

[Securities Regulation Daily Wrap Up, ENFORCEMENT—U.S.: Jarquesy reply brief assails SEC’s administrative proceedings as in-house courts, \(Oct. 12, 2023\)](#)

Securities Regulation Daily Wrap Up

[Click to open document in a browser](#)

By [John Filar Atwood](#)

Jarquesy urges the Supreme Court to affirm the Fifth Circuit’s holding that the Seventh Amendment forbids the adjudication of the Securities Acts’ anti-fraud provisions in jury-less administrative proceedings.

George Jarquesy has filed a brief for respondents in his suit challenging the SEC’s administrative proceedings process in which he argued that administrative proceedings are jury-less in-house SEC courts that are prohibited by the Seventh Amendment and by the separation of powers doctrine. He further argued that the administrative law judge (ALJ) that presided over his administrative trial sat in violation of the constitutional separation of powers and the Take Care Clause of U.S. Constitution ([SEC v. Jarquesy](#), October 12, 2023).

Jarquesy first claimed that the Seventh Amendment guarantees the right to trial by jury in “suits at common law,” encompassing legal, as opposed to equitable, claims for penalties. Citing *Tull v. U.S.*, he noted that it is well established that securities fraud claims seeking penalties, at least the sort charged against him, are legal claims for which the Seventh Amendment applies.

He went on to discuss how denying a jury trial cannot be reconciled with eighteenth century English law, or with the intent of the writers of the Seventh Amendment. He said that the written record from the ratification era establishes that the Seventh Amendment was included in the Bill of Rights in material part to prevent Congress from creating forums for civil adjudications by government against citizens on statutory claims without any jury trial rights. With SEC administrative proceedings, Congress has done just that, he claimed.

Public rights doctrine. Jarquesy noted that the SEC stated in its [merits brief](#) that juries are not required when the government seeks penalties for common law claims for fraud of the sort it pursued against Jarquesy. The government based its position on an interpretation of the public rights doctrine, asserting that when government sues on behalf of the “public” to enforce statutory claims, the claim is a “public right” which can be tried outside of Article III courts without juries.

He countered that whether a claim is a public or private right depends not on the identity of the plaintiff but on the nature of the underlying claim. Unlike disputes stemming from government benefits and franchises, or where the government is the real party in interest, he stated, SEC fraud actions for penalties are private rights requiring fact-finding by a jury.

The Fifth Circuit’s holding in this case is well supported by Seventh Amendment jurisprudence, he argued, including by the standards laid out in the Supreme Court’s ruling in *Atlas Roofing v. Occupational Safety Comm’n*. He noted that the SEC believes the Fifth Circuit erred by relying on the Supreme Court’s post-*Atlas Roofing* decisions which the government deems “inapposite” because they addressed other aspects of the public rights doctrine. Jarquesy contended that those other aspects are controlling, as they further affirm the anti-fraud claims against him to be private, not public, rights. Later cases such as *Thomas v. Union Carbide Agricultural Products Co.* and *CTFC v. Schor* backed away from *Atlas Roofing* which can no longer be said to control Article III or Seventh Amendment analysis, he maintained.

Congress should control. Jarquesy’s second line of argument pointed out that the Supreme Court has long held that the assignment of statutory claims to administrative forums is exclusively within Congress’ control, constituting a quintessential legislative power. However, Dodd-Frank Act Section 929P(a) vested that power

instead with the SEC, purporting to allow the agency to decide for itself whether a claim is to be litigated before an Article III judge with a jury or in its own administrative courts.

Jarquesy said that the SEC has conceded that this authority was transferred without any criteria or “intelligible principle” to constrain the SEC’s exercise of that power. In Jarquesy’s view, this constitutes a textbook violation of the nondelegation doctrine and requires that Section 929P(a) be held unconstitutional and vitiating the proceeding prosecuted against him.

Separation of powers. Jarquesy also argued that the ALJ who presided over his administrative trial sat in violation of the constitutional separation of powers and the Constitution’s Take Care Clause. He noted that the SEC has agreed that ALJs are inferior constitutional officers who enjoy multiple layers of for-cause tenure protection from removal by the President. Specifically, the ALJs are protected from termination by a statutory “good cause” standard and are hired and fired by an external agency, the Merit Selection Review Board, which itself is protected from removal, he said.

The Take Care Clause, he continued, forbids the insulation of inferior officers from removal by more than one level of tenure protection. He stated that for federal executive agencies, the Supreme Court has recognized a singular, narrow exception to the rule of “unrestricted removal power,” an exception applicable only to those officers who have “limited duties and no policymaking or administrative authority.”

That does not describe the SEC’s ALJs, Jarquesy argued. He claimed that the SEC is effectively urging the Supreme Court to create an additional exception for its ALJs, claiming that their adjudicative role is different, but for reasons that contradict the Court’s recent precedents and do not withstand scrutiny.

The case is [No. 22-859](#).

Attorneys: Elizabeth B. Prelogar for the SEC. Sidney Michael McColloch (S. Michael McColloch PLLC) and Karen Lundskow Cook (Karen Cook PLLC) for George R. Jarquesy, Jr. and Patriot28 LLC.

Companies: Patriot28 LLC

MainStory: TopStory DoddFrankAct Enforcement FedTracker Securities FraudManipulation GCNNews
InvestmentAdvisers RiskManagement SupremeCtNews