



Thoughts from the Board

The United States Supreme Court appears to be on the verge of causing some confusion in the enforcement of the Federal Code of Regulations. Most violations of the various regulations, covering the full gambit of federal agencies, are placed before Administrative Law Judges (ALJ) for resolution and imposition of penalties. However, the 5th Circuit Court of Appeals issued a ruling which placed the future of such practice in question. The case of *Jarkesy vs SEC*, has the potential of turning the long running use of ALJs in jeopardy. The Supreme Court agreed to hear *Jarkesy vs. SEC* after the SEC petitioned it to review the case following a May 2022 decision from the 5th U.S. Circuit Court of Appeals in New Orleans. The 5th Circuit sided with the plaintiff and ruled that the SEC's ALJ system was unconstitutional violating 3 different provisions of the constitution since the ALJs are not Article III judges. Justice Brett Kavanaugh said, "What sense does it make to say the full constitutional protections apply when a private party is suing you, but we're going to discard those core constitutional protections when the government comes at you for the same money?"

Granted this case specifically addresses only the SEC use of ALJs, but the implications for the other Federal agencies, and the potential for litigation in this area could increase significantly as ALJs are used widely across the federal landscape.

Many in our local bar may think that it has very little to do with law practice in Colorado but it fact the fallout of any major change may cause much more impact on Colorado regulation enforcement than it would appear on its face. Many of the regulations established in Colorado for the various agencies are in fact based on rulings by the federal ALJs. We as a bar, and as practicing attorneys in Colorado should be watching this case closely and be prepared for the potential impacts on our clients and both the pitfalls and opportunities that this case may hold.

A finding of unconstitutional use of ALJs will surely throw the matter to the members of Congress to come up with an appropriate method of resolving the issues such a ruling would raise. However, given that the esteemed members of Congress have shown a distinct inclination to refuse to work together on any issue I would not expect Congress to resolve this matter quickly, if at all. In the end it may just cause a further backlog at the federal district court level and possibly even a greater strain on the state courts as well.

It is well worth our time to watch the actions of the US Supreme Court on this issue.

The Arguments set forth can be reviewed at: *Jarkesy v. Sec. & Exch. Comm'n*, 803 F.3d 9 (D.C. Cir. 2015)

-- Joseph Bodine, Esq.