UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Atif Bhatti, Tyler Whitney, and Michael Carmody, Plaintiffs, v. The Federal Housing Finance Agency; Melvin Watt, in his official capacity as Director of the Federal Housing Finance Agency; and The Department of the Treasury, Defendants.	)	File No. 17-CV-2185 (PJS/HB)
	)	Minneapolis, Minnesota
	)	December 21, 2017
	)	9:00 a.m.

BEFORE THE HONORABLE PATRICK J. SCHILTZ
UNITED STATES DISTRICT COURT JUDGE
(MOTION HEARING)

APPEARANCES

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P R O C E E D I N G S

IN OPEN COURT

THE LAW CLERK: All rise. United States District Court for the District of Minnesota is now in session, the Honorable Patrick J. Schiltz presiding.

THE COURT: Good morning. Please be seated.

We are here this morning on the case of Atif Bhatti, et al v. The Federal Housing Finance Agency, et al. The case is Civil No. 17-2185.

If I could have all the attorneys make their appearances, please, beginning over here (indicating).

MR. KNUDSON: For the plaintiffs, Your Honor, Scott Knudson and Michael Sawers from Briggs & Morgan.

THE COURT: Good morning.

MR. KATERBERG: Good morning, Your Honor. For the FHFA defendants Robert Katerberg, Arnold & Porter Kaye Scholer. With me at counsel table is John Rackson from the same firm, and Mark Jacobson from Lindquist & Vennum.

THE COURT: Good morning.

MR. BAUNE: Good morning, Your Honor. Craig Baune, Assistant U.S. Attorney. I'm joined at counsel table by Robert Charles Merritt of the Federal Programs Branch of the Department of Justice. Mr. Merritt will be presenting argument on behalf of the Department of the Treasury.

THE COURT: All right. Good morning to all of

you.

You know, I don't even know how to get a foothold on this. I feel like I have about five lawsuits here, and a lot of the claims are kind of -- and the arguments are kind of tangled with each other. So I guess I'd like to try to just march through this one count at a time and hear from all the parties on one count and then hear from all the parties on the other count just to try to break it up a little bit.

I think it would probably go more smoothly if I talked to plaintiffs first. So, Mr. Knudson, could I have you at the podium to talk about Counts One and Two, the removal of authority and separation of powers argument.

MR. KNUDSON: Very good, Your Honor.

THE COURT: Just let me know when you're ready to go there.

MR. KNUDSON: We believe that the separation of powers argument is a structural problem. With respect to how the agency is formed, it's set up with a single director with for-cause removal protection.

THE COURT: Let's talk about the standing issue first, if we could. I just want to tell you what bothers me about the -- my concern about the standing argument from 30,000 feet and then let you take it where you are.

So my understanding of -- the heart of your

argument here is that the structure of the FHFA violates separation of powers because a single director is more insulated from presidential influence, less accountable to the President than a multi-director board would be. And yet what you're complaining about here is that this board essentially entered into a contract with the President, with Treasury, which is an executive agency.

There's just something -- I'm having a hard time grasping the logic here -- again, this is at the 30,000-foot level -- that if this board was properly constituted, the President would have had more influence over it and, therefore, they wouldn't have entered a contract with the President. I mean, it's like if -- the subject of the controversy here is a contract between A and B, and the thing your clients are mad about is they think the contract was too favorable to A, Treasury, and not favorable enough to B, the GSEs, and I don't follow the logic that if A had more influence over B, then the contract would have been more favorable to B and less favorable to A. I'm really having trouble connecting your theory with your harm.

MR. KNUDSON: Well, I'd like to address the standing question sort of in a general sense here because what you're zeroing in on is would it have been different if the President had the power to fire DeMarco when the Net Worth Sweep Rule was adopted.

I think the fact Treasury's approval of a Net Worth Sweep doesn't deprive us, the plaintiffs, of standing, this still is a structural problem, a violation of the separation of powers. My clients have been injured by that and, therefore, they have an injury that's traceable to government conduct, and it's redressable by this Court through its equitable powers. So I think, at a general level, we have standing to pursue this claim.

I think it's also clear from the Supreme Court precedent, *Lujan* and *Free Enterprise*, that we don't have to speculate about what might've been done had DeMarco, the acting Director, been subject to presidential removal power at the President's discretion.

THE COURT: Well, what about if you're not -- it's one thing to be speculating about if Mr. Humphrey would have still been on the FTC, would the FTC have taken different actions with his vote versus somebody other's vote or if this senator had been in the Senate, would the Senate would have done something different than it did without the senator. Here it's just irrational to think that if the President had more influence over DeMarco, DeMarco would not have entered into a contract that was, in your client's view, unduly favorable to the President. It completely just doesn't make sense. It's not us sitting here and speculating what would one vote on a commission -- one vote

different have made. There's just no logic to it.

MR. KNUDSON: Well, the fact is we're sitting in a situation today where the Net Worth Sweep Rule is still in place, has been confirmed by the Senate, and he is authorizing payments of dividends to the Treasury. So we have an ongoing harm that is irrespective of whether or not DeMarco could've been fired by the President. Apparent circumstances create an ongoing injury to my clients.

In 2012 when DeMarco --

THE COURT: But it's the same logical problem. So the constitutional violation here is that the President doesn't have enough influence over Watt, Watt is not sufficiently accountable to the President, and therefore the argument is that if the President had more influence over Watt, Watt would act less favorably toward the President by making -- I mean, because what you're really complaining about are payments to the Treasury, is the Treasury enriching itself at the cost of the GSEs and their shareholders. But, again, I'm just having trouble -- there seems to be a mismatch between your constitutional theory, which is the President doesn't have enough influence over this agency, and your harm, which is the agency is ripping us off to benefit the President. There's just this mismatch.

MR. KNUDSON: Well, we have to take the facts as

they are, and that's basically what *Free Enterprise* says, so that we don't need to speculate about what might have been had it be constitutionally set up. It wasn't constitutionally set up. We have to deal with the circumstances that existed in 2012. Those circumstances violated the separation of powers because the President didn't have removal power. In 2012, what DeMarco did was consistent with what the administration wanted to do. It might not be the case today, but we'd have to remove the for-cause removal protection in order to give the President proper supervisory authority over the director of the agency.

So the circumstances in 2012 are the circumstances before the Court today. We have a structural problem with the separation of powers. DeMarco had for-cause removal protection according to the Obama administration, according to DeMarco, so he could act as he wanted to in adopting the Net Worth Sweep Rule. If we took away that removal power today, we would have Watt subject to presidential control. We would still have the Net Worth Sweep Rule in place, and we need to strike that down because it was adopted under an unconstitutional structure. That's what *Free Enterprise* is saying.

THE COURT: Well, let me ask you about that. So the logic of your theory isn't restrained, isn't restricted

to the Third Amendment. The logic of your theory is that every action taken by this agency since its founding has been invalid. Correct?

MR. KNUDSON: If you follow it through, yes.

THE COURT: I mean, basically, what has happened here is we had a bunch of lawsuits where they tried to excise the growth from the organism (the Third Amendment) and they failed, and now this new wave of lawsuits you're trying to kill the organism. You're trying to kill the host. But killing the host means not just that the Third Amendment dies, it means everything the agency has done dies.

I'm trying to figure out what this would look like. So your complaint -- the relief you ask for is that I declare not only that the agency is invalid -- or that the removal power is invalid, but that the Third Amendment is invalid. So what does that look like then? Do we go back to the Second Amendment -- the world under the Second Amendment? That's invalid, too. Do we go back to the First Amendment? I don't even know what it is. That's invalid, too. Do we go back to the P -- what do you call them, PSPAs? Those are invalid. Literally what do -- so I say you win, Mr. Knudson has convinced me this was an unconstitutionally constituted agency. Now let's all go and do what?

MR. KNUDSON: Well, I think we look to what happened with *Noel Canning*, which was a determination by the Supreme Court that the NLRB was improperly constituted, the recess appointments were invalid. So any decision made by the NLRB by that majority of the board would be unconstitutional. So they had to go back and re-set. So there are ways --

THE COURT: I apologize because, as I'm sure you realize, there was not only lots of briefs to read, but it seemed like dozens and dozens of cases cited, and a lot of them are D.C. circuit opinions, which means they are very, very long, but I didn't read -- but my recollection of that case is that it was an appeal from an action and they basically said that the action was invalid. I don't recall them saying that everything the NLRB did during that time was invalid. Now, correct me if I'm wrong. I didn't have a chance to read that.

MR. KNUDSON: It was an enforcement proceeding, so the specific action was overturned. But also the foundation upon which the board was acting was upset, therefore, what the board did then once they got properly appointed and therefore was constitutionally formed, went back and reaffirmed what had been done before taking --

THE COURT: Did the board go back and revisit every single decision they'd made at the time when the

unlawfully-appointed member was participating?

MR. KNUDSON: If I recall correctly, they had basically blanket ratification of administrative-type decisions, basically what contracts went into it for supplies and things of that nature, and then re-examined adjudications on a case-by-case basis. So they went back, re-set the clock, and started over. It was not a catastrophic decision to tell the board go back, get yourself fixed, and then go back and re-examine these adjudications on a case-by-case basis.

Here we're challenging the Net Worth Sweep Rule, particular action by the agency. If there are other actions that could be challenged because the agency was unconstitutionally formed at the beginning, in 2008, there are other people who might have standing to bring claims on that basis. They face a statute of limitations problem, but if they can get over the limitations period and they have a problem, then they can bring an action. But it's not going to be very many. And if the agency is properly constituted, in other words, we have a director that can be removed at the pleasure of the President, then they can go back -- the director can go back and re-affirm what has been decided before under a constitutionally-correct structure.

THE COURT: Well, there's a couple of things that occur to me. One is, is that it's kind of impossible to go

back and re-make these decisions under the conditions they were made. For example, let's say that a director was ordered to rethink the PSPAs. Well, the PSPAs were reached at a time when, in the view of at least some, the GSEs were on the verge of insolvency. This would be like somebody negotiating for the spare parachute on a plane that was about to crash or the spare lifeboat on the Titanic. You can't go back and recreate the conditions and renegotiate and rethink whether it was a good idea. The conditions don't exist anymore. It's literally impossible for someone to sit there now and say, well, geez, is entering the PSPAs under the conditions that existed in whenever they were entered, 2008 or 2009 -- it's almost impossible to recreate the decisions. It's almost impossible for the director now, who is accountable to the President, to go back and say, geez, in 2008 would it have made sense for me as conservator to have entered this deal. It's very hard to do.

And I still don't quite know what you want -- so you're saying, well, logically our argument means everything this agency has done is unconstitutional and invalid, but we're, like, complaining about the Third Amendment. Okay. So I strike down the Third Amendment. So then what do we do then? If the new director says -- not the new director but the director whose for-cause restriction is struck down, can he just say I hereby ratify retroactively the Third

Amendment and we're all just where we started?

MR. KNUDSON: Well, let me first say that the exigent circumstances of 2008 don't justify an unconstitutional agency.

THE COURT: Yeah. You still have to act constitutionally; I know. All I'm saying is you kind of blithely say in your briefs, well, they just can go back and decide again whether to do this and do that. Well, they can't really decide it again under the conditions that existed at the time. It's really a different decision now.

MR. KNUDSON: They would have to make a decision based on current circumstances; I agree, Your Honor. Now, whether Director Watt could re-adopt the Net Worth Sweep Rule would be an issue subject to discussion between the agency and the Treasury Department and would involve the executive branch determining whether or not that particular rule made sense in today's circumstances.

So the President then would have the authority under Article II to be sure that the laws were faithfully enforced, the due care provision. The Treasury could then examine under the current circumstances whether or not it makes sense to run the capital of the entities -- Fannie Mae and Freddie Mac -- down to zero leaving them subject to market forces or would it make more sense to allow them to rebuild their capital structure so they can participate in

the market the way they were intended to participate, build up their capital, which would mean it would make no sense to re-adopt a Net Worth Sweep Rule. It would be a question decided by the Director subject to discussions with the Treasury to determine what made sense or the agency to act as conservator. It may, in fact, decide that it doesn't need to be conservator after a certain point in time. The current circumstances would run the capital of these two entities down essentially to zero by the end of this year.

THE COURT: All of this, of course, they can do -- everything you described to me they can do now, albeit with the for-cause removal, but any of that stuff he can do now, right?

MR. KNUDSON: Well, as currently constituted with Director Watt having for-cause removal protection, yes. The broad powers under the *Perry Capital* decision gives the agency unfettered control over Fannie Mae and Freddie Mac as conservator.

THE COURT: So by striking down the for-cause removal provision -- so right now we have a director who can do all the things you just described and he can think about whether this makes sense for the GSEs and can -- all that stuff he can do. He can negotiate changes to the deal with Treasury if he wants; nothing that keeps him from doing it now. So your lawsuit, if you win, that same director can

still think through the same things about this deal that you say is too favorable to Treasury with more power -- with the President having more power over him rather than less.

Why would there be any reason that a director who now is more influenced by the President would renegotiate deals to make them less favorable to the President who now has more influence over him?

MR. KNUDSON: Well, we're getting into sort of what --

THE COURT: I'm getting back to the standing issue, I know. It's just a struggle I'm having.

MR. KNUDSON: It's a hypothetical question in terms of what would Director Watt do today if he is subject to removal by the President for any reason whatsoever. He would have to negotiate with Treasury as to what to do with the profits Fannie Mae and Freddie Mac are making, where should those profits go, what makes most sense in terms of -- what role will these two entities play in the housing market. And those are executive-level decisions that under the Article II take care clause the President should have the power to influence. That's how the framers set up the separation of powers. That's why a single director with for-cause removal protection is particularly problematic and in especially this particular agency, which is outside of executive, legislative, for all practical purposes judicial

control.

THE COURT: Before we get to the merits of that, let me just ask one more thing about standing. I'm still not entirely clear. You want me to declare the -- so if you get what you want, I would declare that the agency is unconstitutionally structured. I would strike the for-cause removal provision. I would also declare just one of the agency's actions over the last ten years invalid, that being the Third Amendment. And then what happens? So the next day is the world at the time the Third Amendment was adopted, is that what's restored? So now the GSEs owe the ten percent dividend again, the ten percent quarterly dividend? Is that what the world would look like at that point?

MR. KNUDSON: Well, what we're looking for in terms of relief would be to pay down the liquidation preference the Treasury currently has in terms of the remedy as a result of striking down the Net Worth Sweep Rule. We aren't challenging the other provisions that have been imposed on the entities during conservatorship. We're just challenging the Net Worth Sweep Rule.

THE COURT: So does that mean yes? So the day after my order comes out, we would be basically going back to an hour before the Third Amendment was agreed to, and you would be back with the ten percent -- I'm going to be really

bad at the vocabulary here, but the ten percent dividend on the liquidation preference? That's the world you would be back into, where the GSEs had to borrow from Treasury every quarter just to pay the dividend to Treasury? That's the world we'd be back into then?

MR. KNUDSON: Well, that would be the provision that would be in place. The world has changed since then in terms of the economics of the --

THE COURT: I don't mean world, but that's what the --

So your clients would benefit from that. As shareholders of the GSEs, your clients would benefit from going back to a world where the GSEs had to borrow every quarter just to pay the dividend to Treasury? That would be better for them than the world under the Third Amendment?

MR. KNUDSON: Well, under current conditions I think they wouldn't be borrowing. But, again, I'm speculating on that particular point. But they would be better off.

THE COURT: But the answer is we would go back to the arrangement as it existed a minute before the Third Amendment was -- even though that arrangement was unconstitutional, too?

MR. KNUDSON: That is correct.

THE COURT: Okay. So we would exchange one

unconstitutional regime for another unconstitutional regime.

MR. KNUDSON: Well, we would have a director then subject to presidential removal at the President's discretion, and we could then --

THE COURT: I have no problem with the idea going forward. I don't have a problem if I agree with you on the merits striking the for-cause removal provision and, therefore, this director going forward would make constitutional decisions.

What I'm having trouble with is the wind back. And it's really hard -- I was not able to look at a lot of the decisions that both parties cite -- the three parties cite, but it's just hard to find an example in history. *Buckley v. Valeo* is the closest that I could see to my situation where the Supreme Court at the end of its, whatever, 400-page opinion has one paragraph basically saying and as to all the things that these commissioners have done, we're just going to let them stand without a whole lot of explanation. Then we follow that with *Ryder*, which says, well, we're not going to extend that beyond its facts, which I don't know what that means either. It's not a real satisfactory group of law. It's hard to find examples where a judge essentially says that everything an agency has done for X number of years is unconstitutional. I just can't find those cases.

MR. KNUDSON: Well, we are in a relatively unchartered area of the law, Your Honor. I agree with that. But I would point the Court then to -- the *Nguyen* and *Ryder* cases do cite a *de facto* officer doctrine, which was applied in *Buckley*, but really doesn't apply to constitutional violations. So they boxed in *Buckley* to its facts because of its unusual nature of its case.

Then if you look at *Noel Canning*, when they took a hard look at the recess appointments of the board, then basically they said that was not constitutional and the board had to go back and re-examine what it had done when it was unconstitutionally formed.

The same would pertain here, Your Honor, that if we have to revisit everything the agency has done, so be it. But it's not going to be a catastrophic event. I think what the NLRB did was relatively straightforward. We don't see an agency here that's in a busy adjudicative mode, so there aren't a lot of decisions -- enforcement actions that are going to have to be revisited.

THE COURT: But it's different, you know, to revisit an adjudication than it is to essentially declare everything an agency has done for 10 years to be unconstitutional. I mean, even the Third Amendment -- there's been five years since the Third Amendment has gone. Billions of dollars have changed hands in reliance on the

Third Amendment. People have made decisions. Your clients have made decisions. The GSEs have made -- well, the FHFA as conservator has made decisions. The people who contract with them have made decisions. Congress has made decisions. Treasury has made decisions. There's been five years of people engaging in billions of dollars of economic activity based upon the Third Amendment. This isn't like a videotape that you can just rewind and bring everybody back to five years ago. And I just can't find -- it might exist. As I said, I've worked on this for a couple of days, but there's a lot left to go. I just can't find an example -- I've seen where the Supreme Court has made kind of do-overs on adjudications or on discrete decisions. But that kind of a turning back of the clock, it would be almost unprecedented as far as I can tell.

MR. KNUDSON: Well, the circumstances surrounding the formation of the agency are unique. There is really only one paradigm, that's CFPB, and that was done after the formation of FHFA. So we are here in a situation where there isn't much precedent to look at.

I urge the Court to look at *Noel Canning*. That is really the reset mode that would have to be undertaken. I would suggest it's not as catastrophic as perhaps you're concerned with.

The fact is if they unconstitutionally imposed the

Net Worth Sweep Rule and the funds transferred under that rule, it should be undone. We're asking for a relatively straightforward accounting fix to that problem.

THE COURT: Well, the accounting would be, among other things, the transfers under the Third Amendment would be reversed. But then we would have to figure out what the GSEs would have owed under the Second Amendment regime, right?

MR. KNUDSON: It would follow, yes, if that's still in force.

THE COURT: I mean, that's what you said we would do. We would go back to the legal arrangement a minute before the Third Amendment was signed, and that required these payments and borrowing. So, you know, one factor in the equation would be to reverse the Third Amendment payments, but there have been times -- I think I remember reading in one of the cases that there was at least once when Freddie Mac didn't owe anything because it didn't have any positive net worth for a quarter. Is that right?

MR. KNUDSON: That seems to be correct, Your Honor. But the point would be if we go back to ex ante, before the imposition of the Net Worth Sweep Rule, we would have to look at what happened in terms of actual economic performance and what the ten percent dividend requirement would have meant. And I don't know what the numbers would

be. That was simply something that the agency could work through.

THE COURT: Is it possible that at the end of the day the result of unwinding the Third Amendment and bringing us back to what I call the Second Amendment world would be that -- that sounds like it has to do with guns -- right before the Third Amendment the possibility would be that the GSEs would owe Treasury money and so I would at the end of the day have to be ordering the GSEs to pay money to Treasury?

MR. KNUDSON: You wouldn't be ordering the GSEs to do that. We would be looking at what would be the contractual provisions as between the entities and Treasury with respect to the circumstances under the Second Amendment. But I don't think we'd be here today if we expected that it would be a negative result.

We believe that the harm caused by the Net Worth Sweep Rule is so large that the capital structure of the entities would be dramatically different today.

THE COURT: Has anybody just ballparked this, that if they had never signed the Third Amendment, if they had just gone with the regime that existed before the Third Amendment, what the dollars would look like today?

MR. KNUDSON: I have not seen that calculation, Your Honor.

THE COURT: Okay.

MR. SAWERS: Pardon me, Your Honor.

THE COURT: Feel free to interrupt.

MR. KNUDSON: Well, I think the suggestion here is we unwind the Third Amendment. Our preference is to reduce the liquidation preference. Another alternative is to pay back the dividends paid to Treasury. That's $130 billion without interest calculated to it. So that's a big number.

THE COURT: Yeah. Okay.

Let's turn to the merits of your separation-of-powers argument. I want to put off discussing whether the FHFA was exercising governmental power or non-governmental power. We'll just put that discussion off for now. Let's just assume they were exercising governmental power and the separation of powers applies to them.

You're really riding *PHH*. *PHH* is kind of what you're advocating here today. I did read all, however many pages, of *PHH* last night. I wasn't persuaded by it, and I'll tell you why. Despite my respect for Judge Kavanaugh and the obviously very scholarly opinion that he wrote, at the end of the day, I just wasn't persuaded. Let me tell you why and then tell me why I should've been persuaded.

It seemed to me what Judge Kavanaugh did is first he said the purpose of separation of powers is to protect

individual liberty. Then he kind of describes how, well, good decisions protect individual liberty better than bad decisions, and a multi-member board makes better decisions because they're accountable to each other, and they're a check on each other, and they don't make extreme decisions, and they get each other's input. It seemed to me as I was reading that that none of that has anything to do with separation of powers.

To me -- and my understanding might be wrong -- the accountability that matters for separation of powers is accountability to the President of the United States, not to other people who are not the President of the United States. In other words, separation of powers doesn't protect individual liberty in the abstract. It protects it in a particular way, by making executive officers accountable to the President and the President accountable to the voters.

So to write this decision about how, well, when you have multi members of a commission, they can talk to each other and persuade each other, none of that has anything to do with being accountable to the President. If you read *Free Enterprise Fund*, the theme in *Free Enterprise Fund* again and again and again is the degree of the President's control over the board, the actors, the degree of accountability to the President.

So it seems to me what our case turns on is

whether the President has more control over a multi-member board than he does over a single -- you know what I mean, multi-member head versus a single-member head, and that that should be our focus. It's in the *PHH* opinion, but there's a ton of other stuff in the *PHH* opinion that seems to me to have nothing really to do with separation of powers.

So if I'm right about that -- tell me if you don't think I am, but if I'm right about that, why is it that the President has less control over a single-member head than he does over a multi-member head?

MR. KNUDSON: Well, the point we're making with respect to the structural problem does go with agency, who's insulated from presidential power, and that's the Appointments Clause: President shall appoint principal officers. The removal right is kind of a corresponding part of the appointments power.

So the fact that *PHH* addressed it under the context of single member and then justified the decision in part because the multi-member decisionmaking process is a better decision-making process for reaching the correct result, therefore, it's probably a permissible structure in the separation-of-powers analysis, is reflecting the fact that we are looking at the *Humphrey Executor*'s decision where the court affirmed the multi-member FTC and the rationale, in part, being that they have this deliberative

process that's more effective in reaching the right result. You might remember on a multi-member commission you could have staggered terms. The President would have some influence who is on that commission during the administration. The President may pick the chairman of that commission. So there are circumstances set up that make the multi-member model more reflective of the President's executive choices.

THE COURT: When you're asking how much control a president has over an agency, are you asking like on average or are you asking at any particular time? I mean, for example, let's suppose that the current President, President Trump, was able to appoint the head of the FHFA on his first day in office. Well, then the President would have a lot more control over the FHFA than he would have if it had been a multi-member agency and he was able to appoint only one of seven members during his first term or two of seven members, a lot more control. He got to appoint the one and only person running the agency. But it's also possible that if a new head of the FHFA had been confirmed the month before President Trump took office, he would never get to appoint anybody who's running the FHFA, and he would have had zero control.

So under one scenario he has much more control than if it had been a multi-member board. Under another

scenario, he has much less control than if it's a multi-member board. If you look at it over history -- 20, 30, 40 years, if the agency lasts that long, maybe on average presidents, as a group, would have exercised as much control over the agency as they would have if it had been multi-member. It's just a different kind of control. You see what I'm getting at?

When you're measuring the amount of presidential control over an agency, what's the time frame we're looking at? A day? A year? Ten years?

MR. KNUDSON: I think with respect to the -- I think we're dealing with a context here where we're not asking this Court to overturn *Humphrey's Executor*.

THE COURT: That's good, because that might be a loser if you argued it.

MR. KNUDSON: I totally agree. That's the backdrop to the distinction between a single director versus a multi member.

THE COURT: It was the FTC in *Humphrey's Executor*. It was a multi-membered board. Other than describing in the fact section, the Supreme Court doesn't cite it -- in fact, as I was saying to my law clerk, there's just not a whole lot of reasoning in *Humphrey's Executor.* Right? It's sort of independent agencies are okay with us, next case. That's kind of the -- it's hard to glean a lot. A lot of this --

like Judge Kavanaugh's opinion, a lot of this is kind of reading things backwards onto *Humphrey's Executor* that *Humphrey's Executor* didn't actually say.

I think the critical question is whether the President exercises an unconstitutionally limited amount of control -- I'm putting this terribly, but whether a single member agency is insulated from presidential control more than a multi-member agency; and not only is there less influence, but that makes it constitutionally infirm.

You say in your brief that if you kind of take the *Humphrey's Executor* level of influence, control, it can't dip below that. Well, that's not a numerical value. Right? You kind of look at the FTC, which at that time was five members. There was certain restrictions about who the chair was going to be and the bipartisanship, and you kind of would have to come up with a presidential control score. And then you'd have to look at the FHFA and you would have to, like -- it's just very hard to do. These are not precise numerical values. They're controlled in different ways by the President. I just don't know what to do with that.

MR. KNUDSON: Well, I agree that the more modern cases on separation of powers have looked back and come up with just rationale for explaining *Humphrey's Executor* that wasn't in the opinion itself.

If we take *Humphrey's Executor* as the floor, then when you have a single director with for-cause removal protection, you drop below that floor. The president's appointment power, his removal power has been excised out of that structure. And that's the violation that by itself is unconstitutional.

THE COURT: But why? Why is it that here's the *Humphrey* floor and when you take and you switch the agency from multi member to single member you're below the floor? Why does the President have less control over a single-member agency than a multi-member agency?

MR. KNUDSON: Well, it comes back to trying to explain why *Humphrey's Executor* is still good law. In a multi-member set-up, you have checks and balances built into the decision-making process both among the members in terms of their deliberations.

THE COURT: Which I believe to be irrelevant for separation-of-powers concerns or considerations.

MR. KNUDSON: Well --

THE COURT: The accountability of members of a board to other people who aren't the President to me has nothing to do with separation of powers, which is your accountability to the President. You can be accountable all day long to each other, but that doesn't make you any more or less accountable to the President of the United States,

and that's what separation of powers is concerned about, the ability of the -- that's what *Free Enterprise Fund* was all about, is what is the control of the President, the accountability of the President, the President's responsibility for the agency. They can have the most wonderful pact in the world about how us seven commissioners are going to be really accountable to each other and hold each other accountable. That's great, but they are not the President. The President is the President.

MR. KNUDSON: If you set up a multi-member commission that was something that the President would have no influence over who was on that commission, then you would have a similar problem as you do today with the single-member head of this agency who has a five-year term, can't be removed during that term unless there's cause, so that person could serve completely outside one administration. So, therefore, I think this particular arrangement should be a straightforward separation-of-powers analysis. This has isolated the President from removing the director during the term of the director. That is a straightforward separation-of-powers problem.

Whether or not multi-member commissions are the problem or not isn't before this Court. What is before this Court is this agency and how it's set up. Because it's a single director with a five-year term, isolated from

presidential removal power, isolated from legislative appropriation process, isolated from judicial review, you've got a situation here where you create an agency that's outside the structure the framers set up in the Constitution.

THE COURT: Okay. Is there anything more you want to say on the separation-of-powers issue? I'll have you back on the Appointments Clause, and on res judicata, and the other things that we need to talk about.

MR. KNUDSON: Just to add that in terms of trying to justify this single head there really isn't any history or tradition that would support that as a constitutional practice. Thank you, Your Honor.

THE COURT: All right. Thank you, Mr. Knudson.

Let's see. Mr. Katerberg.

MR. KATERBERG: Thank you, Your Honor.

THE COURT: Let me ask you first off about the standing argument. Is your standing argument -- are you raising it only as a defense to the separation of powers or are you raising it as a defense to all the claims in the Complaint?

MR. KATERBERG: Well, I guess, Your Honor, there's different sort of forms of standing arguments. Our primary standing argument, which is really anchored in traceability, which is causation and redressability, is as to Count One

and, I guess, I sort of view Count Two as sort of an appendage --

THE COURT: I kind of consider the two together.

MR. KATERBERG: -- onto Count One.

Count Three, we don't make strictly a standing challenge to that count, but some of the considerations -- de facto officer doctrine, I mean, I think there's maybe some overlap with the standing doctrine. We don't make -- we're assuming arguendo here. There is an injury in fact, not conceding that, but we can start with traceability and redressability. But for the acting director claim, you know, he did sign the Third Amendment, acting Director DeMarco, on behalf of the conservator as acting director, so we don't have a lot to say about traceability there. It's just that it's really an unprecedented claim. There's a lot of other reasons, including the non-justiciability, the political questions that would be engendered why the Court shouldn't reach the merits.

THE COURT: Okay. So as to the standing on separation of powers, one of the things that I'm struggling with on this is it kind of seems like I have to reason backwards from the remedy and that's, I guess, what redressability makes you do. You look at, well, if the plaintiff wins, what happens? And if what happens doesn't affect the plaintiff, leaves the plaintiffs exactly where

they were or makes it worse for them, then there's no standing. Right?

MR. KATERBERG: That's exactly right, Your Honor. It's maybe a little counterintuitive, and I guess I would say if there's any discomfort with couching it as standing, you could just look at it as they are not entitled to relief if the relief that they are seeking wouldn't address what causes their injury. I mean, we framed it as standing, but they're here also asking for summary judgment today. They have a cross-motion for summary judgment. And so if you can't grant -- if their constitutional theory doesn't get them to the relief that they're seeking, then that's a reason not to grant the relief.

Just for an example -- this is fairly typical in Article III standing jurisprudence -- that, for example, *Franklin v. Massachusetts*, which is a 1992 Supreme Court plurality opinion, the Court looked at -- it was a challenge to certain actions in connection with a 1990 census, and Massachusetts challenged actions with the census because it reduced Massachusetts' congressional representation in Congress. One of the issues was would the court have the power to enjoin the President, enjoin the President to handle the results of the census differently, and redressability ultimately turned on that. Now, the court found that there was redressability, but only because the

Massachusetts injury could be addressed by enjoining lesser officials because everybody sort agreed that you couldn't enjoin the President.

There's other cases I could cite, but that sort of illustrates this principle that, you know, if a ruling on the constitutional issue wouldn't get them what they are looking for in terms of assuaging their injury, then really the game is not worth the candle, and the Court doesn't need to reach out to decide novel constitutional questions.

THE COURT: And so what in your view -- I wasn't asking Mr. Knudson questions about this rhetorically; I sincerely struggle with this. Suppose I agreed with him that the agency as it has been constituted from the beginning is unconstitutional because of the for-cause removal protection. So let's say that's my ruling on the merits. Okay? Now what? In your view, now what? Obviously, what they want is for the Third Amendment to go away and for us to go back to a different unconstitutional time, the unconstitutional time before the Third Amendment, as opposed to the unconstitutional time after the Third Amendment. What do I do?

MR. KATERBERG: So I think if I can just dispute the premise, because I think it's completely wrong, and I think we can be guided here by *Free Enterprise Fund*, which, of course, is the Supreme Court's most recent pronouncement

of this area -- this was a live issue in *Free Enterprise Fund*. If you look at the end of Chief Justice Roberts's opinion, the issue he addressed is the plaintiffs in that case, which was an accounting firm challenging the PCAOB, they wanted relief that would include total invalidation, declare everything --

THE COURT: I couldn't tell -- and I read it last night, but I didn't have time to go look at the briefs. There was this -- there is this line in there. He says you're referring to petitioner's complaint, arguing that the board's "freedom from presidential oversight and control" rendered it "and all power and authority excised it" in violation of the Constitution. We reject such a broad holding. Now, I couldn't tell, that could mean that what they were arguing is that basically the board has to shut down and it can't do anything going forward or it could mean everything the board has ever done should be invalidated. I mean, it's a little ambiguous what Chief Justice Roberts is characterizing an argument, and it wasn't clear to me what exactly the party was arguing.

MR. KATERBERG: I understand, and we may be able to shed some light on that. We have copies of the *Free Enterprise* complaint, which we would be happy to hand up to Your Honor. What you will see is that they show that what was sought in that case was an injunction and voiding of

past actions --

THE COURT: Okay.

MR. KATERBERG: -- against this accounting firm, including the investigation. So that was a live issue. That was rejected in that case.

And I think even *PHH* -- I mean, I don't want to say too much about *PHH* because I don't think --

THE COURT: You're exactly right, and that occurred to me when I was reading *PHH*, is Judge Kavanaugh -- it would have been very easy for him to say since the decision was made by an unconstitutionally-constructed agency, it doesn't stand period. But instead he spent pages and pages going through the merits and then remanded it for more action consistent with the opinion. So even Judge Kavanaugh didn't seem to think that everything that had happened to date was wiped out. That would have been -- he could've cut 50 pages off his opinion if he had done that.

MR. KATERBERG: That's exactly right, Your Honor. In fact, I think he said that explicitly. At the end of the opinion, he said basically what happens, the unconstitutional violation, if there is one, is that the President's power of removal is limited. So the remedy for that is that you excise that. So going forward if the President wants to renew the director of the CFPB or the director of the FHFA if, in fact, for-cause removal is

unconstitutional, the President is not going to be limited by that anymore. And that is the remedy in this situation.

I think *Free Enterprise* stands for that proposition. I think the *PHH* panel opinion, as much as I disagree with it in many other ways, I think that also supports that proposition. And also more recently in the *John Doe Company v. CFPD* case from earlier this year, this is 839 F.3d at 1133, the D.C. Circuit said vacature of past actions is not routine. And the position of that company in that case, which was essentially somebody trying to come in and piggy backing on the *PHH* panel opinion and get an action vacated, so that ignores traditional constraints on separation-of-powers remedies.

We don't generally burn down the house, just kind of lay waste to everything that has happened if there is a removal restrictions issue. The way that these removal restrictions cases developed in the first instance, most of the early cases were actually about suits for back pay. So *Myers v. United States Postmaster General*, the issue was whether -- it's like a Title VII case -- could the President remove him, because if he couldn't, he should get pay for that time. *Humphrey's Executor* --

THE COURT: Historically did it ever come up -- like in *Humphrey's Executor*, obviously, he's suing for the back pay of Humphrey, the deceased Humphrey. But the

implication of the opinion is that President Roosevelt acted wrongly in removing Humphrey, that Humphrey should have been a member of the FTC, that he should have been exercising the authority and his vote on the FTC. There is, obviously, no hint in the opinion itself that the FTC needed to go back and re-do anything because one of its members had been unconstitutionally removed.

Do you know just historically whether anybody looked back at all at that point or did it never even occur to anybody that any of the actions taken in Humphrey's absence were invalid?

MR. KATERBERG: I couldn't say that I have scoured for exhaustive research, but I have seen nothing -- and I have studied this area quite extensively -- I have seen nothing to indicate that past actions by the FTC were called into question in connection with the issue in that case.

There is another one in the 1950s, *Wiener v. United States*, which is the War Claims Commission, a Supreme Court case, and there again it was back pay.

I think where this notion of going back and invalidating really first came up -- the first removal restrictions case I'm aware of where it really came up is *Morrison v. Olson*. Okay. But that is a very different situation than what we have here because Ted Olson was essentially held in contempt by the independent prosecutor.

And I don't think it's that far of a reach to say that if you are held in contempt for not complying with the subpoena and you challenge the validity of the subpoena and you're right that the independent counsel is unconstitutional, you can probably, you know, get your contempt lifted and get the subpoena voided.

I think it's a very different situation than what we have here, which is a transaction between the conservator and another party that is alleged to have an incidental effect on somebody and they sue five years later.

THE COURT: But what makes this so hard, as I read the cases on remedies, is there's nothing quite like this. We have some cases on remedies that arise out of adjudications, like what is the -- the case that limited *Buckley* to its facts?

MR. KATERBERG: I think Your Honor is thinking of *Ryder*.

THE COURT: I was going to say Ryan and I knew that wasn't right. *Ryder*. That's like an adjudication. You know, when you're before somebody who you don't think has the authority to adjudicate your claim, you appeal your claim up and if you win, you win. The action against you doesn't stand. But this isn't an adjudication that we have before me today.

It's also not like pure rulemaking where you

strike down a rule. Essentially I'm being asked to strike down a contract, but the route through that is first to declare that the agency doesn't have -- everything it has done is illegitimate because of its structure, and then I'm being asked to strike down a contract by people who weren't parties to the contract but who say they're affected by the contract. There's really just nothing like that that I can find or that I saw discussed in the cases. It's a real unusual situation.

MR. KATERBERG: It's very different than any of the cases, Your Honor. And there is a presumption of regularity that attaches to government action. That's kind of one of the policies animating the de facto officer doctrine, is that when actions get taken if they're not sort of challenged in real-time and folks depend on those actions and rely on them, we don't generally go back and upend the past actions.

I want to say a couple of things about the adjudications case, because I think it's very important. First, as Your Honor mentioned, *Ryder* limited *Buckley*, but I would also emphasize *Ryder* limited itself and the other Supreme Court cases in that same line.

So there's a case call *Nguyen*. They talk about this policy being really specific to cases involving judges. So if you are criminally convicted and you're up on appeal

and then it turns out one of the judges on your panel is actually an Article IV judge of a territorial court that can't constitutionally sit, that's a problem. I think what the court is saying in those cases is, basically, we're not going to do harmless error analysis. Right? So if your trial judge or your appellate panel was not properly constituted because there was somebody that didn't enjoy the life tenure that Article III judges get, that is sort of per se invalidation. But the Court is very careful to limit it to that context. Okay, that's point number one.

Point number two is I believe you won't find any case that does that in the context of a removal restriction. So those cases all involve -- the nature of the challenge was an Appointments Clause challenge or a challenge under the statutes that govern the terms under which people have to be appointed.

Let's talk about *Noel Canning*. Counsel referred extensively to *Noel Canning*. *Noel Canning* involved a problem with recess appointments that deprived the NLRB of the quorum that it needed to act. So if the body that's taking action against you -- specifically against you, not the incidental effect of a contract, specific adjudicative exercise of sovereign authority against you, but it didn't have the power to act because it didn't have a quorum, it's logical in that instance that that would be voidable. I

don't think that at all supports extending that principle to --

THE COURT: Did the board do what Mr. Knudson said, which was it didn't just reconsider the case in *Noel Canning*, but it went back and had to re-adjudicate all the cases it had at the time it didn't have a quorum?

MR. KATERBERG: I am a little unclear on that. There may have been some kind of ratification that was done after the fact. Those kinds of things are sometimes done as cures for this.

But there's another standing point that I want to talk about just briefly because I don't think it has been touched on, which is the action here was taken by an acting director who didn't actually enjoy the for-cause removal --

THE COURT: I want to get back to that in just a second. Don't let me forget about that. But before we leave the broader topic, of all the cases out there, which do you think -- on this remedies issue what do you do if -- again, supposing I agree with the plaintiffs here that the for-cause removal restriction is unconstitutional, the question then being what do I do? What, of all the cases, do you think is the closest ones to -- recognizing there is nothing exactly like this, what's the closest one, do you think, to these facts?

MR. KATERBERG: I would throw in my lot with *Free*

Enterprise Fund and say as far as the remedy there, I think what that would look like is Your Honor would issue a declaratory judgment that the for-cause limitation won't be operative and, you know, that could go up on appeal. Obviously, we would resist that very strongly in terms of the remedial import. That's what it would be. And that would not help them at all.

As Your Honor noted, this is a two-way contract, so the President through his plenary control over the Secretary of the Treasury -- everybody agrees the Secretary of the Treasury is removable, at will, serves at the pleasure of the President. So if the President had wanted to resist this transaction at any time, he had a plenary veto power all along, never interrupted. All he had to do was tell the Secretary of Treasury, hey, let's not do this.

So the notion that by being sort of made to be more subservient to the President because that's deemed constitutionally required -- the notion that the FHFA director being more subservient to the President would result in a more independent look at the transaction just makes no sense. I think it's completely and utterly logically backwards.

If their claim were different, if their claim were that the FHFA was not independent enough from the President, the opposite of the claim they're making today -- and I

don't want to suggest that that claim would have any legal or factual basis because then we'll see that in the next wave of complaints, but that at least would make some logical sense. Right? But the claim that they had today --

THE COURT: As I said, from 30,000 feet it's a very odd lawsuit. I mean, the constitutional violation here is the President didn't have enough influence over the agency. And the complaint is if he'd had more influence, the agency would have not done this thing that so favored the President. It just doesn't make logical sense.

MR. KATERBERG: You don't need to look further than their own Complaint because in paragraph 60 they talk about how Treasury trumpeted this transaction and Treasury supported it. Paragraph 65 they said it's a massive financial windfall.

THE COURT: Right. Treasury is the President.

On the issue of whether the acting director was removable for cause, I was more inclined toward the plaintiffs on that issue than toward you. I mean, the implication of your argument is that an independent agency goes from being an independent agency to not independent agency to an independent agency to not an independent agency depending on whether there is an acting director. That seems really hard for me to believe that that's what Congress intended. Given the way the statute is written,

given that the acting director has all the same authority, responsibilities, powers, it would be an odd circumstance that an agency when it has a confirmed director is an independent agency, but when it has an acting director, it's not an independent agency. That's whether an agency is dependent turns on, is basically the President's authority over its head. It's hard for me to believe that that's what Congress intended.

MR. KATERBERG: So let me try to clarify that because I don't want Your Honor to have the impression that we're saying that it wasn't independent at the time of DeMarco being acting director. It's an independent agency all along. But being independent in a vacuum, sort of that label, is not something that constitutional significance attaches to. An independence is simply being described that way. That description, there's no basis for saying that violates Article II.

Where an Article II issue potentially comes up is a specific manifestation of independence, which is the President having only limited power to control the agency or to supervise the agency and, more specifically, the power to remove. There we have a statute, and it's about as clear an illustration of the *Russello* presumption, that you attribute significance to the fact that Congress puts certain words in one part of the statute but not in another. And for the

permanent director after Senate confirmation they serve for a five-year term, unless removed before the end of such term for cause by the President.

THE COURT: But 4512 says the acting director serves until the return of the director or the appointment of a successor. So that sounds like -- I mean, on its face that's even more protection than the -- literally speaking here, the President couldn't remove this person at all.

MR. KATERBERG: Well, so I want to be careful about this because with removal -- so I want to explain sort of the mechanics of how the acting directorship works.

So what you have with an acting directorship, and this is laid out in a number of OLC opinions, is essentially you are deputizing a subordinate employee to temporarily perform the functions of the higher office. Okay?

So when we talk about removing DeMarco, could DeMarco have been removed, we're not talking about removing him from his permanent civil service spot. That's not the issue. The issue is could he be required to cease acting as the director. I guess maybe "removal" is not quite the right term for it. I mean, one way to put it -- I think the way Treasury puts it in their brief is accurate. It's an issue of the President revoking his designation.

So the President designates a deputy director to serve as acting director, but there's nothing limiting the

President's power to revoke that designation. The President could revoke it at any time, designate somebody else to act as director. And so there's several ways in which an acting director could cease to act in that capacity: switch to a new acting director or somebody gets appointed -- nominated by the President, confirmed by the Senate. But in all events, they don't enjoy the protection that a full director enjoys, which is --

THE COURT: Well, doesn't that de facto then mean that the agency isn't independent? The word "independent" in the phrase "independent agency" means independence from the President, and the independence from the President comes from the restriction on the ability of the President to remove the head of the agency. If the President doesn't have that authority or if the President isn't so restricted, the agency doesn't seem to be independent to me.

MR. KATERBERG: So there are other ways that the independence is manifested. This is the particular one that has constitutional significance. I don't know that they're really challenging the other ways that the agency's independence is operationalized. Unfortunately, I can't sort of catalog them very specifically, but there's issues about sort of how you report to Congress, you know, how you are sort of situated vis-a-vis the President and the White House staff and that sort of thing. Those kinds of things

would be constant throughout, whether it's a director or an acting director.

So, again, I want to be clear that we're not suggesting that it ceases to become independent, but as to this particular manifestation of independence, which happens to be the only one that's challenged and the only one that has constitutional significance, it's basically turned off during the term of -- or I shouldn't say "term" because it's not a term, but during the temporary service of an acting director.

THE COURT: Okay. Let's turn to the merits of the separation-of-powers claim. As you heard me say, I wasn't really persuaded by *PHH*, and you heard me explain why -- just by the approach of *PHH*, which there just was so much focus on the quality of decision-making and the accountability of non-presidents to other non-presidents.

I think of this inquiry to be -- to what we're looking at is the degree of presidential control over the agency or, put another way, the accountability of the agency to the President. That's the focus of *Free Enterprise Fund*. That's what I think the proper focus is. But I don't know how you measure this.

As you heard me say to Mr. Knudson, in some ways a particular president could have far more control over a single-headed agency, as my hypothetical about President

Trump appointing the head in his first year of office, than you would have if there is a multiple commission. Another hypothetical is you could have a president with literally zero control over the agency if the five-year term started and ended after the president's four-year term. I don't know what to do with that. I don't know how you measure a level of control in *Humphrey's Executor*, say that that's a floor, which is not necessarily true -- *Humphrey's* didn't say you couldn't go below this -- and then compare a whole different agency set-up degree of control. I don't know if you have any thoughts about how you go about doing that.

I mean, I think the most damaging thing to your case is you do have this set up in a way -- besides the historical -- you have the problem with the history, which is something that's pretty new, pretty unusual. We have the possibility of a president of the United States being elected, serving a full four-year term, and never having any influence whatsoever over the agency because he never gets a chance even to appoint a single member of a multi-member commission.

MR. KATERBERG: So several thoughts on that, Your Honor. First, as to sort of the mode of analysis, how Your Honor approaches kind of looking at whether there is an incremental loss of control and it's kind of the time frame focus for that. I mean, I know we've moved on to merits, so

I don't want to take us back and I won't belabor it, but I think a logical place to look at it would've been as of the time of the agency action that is being challenged where, as I just got through explaining, DeMarco didn't have the for-cause protection. So you could look at it that way, is at the time that he made that decision. And that would be logical because we generally want the constitutional issue to be anchored in the thing that's actually causing them their injury.

Another way to look at it would be sort of holistically, big picture, and that's Judge Mariani of the Middle District of Pennsylvania -- I commend Your Honor to the *Naviant* decision involving the FCPB earlier this year. He actually did -- or his law clerk did -- a mathematical analysis and looked at the comparison of the CFPB to the FTC and looked at sort of with the staggered terms and the number of commissioners how does it actually compare. And what he found, and the assumption was presidential four-year terms and the CFPB director having a five-year term, which happens to be the same as a permanent Senate-confirmed FHFA director, 80 percent of presidential terms will enable a president to appoint a director. Whereas, based on the way that the FTC, its number is set and the terms are staggered, only four-sevenths, which is 57 percent of presidential terms, will enable a president to appoint a controlling

majority of three or more commissioners.

So looking at it sort of from that holistic perspective of how it's going to play out over time, statistically a president is more likely to have control over a single-director agency.

I also want to talk about the history because I do think it's very important to bring the Comptroller of the Currency into this. You know, they claim that this is a very sort of recent phenomenon. Social Security Administration, not exactly sort of a little two-bit agency. It manages a trillion dollars a year in retirement benefits. The Office of Special Counsel --

THE COURT: Didn't *PHH* say the comptroller is not -- maybe I'm mixing it up with somebody else. I thought *PHH* said the comptroller did not enjoy for-cause removal protection.

MR. KATERBERG: You're right about that, Your Honor. There's an issue about that. It's a little bit more ambiguous because it doesn't contain a provision that's worded in the traditional way of saying cause or good cause. Or the other formulation you often see is inefficiency, neglect of duty or malfeasance.

What the comptroller statute says -- and this is 12 U.S.C. 2 -- is that the President can remove the Comptroller of the Currency only for reasons communicated to

the Senate. And I should mention that that's -- the comptroller has a fixed term of years, so in that way it's similar to the others. And so there's a dispute about what "reasons" mean. Evidently, Judge Kavanaugh is of the view that "reasons" doesn't require much. But, I mean, I've looked in several dictionaries and thesauruses and, as far as I can tell, "reason" and "cause" is pretty much synonymous with each other. I think when courts talk about employment at will and contrast it with a for-cause standard for removing an employee in the ordinary context, the typical thing you hear is that if employment is at will, you can dismiss for a good reason, a bad reason, or no reason at all. So I think there might be shades of difference between those two, but it certainly --

THE COURT: It does suggest you have to have a reason, because if you don't have a reason, you can't explain your reasons. Yeah, I understand what you're saying. I take it it's never been adjudicated, though?

MR. KATERBERG: It's never been adjudicated. There is an 1868 opinion from the Eastern District of Pennsylvania. The opinion is actually dealing with a totally different question, but I think it's -- it's cited in our briefs. It's called *Case of the District Attorney*. I think it's valuable in guidance because it's just so contemporaneous, and it sort of mentions this example as

kind of a marked departure of the past practice up to that date of the President having at will removal authority over officials.

The government -- the court in the case *Future Income Payments*, which is another recent decision involving the CFPB -- I believe that was the Central District of California -- they went with our argument on this. They included the OCC as an example of an independent agency.

There's one other kicker to this, which is the statute of the OCC -- and this is 12 U.S.C. 1(b)(1) -- specifically forbids the Treasury Department, which is -- organizationally the OCC is housed within the Treasury Department, and the statute specifically forbids Treasury from intervening or interfering in any OCC proceeding or rule or adjudication or anything like that.

So, yes, it's not worded exactly the same way, but I think it's important. Certainly, kind of functionally, the OCC is more similar to FHFA in terms of being a financial regulator than these other examples. And it actually dates back to the Lincoln administration, which gives it a longer pedigree than the FT C, than the ICC, which is sometimes thought of as the first independent multi-member commission. Before any of those were a glimmer in anybody's eye, we had the OCC, a federal financial regulator, and Congress adopting this model that they were

going to be to some degree independent from the President.

THE COURT: Okay. Anything more you wanted to say on separation of powers?

MR. KATERBERG: I don't think so, Your Honor -- actually, one point. I mean, the multi-member structure -- the ironic thing is up until the panel opinion in *PHH*, a multi-member structure for an agency was deemed to be sort of an indicium of independence.

So the idea that you would have multiple members was seen as something that would lessen presidential influence. There's lots about this in the scholarship, because a president might get an appointment or two -- and I think this is what Judge Mariani was talking about -- but the President is going to have to deal with people who are holdovers from the previous administration that are going to dissent from everything his chosen appointees want to do.

So it's just very ironic because the theory behind the plaintiffs' claim today and kind of the idea that is woven into the *PHH* panel opinion is that the multi-member nature acts as a check on the independence. But in reality, if you kind of think about how this plays out over time, it's much more likely to contribute to independence than to check it.

THE COURT: Yeah. It occurred to me if you took a president who really cared about a particular agency's work,

there was some matter the President really had at issue, if you said to the President, well, we'll either let you appoint two of the seven members of the Commission during your four years in office or we'll let you during the last two years of office have your sole -- you get to appoint the one person heading the agency, I suspect most presidents would happily take the one person over the two-sevenths or the three-sevenths even if it was only for a limited time. So it's very hard to make apples to apples comparison. These control issues are going to depend very much on how many members, how long the terms are, who the chair is, how the chair is selected, whether there's a bipartisan requirement, what a quorum is. It's really just very hard to make apples to apples comparison.

MR. KATERBERG: Well, that's exactly right, Your Honor. I think where this discussion has sort of led is that their argument as it evolved, it's really not so much about having a single director. It's about the fact that the single director in this instance happens to have a term of five years because that, as I heard the argument on the other side, is kind of the principle issues that's driving this, is the hypothetical you could have a president that gets all the way through their term without being able to appoint an FHFA director. Of course, you could have the very same thing with a multi-member body depending how long

their terms are. The Federal Reserve Board of Governors has terms that are much longer. I believe it's 14 years. I don't know how they're staggered. Essentially, it's kind of migrated to really a constitutional challenge than the one in the Complaint. I don't want to suggest ideas to them because then we'll see that pop up in the next wave of complaints, but it's not really about single member anymore. It's about that it's five years as opposed to two years or three years or four or whatever.

THE COURT: Well, another thing that factors in this is just because a president can appoint somebody doesn't mean he will be successful, especially these days. If you did the research, I suspect there's going to be -- there are multi-member commissions where in theory the President was supposed to be able to appoint one or two or three people and the Senate never confirmed the appointment, so the President in effect never got anybody on the --

MR. KATERBERG: We could probably go back into history and find many, many examples of multi-member commissions that have really been at loggerheads with presidential administrations and frustrated the President in their attempt to achieve their policy agenda.

THE COURT: Okay. Thanks, Mr. Katerberg.

The Treasury lawyer. I'm sorry, I don't have your name written down here. What was your name again?

MR. MERRITT: Mr. Merritt, Your Honor. Robert Charles Merritt.

THE COURT: Merritt?

MR. MERRITT: Yes. M-E-R-R-I-T-T.

THE COURT: Okay. Mr. Merritt, other than saying this isn't Treasury, is there anything more that you wanted to say? You can take the podium if you do.

MR. MERRITT: No, Your Honor. We don't have anything else to add to the arguments that have been addressed to this point.

THE COURT: Mr. Knudson, let me have you back up to say anything more that you'd like, and then we'll take a break and turn to the other issues after the break.

MR. KNUDSON: Thank you, Your Honor.

With respect to the injury, I would turn the Court's attention to paragraph 3 of our Prayer For Relief that sets out the alternatives: pay down the liquidation preference or the return of the dividends. That was the $130 billion number I gave you earlier. It's certainly concrete harm.

I'd like to say with respect to the issue of separation of powers, the President's removal power, we have a circumstance here where this agency may be in a situation where the President may never have any opportunity to pick the director. If there's any chance he has no influence,

that should be a clear indication that there's a separation-of-powers problem, a violation of the Appointments Clause of Article II.

With respect to what I heard about the presumption of correctness, that doesn't apply to a separation-of-powers violation.

With respect to *Ryder*, the --

THE COURT: I'm sorry?

MR. KNUDSON: *Ryder*, the case that was the criminal conviction with the Article IV judge on the panel.

THE COURT: Oh, right. Okay.

MR. KNUDSON: That, of course, was a decision involving that particular conviction and reversing it. But I would submit that the other defendants who might have been convicted or had their appeals decided by a similarly-constituted panel would have an opportunity to seek habeas relief. I think the courts then would be required to take a look at what the Supreme Court said in *Ryder* and review the conviction.

I think what we're talking about simply here is -- last point I want to make here is with the OCC and the statutory provision that's cited that the President has to give a reason. That's such a narrow, minor limitation on his removal power. He could have any reason he wants. He just has to state what that reason is. So you would give it

a constitutional interpretation to say that's not any limitation on the President's removal power. So as far as establishing long-term precedent, that does not stand.

Thank you, Your Honor.

THE COURT: Thank you.

All right. Let's take a 10- or 15-minute break, and we'll come back and start working our way through the other issues.

THE LAW CLERK: All rise.

(A brief recess was taken.)

THE LAW CLERK: All rise. This court is now in session.

THE COURT: I want to turn to Count Three, relying on the Appointments Clause. Mr. Katerberg, if I could have you first to the podium on this count.

MR. KATERBERG: Thank you, Your Honor.

THE COURT: So is there any limit on how long an acting director can serve, any limit do you think under the Constitution?

MR. KATERBERG: I would say not, not a judicially-enforceable limit and not a numerical limit. We know that OLC advises administrations to make appointments within a timely matter, but it's not simply a calculation of a number of months or a number of years. There's a lot of factors that go into that.

THE COURT: How do you answer Mr. Knudson's question that if there wasn't any limit on the time -- putting aside whatever the limit would be, but if there's no limit on the time, then why would presidents ever do recess appointments? They could just appoint acting directors and let them serve for four years or six years or eight years.

MR. KATERBERG: So it's a fair concern and there's a good answer to that. I can't really say it better than OLC did. I think I'm going to get this right. It's the opinion at 6 OLC 122. It's cited in our briefs. But there are many political and sort of policy reasons for presidents to exercise their power to appoint a permanent nominee, because the fact of the matter is often acting officials are kind of looked at with second-hand status, you know, when they deal with Capitol Hill, both houses of Congress. They're not necessarily held in sort of the same esteem as the permanent head of the agency would be. An acting employee stays at their previous position, their subordinate position. They don't get paid for the salary of the full appointee to that position.

You know, frankly, if Congress perceives that there's abuses going on, which has happened before -- that's what led to the Federal Vacancies Reform Act of 1998 -- you know, it's imminently within Congress's power to adopt statutes that impose a time limit. I mean, that's exactly

what Congress has done in the Vacancies Act, which is an alternative source of authority for acting officials. Here they chose not to do that. Our submission would be that it's sort of up to Congress, and Congress can provide whatever it wants to; when it doesn't, there's not sort of a flee-floating, numerical limitation under the Constitution that's susceptible to judicial enforcement.

THE COURT: This count is challenging because I actually find the challenge itself -- personally I find this to be a better challenge than the separation-of-powers challenge. But it's just so hard to know how -- sometimes, as a judge, you run across things that seem wrong and there's just nothing a judge can do about them. It happens a lot in Washington because they deal much more with political questions and justiciability issues than I do.

If you go back to *Eaton* and you see what the Supreme Court thought they had in mind talking about special and temporary conditions and limited time and you see what that's grown into over time where in this case we had Mr. DeMarco serving almost the five years that he would've served if he had gotten a regular appointment, it certainly seems inconsistent with the spirit, if not the letter, of Supreme Court decisions and with the spirit, if not the letter, of the Appointments Clause. But it's also a real struggle to know what a judge can do about this.

The multi-factored reasonable circumstances test -- and I get your point that OLC wasn't articulating this test for my situation but for the OMB position -- but the problem with any kind of a reasonable circumstances test is -- the problem is you'd be dealing with acting directors and you would have no idea whether you were dealing with somebody who could do the things he was doing or not. We can't have a government run where you literally don't know if the official you're dealing with does or does not have authority until some judge three years later tells you whether that extra month was reasonable or not reasonable. The two-year limit is -- you know, it's the kind of thing the Supreme Court could do, but it makes a district-court judge kind of nervous. I don't even know, like, what the ripples would be.

Let me ask you this. I just don't know how this works. If a president appoints somebody to a recess appointment, that's to the end of the session, right, the session of Congress?

MR. KATERBERG: Into the next session.

THE COURT: The next session.

The next time there's a recess after that can the President do another recess appointment for the same position to the same person? Can recess appointments be consecutive?

MR. KATERBERG: I believe that is a possibility. I haven't studied it. As Your Honor knows, DeMarco is not a recess appointee, so we don't have issues under the recess Appointments Clause in this case. I see no reason why that couldn't take place, but I just couldn't vouch for it for sure because I haven't studied it.

THE COURT: Okay. I completely understand that they're not arguing DeMarco was subject to the two-year limit because he's a recess appointee. It was an analogy. It was a good argument by analogy.

I was going to ask whether acting directors, if they were limited to two years, could they succeed themselves, but it's not your proposal so you wouldn't know because you're not the one proposing it.

MR. KATERBERG: Well, that's right. I just want to point out we're talking about numbers of years, and Your Honor mentioned it was a few years shy of the five-year term. I think it was a little over four years. But really, I mean, just to get a couple things down, as of the Third Amendment, it was three years.

THE COURT: Right.

MR. KATERBERG: And during that three years a nomination had been sent to the Senate, was rejected. They don't dispute that it was an extremely polarized time in this environment. And then for the last maybe eight months

of DeMarco serving as acting Director, which really isn't that relevant anyway because it postdates the action at issue here, but there was a nomination pending, the nomination that ultimately got approved of the current sitting Director, Mel Watt.

But Your Honor's concern about sort of the unpredictabilities is exactly why I think it makes sense to let Congress do what it wants to do here, because when you have something like the provisions in the Vacancies Act, it's very specific. It establishes the very reticulated regime that tells you how the timelines are going to work. The timelines are tolled, for example, during nominations. The timelines can be stacked on top of each other, so you can have somebody continue to serve in an acting capacity for 210 days and then potentially, if there's another nomination, another 210 days. But there is very detailed regime for how that works. So that really fosters predictability. You know, somebody in the White House staff can calendar it. They can put a tickler to remind them that the date is coming up. I mean, none of that is possible if we just have this sort of free-floating, after-the-fact analysis. In addition to not allowing for predictability and stability, a lot of the things that Your Honor would need to look at and we would need to get discovery on are things that courts don't normally take discovery of, you

know: the President's personnel selections and the types of obstacles and considerations that go into that process.

THE COURT: It would be almost impossible. Were we at war? Were we not at war? Were we at an economic crisis? Were we not in an economic crisis? There would be so much to -- it would be very hard to do kind of a reasonable analysis of this.

Your opponents argue, and they're right, that sometimes you have to make hard decisions, and the NLRB decision was one of them. Generally, as judges, you try not to get involved in this stuff if you don't have to.

MR. KATERBERG: Well, that's all right, but there is a threshold reason why the Court doesn't really need to reach any of this in the de facto officer doctrine.

THE COURT: Yeah, I was going to ask you about it. Were you able to find any cases -- and if you said this in your brief, I just forgot, I'm sorry -- that the doctrine by name -- I realize *Buckley* applies something like it, but the doctrine by name is applied outside of adjudicative context?

MR. KATERBERG: Well, it's typically raised in the adjudicative context, but typically it doesn't work there because what happens is somebody that's subject to the adjudicatory authority of an official will raise the challenge in the context of the adjudication. Let me give you an example.

So there's a case that's cited in our brief called *Andrade v. Lauer*, the D.C. Circuit. What that involved is there was a reduction in force, a RIF, in DOJ and the decision-makers and the people that were implementing that were acting officials. The court, I think it was J. Skelly Wright, went through a very detailed analysis of the de facto officer doctrine. By the way, this was a constitutional challenge, Appointments Clause challenge to the ability of these acting officials to decide on the RIF. Ultimately, the de facto officer doctrine did not bar that challenge from going forward, but only because they filed for a PI the day before the RIF was scheduled to occur.

So the de facto officer doctrine says, you know, if people are going to bring these kind of challenges, we want it to be done kind of in realtime.

THE COURT: So the implication of the opinion is if they had waited two years and then sued about the RIF, they would have lost?

MR. KATERBERG: That's exactly right, Your Honor. That's also manifested more recently. The *Andrade* decision is from the '80s, but their more recent decision of the D.C. Circuit is *Southwest General*. That was a case that ultimately went up to the Supreme Court, and it has to do with an acting general counsel of the NLRB, not to be confused with *Noel Canning*, which is a separation of powers

with the NLRB.

In the *Southwest General* case, that was another one where the NLRB was exercising adjudicatory authority over a company dealing with unfair labor practices. The issue was whether the proceeding was validly approved, because you needed a proper general counsel to approve the proceeding. That was objected to.

The D.C. Circuit discussed the de facto officer doctrine, reaffirmed their earlier decision in *Andrade* and said we're going to let this go forward, and the reason for that was because it was raised, you know, in connection with that proceeding.

Now, it doesn't really map neatly onto the situation here because it's not an adjudication, but I don't think that's a reason not to apply the de facto officer doctrine at all. And certainly it's not a reason to let it be raised almost five years after the action took place.

In the context of an action like this, like we were discussing earlier, that's entry into a contract by two different parties that is deemed to have an incidental effect on shareholders.

THE COURT: Your opponents argue that the difficulty there is they're not parties to an adjudication, so they can't raise it before the person that they think doesn't have authority. They have to kind of sue from the

outside. They point out that they brought their suit within the statute of limitations. I'm just forgetting this, but what is the statute of limitations that applies? Is it in the HERA or is it -- are they borrowing a state statute of limitations?

MR. KATERBERG: Well, I believe it's in 28 U.S.C., I want to say, 2401, which is, I think, a general -- it's a generalized six-year statute of limitations for all actions.

THE COURT: Okay. I was just wondering whether Congress -- do you say HERA or do you call it HERA?

MR. KATERBERG: I have heard it both ways. I personally use HERA.

THE COURT: I was wondering whether Congress had given a specific statute in HERA that applied to this lawsuit, which would help their argument, if they're just using the general statute of limitations that applies where there isn't one otherwise specified and it doesn't help as much as.

MR. KATERBERG: I think that's right, Your Honor. It's a generalized statute of limitations that applies to all sorts of different actions against the federal government and agencies involving all kinds of different claims.

It's probably fair to say that if you took the mine-run of lawsuits against the United States, that's a

very, very small portion of those that are going to raise the kinds of challenges to an agency's authority on grounds of the Appointments Clause like we have here. So the general statute of limitations just isn't really designed to deal with the unique concerns that animate the de facto officer doctrine. So that's kind of our point, that it's not -- I think their position is, well, what do you want from us? Of course, it's timely. We sued within the statute of limitations. But that's not really a response, because the concerns that animate the de facto officer doctrine are specific to this type of issue and it's not subsumed within a general statute of limitations.

Your Honor, we also -- you know, we cited a few examples in our brief, but, you know, we could go on. I mean, there are many situations where acting officials have served in high-ranking capacities across many different branches of government. If Your Honor wanted more, I would refer you to the Congressional Research Service Report that's cited in our brief. It gives more examples. But just to give one, so the Social Security Administration, which, as we discussed earlier, is an independent agency headed by a single director like FHFA, it has had an acting administrator for the last four-and-a-half years as of today. So that exceeds by half the three years that DeMarco had served as acting Director as of the Third Amendment. So

it's not at all unprecedented on the first count. You know, they want to put a lot of stress on precedent, let's look for examples where this is done before. *Noel Canning* teaches us that if there's a lot of examples in history where the political branches have gone with a particular type of practice, that's one indicator of its constitutionality. We see many, many examples of high-ranking acting officials serving for a number of years. And I think it's telling, it's instructive that you won't find a single judicial decision since the history of the republic.

In *Southwest General*, the Supreme Court, Chief Justice Roberts, talks about how acting officers has been a wide-spread practice since the George Washington administration; never been a case where a court has invalidated the action of an acting officer for staying too long, and I think that's instructive. They are essentially asking Your Honor to create a new, sort of implied right of action under the Appointments Clause.

THE COURT: All right. Thank you, Mr. Katerberg.

Mr. Knudson. So, as you heard me say, I have some sympathy for your argument just kind of as an original matter, but I'm wondering about remedies, and I'm wondering about the de facto officer doctrine.

I'm sympathetic to the idea that the Supreme Court

didn't seem to have in mind people serving for five years as acting officers. I get the argument about recess appointees and why would you bother making a recess appointee. It's hard for me to know what to do.

The kind of reasonable circumstances test that you suggest, besides being a very difficult test to apply and having courts sticking their nose into things that courts are at least reluctant to stick their nose into in trying to make that decision, the problem with that is you'd never know when you're dealing with somebody whether you were dealing with an officer who had the authority to deal with you or not. It seems to me it would be very problematic for any acting official to not know as she was sitting at her desk whether she had the power of office or a reasonable time had passed.

With respect to the two-year limitations, it's a good argument and I get why you're using that by analogy, but it's just unprecedented. I mean, no court has ever suggested that acting officers can only serve for two years, and there are a number of historical examples of acting officers serving more than two years.

So even if I was bold enough to agree with you and even if I was bold enough to adopt the two-year rule, it would seem grossly unfair to say to the people who has dealt with the agency and dealt with Mr. DeMarco beginning the two

years and one day and the rest of his term that all those things that you thought you did, I'm wiping those all out because unbeknownst to you there's a two-year rule that no one has ever heard of before but I have imposed. And not only am I imposing it, I'm retroactivity applying it and wiping out lots of decisions. That would be a very extreme remedy and a very disruptive thing to do to the government.

I could see, like, the Supreme Court adopting this rule and applying it going forward, but it would be -- you're essentially suggesting that if I were to adopt the two-year rule, that I hold that three years of this officer's activities were all ultra vires; he didn't have the authority to do them. So that's my concerns. Let me invite you to respond.

MR. KNUDSON: Well, in terms of remedy, again, I turn the Court's attention to *Noel Canning*. There the court said, look, the board wasn't properly constituted, there wasn't a quorum. So those decisions made by the board were undone.

THE COURT: Well, the Commissioner of Social Security, who has now served as the acting person for four years plus, thousands and thousands of Social Security cases are adjudicated in her name every year, too bad? We wipe out all the ones that occurred after she passed the second year or after she passed the reasonable time? I mean, do

you really think any court is going to make the Social Security -- if the court were to adopt your rule, make the Social Security Administration re-do three years', four years' worth of tens, hundreds of thousands of Social Security determinations?

MR. KNUDSON: Well, the argument there is what does a de facto officer doctrine apply. We're arguing that in the context of this particular agency all we need to decide is what's significant about this agency. You could distinguish away the Social Security Administration in terms of administerial actions that the agency is taking in administering claims and so forth, the quasi judicial function that is performing in terms of determining disability eligibility would be a different situation where perhaps the de facto officers doctrine might apply.

Here we've got a situation where the Supreme Court has said in *Nguyen*, in *Ryder*, based on an earlier case called *Glidden,* that the de facto officer doctrine doesn't apply when there's an important statutory policy in effect and, by necessary implication, if there is a constitutional violation, it doesn't apply. That was certainly the case in *Nguyen* and *Ryder*. We had criminal convictions, unproperly constituted courts of appeal, so the decisions of those panels had to be revisited. So we think --

THE COURT: But that feels differently. I read

Ryder. That feels differently to me than what's going on here. We all the time have an adjudication that goes up on appeal. We get reversed. It comes back. We re-adjudicate. That we're very familiar with.

You're suggesting that I hold that, for example, under one of your alternate arguments, that when Mr. DeMarco hit his second year anniversary, he no longer could function as acting officer, and that everything he did after that date is invalid, and that for the people who depended on the validity of his credentials, it's just too bad for them. They're going to have to go and rewind their lives three years or four years or whatever it is from today. That seems like exactly what the de facto officer doctrine -- and I understand it's been pretty much limited to the adjudicative context, although not exclusively it sounds like, but that sounds like exactly the kind of concerns the doctrine is designed to prevent, just the horrible disruption of trying to unwind two or three or four years of agency action.

MR. KNUDSON: Well, I think the agency overstates the hardship issue in the context of what decisions would be undone by determining the acting Director DeMarco served too long in that capacity.

First, I could point out that Director Lockhart was operating under Senate confirmation. Director Watt was

confirmed by the Senate. So we're looking at a period of time in which acting Director DeMarco in his decisions would be implicated.

THE COURT: Yeah, five years' worth, right?

MR. KNUDSON: Four years and four months, I believe.

THE COURT: If I bought the two-year theory, it would be basically two-and-a-half years or so of decisions.

MR. KNUDSON: Well, certainly we're suggesting a bright line. That's for ease of application. There is certainly a constitutional basis for that bright-line rule. And I don't think it's --

THE COURT: Suppose the Supreme Court adopted your bright-line rule or I did it or somebody did it, so it's now a two-year bright-line rule. Going forward now we have a vacancy in an agency and they have an acting director and she hits the two-year mark and there's no replacement. Now what?

MR. KNUDSON: Well, then the President would have to determine what to do, because I think at that point then the acting director would lose authority to act.

THE COURT: Can the President appoint a new acting director at that point?

MR. KNUDSON: The President would have to nominate somebody to the Senate because you can't avoid the

confirmation process.

THE COURT: Okay. So then the agency just shuts down?

MR. KNUDSON: No. There would still be officials that would have authority to act.

THE COURT: A lot of statutes put the authority in the head of the agency, you know, the Commissioner of Social Security shall have the power to X. Without a commissioner, you can't exercise that power.

Suppose your rule had been in effect, we got to the two-year mark of the Commissioner of Social Security. The agency just has to shut down until the President nominates and the Senate confirms a new commissioner?

MR. KNUDSON: Well, I think that there would be functions of the Social Security Administration that would continue to operate that would be ministerial in nature and would continue.

THE COURT: Well, let's take the ones that wouldn't continue to operate. Those just cease? The agency just ceases those functions? Or can the President appoint a new commissioner and give her two years?

MR. KNUDSON: I think then the default rule would be, yes, they'd have to be able to fix the problem, but they would have to find somebody who would be qualified and put them up for Senate confirmation subject to the two-year

limitation.

THE COURT: So the answer is he can't just appoint another acting director?

MR. KNUDSON: He can't renominate the same person.

THE COURT: Well, can he appoint a different person to be acting director for two years?

MR. KNUDSON: I think you would have to nominate somebody, put them to the test of Senate confirmation; otherwise, you would be voiding the power of the Senate to give its consent and --

THE COURT: I don't know if that's yes or no. Let's say we have an agency, the Social Security Administration, and it has an acting director right now who is about to hit her second year. There is a nominee, somebody else who has been nominated to be the commissioner, but the Senate hasn't acted on it. We now get to the two-year anniversary. Tomorrow is a new day. What happens? No acting director? Or the President could appoint another temporary acting director while this nomination pends?

MR. KNUDSON: Of course, there are situations where the government will stop functioning, such as it runs out of money because there hasn't been an appropriation. So there are circumstances where the constitutional limits on the structure of the government or on the President's appointment power would implicate a situation where there

would a possibility that that particular agency would have to evaluate what functions could be covered by the de facto officer doctrine and which ones could not.

So if they were ministerial, administrative in nature, I think the agency would continue to operate. But if it's something where there's a significant statutory policy or constitutional issue involved, then the de facto officer doctrine doesn't apply and there has to be -- it would force the issue to the Senate. Now they have to take an action and resolve this crisis.

THE COURT: Remind me of the timeline. So in our case -- the facts of our case suppose you lost on your other challenges and you won on your Appointments Clause challenge. Let's just say I agreed with the two-year bright-line rule. So that would mean the Third Amendment was invalid because DeMarco would've been past his expiration date. Right? But the PSPAs would -- again, if you only win on the Appointments Clause, the PSPAs would be valid, right, because those were signed by Lockhart? Right?

MR. KNUDSON: Correct.

THE COURT: And the conservatorship would be valid.

I assume if there was a Third Amendment, there was a First Amendment and a Second Amendment. Were they during DeMarco's term or Lockhart's? If you don't have that at

hand, that's fine. I'm just curious.

MR. KNUDSON: The PSPAs were in September of '08. That was Lockhart's. Then the Second Amendment, I believe, was within the two-year time frame.

THE COURT: It was DeMarco within the first two years?

MR. KNUDSON: I think he was three months into his term.

THE COURT: Okay. So we would have to unwind it to the situation that existed at the time of the Second Amendment?

MR. KNUDSON: Correct.

THE COURT: Okay. Anything more you wanted to say about the Appointments Clause?

MR. KNUDSON: Also, we talk about justiciability, and I think you can see the *Eaton* court addressed this and said ten months was okay under the circumstances there. The OLC opinion talks about what is reasonable. I think if you look at the Supreme Court's most recent pronouncement on justiciability political question, it was the question in *Zivotofsky* as to what you could put on a passport as a place of birth, and the Supreme Court said that's not a political question and sent it back to the D.C. Circuit to decide it in the first instance. And, of course, you're aware the court has taken the Jermandy (ph) case for this term.

So the courts are obligated to weigh in on issues that are complex, where it's not an easy line-drawing situation. That's why we suggested the two-year bright-line rule. But certainly if you look at the OLC opinion, an acting director can serve only as long as what's reasonable in the circumstances. DeMarco served without presidential supervision from August '09 to January of '14. The Obama Administration sat on that position for over two years before nominating somebody that the Senate did not confirm. By the time the Net Worth Sweep Rule was imposed, the crisis that ostensibly generated the aging in the first place had passed by. The President had plenty of time to find a new appointee. So we're saying the 2008 crisis did not suspend the Constitution. The President had an obligation to put somebody up. At some point, the Senate had an obligation to confirm the President. The Executive Branch, the Legislative Branch had to find a solution. This court can tell them that's the case. Thank you.

THE COURT: Okay. Let me just ask you a couple follow-up questions that I forgot. One is can you confirm the -- the statute of limitations that applies to this action before me, it's the general federal statute of limitations?

MR. KNUDSON: Yes, 28 U.S.C. --

THE COURT: Secondly -- I forgot to ask

Mr. Katerberg about this -- you make this argument based on 4512(f) that it talks about in the event of the death, resignation, sickness or absence of the director, the President can designate an acting director, and you make the argument that Lockhart was not the director. I just want to clarify -- I didn't have a chance to look up these cases, but are there courts that have actually considered this argument and either accepted it or rejected it? The case you rely on is a '98 case, *Doolin Security Savings Bank*. So I assume that's a case you're using by analogy since --

MR. KNUDSON: By analogy, Your Honor, yes.

THE COURT: Right. Have there been cases that specifically address this argument?

MR. KNUDSON: I'm not aware of any, Your Honor.

THE COURT: Thank you, Mr. Knudson.

Mr. Katerberg. Are you aware of any cases addressing this 4512(f)?

MR. KATERBERG: Yes, Your Honor. I've got two. They're cited in our brief.

THE COURT: There's this *UBS America*?

MR. KATERBERG: *UBS America*. I think we probably cited the Second Circuit decision. I think there's a Southern District decision that was affirmed that also contained some reasoning. Then there's a Northern District of Illinois decision called *City of Chicago*.

I just want to emphasize, so *Doolin* is about a statute, the Vacancies Act, and it's really two steps removed. One, it's not about HERA, the unique acting director provision in HERA. It's about the Vacancies Act. On top of that, it's about a prior version of the Vacancies Act that is no longer even in existence.

But even if you assume arguendo that *Doolin* applies, what *Doolin* essentially says is in order for the acting director power to be triggered under this pre-existing version of the Vacancies Act, the prior person needs to have been presidentially appointed and Senate confirmed. We have that here because DeMarco's predecessor was a guy named James Lockhart, and he was presidentially appointed and confirmed by the Senate as the Director of OFHEO, O-F-H-E-O (FHFA's predecessor) and then was sort of carried over by HERA.

So really I can't even understand what their challenge is getting at, because even if this case that is inapplicable for several reasons applies, our facts line up with what the Court said would be permissible in that case.

If I could address a few other things that came up during counsel's presentation? Your Honor, their position would invite chaos across the government. I mean, I shudder to think what it would look like the day after the ruling in the General Counsel's Offices of agencies across the

government because this practice of acting officers is extremely common.

I think while we're talking about *Doolin*, I can refer to Judge Randolph's opinion in *Doolin* where he traces through the history of acting officials in the government, and the way he describes it is it gives a little play in the joints that's needed for government to work, because I think, as citizens, we don't want the government agency to completely shut down and stop doing the important things it does during the sort of transitory periods. Sometimes those transitory periods last longer than others, and there can be a variety of reasons for that.

I think the way that the Court should approach it in this case is essentially you're being asked to invalidate an act of Congress. And the reason I say that is because in HERA, in 4512(f), Congress did not do what it normally does in the Vacancies Act and in other acting official provisions. It did not put a temporal limit on the service of the acting director. I think Your Honor has to assume that that was deliberate on Congress' part. They knew how to put that in if they wanted to; they didn't. So, I mean, I guess it would be an as-applied challenge, not a facial challenge, but that's essentially the relief they're seeking here, is declaring an act of Congress unconstitutional.

I want to talk a little about the de facto officer

doctrine because I think some confusion has been introduced. I think the issue I've heard is whether the de facto officer doctrine is limited to the adjudicatory situation. If I can sort of reframe that. I think the way we would put it is the de facto officer doctrine applies across the board. But there have been a recent line of cases where courts have been less willing to apply it in the adjudicatory context, and those cases have involved judges -- challenges to judges, as we talked about earlier this morning, hearing criminal cases when they were not proper Article III judges or where their appointment was otherwise defective.

So I think it's instructive to look at what *Ryder* says. This is 515 U.S. at 182: We think that one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to a decision on the merits of the question. So there are several things built into that: timely. You know, it's got to be timely. So that's perfectly consistent with the position we've been urging all along.

Now, some of these cases what they'll say is even though it wasn't raised below, we're not going to deem it forfeited. You know, that's logical because in some sense it goes to jurisdiction. If the lower court didn't have jurisdiction because the judge wasn't an Article III judge, then maybe, even though they didn't raise that below, will

let them make that challenge to their conviction on appeal, but it's still timely in the sense that I'm talking about and in the sense that the de facto officer doctrine is concerned with, because normally you have to appeal, I think, within 30 days or 60 days, and similar for a petition for cert in a case like *Nguyen* and *Ryder* that ends up in the Supreme Court. So we're talking about sort of orders of magnitude different than the four some years, almost five years in our case here.

OLC, Your Honor, has opined specifically about the de facto officer doctrine being what they call a "common cure" for any issues posed by acting officers potentially staying too long. Again, there's no judicial decision that has ever said that this is a problem, but the opinion, acting officers, which is 6 OLC 119, at the end they say, In many instances, potential infirmities in the authority of acting officers will be cured by the de facto officer doctrine. They give some examples.

You know, there's no case I can point Your Honor to that's exactly like this because, like I said, it's never been done before. But what OLC points to, which I think provides a coherent analogy, is a typical case of a de facto officer is one who has been properly appointed but who continues to serve after his term of office is expired. And they cite a couple of cases: *Waite v. Santa Cruz*, Supreme

Court case and the district court from Maine. So it's been held to apply in that context, and so I see no reason why it wouldn't equally apply where the nature of the challenge is that you have an acting officer that stayed too long, as opposed to somebody who was properly in office at one point but their term is expired. They're essentially serving too long as well.

Finally, I want to address the suggestion that it doesn't apply to constitutional issues. There is some language like that in some of the cases, but, again, that's confined to the judicial context. So the constitutional challenge is to judges sitting on a particular case based on not having life tenure as related to Article III. The Supreme Court has said, you know, we're not going to allow the de facto officer doctrine to bar somebody from bringing that kind of challenge to their conviction. But there is not any sort of across-the-board exemption for constitutional claims from the de facto officer doctrine.

I'd go back to *Buckley v. Valeo*. I think they used the words "de facto." I don't think they added "officer" appended to that, so we could debate whether it's exactly the concern. But the cases that *Buckley* refers to in that paragraph of the opinion, they relate to something that's kind of analogous too, which is when legislative apportionments have been held unconstitutional in the past,

there's many cases that say we're not going to go back and say that the acts that the Legislature passed, you know, under the illegal, unconstitutional apportionment are going to be retroactively invalidated, and that's the principle that the court used to inform how it's going to handle the situation of the past acts of the Federal Election Commission. All this sounds in constitutional issues and so there is no reason to think it would be limited to statutory challenges.

That's all I have, unless Your Honor has questions.

THE COURT: Okay. While you're there, why don't we move to the next issue, which is the non-delegation doctrine.

I've really struggled with the arguments about whether the FHFA, when it was acting as conservator, was exercising governmental authority such that the traditional non-delegation doctrine would apply. It also would apply to the separation-of-powers issue and so on. Here's what I'm sincerely struggling with, is at what level are we focusing here?

So there is, on the one hand, the character of the agency. The FHFA is a government agency. On another level, there's the role it's playing. It's playing the role of conservator, which typically a conservator steps in the

shoes of the entity for which it is acting as conservator, and if it's private entity, it's essentially acting as a private entity. And then there's the individual task that's being done. So there's arguments in the briefs about, well, the powers that the FHFA had as the conservator under the statute, focusing on its role as conservator, and there's other arguments about the specific challenged act, signing the Third Amendment, and whether that's government -- so what am I -- this is kind of like I have a lens on my camera. I'm trying to figure out where I'm supposed to be focusing it. What is it that matters here, that signing the Third Amendment -- is my question whether signing the Third Amendment was a governmental act or is the question whether acting as a conservator for the GSEs was a governmental act? What's the right question to ask here?

MR. KATERBERG: So I think it derives from underlying principles of Article III standing. We have not raised an Article III standing to the non-delegation counts in this case, but the only thing that they have standing to raise a non-delegation challenge to is the specific thing that causes them injury. Here that is entry into the Third Amendment.

So could FHFA as regulator, for example, have the power to promulgate rules and regulations? You know, that's probably legislative in nature, but they haven't alleged any

rule or regulation of FHFA that has caused them injury.

THE COURT: Well, they do allege some. I'm not sure the argument works, but they argue that even if the -- the problem is that all their arguments depend on the Third Amendment being illegal. If the Third Amendment is legal, then they aren't harmed by the current director abiding by the Third Amendment.

They say that the FHFA would have regulatory authority to stop the FHFA as conservator from making the dividend payment. But if you can't challenge the Third Amendment, then it seems to me the premise for those arguments falls apart. If the Third Amendment is legal, then there there's nothing illegal about any of its actions.

MR. KATERBERG: That's absolutely right.

There is another important point that's sort of baked into this, which is that argument actually doesn't work because if Your Honor looks at the certificates of designation for the preferred stock, the consequence -- if a dividend is not paid that's due -- well, let me back up for a step. The amount of the dividend and the dividend obligation is set by the Third Amendment, which is the contract entered into in August 2012, and so it spells out what's due each quarter.

If the director in a regulatory capacity opted not to approve a dividend for a given quarter under the terms of

the Treasury agreement and the certificates of designation, what happens is the amount simply gets added to the liquidation preference. So it essentially becomes are you going to pay Treasury now or are you going to pay Treasury later.

THE COURT: Now or later.

MR. KATERBERG: But I don't see them arguing that paying Treasury later and just adding it to the liquidation preference would in any way assuage the injury that they claim to have suffered from the Third Amendment. As Your Honor noted, it's all rooted in the Third Amendment. I mean, that's the underlying transaction that's being challenged here.

Now, I think for the non-delegation claim Your Honor needs to look at the Third Amendment, and what the Third Amendment is is it's a financial transaction. In character it's no different than transactions that all kinds of businesses that are failing or near failure engage in bankruptcy or any number of contexts with entities that are willing to provide credit. Now, the scale is, of course, extremely different. It's orders of magnitude different in scale. And it's also different in the sense that Congress has seen to fit to attach certain consequences and certain protections to the nature of the transaction. But the transaction itself, it's not an exercise of sovereign

governmental power, and that's really what we look at for non-delegation. I mean, for the traditional Article I non-delegation where we talk about intelligible principles, really that's talking specifically about legislative power of Congress. So Congress, you know, subject to certain limits, can't totally abdicate its legislative powers and just say to an agency, you know, you figure it out. I think it's pretty clear this is not an exercise of legislative power, this transaction. It's not prescribing rules of conduct that are going to govern private individuals.

THE COURT: So their argument is that the FHFA is acting as a governmental entity when it signs the Third Amendment and they argue the private non-delegation doctrine only in the alternative. So your position is essentially that FHFA was not acting as a government entity when it signed the Third Amendment. So you would say that the legislative non-delegation doctrine is just irrelevant because they weren't exercising government power?

MR. KATERBERG: That's one way of putting it. I guess I would say it doesn't matter to me much whether it's relevant because I think we prevail under either way of looking at. The intelligible principles test is not --

THE COURT: We'll get into that. I'm still having trouble. I don't know whether the question for me is whether in signing the Third Amendment the FHFA was

exercising governmental authority or the question is in acting as a conservator, the FHFA was acting as a governmental -- was exercising governmental authority. What's the right question?

MR. KATERBERG: I don't think Your Honor needs to address the broader question. There may be some things that the FHFA could do as conservator that are governmental in character. They are not -- whatever those things may be, they are not challenged in this case.

What's challenged in this case is entry into the Third Amendment. That is a business transaction. It's not sovereign in character. It's not regulating anybody. It's not imposing sanctions on anybody. It's not coining money, none of these things that are sort of deemed to be unique to the government.

So it's kind of like the *Pittston* case, the Fourth Circuit case we cited in our briefs, where a statute creates a coal industry retirement board to take retirement savings and invest it and do certain things, and that's no different than any other number of private pension funds do in character. Again, it could be a different scale, but you've got to look at the character of the activity. The character of the activity entering into a deal like the Third Amendment is fundamentally sort of --

THE COURT: The problem with that is, though,

government agencies do things all the time for which there are equivalents in their private counterparts and we don't say that that's not government action. The agency for which I work -- not an agency, but we have payroll people who pay payroll. We have HR people who give advice about HR things. They're all government actors who are acting as public employees when they do that, even though down the street there's a hundred other people paying payrolls for private companies and giving HR advice to private employees. So the fact that the private people do X doesn't mean that when the government does it it's not exercising government authority or it's not acting as a public actor.

MR. KATERBERG: So, Your Honor, I'm with you on that, but I would take it a step further and say, you know, you're not going to see the non-delegation doctrine applied to those kinds of activities because, again, the non-delegation doctrine is about Congress delegating its legislative power.

I doubt very much if you had a statute that gave an agency the broadest possible authority in the world with no intelligible principles whatsoever -- let's imagine that's the case -- and it has to do with buying an automobile fleet or hiring and firing employees or buying office supplies, I don't think that's the kind of thing that would be susceptible to a challenge on the ground that

Congress, by authorizing the agency to do that, vested the agency with legislative power because the nature of the activity is not legislative in nature.

THE COURT: I think that's your best argument here -- that is -- whether they were exercising governmental authority, it's hard for me. I'm just not sure what the answer to that is. But if they are exercising governmental authority in signing the Third Amendment, it doesn't look anything like legislative authority. Legislative authority is about prescribing standards of conduct. It's a contract. Executives sign contracts, not legislatures. I think that's your best argument.

On the intelligible principle what do you do with the *Perry Capital* case? I mean, I read half of *Perry Capital* before I ran out of time this morning, but it sounded like the panel there thought essentially there's almost no restrictions whatsoever on the actions of the FHFA as conservator. It was hard for me to find -- if you take *Perry Capital* at its word, it's hard for me to find any intelligible principles in that. I realize this is a really low threshold.

Courts in the past have found -- I have a friend who teaches Constitutional Law in a law school and I just mentioned to him I had, among other things, a non-delegation issue coming up and he said, Well, the plaintiff will lose

then because no plaintiff has won in 100 years. I said, Well, you know, this might be the case because I've got this D.C. Circuit opinion that essentially says they can do whatever they want.

MR. KATERBERG: Right. Well, so the first thing is I'm gratified that Your Honor looked at the *Perry Capital* opinion because I think --

THE COURT: Half of it.

MR. KATERBERG: -- if you rested on their characterization of it, you would find it to be sort of distorted and exaggerated. I think it's important to look at what *Perry Capital* says.

Perry Capital does supply limiting principles, which is the action of the agency has to be within its conservatorship authority. Now, yes, that authority is broad, but it is constrained.

THE COURT: If I asked you to show me the most intelligible of intelligible principles that guided the FHFA in its actions as conservator, what would you say is the most intelligible of those principles?

MR. KATERBERG: I'd say, well, the charters of Fannie Mae and Freddie Mac, which FHFA is conservator, is charged with taking steps to allow the agencies to continue to -- excuse me, the enterprises to continue to promote those public purposes and their charters. I think that

would be among them.

I think the powers of FHFA that are laid out in 4617(b) of the statute.

THE COURT: I'm sorry, I'm just thinking aloud here. Those principles, you mention that in the brief, but the principles in Fannie Mae's charter provide intelligible principles about how Fannie Mae should conduct Fannie Mae business. But is there an intelligible principle governing FHFA in how it conducts its conservator business insofar as they're -- I realize part of what a conservator does is to run the business that it's conserving, but it makes decisions as conservator, too.

Is there anything in HERA or anything other than in the charters of Fannie Mae and Freddie Mac that you think provides intelligible principles to FHFA in its exercise as conservatorship?

MR. KATERBERG: Well, and I don't think it can be divorced from the charters because, I mean, the charters are statute. So Congress enacted these statutes that created Fannie Mae and Freddie Mac. And part of a very essential function of being a conservator is to ensure they can continue to accomplish those purposes. So I don't think it can be read in a vacuum without looking at the charter.

But the provisions of HERA in 4617(b) that talk about preserving and conserving assets, carrying on the

business of the regulated entity, the D.C. Circuit looked at that and they said this gives sufficient guidance because FHFA has to engage in activities within the scope of the conservator authority, which is essentially running the business to allow these enterprises to continue to perform the important public mission that they performing.

If FHFA were hypothetically to do something that was outside the conservatorship power, you know, there could be issues with that. This is well within the heartland of conservator power to run the business.

THE COURT: Is there anything they could do that would be outside of their conservatorship powers given how broad they are?

MR. KATERBERG: I mean, there could be -- you know, if an FHFA employee embezzled the funds and gave it to his brother-in-law. I mean, I guess we could imagine a wide variety of hypotheticals I think everybody would agree is not what conservators are supposed to be doing.

Every court that has looked at this -- this has come up in the APA challenges to date. And there's a footnote in our brief that collects all the citations -- and Your Honor will find that every judge that has looked at this, save for the one dissenting judge in *Perry Capital* in the D.C. Circuit, has said that this is well within the range of powers that conservators do when they're charged

with rescuing financial institutions that have systemic importance beyond that particular company and its shareholders.

THE COURT: Let me ask you about a couple of the arguments they make. One of them -- or one or two of these I'm not quite sure I understand what the argument is, so maybe you can clarify it and then respond to it, because --

So one of the phrases that they keep saying in their briefs is that they keep pointing out that when the FHFA acts as a conservator, unlike conservators in any other context, they are allowed to consider their own interests and, hence, because they're a government agency the government's interest and, therefore, they are exercising government authority, not private authority. How do you respond to that?

MR. KATERBERG: I don't think that makes a difference to whether the character of the activity is private or governmental. It's saying that you're allowed to take into account, for example, the important public mission of Fannie Mae and Freddie Mac and trying to sort of keep them afloat, to keep the housing markets functional, and kind of what's going to be best for that perspective.

I mean, one way of looking at --

THE COURT: Just to be clear, I'm not asking this on the intelligible principle issue. I'm asking this on

whether they are exercising private or government authority. I guess the argument is they could have entered the Third Amendment consistent with their statutory guidance. They could have entered the Third Amendment even if they thought it was going to be really bad for the GSEs because they're explicitly allowed to do things for their own benefit or for the benefit of the government. They could have decided, well, this is going to be tough on the GSEs, but it's great for us, great for the government, so we're going to do it. That's something a traditional conservator would never be allowed to do and wouldn't even occur to them.

MR. KATERBERG: Well, and Congress is free to do that. It's Congress' policy choice.

THE COURT: Yeah, they could do that.

MR. KATERBERG: It doesn't change the character of the activity, though. They're still engaging in a fundamentally private transaction when they do the Third Amendment and the fact that the statute directs them that they can take into account certain considerations when they do that.

THE COURT: So if the agency acting as conservator takes an act to further the government's interests, even potentially at the cost of the private entities into whose shoes they've stepped, you would still say that's an exercise of private authority, not public authority?

MR. KATERBERG: That's right, Your Honor. The nature of the transaction is still not something that's inherently sovereign and governmental in character.

THE COURT: Okay. Another argument they make is they refer -- and you did respond to this, and I didn't understand either the argument or the response, and I didn't have time to look into it -- they keep talking about the FHFA having the power to suspend the applicable provisions of the APA in HERA. What are they talking about, and what is your response?

MR. KATERBERG: It's a gross embellishment that doesn't really have any connection to reality, Your Honor. I think what they're talking about is there's a statutory provision in 4617 called 4617(f) and it says that no court may take action to restrain or affect the conservator.

THE COURT: That is all they're referring to, is the anti-injunction provision?

MR. KATERBERG: I think Your Honor would have to ask them.

THE COURT: I'll ask them.

MR. KATERBERG: My answer to that is it's not dealing remotely with what they describe because that provision says that a court can't enter an injunction against FHFA or against -- potentially an injunction against somebody else that is going to disrupt FHFA in carrying out

its conservatorship responsibilities. But it doesn't say anything about suspending the application of --

THE COURT: There's a difference between -- as a practical matter, it might not make much of a difference, but legally there's a big difference between saying you are exempt from the APA and the APA applies to you, but a judge can't enter an injunction to enforce it.

MR. KATERBERG: Your Honor, we don't purport to claim the authority to make illegal things legal or anything like that. I mean, there's nothing in the statute that provides for that.

Congress made a policy decision that it wanted to give FHFA's conservator wide latitude in running the businesses as conservator and so it didn't want courts interfering with kind of the day-to-day management, the business judgments, and those sorts of things. But nothing about that renders what is illegal legal, which is how they've characterized it.

THE COURT: Okay. And then, last, they repeatedly refer to the fact that the FHFA exercised authority under a statute to alter legal rights and obligations of third parties. I think they're referring to the Third Amendment entering a contract, which do you -- I probably should have this in the opposite -- I should have had Mr. Knudson up first. I understand the response that entering a contract

is not a governmental activity, private people do it all the time, and contracts affect third parties all the time. Other than that, do you understand them to be referring to anything other than entering the contract?

MR. KATERBERG: No. I think Your Honor is right, I think they are referring to entry into the contract. You know, contracts can have incidental effects on other people. You know, if a regular company outside the context of conservatorship enters into a major financing contract, it may have an effect on other stakeholders with relation to that company. And, you know, what the rights are can be sorted out under state law and under contract law and that sort of thing, but it's not anything that gives it a uniquely governmental attribute.

I mean, really what the non-delegation doctrine is concerned with -- and I would focus on the private non-delegation doctrine here -- is the few cases that have applied that branch of the nondelegation doctrine, what it's about is private companies having the ability to enact basically laws that are going to be binding on their competitors, you know, to get an unfair advantage in the marketplace by prescribing rules of conduct, you know. So this was in the cases from the 1930s. The D.C. Circuit did it more recently in the *Amtrak* case; although, ultimately that was reversed by the Supreme Court on other grounds.

But the idea is we don't want Congress to be able to pick out one winner in a competitive area in an industry and allow that company to basically write the rules for its competitors on paying of penalty. This couldn't be more far afield from that.

So, again, what we have here is entry into a contract that they claim incidentally affects their rights, but we didn't prescribe rules of conducts for shareholders, we're not sanctioning shareholders, we're not investigating shareholders. Those latter kinds of things would be the kind of governmental powers that the non-delegation doctrine, as related to the private side, is concerned with, but it simply doesn't apply here.

THE COURT: Anything more you want to say on the delegation issues?

MR. KATERBERG: No, Your Honor. I think that covers it.

THE COURT: Okay. Thank you.

MR. KATERBERG: Thank you.

THE COURT: Mr. Knudson.

MR. KNUDSON: Thank you, Your Honor.

Just a prefatory comment about *Nguyen* that was mentioned earlier. In that case, they held that the party hadn't raised a de facto officer issue in the Ninth Circuit. The court accepted that argument before it in the Supreme

Court, so it's not untimely for us to be bringing this lawsuit now.

THE COURT: Okay.

MR. KNUDSON: I also want to point out that the Treasury Department has taken the position in *PHH*, and it's filed this in the *Collins* case that's mentioned in the briefs, that the government now takes the position that the single officer for clause situation is unconstitutional. I haven't heard anything from the Treasury here today addressing that particular issue.

With respect to the non-delegation --

THE COURT: Well, wait a minute. The Treasury in *PHH* argued that the -- why was Treasury involved in *PHH*?

MR. KNUDSON: Filed an amicus brief --

THE COURT: Oh, it was an amicus brief.

MR. KNUDSON: -- setting forth the position of the United States. They agreed with the conclusion of the panel that the for-cause removal provision applicable to the director of the CFPB violates the constitutional separation in powers. This is a filing called an advisory as filed in *Collins v. FHFA* in the Southern District of Texas - - --

THE COURT: All right. With the non-delegation doctrine let me start just by asking -- just assume that I agree with you that whether I'm supposed to be looking at the task or the role or whatever that it was governmental,

and that the agency was exercising governmental authority when it entered into the Third Amendment. Why is that legislative authority? It doesn't look to me anything like legislative authority to enter into a contract. That's not what Congress does. That's not what the Minnesota State Legislature does.

MR. KNUDSON: -- but the director, acting Director DeMarco, was acting as a public official.

THE COURT: I'm saying assume I'm agreeing. But the non-delegation doctrine is -- I'm not talking about the private one. I'm talking about the traditional non-delegation doctrine. It's the non-delegation of legislative authority. Entering the Third Amendment wasn't an exercise of -- even if it was exercising government authority, it wasn't legislative authority is my suggestion.

MR. KNUDSON: Well, the conservator was acting under authority granted by Congress in HERA, and it was given unfettered authority to do what it chose to do as a conservator. It could prescribe rules affecting the entities. In one of those terms, it was a contractual term, but it was still implicating the structure of these entities. In essence, what the director did was adopt a term that was completely inconsistent with what a conservator would be doing. It adopted a term that essentially gutted financial viability of Fannie Mae and

Freddie Mac. This is an unbelievable delegation of unfettered authority.

The *Perry Capital* decision says that the conservator is bound by no federal statute except HERA or the Constitution. So it has nothing -- and no court can tell it what to do unless it can find a violation of HERA. Interpretation of the conservator powers in *Perry Capital* basically removed any practical limitation on the powers of the conservator.

So we're saying that creating an agency with unfettered discretion, delegating to that agency something that's in violation of the non-delegation doctrine. So by being able to prescribe conduct, which is what a legislative function would be --

THE COURT: It is, but you're not suing them for a regulation prescribing conduct. You're suing them -- the heart of your lawsuit is for entering into a contract, and entering into a contract -- that's why I'm having trouble understanding what the non-delegation of legislative authority has to do. If you were suing them for -- typically when you see a non-delegation challenge, and you don't see many of them because they are hard to win, but when you see them, it's typically the agency has promulgated a rule, a regulation, and the argument is that's a legislative act and they were delegated legislative

authority without a guiding principle.

Here I just don't -- and if you know such a case, tell me -- I'm just not ever aware of a government agency's decision to enter into a contract being challenged on non-delegation grounds. Have you seen such a challenge before or a case involving such a challenge?

MR. KNUDSON: The argument we're making here is that there is no intelligible principle to guide the conduct of FHFA.

THE COURT: Yeah, and I understand your argument, and I follow that completely. But it doesn't matter unless the action you're complaining of is a legislative act, is an exercise of legislative power. That's what I keep getting stuck on.

MR. KNUDSON: It isn't necessarily limited to legislative acts. It can apply to this contracting situation, as well. So that Congress has to give the agency some intelligible principle as to how to conduct itself, how to --

THE COURT: In the exercise of legislative authority.

MR. KNUDSON: Well, the authority granted in the statute, yes. So we believe the non-delegation doctrine would apply to limit what Congress could authorize the agency to do given the limitations on judicial review in

4712(f), which basically says the court can't enjoin anything the agency tries to do unless you can find a violation of the statute itself. And the statute is devoid of any principles to guide the conduct of the agency when acting as a conservator.

THE COURT: Okay. Let me ask about the government action. So we start with the baseline that, generally speaking, when someone is a conservator, that person is stepping into the shoes of the entity for which he's acting as conservator. If that entity is private, then the conservator is acting in a private capacity when he acts on behalf of the agency. If it's public, I assume it would be public. So given that that's the general rule and given there's no dispute that Fannie Mae and Freddie Mac are private entities, just -- I recognize you read this and you have this in your brief, but I just want you to crystallize for me what you think the best argument or two are -- why is it that when this agency stepped into the shoes of private agencies as conservator their actions were governmental rather than private?

MR. KNUDSON: Let's talk through a timeline on this one then.

THE COURT: Okay.

MR. KNUDSON: First we have Director Lockhart bringing the companies into conservatorship acting as

regulator. Then on the back-end in the timeline we have Director Watt authorizing the payment of dividends as regulator because there is a regulatory provision, 12 CFR 1231.12, which says no dividends can be paid out without approval of the agency. So the entities go into conservatorship under a regulatory process. They continue to pay dividends to the Treasury being approved by the Director as regulator. So on the front-end and the back-end we clearly have the government controlling the conduct of these entities.

Then with respect to the Net Worth Sweep Rule, what the agency has argued in *Perry Capital* was it was acting in the governmental interest, in the public interest. It can't be heard here to argue otherwise. The money that they take that would go to the entities goes to the government. So, again, it's a public function.

So conduct of the conservator here should be deemed to be a public action because of the context in which power to direct the dividends arose out of a regulatory action. Payment of those dividends is done under a regulatory approval.

The choice the director made in 2012 to adopt or impose the Net Worth Sweep Rule was under a policy decision to essentially put these entities out of the housing market business. As of that time, they thought there should be a

different model for the housing market. Now, they didn't get rid of them, but they made it very difficult for them to operate going forward.

THE COURT: I don't know that this is relevant to anything, but they dumped tens of billions of dollars of taxpayer money into the entities. That seems like a silly way to try to put them out of business.

MR. KNUDSON: That was before the Net Worth Sweep Rule was adopted, Your Honor. Now the companies have turned around. They are making large profits, and the profits are all going to the Treasury.

So it was a situation where at the time it was adopted the market was turning around. These companies could be restored to financial stability. They had to continue this rule that essentially prevents that from happening.

THE COURT: Okay. But you want to argue the *Perry Capital* case here and we don't have the *Perry Capital* case here. We have this constitutional case.

So there's a couple of arguments -- I went through these with Mr. Katerberg, and I just want to clarify that I understand your arguments. These are arguments as to why when the agency entered into the Third Amendment they were, in your view, exercising governmental authority.

You talk about they exercised authority to alter

legal rights and obligations of third parties. Other than through entering into the Third Amendment, is there anything else you're referring to when you make that argument in your briefs?

MR. KNUDSON: That's our point, Your Honor.

THE COURT: Okay. And then when you say they were acting in the public interest, and you've just repeated that point, I understand that; I think that's a good argument for you.

When you talk about them suspending the application of the APA in HERA, are you referring to something other than the anti-injunction provision?

MR. KNUDSON: No, we're referring to that.

THE COURT: Okay. I just wanted to make sure I understand that.

Is there anything more you want to say about the non-delegation issues?

MR. KNUDSON: No, Your Honor. That should sum it up.

THE COURT: Okay. Thank you, Mr. Knudson.

Mr. Katerberg, is there anything more you wanted to say on the non-delegation issues?

MR. KATERBERG: Nothing more, unless Your Honor has questions.

THE COURT: Okay. Why don't we just take another

short break here. My court reporter has been going about 90 minutes. We'll come back and talk about the last two issues, which are the succession-clause issue and the res judicata. So we'll see you in about ten minutes.

THE LAW CLERK: All rise.

(A brief recess was taken.)

THE LAW CLERK: All rise. This court is now in session.

THE COURT: Please be seated.

I want to turn to the issue of res judicata. This was raised by Treasury. Are you going to argue it, Mr. Merritt?

MR. MERRITT: Yes, Your Honor.

THE COURT: Okay. Can I have you at the podium then, please.

Now, this issue dovetails with the succession-clause issue. Are you prepared to address that as well?

MR. MERRITT: Yes, Your Honor.

THE COURT: Okay. So I used it be a law professor before I became a judge, and I taught Civil Procedure, and this would have made a fantastic exam question on res judicata because there's, like, three really, I think, hard issues on this.

The first issue is whether the *Perry Capital* and

Saxton cases ended in final judgments on the merits. You say they did. Your opponents say they didn't. I think this is just a hard question. I'm wondering whether there is -- here's my first reaction to this, and it really -- like everything I'm saying today, it's just a first reaction subject to further thinking. If a lawsuit was dismissed on the basis of the succession clause, that does not feel to me like a judgment on the merits. That is essentially saying if I were to dismiss a lawsuit on the basis of the succession clause, I would be saying to the plaintiffs you don't have the right to adjudicate this lawsuit on the merits, somebody else has a claim on the merits, somebody else might, but you don't. That feels like it's akin to a standing ruling or a failure to certify a class ruling. That doesn't feel like a judgment on the merits to me. I'm saying you're not entitled to a judgment on the merits from me. That's why I'm dismissing the lawsuit.

The anti-injunction provision is interesting. That feels to me more like the merits. That's basically saying under the law, Congress has said you don't get a remedy for this even if you do find a wrong and, therefore, you lose. You don't get the remedy. There's lots of lawsuits where you lose because you're not entitled to remedy. Those feel like merits-based decisions.

So I guess my questions are, number one, what do

you think of my first reaction? And, number two, just assuming for the sake of argument that I'm right, what do I do with a case like *Perry Capital* which has both in it? It has some anti-injunction ruling in it, and it has some succession clause ruling in it.

MR. MERRITT: So regarding your initial thoughts on this issue, Your Honor, I think, as you admit, it can be a close issue. I think it's useful to contrast what a ruling on the shareholder succession provision does versus some other kind of precondition to suit or something like that, how it would operate.

What a ruling that says a claim is barred pursuant to the shareholders' succession provision says that if that plaintiff -- actually, the claim does not belong to him because it is a derivative cause of action, which is what was a necessary precondition of the findings in both *Perry Capital* and *Saxton*. So that is just saying that so long as a shareholder in the GSEs is attempting to bring any claim that is derivative in nature during the conservatorship that they don't have the ability to do that.

So I think that can be distinguished from something that they could easily fix, something like -- some of the examples cited in the Wright Miller in their briefs were failure to plead demand or like a failure to exhaust administrative remedies or something that you just kind of

send back and they can fix and they can come back.

I think on the shareholder succession provision at least so long as the conservator remains in effect and plaintiffs attempt to pursue claims that are derivative in nature, that they are precluded by doing so by the prior judgments adjudicating that issue.

THE COURT: But standing is not easily fixed. If you have somebody who sues and you can tell that person doesn't have standing to pursue that claim, that's not considered a judgment on the merits. It doesn't have preclusive effect later on.

Wouldn't a ruling that you don't have the right to bring a derivative action because only the conservator has the right to bring that action, wouldn't that be pretty close to a standing issue?

MR. MERRITT: It certainly does dovetail with the issue of standing because in many ways, as pointed out in our briefs and other places, the shareholder succession provision kind of operates in a similar way to the shareholder standing rule that has been long recognized essentially saying that shareholders of corporations cannot bring claims based on harms to the corporation, you know, in their own name.

I think, I mean, the main difference here is that this was -- the thing that deprived them of standing was the

statute itself, a statutory bar, which is in some ways different from kind of a finding based on standing.

THE COURT: Well, it's different than Article III standing, but then there's this doctrine that I find impenetrable called statutory standing or -- what's the word for the other -- prudential standing -- prudential standing, which it's just unintelligible, but that's not here nor there today.

So what about my second question? What happens if you have a -- you've given me two opinions that have both in them. They have both these doctrines cited in them. If, in fact, one is a judgment on the merits and one is not a judgment on the merits, what do I do about that?

MR. MERRITT: So in that situation you would be saying that -- I guess it probably doesn't matter if it's a hypothetical, but assuming the 4617(f) bar was not a judgment on the merits --

THE COURT: Right.

MR. MERRITT: I think our position is so long as there was a judgment on the merits -- on a basis that you could characterize it as a judgment on the merits that it would bar a later suit.

THE COURT: Okay. Let me skip to a later element. Three of the four elements of res judicata are kind of in play today. The last is whether it's the -- I forget the

exact way that it's put -- whether both suits are based on the same claims or causes of action.

So here there's a bitter dispute between my law clerk and me as to whether these are or are not on the basis -- to me they feel like they are based on the same claims. To me it feels like *Perry* attacked the legality of the Third Amendment on certain grounds and then *Saxton* attacked the legality of the Third Amendment on certain grounds, and this is just yet another case attacking the validity of the Third Amendment on just different grounds. And that's exactly the kind of claim splitting that res judicata is supposed to prevent. If you don't like the Third Amendment, you're not supposed to be able to bring a first lawsuit and make certain arguments and then bring a second lawsuit and bring other arguments and a third lawsuit and make other arguments. You're supposed to make all your arguments in your first lawsuit. But to my law clerk -- I hate to put words in her mouth, but she would put her argument better than me -- to her it feels differently. The earlier lawsuits were attacks on the Third Amendment. This lawsuit, although we all know it's an attack on the Third Amendment, isn't structured as such. It's an attack on the agency, the constitution of the agency.

Now, if the lawsuit is successful, the Third Amendment would fall because, as I said earlier today, you'd

be killing the host and the organisms would fall. But it isn't a lawsuit -- even though it mentions the Third Amendment a thousand times in the Complaint, it's technically a lawsuit attacking the structure of the agency and, therefore, this is a lawsuit that could've been brought before the Third Amendment was even signed. So she would ask how can it be about the Third Amendment when the exact same lawsuit could've been brought before there even was a Third Amendment? So, in her view, it's not part of the same claims. So why is she wrong and I'm right?

MR. MERRITT: Your Honor, I would humbly agree with your position on that. I think what the claim preclusion test looks at is whether the actions essentially challenge the same transaction or a series of transactions.

It also looks at what type of harm the action is getting at, like what is the basis for the harm that the plaintiff has suffered that they bring the action in. At that point, I would go to back to something Mr. Katerberg said regarding what the plaintiffs have actually alleged here that would give them standing and what would give them an injury in this case and that is the Third Amendment. I mean, without the Third Amendment it is true -- and this is one the reasons why Treasury has argued that there should be no claims against it, that the claims against it should be dismissed -- that this case is not a direct challenge to the

Third Amendment, but is instead structured as a challenge to FHFA's constitutionality. But at bottom what they're alleging their harm is is the Third Amendment, which is the same harm -- or harm inflicted upon them through what the Third Amendment did to the GSEs, which is the same harm that was at issue in all the prior cases, including *Perry Capital* and *Saxton*. So not only does this arise out of the same transaction, but it also is getting at seeking to remedy the same harm.

THE COURT: Okay. The third issue is the privity issue, whether these plaintiffs are in privity with the plaintiffs in the previous actions. That seems to turn on whether, at least in part, this is a derivative action. This goes to the succession clause issue, as well.

Just, again, on a 30,000-foot level, I'm sympathetic to your position. I agree with you that the way that we normally decide whether something is a derivative action is you look at who suffered the harm and who would be benefited by the remedy. It seems to me that, on first glance, there's nothing here that the FHFA did to the shareholders as shareholders. They did something to the companies, and the thing they did to the companies hurt the value of the shareholders' shares. But that's a derivative action.

Likewise, it doesn't feel to me like any remedy

would have anything to do with the shareholders, except indirectly. I'm not going to order anybody to pay any money to a shareholder. I'm not going to enjoin anybody from doing anything with respect to a shareholder. It feels like a derivative action.

There's two things that give me pause, though. One is they asked the question, and it's a legitimate question, is if they can't challenge the constitutionality of the agency in this way, who can?

Just assume that FHFA is unconstitutionally structured. Assume that the Third Amendment, along with everything else it did, is invalid because of it's unconstitutional structure. If they can't bring that claim, who can? Who can?

MR. MERRITT: Well, Your Honor, I think the answer to that -- I mean, even if it is that no one can bring that claim, I don't think there should be concern about getting to that point for the reasons stated in our brief. I mean, I think it's important to remember that, you know, the actual legal theories asserted here are, as you say, challenges to FHFA's constitutionality. So the notion that that constitutional violation cannot be challenged by anyone is not at issue here.

Assuming there was some party out there, such as a party affected hypothetically, of course, by FHFA in its

regulatory capacity or some party that was able to show direct personal injury as a result of the constitutional allegations that are at issue here, that party would not be barred by these provisions and would be able to bring a claim. And separately the plaintiffs have the ability to challenge the Third Amendment.

THE COURT: Well, what if the person is somebody harmed by the Third Amendment, though? How could anybody on earth who believed themselves to be harmed by the Third Amendment and believed that the Third Amendment was unlawful because of the constitutional structure of the agency, how could anybody get that claim heard? Or maybe the answer is nobody can.

MR. MERRITT: Yeah, in response to that I would submit that a party, a shareholder in the FHFA or in the GSEs that were unable to show direct personal injury as a result would -- unless -- sorry. I will back up on that. Unless a party was able to show direct personal injury -- if the only party was a shareholder in the GSEs that showed a derivative injury through the corporation to themselves, then that party would not be able to bring suit.

THE COURT: So essentially nobody, except the GSEs themselves, could sue if in fact the Third Amendment was unlawful because the FHFA was unconstitutionally structured?

MR. MERRITT: I think that's -- I mean -- for the

reasons we've stated, we don't think it would get to that point, but, yeah, I think that's right. I don't think there is any harm in that.

Again, one of the points made in the briefs is that the shareholder standing rule, which is kind of a similar proposition of law to have the shareholder succession provision operate, which basically says plaintiffs cannot bring claims based on injury to the corporation, that has been applied in other contexts too for findings based on the Constitution. So there would be no special --

THE COURT: The problem here is that by statute the claim can only be brought by the conservator, and the claim is against the conservator. Normally we don't give effect to statutory provisions that would literally bar -- would allow government agents to act unconstitutionally without anybody being able to bring them to account or to get a remedy for that, which seems -- unless -- this isn't mentioned in your brief, but I wondered, is it theoretically -- I assume it's theoretically possible for FHFA as conservator to sue FHFA as agent. I shouldn't say I assume. I mean, it seems like it's a possibility to me because the FHFA, as conservator, is stepping in the shoes of the GSEs. GSEs can sue FHFA. You didn't seem to contest this. Your opponent said, well, FHFA couldn't sue itself. There would

be an Article III problem. But it wouldn't -- at least it seems to me there's an argument that FHFA, as conservator, it's not suing as FHFA. It's suing as Fannie Mae. Fannie Mae can sue the FHFA, as unlikely as it would be that such a lawsuit would be brought.

MR. MERRITT: Yes, Your Honor. We didn't get into that in the briefs partly because we don't think that there is any basis for these constitutional claims asserted, especially insofar as they challenge the Third Amendment. But I think -- I mean, I haven't again scoured -- done full research on that, but I think the point you make is possible in theory and isn't that different from the situation in which derivative suits are often brought in which a -- you know, we're talking about situations in which the corporation is injured by something, a corporate board or something like that does, and should the corporation agree to -- like such as if demand is made and agree to pursue the action on its own would be a potentially similar situation.

THE COURT: The other argument they made that I'd like to ask you about -- as I told you, my first reaction is that this looks like a derivative lawsuit to me. But they characterize their claim -- and I don't know enough about the facts and the operative documents to know if this is true, but they say if hypothetically you have a case where a corporation takes an action that deprives one set of

shareholders of a legal right they have to benefit another set of shareholders, then the harmed shareholders could sue and it wouldn't be a derivative action. It's suing the corporation for favoring one group of shareholders over another. I mean, that's a shareholder claim, not a corporate claim. Okay? And they say, well, that's what happened here. We had a legal right to certain dividends. And I don't know if they are also arguing rights of corporate governance or whatever, but we had certain legal rights, and FHFA took those from us to give them to another shareholder, Treasury. So this isn't a claim we're making on behalf of the corporation to remedy a wrong to the corporation. We got screwed as shareholders to favor other shareholders, and that's the kind of lawsuit we're bringing here. If that's right, it doesn't sound derivative. What is your response to that argument?

MR. MERRITT: I would say, first of all, what they are -- again, what they are challenging here is the Third Amendment, which is not due to a lot of things you are describing. All it really does is renegotiate the dividend that was payable from a fixed rate to a variable dividend.

THE COURT: Did the shareholders of Fannie Mae preconservatorship, just as it was operating, did they have a legal right to dividends or only such dividends as Fannie Mae decided to declare?

MR. MERRITT: Preconservatorship?

THE COURT: Yeah.

MR. MERRITT: I can't speak on -- I know that there is -- the right to dividends were extinguished by the conservatorship, and that's kind of the era we're operating in here. I can't say with confidence.

THE COURT: Okay. I'm sorry, I cut you off. What is your response then to that argument?

MR. MERRITT: Okay. So one response is that, you know, if what the plaintiffs are arguing is essentially that -- I guess you could call it some sort of expropriation theory, that the value of their shares were taken -- you know, clearly what we would consider -- how we measure the value of the shares but was taken from them and given to Treasury. That is essentially an argument that economic value of their shares is what's being appropriated, and that is the kind of claim that has been classically considered derivative as the --

THE COURT: Well, if I understand it right, it's derivative -- if somebody outside the corporation does something to hurt the corporation and as a result of what they do to hurt the corporation the value of the shares is diminished, that's certainly a derivative claim. That's a classic derivative claim.

Now, are you talking about -- but they're talking

about something different, which is -- let's just talk about it hypothetically. Hypothetically the corporation's value is exactly the same. The corporation hasn't been harmed at all. But what has happened is the corporation has somehow acted to harm one group of shareholders to benefit another group of shareholders. The corporation hasn't been harmed. It's not seeking any remedy. That's how they're trying to portray what they're doing here. Why isn't that an accurate portrayal of what's happening here?

MR. MERRITT: If what their injury is is reduced value in the shares, that is an injury to the corporation.

There is another species of what is called economic dilution claims, when one shareholder gets more value in their shares as related to another shareholder, and that is also, in general, considered to be a derivative injury again, because regardless of --

THE COURT: When does that come up, like when an corporation issues additional shares and thus dilutes the existing shares?

MR. MERRITT: That's one way. So I think it can be useful to look at the cases finding an exception to the rule that that kind of behavior would be a derivative injury.

We specifically cited a case, the *Gentile* case -- which I thought was pronounced gentile, but I think it's

gen-tilly -- that essentially recognized that when you have a controlling shareholder and they take some sort of action -- transact with the corporation in a way that, you know, as set forth in the briefs, but causes the issuance of some sort of excessive amount of shares and for less consideration than that would be worth, that causes them to have an excessive amount of shares in a corporation vis-a-vis the minority shareholders and that also creates some injury to the minority shareholders' voting power, in that narrow circumstance this type of kind of economic dilution of the shares -- expropriation of economic valuation of the shares could be considered what they called "dual natured." As the recent Delaware Supreme Court decision in the *El Paso Pipeline* case made clear, the *Gentile* exception should be limited to its facts.

So in this case, plaintiffs did not even attempt to fit their claims into that or allege that Treasury is the controlling shareholder or it has voting rights or they were benefited and, most importantly, that plaintiffs' voting rights were in some way diminished based on the Third Amendment specifically. As the *El Paso Pipeline* court determined, extraction of solely economic value from the minority by a controlling shareholder does not constitute direct injury.

So I would point Your Honor as well to a couple of

other recent district-court cases that were dealing with similar allegations by GSE shareholders that the value of their shares had been expropriated in some way from them to Treasury and found that absent allegations of kind of a harm to voting power, something beyond extraction of economic value, that those were derivative in nature, and those would be the *Saxton* case in the Northern District of Iowa and the *Edwards* case in the Southern District of Florida.

THE COURT: Okay. Is there anything more you wanted to say on these issues?

MR. MERRITT: Not on these issues, Your Honor.

I don't know if this is the appropriate time, if you want to talk about it later, which is --

THE COURT: About Treasury?

MR. MERRITT: -- Treasury's main argument.

THE COURT: I figure at some point you want to talk about Treasury.

This is a puzzler. This is just such a hard case. There are so many hard issues. There aren't any claims against you per se. Nowhere in their 59-page brief do they anywhere suggest that Treasury violated the law in any way, so I get that. At the same time, they are seeking to invalidate the contract to which Treasury is a party. It's a weird lawsuit because somebody who is not a party to a contract is suing to invalidate a contract on the grounds

that one of the parties to the contract didn't have the ability, capacity, whatever to enter the contract. So I completely understand why they want both parties to the contract in the lawsuit, because they want the eventual judgment to bind both parties. They don't want to win and then have Treasury come in and say, wait a minute, we're not bound by that judgment and we're parties. But they also don't really have any claims against Treasury, maybe a declaratory judgment claim, maybe.

So I agree with you, there aren't any claims here. Treasury doesn't have to write a check here. That's completely true. But at the same time I understand why they want you in the lawsuit. I just don't know what to do with that.

MR. MERRITT: So Treasury can only respond to the Complaint as it's currently pled. And, you know, as you mentioned, the basis for Treasury being in this was kind of stated in our reply brief, which is this is what the plaintiffs characterize as an action to invalidate a contract to which Treasury is a party. But as I think has been made clear in today's discussions and in the briefs, this is not really what this action or at least -- it's an action to invalidate an agency.

THE COURT: We keep going back between what it really is and what it's being portrayed as. I understand,

and it's a little tricky.

MR. MERRITT: So I think given that kind of disconnect, you know -- the case as pled asserts five counts and asserts that Treasury has violated the President's removal power and Treasury has done all this, and having pled it that way, plaintiffs were certainly capable of, and have done many times, challenged this contract directly, challenged that it is invalid in its terms and that Treasury --

THE COURT: That's the blind alley they have put themselves in because they can't -- they're trying to not make this a claim to invalidate the Third Amendment based upon *Perry Capital* type of grounds. But if you are just genuinely bringing a lawsuit because you genuinely want to have an agency declared unconstitutional, then Treasury has no -- you've got no dog in that fight. So it's a --

MR. MERRITT: Right. I mean, that is the subject matter as it's presented. We're not a necessary or proper party to the adjudication of FHFA's status.

THE COURT: Right, not to that claim you're not. Right. Correct. Yeah. Okay. But other than that, I completely understand. No one here is pretending that there is any direct claim against you in the lawsuit.

MR. MERRITT: And, Your Honor, if I might make one more point in response to opposing counsel's argument about

what the government had filed in the *PHH* panel rehearing. I would just like to --

THE COURT: Oh, right, where they said you agreed with their position.

MR. MERRITT: That was an amicus brief in a different case involving CFPB, and the government has not taken any position with respect to FHFA and does --

THE COURT: Well, did Treasury in fact argue that the CFPB was unconstitutional because it had a single director instead of multiple directors?

MR. MERRITT: That was the thrust of the amicus brief in that case, Your Honor. I think -- just I would point out that has no relation to this case.

THE COURT: Well, except it's addressing the same issue, just different names.

MR. MERRITT: Well, one of the issues in the lawsuit that we don't think there is any reason to get to in this case for the reasons stated in the brief.

THE COURT: Okay. Well, it's possible on that issue I will end up ruling against both you and the plaintiffs and in favor of FHFA, but these are tricky times that we live in.

Okay. Thank you, Mr. Merritt.

MR. MERRITT: Thank you, Your Honor.

THE COURT: Yeah, Mr. Katerberg -- now, I've been

calling you kat-er-berg. Is it kate-er-berg?

MR. KATERBERG: I answer to both, Your Honor.

THE COURT: So when your parents told you how to pronounce your name, which one did they tell you?

MR. KATERBERG: Kate-er-berg would be the default.

THE COURT: Kate-er-berg, okay.

MR. KATERBERG: I have no objection whatsoever.

Your Honor, I'd just like to make some quick, discrete points mostly on the succession clause and the claim preclusion issues. We do join -- FHFA does join in those arguments.

First, Your Honor had a question about the entitlement of shareholders to dividends preconservatorship. I am completely confident, at least for common stock, it was discretionary. I believe it was discretionary for preferred stock as well. I can't say that categorically. I think in the Complaint they don't specify what series of preferred stock the three plaintiffs in this case owned. I believe it's discretionary for all of them. I'm sure we could get to the bottom of that. If I'm wrong about that, they will tell you so.

On the claim preclusion issue, the element that the same claims are causes of action, there is a very useful data point that I think it's worthwhile to throw into the mix, because some of the discussion, I think framed by

plaintiffs, has proceeded as if the prior cases, the APA claims, and the constitutional claims are sort of two paths that never shall meet. In fact, earlier this year, the case in the Southern District of Texas, *Collins v. FHFA*, was a case that blended the two elements.

So the *Collins* decision, which is 254 F. Supp. 3d 841, rejected all these challenges. Counts One to Three of the complaints sought relief under the Administrative Procedure Act, like the *Perry Capital* case and the *Saxton* case that we're relying on for claim preclusion.

Count Four, and this is going to sound familiar, challenges the provision in here that requires cause for removal of the FHFA director arguing that it's not constitutional violation of the separation of powers.

So I really think you have an Exhibit A that shows that it's only natural to join these claims in the same action.

I want to address a concern that Your Honor had about -- and I'll call it the concern if they can't challenge it, who can, referring to the constitutionality of FHFA, and I want to address that on two levels:

First, I don't think that that should actually be a proper area of concern, and we know that from, for example, Chief Justice Rehnquist's decision in the *Valley Forge v. Americans United for Separation of Church and State*

case where it essentially makes the point, and there are other cases that say the same thing, the fact that there may be a constitutional violation out there is not a reason to stretch standing requirements or to find some -- to assume that someone must have standing to bring the challenge; I mean, standing operates independently. We don't need to sort of lean toward finding that someone necessarily must have standing just because there is a constitutional issue adjudicated.

THE COURT: We can't avoid requiring standing because it's part of Article III, which is part of the Constitution. At the same time, the Supreme Court generally doesn't allow Congress to insulate people from their unconstitutional acts. At least we try hard not to construe statutes to make unconstitutional acts unremediable in court.

MR. KATERBERG: Sure. So that gets to my second point, which is FHFA does a lot of things other than the Third Amendment and other than the conservatorship issues that are in this case. There's plenty of times -- and I know because my firm represents FHFA in many of these cases -- there are plenty of times where they get sued for various regulatory actions that affect people in various capacities. So it's not as if the Third Amendment lawsuits are the exclusive avenue for any constitutional issues to be

brought to the attention of an Article III court. If those arguments have merits, they're going to --

THE COURT: Well, the question, to be more precise, how does someone who has been harmed by the Third Amendment -- there might be people harmed by other things, but how does someone harmed by the Third Amendment who believes that the Third Amendment was invalid because of the constitutional infirmities in the agency, how do they bring that claim if they can't bring it as a derivative claim, if they can't bring it as an individual claim?

MR. KATERBERG: I think the answer is if their harm -- I mean, their harm -- and we think it is derivative of the harm to the corporation -- then they don't own that claim. I mean, the idea behind derivative lawsuits is that in certain circumstances we're going to allow shareholders to assert the rights of the corporation. But, essentially, if the injury is to corporation -- and, again, we think it is -- then HERA has said we're altering the normal rule that will apply outside conservatorship where Delaware law and Virginia law allow derivative claims. In certain circumstances, it's the corporation's to bring.

Now, I know the next question is going to be, well, you control the corporation. The corporation is not going to do that. I guess I just don't think that's a problem. I mean, one way to look at it is in any sort of

market situation if two companies are suing each other for patent infringement or an antitrust claim or whatever and one of those companies buys the other, there's not going to be anybody anymore to bring the patent-infringement claim as to that action or to bring the antitrust claim, but that's not a problem because --

THE COURT: There you have both the wrongdoer and the person injured by the wrongdoing that become one. Here allegedly you have the people being harmed who aren't part of the -- they wouldn't be part of the one. Here you have plaintiffs who say we were harmed because party A hurt our corporation, party B. And if the only person who can sue party A for harming corporation B is the wrongdoer, is A, the claim won't get brought. I mean, it would be an argument in favor, recognizing the exception -- whether it be a conflict of interest exception or a reading statute so they don't foreclose constitutional claims unless it's clear -- but that's the argument.

I think you're acknowledging that if I agree with your argument, that this is a derivative suit and doesn't create an exception, then they're basically out of luck, plaintiffs.

MR. KATERBERG: Well, again, to sort of map it onto my hypo, you could have shareholders of a corporation that is the victim of an antitrust violation that believe

it's just the most terrible antitrust violation ever and you've got to go after all these guys, but if the defendant buys the plaintiff, they're not going to be able to assert that claim because the claim belongs to the corporation.

So if the claim is truly derivative -- and, again, we think here it is because the injury derives from the diminution in the value of the common stock -- then it's the corporation's choice to make. And if the corporation gets bought by the alleged wrongdoer, that lawsuit is not going to go on anymore. But I don't think that's anything that really we need to worry about as a policy matter.

Your Honor also asked about sort of harm to their interests as shareholders and whether that would make it other than a derivative case. I want to address -- I may not have taken these down exactly right, but I think Your Honor mentioned sort of dividends -- we talked about that -- voting rights, interest as shareholders. But I think if we pierce through -- I mean, fundamentally what they are complaining about, again, is the injury to the value of the stock. The dividends weren't there before. I mean, we can sort of divide it into three periods. There's the preconservatorship; dividends discretionary. But the moment of the conservatorship and the entry into the original PSPAs they weren't getting any dividends more at that point anyway. They weren't having voting rights at that point

anyway. So there maybe is a mismatch. I mean, to the extent they're complaining about those things, maybe they should be attacking the original entry into the conservatorship.

THE COURT: Oh, I see what you're saying. The before and after has to be not preconservatorship and Third Amendment. It has to be Third Amendment and conservatorship.

MR. KATERBERG: That's exactly right, Your Honor, because, I mean, really the Third Amendment altered the terms of how Treasury was going to get paid dividends.

THE COURT: Yeah, that's a good point. I hadn't thought of that. That's a good point.

MR. KATERBERG: They were already far under water; I mean, we're talking at the bottom of the ocean.

THE COURT: Apparently, they don't think so. Apparently, their briefs say they would have been just fine.

MR. KATERBERG: And I understand that, but --

THE COURT: They didn't need your hundreds of billions of dollars.

MR. KATERBERG: But I think for the purposes of the derivative claim -- I mean, this is the claim challenging the Third Amendment, and the proper mode of analysis is to look at how the Third Amendment specifically altered the legal regime, as opposed to --

THE COURT: I think you're right on that. I think that's a good point, and I had not focused on that.

MR. KATERBERG: So I want to briefly address the Department of Justice brief that they referred to. So this is -- I believe this is in the record, because I think it's Exhibit 1 to Plaintiffs' motion for summary judgment, ECF No. 46-1. First of all, just to clarify, it's not Treasury. It's the Department of Justice filing on behalf of the United States' amicus in the D.C. Circuit en banc proceeding in *PHH*. But the brief specifically distinguishes FHFA from the CFPB. It says that in contrast to the CFPB, the FHFA is a safety and soundness regulator for specified government-sponsored enterprises, namely Fannie Mae and Freddie Mac, for which the agency has acted as conservator since its conception. This is page 18 of Exhibit 1 to plaintiffs' motion for summary judgment. So it carves out FHFA. There's no way this can be favorably read as expressing a position.

THE COURT: Well, I heard what you read, but it didn't make any sense to me. Why would that have any implications for separation of powers?

MR. KATERBERG: Well, because Your Honor has read the panel opinion and you've seen that it is replete with references -- I think it's in the second sentence in the opinion -- to the exercise of executive law enforcement

power against citizens. That's what this is all about.

PHH Corporation had a $109 million fine against it. That is a thread that's woven throughout *PHH*. So what this is saying is that --

THE COURT: Oh, I see. So they are distinguishing between exercising that kind of enforcement authority and not?

MR. KATERBERG: That's exactly right. So they're saying that FHFA is a different category than CFPB, and it would be a separate analysis.

Secondly, page 19 of the same brief, the DOJ endorses the panel's conclusion that the proper remedy for a constitutional violation is to sever the provision limiting the President's authority to remove the CFPB's director, not to declare the entire agency and its operations unconstitutional.

This gets back to one of the points we were discussing at the very beginning this morning, which is when you do have in the rare case an instance where removal restrictions are found to be unconstitutional, as the *PHH* panel found, the *PHH* panel agreed with us that the remedy wouldn't be to go back and declare everything unconstitutional; as I put it, burn down the house. So DOJ in this amicus brief has registered that they agree with that as well, and that's another reason why Counts One and

Two in this case should be dismissed.

THE COURT: All right. Thank you, Mr. Katerberg.

Mr. Knudson. So since you have lots of sticky notes and since it's getting late, I'll just let you go and I'll stop you if I have any questions.

MR. KNUDSON: All right. First, let me respond to what Mr. Katerberg just said about what the government was saying with respect to the constitutionality of the CFPB and also what Treasury was saying about that, as well.

The advisory was filed in *Collins v. FHFA*. So it took the position, with respect to this agency, that the structure with the for-cause removal power was unconstitutional.

THE COURT: Is that in the record?

MR. KNUDSON: It is in the record. I have a copy of this, Your Honor.

THE COURT: Or you can just tell me where it is in the record. Does it have the ECF --

MR. KNUDSON: It's Document 46 in case 16-3113.

THE COURT: Okay. We can find it then.

MR. KNUDSON: Then with respect to why the issues here are more critical in terms of the constitutional violations as between the CFPB and the FHFA: One, both agencies are exempt or have exemption from executive oversight by the for-cause removal provision. Both agencies

are self-funding, so they are not subject to legislative oversight.

What makes this agency different is 4712(f), the insulation of that agency from judicial review. When we were talking about --

THE COURT: Forgive me if I'm wrong, but (f) just applies to its conservator function, right?

MR. KNUDSON: That's right, but that's what we have here.

THE COURT: Of course. It says a lot of other things other than to act as conservator for Freddie Mac and Fannie Mae, I assume, right?

MR. KNUDSON: Yes.

THE COURT: Okay.

MR. KNUDSON: So with respect to the argument that the agency was making regarding the fact there is no harm if only the agency can bring this constitutional challenge to its structure and, therefore, it's a derivative claim and barred for private enforcement action under 4712(f), nobody can bring that claim because, as you pointed out, there is an Article III problem here. And the *U.S. v. ICC* Supreme Court decision essentially says you can't expect the agency to sue itself for something that it has done improperly.

THE COURT: Is it conceivable that an agency, as conservator, could sue itself as agency?

MR. KNUDSON: No.

THE COURT: You don't think so?

MR. KNUDSON: Posited hypothetically, yes, you could put on both sides --

THE COURT: I know practically it's unlikely.

MR. KNUDSON: -- you don't have a real lawsuit then. So it would be an improper use of judicial power to resolve a case where there is no adversity. That's basically where the problem would be.

Then with respect to the question of whether or not there's been an adjudication on the merits yet of these constitutional claims, I would submit that your law clerk has analyzed it correctly, that this is in fact a different kind of claim.

The claims that have been adjudicated in *Perry* or *Saxton* were decisions that were decided on jurisdictional grounds, so lack of capacity to sue is not a determination on the merits. In fact, we cite to the restatement first of judgments as to how far that principle has been. Lack of capacity is not a determination on the merits. So we --

THE COURT: This isn't the issue we disagreed on, but that's okay. I'm sympathetic to your argument insofar as a dismissal is based upon the succession clause because that feels like lack of capacity. If you brought one of these lawsuits and I dismissed it because of the succession

clause, I would basically say the claim isn't yours, it's somebody else's. That's like saying you don't have the capacity to bring this claim. But if the dismissal is based on the anti-injunction provision, that's not capacity. That's saying you lose. You're not entitled to the remedy you are seeking. That feels to me more like it's on the merits.

MR. KNUDSON: Well, I would suggest then -- the *Saxton* court dismissed the case bringing claims against the agency under 4617(f).

THE COURT: That's the anti-injunction provision.

MR. KNUDSON: Yes, but that's a jurisdictional determination. The Court doesn't have the authority to rule on the merits of your claim. Congress has taken away that power, unless you can prove up a HERA violation.

THE COURT: Well, I have to look at it again, but I thought it was not that you have no authority to adjudicate violations, but a particular remedy you can't -- there's no sense in me talking about it, I can't remember what --

MR. KNUDSON: We've both been at it a long time this morning.

So with respect to -- you were concerned about, well, courts look for ways to prevent the constitutional violation from going without a remedy.

THE COURT: Correct.

MR. KNUDSON: HERA is modeled after the FIRREA statute. The Ninth Circuit and the federal circuit have addressed this concern because they had the same anti-injunction provision in them and said that if there is a manifest conflict of interest, even if it's a derivative claim, the shareholder can bring that claim. So we would urge the Court to follow form because the logic of that decision is consistent with the principle that if there is a constitutional violation, there should be a forum in which that issue can be addressed in the wrong remedy then, we believe, under state law or under federal principles of what would govern here. The *Kamen* case we say that federal law should determine whether or not these claims can be brought as direct claims, and as a constitutional issue we should be able to bring these claims.

THE COURT: Putting aside the -- let's just forget that you're bringing a constitutional issue and forget any kind of conflict or of interest or constitutional exception. As you heard me say, these kind of look to me like derivative claims. The FHFA didn't do anything to shareholders directly. They did something to Fannie Mae, and as a result of what they did to Fannie Mae, your clients' shares are worth less. But that's an indirect injury. That's not a direct injury.

The remedies you're seeking -- I haven't gone through them and checked them all against this, but overwhelmingly my memory is it's asking for money to be restored to the company, to declare a contract that the company is a party to to be invalid. That's all relief to the company. Your clients might indirectly benefit from that, but no one is cutting a check to them. I'm not ordering anybody to pay any money to them. This looks like a derivative. Why isn't this a derivative claim?

MR. KNUDSON: We cite to some of the Delaware precedent that suggests when you've got a reallocation of economic interests among shareholders or between shareholders that that's a direct claim.

THE COURT: How is the reallocation of the -- any time a company, like, issues new stock, there is necessarily going to be a reallocation, and yet I don't think -- I think those are derivative claims if somebody sues -- maybe I'm wrong about that.

Are you claiming that prior to the Third Amendment your clients had a right to dividends, a legally enforceable right to dividends?

MR. KNUDSON: Let's go before conservatorship then, because once conservatorship steps in, then payment of dividends is --

THE COURT: But the Third Amendment didn't change

your -- I mean, the Third Amendment, if that's the focus of your challenge -- as Mr. Katerberg correctly points out to me, if the Third Amendment is struck down, you don't go back to preconservatorship. You go back to Amendment II, the Amendment II world. In the Amendment II world you didn't have any right to dividends.

MR. KNUDSON: What has happened here is sort of reallocation of rights relative to shareholders. So, all of a sudden, what money is being paid out is going to Treasury as a shareholder, and it's not available to be paid to the individual, private shareholders. So the money is going to the wrong place as a result of the Net Worth Sweep Rule.

THE COURT: But did the individual shareholders have any legal right to that money as dividends?

MR. KNUDSON: Well, if we go preconservatorship, profits of the companies then get paid to the shareholders.

THE COURT: Do they have a right to the dividends or is it within this -- preconservatorship was it within the discretion of Fannie Mae to declare a dividend and how much the dividend would be?

MR. KNUDSON: There's a limit on what the board could decide to do. There is two points. One is they have a fiduciary duty to their shareholders, and if they're sitting on the money and not paying it out in dividends, they have to have a sound business reason for doing so.

Two, there are tax implications for not paying out money in dividends, so there is an incentive to do so. There is a justifiable expectation that you get paid some dividends as virtue of being a shareholder in what was at one time a profitable business.

THE COURT: If we go ahead now to the day before the Third Amendment was signed, did your clients have any rights to dividends then?

MR. KNUDSON: If there were profits coming in subject to the conservator allowing them to be paid, yes, they had a right to dividends.

THE COURT: Well, I mean, they were borrowing money to -- they weren't even able to fulfill their obligations to Treasury. I mean, there was no excess --

MR. KNUDSON: Prior to the Third Amendment, yes, the companies were losing money, but that situation changed significantly soon afterwards, and they've been making substantial profits in the recent years.

THE COURT: Okay. I'm sorry, I cut you off.

MR. KNUDSON: So my point there being is that under Delaware law this would be deemed to be a direct claim. Because we're asserting a situation where there is no other remedy available to us, you should adopt the manifest conflict-of-interest exception that would allow these claims to be asserted against the agency along the

lines to consider them against the FDIC.

At the end of the day, there is certain residual value of these companies the shareholders have that has been impacted by the agency's actions and so there, again, is a direct claim.

THE COURT: Well, that's not -- I mean, if somebody goes and burns down 3M's headquarters and all its contents, that has a huge value on the shareholders' stock, but it wouldn't be a direct claim. It would be 3M's claim.

MR. KNUDSON: Well, in that instance that's true.

THE COURT: So in terms of if the Third Amendment has some impact on the residual value of the companies, that strikes me as a derivative claim, not a direct claim.

MR. KNUDSON: But it's as between shareholders. Relative rights between shareholders becomes a direct claim by -- the shareholders have been harmed by this particular action. So if the company decides that they are going to give a preference to one set of shareholders over another, that's a direct claim and direct injury to the harmed shareholders.

THE COURT: Okay. Anything more you wanted to say?

MR. KNUDSON: I think that should sum it up, sir.

THE COURT: All right. Thank you, Mr. Knudson. I know it has been a long morning. Oh, I'm sorry, let me make

it one minute longer. Talk to me about your claims against Treasury. You heard what I said with Mr. Merritt.

MR. KNUDSON: Oh, yes. Sorry, Your Honor.

THE COURT: You don't have any claims against Treasury. At least your Complaint doesn't say Treasury did anything unlawful. There's five counts in your Complaint and none of them allege that Treasury violated any law.

MR. KNUDSON: Well, a very simple answer to that is that we believe we would have to make Treasury a party to this litigation in order to have relief that could be effective against it. It's a point you noted earlier. We think at least it's a permissive party defendant, if not a necessary party to this lawsuit.

We do cite the case out of South Dakota where some tribal members brought actions against a vendor and the issue was, well, doesn't the tribe have to be a party to this lawsuit, and the answer was yes, and sovereign immunity prevented them from being made a party to that lawsuit. Without the tribe being a part of the lawsuit, the claims were dismissed.

So we think we're in a situation somewhat similar where we need to have Treasury before this Court so it can be bound by the equitable relief we're seeking.

THE COURT: I think the problem is you need a claim against Treasury. It might be that if you amended

your Complaint to bring a declaratory judgment action or something, but as the Complaint is drafted, there just isn't a viable claim against Treasury is the problem.

I completely sympathize with why you want them in here. You want to make sure that if you do win and the Third Amendment is declared unconstitutional or invalid that it binds Treasury. You don't want to have to then defend a lawsuit by Treasury to re-argue the issues. There just isn't a claim against Treasury. So it may be that what you would have to do is amend your Complaint to bring a dec action or something against Treasury; I don't know.

MR. KNUDSON: We certainly could do that.

THE COURT: It's a tricky situation. It doesn't come up a lot.

MR. KNUDSON: Very tricky. We could amend that if that's the remedy you seek.

THE COURT: Thank you, Mr. Knudson.

Let's see. Mr. Katerberg, you had a --

MR. KATERBERG: Your Honor, may I be heard? I know we've been here for a long time. I just want to clear up something, a very discrete thing, because I think the question has been muddied a little bit about whether the shareholders could get dividends during conservatorship. It shouldn't be muddy because there is a very clear answer and it's in the record.

The original preferred stock purchase agreements, and I'm referring to Document 37-1 in the record, has a covenant. This was in September 7, 2008, four years before the Third Amendment. It says, Seller -- and the "Seller" is Fannie and Freddie -- shall not, and shall not permit any of its subsidiaries, to in each case without the prior written consent of Treasury declare or pay any dividend with respect to any of Seller's equity interest, which would cover all the common stock, preferred stock, everything. So that we should be very clear on that, there's no dividends for the private shareholders during conservatorship. That's with or without the Third Amendment.

Thank you.

THE COURT: Okay. Thank you.

Let's see. Mr. Merritt, did you have something more you wanted to say?

MR. MERRITT: Very briefly, Your Honor. Again, I don't want to belabor these points; we've been here awhile and you understand the issues.

With respect to something opposing counsel just said about that they believe Treasury is a necessary -- or would be properly joined, I would just submit that that's not how they've pled this case. As you pointed out, they submitted substantive claims against it and without factual allegations to back that up, they should be dismissed. If

they were to amend their Complaint to bring actions against Treasury, they would have to back those claims up with some sort of allegations that Treasury wronged them in some way out of this transaction. So I just wanted to make that clear.

Just briefly to address the point about the conflict of interest, because I know this isn't in our briefs, but we would urge Your Honor to follow the logic of the *Perry Capital* -- the D.C. Circuit in *Perry Capital* on that point which basically finds that the shareholder succession provision does not speak of any exceptions by its plain text.

The cases plaintiffs cite, *Delta Savings Bank* and *First Hartford*, are based on logic that wouldn't be applicable here when dealing with a bar. They analogized it to shareholder derivative actions, but if we were to recognize an exception to a statutory provision that bars such derivative actions every time there was a conflict of interest, the exception would potentially swallow the rule because presumably derivative actions are brought because there is such a conflict of interest. That's all I have.

THE COURT: Mr. Knudson, you want one more bite at the apple? Sure, come on up.

MR. KNUDSON: I want to clarify toward the end of my remarks if you think there is a defect in our Complaint

vis-a-vis Treasury, we would seek leave to amend and cure that defect.

THE COURT: All right. Thank you.

Thank you all. As I said, I know this has been a very long day. It's also a very, very difficult case. I appreciate your help with it.

I'll take the motions under advisement. We'll get an order out when we can. I don't think it will be anytime soon. There is a ton of stuff for us to research and think about here. I imagine it will be a while before I can get an order out, but we'll do the best we can.

Happy holidays to all of you, and safe travels for those of you who are traveling.

THE LAW CLERK: All rise.

(Court adjourned at 1:15 p.m.)

* * *

I, Debra Beauvais, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Certified by: s/Debra Beauvais
Debra Beauvais, RPR-CRR