

Navigating Federal Agency Appeals: Lessons in Error Preservation

Appealing Strategies Podcast

Thompson Coburn LLP

Intro [00:00:01]:

Welcome to Appealing Strategies, the podcast where we provide practical tips to trial and appellate lawyers on strategies for winning on appeal. Here are your hosts, Douglas Lang and Booker Shaw.

Douglas Lang [00:00:18]:

Welcome to Appealing Strategies, sponsored by Thompson Coburn LLP. Hello, I'm Doug Lang, a retired appellate judge and practicing appellate lawyer at Thompson Coburn, along with my Thompson Coburn colleague Booker Shaw, who's also a retired appellate and trial judge practicing at Thompson Coburn as well. Between the two of us, we've decided or sat on panels deciding thousands of appeals, and we're going to discuss some of the lessons that we learned as judges and in private practice.

Also joining us is Adrienne Clair, who's a Thompson Coburn partner, member of our Management and Executive committees, and who practices in our Washington, D.C. office. Adrienne has devoted her legal career to representing clients regarding energy regulatory and appellate work. Adrienne's expertise will be especially helpful today since we will discuss the complex world of federal regulatory agencies and how litigation can erupt out of a regulatory process. In particular, we're going to focus on dilemmas of how to ensure your client can get before a federal agency to make their position known and moreover, what can be done in the way of court litigation if the agency either freezes your client out of a proceeding or decides against your client's position.

Specifically, we're going to discuss what happened in the fairly recent United States Supreme Court case of *Nuclear Regulatory Commission v. Texas* as found at 145 Supreme Court 1762 and it's a June 2025 case. First, I'll ask Adrienne to tell us in short order what the new Nuclear Regulatory Commission actually does.

Adrienne Clair [00:02:33]:

Sure, and thank you. The Nuclear Regulatory Commission, or NRC, is an agency that was created by Congress in 1974 to ensure the safe use of radioactive materials for beneficial civilian purposes while also protecting the environment. The NRC has broad responsibility for licensing, oversight and regulation of nuclear energy technology and radioactive materials. Significant for our discussion today, the NRC is like every other federal agency. They're creatures of statute. The NRC was specifically established by the Energy Organization Act of 1974, and as creatures of statute, the NRC, like every other federal agency, has only the power and authority that's granted to it by its enabling statutes by Congress, and those agencies have specific regulations, as does the NRC, that then in turn implement their statutory authority. As was the case in *NRC v. Texas*, the parties' rights to participate in agency proceedings and then in turn in appellate litigation are set forth in the governing statutes and regulations.

Douglas Lang [00:03:40]:

Well, this case has a peculiar twist and involves two appeals by the same parties. One, the appellant parties, the State of Texas and Fasken, won, and one, they lost. It demonstrates how the Supreme Court will curtail parties' efforts to get two bites out of the apple. Adrienne, in this *NRC v. Texas* case, what was the basic storyline?

Adrienne Clair [00:04:10]:

Sure, I'll talk about the substance of it first, and then I know that Judge Shaw will talk about some of the sort of procedural machinations that the case went through. There are over 50 power plants in the United States that generate electricity for our homes and businesses. However, as you may know, nuclear fuel that has been used in a reactor becomes inefficient for future use. And that fuel is referred to commonly as spent fuel. It's also called used fuel or irradiated fuel. And the spent fuel has to be disposed of someplace. The problem is that some plants are shutting down, and on-site storage won't work as a long-term solution.

So in the past, the Yucca Mountain Nuclear Waste repository in Nevada was where the spent fuel had been sent. The federal government has now decided to look for additional sites for storage. More specifically, this case deals with private businesses that have sought licenses to store spent fuel off site and away from the nuclear power plant. One such licensing proceeding is what this case is about. Relevant to our discussion, the appellants here did not satisfy the statutory requirements and regulations applicable to the NRC in order to have party status. Failure to have party status in turn deprived them of certain rights, including the right to appeal the NRC's licensing determination.

Douglas Lang [00:05:31]:

With that background, Judge Shaw, how did this litigation become big enough to eventually get to the Supreme Court of the United States?

Booker Shaw [00:05:40]:

Well, this case involves the interesting situation where the State of Texas and a private landowner pursued two separate appeals in two separate circuit court regarding the same adverse regulatory ruling in the licensing process that Adrienne has just outlined. Both of these cases involved an application before the NRC for a license to construct a temporary off-site nuclear fuel storage facility. The landowner, Fasken, whose property was located near the site, opposed the granting of the license and filed a petition to intervene in that licensing proceeding before the NRC. The Commission denied that intervention, so Fasken appealed the denial of that intervention to the D.C. Circuit Court of Appeals. The test under the NRC intervention regulations was whether the intervener offered a "sufficient" contention, defined as, "sufficient information to show that a genuine dispute exists with the applicant licensee on a material issue of law or fact." Fasken claimed the Commission erred because it ruled contrary to the intervention regulations.

Fasken did not argue that the regulations were inconsistent with the statute because they exceeded the statutory requirements. However, the D.C. circuit ruled against Fasken. Now, Fasken did not seek *en banc* review of the denial of intervention, nor did it petition for certiorari. Thereafter, the Commission issued a draft environmental impact statement regarding the effect of an issuance of

the permit, and the Commission then granted a license to build and operate the proposed facility. Fasken and Texas decided to try again, and this time they appealed the granting of the permit to the Fifth Circuit Court of Appeals on the ground that the Commission had no statutory authority to issue the permit. The Commission argued that Fasken had no standing to bring the action because only a party can appeal the decision. Neither Texas nor Fasken were parties because one can only be a party if one is a permit applicant or one whose petition for intervention was granted.

However, the Fifth Circuit agreed with Fasken's argument that the Commission's granting of the permit was *ultra vires* and that the Commission acted entirely outside of its statutory authority to grant permits for off-site temporary storage facilities. So neither Texas nor Fasken needed to qualify as a party under the Hobbs Act to make their challenge, and the Fifth Circuit vacated their permit. Fasken also argued, as it did in the appeal to the D.C. Circuit Court, that the Commission erred in denying its intervention. However, this time Fasken contended that the regulations respecting intervention were inconsistent with the statute.

Douglas Lang [00:09:09]:

So we've got two appeals going. One, the State of Texas and Fasken win. The other, they get poured out. So Adrienne, explain how the Supreme Court resolved this matter.

Adrienne Clair [00:09:23]:

Sure. So there were some interesting legal strategies applied in the Supreme Court proceeding, but none of them survived the Court's review. First, on the issue of intervention, as Judge Shaw explained, Fasken had not preserved their right to challenge the intervention. The denial of the intervention before the D.C. Circuit and the Supreme Court upheld that ruling. The Supreme Court also addressed the *ultra vires* claim and it essentially ruled that the *ultra vires* theory was inapplicable and that the theory was a “dressed-up” typical statutory authority argument. The Court referred to the argument as a “fairly common maneuver” when a litigant tries to squeeze its argument into a very narrow exception.

So on both grounds, the intervention as well as the *ultra vires* claim, the Supreme Court denied review.

Douglas Lang [00:10:13]:

Well, Judge Shaw, the Supreme Court gave a clue about what argument might have worked at the D.C. Circuit level but was not asserted by Fasken. What was that?

Booker Shaw [00:10:26]:

Well, Judge, as Adrienne mentioned, when Fasken appealed to the D.C. Circuit Court, they argued only that Commission erred by improperly applying the regulations. The Supreme Court remarked that it was not until the appeal to the 5th Circuit that they claimed the regulations were inconsistent with the statute. The Court further noted that Fasken did not request *en banc* review nor petition for certiorari. So it's not clear how the case in the D.C. Circuit would have turned out had the inconsistency argument been made. But the Supreme Court hinted that it might have decided the Commission erred in denying intervention. This, of course, demonstrates that to bring an argument

that the lower court or agency erred, it is essential to formulate and present all of your appellate arguments at each and every opportunity.

Appellate courts, indeed the Supreme Court, will not give a party two bites at the apple or a do-over opportunity.

Douglas Lang [00:11:27]:

Well, Adrienne and Judge Shaw, of course, that gives us some idea of what one should do and maybe not do. And certainly in remarking about the D.C. Circuit case, the Supreme Court kind of baited everyone and said, well, you didn't try to have a rehearing *en banc* and you didn't come to us. So it's kind of like too bad. But we really don't know if their position would have been one that the Supreme Court would have done something else with.

Well, the next podcast, and there will be one because we're doing a series of these, as some of you know at this point, it'll be on other trial tactics and preserving points on appeal. So I want to thank my colleagues Judge Booker Shaw and Adrienne Clair for the tips about error preservation.

Remember, if you don't preserve error, you're likely out of luck. So folks, until next time, thank you.

Outro:

Thank you for listening. Please be sure to follow us on your favorite podcast player. If you have questions, visit thompsoncoburn.com to connect with our team.