

SARBANES-OXLEY CASE TO BE APPEALED TO SUPREME COURT

D.C. Circuit Denies Rehearing, But 5-to-4 Split Signals Importance of Issue

Washington, D.C., November 19, 2008—On a 5 to 4 split, the U.S. Court of Appeals for the D.C. Circuit this week declined to review a constitutional challenge to the Public Company Accounting Oversight Board. The Competitive Enterprise Institute, together with the law firm of Jones Day, plans to appeal the case to the U.S. Supreme Court.

“While the court’s decision is, of course, disappointing, the 5-4 split among the judges demonstrates that this is an extremely important issue. We are hopeful that the Supreme Court will accept this case for review,” said **Sam Kazman, CEI General Counsel**.

The plaintiffs are challenging the constitutionality of the PCAOB on the grounds that the Board violates the Appointments Clause of the Constitution, which requires that major officers be appointed by the President with the advice and consent of the Senate. The Board’s members were selected by the Securities and Exchange Commissioners acting as a body, rather than by the President or by the SEC’s chairman. This avoided the individual accountability that the Framers viewed as crucial to reining in government.

Plaintiffs had requested a rehearing by the full court after three-judge panel in August rejected this argument, in a 2-1 decision, saying that the SEC had adequate power to supervise the Board. In a lengthy dissent, Judge Brett M. Kavanaugh argued that the Board’s structure violated both the President’s appointment and removal powers, and was contrary to previous Supreme Court rulings on the issue. He characterized it as “the most important case” on the issue “in the last 20 years.”

The vote in this week’s decision to deny the petition for rehearing en banc was extremely close. Of the 9 participating judges, 4 voted for rehearing.

The plaintiffs in the case are the Free Enterprise Fund and Beckstead & Watts, a small Nevada accounting firm that was being investigated by the Board. They are represented by Jones Day and CEI.