No. 07-5127

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

FREE ENTERPRISE FUND,
BECKSTEAD AND WATTS, LLP,

Plaintiffs-Appellants,

v.

PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD,

Defendant-Appellee,

and,

UNITED STATES OF AMERICA,

Intervenor Defendant-Appellee.

BRIEF OF *AMICUS CURIAE* MOUNTAIN STATES LEGAL FOUNDATION

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), *Amicus Curiae* Mountain States Legal Foundation certifies as follows:

A. Parties and *Amici*

Parties appearing in the district court were Free Enterprise Fund and Beckstead and Watts, LLP, plaintiffs, and Public Company Accounting Oversight Board ("PCAOB" or "the Board").

Parties appearing in this Court are Free Enterprise Fund and Beckstead and Watts, LLP, Plaintiffs-Appellants and the PCAOB, Defendant-Appellee, and the United States of America, Intervenor-Appellee. *Amici* appearing in this court are Mountain States Legal Foundation, Washington Legal Foundation, Council of Institutional Investors, and seven former chairmen of the United States Securities and Exchange Commission ("SEC").

B. Rulings Under Review

The ruling under review is the U.S. District Court for the District of Columbia's memorandum opinion and final order dated March 21, 2007, granting Defendant's and the United States' motions for summary judgment. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, No. 06-0217, 2007 WL 891675 (D.D.C., Mar. 21, 2007) (Robertson, J.) (A37-A52).

C. Related Cases

This case was not previously before this Court or any other court, and there are no related cases within the meaning of Circuit Rule 28(a)(1)(C).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, *Amicus Curiae* Mountain States Legal Foundation ("MSLF") submits this Corporate Disclosure Statement. MSLF is a nonprofit, public-interest legal foundation organized under the laws of the State of Colorado. MSLF has no parent companies, subsidiaries or affiliates that have issued shares to the public.

CERTIFICATE OF COUNSEL PURSUANT TO CIRCUIT RULE 29(d)

I hereby certify, pursuant to Circuit Rule 29(d), that a separate *amicus curiae* brief is necessary in this case because it is impracticable for MSLF to file a joint brief with *amicus curiae* Washington Legal Foundation ("WLF"). Paul Kamenar, Counsel for WLF, was consulted regarding the feasibility of filing a joint *amicus* brief. Mr. Kamenar advised that WLF intends to focus its *amicus* brief on the Presidential Removal Authority of the Constitution. MSLF intends to focus its *amicus* brief on the Appointments Clause of the Constitution. Because WLF and MSLF intend to brief different issues, MSLF submits that it is therefore impracticable to file a joint *amicus* brief with WLF.

Elizabeth Gallaway

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

Mountain States Legal Foundation ("MSLF") is a non-profit, public interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of private property rights, individual liberties, limited and ethical government, and the free enterprise system. Since its establishment in 1977, MSLF has been active in litigation aimed at ensuring that the United States Constitution is interpreted in accordance with the intent of the Founders.

MSLF has over 5,000 members throughout the United States. Hundreds of these members are shareholders in various public companies that are subject to regulation by the Sarbanes Oxley Act. The outcome of this case may have serious consequences for these members if the appointment method for members of the Public Company Accounting Oversight Board ("PCAOB") remains unlawful and unconstitutional.

MSLF believes that its members' interest in the outcome of this case, as well as its knowledge regarding various constitutional guarantees, and its commitment to preserving the Framers' intent are such that its *amicus curiae* brief will assist this Court.

SUMMARY OF THE ARGUMENT

The Appointments Clause, U.S. Const. art. II, § 2, cl. 2, is more than a *pro forma* selection ritual for high-ranking officials in the federal government. Rather, reflects a deliberate attempt by The Framers to reinforce the Constitution's separation of powers principles through structure and politics. Politically, the Framers sought to insure that individuals with appointment authority would be held accountable for their choices. To do so, they vested appointment authority in single individuals. Structurally, the Framers, ever-cognizant of the federal balance-of-power, drafted the Appointments Clause to insure that one branch of the federal government could not aggrandize itself at the expense of another via the appointment power.

The appointment of the PCAOB by the SEC Commissioners as a group, rather than by the SEC Chairman as an individual, offended both of these goals. First, and most egregiously, the multi-headed body side-stepped the political accountability function of the Appointments Clause and conducted an incorrigibly corrupt deliberation and selection process. Infighting among the Commissioners debased the appointment process into a common horse trade in which no one Commissioner could be held accountable for his or her choice. Second, the PCAOB appointment process offended the structural goals of the Appointments Clause and aggrandized Executive power at the expense of Legislative power.

ARGUMENT

I. BACKGROUND

The Appointments Clause embodies the constitutional principle of separation of powers because it ensures the integrity of the appointments process and preserves the balance of power among the federal branches. *Buckley v. Valeo*, 424 U.S. 1, 122 (1976). The Framers drafted the Appointments Clause to avoid the political bargaining associated with a group appointment process and to prevent one branch from aggrandizing its power at the expense of another. Martin S. Flaherty, *The Most Dangerous Branch*, 105 Yale L. J. 1725, 1180 (1996) ("Flaherty").

These twin goals of the Appointments Clause echo the separation of powers principles that underlie the Constitution as a whole. The separation of powers theory emerged from political trial and error as the early American states attempted to find a system of government that was powerful yet compatible with their libertarian ideals. Matthew Spalding, *The Formation of the Constitution*, *in The Heritage Guide To The Constitution,* 7 (Edwin Meese, III, Matthew Spalding & David Forte eds., 2005) ("Spalding"). It combined republican principles of direct representation with elements of Great Britain's then-existing system of mixed government. *Id.* *See also* Flaherty, at 1761-71.

Republican government, typified by the Articles of Confederation ("the Articles"), sought to establish government accountability through direct representation. Flaherty, at 1763-64. *See also* Spalding, at 7. Under the Articles, each state governed itself through elected representatives who, in-turn, elected a relatively weak national government. Spalding, at 7. However, in their effort to represent the populace as closely as possible, the Articles sacrificed government efficiency. *Id.* The national government was weak in international affairs, unable to collect taxes to pay foreign creditors, and ineffectual when confronted with domestic disorder. *Id.* At

the state government level, self-interested factions "enact[ed] ill-advised laws that confiscated property, transferred wealth through schemes of calculated inflation, eliminated existing contractual obligations and even limited the right of trial by jury." Flaherty, at 1762-63. Although the Articles' republican system was well-intentioned, factional self-interest within the states and a weak national government undermined its libertarian objectives. *Id.*

The Articles' system of direct-representation stood in stark contrast to the then-existing British system. British "mixed government" allocated a role for each social order in society: monarchy, nobility and the commons, and structured these institutions to check the powers of the other. Flaherty, at 1757. This design, while undeniably powerful and effective, was antithetical to the Americans who valued egalitarianism and had known only tyranny under British rule. *Id.* at 1758.

The Framers' solution to the shortcomings of pure republicanism and the tyranny of British mixed government was the concept of separation of powers. *Id.* at 1763-74. Separation of powers borrowed the power structure of British government, but in a more egalitarian way. It differentiated institutions by function, rather than by societal order, and populated each branch with elected officials. *Id.* at 1765. Separation of powers promised an effective, yet accountable government whose balanced powers would prevent tyranny. *Id.* at 1768.

This historical background is important because it places the Appointments Clause in context. Designed to work in tandem with the Constitution, the Appointments Clause insures the integrity and efficient functioning of the Union. Thus, the selection procedures detailed in the Appointments Clause are not simply a matter of "etiquette or protocol." *Buckley*, 424 U.S. at 125. Rather, they are some of the structural foundations of Constitution's separation of powers.

A. THE APPOINTMENTS CLAUSE

The Appointments Clause acts symbiotically with other Constitutional provisions to preserve the separation of powers. One of several "self-executing, structural safeguard[s]" the rubric of the Appointments Clause preserves the power balance among the federal branches and ensures accountability and integrity of the appointments process. Donna M. Nagy, *Playing Peekaboo with Constitutional Law: The PCAOB And Its Public/Private Status*, 80 Notre Dame L. Rev. 975, 1053 (2005) ("Nagy").

The primary method employed by the Framers to ensure accountability in the appointments process was single-headed appointment authority. *See* Michael J. Gerhardt, *The Federal Appointments Clause*, 1-44 (2000). The Appointments Clause first requires that "ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States" be appointed by the President, solely. U.S. Const., art. II, § 2, cl. 2. Second, it provides that "Congress may by Law vest the Appointment of such inferior Officers . . . in the President alone, in the Courts of Law, or in the *Heads of Departments*."[1] *Id.* (emphasis added).

Hamilton placed great confidence in the integrity of a single-headed appointments process. *See generally* Alexander Hamilton, *The Federalist: The Famous Papers on the Principles of American Government*, 480-84 (Benjamin Fletcher Wright, ed., 1961) ("*The Federalist*"). He explained that a single individual has a "livelier sense of duty and a more exact regard to reputation" than a group, and possesses "stronger obligations . . . to investigate with care" a potential appointee's qualifications and reputation. *The Federalist*, at 481. An

[1] *Amici* submits that the term "Heads of Departments" denotes appointment by a single individual. Appellant's brief addresses the meaning of this term at length and to avoid repetition, *Amici* respectfully refers the Court to Appellant's brief. *See Brief of Appellants*, 39-44.

individual, who has "fewer personal attachments to gratify," is "less liable to be misled by the sentiments of friendship [or] affection . . . [or] distracted and warped by [diverse] views, feelings, and interests". *Id.* *See also* Ross E. Weiner, *Inter-Branch Appointments After the Independent Counsel: Court Appointment of United States Attorneys*, 86 Minn. L. Rev. 363, 395-96 (2001).

Hamilton was deeply skeptical of appointment by a group. *See The Federalist*, at 484-89. He explained that a collective body "[could not] be regulated" because of a "systematic spirit of cabal and intrigue" and cautioned that a group's decision would always be the result of a "bargain" among the parties. *Id.* at 481. He noted that each individual's "likings and dislikes, partialities and antipathies, attachments and animosities" would influence the decision-making process and, ultimately, the appointment would come only from "a victory gained by one party over the other, or [from] a compromise between the parties." *Id.* Hamilton believed that a collective appointments process would distort the selection process and ultimately devolve into a perverse compromise in which the qualifications that unite the votes of the collective body would supersede those that qualified the candidate for the position. *Id.*

In addition to protecting the integrity of selection process, the Framers designed the Appointments Clause to act as a "bulwark against one branch aggrandizing its power at the expense of another branch." *Ryder v. U.S.*, 515 U.S. 177, 182 (1995) *citing Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 878 (1991). The Clause limits the nature and number of persons who can participate in the appointments process, and thereby restrains Congress's ability to disburse political power across political entities. *Freytag,* 501 U.S. at 884. *See also* Nagy, at 1049-58. Its structure prevents the diffusion of appointment power by limiting the ability of one branch to capture an important office. *Freytag*, 501 U.S at 884.

Appointment by group disturbs the separation of powers because it decreases stability in the administration of government, and risks undue influence of the Executive branch. *The Federalist*, at 88. The Supreme Court has recognized this structural function and noted that:

> [T]he structural principles embodied in the Appointments Clause do not speak only, or even primarily, of Executive prerogatives simply because they are located in Article II. The Appointments Clause prevents Congress from dispensing power too freely, it limits the universe of eligible recipients of the power to appoint. Because it articulates a limiting principle, the Appointments Clause does not always serve the Executive's interest. . . . The structural interest protected by the Appointments Clause are not those of any one branch of Government but of the entire Republic.

Freytag, 501 U.S. at 880.

Ultimately, a violation of the Appointments Clause offends the very underpinnings of the Constitution. The Framers embedded both structural and political principles in the Appointments Clause to insure the separation of powers. *Id.* at 878. By violating the Founders' carefully-constructed framework, the PCAOB selection process has violated both principles. It has debased the structure of the Appointments Clause and unlawfully and unaccountably dispersed Executive power.

II. THE GROUP APPOINTMENT OF THE PCAOB IS UNCONSTITUTIONAL.

A. THE SELECTION PROCESS OF THE PCAOB BY THE SEC COMMISSIONERS WAS INHERENTLY FLAWED.

The appointment of the PCAOB was unlawful because the Board was not appointed by a single individual, the SEC Chairman, but instead by the SEC Commissioners as a group.[2] Thus, the deliberation and appointment process was contrary to the prescriptions of the Appointment

[2] Appellant's brief discusses at length whether the PCAOB's members are principal officers within the meaning of the Appointments Clause. *See Brief of Appellants*, 30-35. This *amicus curiae* brief will therefore only address the PCAOB's appointment as inferior officers.

Clause. Moreover, the SEC Commissioners' choice vote inherently unreliable. The appointment of the PCAOB was a messy, meandering experiment in federal appointment authority that bore out the problems anticipated by the Founders. In fact, the PCAOB appointment process was exactly what the Founders sought to avoid.

In 2002, the Government Accountability Office ("GAO") investigated the PCAOB appointment process "amid allegations that the SEC Chairman withheld relevant information from the other Commissioners concerning the suitability of the newly appointed PCAOB chairman. . . ." Government Accountability Office, *Securities and Exchange Commission, Actions Needed to Improve Public Company Accounting Oversight Board Selection* Process, 21 (Dec. 2002) *available at* http://www.gao.gov/new.items/d03339.pdf (last visited December 16, 2007) ("GAO Report"). The report described a "breakdown" in the PCAOB selection process due to a lack of consensus among the Commissioners. *Id.* at 2-3. It indicated that infighting among the Commissioners resulted in delay, a haphazard selection process, and ultimately, inadequately vetted appointees. *Id.* It concluded that "the biggest impediment to the smooth functioning of the selection process was a lack of initial consensus among the Commissioners and key SEC staff on the selection process." *Id.* at 20.

As the Framers anticipated, the multi-member appointment process of the PCAOB "had fallen easy prey to demagogues, provincialism and factions." Gerhardt, at 18. Unable to reach a consensus on their desired appointees, the selection process deteriorated. As predicted by Hamilton, "each member [had] his friends and connections to provide for, and the desire for mutual gratification [begat] a scandalous bartering for votes and bargaining for places." *The Federalist*, at 487. As a group, the SEC was unable to "agree [upon a] process for screening candidates before they were interviewed and appointed by the Commissioners." GAO Report, at

5. Additionally the group was unable to "determine how and what information would, and should, have been developed and passed along for their consideration as they deliberated about candidates." *Id.*

This breakdown in the appointment process was not a victimless no-harm-no-foul technicality. The multi-headed appointment procedures used by the SEC offended both of the elementary principles of the Appointments Clause—accountability and power balancing. *See* Gerhardt, at 28. As a group, the SEC Commissioners had no individual responsibility for the PCAOB appointments, nor for the chaotic and wasteful process through which they were selected. When an individual selects an appointee, his motives and methodology, if not overtly clear, can be discovered through investigation into that person's background, motives, and history. *See The Federalist*, at 480-84. But when a group selects a candidate, the complexity in discerning the group's motives and methodology increases exponentially.

The district court held that "since the SEC Chairman has voted for each PCAOB member" the Plaintiff-Appellees' injury was not traceable to the improper PCAOB appointment process. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 2007 WL 891675 at *5 (D.D.C. 2007). However, it is impossible to know what bargains were struck and/or what political favors were exchanged as the SEC Chairman bargained, albeit unsuccessfully, with the other Commissioners to reach a consensus on the makeup of the Board. Failure to follow the structure of the Appointments Clause rendered selection process itself corrupt. In fact, no one, except perhaps the SEC Chairman, knows whether he would have voted for the same individuals had he appointed them on his own. This inability to dissect the appointments process and hold one individual accountable for his choice is exactly why the Framers placed appointment authority in one person—the "Head" of a department. U.S. Const. art. II, § 2.

B. GROUP APPOINTMENT UNLAWFULLY AGGRANDIZES EXECUTIVE POWER AT THE EXPENSE OF LEGISLATIVE POWER.

The PCAOB appointment process also disrupts the power allocation of the Appointments Clause by aggrandizing Executive power at the expense of Legislative power. Hamilton explained this tendency in *The Federalist Papers*, noting that:

> Such a council . . . would be productive of an increase of expense, a multiplication of the evils which spring from favoritism and intrigue in the distribution of public honors, a decrease in the stability of the administration of the government, and a diminution of the security against an undue influence of the Executive.

The Federalist, at 487-88.

Here, the SEC commissioners will inevitably select appointees who are best suited to their own interests, not the interest of the position. With no single individual to hold accountable, Congress will be unable to point out deficiencies or corruption in the Commissioners' appointment and thereby hold them to task. Without the stopgap of a properly-enforced Appointments Clause, the PCAOB will become a fiefdom of the SEC whose members and interests reflect only those of the agency. Given the significant and potentially invasive power possessed by the PCAOB, this power imbalance threatens the effectiveness of the Appointments Clause and the stability of government as a whole.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision below.

Dated: December 31, 2007

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because the brief contains 2,581 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) and Circuit Rule 32, as determined by the Microsoft Office Word 2003 program used to prepare this brief.

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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of December 2007, I served two true and accurate copies of **BRIEF OF AMICUS CURIAE MOUNTAIN STATES LEGAL FOUNDATION** on all parties by sending said copy *via* U.S. Mail, first class, postage paid, and addressed to the following:

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