 116 U.S. at 485 (emphasis added). *Myers*, to the contrary, specifically and correctly held that the blended powers of Congress, set out in Section 2 of Article II, must "*be strictly construed, and not to be extended by implication*." *Myers*, 272 U.S. at 163. *Perkins* is contrary to the plain language of the Constitution, the political theory set out in *The Federalist*, the express writings of James Madison and Alexander Hamilton, and the "Legislative Decision of 1789," all approved by *Myers*. Indeed, it is contrary to *Meyer's* constitutional holdings set out above.

Nor is *Perkins* consistent with the constitutional requirement that the power of Congress be strictly construed, to check its propensity to appropriate all

power to itself. No provision in the Constitution provides Congress with any control over removal of any executive officer. The power to consent to appointments, or to designate what officers may make appointments, is irrelevant to the power of removal, a purely executory function.

Every time Congress provides any limitation on the removal of any officer performing any executive function, whether removal only for cause or a term of office, it draws executive power and prerogative into its "impetuous vortex." *The Federalist* No. 48 at 343 (James Madison) (Benjamin Fletcher Wright ed., 1961). Under the *Perkins* reasoning, all Congress need do to absorb the President's executive power is give up its right to consent to appointments and vest the appointment power in the President alone or in department heads. Surely, Congress may not so easily avoid the dictates of the Constitution, especially given the skepticism with which the Founders viewed legislative power.

The only reasonable explanation why the *Myers* Court did not overrule *Perkins* is because the issue presented in *Perkins* was not before the *Myers* Court, though it did expound on it at some length as precedent. It is now time, however, for this Court to reconsider its decision in *Perkins*, as well as the other decisions challenged here and recognize that this Court has for many years departed from the Constitution's plain language and the intent of the Founders regarding independent agencies.

2. *Humphrey's Executor v. United States* should be overruled.

Humphrey's Executor v. United States, 295 U.S. 602 (1935), is another prime example of this Court ignoring constitutional text and permitting the legislature to "draw all power into its impetuous vortex." Indeed, it is the inevitable outgrowth of *Perkins*. In *Humphrey's Executor*, the Court found, for the first time, that so-called "independent agencies" were constitutional, and the decision is the fountainhead of the judicially sanctioned expansion of those agencies since then.

Congress had created the Federal Trade Commission and empowered it to prevent persons from using unfair methods of competition in commerce. The Commission had the power to make rules (subject to the sufficient delegation from Congress), investigate and prosecute violations, and adjudicate the violations prosecuted (subject to due process standards of fairness and review by Article III courts). *Humphreys' Executor*, 295 U.S. at 620-21.

The Commission consisted of five members appointed for specified terms by the President with the advice and consent of the Senate. *Id.* at 620. The President could remove these members only for "inefficiency, neglect of duty, or malfeasance of Office." *Id.* President Roosevelt removed, without cause and during his specified term, one of the commissioners appointed by President Hoover. Thus, the issue before the Court was whether Congress

acted unconstitutionally in encroaching on the executive power of the President by limiting the removal powers of the President.

The *Humphrey's Executor* Court, without any constitutional analysis, found Congress's action constitutional. It ignored the plain language of the Constitution and the intent of the Founders, as well as the carefully reasoned constitutional analysis of *Myers*. It "gutt[ed], in six quick pages, devoid of textual or historical precedent for the novel principal set forth, a carefully researched and reasoned 70-page opinion[, *Meyers*]." *Morrison v. Olson*, 487 U.S. 654, 726 (1988) (Scalia, J., dissenting). In fact, *Humphrey's Executor* was "considered by many . . . the product of an activist, anti-New Deal court bent on reducing the power of President Franklin Roosevelt." *Id.* at 724.

In *Humphrey's Executor* the Court found that Congress's purpose in creating the FTC was to render it "*independent of any department of the government*." *Humphrey's Executor*, 295 U.S. at 625 (emphasis added). In fact, Congress intended that the Commission be answerable only to the people of the United States:

> [T]he commission was *not to be "subject to anybody in the government but * * * only to the people of the United States" free from "political* domination or *control"* or the "probability or possibility of such a thing" to be "separate and apart from any existing

> department of the government – *not subject to the orders of the President*."

Id. (emphasis added).

Humphrey's Executor held Congress's constitutionally bizarre creation constitutional by the simple expedient of declaiming that it was not part of any other branch of government, or part of more than two branches, but controlled by neither. The Court found that "the Federal Trade Commission is an *administrative body* created by Congress to *carry into effect* legislative policies embodied in the statute." *Id*. at 627 (emphasis added). Though this description appears to be the very definition of executive power, the Court nevertheless held that "such a body cannot in any proper sense be characterized as an arm or an eye of the executive." *Id.* Instead, The Court found that the FTC was a "quasi-legislative" and "quasi-judicial" body. *Id.* at 628. The Court then merely declared, without any legal analysis or reference to constitutional text or history:

> The authority *of Congress, in creating quasi-legislative or quasi-judicial agencies*, to require them to act in discharge of their duties *independently of executive control cannot be well doubted*.

Id. at 629.

Astonishingly, *Humphrey's Executor* did not even pause to examine how a congressional purpose to create a body "subject only to the people of the United States," beyond the control of the constitutionally

defined branches of government, could itself be sustained under the Constitution. Remarkably, the opinion then determined that the FTC exists as part of the legislative and judicial branches, though subject to neither, ignoring its "purely" executive functions such as investigation and prosecution.

Nor did the Court explain how its proclamation is consistent with the Court's own holding that there is a "fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others." *Humphrey's Executor*, 295 U.S. at 629. Nor could it have, for the Constitution creates only three forms of federal authority – legislative, executive and judicial – and sets out in some detail who shall exercise each. The Constitution says nothing about independent agencies. Indeed, the Court failed to explain even the constitutional basis for the existence of these "quasi" powers, which led Justice Jackson to complain two decades later:

> The mere retreat to the qualifying "quasi" is implicit with confession that all recognized classifications have broken down, and "quasi" is a smooth cover which we draw over our confusion as we might use a counterpane to conceal a disordered bed.

Federal Trade Comm'n v. Ruberoid Co., 343 U.S. 470, 487-88 (1952) (Jackson, J., dissenting).

Humphrey's Executor simply took the permissibility of independence for granted, ignoring the

constitutional requirement for political accountability as a fundamental element of the Constitution's structure. The sum of the constitutional reasoning of *Humphrey's Executor* is the bald proclamation that Congress's authority "cannot well be doubted." *Humphrey's Executor*, 295 U.S. at 629. Unaccountably, the cases since the 1930's have not discussed the constitutional basis for independent agencies or "quasi" powers:

> The embarrassing truth is that in the long line of cases since the 1930's, discussing the various facts of administrative government, not one makes a serious effort to justify the independent agencies in constitutional terms. There is talk of necessity, talk of chilling and talk of coercion – in short, talk of policy – but there is nothing about constitutional structure, or the vision of the Founders.

Stephen L. Carter, *The Independent Counsel Mess*, 102 Harv. L. Rev. 105, 131 (1988). Thus, under the current scheme, whenever Congress decides independence is necessary, irrespective of whether it is permitted constitutionally, it may insulate that agency from presidential control.

Finally, *Humphrey's Executor* legitimizes placing power in the hands of a group of men responsible to no one, contrary to Hamilton's exhortation that the great danger to political responsibility is when all power is not concentrated in one person, but in a

group of men, such as is the case with the FTC and with the PCAOB here:

> When power . . . is placed in the hands of so small a number of men as to admit of their views being easily combined in a common enterprise . . . it *becomes more liable to abuse, and more dangerous when abused, that if it be lodged in the hands of one man; who from the very circumstances of this being alone, will be more narrowly watched and more readily suspected*. . . .

The Federalist No. 71 at 457 (Alexander Hamilton) (Benjamin Fletcher Wright, ed., 1961).

Humphrey's Executor is the linchpin for the validity of independent agencies, including the independent counsel upheld in *Morrison v. Olson,* 487 U.S. 654 (1988), on which the District of Columbia Circuit principally relied in validating the PCAOB. The entire structure of such agencies, including the PCAOB, is much less than a house of cards; it is more akin to a house of air, without any foundation at all.

3. ***Morrison v. Olson*** **should be overruled.**

The inevitable outgrowth of *Humphrey's Executor* is *Morrison v. Olson*, *supra.* At issue there was the constitutional validity of the congressional creation of an independent counsel to investigate the executive branch and the President under the Ethics in Government Act. *Morrison*, like *Humphrey's Executor*,

did not engage in an examination of constitutional text or political theory to justify its decision upholding the legitimacy of the independent counsel. Like *Humphrey's Executor*, it also simply assumed, without discussion, that Congress may create independent agencies with "quasi" powers, independent of the President, whenever Congress deems it expedient. Predictably, *Morrison* relies principally on *Humphrey's Executor* and *Perkins*, *supra*. *Morrison,* 487 U.S. at 686-87, 690 n. 29. Under this reasoning, independent agencies are constitutional not because there is any basis in the text of the Constitution, but "because [a majority of the Supreme Court] say it is so." *Morrison*, 487 U.S. at 711 (Scalia, J., dissenting).

It is also clear from a reading of the entirety of the text of this case and *Humphrey's Executor* that the Court assumes, without any constitutional analysis, that Article II, § 1, is identical to Article I, § 1. *Morrison* effectively treats *Myers* as a historical relic of only academic interest, not precedent. Indeed, the Court specifically rejects Justice Scalia's view to the contrary. *Id*. at 690 n. 29 (relying on the much earlier case of *Perkins* for that proposition). Therefore, the Court views Sections 2 and 3 of Article II as the sole grants of power to the executive, rather than as a limitation on Section 1. And it does so without any constitutional analysis, but merely by proclamation.

The *Morrison* Court had a problem, though. The independent officer in question was a prosecutor wielding undeniably pure executory powers, as all

sides admitted. Indeed, in discussing *Humphrey's Executor*, the Court admitted that "it is hard to dispute that the powers of the FTC at the time of *Humphrey's Executor* would at the present time be considered 'executive' at least to some degree," recognizing that the entire basis for that decision was improper. *Id.* at 690 n. 28. Accordingly, the Court was forced to "reinterpret" the holding of *Humphrey's Executor*.

True to form, it did so without any analysis whatsoever, which analysis would have undermined its decision. Thus, "*Humphrey's Executor* [like *Myers*] is swept into the dustbin of repudiated constitutional principles." *Id.* at 725 (Scalia, J., dissenting). The Court then announced that *Humphrey's Executor* "really" stood for the proposition that the permissibility of independence tolerated by the Constitution rests on the *degree of intrusion into presidential authority by Congress*." That is, *Morrison* "replaced the clear constitutional prescription that the executive power belongs to the President alone with a 'balancing test.'" *Id.* at 711 (Scalia, J., dissenting).

Consequently, courts must now inquire into whether the authority that such an officer exercises is "not essential" to "the President's proper execution of his Article II powers." *Id.* at 691. Or they may inquire into whether the imposition on the President's power "unduly trammels on executive authority." *Id.* Likewise, courts may now inquire whether the President's need to control is "so central to the function of the executive branch as to require . . . that the [officer] be

terminable at will." *Id.* The Court also engaged in such additional amorphous balancing tests as "impermissibly burdens the President's power," *id.* at 692, "completely stripped [executive power] from the President,"[3] *id*., "sufficiently deprives the President [of executive power]," *id.*, or "impermissibly undermines the powers of the Executive Branch," *id.* at 695.

Worse, the Court "does not even attempt to craft a *substitute* criterion – a judiciable standard. . . ." *Id.* at 711 (Scalia, J., dissenting) (emphasis in original). Indeed, divorced from the text of the Constitution, or the political theory on which the Founders based it, and without any reliable guidelines, *Morrison* provides no decisional rule at all. Thus, the principal of restraint on Congress required by separation of powers becomes no more than Congress's own uncontrolled discretion. *Morrison* is, therefore, "an open invitation for Congress to experiment." *Id.* at 726 (Scalia, J., dissenting). *Morrison* provided Congress with a Pandora's box of congressional authority, which Congress pried open with its appointment of the PCAOB, and this Court must not allow that.

This Court should overrule *Morrison* and return to the plain text of the Constitution and to the intent and political theories of the Founders. It should hold

---

[3] This appears not to be even balancing. Rather, there is no imposition on presidential authority unless the Congress usurps all the President's authority.

that Congress's creation of the PCAOB unconstitutionally infringes on the executive power of the President, in violation of the Separation of Powers Doctrine, as does the SEC that appoints its members, another independent agency possessing no constitutional basis.

CONCLUSION

The plain language of the Constitution of the United States vests *all* executive power in the President of the United States as a plenary power. U.S. Const. art. II, § 1, cl. 1. Unlike Congress, the President does not have limited, enumerated powers "granted herein." Rather, the President possesses all executive power vested in Section 1, including the power to remove any executive officer or employee, except as limited in Section 2.

Section 2 of Article II is a limitation on the broad executive powers granted by Section 1, not a grant of power. Section 2 limits presidential power by providing a limited blending of Congress's power with that of the President by allowing the Senate to consent to treaties and certain appointments and permits Congress to vest appointment power without Senate consent in certain inferior executive officers in the President, Courts, or Department Heads. Those blended powers should be strictly construed and not extended by implication.

Nowhere in the Constitution is Congress, a body of enumerated powers only, vested with any power to condition the removal of persons performing, executing, implementing, or carrying out Congress's legislation. Nor can that power be implied from Congress's ability to designate certain persons to appoint inferior executive officers.

The constitutional text provides this formula in order to protect the liberty of the people by placing federal power in three departments of government – the legislative, the executive, and the judicial – independent of one another and co-equal. There are no others and all officers and employees of the government must, of necessity, be in one of these three branches. These branches are not entirely separate but are blended in very limited ways, as Section 2 of Article II demonstrates. The purpose of this blending is to allow those branches to check, balance, and moderate the others to prevent the concentration of too much power in any of those branches of government, particularly the legislative, which is the very definition of tyranny.

Because the legislative is the strongest and most ambitious of the branches of government, it requires more checks and balances, whereas the executive and the judicial branches require more protection. No blended power with the President should be implied, but, rather, it should be strictly construed. All efforts should be made not to allow the legislative branch to draw additional powers to itself or to limit in any way

the power of the executive, except as specifically provided by the Constitution.

The Constitution, the intent of the Founders, and the political theory on which they relied all require that the President be responsible for all persons executing or administering the laws and be responsible to the people for their performance. Thus, the Constitution requires political responsibility in carrying out or administering the laws of the United States. Independence of one or a group of persons who carry out the laws of the United States is anathema to the structure of the Constitution. Indeed, placing power in the hands of these few, independent of control and supervision by the President, is the very danger the Founders sought to avoid.

Therefore, there is no constitutional basis for "independent agencies" or for "quasi" powers. Nor may any employee or officer of the United States be independent of the three branches of government. Indeed, all officers and employees who execute, carry out, administer or implement the laws of the United States are subject to the control and supervision, without congressional limitation, of the President.

Thus, the PCAOB, at issue here, is an unconstitutional body without constitutionally adequate control and supervision and without real responsibility to anyone who may be answerable for its conduct. Such unbridled power is exactly what the Founders sought to limit. The PCAOB, like all independent agencies, wreaks havoc with the

Separation of Powers Doctrine, and this Court should so declare.

Respectfully submitted,

J. SCOTT DETAMORE
Counsel of Record
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021

Attorney for Amicus Curiae Mountain States Legal Foundation

Dated August 3, 2009