

# Administrative Law Goes to Court



By Paul Engel

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- Can an executive agency act as judge, jury, and enforcer of their own rules?
- How important is your right to a trial by jury?
- Can Congress overrule the Seventh Amendment by simple legislation?

Seeking redress of our grievances is an important right, protected by the First Amendment. Can the federal government deprive you of due process as a condition of seeking redress? While not talked about in that way, that's pretty much what the case SEC v. Jarkesy is all about. After assessing George Jarksey Jr. civil penalties for alleged violations of antifraud provisions, the SEC attempted to deny him his right to a trial by jury. Could this be a start of reforms of unconstitutional administrative law courts?

## Securities and Exchange Commission

After the stock market crash of 1929, Congress passed several laws to regulate the trading of securities. This was not exactly constitutional, since Congress is only empowered to punish securities fraud under Article I, Section 8, Clause 6.

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

[U.S. Constitution, Article I, Section 8](#), Clause 6

Of course, the Constitution hasn't stopped Congress from creating illegal agencies in the past, including the Securities and Exchange Commission.

To enforce these Acts, Congress created the Securities and Exchange Commission. The SEC may bring an enforcement action in one of two forums. It can file suit in federal court, or it can adjudicate the matter itself.

### [Securities And Exchange Commission v. Jarkesy et al.](#)

Not only did Congress create the SEC and empower them to bring enforcement actions, but claimed that they can act like a court and adjudicate those actions themselves. Does anyone else see a problem here? Congress creates the SEC, then makes them judge, jury, and enforcer?

The forum the SEC selects dictates certain aspects of the litigation. In federal court, a jury finds the facts, an Article III judge presides, and the Federal Rules of Evidence and the ordinary rules of discovery govern the litigation. But when the SEC adjudicates the matter in-house, there are no juries. The Commission presides while its Division of Enforcement prosecutes the case. The Commission or its delegee—typically an Administrative Law Judge—also finds facts and decides discovery disputes, and the SEC's Rules of Practice govern.

### [Securities And Exchange Commission v. Jarkesy et al.](#)

Basically, if the SEC wants, they create a kangaroo court where everyone except you works for the SEC. This is not only a problem with the SEC, but with all Administrative Law Courts. When it comes to the SEC, this was not always the case.

One remedy for securities violations is civil penalties. Originally, the SEC could only obtain civil penalties from unregistered investment advisers in federal court. Then, in

2010, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act. The Act authorized the SEC to impose such penalties through its own in-house proceedings.

[Securities And Exchange Commission v. Jarquesy et al.](#)

Leave it to Congress to take a problem and make things worse. Originally, if the SEC thought you violated one of their rules, they had to take you to federal court, where you received the due process required by the Fifth Amendment. The court had to make sure you were provided with the evidence against you and they had to follow the rules of evidence. When Congress claimed to “fix” the problems that led to the housing collapse of 2008, many of which Congress created, not only did they NOT fix problem, they created a new one: The violation of due process and the Constitution of the United States.

**George Jarquesy, Jr.**

Now, let me introduce you to the subject of this case, Mr. George Jarquesy, Jr.

Shortly after passage of the Dodd-Frank Act, the SEC initiated an enforcement action for civil penalties against investment adviser George Jarquesy, Jr., and his firm, Patriot28, LLC for alleged violations of the “antifraud provisions” contained in the federal securities laws. The SEC opted to adjudicate the matter in-house. As relevant, the final order determined that Jarquesy and Patriot28 had committed securities violations and levied a civil penalty of \$300,000. Jarquesy and Patriot28 petitioned for judicial review.

[Securities And Exchange Commission v. Jarquesy et al.](#)

After an in-house review, the SEC levied a civil penalty of \$300,000. Mr. Jarquesy asked for a court to review his case.

The Fifth Circuit vacated the order on the ground that adjudicating the matter in-house violated the defendants’

Seventh Amendment right to a jury trial.

[Securities And Exchange Commission v. Jarkesy et al.](#)

The Fifth Circuit vacated the order because, in the court's view, it violated the Seventh Amendment. The Seventh Amendment is one of the "Due Process Amendments". What does the Seventh Amendment say?

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

[U.S Constitution, Amendment VII](#)

Interestingly, the \$20 minimum is not indexed for inflation. Even though \$20 in 1789 would be over \$700 today, all it takes is a controversy of \$20 for you to have a right to a jury trial. That is, if this is a common law suit.

Because the claims at issue here implicate the Seventh Amendment, a jury trial is required unless the "public rights" exception applies. Under this exception, Congress may assign the matter for decision to an agency without a jury, consistent with the Seventh Amendment. For the reasons below, the exception does not apply.

Pp. 13–27.

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So the SEC antifraud provision are just like common law fraud, so this is a suit of common law. What is this "public rights" exception the court is talking about though?

public rights: rights enjoyed by persons as members of the public, as distinct from private rights attached to the personality of the individual or deriving from property owned by him. Public rights may derive from the common law (such as

the right of members of the public to pass and repass along the highway) or from statute.

[Collins Dictionary of Law © W.J. Stewart, 2006](#)

Are there cases that involve “public rights” and therefore do not fall under the jurisdiction of courts because they do not involve a controversy of law or equity? There may be, but that is not the situation in this case.

The SEC claims that the public rights exception applies because Congress created “new statutory obligations, impose[d] civil penalties for their violation, and then commit to an administrative agency the function of deciding whether a violation ha[d] in fact occurred.” ... Congress cannot “conjure away the Seventh Amendment by mandating that traditional legal claims be . . . taken to an administrative tribunal.” ... The SEC’s argument that *Granfinanciera* does not apply because the Government is the party bringing this action also fails. What matters is the substance of the suit, not where it is brought, who brings it, or how it is labeled.

[Securities And Exchange Commission v. Jarkesy et al.](#)

Put another way, the SEC claims that Congress created an exception to the Seventh Amendment by allowing them to handle cases in-house.

### **Gorsuch Concurrence**

Justice Gorsuch wrote a concurring opinion, which Justice Thomas joined. Justice Gorsuch brought up a very important point.

I write separately to highlight that other constitutional provisions reinforce the correctness of the Court’s course. The Seventh Amendment’s jury-trial right does not work alone. It operates together with Article III and the Due Process Clause of the Fifth Amendment to limit how the government may

go about depriving an individual of life, liberty, or property. The Seventh Amendment guarantees the right to trial by jury. Article III entitles individuals to an independent judge who will preside over that trial. And due process promises any trial will be held in accord with time-honored principles. Taken together, all three provisions vindicate the Constitution's promise of a "fair trial in a fair tribunal."

[Securities And Exchange Commission v. Jarkey et al.](#) – Gorsuch Concurrence

Justice Gorsuch points to a triad of protections of our rights. As the court noted, the Seventh Amendment protects our right to a jury trial, while the Fifth Amendment protects our right to due process. Article III protects our right to an independent judge to oversee your trial.

In 2010, however, all that changed. With the passage of the Dodd Frank Act, Congress gave the SEC an alternative to court proceedings. Now, the agency could funnel cases like Mr. Jarkey's through its own "adjudicatory" system. ... That is the route the SEC chose when it filed charges against Mr. Jarkey.

[Securities And Exchange Commission v. Jarkey et al.](#) – Gorsuch Concurrence

With the passage of the Dodd Frank Act, the SEC can now deal with issues like Mr. Jarkey in-house. Why would that be a problem?

There is little mystery why. The new law gave the SEC's Commissioners—the same officials who authorized the suit against Mr. Jarkey—the power to preside over his case themselves and issue judgment. To be sure, the Commissioners opted, as they often do, to send Mr. Jarkey's case in the first instance to an "administrative law judge" (ALJ). ... But the title "judge" in this context is not quite what it might seem. Yes, ALJs enjoy some measure of independence as a matter of regulation and statute from the lawyers who pursue charges

on behalf of the agency. But they remain servants of the same master—the very agency tasked with prosecuting individuals like Mr. Jarkey. This close relationship, as others have long recognized, can make it “extremely difficult, if not impossible, for th[e ALJ] to convey the image of being an impartial fact finder.” ... And with a jury out of the picture, the ALJ decides not just the law but the facts as well.

[Securities And Exchange Commission v. Jarkey et al.](#) – Gorsuch Concurrence

I think Justice Gorsuch’s point is not only right, but extremely critical. With Administrative Law Judges, controversies are handled by the executive branch agency. Sounds like a good deal for the agency.

Going in, then, the odds were stacked against Mr. Jarkey. The numbers confirm as much: According to one report, during the period under study the SEC won about 90% of its contested in-house proceedings compared to 69% of its cases in court. ... Reportedly, too, one of the SEC’s handful of ALJs even warned individuals during settlement discussions that he had found defendants liable in every contested case and never once “ruled against the agency’s enforcement division.”

[Securities And Exchange Commission v. Jarkey et al.](#) – Gorsuch Concurrence

That’s the problem with Administrative Law Judges: They are biased. Everyone in the court, even your counsel, works for the agency. There is no impartial judge or jury, which explains why so many ALC cases are won by the agency; the home team has the advantage.

The rules of evidence, including their prohibition against hearsay, do not apply with the same rigor they do in court. ... For that reason, live testimony often gives way to “investigative testimony”—that is, a “sworn statement” taken outside the presence of the defendant or his counsel.

How did all this play out in Mr. Jarkey's case? Accompanying its charges, the SEC disclosed 700 gigabytes of data—equivalent to between 15 and 25 million pages of information—it had collected during its investigation. ... Over Mr. Jarkey's protest that it would take "two lawyers or paralegals working twelve-hour days over four decades to review," ... the ALJ gave Mr. Jarkey 10 months to prepare for his hearing, ... Then, after conducting that hearing, the ALJ turned around and obtained from the Commission "an extension of six months to file [her] initial decision." ... The reason? The "'size and complexity of the proceeding.'" ... When that decision eventually arrived seven months after the hearing, the ALJ agreed with the SEC on every charge.

### Securities And Exchange Commission v. Jarkey et al. – Gorsuch Concurrence

Does that sound like a fair trial with an impartial judge to you? There was not enough time to deal with a data dump but, of course, the judge gets an extension to make her decision. Sure, the decision didn't go Mr. Jarkey's way, but he can always appeal, right?

Mr. Jarkey had the right to appeal to the Commission, but appeals to that politically accountable body (again, the same body that approved the charges) tend to go about as one might expect. The Commission may decline to review the ALJ's decision. ... If it chooses to hear the case, it may increase the penalty imposed on the defendant. ... A defendant unhappy with the result can seek further review in court, though that process will take more time and money, too. Nor will he find a jury there, only a judge who must follow the agency's findings if they are supported by "'more than a mere scintilla'" of evidence. ... Mr. Jarkey filed an appeal anyway. The Commission agreed to review the ALJ's decision. It then afforded itself the better part of six years to issue an opinion. And, after all that, it largely agreed with the ALJ.



## [Securities And Exchange Commission v. Jarkey et al.](#) – Gorsuch Concurrence

Years of appeals in a biased court doesn't sound like a fair trial system, and it most definitely doesn't sound like due process. No wonder Justice Gorsuch felt compelled to expand on his concurrence.

### **Dissent**

It seems the same three justices have dissented in most of the cases I've reviewed lately. This time, Justice Sotomayor wrote the dissent and justices Kagan and Jackson joined.

Throughout our Nation's history, Congress has authorized agency adjudicators to find violations of statutory obligations and award civil penalties to the Government as an injured sovereign. The Constitution, this Court has said, does not require these civil-penalty claims belonging to the Government to be tried before a jury in federal district court. Congress can instead assign them to an agency for initial adjudication, subject to judicial review. This Court has blessed that practice repeatedly, declaring it "the 'settled judicial construction'" all along; indeed, "'from the beginning.'" ... Unsurprisingly, Congress has taken this Court's word at face value. It has enacted more than 200 statutes authorizing dozens of agencies to impose civil penalties for violations of statutory obligations. Congress had no reason to anticipate the chaos today's majority would unleash after all these years.

## [Securities And Exchange Commission v. Jarkey et al.](#) – Dissent

Keeping to pattern, the dissent focuses on tradition rather than the law. Yes, Congress has authorized agencies to award civil penalties. And no, the Constitution doesn't require jury trials, but it does require that right to be preserved. That means it's the right of the accused to request a jury trial, and the government is to comply. The fact that the court has

blessed this doesn't mean that it's constitutional. Besides, as the Constitution states, it is the supreme law of the land, not the courts.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land;

[U.S. Constitution, Article VI, Clause 2](#)

However, the dissent seemed to have missed the supremacy clause when it was taught in law school. Oh, wait, it's unlikely that the justices actually studied the Constitution in law school.

Today, for the very first time, this Court holds that Congress violated the Constitution by authorizing a federal agency to adjudicate a statutory right that inheres in the Government in its sovereign capacity, also known as a public right. According to the majority, the Constitution requires the Government to seek civil penalties for federal securities fraud before a jury in federal court. The nature of the remedy is, in the majority's view, virtually dispositive. That is plainly wrong. This Court has held, without exception, that Congress has broad latitude to create statutory obligations that entitle the Government to civil penalties, and then to assign their enforcement outside the regular courts of law where there are no juries.

[Securities And Exchange Commission v. Jarkesy et al.](#) – Dissent

The dissent points out that the court has found that Congress screwed up, but that is nothing new. The dissent also claims that the government is the sovereign. It would be nice if they actually looked up that word in a legal dictionary.

A chief ruler with supreme power;

In the United States the sovereignty resides in the body of the people.

SOVEREIGN:

A Law Dictionary, Adapted to the Constitution and Laws of the United States. By John Bouvier. Published 1856.

The dissent thinks the government has the power to grant itself a right by law because it's "sovereign". Yet it's we the people who are sovereign, so only we have the power to delegate a right to government. The dissent made another major legal error.

Beyond the majority's legal errors, its ruling reveals a far more fundamental problem: This Court's repeated failure to appreciate that its decisions can threaten the separation of powers. Here, that threat comes from the Court's mistaken conclusion that Congress cannot assign a certain public-rights matter for initial adjudication to the Executive because it must come only to the Judiciary. The majority today upends longstanding precedent and the established practice of its coequal partners in our tripartite system of Government. Because the Court fails to act as a neutral umpire when it rewrites established rules in the manner it does today, I respectfully dissent.

Securities And Exchange Commission v. Jarkesy et al. – Dissent

It's the dissent that is mistaken, and it's their position that threatens not only the separation of power, but due process. It's the courts, not the executive branch, that is designed to deal with controversies in law. And just how is the assignment of fine a public-right? Furthermore, it's the Constitution that protects a person's right to a trial by jury, not this court. In fact, it's because this court acted as a neutral umpire that it recognized Mr. Jarkesy's right to a trial by jury. Chief Justice Roberts made this point in his opinion.

A defendant facing a fraud suit has the right to be tried by a jury of his peers before a neutral adjudicator. Rather than recognize that right, the dissent would permit Congress to concentrate the roles of prosecutor, judge, and jury in the hands of the Executive Branch. That is the very opposite of the separation of powers that the Constitution demands. Jarkesy and Patriot<sup>28</sup> are entitled to a jury trial in an Article III court.

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Thankfully, Chief Justice Robert's opinion won the day.

## **Conclusion**

I've noticed a pattern in several of the opinions lately. The same three justices seem to be more interested in history than the law. If you keep doing that same things, you never have the opportunity to correct your mistakes. That has been the pattern of the Supreme Court for decades. I for one am glad to see this changing. This case is a perfect example of why we protect the rights of the people, regardless of who they are.

People like Mr. Jarkesy may be unpopular. Perhaps even rightly so: The acts he allegedly committed may warrant serious sanctions. But that should not obscure what is at stake in his case or others like it. While incursions on old rights may begin in cases against the unpopular, they rarely end there. The authority the government seeks (and the dissent would award) in this case—to penalize citizens without a jury, without an independent judge, and under procedures foreign to our courts—certainly contains no such limits. That is why the Constitution built “high walls and clear distinctions” to safeguard individual liberty. ... Ones that ensure even the least popular among us has an independent judge and a jury of his peers resolve his case under procedures designed to ensure a fair trial in a fair forum. In reaffirming all this today, the Court hardly leaves the SEC without ample powers and

recourse.

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The beauty of our system, especially the due process protections, is that everyone gets them. Rich or poor, popular or not, the Constitution protects all of our rights. If we allow them to be trampled because of tradition, we lose more than just the right to a trial by jury, we lose the most basic protections of justice.

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