

TOP STORY—U.S.: Dirks personal benefit question in Title 18 context remains for another day,(Jan. 11, 2021)

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Questions on the Dirks personal benefit test in criminal cases and on district court jurisdiction to hear constitutional challenges to SEC ALJs will have to wait for better vehicles.

The Supreme Court's first order list of 2021 is a long one and includes the disposition of two securities-related petitions. *Olan v. U.S.* has been granted, vacated, and remanded for further consideration, but the petitioner's question about the application of the *Dirks* personal benefit requirement remains to be addressed on another day. The Court also [declined](#) to hear *Gibson v. SEC*, which asked the justices to ponder district court jurisdiction for ALJ challenges.

Dirks question put on hold. The petition in *Olan* ([20-306](#)) was brought by hedge fund analysts seeking review of their conviction on charges arising from the misappropriation of confidential information, including wire fraud and insider trading. The analysts had received information about a potential change in various Medicare reimbursement rates and then recommended that their employer trade based on that information. The Second Circuit [upheld](#) the convictions in late 2019, finding that the *Dirks v. SEC* (1983) personal-benefit test does not apply in criminal prosecutions under the wire fraud and securities fraud provisions of Title 18 of the U.S. Code. The court also held that confidential government information may constitute "property" for purposes of the same statutes.

The petition presented two questions, the first of which asked the Court to consider the Second Circuit's holding that information about a proposed government regulation is a "thing of value" or "property." No doubt central to the Supreme Court's order is the holding in *Kelly v. U.S.*, which was decided after the Second Circuit issued its opinion. In [Kelly](#), the Court held that a scheme to alter a regulatory decision that did not aim to obtain money or property could not have violated the federal-program fraud or wire fraud laws. The petition argued that the Second Circuit's holding conflicts with *Kelly Cleveland v. U.S.* (2000), which held that a gaming license was not "property" while in a state government's hands; both of these cases would have come out the opposite way under the appellate court's analysis, the petition said.

A one-paragraph [memorandum](#) filed by the Solicitor General for the U.S. in late November 2020 urged the Court to grant the petition for certiorari, vacate the decision below, and remand the case. The memorandum noted that a GVR order in light of *Kelly* would be appropriate to allow the Second Circuit to consider the issue in a different posture. While *Kelly* was discussed in the petition for certiorari, it was previously mentioned only in supplemental letters addressing the petitioners' motions to stay the court of appeals' mandate. The GVR order also embraces the petition in *Blaszczak v. U.S.* ([20-5649](#)). The petitioner in *Blaszczak* was a codefendant below with the *Olan* petitioners and was the individual from whom they received the information at issue. The *Blaszczak* petition asked the same questions as the petition in *Olan*.

The petition in *Olan* raised a second question that was not addressed by the GVR order: whether the *Dirks* test requiring proof of personal benefit to establish insider trading applies to Title 18 statutes that proscribe fraud in language virtually identical to the Title 15 antifraud provisions at issue in *Dirks*. According to the petition, the Second Circuit read *Dirks* as establishing the personal benefit test based on the statutory purpose of the Exchange Act. The protection of the free flow of information in the securities markets does not exist in the Title 18 context, but petitioners argue that the provisions of Title 18 use identical language as the analogous antifraud provisions of the Title 15 securities laws. Nothing in *Dirks* limits the holding to Title 15 or suggests that the Court intended to implement a statutory purpose unique to Section 10(b) fraud cases, they say. While the petition maintains that the Second Circuit has essentially erased the personal benefit requirement from criminal insider trading law, this question will remain open for now.

Administrative law judges. The Court also declined to hear *Gibson v. SEC* ([20-276](#)), which asked the justices to consider the question of federal district court jurisdiction to hear constitutional challenges to the authority of the SEC's administrative law judges. Under the statutory review scheme set out in the Exchange Act, there is no right of judicial review for structural constitutional challenges until there is a final order (and then exclusively in the appropriate court of appeals), and this is what the [Eleventh Circuit](#) and [district court](#) said here.

The petition asserted that individuals like are deprived of the ability to seek relief in the federal district courts before they suffer the costs of defending against the SEC's charges. For its part, the SEC noted that the Court has previously denied petitions raising questions similar to *Gibson's* and argued that the statutory review scheme shows a clear intent by Congress to deny review in the district courts in cases like this and to provide for review in the appellate courts. Further, no court of appeals has found that the statutory review scheme may be bypassed, and, in the meantime, the expense and other burdens of litigation are "part of the social burden."

It is worth noting, as did the SEC in its [response](#), that there are currently other, perhaps better, vehicles than *Gibson* to resolve the question presented. Cases are pending before the [Fifth](#) and [Ninth](#) circuits in which, unlike *Gibson*, the plaintiffs have not yet had their evidentiary hearings. A circuit conflict emerging as the result of these decisions may then warrant the Court's review.

Read the Docket. These cases, and others before the Court may be referenced in the latest version of the [Supreme Court Docket](#). Issued opinions, granted petitions, pending petitions, and denied petitions are listed separately, along with a summary of the questions presented and the current status of each appeal.

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