

Should The SEC Ask What Would Blackstone Do?

Article By:

Keith Paul Bishop

The Securities and Exchange Commission recently [trumpeted](#) its enforcement successes for its 2014 fiscal year. For an agency dedicated to full disclosure, there were some notable omissions, including:

- A California federal jury verdict finding the former Chief Executive Officer of STEC, Inc. innocent of insider trading;
- A New York federal jury verdict finding hedge fund manager Nelson Obus and his co-defendants innocent of insider trading;
- A Chicago federal jury verdict finding that an Illinois farmer and his three sons innocent of insider trading in Florida East Coast Industries, Inc. securities;
- A Georgia federal judge clearing Ladislav “Larry” Schvacho of insider trading; and
- A Texas federal jury finding Mark Cuban innocent of insider trading.

Note that all of these losses occurred in an Article III court and 80% of them occurred after a jury trial. Perhaps that is why The Wall Street Journal recently [reported](#):

The Securities and Exchange Commission is increasingly steering cases to hearings in front of the agency’s appointed administrative judges, who found in its favor in every verdict for the 12 months through September, rather than taking them to federal court.

All this reminds me of Sir William Blackstone’s famous observation:

Every new tribunal, erected for the decision of facts, without the intervention of a jury, (whether composed of justices of the peace, commissioners of the revenue, judges of a court of conscience, or any other standing magistrates) is a step towards establishing aristocracy, the most oppressive of absolute governments.

Commentaries on the Laws of England, Book III, ch. 23.

In this recent [post](#), Columbia Law School Professor Philip Hamburger points out that an Article III judge and jury aren't the only things that are lost in SEC administrative proceedings:

And, of course, it is not just a matter of judges and juries. By escaping these lawful adjudicators, the SEC also escapes the full range of procedural niceties that are known as the due process of law. In its place, the SEC offers only administrative process — what in administrative doublespeak is called “all the process that is due.”

As I pointed out in [SEC ALJs Face Free Enterprise Challenge](#), some of the things that a respondent doesn't get in an administrative proceeding are the application of the Federal Rules of Evidence, broad discovery, and the ability to assert counterclaims.

Henry V and Admiral Yi Sun-Shin

This past Saturday (October 25) was St. Crispin's day and who can forget these famous lines from Act IV, Scene 3 of Shakespeare's Henry V:

And Crispin Crispian shall ne'er go by,
From this day to the ending of the world,
But we in it shall be remember'd;
We few, we happy few, we band of brothers;
For he to-day that sheds his blood with me
Shall be my brother;

Sunday (October 26) was the anniversary of another historic victory by a small “band of brothers”. These “happy few” were the sailors manning 13 ships under the command of Korean Admiral Yi Sun-Shin. In the 1597 battle of Myeongnyang, this tiny fleet defeated an armada of 133 Japanese warships (plus a couple of hundred supporting ships). If you want to experience this amazing battle, I recommend [The Admiral: Roaring Currents \(??\)](#).

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