

SEC as Investigator, Prosecutor and Judge: Defendant's Right to Jury Trial

By Aditya Parolia, LLM Candidate 2016 | November 16, 2015

The [New York Times recently](#) ran an article criticizing SEC's filing of securities cases before its own judges—administrative law judges employed by the SEC. Last year, the [Wall Street Journal weighed in](#) against SEC being prosecutor and judge in its own cause. On a practical level, the criticism is that SEC is filing more cases before its judges to side step federal courts where it does not have a successful record of winning. On a doctrinal level, the SEC's new policy is decried for being constitutionally suspect, being allegedly against the tenets of due process, equal protection and a right to jury trial.

The clamor against SEC's new policy comes in the wake of numerous lawsuits pending before federal courts challenging the constitutional validity of adjudication by SEC judges. The criticisms seem to carry water in the light of the fact that SEC rarely loses before its judges. However, the arguments against adjudication by SEC judges have not withstood doctrinal scrutiny. It behooves us to ask: does the SEC have the power to file cases before its judges?

SEC definitely has the statutory power to file cases before its judges. Although this power was limited prior to 2010, the Dodd Frank Act of 2010 expanded SEC's jurisdiction and empowered its judges to issue orders and levy fines, which was previously only done by federal courts. University of Pennsylvania [Professor David Zaring](#) and other scholars agree that SEC's policy of filing more cases before its judges is a reasonable interpretation of the 2010 Act that should be given *Chevron* deference. If SEC has the requisite authority, then the next question is: whether the statutory power conferred on SEC is constitutionally valid?

The constitutional issues pertaining to SEC judges continue to be contested in federal courts. In view of the above, the outcomes in those cases seem to be a foregone conclusion. In June 2015, US District Court, Northern District of Georgia, held that federal courts have the jurisdiction to review SEC proceedings. Nevertheless, on merits, the court held that the Seventh Amendment does not apply to SEC administrative proceedings. In September 2015, US Court of Appeals, District of Columbia, held that federal courts' power to review securities cases is limited to the exclusive scheme provided under the securities laws. The court affirmed the lower court's dismissal of the suit for lack of subject matter jurisdiction.