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Jarkesy v. SEC and Its Potential Impact on the Future of SEC Administrative Proceedings

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On May 18, 2022, a split panel for the Fifth Circuit Court of Appeals held that Securities and Exchange Commission (SEC or Commission) administrative proceedings are unconstitutional. In *Jarkesy v. SEC*, the Fifth Circuit opined in a groundbreaking ruling that administrative adjudication of SEC antifraud claims seeking civil penalties violates: (1) the Seventh Amendment right to a jury trial; (2) the judicially-crafted nondelegation doctrine; and (3) the Take Care Clause of Article II of the Constitution.[1] This decision limits SEC actions and relief in administrative proceedings moving forward, at least within the Fifth Circuit. It is also just one of several recent developments casting doubt on the future of SEC in-house administrative enforcement proceedings.

Facts

The Fifth Circuit's ruling in *Jarkesy* arises out of an SEC administrative proceeding brought against George Jarkesy (Jarkesy), who formed two hedge funds that raised around $24 million from over 100 investors, and the associated investment adviser, Patriot28 LLC (collectively, respondents or petitioners). The SEC charged both with securities fraud under the Securities Act of 1933, the Securities Exchange Act of 1934, and the Investment Advisers Act of 1940. Further, the administrative action alleged misrepresentations regarding the funds' prime broker and auditor, the funds' safeguards, and the value of the funds' assets.

These substantive claims were never adjudicated in a district court. Rather, the SEC, which has the option of bringing enforcement actions in either federal district court or using its own in-house administrative process, chose to bring the action as an administrative proceeding before an Administrative Law Judge (ALJ). In an SEC administrative proceeding, the ALJ presides over the matter in a similar way to a federal court judge, deciding motions, resolving discovery issues, and ultimately presiding over a non-jury hearing. If a respondent disagrees with the ALJ's findings at the hearing or the penalty that the ALJ imposes, then the respondent has the right to appeal the findings to the Commission. The Commission (which, as the administrative head of the SEC, approved commencement of the administrative proceeding under appeal to it and, as such, has an interest in the proceeding) may decide whether the ALJ's findings or conclusions were proper and made on the basis of the record. Only after exhausting the administrative process does a respondent have the right to appeal the proceedings to a Circuit Court.[2]

Respondents and industry participants frequently view these SEC in-house administrative proceedings as unfair and biased in the SEC's favor because the SEC ratified the appointment of its ALJs, authorizes the commencement of enforcement actions in the first place, and then sits in judgment on appeal of the ALJ's decisions in those enforcement actions. Indeed, respondents attempted to short-circuit this process by filing an action before

the issuance of a final ALJ decision, in the District Court for the District of Columbia, seeking to enjoin the SEC's administrative proceedings based on their constitutional objections.[3] The district court, however, and later the US Court of Appeals for the DC Circuit, dismissed the case, requiring respondents to exhaust the administrative process in the first instance.

On appeal of the ALJ's findings in *Jarkesy*, the Commission affirmed; predictably rejecting the respondents' argument that the administrative proceeding violated their constitutional rights. The Commission ordered respondents to cease and desist from further violations and to pay a civil penalty of $300,000. Patriot 28 also was ordered to disgorge almost $685,000, while Jarkesy was barred from engaging in various securities industry activities.[4]

Fifth Circuit Opinion

The Fifth Circuit appeal arose out of a review of the Commission's decision. In an opinion written by Judge Elrod, the court held that the SEC's administrative proceedings were unconstitutional. The court focused on three constitutional arguments. First, it held that the administrative process deprived the petitioners of their constitutional right to a jury trial. Second, the court found the SEC's administrative proceeding framework resulted from an unconstitutional delegation of Congress' legislative power to the Commission. Third, the court concluded that the statutory removal restrictions on ALJs violated Article II of the Constitution.

Ultimately, the Fifth Circuit vacated the SEC decision and remanded the case. The court's reasoning and its likely impact on future SEC enforcement proceedings is discussed in further detail below.

Unconstitutional Deprivation of the Right to a Jury Trial

The first issue the Fifth Circuit addressed was whether the SEC's administrative adjudication of the petitioners' investing activities without a jury trial violated the Seventh Amendment. The Seventh Amendment guarantees defendants the right to a trial by jury "[i]n suits at common law . . . ."[5] In *Tull v. United States*, the US Supreme Court interpreted "suits at common law" to include all actions akin to those brought at common law as those actions were understood at the time of the Seventh Amendment's adoption, including suits brought under a statute seeking civil penalties.[6] However, the Supreme Court, in *Atlas Roofing Company, Inc. v. Occupational Safety & Health Review Commission*, also held that executive agencies may adjudicate disputes themselves without a jury "where 'public rights' are being litigated. . ." even if the action involves common-law claims.[7] Thus, the main contention between the majority and the dissent in *Jarkesy* stems from a conflicting interpretation of the public-rights exception.

The majority applied a two-part framework set out by the Supreme Court in *Granfinanciera, S.A. v. Nordberg* to determine when the public-rights exception applies.[8] Under *Granfinanciera,* an administrative proceeding falls into the public-rights exception when (1) the dispute involves a new cause of action created by Congress, and therefore remedies, unknown to the common law because traditional rights and remedies were inadequate to cope with a manifest public problem; and (2) requiring jury trials would "go far to dismantle the statutory scheme" or "impede swift resolution" of the claims created by statute.[9]

Applying this framework, the majority held that the SEC's administrative adjudication of the petitioners' investment activities violated the Seventh Amendment because the securities fraud claims it asserted were analogous to traditional common law claims for fraud.[10] The court also found that the public-rights exception did not apply to the SEC civil fraud action because fraud actions are not new actions unknown under common law and a civil penalty was a type of remedy at common law that could be enforced only in courts of law.[11] Further, the majority held that a jury trial in this

matter would not "go far to dismantle the statutory scheme" or "impede swift resolution" of the statutory claims since "the statutory scheme itself allows the SEC to bring enforcement actions either in-house or in Article III courts, where the jury-trials would apply."[12] As a result, the majority held that the application of the *Granfinanciera* two-step framework required the court to vacate the SEC's decision and remand for further proceedings before a district court.[13]

By contrast, the dissent contends that the majority misapplied *Granfinanciera* and, as a result, improperly narrowed the scope of the public-rights doctrine.[14] Specifically, the minority asserts that *Granfinanciera* is distinguishable from the instant case because it involved a suit between two private litigants rather than a suit between the government and a private individual.[15] As a result, the dissent contends that a court need consider only whether jury trials would "go far to dismantle the statutory scheme" or "impede swift resolution" when the action involves a dispute between two private individuals.[16]

In cases that involve the government, however, the dissent argues that "[t]he Supreme Court has never retreated from its holding in *Atlas Roofing*," which defined cases in which "public rights" are being litigated as "cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact."[17] Put differently, the dissent argues that whenever an administrative agency sues under a statute within the power of Congress to enact, an administrative proceeding of such action without a jury does not offend the Seventh Amendment. The majority's improper application of the *Granfinanciera* framework, the dissent contends, significantly limits the public-rights exception and goes directly against the Supreme Court's pronouncements.[18]

The conflict between the majority and dissent in *Jarkesy* illustrates the lack of explicit guidance provided by the case law surrounding this issue. For example, while the dissent fails to reconcile its broad interpretation of the public-rights exception with the Supreme Court's rejection of the notion that the public-rights doctrine applies whenever the action is "between the government and others,"[19] the dissent does cite several cases post-dating *Granfinanciera* which found that an agency proceeding did not violate a party's constitutional right to a jury trial.[20] While these cases all involved the government as a party, none provide significant discussion on the proper scope of the public-rights exception or whether *Granfinanciera* altered the public-rights analysis in actions involving the government. Moreover, several other courts have held that the Seventh Amendment right to a jury trial applies to a government civil penalty action.[21]

Despite the unclear precedent, *Jarkesy*'s holding remains the law within the Fifth Circuit, at least for now. Thus, defendants within the Fifth Circuit considering a challenge to an administrative proceeding based on the Seventh Amendment must show that: (1) the action's claims arise at common law and do not involve a new cause of action created because traditional rights and remedies were inadequate to cope with a manifest public problem; and (2) requiring a jury trial would not "go far to dismantle a statutory scheme" nor "impede swift resolution."

As to the first prong, the majority recognized that equitable relief in a civil penalty action typically is seen as a remedy reserved to the political branches of government.[22] However, if the proceedings "involve a mix of legal and equitable claims . . . the facts relevant to the legal claims should be adjudicated by a jury, even if those facts relate to equitable claims too."[23] As to the second prong, litigants should analyze the statute providing the claims and remedies to determine whether Congress envisioned jury trials to be compatible with the statutory scheme it charged an agency with advancing. Litigants seeking a jury trial also should be prepared to argue that a jury trial would not significantly slow the resolution of the dispute in comparison to an agency proceeding without a jury.

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Congress Unconstitutionally Delegated Legislative Power to the SEC

In addition to violating the petitioners' Seventh Amendment right to a jury trial, the Fifth Circuit held that Congress unconstitutionally delegated legislative power to the SEC under the Dodd-Frank Act by providing the regulatory agency with unfettered discretion to bring enforcement actions before administrative tribunals or Article III courts. Specifically, the court held that the SEC's power violated the long-standing nondelegation doctrine, which provides that "Congress may grant regulatory power to another entity only if it provides an 'intelligible principle' by which the recipient of the power can exercise it."[24] The Fifth Circuit's analysis focused on two key issues under the nondelegation doctrine:

> (1) whether Congress has delegated power to the agency that would be legislative power but-for an intelligible principle to guide its use and, if it has, (2) whether it has provided an intelligible principle such that the agency exercises only executive power.[25]

The Fifth Circuit Held That Congress Delegated a Legislative Power to the SEC

The majority defined "legislative action" as rules and/or regulations that have "the purpose and effect of altering the legal rights, duties and relations of persons . . . outside the legislative branch."[26] Despite moments of inefficiency, the court opined that legislative actions must be taken by Congress because "accountability evaporates if a person or entity other than Congress exercises legislative power."[27] In this context, the Fifth Circuit noted that the SEC could determine which subjects of an enforcement action were entitled to Article III proceedings, and which were to be tried before an administrative tribunal. Notably, the SEC did not dispute that the agency maintained absolute discretion to determine whether to bring a securities fraud action before an administrative tribunal or Article III court. Rather, the SEC asserted that the agency's prosecutorial discretion was consistent with an executive power. The Fifth Circuit rejected this argument. The court opined that the SEC's discretion is not consistent with an executive power because "the SEC [has] the power to decide which defendants should receive *certain legal processes* (those accompanying Article III proceedings) and which should not."[28]

In rebuttal, the dissent stated that the Supreme Court previously "analogized agency enforcement decisions to prosecutorial discretion exercised in criminal cases."[29] For example, in *United States v. Batchelder*, the Supreme Court held that the government's prosecutorial discretion to decide between two criminal statutes that provided for different sentencing ranges did not violate the nondelegation doctrine.[30] Judge Davis opined that if a prosecutor's discretion to choose between two criminal statutes "for essentially the same conduct does not violate the nondelegation doctrine, then surely the SEC's authority to decide between two forums that provide different legal processes does not violate the nondelegation doctrine."[31] Therefore, the dissent would have held that "the SEC's forum-selection authority is part and parcel of its prosecutorial authority."[32] Notwithstanding the dissent's concerns, the majority rejected this approach. The Fifth Circuit noted that the SEC's authority is "open-ended" and "Congress has said nothing at all indicating how the SEC should make that call in any given case."[33] Thus, the SEC's discretion was consistent with legislative action.

The Fifth Circuit Held That Congress Did Not Provide the SEC with an Intelligible Principle by Which to Exercise Its Power

The majority also held that Congress failed to provide an "intelligible principle" regarding the SEC's authority to commence an action before an Article III court or an administrative tribunal. Pursuant to the nondelegation doctrine, "Congress may grant regulatory power to another entity only if it provides an 'intelligible principle' by which the recipient of the power can exercise it."[34] While the

majority acknowledged that the Supreme Court has not held that Congress failed to provide an intelligible principle "in the past several decades," the court opined that there is very limited precedent where "Congress offered *no guidance* whatsoever."[35] Therefore, the Fifth Circuit held that "[i]f the intelligible principle standard means anything, it must mean that a total absence of guidance is impermissible under the Constitution."[36]

For these reasons, the court held that Congress unconstitutionally delegated its legislative power when it gave the SEC unfettered authority to choose whether to bring enforcement actions in Article III courts or in agency administrative proceedings. The court ordered that this holding provided an alternative ground for vacating the SEC's judgment.[37]

Statutory Restrictions on Removing SEC ALJs Are Unconstitutional

The Fifth Circuit further held that the statutory removal restrictions for SEC ALJs are unconstitutional because the restrictions violate the Take Care Clause in Article II of the Constitution. That clause provides that the president must "take Care that the Laws be faithfully executed."[38] Citing *Myers v. United States*, the court recognized that this provision guarantees the president a certain degree of control over executive officers, including adequate power over officers' appointment and removal.[39] The court in *Jarkesy* found that SEC ALJs perform substantial executive functions, are protected from removal by two layers of for-cause protection, and that this removal protection unconstitutionally impedes the President's power to choose who holds such positions.

In its decision, the Fifth Circuit relied heavily on *Free Enterprise Fund v. Public Company Accounting Oversight Board*[40] and *Lucia v. SEC.*[41] In *Free Enterprise*, the Supreme Court considered the constitutionality of two layers of for-cause removal protection for members of the Public Company Accounting Oversight Board (PCAOB). The PCAOB was created by the Sarbanes-Oxley Act of 2002 with expansive power to regulate the accounting industry. PCAOB members were appointed by the SEC and could be removed by the SEC only for "willful violations of the [Sarbanes-Oxley] Act, PCAOB rules, or the securities laws; willful abuse of authority; or unreasonable failure to enforce compliance–as determined in a formal Commission order, rendered on the record and after notice and an opportunity for a hearing."[42] The President could remove SEC Commissioners only for "inefficiency, neglect of duty, or malfeasance in office."[43] The Supreme Court held "that the dual for-cause limitations on the removal of [PCAOB] members contravene the separation of powers."[44] The Supreme Court reasoned that under the removal arrangement, the President "can neither ensure that the laws are faithfully executed, nor be held responsible for a [PCAOB] member's breach of faith."[45]

In light of the Supreme Court's decision in *Free Enterprise*, the Fifth Circuit in *Jarkesy* considered whether SEC ALJs serve sufficiently important executive functions, and whether the restrictions on their removal are sufficiently onerous that the President has lost the ability to take care that the laws are faithfully executed. The Fifth Circuit relied on *Lucia* to determine that SEC ALJs serve important executive functions. In *Lucia*, the Supreme Court addressed the question of whether SEC ALJs are officers of the United States subject to the Appointments Clause of the Constitution as opposed to mere employees. The Appointments Clause recognizes two types of Officers of the United States: principal and inferior officers.

> Only the President, with the advice and consent of the Senate, can appoint a principal officer; but Congress (instead of relying on that method) may authorize the President alone, a court, or a department head to appoint an inferior officer.[46]

Relying on past precedent, the Supreme Court in *Lucia* set out a framework for distinguishing

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officers from employees. To qualify as an officer, an individual must occupy a continuing position established by law[47] and exercise significant authority pursuant to the laws of the United States.[48]

In *Freytag v. Commissioner* (a decision that the Supreme Court in *Lucia* heavily relied on) the court applied this framework to Special Trial Judges (STJs) of the US Tax Court, holding that STJs are officers of the United States for purposes of the Appointments Clause.[49] Following *Freytag*, the court in *Lucia* held that SEC ALJs also are officers of the United States for purposes of the Appointments Clause.[50] In doing so, it reasoned that the STJs are "near-carbon copies of the [SEC's] ALJs."[51] Specifically, it found that like the STJs in *Freytag*, SEC ALJs hold a continuing office established by law and "have all the authority needed to ensure fair and orderly adversarial hearings," including the power to take testimony, conduct trials, rule on the admissibility of evidence, and enforce compliance with discovery orders.[52] It also noted that SEC ALJs may have an even more autonomous role than STJs because when the SEC declines to review an ALJ's decision, the ALJ's decision itself becomes final.[53] It also concluded that the SEC itself was the head of a department, but noted that the SEC had left the task of appointing ALJs to its Staff.[54] Accordingly, because ALJs were officers of the United States who were appointed by SEC Staff rather than the SEC itself, the Supreme Court held they were appointed in violation of the Appointments Clause.

Applying the reasoning of *Free Enterprise* and *Lucia*, the Fifth Circuit concluded that if SEC ALJs are inferior officers of an executive agency, "they are sufficiently important to executing the laws that the Constitution requires that the president be able to exercise authority over their functions."[55] After determining that SEC ALJs serve sufficiently important executive functions that the president must be able to exercise authority over them, the Court evaluated the restrictions on removal of SEC ALJs. The ALJs may be removed by the SEC only "for good cause established and determined by the Merit Systems Protection Board (MSPB) on the record after opportunity for hearing before the Board."[56] SEC Commissioners, in turn, may be removed by the president only for good cause. Additionally, MSPB members "may be removed by the president only for inefficiency, neglect of duty, or malfeasance in office."[57]

Thus, the court found that there were at least two layers of removal protection for SEC ALJs. The court held that these statutory removal restrictions are unconstitutional because they sufficiently insulate SEC ALJs from removal such that the president cannot take care that the laws are faithfully executed.[58] Because the court vacated the SEC's judgment on Seventh Amendment and nondelegation grounds, it did not decide whether vacating would be the appropriate remedy for the unconstitutional statutory restrictions on removal.

Key Takeaways

In addition to *Jarkesy*, the SEC has suffered several setbacks to its administrative enforcement proceedings which, taken together, raise questions about the future scope, validity, and utility of those proceedings. As noted above, in *Lucia*, the Supreme Court held that SEC ALJs were unconstitutionally appointed. In advance of the court's *Lucia* decision, on November 30, 2017, the SEC issued an order providing that, in its capacity as head of a department, it was ratifying the prior appointment of all its ALJs.[59] However, in *Lucia*, the remedy ordered by the court included that the respondent be given an entirely new hearing before a properly appointed ALJ who was different from the ALJ that presided over the previous hearing. Accordingly, on August 22, 2018, the SEC issued an order providing respondents in any proceeding then pending before an ALJ or the SEC itself an opportunity for a new hearing before an ALJ who did not previously participate in the matter.[60] This meant that over 120 SEC administrative proceedings had to start over again from the

beginning before a different ALJ. This applied even to proceedings in which a hearing had already been completed and were then pending before the Commission on appeal.

Now, the *Jarkesy* decision effectively held that all SEC administrative proceedings as currently established are unconstitutional. Although the SEC has a pending petition for rehearing *en banc*, this is currently the law in the Fifth Circuit. Thus, the SEC presumably will bring its enforcement actions, at least within the Fifth Circuit, in federal district court rather than attempting to initiate more administrative proceedings. The decision may also make the SEC more reluctant to bring enforcement actions in administrative proceedings even with respondents outside the Fifth Circuit for fear that any decision could eventually be vacated elsewhere in another ruling similar to *Jarkesy* and using that decision as precedent for doing so.

Additionally, just a few days before the *Jarkesy* decision, the Supreme Court granted *certiorari* in *SEC v. Cochran*, on the question of "whether a federal district court has jurisdiction to hear a suit in which the respondent in an ongoing SEC administrative proceeding seeks to enjoin that proceeding, based on an alleged constitutional defect in the statutory provisions that govern the removal of the ALJ who will conduct the proceeding."[61] Earlier this year, the Supreme Court also granted *certiorari* on a similar question involving a Federal Trade Commission proceeding.[62] Depending on the outcome of these cases before the Supreme Court, respondents in SEC administrative proceedings may be able to enjoin those proceedings while pursuing constitutional objections in federal courts. This would significantly delay the progress of SEC administrative proceedings and be particularly troublesome for the SEC, which historically favored administrative proceedings, in part, because they usually move quicker than federal court litigation. It would also provide respondents with a faster route to federal court review of the constitutionality of SEC administrative proceedings.

Further, the Supreme Court may soon decide to issue *certiorari* on the question of whether the statutory restrictions on removing the SEC's ALJs are unconstitutional. In *Lucia*, the Supreme Court declined to consider that issue, explaining "no court has addressed that question, and we ordinarily await thorough lower court opinions to guide our analysis of the merits."[63] The Fifth Circuit has now provided an opinion on that issue, and courts in other circuits are likely to do the same. An adverse decision for the SEC by the Supreme Court would impact all pending SEC administrative proceedings, although the precise impact of such a decision is unclear.

All of the foregoing developments create significant risks of reversal in SEC administrative proceedings until they are definitively resolved one way or the other in future litigation. In the meantime, the SEC will likely bring even more actions in federal district courts from the beginning and rely less on its administrative process.

It is important to note that the Fifth Circuit holdings that Congress unconstitutionally delegated legislative power to the SEC and violated the Take Care Clause by affording SEC ALJs two layers of removal protection are not necessarily fatal to SEC administrative proceedings. Both constitutional defects can likely be remedied by additional Congressional legislation. Congress could provide an intelligible principal to guide the SEC when determining whether to bring an enforcement action in federal court or an administrative forum. Congress could similarly strip SEC ALJs of the two layers of removal protection by making them removable at will by SEC Commissioners. Indeed, on this last issue, legislation may not even be necessary. In *Free Enterprise*, the Supreme Court severed the unconstitutional restrictions on removal of PCAOB members from the remainder of the Sarbanes-Oxley Act leaving PCAOB members removable at will by the SEC and the president separated from PCAOB members by only a single layer of good-cause tenure.[64] However, rendering SEC ALJs removable at will by the SEC would increase existing concerns that the ALJs are

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neither impartial nor free from influence by SEC Commissioners. This is no small concern because SEC Commissioners currently ratify the appointment of ALJs, approve commencement of enforcement actions at the agency, and then hear appeals from ALJ decisions in administrative enforcement proceedings.

Similarly, the court's holding that respondents in SEC securities fraud enforcement actions have a Seventh Amendment right to a jury trial is unlikely to stop, by itself, all SEC administrative enforcement actions, even within the Fifth Circuit. The SEC is charged with enforcing a broad array of securities laws and many of its enforcement actions do not involve fraud. For example, the SEC could likely still bring administrative actions addressing the failure of investment advisers to maintain required books and records, adopt and implement adequate compliance programs, or comply with the custody rule.[65] In *Jarkesy*, the court acknowledged that "some actions provided for by the securities laws may be new and not rooted in any common-law corollary."[66] Defendants in SEC actions based solely on such statutes or regulations will have difficulty persuading a judge that they are entitled to a jury trial under the Seventh Amendment. Moreover, although the court held that in proceedings with a mix of legal and equitable claims, facts relevant to legal claims should be adjudicated by a jury, even if those facts relate to equitable claims too, the SEC could still bring enforcement actions seeking only equitable relief in an administrative proceeding. Of course, this assumes that the SEC or Congress can address the nondelegation doctrine and Article II constitutional violations found in *Jarkesy*.

Conclusion

On July 6, 2022, the SEC filed a petition in the Fifth Circuit seeking *en banc* review. The SEC argued that the panel's ruling contradicts longstanding Supreme Court, Fifth Circuit, and other Circuit precedent. The SEC further argued that *en banc* review is warranted because the panel's ruling implicates the constitutionality of removal restrictions. The defendants filed an opposition to the SEC's petition on July 19, 2022, arguing that the court correctly applied existing precedent and the nondelegation doctrine. While *en banc* review is rare and disfavored,[67] it is warranted when necessary to maintain uniformity of decisions within the Circuit or the issue presented is one of exceptional importance.[68] Here, it is likely that the SEC's petition for *en banc* review will be successful because the issue presented satisfies both considerations.

Until then, the SEC will most likely proceed by continuing to file most litigated actions in federal district court. However, the long-term impact of *Jarkesy* and the fate of SEC administrative proceedings will be determined by future decisions by the federal courts.

Mr. Ansley and **Mr. Rossi** are Shareholders, and **Mr. Deau**, **Mr. Vera**, and **Mr. Sobelman** are Associates, with Vedder Price.

NOTES

1 Jarkesy v. SEC, 34 F.4th 446 (5th Cir. 2022).

2 The SEC has argued and most federal courts to consider the question have agreed that 15 U.S.C. § 78y(a)(1) divests United States district courts of jurisdiction to hear constitutional challenges to SEC administrative proceedings. *See* Tilton v. SEC, 824 F.3d 276, 280-91 (2d Cir. 2016), *cert. denied*, 137 S. Ct. 2187 (2017); Bennett v. SEC, 844 F.3d 174, 177-88 (4th Cir. 2016); Bebo v. SEC, 799 F.3d 765, 768-775 (7th Cir. 2015), *cert. denied*, 577 U.S. 1236 (2016); Hill v. SEC, 825 F.3d 1236, 1240-52 (11th Cir. 2016); Jarkesy v. SEC, 803 F.3d 9, 13-30 (D.C. Cir. 2015). However, in *Cochran v. SEC*, the Fifth Circuit held that a district court has jurisdiction to consider a respondent's constitutional challenge to an ongoing SEC administrative proceeding. Cochran v. SEC, 20 F.4th 194 (5th Cir. 2021), *cert. granted*, No. 21-1239 (2022).

3 *Jarkesy*, 803 F.3d at 29-30.

[4] *John Thomas Cap. Mgmt. Grp., LLC d/b/a/ Patriot28 LLC, and George R. Jarkesy, Jr.*, Securities Act Release No. 10834, Exchange Act Release No. 89775, Investment Advisers Act Release No. 5572, Investment Company Act Release No. 34003 (Sept. 4, 2020), Rel. No. 693, 2014 WL 5304908 (ALJ Oct. 17, 2014).

[5] U.S. Const. amend. VII.

[6] Tull v. United States, 481 U.S. 412, 417-19 (1987).

[7] Atlas Roofing Co., Inc. v. Occupational Safety & Health Rev. Comm'n, 430 U.S. 442, 450 (1977).

[8] Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989).

[9] *Jarkesy*, 34 F.4th at 453 (*citing Granfinanciera*, 492 U.S. at 60-63).

[10] *Id.* at 454-55 (*citing Tull*, 481 U.S. at 418-19, 422).

[11] *Id.* at 453-54.

[12] *Id.* at 455-57 (*citing* Dodd-Frank Act § 929P(a) and 15 U.S.C. § 78u-2(a)).

[13] *Id.* at 457.

[14] *See id.* at 471-72 (Davis, J., dissenting).

[15] *Id.* at 471.

[16] *Id.*

[17] *Id.* at 467.

[18] *Id.* at 467-71 (Davis, J., dissenting).

[19] *Atlas Roofing Co., Inc.*, 430 U.S. at 452.

[20] *See, e.g.,* Imperato v. SEC, 693 F. App'x 870, 876 (11th Cir. 2017); Crude Co. v. FERC, 135 F.3d 1445, 1454-55 (Fed. Cir. 1998); Cavallari v. Off. of Comptroller of Currency, 57 F.3d 137, 145 (2d Cir. 1995); Sasser v. Adm'r EPA, 990 F.2d 127, 130 (4th Cir. 1993).

[21] *See Tull*, 481 U.S. at 427-28 n.4 (While the Seventh Amendment was not applicable to administrative proceedings, the Court held that "petitioner's demand for a jury trial be granted to determine his liability [under the Clean Water Act], but that the trial court and not the jury should determine the amount of penalty, if any."); *see also* United States v. ERR, LLC, 358 F.4th 405, 414 (5th Cir. 2022) (Following *Jarkesy*, the Fifth Circuit held that a "Recoupment Claim [for a violation of the Oil Pollution Act] sounds in law and hence triggers [Defendant's] Seventh Amendment right to a jury."); McLaughlin v. Owens Plastering Co., 841 F.2d 299, 301 (9th Cir. 1988) (When the Secretary of Labor sought liquidated damages for violations of the Fair Labor Standards Act, the Ninth Circuit held that "[t]he Secretary may not bring an action at law and then deny the defendant a jury trial by attempting to characterize the action differently.").

[22] *See Jarkesy*, 34 F.4th at 454-55.

[23] *Id.* at 454 (*citing* Ross v. Bernhard, 396 U.S. 531, 537-38 (1970)).

[24] *Id.* at 461.

[25] *Id.*

[26] *Id.* (*quoting* INS v. Chadha, 462 U.S. 919, 952 (1983)).

[27] *Id.* at 460 (Elrod, J., majority).

[28] *Id.* at 462.

[29] *Id.* at 474 (Davis, J., dissenting).

[30] *Id.* (citing 442 U.S. 114 (1979)).

[31] *Id.*

[32] *Id.*

[33] *Id.* at 462 (Elrod, J., majority).

[34] *Id.* at 461.

[35] *Id.* at 462.

[36] *Id.*

[37] *Id.* at 459 n.9.

[38] U.S. Const. art. II, § 3.

[39] Myers v. United States, 272 U.S. 52, 117 (1926).

[40] Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477 (2010).

[41] *Jarkesy,* 34 F.4th at 464 (*citing* Lucia v. SEC, 138 S. Ct. 2044, 2053 (2018)).

[42] *Id.* at 463 (*quoting Free Enter. Fund,* 561 U.S. at 503).

[43] *Id.* (*citing Free Enter. Fund,* 561 U.S. at 486-87, 502). In *Free Enterprise*, the court explained that the parties agreed SEC Commissioners cannot be removed by the president except under the standard set forth in *Humphreys Executor v. United States* of "inefficiency, neglect, of duty or malfeasance in office" and decided the case "with that understanding." *Id.* at 487 (*citing* 295 U.S. 602, 620 (1935)). However, the Securities Exchange Act of 1934 does not address the standard for removal of SEC Commissioners by the President.

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[44] *Free Enter. Fund*, 561 U.S. at 492.

[45] *Id.* at 496.

[46] *Lucia*, 138 S. Ct. at 2051 n.3.

[47] *Id.* at 2051-55 (*citing* United States v. Germaine, 99 U.S. 508, 511 (1879)).

[48] *Id.* at 2051 (*citing* Buckley v. Valeo, 424 U.S. 1, 126 (1976)).

[49] *Freytag*, 501 U.S. at 892.

[50] *Lucia*, 138 S. Ct. at 2052.

[51] *Id.*

[52] *Id.* at 2053.

[53] *Id.* at 2053-54.

[54] *Id.* at 2050-55 (*citing Free Enter. Fund*, 561 U.S. at 511-13).

[55] *Jarkesy*, 34 F.4th at 464.

[56] *Id.* (*quoting* 5 U.S.C. § 7521(a)).

[57] *Id.* at 465 (*quoting* 5 U.S.C. § 1202(d)).

[58] *Id.*

[59] SEC Order, *In re: Pending Administrative Proceedings*, Securities Act of 1933, Rel. No. 10440 (Nov. 30, 2017).

[60] SEC Order, *In re: Pending Administrative Proceedings*, Securities Act of 1933, Rel. No. 10536 (Aug. 22, 2018).

[61] *SEC v. Cochran*, No. 21-1239 (May 16, 2022).

[62] *Axon Enters., Inc. v. FTC*, No. 21-86 (Jan. 24, 2022).

[63] *Lucia*, 138 S. Ct. at 2050-51 n.1.

[64] *Free Enter. Fund*, 561 U.S. at 508-10.

[65] 17 C.F.R. § 275.204-2; 17 C.F.R. § 275.206(4)-7; and 17 C.F.R. § 275.206(4)-2.

[66] *Jarkesy*, 34 F.4th at 457.

[67] 5th Cir. R. 35.1.

[68] Fed. R. App. P. 35(a).

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