

IP HOT TOPIC

SCOTUS Administrative Law Case Potentially has Significant Implications for IP Law

Securities and Exchange Commission v. Jarkesy

On Wednesday, November 29, 2023, the US Supreme Court heard oral argument in *Securities and Exchange Commission v. Jarkesy*, a blockbuster administrative law case that presents three important questions about the powers and structure of the SEC. The three questions are (1) whether the statutory provisions authorizing the SEC to seek civil penalties in administrative enforcement proceedings violate the Seventh Amendment; (2) whether Congress violated the non-delegation doctrine by authorizing the SEC to choose to bring enforcement proceedings in either an administrative tribunal or in federal court; and (3) whether Congress violated Article II by granting for-cause removal protection to administrative law judges (ALJs) in US federal agencies whose leaders likewise enjoy for-cause removal protection.

Why does this matter for IP lawyers? It matters because an affirmative answer to any one of these questions would have huge implications for the functioning of all federal administrative agencies, including the U.S. Patent & Trademark Office and the International Trade Commission. Consider two examples. First, a decision in Jarkesy's favor on question (1)—depending on how broadly it is written—could call into question the Supreme Court's holding in [Oil States](#) that adjudicating patent validity in IPR proceedings does not violate the Seventh Amendment. That is because Oil States rested its Seventh Amendment holding exclusively on the Court's prior holdings that the Article III and Seventh Amendment questions rise and fall together. But some of the Justices' questions suggested that perhaps the Court should decouple those two inquiries—in which case the stated basis for the Seventh Amendment holding in Oil States would no longer be good law. Second, a holding in Jarkesy's favor on question (3) would mean that ITC ALJs' for-cause removal protections are unconstitutional.

Virtually all of the two-hour-plus argument focused on the first question presented. In general, the more conservative justices appeared skeptical of the SEC's position on that question and friendlier to Jarkesy's, while the more liberal justices appeared skeptical of Jarkesy's position and friendlier to the SEC's. But the argument did not provide sufficient clues to form the basis of a reliable prediction on how the case is likely to come out—particularly since two of the three questions presented were barely discussed at all.

We will be following the case and will provide further analysis following the decision, which is expected by June 2024.

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