

Will Jarkesy Be a Fatal Blow to Civil Enforcement in Administrative Agency Proceedings?

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The end of the Supreme Court's recent term saw two major decisions in the field of administrative law: *Loper Bright Enterprises v. Raimondo* and *Securities & Exchange Commission v. Jarkesy*. The *Loper Bright* decision, which overruled the landmark 1984 case *Chevron v. Natural Resources Defense Council*, has been widely publicized and discussed. Although it has received less attention, the Supreme Court's *Jarkesy* decision, which requires the Securities & Exchange Commission ("SEC") to bring fraud actions seeking civil penalties in a court of law, where the defendant is entitled to a trial by jury, will almost certainly have impact across the federal government. The full effects of the decision will only be realized in the years to come, but it is likely that *Jarkesy* will bring significant changes to regulatory enforcement and the administrative state altogether.

Immediate Takeaways

The Supreme Court held that a provision of the Dodd-Frank Act, which permitted the SEC to seek civil monetary penalties in administrative proceedings, violated the defendants' Seventh Amendment right to a trial by jury. In reaching its conclusion, the Court found that because the civil penalties in the SEC enforcement action were designed to punish and deter, rather than restore the status quo, the civil penalties were a common law remedy that could only be enforced in a court of law. Although *Jarkesy* addressed a specific remedy sought by the SEC, civil monetary penalties are commonplace in administrative proceedings, and the Court's analysis suggests that the *Jarkesy* framework should apply to any action in which an administrative agency seeks a legal remedy.

Background

Until 2010, if the SEC wished to bring an action seeking money penalties against a defendant, it was required to file a lawsuit in federal court. Like any other lawsuit, that proceeding would be governed by the federal evidence and civil procedure rules, be presided over by an independent judge, and tried before a jury responsible for finding facts and rendering a verdict. In 2010, in the wake of the Wall Street financial crisis, Congress passed the Dodd-Frank Act, which, among other things, authorized the SEC to bring claims seeking monetary penalties in its own in-house administrative proceedings. In these proceedings, the Commission itself,^[1] not a jury, finds facts and delivers a verdict, while the Commission's Division of Enforcement acts as the prosecutor. Additionally, the administrative proceedings feature relaxed evidentiary and procedural rules, permitting hearsay and limiting discovery. A respondent may appeal an adverse determination from the Commission, but the standard of review is deferential.

In 2013, the Commission brought an enforcement action against Jarkesy and his investment fund, Patriot28, alleging that Jarkesy, who managed the fund, misled investors. The SEC sought civil

penalties against the defendants and, relying on its authority under Dodd-Frank, elected to bring the action in its administrative courts rather than in federal court. The Commission ultimately levied a \$300,000 penalty against the defendants, who appealed. The Fifth Circuit held that the defendants were entitled to a jury trial under the Seventh Amendment and vacated the SEC's award.^[2]

The Court's Analysis

The Supreme Court held, in a 6-3 decision penned by the Chief Justice, that the SEC must bring civil penalty actions for security fraud in an Article III court, where the defendant is entitled to a jury, and it cannot bring such actions in its in-house proceedings. In so holding, the Court divided its analysis into two main parts: when the right to trial by jury is implicated, and whether the "public rights" exception to the Seventh Amendment applied. The public rights exception involves certain matters that were historically determined by the legislative and executive branches, independent of the judiciary.

In the first part of its analysis, the Court recognized that the Seventh Amendment applies to causes of action that are "legal in nature," as opposed to actions seeking equitable relief. In determining whether the suit is legal in nature, the Court emphasized that the remedy is the most important consideration. Only courts of law are permitted to issue monetary penalties to punish culpable individuals, and therefore the SEC's civil monetary penalty was "all but dispositive" of the issue. Because the SEC's monetary penalty sought to punish the defendants rather than restore the victim, the action is legal in nature, requiring it to be decided in a court of law. The Court further explained that its conclusion was bolstered by the nature of the SEC's action itself: the essence of federal securities fraud is rooted in common law fraud, which has historically been a legal claim tried before a jury.

In considering the second issue, whether the SEC's action implicated the public rights doctrine, the Court emphasized that once a suit is brought that implicates federal jurisdiction, it must be decided by an Article III court. Likewise, if the nature of the claim is one rooted in common law, it is presumptively an action concerning private rights, which requires Article III adjudication. The Court admitted that its historical discussion of public rights has been an "area of frequently arcane distinctions and confusing precedents," but the Court emphasized that the public rights exception must be narrowly applied, and its prior precedents have been limited to collection of revenue,^[3] regulation of immigration and foreign commerce,^[4] imposition of tariffs by the President,^[5] relations with Indian tribes,^[6] administration of public lands,^[7] and granting of public benefits, such as payments to veterans, pensions and patent rights^[8] - none of which applied to the SEC's action for monetary penalties. The Court explicitly rejected the position advanced by the SEC, and argued by the dissent, that because Congress created new statutory obligations and assigned their enforcement to an agency, those enforcement actions are inherently a public right. Instead, the Court emphasized that it is the nature of the action, not its statutory origins, that is dispositive of whether the action must be brought in an Article III court.

Considering Jarkesy's Impact on Administrative Proceedings

The Court's decision applies directly to the SEC and its ability to seek civil monetary penalties in securities fraud cases, but nothing in the ruling limits its scope to the SEC. Instead, the type of remedy sought drives the analysis of where a claim must be brought: an action that seeks a remedy only available in law courts must be brought in an Article III court with the right to have it tried before

a jury. The Supreme Court did not hold that all civil monetary penalties are necessarily remedies that can only be enforced in courts of law, but it did hold that remedies that are punitive must be enforced in a law court.

Civil monetary penalties are not unique to the SEC; according to the Government Accountability Office, 49 separate government agencies or government corporations have the authority to issue civil monetary penalties.^[9] At the very least, these agencies' ability to seek civil penalties through administrative proceedings is in jeopardy. Although *Jarkesy* is framed as a Seventh Amendment jury trial question, bundled with that question in the Court's analysis is a jurisdictional issue: whether legal proceedings must be brought in an Article III court. The Court answers this in the affirmative. "If a suit is in the nature of an action at common law, then the matter presumptively concerns private rights, and adjudication by an Article III court is mandatory." Slip op. at 14. This could suggest that an administrative agency may be without subject matter jurisdiction to hear administrative actions that are legal, as opposed to equitable, in nature.

In addition to Seventh Amendment and Article III issues, the Supreme Court elected not to reach the Fifth Circuit's two alternative grounds for vacating the SEC's final order. At the appellate level, the Fifth Circuit held that Congress violated the non-delegation doctrine by authorizing the SEC, without adequate guidance, to choose whether to litigate the action in an Article III court or to adjudicate the matter in an SEC court. The circuit court also held that the statutory restrictions on the removal of an SEC ALJ, which includes two separate layers of for-cause removal protections, violates Article II's Take Care clause. The latter of these two issues is particularly relevant to litigants in independent agency proceedings, regardless of whether the action is legal or equitable in nature.

The combination of these two issues may pose significant obstacles for agencies seeking to bring actions before ALJs within their own administrative courts, and the *Jarkesy* opinion raises further questions regarding the legitimacy of agency proceedings that fail to provide litigants with fundamental hallmarks of due process, such as cross-examination and public trials.

For additional information about *Jarkesy* or administrative enforcement actions generally, please contact a member of Benesch's [White Collar, Government Investigations & Regulatory Compliance Practice Group](#).

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[1] The Commission may delegate its fact-finding authority to a designee, usually an individual commissioner or an administrative law judge.

[2] The defendants alleged three separate constitutional defects: (1) the SEC process violated their Seventh Amendment right to a jury trial; (2) Congress unconstitutionally delegated legislative power to the SEC when it gave the SEC authority to choose an enforcement venue; and (3) the dual-layer removal restrictions on SEC ALJs violate the Take Care clause. Although the Supreme Court reached only the first issue, the Fifth Circuit sustained the challenge to the ALJ removal restrictions.

Litigants in administrative proceedings, particularly within the Fifth Circuit, should be aware to raise this challenge in proceedings before an ALJ.

[3] *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272, 284 (1856).

[4] *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320 (1909).

[5] *Ex parte Bakelite Corp.*, 279 U.S. 438, 446 (1929).

[6] *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 174 (2011).

[7] *Crowell v. Benson*, 285 U.S. 22, 51 (1932).

[8] *United States v. Duell*, 172 U.S. 576, 582-83 (1899).

[9] See GAO-24-107193 (April 18, 2024).