

In SEC v. Jarkesy, Supreme Court Leaves Open Constitutional Challenges Related to FTC Structure and Process

A photograph of a modern building with a curved facade and large glass windows, set against a light blue sky. The building's lines are curved and repetitive, creating a sense of depth and architectural interest.

3 MIN READ

June 28, 2024, 10:51 AM

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In a much-watched case concerning the administrative state, on June 27, the Supreme Court decided in *SEC v. Jarkesy* that defendants facing a fraud suit by the SEC have a Seventh Amendment right to a jury trial in an Article III court, rather than an administrative proceeding where the agency plays “the roles of prosecutor, judge, and jury.” Why are antitrust lawyers writing about this case? The Court also had granted cert on two other important issues, which could affect the FTC’s structure and process: (i) whether statutory provisions that authorize the SEC to choose to enforce the securities laws through an agency adjudication instead of filing a district court action violate the nondelegation doctrine; and (ii) whether Congress violated Article II by granting for-cause removal protection to administrative law judges (“ALJs”) in agencies whose heads enjoy for-cause removal protection. The Court did not reach those issues because the Seventh Amendment decision alone resolved the case. The Fifth Circuit’s nondelegation and removal holdings remain good law.

Regarding the nondelegation question, the Fifth Circuit held that Congress had violated the Constitution by failing to provide an “intelligible principle” to guide the SEC’s authority over “whether to bring enforcement actions in Article III courts or within the agency.”

Regarding the ALJ removal question, the Fifth Circuit held that the “two layers” of for-cause removal protections for SEC ALJs violate the Constitution. SEC ALJs only are removable for cause by SEC Commissioners, and likewise, SEC Commissioners only are removable for cause

by the President. Thus, SEC ALJs enjoy two layers of for-cause insulation from the President's removal power, which the Fifth Circuit held to violate the President's authority in Article II to "take Care that the Laws be faithfully executed."

While *SEC v. Jarkesy* specifically concerns the SEC, the Fifth's Circuit's decision has the potential to affect the structure and process of other agencies as well, including the FTC. First, the FTC's enabling statute is similar to the SEC's in that it provides the FTC with the ability to choose whether to sue parties in federal district court (i.e., an Article III court), or in the FTC's internal Part 3 system. It is unclear how the FTC's discretion to choose between bringing an action in Article III versus Part 3 (particularly for permanent injunction actions) could be distinguished from the SEC's, which the Fifth Circuit held to violate the Constitution's nondelegation doctrine.

Second, FTC ALJs enjoy double insulation of for-cause removal similar to SEC ALJs. FTC ALJs only are removable for cause by FTC Commissioners, and likewise, FTC Commissioners only are removable for cause by the President. Therefore, it is unclear how FTC ALJs' removal status could be distinguished from SEC ALJs', which the Fifth Circuit held to violate the Constitution's Take Care clause.

While these holdings remain good law in the Fifth Circuit, other courts of appeal may reach different conclusions. Therefore, it may only be a matter of time before a circuit split ripens, and these fundamental constitutional questions once again reach the Supreme Court.

For additional reading about constitutional questions related to FTC practice, see (i) Dwinell and Minerva, *Recent Challenges to FTC Constitutionality: Surveying the Landscape*, and (ii) Steinthal, *Did the Supreme Court Just Make It Harder for the FTC to Block Mergers?*.

“Since the answer to the jury trial question resolves this case, we do not reach the nondelegation or removal issues.”

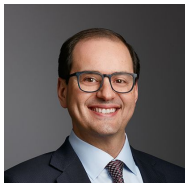
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”[T]he dissent would permit Congress to concentrate the roles of prosecutor, judge, and jury in the hands of the Executive Branch. That is the very opposite of the separation of powers that the Constitution demands.”

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