

September 16, 2015

Skadden, Arps, Slate, Meagher & Flom LLP

1 Judge: We will proceed with our last case, which is Tilton vs.
2 SEC.

3 David Zornow: Good morning.

4 Judge: Good morning.

5 David Zornow: May it please the court, David Zornow for Lynn
6 Tilton and the Patriarch appellance. Unless this court exercises
7 its jurisdiction and enters a stay or injunction, Lynn Tilton
8 will be faced on October 13th with a trial before a structurally
9 unconstitutional judge. In that proceeding, Ms. Tilton's
10 reputation and livelihood will be on the line, so too will be
11 the wellbeing of her many portfolio companies and the tens of
12 thousands of employees, principally blue-collar employees who
13 work at those companies.

14 Judge: That's not--so far. You'll get to other things.

15 David Zornow: Yes.

16 Judge: So far that's different from anybody, for example, who's
17 falsely accused of a crime or sued for fraud, the line after you
18 win 'where do I go to get my reputation back.' Go ahead, we
19 understand the concern.

20 David Zornow: I think the point, Your Honor, is that there is a
21 tremendous amount at stake in that proceeding and it's going to
22 be presided over by an ALJ who we believe has not been legally
23 appointed, an ALJ that is going to be making critical
24 credibility determinations, finding facts, finding conclusions
25 of law, ordering sanctions.

1 Judge: Supposing your client was being tried by a judge after
2 you had unsuccessfully moved for disqualification, wouldn't you
3 be saying the same thing? He's about to be tried before a judge
4 who ought not to try this case because he has a
5 disqualification?

6 David Zornow: You honor, I think the answer to that question is
7 this court's decision in [INDISCERNIBLE] Ross vs. the SEC. In
8 that case, construing this very statutory review scheme, Judge
9 Timbers writing on behalf of the court, a former general counsel
10 of the SEC has laid out three different potential claims that
11 could have been made by the petitioner, including a claim of
12 bias. That was an ongoing SEC proceeding just like this case and
13 it was a claim by the petitioner of bias. Judge Timbers said,
14 "No, you've got to exhaust your administrative remedies in that
15 situation because the proceeding itself will bear and illuminate
16 that issue." He also said that if--

17 Judge: Yeah, but a disqualification case won't. If they said,
18 "Judge, you're disqualified because you own stock in this
19 company," nothing in the trial will change that.

20 David Zornow: Your Honor, we're talking here about a structural
21 constitutional issue, not a question of disqualification under
22 some rule.

23 Judge: Your point is it's very unfair to subject a person to a
24 proceeding before a judicial officer who ought not to be
25 conducting that proceeding and I'm suggesting to you that that's

1 exactly what happens after a disqualification motion is denied.

2 David Zornow: With respect, Your Honor, I think there is a vast
3 distinction between a constitutional problem of this nature,
4 which the court--

5 Judge: Alright, then let me give you another example. Supposing
6 at the outset of a criminal trial that the defendant says,
7 "Judge, we move to dismiss because the statute under which
8 you're trying me is unconstitutional." Motion denied, trial
9 begins. Why is that different?

10 David Zornow: It's different because to quote Judge Friendly's
11 decision in Sterling Drug, "An injunction can lie when a
12 proceeding is being conducted in a manner that cannot result in
13 a valid order." When litigants come into this courtroom and the
14 other courtrooms in this building, they're entitled to know that
15 the judges sitting on the bench have been appointed consistent
16 with the appointments clause of the constitution. They expect
17 that and if that has not occurred and that has not occurred
18 here, it is unfair to subject somebody like Ms. Tilton to two
19 trials in effect.

20 Judge: Understood, but follow on Judge Newman's line of
21 question, supposing your position in a civil case is that there
22 is no case of controversy, no subject matter jurisdiction. Does
23 that mean you get to

24 [00:05:00]

25 immediately appeal because he would be going through a

1 proceeding over which the court is not constitutionally
2 justified here?

3 David Zornow: Your Honor, I think we have to go back to first
4 principles here. The District Court has jurisdiction to hear
5 this matter under Section 1331. There's no question about that.

6 Judge: I'm just asking why that person is in a different
7 position from your client because are they not required to go
8 through a proceeding which they say is unconstitutional? The
9 court does not have jurisdiction over it.

10 David Zornow: Unlike the cases that the government relies on,
11 what we are asking for is one trial before a legally appointed
12 judge. If you look at the language in this court's opinion in
13 Central Hudson, again it says, "There is no purpose to requiring
14 the exhaustion of administrative remedies where the trial is
15 going to be a nullity." Let me reframe this in terms of the
16 analysis. This is a statutory--

17 Judge: Is this really exhaustion? Exhaustion generally means
18 you must go to the agency before you pursue the rest of the
19 statutory remedies. That's not what's happening here. You're not
20 trying to bypass the agency and come here for a ruling on the
21 merits. You're trying to go into the District Court, which is no
22 part of the statutory review scheme, so I'm just wondering is
23 exhaustion really the right doctrine to be talking about here.

24 David Zornow: I think there are analogies because in the
25 exhaustion case, if you look at [INDISCERNIBLE], the court is

1 looking at the purpose of the administrative schemes.

2 Judge: We said things about [INDISCERNIBLE] since then, to put
3 it mildly, don't expand it. If anything, they limit it. In any
4 event, let me ask you this. If you are right that this
5 proceeding that's about to happen is so without jurisdiction
6 that it must be corrected, that they're going to act outside
7 their jurisdiction, then why doesn't mandamus law?

8 David Zornow: You Honor, we believe that jurisdiction lies
9 through Section 1331, but certainly and the government brought
10 up mandamus cases we certainly feel that if the court wished to
11 exercise its mandamus power in this case, I think you would be
12 entitled to.

13 Judge: I'm not attesting we wish to do anything. Why you don't
14 come with a writ of mandamus properly drafted and framed, which
15 would at least preserve the same appellate scheme rather than go
16 to the district court, which has no part of the appellate
17 scheme?

18 David Zornow: Well, the burden is on the SEC to establish that
19 congress intended through the statutory review scheme to strip
20 the federal court of jurisdiction and you have to look at the
21 text structure and purpose of the act. If you look at that, it
22 is geared toward dealing with final orders. Indeed, the
23 exclusive jurisdiction of the Court of Appeals only kicks in
24 upon the filing of the appellate record.

25 Judge: That's the petition for review jurisdiction. That's not

1 its mandamus.

2 David Zornow: In our brief, Your Honor, we cite the Hamilton
3 case, which stands for the proposition that this court can
4 construe our application as an application for a writ of
5 mandamus and we certainly do as an alternative to what we
6 believe is clear subject matter jurisdiction in the district
7 court. The oddity of this situation is that were we to go back
8 through the entire administrative proceeding, we would be right
9 back in front of this court, so the court can certainly exercise
10 its powers under mandamus.

11 Judge: If this were a mandamus petition, I take it we would not
12 be asking whether your position is correct, but whether the
13 tribunal lacks even colorable jurisdiction. That's what we would
14 be asking in a typical mandamus where it challenges lack of
15 jurisdiction. In other words, this ALJ isn't someone who walked
16 off the street one day and said, "Here I am, I'm going to run
17 your hearing." He's not an interloper. You have a technical
18 argument that he doesn't satisfy the appointments clause.

19 David Zornow: I beg to differ with the use of the word
20 'technical.'

21 Judge: Do you think he's an interloper? He didn't come in off
22 the street. Can we agree to that?

23 David Zornow: Of course not. We have no idea when this person
24 was appointed. We know that the SEC has conceded that she was
25 not appointed by the commission as we believe it is clear when

1 required.

2 [00:10:00]

3 Judge: Do you agree that there is such a distinction between
4 jurisdiction and at least colorable jurisdiction?

5 David Zornow: There may be such a distinction, Your Honor,
6 but--

7 Judge: We've referred to it many times in our cases, so I don't
8 think we invented it.

9 David Zornow: My point, Your Honor, is that, first of all, let
10 me object or quarrel with the word 'technical' here because the
11 appointments clause as Buckley v. Vallejo said, this is not some
12 frivolous matter of etiquette and unimportant stuff.

13 Judge: It's a fundamental defect, but it's debatable and the
14 commission recently split three to two, didn't they?

15 David Zornow: The commission split three to two right--

16 Judge: Doesn't that suggest it's a matter of fair dispute?

17 David Zornow: The commission didn't even bother citing or
18 analyzing the two federal district court decisions in the Duca
19 case and in the Hill and Grey cases, which found jurisdiction to
20 consider this claim now and then join the proceedings.

21 Judge: You're saying the three got it wrong?

22 David Zornow: Absolutely they got it wrong and not
23 surprisingly.

24 Judge: Do you think the two got it right?

25 David Zornow: I assume so. We haven't seen their opinion

1 because the majority put out the opinion before waiting for the
2 dissent.

3 Judge: Well, I'm just saying that when a tribunal of five
4 commissioners splits three to two, that's some suggestion
5 there's a fair dispute about the issue. You can't deny that, can
6 you?

7 David Zornow: We think that if--

8 Judge: I know you think you're right, but you don't even think
9 reasonable people can disagree with you?

10 David Zornow: You know, Your Honor, I think if you get to the
11 merits of this question and you look again, I think the Second
12 Circuit is really the circuit that leads the way both on
13 jurisdiction through [INDISCERNIBLE] and on the merits through
14 Samuels/Kramer.

15 Judge: You may be right. We'll come out your way in the end,
16 you may be right. I'm just asking you, can reasonable minds
17 differ on the merits?

18 David Zornow: I think the standard is whether it is a clear
19 deprivation of right and it would be a clear deprivation of
20 right here to force Ms. Tilton under these circumstances--

21 Judge: Sure, it would be a clear deprivation if you're right on
22 the merits, that he's not a mere employee. Sure, if you're right
23 on the merits, you win. Most people do.

24 David Zornow: Your Honor, what's going to happen in the
25 administrative proceeding other than now that we've read

1 Footnote #115 of the Lucia decision--?

2 Judge: What might happen? You might win on the merits.

3 David Zornow: Well, it would be nice, but we wouldn't have our
4 ruling on the constitutionality of the structural defect.

5 Judge: You're not entitled to that in the worse. If your client
6 is taken before that tribunal, I assume he's not going to fall
7 on his sword and say, "Whatever they say is true," right? He's
8 going to defend.

9 David Zornow: Well, Your Honor, I will tell you--

10 Judge: Can we agree he's going to defend?

11 David Zornow: I'm not sure we can agree on that because the SEC
12 has set a trap.

13 Judge: Your client is going to walk in there and say, "Throw
14 the book at me?"

15 David Zornow: I don't know what the client is going to do at
16 this point, Your Honor, but I do know--

17 Judge: Oh, c'mon, he's going to defend. He's being accused of
18 something.

19 David Zornow: Well, except the SEC has now set a trap. That
20 trap is that they want us to go through this administrative
21 hearing for the sole purpose, the sole purpose of being able to
22 argue at the end of the day under Footnote #115 in the Lucia
23 case that there's harmless error, even if the judge was
24 unconstitutionally appointed.

25 Judge: That's a separate argument, but you're going to defend

1 your client, aren't you?

2 David Zornow: I'm not sure that this court should require our
3 client to use the words of Justice Roberts and free enterprise
4 to bet the farm by going through a proceeding that is not going
5 to add one iota of fact or--

6 Judge: That's not betting the farm. Betting the farm would be
7 if he or she or it, for that matter, said, "Okay, you can't hear
8 this case, I'm leaving." What he, she or it can do is put up a
9 fight and if they lose, they can come here and make exactly the
10 same argument. Can they not?

11 David Zornow: Under the recent cases involving Wellness vs.
12 [PH] Sharif and TPG, I'm not sure, in addition to the argument
13 about harmless error in de novo review, I'm not sure we wouldn't
14 be risking an argument that somehow by consenting to
15 participating in the proceeding that she had waived her rights
16 to get the constitutional issue.

17 Judge: You consider all of this an act of consent?

18 David Zornow: We're now in a unique posture, which is we are
19 pre-hearing. The Bebo case, the hearing had already started. We
20 are in a unique posture here.

21 [00:15:00]

22 Once we walk into that hearing and we begin contesting that
23 hearing, even though we've made it clear. I agree with Your
24 Honor. We've blasted it from the rooftops that we object to the
25 constitutionality. Nevertheless, under the recent cases, I can't

1 tell my client that there's no risk, that this court or some
2 other court down the road won't say that by participating in
3 that hearing that she has consented and waived the
4 constitutional argument and what purposes serve--?

5 Judge: If you're so worried that a court is going to think that
6 stepping foot in the door of that hearing is going to be a
7 waiver, if you're so confident that that's a real risk, you do
8 have an alternative. You can say to the client, "My best legal
9 advice is you should not step into the door. You should let the
10 hearing happen and I'm so confident we'll win on appeal because
11 there was an improper officer." You can give that advice if you
12 dare. I don't think you will, but you can.

13 David Zornow: Your Honor, I don't believe under this fact
14 pattern that we should be put to that kind of judgement.

15 Judge: That's the so-called bet the farm.

16 David Zornow: That is the bet the farm and a conclusion that
17 it's a farfetched risk at this stage is, frankly--

18 Judge: You know you're not going to give that advice. If we
19 reject your claim here and I appreciate that's something you
20 hope won't happen, but if by any remote chance we should, your
21 client is going to go to the hearing. Your client's going to put
22 on a defense. If the defense has merit, your client will
23 probably win, possible. Sometimes people will a meritorious
24 defense lose. In which case, they come to the Court of Appeals
25 and there they win, on this scenario, either on the merits or on

1 the issue you're now raising, so you're not really in the dire
2 straits you're telling us about.

3 David Zornow: Well, Your Honor, I am not prepared to say and
4 it's not because I'm playing games or anything like that, I
5 think it is a real issue. I think the SEC planted an exploding
6 bomb in Footnote #115. That's not something that came to the
7 table in the Bebo case. It's now here. I think we've got the
8 Shireef issue. Your Honors, I know my time is up. Yeah?

9 Judge: Now I don't want to try to put some words in your mouth,
10 but supposing you do win before the SEC and everybody's happy.
11 [INDISCERNIBLE]. Can't you argue, but then if you win, you never
12 got a chance to contest the jurisdiction of the court because of
13 that?

14 David Zornow: Exactly. Thank you for saying it better than I
15 did, but I was hoping I had said that.

16 Judge: That's not at all what will happen because if the SEC
17 appeals as they probably will. The first point in appellees
18 brief will be the court lacked jurisdiction.

19 David Zornow: I don't know that the SEC can appeal to the
20 [INDISCERNIBLE].

21 Judge: They can't appeal?

22 David Zornow: If we win, I don't--

23 Judge: There's no appeal?

24 David Zornow: Well, I'll have to check that. I'm not 100% sure.

25

1 Judge: You mentioned the free enterprise case and that's your
2 best Supreme Court case it would seem to me.

3 David Zornow: I would say so.

4 Judge Droney: It seems that the only real difference between
5 that case and this case is that there was no enforcement action
6 in that case and I think it was the PCAOB, right, but here there
7 is one. Is that what it boils down to, that case would have been
8 decided differently if there had been an enforcement action
9 taken?

10 David Zornow: If that were the case, it would make no sense,
11 Judge Droney. First of all--

12 Judge Droney: Well, they didn't spend a lot of time on a
13 Thunder Basin, three-part analysis in that case, did they?

14 David Zornow: Well, they talked about the Thunder Basin
15 analysis and they spoke about that issue under meaningful
16 review, but it would be an awfully odd result if the
17 differentiating factor here was that the person who comes in
18 before they've been sued by the SEC can gain jurisdiction and
19 the person who's already been sued can't, that's exactly what
20 happened in the Grey Financial case before Judge May in Georgia.
21 They brought their action before they had been sued by the SEC
22 and what do you think the SEC said in response? We can all
23 predict it. They said, "Rightness, you're out of court." In
24 essence, the SEC has setup the framework here so that we're
25 never going to get the review. We can't get the review

1 beforehand because it's not right,

2 [00:20:00]

3 we can't get it now because the proceeding is ongoing and we're
4 not going to be able to get it later because they're going to
5 argue harmless error and we're not going to be able to get it
6 later because they're going to argue harmless error and

7 [INDISCERNIBLE] is a case, which held that an injunction would
8 lie on the one claim that the court found was holy collateral
9 after the proceeding had begun. The question really isn't, "Is
10 there a proceeding that's been brought or not?" The question is
11 what's the nature of the claim and how does it fit into the
12 textual analysis of the statute.

13 Judge: You're saying the harmless error would be someone who
14 was constitutionally, improperly heard the case, heard it, yet
15 it's a harmless act.

16 David Zornow: Their argument is that because the SEC, the
17 commission itself, exercises the de novo review, that once the
18 ALJ makes the determination and it goes up to the commission, if
19 the commission endorses the findings of the ALJ, it's harmless
20 error because who cares whether the person was appointed
21 unconstitutionally.

22 Judge: That's also an argument that they're an employee and not
23 an officer, isn't it?

24 David Zornow: Let me just say on the question of the de novo
25 review, they argued this very point in Landry, which is the case

1 they love in the DC circuit. If you look at the solicitor
2 general's brief in opposing to Landry's petition for cert, they
3 make this very argument that it's harmless error, assuming
4 arguendo that the ALJ is unconstitutionally appointed. It's
5 harmless error. The fact that they have to answer to--de novo
6 review doesn't end the question as to whether an ALJ is an
7 inferior officer under the appointments clause.

8 Judge: Let me ask you, in Freytag, we've got the special tax
9 judges, right?

10 David Zornow: Yes.

11 Judge: How similar or dissimilar are their duties than the
12 ALJ's under the SEC scheme?

13 David Zornow: Extremely similar.

14 Judge: They focused in some finalities. How important are those
15 finality aspects to the special trail judges in the US tax
16 court?

17 David Zornow: If you take a look at Freytag, Your Honor, the
18 court reached its holding before it even discussed the question
19 of finality based on the significant responsibilities and duties
20 of the special tax judges. Remember, in that case, there were
21 four categories of case that the chief tax court judge could
22 assign to a special--

23 Judge: It would seem to me in looking at them that the first
24 three were not really very substantial duties. I think at the
25 time it was matters less than 10,000. Its 50,000 now.

1 Declaratory judgments, which sounds like a lot of work, but if
2 you look closely, it looks like it's not that much, really and
3 then liens, I think, and levies. It sounds like magistrate judge
4 kind of stuff in Article 3. Can you shed light on it? It's hard
5 to track those first three responsibilities and see if they
6 really amount to much is my question?

7 David Zornow: Well, yeah and I think those clearly were smaller
8 cases and the case came up--

9 Judge: Why do you say that other than I just kind of said--?

10 David Zornow: Well, that was the whole argument in the case.
11 The argument was about the fourth bucket, which is where that
12 case came up from and that bucket involved a case that was a
13 huge case. The petitioners in that case said, "First of all, the
14 chief tax court judge doesn't have the authority under language
15 that says--" and you can give them any other proceeding to
16 basically give them an incredibly complicated case, but it was
17 accepted and understood in the context of that case that the ALJ
18 or the special tax court judge could not render a final decision
19 in those cases and perhaps because they were more complicated
20 cases, but we think finality is really a red herring, but if
21 you're looking for finality, there is a decision that we've come
22 across since we filed our brief in Alchemy Ventures. A decision
23 of the SEC, which I can either hand up to the court or submit it
24 by letter in which the SEC says that default orders entered by
25 their ALJs accompanied by proposed sanctions and cease and

1 desist are final orders for purposes of enforcement by the
2 Division of Enforcement in the district court. That would bring
3 it, in my view, completely within the Freytag analogy, which
4 basically said as an alternative holding, if they've got final
5 decision-making authority in certain respects, then the fact
6 that they may not have

7 [00:25:00]

8 final decision-making authority in other respects doesn't
9 undermine the notion that they're inferior officers. Your Honor
10 raised the example of the United States magistrate judge.
11 Clearly, an inferior officer under the appointments clause.
12 There are many aspects of the work of the magistrate judge in
13 which they cannot render a final decision. That's in the nature
14 of being an inferior officer. Before I sit down, can I just put
15 one thing on the table here? We are obviously coming up against
16 an October 13th trial date. We ask the ALJ to adjourn that trial
17 date to give this court time to reach its decisions. We
18 understand this is an important decision, we appreciate the fact
19 that you've given us expedited argument and we're hopeful of
20 getting a decision before October 13th, but in the event that
21 it's going to take the court longer to decide the issue, we
22 would ask for a stay to preserve the status quo so that the
23 hearing does not begin.

24 Judge: Another possibility is our famous words opinion to
25 follow and we can decide the case. Well, what did the SEC say

1 about can you wait until we get done with this?

2 David Zornow: They objected before the ALJ to our adjournment,
3 but interestingly, Your Honor, in the Duca case, which is Judge
4 Burman's case in which he's entered an injunction, there are
5 things happening still in the district court in that case. There
6 was an answer that needed to be filed. Last week, stunningly,
7 the SEC asked Judge Burman for a stay of any remaining
8 proceedings in the district court in the interest of judicial
9 economy so that this court and that case is coming up thorough
10 an SEC appeal here we should wait. I would expect now that the
11 SEC ought to consent to a stay here in the interest of that same
12 judicial economy.

13 Judge: That motion is pending, right?

14 David Zornow: They had a conference this morning, Judge, I
15 don't know what the outcome was. I know that Judge Burman issued
16 an order on Friday in which he noted--he used the word 'irony.'
17 That here, parties like us had been asking for judicial review
18 so that we don't have to go through wasteful trials that are
19 going to turn out to be unconstitutional.

20 Judge: In the interest of judicial economy, not commission
21 economy.

22 David Zornow: Well, I think that Judge Burman would say that
23 it's both. If the SEC is unwilling now under those circumstances
24 to agree to a stay that would permit this court to decide this
25 very important issue, he used the word 'irony,' I'll use a

1 different in keeping with the season chutzpah. It's chutzpah.
2 There's no reason that this hearing, after a five and half year
3 investigation, needs to go forward under their
4 one-size-fits-all, 300 days from soup to nuts to decision when
5 you have this weighty constitutional issue hanging over it.

6 Judge: We will ask them.

7 David Zornow: Thank you, Your Honor.

8 Judge: Thank you. Mr. Stearn, we'll certainly give you
9 additional time. We've gone way over and we'll treat you the
10 same if you'd like that additional time.

11 Mr. Stearn: I'm happy to deal with whatever questions the court
12 has. A lot of things that were said, including the idea that the
13 commission was laying a trap for the plaintiff or respondent
14 here to fall into. I think that's clearly not the case. We've
15 made absolutely clear in our brief that the issues of the
16 constitutionality of the appointments clause issue can be
17 decided by the commission and will be subject to de novo review
18 in this court or the DC circuit in the event of a final adverse
19 decision.

20 Judge: That is a question in my mind, at least, if there's an
21 adverse decision, but if the decision is and it's always
22 possible, if it's not adverse to the defendants there and the
23 plaintiffs here, then they never get a chance to challenge the
24 constitutionality of the court before which they won.

25 Mr. Stearn: Right, but the Supreme Court and these cites are in

1 our briefs, the Supreme Court in Elgin and in FTC vs. Standard
2 Oil says that

3 [00:30:00]

4 the possibly that the constitutional issue may never arise and
5 there may never be a final review because the case may go off on
6 other grounds is a reason to let the administrative process go
7 forward. It is not a reason to intervene. The Supreme Court says
8 that explicitly in Elgin, it says it specifically in FTC vs.
9 Standard Oil.

10 Judge: It's not that it will never be decided, it's just that
11 this litigant won't--

12 Mr. Stearn: Exactly and, of course, the issue will get
13 decided--

14 Judge: You will go after other people and on the merits, you
15 will win and it'll be either here or in DC, right?

16 Mr. Stearn: That's correct, Your Honor. Undoubtedly, given the
17 number of cases in which this issue was coming up, it will get
18 to be decided. My only point is that to the extent that every
19 single respondent is saying, "Well, if I don't go to District
20 Court and if I win, to proceed to raise my constitutional
21 arguments." Well, what the Supreme Court has said is that that's
22 good, not bad.

23 Judge: Anyone who loses on the merits in your proceeding will
24 be met with your argument that the ALJ point is harmless error
25 and you will presumably assert that always, won't you?

1 Mr. Stearn: Your Honor, I don't know what we would assert.

2 Judge: You've asserted it so far, right?

3 Mr. Stearn: No, we haven't asserted it. That's something the
4 commission noted in a footnote. We weren't, obviously, part of
5 the commission proceedings. The commission noted in a footnote
6 and much is being made of this footnote, but all that that
7 footnote says is that the respondents in that case said, "Judge
8 Randolph has it right." Look at Judge Randolph's concurrence in
9 Landry as opposed to the DC circuit's majority ruling.

10 Judge: Your argument here that we are not to decide it first or
11 permit the district court to decide it first would be a lot
12 stronger if you would assure us that you won't assert harmless
13 error such that if a litigant is forced to go into your
14 proceeding and loses, there will then be a merits ruling on the
15 jurisdictional point. The more you say, "Oh, we might say
16 harmless error," the more you, at least to me, suggests maybe
17 he's right. We ought to give them an up or down ruling.

18 Mr. Stearn: Your Honor, I can't commit. My own sense is that we
19 will not make that argument, but I cannot commit the future of
20 litigants. I can get back to the court if--

21 Judge: Before we decide whether to give the district court
22 jurisdiction, the commission would advise us of its view on
23 whether it would assert harmless error?

24 Mr. Stearn: If the court believes that that's crucial, we would
25 get back--

1 Judge: I don't know if the court believes it. I'm just raising
2 it as a possibility.

3 Mr. Stearn: The reason that I don't think it's crucial is that
4 it makes absolutely no difference whether we assert it or not.
5 This court or the DC circuit--

6 Judge: Asserting it, it creates the possibility that the
7 question will never be ruled on.

8 Mr. Stearn: No, no, because supposing this went to District
9 Court and we made the argument there that, look, there's de novo
10 review, so it's harmless error. Well, that would be an argument
11 that could be made in District Court. It could be made in the
12 Court of Appeals. Neither court has to accept the argument.

13 Judge: Then you're here resisting it going to the district
14 court. There's no sense in telling us what would happen if it
15 went to the district court. You're trying to defeat that.

16 Mr. Stearn: That's right, Your Honor.

17 Judge: You're trying to defeat it on the grounds that if he
18 loses before the commission, there will be a proceeding here or
19 in DC, right? That's the route you want us to stay with.

20 Mr. Stearn: That's correct.

21 Judge: He says if he does that, he'll be met with a harmless
22 error argument. Not only he, but every other litigant who loses
23 before the commission on the merits will always be met with
24 harmless error and the question will forever evade review.

25 Mr. Stearn: Even assuming the argument is made, it would mean

1 that this court would have to agree with it.

2 Judge: Would have to what?

3 Mr. Stearn: The fact that the argument was made, if it were
4 made would have no significance unless this court were to
5 conclude that the fact there is de novo review means that any
6 error was harmless. That would be an issue for this court to
7 decide if the argument were made.

8 Judge: If the commission were to take the position, we won't
9 assert harmless error. Anybody from here after who goes through
10 one of these proceedings

11 [00:35:00]

12 and loses and gets to the Court of Appeals and he wants to then
13 say, "Point 1 of my brief, the ALJ was an inferior officer
14 improperly appointed," we won't say that's harmless error. We'll
15 meet it on the merits. You see, then you would give me at least
16 a lot of assurance that the normal appellate route should be
17 followed. Conversely, if you resist that appellate route, you at
18 least make me wonder maybe he's right. He'd better go into
19 district court and get an up or down.

20 Mr. Stearn: I'm not resisting the idea that this court, just
21 like the district court would be--the reason I brought up the
22 district court is if it's harmless error, it's harmless error in
23 whatever forum. There's no disadvantage to going to the Court of
24 Appeals. That's not an argument that would be uniquely made in
25 the Court of Appeals.

1 Judge: It's awfully theoretical. The fact that one can decide
2 harmless error or not without a record is harmless error.

3 Mr. Stearn: I think that that's correct, but again, we're
4 talking about the theoretical possibility of raising a harmless
5 error argument and it would only have any meaning if this court
6 were itself to look and go, "Yes, based on legal principles,
7 regardless of what the commission thought, based on legal
8 principles, this court thought that's right, it's harmless
9 error."

10 Judge: Why don't you do this? Why don't you go back to your
11 agency and see what type of lever they care to send up on the
12 issue on whether they will or will not assert harmless error in
13 cases of those litigants who lose before the commission and come
14 here challenging the jurisdiction of the ALJ.

15 Mr. Stearn: I'll absolutely do that,

16 Judge: I'm not saying which way you should go, but at least
17 tell us whether they're able to take a position. If they're not,
18 we'll know that and if they are, we'll know that.

19 Mr. Stearn: Absolutely, I understand, Your Honor and we'll
20 definitely do that.

21 Judge: Alright, now let's get rid of this part, the raise the
22 stay issue. Are you opposed to a stay of the commission
23 proceeding until we decide?

24 Mr. Stearn: Yes, we are.

25 Judge: Why is that?

1 Mr. Stearn: We would have opposed the stay if it had been moved
2 for before, we oppose it now because we don't believe that if
3 we're going to lose this case, which I hope we're not, then a
4 stay would be appropriate. If we're not going to lose the case
5 and--

6 Judge: Yes, but you're not going to know that until we write an
7 opinion and so if you don't want the stay, you want us to write
8 one very quickly and that's when mistakes get made. Wouldn't you
9 rather we get it right?

10 Mr. Stearn: Your Honor, you could take our brief as a response
11 to a stay motion saying that we not only think we're right in
12 the end, we think we have a substantial likelihood of
13 prevailing.

14 Judge: I fully get that.

15 Mr. Stearn: Right, but we don't think that the standards for a
16 stay pending appeal are met. We don't think the plaintiff has
17 demonstrated--

18 Judge: We're talking about the realities of this situation. He
19 wants to get into the district court tomorrow and we could do
20 that. We could just say, "He's right by order, opinion to
21 follow," and he's in the district court tomorrow and that would
22 be a terrible result for you, but you want us to write a careful
23 opinion that in the end comes out your way, right? All I'm
24 suggesting is the environment for getting what you want will be
25 enhanced if there's a stay.

1 Mr. Stearn: Your Honor, I really am not going to be able to
2 agree to a stay. I know we would have opposed it if it--

3 Judge: [INDISCERNIBLE] take the position, "We'll oppose
4 everything." All of a sudden, it's a terrible tactical position.

5 Mr. Stearn: I understand that, Your Honor.

6 Judge: We can grant a stay whether you agree to it or not.

7 Mr. Stearn: I'm fully aware of that.

8 Judge: But your position is no stay.

9 Mr. Stearn: That's correct, Your Honor. We would have opposed
10 the stay if it had been properly moved for and we're opposing it
11 now. The fact that it's being asked for belatedly at argument
12 rather than--we could have opposed it.

13 Judge: What's your view on whether we should treat this appeal
14 as a petition for mandamus?

15 Mr. Stearn: Your Honor, go back to your comment. I do think if
16 there were going to be any review of an issue of this kind and I
17 refer to the DC Circuit's decision we cite in Vacherie, which
18 was a case involving an appointments clause challenge to the
19 military commission, it was reviewed on mandamus. The DC Circuit
20 said, "Yes, we can review it on mandamus. No, we're not going to
21 grant it," and the reason the court said 'we're not going to
22 grant it' is first, it said there was irreparable injury,
23 [00:40:00]

24 but second, to come back to the point that you were making,
25 Judge Newman, is there's a difference to having the general

1 jurisdiction to issue a writ of mandamus and whether a plaintiff
2 has satisfied the mandamus standards. Here, the issue can be
3 resolved on ultimate review and there is no clear indisputable
4 right. I would like to note that although there is going to be a
5 dissent on the commission's decision, it's not clear that the
6 dissenting commissioners are dissenting on the issue of the
7 appointments clause. There's a merits question in that case, so
8 we don't know that the commission is, in fact, split on the
9 issue of the status of the ALJs as inferior officer, but as at
10 an absolute minimum, this is not the kind of case where there is
11 a clear and indisputable bribe. If the court wanted to treat
12 this as a mandamus petition, the plaintiff says, "Look, we found
13 a notice of appeal. In some circumstances, the Court of Appeals
14 has treated the filing of a notice of appeal from the district
15 court and filing the brief as a mandamus petition." That's when
16 you're mandamus in the district court. This would not be a
17 mandamus of the district court. This would be a mandamus of the
18 commission and if this court wanted briefing on that, we'll
19 supply it, but we don't believe that the case has been briefed
20 that way. If the court did want to go down that route, we would
21 respectfully ask for the opportunity to file a briefing.

22 Judge: Why would it not be a mandamus or could it not be a
23 mandamus to the district court to hear the--?

24 Mr. Stearn: Well, if you think the district court has
25 jurisdiction and you just reverse, the alternative question that

1 was being discussed earlier is let's assume that the district
2 court didn't have jurisdiction and he was correct. Is the court
3 that has the ultimate authority over what the commission does
4 and under the standards setup by the DC circuit that were then
5 adopted by this circuit in the FCC case that we cite, if the
6 ultimate decision is vested in the Court of Appeals, then it
7 exercises authority over all of the actions that could affect
8 that ultimate jurisdiction, so if any court were to consider the
9 question of, say, the bias of a decision-maker or whatever, that
10 would be this court or a DC Circuit. That would be a mandamus to
11 the commission.

12 Judge: You agree that if the ALJ lacked even colorable
13 jurisdiction, a district court proceeding to adjoin would be
14 appropriate?

15 Mr. Stearn: No, but I think that--

16 Judge: Really? If he walked into a hearing room where it said
17 'SEC' on the door and he walked in and there was a man sitting
18 there who had no papers whatsoever authorizing him to be an ALJ.
19 He just sat there and said, "Go ahead, call your first witness,"
20 he couldn't run into district court and adjoin that?

21 Mr. Stearn: I think he could come to this court and seek a
22 mandamus writ.

23 Judge: Oh, that would be mandamus.

24 Mr. Stearn: Yes. Now I'm not saying there would be no--

25 Judge: No remedy.

1 Mr. Stearn: Yes. I'm willing to fight you, Judge Newman, but
2 not on a briefing.

3 Judge: I'll just go back to one of the appointments clause
4 issues, which is the Freytag special trial judges appointed by
5 the US tax court. How are the duties of those special trial
6 judges more important or more responsible than the ALJs here,
7 especially since it looks like most of these proceedings are
8 going through the administrative process now rather than the
9 district court?

10 Mr. Stearn: Well, I do think that the commission's decision
11 and I don't know how it's pronounced, whether it's Lucia,
12 Luchia, whatever I think that the commission goes through and
13 lays out in some detail why the ALJs are not like Freytag and
14 why they should be deemed employees.

15 Judge: What they talk about is the finality of those decisions.
16 In the first three of the four responsibilities that Freytag
17 identifies through the statute. I looked at it and it seems like
18 they're not really that big a deal, those three areas. I don't
19 mean to say

20 [00:45:00]

21 a tax dispute of \$45,000 is not a big deal to the taxpayer. Of
22 course, it is, but in the scheme of things, those
23 responsibilities don't seem to be all that great. If you clear
24 all that away and you just look to the fourth factor and then
25 you look at how the hearings are conducted with evidentiary and

1 motions decisions and discovery, they look pretty similar to the
2 ALJs here. Am I wrong about that?

3 Mr. Stearn: I think there are distinctions to be drawn on that
4 second point, but just to the first on the finality, the way
5 Freytag was briefed is the government came in and essentially
6 conceded that the special tax on judges were going to be
7 inferior officers in all of the cases in which they rendered
8 final decisions. That was just the way that was written. Then
9 there was a fourth category where no final decisions were issued
10 and so that became the finding ground and one of the--

11 Judge: [INDISCERNIBLE] discussion, the court [INDISCERNIBLE].
12 If that's status for the first three, then it's for the fourth,
13 so we don't need to discuss this. That's why I'm asking. When
14 you peel it back, is there really a substantive--

15 Mr. Stearn: They didn't say they don't need to discuss it. What
16 they said was that if you're going to be an inferior officer for
17 these purposes, you don't stop being an inferior officer. It's
18 basically saying that the government's attempt to salami it up
19 among the four different categories wasn't working. If you're
20 conceding effectively that there were going to be inferior
21 officers for three of the four categories, then they are
22 inferior officers and I think that's the point that the DC
23 Circuit was picking up on in Landry. Then the DC Circuit also
24 went on to say that even as to the duties that were being
25 exercised in that fourth category, the role of in that case

1 FDIC ALJs was different and among other distinguishing factors,
2 there was no difference required to the fact findings of either
3 the ALJs in the FDIC proceedings or the SEC proceedings.

4 Judge: Isn't there credibility decisions for the ALJs for the
5 SEC?

6 Mr. Stearn: Yeah, the commission discusses that and its
7 decision and it says, "Yeah, we've said that credibility
8 determination's based on demeanor. We're inclined to defer," but
9 even there we don't defer blindly and we're convinced that when
10 the record tells us something else, we don't defer to it. That's
11 a very different--

12 Judge: APA Authority, too, decided as the initial decision like
13 it would have, don't you?

14 Mr. Stearn: That's right and that's the case in both here and
15 in Landry and that's, we think, a very important distinction.
16 Also, the [INDISCERNIBLE] the ability to issue sanctions, what's
17 important to recognize is that everything an ALJ does has to go
18 through the commission. Say if the ALJ wants to get a subpoena
19 enforced, the ALJ can't enforce the subpoena nor can the ALJ go
20 to district court to get enforced. It has to go to the
21 commission and then the commission can seek enforcement. What
22 you have, if you look at what the Supreme Court was regarding as
23 the key characteristics in Freytag, some of the things are
24 obviously the same. The both preside over hearings and take
25 evidence, but we think that we--

1 Judge: One other thing, if he wins on the merits before the
2 commission, does the general counsel have any right to come
3 here?

4 Mr. Stearn: I didn't think it did, but I honestly just don't
5 know the answer to that.

6 Judge: Thank you, Mr. Stearn.

7 Mr. Stearn: Thank you very much, Your Honor.

8 Judge: Mr. Zornow, you have a couple of minutes left.

9 David Zornow: Thank you, Your Honor, I'll be brief. I do have
10 copies of the Alchemy decision that I referred to and I can hand
11 it up. this decision very clearly states the default order of an
12 ALJ can be taken directly by the division of enforcement, the
13 district court for enforcement there without bypassing the
14 commission, so if we're going to get hung up on the finality
15 issue, I think that's the answer to it. On this issue of the
16 duties, on the merits, I would refer the court, as we cite in
17 our brief, to the website. Here's how they describe on the
18 website, "Administrative law judges are independent judicial
19 officers who, in most cases, conduct hearings and rule on
20 allegations of security violations initiated by the commission
21 division of enforcement. They conduct public hearings at
22 locations throughout the United States in a manner
23 [00:50:00]
24 similar to nonjury trials in federal district courts." On the
25 issue of deference to credibility to findings, well, I'm a

1 little hard-pressed as to how you do that on a de novo basis,
2 but the commission, on the cases we cite, in Re Claassen and in
3 Re Pelosi say, "We accept a fact finder's credibility finding
4 absent overwhelming evidence to the contrary." Two of you have
5 been district judges and we've all been in courts where
6 credibility findings are made. It's hard for me to understand
7 how those findings aren't going to carry a hell of a lot of
8 weight when they go up to the commission.

9 Judge: I suppose there's also a question as to whether
10 admissibility of evidence. As a commission, I suppose you have
11 the record you have and you have to send it back to a hearing
12 officer in order to have it augmented rather than
13 [INDISCERNIBLE].

14 David Zornow: Well, it's a technical matter. They could haul
15 the parties before the commission, but I venture to say that I
16 can't think of a time that that's happened and I'm sure in the
17 overwhelming number of cases, they abide by the standard in
18 Claassen and Pelosi. In terms of whether or not they're going to
19 make the harmless argument, here's the Landry brief that I cited
20 before, "Even assuming arguendo that the ALJ is not appointed in
21 conformity with the appointments clause, such a deficiency would
22 not provide a basis for invalidating the order that is before
23 this court. The decision under review is a decision of the FDIC
24 board, not a decision of the ALJ." That's signed by the
25 solicitor general of the United States. I think they work in the

1 same building. On the mandamus issue, the law is quite clear
2 that mandamus lies with respect to agency determinations and we
3 would certainly be prepared and invite the opportunity to brief
4 that if it's in doubt, assuming that we get a stay of our
5 October 13th trial date. Just to say it in terms of Elgin and
6 FTC vs. Standard Oil, take a close look at those cases, Your
7 Honors. Elgin is a case in which the court didn't even get to
8 the Thunder Basin factors before it found based on a statutory
9 analysis that the thing had to be channeled in the way it was
10 and the petitioners conceded they fell within the statutory
11 review process. The difference here is we don't concede that. We
12 think we're outside of what congress intended. We think it is
13 not fairly discernible that congress intended that this kind of
14 claim would have to go through the administrative process. As
15 far as FTC vs. Standard Oil, which they beat like a drum, that's
16 a case where the FTC brought an action and the petitioners then
17 ran it to the district court to basically say the commissioners
18 didn't have a reasonable basis to bring the case. They were
19 trying to have a collateral inquest on a matter, which
20 [INDISCERNIBLE] says, if you want to call it bias, it's got to
21 go through the administrative thing. They were trying to kill
22 the entire administrative process. We're not trying to kill this
23 case. We're trying to have this case heard one time by a
24 constitutionally legitimate judge.

25 Judge: Thank you, Mr. Zornow. Let's just talk about 28J letters

1 for a second. You've asked to submit the Alchemy case?

2 David Zornow: Yes.

3 Judge: It doesn't seem like you need too much time for that. My
4 suggestion is by Monday, next Monday, with a cover letter and
5 then Wednesday for you, Mr. Stearn, to respond. Does that give
6 you enough time, next Wednesday, so that would be the 21st to
7 file and the 23rd to respond to that issue? That's acceptable to
8 both of you, right?

9 Mr. Stearn: Yes, sir.

10 Judge: I guess the other one is the harmless error position of
11 the government here. How long do you think you need to find that
12 out?

13 Mr. Stearn: [INDISCERNIBLE].

14 Judge: So you can file something by the 25th on that, you
15 think? Okay and then do you want to take until the 30th, the
16 following Wednesday to respond to that?

17 David Zornow: Sure, Your Honor, and just noting again and I'll
18 be my own broken record--

19 Judge: We don't want it to be November 1st.

20 David Zornow: We're getting perilously close to the beginning
21 of the hearing.

22 Judge: So you won't be asking for an extension to the time I
23 guess to respond, right?

24 David Zornow: Well, no, we'll get that in very quickly, but
25 again, I do think for the reasons stated that a stay would be in

1 everyone's interest here, including the ability for the court to
2 consider and important issue in a considered way.

3 Judge: Thank you, both. We'll reserve decision. That completes
4 the day calendar for today, so we'll ask the clerk to adjourn
5 court.

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