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US High Court Questions Constitutionality Of Accounting Board

By Fawn Johnson, Of DOW JONES NEWSWIRES

WASHINGTON -(Dow Jones)- Conservative U.S. Supreme Court justices appeared willing Monday to question the constitutionality of how the 2002 Sarbanes-Oxley accounting law handles appointments to an independent overseer.

Free-enterprise groups and a Nevada accounting firm sued to stop the Securities and Exchange Commission from naming members of the Public Company Accounting Oversight Board, which was set up by Congress to oversee public company accountants.

The Free Enterprise Fund and accounting firm Beckstead and Watts argue that the accounting board undermines the president's constitutionally guaranteed authority and independence because the board's members are selected by the SEC, which is independent from the White House.

Some conservatives are opposed to the Sarbanes-Oxley law generally and view the Supreme Court case as a way to reopen the accounting statute writ large. Sarbanes-Oxley was lawmakers' response to accounting scandals at Enron Corp. and Worldcom. Congress's intent was to create an accounting overseer that was independent from accounting firms.

During an oral argument, Justice Antonin Scalia noted that the president's control over the accounting board is limited because the board answers to all five independent commissioners of the SEC, not just the chairman.

"The president has control over the SEC only because he can dismiss the chairman of the SEC," Scalia said. "The governance of the board is by the members of the SEC."

Chief Justice John Roberts pointed to the independence and power of the accounting board. He noted that the board can impose "collateral consequences" on companies that don't comply with its requests, all without input from the SEC.

Other justices appeared less willing to assume that the accounting board is an unconstitutional body. Justice Sonia Sotomayor asked how the accounting board's situation as an entity answering to the SEC is different from an employer who delegates responsibility.

The SEC can't remove members of the accounting board for anything other than willful violations. Petitioners argue that this situation insulates accounting- board members from the SEC's influence and, by extension, the White House.

"It's this thing out there running rampant that nobody can check," said CATO Institute Senior Fellow Ilya Shapiro, who has written several articles about the case. CATO, what is known as a free-market think tank, filed a brief supporting the petitioners.

Groups such as CATO argue that independent entities such as the accounting board violate the Constitution because the boards aren't accountable to people elected to power.

Several former SEC chairmen and the accounting profession support the current setup of the accounting board and its relationship to the SEC.

Former SEC Chairman Harvey Pitt said the system now makes the SEC the "ultimate setter and arbiter of policy affecting our capital markets." If the accounting board were to become completely separate from the SEC, Pitt said, "the accounting profession would be torn in two diametrically opposite directions, and the SEC's policy objectives would be lost."


The Center for Audit Quality, whose members are composed of public accounting firms subject to the board's governance, said the board is good for markets.

"I do think the market and investors benefit from having this oversight structure," said Cindy Fornelli, the center's executive director.

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