

**MEMO# 35772**

July 15, 2024

# Supreme Court Recognizes Right to Jury Trial in Certain SEC Enforcement Actions

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TO: ICI Members

Investment Company Directors

Chief Compliance Officer Committee

SEC Rules Committee

Small Funds Committee SUBJECTS: Compliance

Fund Governance

Investment Advisers

Litigation & Enforcement RE: Supreme Court Recognizes Right to Jury Trial in Certain SEC Enforcement Actions

In *Securities and Exchange Commission v. Jarkesy*, the Supreme Court held that when the SEC seeks civil penalties against a defendant for securities fraud, the Constitution's Seventh Amendment entitles the defendant to a jury trial.[\[1\]](#)

## Background

The Securities Act, the Exchange Act, and the Investment Advisers Act all have antifraud provisions, and the SEC may seek to enforce them in federal court or in-house. When the SEC adjudicates a matter in-house, there are no juries. The SEC presides while its Division of Enforcement prosecutes the case. The Commission or its delegate—typically an Administrative Law Judge (ALJ)—also finds facts and decides discovery disputes.[\[2\]](#)

Originally, the SEC could obtain civil penalties from unregistered investment advisers only in federal court, until the Dodd-Frank Act authorized the SEC to impose such penalties through its in-house proceedings.

In 2013, the SEC initiated an enforcement action for civil penalties against investment adviser George Jarkesy, Jr. and his firm (Patriot28, LLC) for alleged violations of the antifraud provisions in the federal securities laws. The SEC adjudicated the matter in-house, and the final order determined that Jarkesy and Patriot28 had committed securities violations and levied a civil penalty of \$300,000. Jarkesy and Patriot28 petitioned for judicial review, and 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.[\[3\]](#)

## Summary of the Court's Opinion

Affirming the Fifth Circuit's judgment, the Court held that when the SEC seeks civil penalties against a defendant for securities fraud, the Seventh Amendment entitles the defendant to a jury trial. The Court maintained that the SEC's antifraud provisions replicate common law fraud, and that common law claims must be heard by a jury.

The Court emphasized the historical importance of the right to trial by jury and that the Seventh Amendment's text states that in "[s]uits at common law, . . . the right of trial by jury shall be preserved." The Court stated that the Seventh Amendment extends to claims that are "legal in nature," and this determination requires courts to consider the cause of action and the remedy it provides (with the latter being more important). Here, the Court found that the remedy was "all but dispositive" because these civil penalties were designed to punish and deter, not to compensate, and therefore were "a type of remedy at common law that could only be enforced in courts of law."

The Court also found that the "public rights" exception to Article III jurisdiction (i.e., involving matters that "historically could have been determined exclusively by [the executive and legislative] branches") did not apply because the action did not fall within any of the distinctive areas involving governmental prerogatives where the Court has concluded that a matter may be resolved outside of an Article III court, without a jury. The Court noted that the "public rights exception is, after all, an exception" with no textual basis in the Constitution that must derive instead from background legal principles. According to the Court, "what matters is the substance of the suit, not where it is brought, who brings it, or how it is labeled."

The Court did not reach the other two Constitutional issues identified by the Fifth Circuit,[\[4\]](#) affirming that ruling on the Seventh Amendment ground alone.

## Summary of the Concurrence

Justice Gorsuch's concurring opinion (joined by Justice Thomas) noted that the government has historically litigated suits of this sort before juries. It highlighted that the jury-trial right 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. ALJs "remain servants of the same master—the very agency tasked with prosecuting individuals like Mr. Jarquesy." The concurrence noted that the SEC remains free to pursue charges against Jarquesy "[i]n a court, before a judge, and with a jury."

## Summary of the Dissent

Justice Sotomayor's dissent (joined by Justices Kagan and Jackson) maintained that the Constitution does not require 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. Pointing to prior case law and its view of the public rights exception, the dissent calls the Court's decision mistaken in holding otherwise. It noted that Congress has enacted more than 200 statutes authorizing dozens of agencies to impose civil penalties for violations of statutory obligations, and that "Congress had no reason to anticipate the chaos today's majority would unleash after all these years." According to the dissent, the upshot is that "the constitutionality of hundreds of statutes may now be in peril, and dozens of agencies could be stripped of their power to enforce laws enacted by Congress."

## Conclusion

While Jarkesy's holding speaks only of the SEC seeking civil penalties against a defendant for securities fraud, its implications are broader. In light of this case, those federal agencies adjudicating matters in-house must assess whether they may continue to do so, and defendants in agency enforcement actions brought in-house may challenge that practice. Agency and future court decisions will continue to shape the scope of in-house adjudication.

This decision also will affect how defendants react to SEC enforcement. They now will weigh the relative advantages of litigating in federal court (where possible) and settling matters administratively.

It remains to be seen how this will affect the SEC's overall enforcement activity. Bringing cases in federal court is more resource-intensive, which could suggest that the SEC will bring fewer actions. On the other hand, the SEC has been adjudicating in-house less frequently in recent years, which should blunt the decision's impact.

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## Notes

[1] Securities and Exchange Commission v. Jarkesy et al., No. 22-859 (U.S. June 27, 2024), available at [https://www.supremecourt.gov/opinions/23pdf/22-859\\_1924.pdf](https://www.supremecourt.gov/opinions/23pdf/22-859_1924.pdf). Chief Justice Roberts (joined by Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett) wrote the Court's opinion in this 6-3 decision.

[2] When a Commission member or an ALJ presides, the full Commission can review that official's findings and conclusions, but it is not obligated to do so. Judicial review is also available once the proceedings have concluded.

[3] The Fifth Circuit also determined that (i) Congress had violated the nondelegation doctrine by authorizing the SEC, without adequate guidance, to choose whether to litigate this action in an Article III court or to adjudicate the matter itself, and (ii) the insulation of the SEC ALJs from executive supervision with two layers of for-cause removal protections violated the separation of powers.

[4] See *supra*, note 3.