Policy Background: *Jarkesy* and the Future of Administrative Law Judges

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In *SEC v. Jarkesy*, the Supreme Court both eliminated the right of the Securities and Exchange Commission (SEC) to bring suits for fraud before Administrative Law Judges (ALJs) and took a major step towards restricting agencies' use of ALJs more broadly, although it did not explicitly state that in the opinion's formally narrow holding.

- The Seventh Amendment requires a jury trial in these types of civil suits; therefore a statute which permitted the SEC to choose between bringing an action before an ALJ and a Federal court violates the Seventh Amendment's guarantee of a jury trial (defendants may waive the right).
- Many Federal agencies beyond the SEC use ALJs for at least some types of enforcement actions; these include the Food and Drug Administration (FDA), the Environmental Protection Agency (EPA), the Federal Communications Commission (FCC), and the Consumer Financial Protection Bureau (CFPB), among others. Those agencies now face the prospect of litigation challenging their statutory authority in this area; some of these cases are highly likely to reach the Supreme Court.
- It is likely that the decision will lead to restrictions not only on enforcement agencies' powers but their actual enforcement actions as well, given their limited budgets and the greater expense of bringing suit in Federal court.
- However, earlier final decisions reached by ALJs and administrative agencies are likely not subject to challenge on the basis of the recent decision.

The Decision

Background to the case

The case grew out of an SEC enforcement action against George Jarkesy under the Dodd-Frank Wall Street Reform and Consumer Protection Act in which the SEC claimed that two hedge funds had engaged in fraud. The SEC decided to use its internal enforcement mechanisms (including an ALJ) on the case rather than bringing it to Federal court for a jury trial. After an ALJ ruled against Jarkesy, the full Commission upheld the judgment, including civil monetary penalties and disgorgement of profits. Jarkesy appealed, and in May 2022 the US Court of Appeals for the Fifth Circuit ruled that SEC's use of the ALJ, with the possibility for significant civil penalties, violated the Seventh Amendment right to a jury trial. (The Fifth Circuit also ruled that the SEC's use of ALJs in this case included other constitutional violations, but the Supreme Court did not rule on those points.)

Chief Justice Roberts' opinion

Chief Justice Roberts wrote the majority opinion for the Court, joined by the other conservative Justices (Alito, Barrett, Gorsuch, Kavanaugh, and Thomas). Most basically, Roberts states that the Seventh

Amendment right to jury trial "in Suits at common law" at issue "is not limited" to common law actions in 1789 but includes a "statutory claim that is 'legal in nature.'" In other words, just because Congress assigned the enforcement power to an agency under a statute does not override the Seventh Amendment guarantee. In particular, for the majority, "money damages are the prototypical common law remedy," and therefore the SEC's attempt to seek civil monetary penalties puts its enforcement action within the reach of the Seventh Amendment.

Justices Neil Gorsuch and Clarence Thomas concurred in Roberts' opinion but would have gone much further, arguing that a jury trial is necessary before the government can take a citizen's money (a point reinforced by the Due Process Clause of the Fifth and Fourteenth Amendments).

Justice Sotomayor's dissent

In a strongly worded dissent joined by Justices Elena Kagan and Ketanji Brown Jackson, Justice Sonia Sotomayor called the decision a "power grab" that would cause "chaos" and a "devastating blow to the manner in which our government functions." Noting that Congress had approved the policy of permitting Federal agencies to impose civil monetary penalties, Sotomayor wrote that the decision "upends longstanding precedent and the established practice of its coequal partners in our tripartite system of government [.]" More specifically, Sotomayor wrote that "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"—a very unwise decision, in her view.

Analysis of the Decision

From the summary above, Roberts' opinion can seem uncontroversial, even conclusory. Of course, Congress authorized administrative law judges when writing or amending authorizing statues of Federal agencies and, at least implicitly, reaffirm this perspective every year in the annual appropriations process. And various court decisions have upheld ALJs' powers. But Congress cannot override a constitutional guarantee; the Supreme Court has the ultimate power of judicial review in determining whether a statute is constitutional.

Viewed from another perspective, however, the decision is far more radical. From the perspective of administrative law that has held until this decision, a Federal agency's action against a defendant for violation of the statutes it enforces arise from those *statutes*, not from violations of the common law (put more simply, Jarkesy was charged with fraud within the meaning of the Dodd-Frank Act, not common law fraud).

The distinction matters because the text of the Seventh Amendment provides for jury trials "in Suits at common law." But is an action for a violation of a regulation adopted under the Administrative Procedure Act or a statute giving enforcement power to an agency truly a suit "at common law," and if so, on what ground? The traditional view in administrative law has been that statutory claims are not claims under common law—precisely the point the majority rejects: "what matters is the substance of the action, not where Congress has assigned it."

The Public Rights Doctrine

A foundation for the view that statutory claims brought by Federal agencies are different than those under the common law is the "public rights doctrine," which dates back to an 1856 Supreme Court case, *Murray's Lessee*. More specifically, the Supreme Court's decision in *Atlas Roofing v. OSHA* in 1977 held that Congress can pass statutes authorizing suits that are "unknown to the common law"—and thus beyond the reach of the Seventh Amendment's guarantee of a jury trial in civil cases. Atlas Roofing

includes language providing that for "cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact, the Seventh Amendment does not prohibit Congress from assigning the factfinding function [the equivalent of a jury trial] and initial adjudication to an administrative forum with which the jury would be incompatible." Those are the kinds of cases in which ALJs have been used in a variety of agencies beyond the SEC, typically cases that often rely on expert knowledge of a regulated industry.

Roberts' originalist interpretation of the Constitution is clear: he wrote that the "hallmark" of whether something is a public right is "whether it is made of the stuff of the traditional actions at common law tried by the courts at Westminster in 1789." Those actions—which include imposing monetary penalties—in the majority's view clearly fall under the Seventh Amendment. (This leaves out, for instance, cases about collecting taxes due (clearly a government function) and other areas that fall within government's exclusive power.

Applicability of the Decision

The Court's ruling, while quite wide in its principle, was considerably narrower in application. Strictly, it applies only to defendants accused of fraud by the SEC and likely other agencies ("A defendant facing a fraud suit has the right to be tried by a jury of his peers before a neutral adjudicator"), and the Court noted that previous decisions of ALJs, including those which imposed civil monetary penalties, are not subject to being reopened in new litigation simply because of the Court's decision. This leaves open, however, the question of how far the decision will go in practice.

Juries decide many complex questions in both civil and criminal law. The issue is not whether juries are workable, it is whether they are required. Where, as in the Dodd-Frank statute, the government has an option between an administrative remedy and a suit involving a jury trial, there is a strong argument that Jarkesy applies and that the government should use a jury trial to exercise enforcement power, binding itself to Federal courts' strict rules on evidence and use of a neutral finder of fact. (One difference between a jury trial in an Article III court and a proceeding before an administrative law judge is different, often broader, rules on the admissibility of evidence.)

More broadly, however, the Court has called into question the workability and future of about 200 statutes implemented by a large number of agencies and even whether the ALJ system can continue. How far the Court is willing to go in its originalist interpretation in other potential cases—notably, where a statute gives an exclusive or quasi-exclusive enforcement right to a Federal agency—is the larger question once other suits based on different statutes come before it. In 1789, there was no administrative state. This leads to a broader question as to the extent to which the public rights doctrine will remain a permissible exception to the Seventh Amendment right to a jury trial. If the court narrows the public rights doctrine, much of the current structure of the administrative state and agency enforcement of laws and regulations could be called into question. Five years from now, it is possible that the system could look very different, forcing agencies to choose between less enforcement or more expensive enforcement through jury trials and forcing Congress to review statutes in which it has delegated power to agencies.

Agencies would be wise to consider carefully how they will proceed with future enforcement actions.

Conclusion: Back to the Supreme Court

Jarkesy is one of a series of Supreme Court decisions which raise significant questions about the future of the administrative state. In particular, starting with *West Virginia v. EPA*, the Roberts Court has restricted agencies' discretion in favor of clear delegations of authority from Congress and, as here,

increasing the power of the courts. In so doing, however, it seems inescapable to conclude that the net effect of these decisions will be less regulation.

Some agencies have specific authority from Congress to use civil monetary penalties for their own budgets (including enforcement efforts); if they are unable to enforce their statutes through ALJ procedures, then either their budgets will fall or Congress will have to provide greater funds. Bringing cases to trial can be expensive. As one law professor noted in response to the decision, "[t]he SEC doesn't have infinite resources, and so if the cost of settlement goes up, it means they're going to have fewer resources to bring enforcement actions."

The broader question—almost certain to reach the Supreme Court in two or three Terms—is whether Congressional statutes that include (as Sotomayor wrote in dissent) the "Occupational Safety and Health Review Commission, the Federal Energy Regulatory Commission, the Federal Mine Safety and Health Review Commission, the Department of Agriculture, and many others" are themselves vulnerable to a Seventh Amendment challenge. It is understandable that the Court made a somewhat narrow ruling on the case before it rather than a sweeping abolition of the role of ALJs that would have been disruptive to the workings of so many agenices. But those agencies must now consider how to operate—and what enforcement matters to bring—in a new and uncertain regulatory environment.

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