UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FREE ENTERPRISE FUND, ET AL.,	:	Civil Action No. 06-0217
Plaintiff	:	June 29, 2006
v.	:	
PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD, ET AL.,	:	3:00 p.m.
Defendants	:	
. . . . .	:	. . . . .

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE JAMES ROBERTSON
UNITED STATES DISTRICT JUDGE

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P R O C E E D I N G S

COURTROOM DEPUTY: This is Civil Action Number 06-217, Free Enterprise Fund, et al. versus Public Company Accounting Oversight Board, et al. Will counsel please identify themselves for the record?

THE COURT: The ones who are going to be speaking.

MR. LAMKEN: Jeff Lamken for the defendants, the Public Company Accounting Oversight Board, and the individual defendants.

MR. CARVIN: Michael Carvin for the plaintiffs.

MR. KATERBERG: Robert Katerberg for the United States.

THE COURT: You call this Free Enterprise Fund versus Public Company Accounting Oversight Board, but from where I sit it looks like Jones Day versus Baker Botts, which is possibly even a more interesting lineup.

Well, all of you in the courtroom are more schooled in these issues than I am, and I'm just going to sit back and listen to the argument. Who's going to present the motion to dismiss?

MR. LAMKEN: I will, Your Honor.

THE COURT: All right, sir. Start with your strongest argument, which would be what, standing?

MR. LAMKEN: I was going to start with the exclusive review mechanism and exhaustion of administrative remedies, sir.

THE COURT: Fine. Go ahead.

MR. LAMKEN: May it please the court, there appears to be no dispute that Sarbanes-Oxley establishes an exclusive statutory review mechanism, and there appears to be no dispute that plaintiffs could avail themselves of that mechanism to raise their constitutional claims and obtain review in the Court of Appeals; for example, seeking pre-enforcement review by challenging a board rule-making before the SEC, and challenging the SEC's resulting decision in the Court of Appeals, or post-enforcement following imposition of any sort of sanction.

The question here, or the principal question here, is whether, confronted with an ongoing formal investigation, plaintiffs may bypass that remedy by bringing what they deem a facial constitutional challenge to the board's authority. In our view the answer is no, for three related reasons.

The first is that each of the principles that animate the exclusive review mechanism and the necessity of the administrative exhaustion apply with force here notwithstanding the facial label. The first of those reasons is the need for the agency's expert interpretation of the statute and practical experience. In this case, plaintiff's claim of an excess delegation of authority to the board, its claim that the board exercises unchecked authority that violates separation of powers, and its claim that there's a violation of the appointments clause because the board's members are principal officers as opposed to inferior officers or mere employees who

must be appointed by the president, all turn on the claim that the SEC --

THE COURT: Are you keeping up with this, Rebecca? He's talking pretty fast.

THE REPORTER: I am so far, but it is fast.

MR. LAMKEN: I should slow down. My apologies.

THE COURT: Maybe it's just me that's not keeping up with it.

MR. LAMKEN: Well, then, I ought to slow down for certain.

Each of these claims turns critically on the plaintiff's assertion that the SEC exercises insufficient authority and control over the board's activities. One need look no further than Section 6 of the complaint to see those allegations. Repeatedly the SEC's supervision and oversight is characterized as nominal, minimal, or limited. Those, in our view, are dubious interpretations of the statute, but in any event, are most directly and inappropriately directed to the Securities and Exchange Commission first, because the Congress has given the SEC authority to apply and interpret those review and supervision and oversight provisions in the first instance. It would be premature to decide that they're constitutionally insufficient to give the SEC sufficient control over the board before the SEC has actually told us what they mean.

Second, even apart from the purely legal construction

of those mechanisms, the SEC has substantial experience with similar provisions through which it exercises supervision and control over self-regulatory organizations like the New York Stock Exchange, like the National Association of Security Dealers, which, like the board, can discipline their members and create rules of conduct.

Through decades of experience with those similar review provisions, the SEC has a unique practical insight to the sort of relationship they establish, the degree of control, the degree of independence that results. Absent channeling this through the Securities and Exchange Commission, the Court would not have a sufficient background to illuminate precisely how these statutes operate in order to inform its view.

For example, in *Ticor*, Judge Edwards in his opinion pointed out that even though it was a constitutional challenge based on separation of powers grounds, the agency's application could illustrate and illuminate the nature of the agency process that was being challenged as unconstitutional. Similarly, in *Morrison vs. Olson*, the Supreme Court, after describing the statute in the abstract, said, a-ha, its actual application in these instances illustrates how the statute works in practice.

The same is true here. Channeling through the SEC would give that agency the opportunity to explain the nature of the relationship and the degree of control the SEC exercises over the board in practice based on its experience.

Third, in the context of an actual challenge, and confronted with a constitutional challenge to the SEC's oversight and control over the board, the claim that it is insufficient, the SEC would have the opportunity to articulate with greater precision than it has in the past precisely the nature of that control, and potentially to reconsider its views in order to ensure and avoid any constitutional challenges.

Which brings me to the second reason, which is the avoidance of constitutional issues. Congress in this case has given the SEC an unusual degree of authority over the board. In section 107(D)(1), for example, based on the public interest alone, the SEC can withdraw the board's enforcement authority entirely. The SEC also has authority to revisit the board's rules by its own rule-making, and it can approve or disapprove the board's rule-making processes.

To the extent plaintiffs suffer an injury at all, it is through the application of the board's rules and the board's sanctions that the SEC has authority to review. They should not be able to challenge those -- raise those injuries as injury in fact for a suit in this court before asking the SEC to exercise its authority to prevent those injuries, to exercise its authority under, for example, Section 107(D)(1).

And finally, there is the interference with the administrative processes. One of the principles that exists throughout the common law and through doctrines like

Younger Abstention is that individuals should not be able to bring suits to prevent prosecutions or prevent investigations because it interferes with the administrative process.

The exhaustion doctrine and the exclusive review mechanisms reflect that principle here, and it's reflected in cases of the DC Circuit which say that once you're subject to an ongoing investigation or imminent enforcement proceeding, you may not bypass the procedures that Congress has provided for you to raise your challenge and instead bring an anticipatory challenge in District Court. Instead you must await the sanction, if one is imposed, and then challenge it afterwards, or you may bring a rule-making challenge through the alternative mechanism that Congress has established.

But in this case neither FEF nor Beckstead & Watts has ever challenged any of the board's rules before the commission, nor have they challenged any of the commission's approval of the rules before the DC Circuit, which they would have the opportunity to do if they chose to.

THE COURT: Well, back up a minute. Younger Abstention is grounded in state/federal issues, deference to state court systems and so forth.

MR. LAMKEN: That's true.

THE COURT: What kind of deference do I owe or does a federal court owe to this kind of a body?

MR. LAMKEN: Well, to the Securities & Exchange

Commission, Congress has allocated to the agency in the first instance authority per the statute, but Younger Abstention actually applies in the federal context as well. There's a case called *Deaver vs. Seymour* from the DC Circuit that applies the Younger Abstention to preclude as a matter of fact separation of powers challenge against the independent prosecutor where there's an effort to keep the independent prosecutor from seeking or obtaining an indictment.

Similarly, the Alcee Hastings case, there's a separation of powers challenge to the judicial conference, or -- yeah, the judicial conference, I believe, to prevent the investigation of Judge Alcee Hastings. And the DC Circuit again said, no, we're going to defer and wait for that investigation to be completed, because it will illustrate how this process works, it will provide greater guidance in terms of our determination of the constitutional issues, and plus the issue could potentially go away, avoiding the necessity of constitutional adjudication.

The second reason we believe that this case must be dismissed for failure to exhaust administrative remedies and failure to use the exclusive judicial review mechanism is that we do not believe that there is a freestanding facial challenge exception to exhaustion of administrative remedies. The cases on which plaintiffs rely break down into roughly two categories; first, cases where there is an express preclusion provision that

doesn't cover the particular case at issue. McNary was an example of that, where it simply identified particular individual challenges, that these challenges must be brought through the mechanism established by statute, but didn't mention the more expansive challenge that was before the Supreme Court in that case.

The other category of cases is where you can't obtain judicial review through the statutory review mechanism, and therefore the mechanism is inadequate. We all presume that Congress intends judicial review to be available; we therefore presume that when judicial review would not be adequate or available under this exclusive statutory review mechanism, that Congress didn't intend for that to apply to the particular claims, and they will allow plaintiffs in that circumstance to bypass a brand new mechanism and bring the challenge by other means.

And McNary, again, is an example of that, because the Court was concerned that the actual mechanisms neither will provide a sufficient record for the Court of Appeals to provide review, nor would there be a meaningful opportunity to get the claim in to the Courts of Appeals, because in order for the alien to challenge the denial of his adjustment of status, he would have to be caught and on the edge of being deported.

Third, consistent with the general principle that there's no right to bring abstract constitutional challenges,

our view is it's consistent with the general rule that one does not have a right to bring constitutional challenges to statutes in the abstract. Any injury plaintiffs suffer in this case arises from board's rules, which they must follow, or the application of a sanction, but each of those actions is subject to review at the SEC and then subject to judicial review in the DC Circuit. Because this injury in fact arises out of an application of the board's rules, it is reviewed by the SEC and then the Court of Appeals, and indeed it arises from ones that are stayed pending SEC review, we believe that those challenges should be brought through the mechanism that Congress has established.

If the Court has no questions, I'll reserve any remaining time for rebuttal. Thank you, Your Honor.

THE COURT: You don't want to talk to me about standing?

MR. LAMKEN: I would be happy to address standing if you would like.

THE COURT: That's where I started.

MR. LAMKEN: Okay. My apologies for not getting to where you started.

THE COURT: It's the great puzzle for district judges. You never know how the Court of Appeals is going to come out, so you have to teach me something about standing.

MR. LAMKEN: It is not exactly the most clear area of

law.

There are two challenges to standing that we have here. The first is the challenge to FEF's standing to bring this claim, because it does not articulate who its members are, which regulations injure them, or the nature of their injuries. The First Circuit case we cited in our brief indicates that those are necessary elements to establish standing.

The contrary DC Circuit cases cited by plaintiffs actually are situations where the DC Circuit was able to say with absolute certainty that notwithstanding the failure to identify the members who could bring -- who had standing and that would have standing in their own right, notwithstanding the failure to identify the injuries, the Court could say with certainty that there was a member of the organization that was capable of bringing this suit.

There are actually two particular challenges to standing. The first is the challenge to both plaintiffs' standing to challenge limitations on the SEC's authority to select who will be members of the board. The statute provides that the SEC, when it selects members of the board, can have two and only two members of the accounting profession. That challenge, if it can be brought, must be brought by the SEC itself, since it's the SEC's authority and the SEC's discretion that is being limited. The plaintiffs' claims suffer the usual problem that third party standing claims suffer, which is that

they can't show that the other party, the SEC in this case, would have acted differently absent the restriction on its authority.

It is particularly problematic here in the context of the plaintiffs' claim that the statute, to be constitutional, had to put all of the authority in the hands of the SEC chairman, as opposed to the SEC, because the SEC chairman in this case voted in favor of each of the members of the board. And therefore it seems to apparent to us, at least, that the decision would not have been affected if the authority at a certain point had been selected -- had been conducted differently or established differently in the statute.

THE COURT: Does Beckstead & Watts have any better claim of standing than the Free Enterprise Fund?

MR. LAMKEN: Beckstead & Watts doesn't have the difficulty that Free Enterprise Fund does, in that it's not an organization. For an organization to establish standing, it must show that it has a member that would have standing to challenge if it chose to do so, that the organization's purpose is germane to the challenge that's brought, and finally, that there's no indispensable plaintiff if the suit is brought on its own behalf.

Where Beckstead & Watts -- excuse me. Where FEF's claim as an organization falters here is on the first step. You can't tell that it has a member that has standing to bring the

suit because it doesn't tell you who its members are or how they are injured. Because Beckstead & Watts isn't an organizational plaintiff, it doesn't have that difficulty. Thank you.

THE COURT: Thank you, sir. Does the government want to be heard?

MR. KATERBERG: Thank you, Your Honor. Robert Katerberg on behalf of the United States. We filed a statement of interest in support of the board's motion to dismiss because the issues that are raised implicate several key jurisprudential principles that are of paramount importance to the United States.

First among those is that Congress is entitled to specify how and when legal challenges to regulatory authorities and their actions may occur. The type of scheme that's at issue here is certainly not unique to the SEC, to the board, or even to the securities context. The United States Code, we would submit, is replete with review systems like the one that's at issue here, and indeed they are necessary to enable our government to work effectively.

Second, Your Honor, there are key benefits that flow from deferring judicial review until after the administrative process is complete, and from centralizing judicial review in particular courts that Congress selected. And counsel for the board alluded to some of those a moment ago, but just to name a few, they include having a crystallized record so that there

isn't just an abstract philosophical issue presented for the Court's consideration; likewise, avoiding piecemeal litigation, and, importantly, preventing litigation from being used as a preemptive weapon to impede an ongoing investigation; third, Your Honor, is the principle that important constitutional questions like I think both sides would agree are presented here should certainly not be decided unless and until necessary, and not decided in the abstract.

Now, holding the plaintiffs in this case to the exclusive statutory review mechanism in the Sarbanes-Oxley Act and the securities laws serves each of these principles. First, there can be no dispute that Congress made its choice apparent here, because it simply adopted the framework that has been in place for as long as we have had securities laws in this nation and has been the vehicle for numerous challenges, including facial constitutional challenges to the NASD, the National Association of Securities Dealers, and to the SEC itself. That's got to count for something.

Because Congress wasn't just making this up out of thin air. They simply adopted the system that had long been in place, and it can't be assumed that in the Sarbanes-Oxley Act Congress intended to give public company accountants a privileged status, greater judicial review rights than those that are accorded to other types of industry participants, other actors who are regulated under the securities laws by NASD or

other self-regulatory organizations. To the contrary, the intent is clear that Congress intended to put them on the same footing as those other types of actors.

Now, the review scheme that Congress adopted applies to anything that the board could do that can concretely aggrieve plaintiffs in a legally cognizable way. And that's important, because it applies both to disciplinary sanctions imposed by the board, and also to rules promulgated by the board and approved by the SEC. Those rules, Your Honor, would include the very auditing standards that the plaintiffs complain about as unduly burdensome. That's paragraph 63 to 64 and 72 of their complaint.

Now, the plaintiffs attack our argument as being, I think the phrase they used is at war with itself, under the notion that somehow it's inconsistent to claim both that the exclusive review process applies to rules and simultaneously to orders. But we don't see anything inconsistent about it. The fact is that the duality is complementary. It's the same system that governs rules and disciplinary sanctions alike that are taken by self-regulatory organizations such as the NASD and the others. And the fact that Congress gave basically multiple options - they can either raise these challenges through judicial review of a disciplinary sanction or through an appeal from an auditing standard from a rule promulgated - that simply gives more options. So it would be anomalous to hold that that

somehow cuts in favor of the narrower view of the exclusive statutory review scheme.

Now, Your Honor, the benefits I alluded to a moment ago from adhering to exclusive statutory review schemes transcends this particular case, but they are particularly compelling here for several reasons. As counsel for the board mentioned, the issues that plaintiffs raise here, and there can be no dispute about this, that they are intertwined at their core with the nature and degree of SEC oversight. The nature of the supervision that the SEC exercises over the board is a fundamental part of the legal analysis for each of the claims; the appointments clause claim, the separation of powers claim, and the nondelegation claim. It would be anomalous to short-circuit the very process under which that supervision is to be exercised to answer what would in effect be a hypothetical question. And for that same reason, this case exemplifies the maxim against deciding constitutional issues in the abstract.

As we understand it, plaintiffs' principal stratagem for avoiding the exclusive review mechanism is that they portray their challenge as one that goes to the board's very existence rather than any particular action of the board. But we don't think that helps them. Because a generalized philosophical objection is not sufficient to invoke the Court's jurisdiction. It's only through specific concrete actions of the board, those auditing standards that they complain are unduly burdensome, or

orders, disciplinary sanctions that can go up through the review mechanism, that the board can tangibly affect plaintiffs.

I mean, in our system of jurisprudence, we ordinarily don't entertain challenges where somebody just says, I philosophically disagree with the fact that there is this regulatory agency. Those people have to wait until the regulatory agency does something to them, and then that can be pursued through the appropriate fashion specified by Congress. And each and every one of the ways that plaintiffs claim to be injured in the complaint are through concrete actions of the board that can be addressed by the statutory review mechanism.

Finally, Your Honor, there's a complete absence of irreparable harm here from going about review in the right way. And I might add that it's unclear exactly to what extent irreparable harm would be an exception to the exclusive statutory review mechanism in this case under the securities laws, but the Court need not reach that question. Because there's nothing at all here -- because in addition to the fact that there's nothing alleged in the complaint other than the burdens of complying with an ongoing investigation, which the Supreme Court has held as a matter of law is not sufficient, there's nothing.

And moreover, the statute by its very design delays the effectiveness of any rule or auditing standard or disciplinary sanction that the board issues until after SEC approval. We

cited those statutory provisions in our brief, and what they provide is that in the case of rules, they don't become effective until the SEC approves them.

And the same is true presumptively for disciplinary sanctions. In fact, the plaintiffs complain about the publicity from a disciplinary sanction, but under the statute, the disciplinary process -- the investigations are confidential until they are proved by the SEC. So the statute is designed in such a way that it would automatically guard against the very harm that the plaintiffs -- any harm that the plaintiffs can suffer that they can conceivably say should exempt them from the exclusive review mechanism.

Finally, Your Honor, as we alluded to at the conclusion of our statement of interest, independent of the specific parameters of this statute, even if Your Honor was to conclude that the specifics of the statutory scheme here do not absolutely deprive the court of jurisdiction, there are any number of other reasons why judicial review should await a final order that can be taken to the Court of Appeals. And a case that the plaintiffs actually cite, *Ticor vs. FTC*, 814 F.2d 731, illustrates that point. Your Honor, that was a facial separation of powers challenge to the FTC's authority to bring enforcement proceedings; in that respect, exactly like this case.

Now, it produced three different opinions by the judges

of the DC Circuit panel, so none of those are binding, but we contend that they are instructive. It was before *Thunder Basin*, and the panel did not reach the particular question of whether there was a *Thunder Basin* exclusive statutory review scheme that applied, but they all agreed on the bottom line that a free-floating action in District Court for injunctive relief was inappropriate. They had different rationales. Judge Edwards, in his opinion, reached that conclusion based on nonstatutory exhaustion principles; Judge Williams on the ground that there was no final agency action; and Judge Joyce Green, sitting by designation, on rightness principles.

And in our statement of interest, we pointed out that the ripeness doctrine basically cries out for application here, even if Your Honor was to conclude that there was some form of jurisdiction. So even putting the specific statutory scheme here to one side, these numerous other rationales would call for a dismissal in this case as well.

Thank you, Your Honor. We submit that the Court should grant the Court's motion.

THE COURT: Thank you, sir. Mr. Carvin?

MR. CARVIN: Good afternoon, Your Honor. The government and the defendants want this court to accept the extraordinary notion that Congress has implicitly stripped this court of its important traditional power to enjoin constitutional violations. There's not a sentence in the

statute, there's not a sentence in the legislative --

THE COURT: They've done it before.

MR. CARVIN: Excuse me?

THE COURT: Never mind.

MR. CARVIN: Depending on the nature of the violation. But what they want you to do is infer that you can't exercise this traditional power because you're supposed to look at the statutory scheme and say Congress intended that to be exclusive. But what we have here is a challenge to the agency's structure under the Constitution. What the statutory review mechanisms deal with is a challenge to agency action under the statute.

Now, you only have to state that proposition to recognize that the statutory review mechanisms are ill equipped and indeed unable to resolve the case we have brought to Your Honor, so it simply makes no sense for us to go through those statutory review mechanisms even if they were available to us, which they are not.

THE COURT: But what -- I think standing is the right word to use in this question. What standing do you have to complain about the existence of this organization except for what it does to your clients?

MR. CARVIN: Right. As to what it does to our clients, it is that they are regulating us. And I want to make it clear that as to our general standing, at least for Beckstead & Watts, no one is challenging our standing. Because it could not be

clearer under *NRA Political Victory Fund*, the Federal Reserve case, in *Glidden v. Zadnick* (ph), all you need to do if you're mounting a separation of powers challenge is saying that they are regulating us. This entity is regulating us, and this entity has no authority to regulate us.

In this context, Congress could adjudicate this dispute, but Congress has no power under our separation of powers schemes to fulfill the judicial function.

THE COURT: I agree the standing issue is easier when you talk about Beckstead & Watts. Tell me about Free Enterprise Fund. Who are they and what skin do they have in this?

MR. CARVIN: Their membership is subject to the direct regulatory authority of the PCAOB. They are both regulated directly in terms of standards, and they are assessed a fee every year by the PCAOB to fund it. So they have a direct monetary and regulatory interest in it. So that was clearly alleged in our complaint, and that is all we need to establish. Again, it's uncontested, if those are proven true, that that is enough to establish our separation of powers standing. In other words, the separation of powers standing, as the Court put it in *Thomas v. Union Carbide*, doesn't relate to what the agency is doing, it relates to who is doing it.

For purposes of our case here, we will stipulate that everything the board does is fully consistent with the public interest as defined by Sarbanes-Oxley. We don't really care

whether or not their regulations are consistent with the act or inconsistent with the act. Our problem is that the people who are exercising this extraordinarily important governmental function are not appointed by the President, are not removable by the President, and are not subject to control by the constitutional entity that our Constitution is vested with the power to administer and execute the law.

It's just like saying if they appointed a Justice Department corporation to bring criminal prosecutions, you couldn't challenge that unless you argued that they were abusing their prosecutorial discretion. That's not the issue. The question is who is bringing it.

And that illustrates, I think as best as I can, that the statutory review mechanism is inherently ill equipped to decide this entirely separate question. They can't decide it for three reasons. One is it is black letter law, which no one, I don't think, disputes that agencies are not able to decide the constitutionality of statutes, so they cannot resolve whether or not Sarbanes-Oxley violates the separation of powers. Creatures of statute can't say that the statute is unconstitutional, so they can't grant us the relief we're seeking. In these particular circumstances there is no statutory review process available to us because they have not imposed the disciplinary sanctions, which you just heard is the only mechanism we can use to challenge it under the statutory review mechanism.

And third, they can't grant us any of the relief we seek in this court, because even if they find that Beckstead & Watts complies with the board's auditing standards, that doesn't change the fact that tomorrow the board can promulgate new auditing standards, can inspect us, can investigate us, and there's absolutely nothing we can do about it under the statutory review mechanism.

And that's the essential point, that there's absolutely no overlap between our separation of powers challenge here and the statutory review mechanism which focuses only on the accounting standards and their compliance with the act. You will never hear a word from us about those accounting standards during this case, because it's got nothing to do with our case. Every case they rely on involves a decision by the agency which creates the injury and which the agency itself can eliminate the injury. None of those are true here, for the reasons I've already stated.

So I fully embrace what the defendants and the government just said. The purposes of statutory review are to moot out cases before they ever get to federal court, which cannot be done here because they can't give us the relief even if we completely prevailed, and are to narrow the issues before they get to the court. Some sort of Younger Abstention, as you put it.

Now, you asked Mr. Lamken what kind of deference is due

here, and the word you didn't hear out of his mouth is Chevron deference. And that's typically, of course, the deference you give to administrative agencies. And the reason you didn't hear him argue that there's any Chevron deference here is because with all respect to the securities experts at the SEC, they obviously don't have any expertise about the appointments clause or the separation of powers principles that are the only claims in this case.

It is, of course, black letter law that courts defer to agencies only with respect to the statutes they administer, and they don't administer the Constitution, and they are indeed disabled from speaking to the constitutionality of the statutes which created them in the first place. So there will be no Chevron deference, there will be no narrowing of the issues if you make us go through this statutory review process.

So Mr. Lamken hypothesizes, well, maybe if we all sit around for a couple of years and wait for the board to complete its investigation, which, of course, they'll have every incentive to delay on, and we go through the PCAOB review process and we go through the SEC review process, maybe when they're deciding the issue, assuming they do impose sanctions, which we don't assume, on Beckstead & Watts, maybe in deciding something other than the issue in front of them, which is whether or not Beckstead & Watts complied with auditing standards, maybe they'll do an extended exegesis on the

appointments clause and use that to determine whether or not the statute complies with those separation of powers principles.

But again, that can't happen. It can't happen for a number of reasons. One is, again, they are not able to opine on the appointments clause or the separation of powers, and therefore they can't use that to narrow the statute pursuant to those grounds. The second reason -- and even if they did, again, it would not be in any way deferring to whatever they said about that.

But the more important point, I think, is while both the government and the defendants have opined at length in extraordinary generalities about how much we can learn from the SEC if we go through this tortuous process, they have yet to give us an example. I defy them to give a limiting construction of the statute which would any way moot out or negate our separation of powers challenges. The one example they gave in the brief was, well, maybe the SEC doesn't have to defer to the board's construction of the regulations if they comply with the act but not the public interest; in other words, you have to comply with both the act and the public interest before the SEC will defer to the board's interpretation. That's fine with us. If that's what the SEC says, that will not affect one iota of what we are doing.

Today Mr. Lamken gave the example of how the SEC has the power to promulgate a rule which deprives the board of all

authority. Passing the point that that would be a complete violation of the statute, under his own analysis, the only way they can do that is by promulgating a rule voluntarily. They cannot do that through the adjudicatory process where they're reviewing the sanctions against Beckstead & Watts. So under their own analysis, the vehicle for turning the board into some kind of nulle, some kind of advisory body, is not available to them in the statutory review mechanisms they are urging upon this court. So they have not given any flesh to this extraordinarily amorphous notion of what the SEC could do to crystallize the issues that are currently injuring the plaintiffs and which are currently in front of this court.

And there is a basic precedent which clearly shows -- their leading case is *Thunder Basin*, and they claim that that somehow supports their notion of implicit preclusion. But in *Thunder Basin* itself, it says the challenges that are collateral to the issues that are determined within the statutory review mechanism are not subject to implicit preclusion. That's not these DC Circuit cases that Mr. Lamken sought to distinguish, that's their leading case which says that.

So the only question this Court needs to resolve is, is the separation of powers challenge collateral to determining the fact-bound auditing issue that might be presented if and when the board ever goes after my client for violation of those auditing standards. And we know that those are two ships

passing in the night, for the reason I've already explained, and we know under binding DC Circuit precedent that it is inherently collateral. In the *Andrade* case they said that a separation of powers appointments clause challenge can go immediately to District Court, because agencies are neither equipped nor able to resolve those important questions of governmental functions.

I would also refer the Court to *National Mining Association*, where they found that *Thunder Basin* didn't preclude. In *National Mining Association*, the statutory review mechanism was an order telling these mine companies how much they needed to pay these mine workers. The government quite reasonably said, you need to go through that, you can't run straight into District Court. And the DC Circuit said no. They're not challenging the actual order, they're challenging the formula that leads to the order, and therefore it doesn't fall within *Thunder Basin*.

Well, if the formula leading to the order that would give you an appealable case is sufficiently collateral to allow you to bypass that to go to District Court, then obviously this one, which has absolutely no overlap with the agency mechanisms, is extraordinarily even more collateral.

In addition, we fall under the well documented doctrine which I've already established under *Andrade* and *Meredith* and the *McCarthy* cases cited in our brief that the agency can't solve our problems because they can't rule on the issues that we

are presenting to Your Honor. Neither the government nor the defendant disputes the fact that the SEC is powerless to resolve this case. So if they can't resolve the constitutional issues, then by definition it is not an alternative that could get us the relief we seek, and therefore it can't implicitly preclude the one avenue we do have to achieve that relief.

There are a number of other reasons that make this an extraordinarily simple case for why this is not precluded. One is, as the government acknowledges, they concede that the agency adjudication, as does the board, is not the sole vehicle for resolving this dispute. On the one hand they keep criticizing Beckstead & Watts for circumventing this agency process which is not available to them but may become available in the future; on the other hand they say, but, of course, Beckstead & Watts can circumvent that agency adjudication tomorrow, just need to rifle through the Federal Register, pick a rule and go to the Court of Appeals. And in the Court of Appeals we'll say, oh, well, we're perfectly happy with the rule. The rule doesn't bother us at all, but we just want to use this as a vehicle where there is no case or controversy to resolve the antecedent question of the existence of the agency.

They say that's not only perfectly appropriate, they say that's a perfectly reasonable way to go. Well, if it's perfectly reasonable to do that, then we've all agreed that this tortuous two-year process of waiting for the PCAOB to make up