ADJUDICATIVE ANGST: ADMINISTRATIVE LAW JUDGES AND THE FAIRNESS PARADOX AT THE HEART OF *SEC v. JARKESY*

Abstract: Ever since Congress passed the Administrative Procedure Act (APA) in 1946, Administrative Law Judges (ALJs) have adjudicated disputes like federal courts. ALJs resemble Article III judges with respect to insulation from executive branch control, and similarly play an important part in assessing agency enforcement of federal law. Today, almost two thousand ALJs adjudicate Social Security, Medicare, and securities regulation claims, among others. Until recently, the U.S. Supreme Court has largely upheld administrative adjudication as consistent with the Constitution under the public rights doctrine. Yet, as the Supreme Court has shifted rightward, attacks on this feature of the modern administrative state have grown. In 2022, in *Jarkesy v. SEC*, the United States Court of Appeals for the Fifth Circuit invalidated the Securities and Exchange Commission's use of ALJs to adjudicate federal securities law on two key grounds. First, it determined that SEC ALJs could not impose securities fraud fines without violating the Seventh Amendment right to a trial by jury; and second, the court determined that dual for-cause removal provisions protecting SEC ALJs from presidential control infringed upon the President's Article II removal power. In 2024, the U.S. Supreme Court affirmed the Fifth Circuit's Seventh Amendment holding, avoiding the removal issue for now. This Note argues that these two holdings are in tension. Lurking beneath the Court's formalist Seventh Amendment jurisprudence is a deep skepticism of the fairness of ALJ adjudication. Yet, the Court adopting the Fifth Circuit's removal analysis would subject ALJs to political influence, thereby perpetuating the very fairness deficiencies it denounces in *Jarkesy* across thousands of ALJ proceedings.

INTRODUCTION

"[I]f we're right, people lose homes, people lose jobs, people lose retirement savings, people lose pensions."[1] This is how the 2015 biographical film *The Big Short* described financial bets against the American housing market in the years preceding the 2008–2009 Financial Crisis.[2] The resulting Great Recession had nationwide consequences, leading to mass layoffs, foreclosures,

[1] THE BIG SHORT (Paramount Pictures 2015). Based on a 2010 novel of the same name, the film offers a contemporaneous account of the events leading up to the United States housing bubble and the resulting 2008 Financial Crisis. *Id.*

[2] *Id.*; *see also* MICHAEL LEWIS, THE BIG SHORT: INSIDE THE DOOMSDAY MACHINE (2010) (describing a group of financial investors who correctly predicted and subsequently profited from the 2008–2009 Financial Crisis).

and evictions.[3] To prevent future financial crises, the government enacted the Dodd-Frank Act in 2010.[4] As landmark financial reform legislation, the Dodd-Frank Act expressly sought to overhaul the United States' financial regulatory system.[5] To achieve this goal, the Act granted novel powers to the Securities and Exchange Commission (SEC), giving the financial regulatory agency more teeth to regulate dishonest financial activity.[6] Dodd-Frank broadened the SEC's authority to include administrative adjudication jurisdiction over almost all defendants alleged to have committed civil securities law violations.[7] Subsequently, the SEC could choose to pursue enforcement actions in federal court or before SEC administrative law judges (ALJs), who preside over formal agency adjudications that mirror Article III courts.[8]

Like federal district courts, ALJs resolve factual disputes and apply federal law in decisions that may become binding upon the parties.[9] The Supreme Court has explained that ALJs exercise authority analogous to that of an Arti-

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[3] *See* Andrew Loo, *2008–2009 Global Financial Crisis*, CORP. FIN. INST., https://corporatefinanceinstitute.com/2008-2009-global-financial-crisis [https://perma.cc/UPA4-6W4L] (tracing the consequences of the 2008–2009 Financial Crisis and Great Recession).

[4] Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376 (2010), codified as amended at 12 U.S.C. § 5301 (2012).

[5] *Id.* The statute's purpose is listed at the beginning of the legislation: "[An Act] [t]o promote the financial stability of the United States by improving accountability and transparency in the financial system, to end 'too big to fail,' to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes." *Id.*; *see also* Sara Hill, *Unveiling the Insights: Exploring Dodd-Frank Act Section 1071 at the CRA and Fair Lending Colloquium*, WOLTERS KLUWER (June 30, 2023), https://www.wolterskluwer.com/exploring-dodd-frank-act-section-1071 [https://perma.cc/6BQ3-CMXR] (referring to the Dodd-Frank Act as watershed legislation reacting to the 2008–2009 financial crisis).

[6] *See* Xin Zheng, *A Tale of Two Enforcement Venues: Determinants and Consequences of the SEC's Choice of Enforcement Venue After the Dodd-Frank Act*, 96 ACCT. REV. 451, 451 (2021) (noting that "[t]he Dodd-Frank Act expanded the SEC's enforcement power by allowing the SEC to use administrative proceedings for nearly all defendants with alleged civil violations of securities laws").

[7] *Id.*; *see also* Mark K. Schonfeld, John H. Sturc & Barry R. Goldsmith, *The Expansion of SEC Enforcement Under the Dodd-Frank Act*, 27 REV. BANKING & FIN. SERVS. 21, 21 (2011) (explaining that the Dodd-Frank Act provided the SEC with new tools in an "already substantial enforcement arsenal").

[8] *See, e.g.*, H.R. REP. NO. 111-687, pt. 1, at 78 (2010) (explaining that the statute "provides appropriate due process protections by making the SEC's authority in administrative penalty proceedings coextensive with its authority to seek penalties in Federal court"). Although similar, the powers and responsibilities of ALJs and Article III judges are not identical. *See* Kent Barnett, *Resolving the ALJ Quandary*, 66 VAND. L. REV. 797, 798–99 (2013) (listing the similarities and differences between ALJs and federal judges).

[9] *See* Robin J. Arzt, David H. Coffman & Pamela L. Wood, *Advancing the Judicial Independence and Efficiency of the Administrative Judiciary: A Report to the President-Elect of the United States*, 29 J. NAT'L ASS'N ADMIN. L. JUDICIARY 93, 95 (2009) (arguing that "ALJs are the functional equivalent of federal trial judges"); Barnett, *supra* note 8, at 798–99 (noting the shared features of Article III judges and ALJs).

cle III judge.[10] ALJs retain a degree of insulation from the political process, protected by two layers of for-cause removal protections under the Administrative Procedure Act (APA).[11] Following the Supreme Court's decision in 2018, in *Lucia v. SEC*, SEC ALJs are also subject to the Constitution's Appointments Clause.[12] Of course, Article III judges have key distinguishing features, namely that their salaries may not be reduced, they may only be removed from their positions by impeachment, and they cannot have any association with the agencies appearing before them.[13]

Proponents argue that ALJ adjudication offers a viable alternative to federal judicial review, as ALJs use expertise to efficiently preside over thousands of specialized administrative claims each year.[14] The Supreme Court has pre-

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[10] *See, e.g.*, Lucia v. SEC, 585 U.S. 237, 242 (2018) (citing Butz v. Economou, 438 U.S. 478, 513 (1978)).

[11] *See* Barnett, *supra* note 8, at 800 (explaining the current statutory process for removing ALJs). The original APA called ALJs "hearing examiners," but the adjudicators successfully lobbied for a change to the more prestigious title of "administrative law judge[s]" in 1972. *See* K.G. Jan Pillai, *Rethinking Judicial Immunity for the Twenty-First Century*, 39 HOW. L.J. 95, 123 (1995) (cataloguing the evolution of the ALJ position in the decades following the APA). SEC Commissioners can initiate removal proceedings of SEC ALJs with the Merit Systems Protection Board (MSPB), which will independently determine if there is good cause for removal. 5 U.S.C. § 7521(a). Likewise, SEC commissioners may only be fired by the President for cause, rather than at-will. *See* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 487 (2010) (assuming that SEC Commissioners can only be removed by the President for good cause). The Fifth Circuit panel in *Jarkesy* determined that these dual for-cause removal provisions unconstitutionally interfered with the President's Article II duties. *See* 34 F.4th 446, 463 (5th Cir. 2022), *aff'd*, 603 U.S. 109 (2024).

[12] *See Lucia*, 585 U.S. at 251 (holding that SEC ALJs were "Officers" under the Constitution and thus had to be appointed in accordance with the Appointments Clause). The Appointments clause states in relevant part that "the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. CONST. art. II, § 2. Some scholars believe that *Lucia* applies not only to SEC ALJs, but the entire ALJ corps. *See, e.g.*, Emily S. Bremer, *Presidential Adjudication*, 110 VA. L. REV. 1749, 1751 n.8 (2024) (assuming that *Lucia*'s holding applies to ALJs within other agencies because of their shared functions and responsibilities). Following *Lucia*, the Office of the Solicitor General issued guidance extending *Lucia's* reasoning to all ALJs. Memorandum from the Solicitor General, U.S. Dep't of Just., to Agency Gen. Counsels, Guidance on Administrative Law Judges After *Lucia v. SEC* (S. Ct.) (July 2018).

[13] U.S. CONST. art. III, § 1. Article III specifies that federal judges serve for life under "good Behaviour." *Id.* ALJs, although nominally impartial, technically work for the agency they adjudicate claims for. *See Administrative Law Judge Positions*, U.S. OFF. OF PERS. MGMT, https://www.opm.gov/policy-data-oversight/classification-qualifications/general-schedule-qualification-standards/specialty-areas/administrative-law-judge-positions/ [https://perma.cc/XU2Y-B76Z] (explaining that ALJs are employed by the federal government in various agencies, deciding cases in areas like "admiralty, advertising, antitrust, banking, communications, energy, environmental protection, food and drugs, health and safety, housing, immigration, interstate commerce, international trade, labor management relations, securities and commodities markets, social security disability and other benefits claims, and transportation").

[14] *See* Brief for Ass'n of Admin. L. Judges as Amici Curiae Supporting Petitioners at 2, 22, SEC v. Jarkesy, 603 U.S. 109 (2024) (No. 22-859) (arguing that ALJs have agency-specific expertise to aid

viously upheld such adjudications under the so-called "public rights doctrine."[15] In recent years, however, previously stable administrative law doctrines are in flux.[16] During the last four terms, the Supreme Court has rejected agency efforts to combat the spread of COVID-19, struck down comprehensive climate regulation, and vetoed President Joe Biden's plan for federal student loan forgiveness under the novel major questions doctrine.[17] As part of the recent upheaval in administrative law doctrine, jurists and scholars alike have criticized certain forms of ALJ adjudication as violating the Seventh Amendment right to a jury trial for "Suits at common law."[18] Likewise, academics and federal judges have argued that Article II of the Constitution requires greater presidential removal authority over ALJs.[19]

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in resolving disputes, with Social Security Administration (SSA) ALJs hearing "hundreds of thousands" of claims per year).

[15] *See, e.g.*, Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n, 430 U.S. 442, 455 (1977) (allowing administrative adjudicators to preside over civil enforcement actions without running afoul of the Seventh Amendment under the public rights doctrine); *see also* Bremer, *supra* note 12, at 1795 n.258 (recognizing the connection between ALJ adjudication and the public rights doctrine).

[16] *See, e.g.*, Loper Bright Enters. v. Raimondo, 603 U.S. 369, 412 (2024) (overruling the *Chevron* doctrine, which required federal courts to defer to reasonable agency interpretations of ambiguous statutes); *see also* Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1011–12 (2023) (examining several of the Court's recent administrative law decisions invalidating agency action under the major questions doctrine, which "require[s] explicit and specific congressional authorization for certain agency policies").

[17] *See* Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 595 U.S. 109, 117 (2022) (holding that the Occupational Safety and Health Administration (OSHA) could not implement vaccination requirements for private employers); West Virginia v. EPA, 597 U.S. 697, 724–25 (2022) (invoking the major questions doctrine to reject Environmental Protection Agency (EPA) efforts to limit greenhouse gas emissions); Biden v. Nebraska, 600 U.S. 477, 494 (2023) (holding that a federal statute does not provide the Secretary of Education authority to "waive or modify" $430 billion in student loan debt); *see also* Deacon & Litman, *supra* note 16, at 1011–12 (examining the Supreme Court's recent invocation of the major questions doctrine to limit administrative agency authority); Benjamin C. Skillin, Note, *Major Questions Require Major Coordination: Enhancing Regulatory Coordination to Combat Nondelegation and Anti-Deference Judicial Scrutiny*, 64 B.C. L. REV. 1283, 1284 (2023) (same).

[18] *See* Axon Enter., Inc. v. FTC, 598 U.S. 175, 202 (2023) (Thomas, J., concurring) (questioning the constitutionality of administrative adjudication over private property rights); Jennifer L. Mascott, *Constitutionally Conforming Agency Adjudication*, 2 LOY. U. CHI. J. REG. COMPLIANCE 22, 25 (2017) (same); *see also* Thryv, Inc. v. Click-To-Call Techs., LP, 590 U.S. 45, 78 (2020) (Gorsuch, J., dissenting) (writing that the Court has committed a constitutional error by delegating the "disposition of individual rights to executive agency officials").

[19] *See* Linda D. Jellum, *"You're Fired!" Why the ALJ Multi-Track Dual Removal Provisions Violate the Constitution and Possible Fixes*, 26 GEO. MASON. L. REV. 705, 708 (2019) (contending that the current dual for-cause removal protections for ALJs are unconstitutional); Fleming v. Dep't of Agric., 987 F.3d 1093, 1104 (D.C. Cir. 2021) (Rao, J., concurring in part and dissenting in part) (same). In early 2025, the Department of Justice declared that multiple layers of removal protections for ALJs are unlawful. *See* Jasper Ward & Luc Cohen, *US Declares Administrative Law Judge Removal Rules Unconstitutional*, REUTERS (Feb. 21, 2025), https://www.reuters.com/legal/us-declares-administrative-law-judge-removal-rules-unconstitutional-2025-02-21/ [https://perma.cc/ZM4C-YV2Y] (noting that the Trump Administration would no longer defend these statutory protections in court).

In 2022, in *Jarkesy v. SEC*, the Court of Appeals for the Fifth Circuit became the first federal court to adopt these arguments wholesale.[20] In *Jarkesy*, the Fifth Circuit struck down the SEC's adjudicative enforcement regime on two pertinent constitutional grounds.[21] First, the court held that the SEC's internal adjudication of securities fraud penalties violated the Seventh Amendment right to a civil jury trial; and second, that dual for-cause removal provisions shielding SEC ALJs from presidential control infringed upon the President's Article II removal power.[22] In 2024, in *SEC v. Jarkesy*, the United States Su-

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[20] *See* Jarkesy v. SEC, 34 F.4th 446, 451 (5th Cir. 2022) (holding that the SEC ALJ adjudication structure suffers from three different "constitutional defects"), *aff'd*, 603 U.S. 109 (2024). The Fifth Circuit's opinion spurred similar challenges to the structure of other ALJ adjudication schemes. *See* Robert Iafolla, *Attacks on Agency In-House Judges Heat Up, Blunting Enforcement*, BLOOMBERG L. (Oct. 8, 2024), https://news.bloomberglaw.com/daily-labor-report/attacks-on-agency-in-house-judges-heat-up-blunting-enforcement-43 [https://perma.cc/U5QV-BJWM] (noting the increase in constitutional challenges to ALJ proceedings following the Fifth Circuit's ruling in *Jarkesy*).

[21] *See* 34 F.4th at 451 (concluding that the SEC enforcement proceedings violate the Seventh Amendment right to a jury trial and the President's Article II responsibilities). The Fifth Circuit also held that Congress violated the nondelegation doctrine by allowing the agency to choose whether to bring claims via agency tribunals or Article III courts. *Id.* at 459. *Jarkesy* appears to be the first federal appeals court decision to strike down agency action under the long dormant nondelegation doctrine. *See* Devon Ombres, SEC v. Jarkesy*: The Threat to Congressional and Agency Authority*, CTR. FOR AM. PROGRESS (Nov. 27, 2023), https://www.americanprogress.org/sec-v-jarkesy [https://perma.cc/3WNF-4UAZ] (writing that if the Supreme Court upheld the Fifth Circuit's decision, it would be the first time since the early 1900s that it has invoked the nondelegation doctrine to invalidate a federal law). The nondelegation doctrine posits that there are stringent limits on how much legislative power Congress can delegate to administrative agencies. *Id.* In recent years, some Justices have attempted to revive the nondelegation doctrine. *See, e.g.*, Gundy v. United States, 588 U.S. 128, 164 (2019) (Gorsuch, J., dissenting, joined by Roberts, C.J. & Thomas, J.) (arguing that the original meaning of the Constitution requires the Court to retreat from its permissive delegation doctrine). This Note focuses on the intersection between *Jarkesy* and ALJ adjudication, so it will not address the Fifth Circuit's nondelegation holding. *See infra* Part III and accompanying text. Notable scholars have examined the doctrine comprehensively elsewhere. *See, e.g.*, Eric Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1721 n.2 (2002) (offering an "honor roll of scholarship" by law professors analyzing the nondelegation doctrine); Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 285 (2021) (arguing that the nondelegation doctrine lacks any historical foundation). Moreover, in 2025, the Court rejected a nondelegation claim, suggesting that the nondelegation doctrine remains dormant—at least for now. *See* FCC v. Consumers' Rsch., 145 S. Ct. 2482, 2492 (2025) (rejecting nondelegation challenge to Congress's grant of authority over the administration of universal-service subsidy programs to the FCC).

[22] *Jarkesy*, 34 F.4th at 451. The Fifth Circuit first addressed the Seventh Amendment and the applicability of the public rights doctrine. *Id.* The Supreme Court has permitted agency adjudication of so-called public rights, such as government benefits yet required federal court jurisdiction over private rights such as private property or tort disputes. *See* Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n, 430 U.S. 442, 458, 461 (1977) (allowing an administrative tribunal to adjudicate a novel statutory claim under the public rights doctrine). The Court has analyzed public rights cases somewhat inconsistently. *See, e.g.*, Stern v. Marshall 564 U.S. 462, 488 (2011) (admitting that the public rights doctrine is not entirely clear).

preme Court affirmed the Fifth Circuit's Seventh Amendment holding, declining to answer the presidential removal question.[23]

At first glance, the two holdings appear to work in tandem: both can simply be characterized as part of the Supreme Court's increasingly formalist separation of powers jurisprudence obstructing the administrative state.[24] This Note attempts to search further, arguing that the approach to ALJ adjudication in the *Jarkesy* litigation presents an inescapable contradiction.[25] Underlying the Court's Seventh Amendment jurisprudence is a deep skepticism of the fairness of agency adjudication.[26] Yet, adopting the Fifth Circuit's removal holding, which expands presidential control over ALJs, would subject ALJs hearings to greater political influence, intensifying the very fairness concerns the Court raises in the Seventh Amendment context.[27] The Court is poised to adopt the Fifth Circuit's presidential removal holding.[28] If it does so, it will

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[23] *See* SEC v. Jarkesy, 603 U.S. 109, 121 (2024) ("Since the answer to the jury trial question resolves this case, we do not reach the nondelegation or removal issues."). In the lead-up to the case, one regulatory law scholar argued that the Court's ruling may be "the most important administrative law decision of the last half-century." Ronald Mann, *Supreme Court to Consider Multi-pronged Constitutional Attack on SEC*, SCOTUSBLOG (Mar. 14, 2023), https://www.scotusblog.com/justices-to-consider-multi-pronged-constitutional-attack-on-sec [https://perma.cc/VFW4-KWKW].

[24] *See* Note, *Administrative Law—Separation of Powers—Public Rights Doctrine*—SEC v. Jarkesy, 138 HARV. L. REV. 405, 415 (2024) (referring to *Jarkesy* as an example of the Court's assault on the administrative state); Saule T. Omarova & Brian Richardson, *Public Investment As Constitutional Power and Accountability Challenge,* 92 U. CHI. L. REV. 461, 462 (2025) (characterizing *Jarkesy* as part of a "concerted legal attack" on the administrative state); Steve Vladeck, *Destabilizing the Administrative State*, ONE FIRST (July 8, 2024), https://www.stevevladeck.com/p/89-destabilizing-the-administrative [https://perma.cc/49PB-5XPL] (writing that the Supreme Court's decision in *Jarkesy*, along with other recent administrative law cases, "throw[s] into doubt a stunning array of prior administrative action"); *see also* James Fallows Tierney, Jarkesy's *Stakes for the SEC*, 74 DUKE L.J. 1851, 1867 (2025) (referring to Chief Justice Roberts's opinion in *Jarkesy* as employing a "formalist" analysis).

[25] *See infra* notes 189–243 and accompanying text. Administrative law scholars have increasingly raised concerns about the tension between the President's Article II removal power and the Due Process Clause's requirement of impartiality in adjudication. *See* Christopher J. Walker, *Constitutional Tensions in Agency Adjudication*, 104 IOWA L. REV. 2679, 2680 (2019) (writing that "political control over agency adjudication . . . potentially raises due process concerns"); Kent Barnett, *Regulating Impartiality in Agency Adjudication*, 69 DUKE L.J. 1695, 1696–98 (2020) (sketching the conflict between the President's removal power and neutrality in agency adjudication); Bremer, *supra* note 12, at 1813 (collecting scholarship to show there is an inherent tension between Article II's requirement that the President retain control over agency officials and realizing sufficient due process in agency adjudication). This Note specifically focuses on the conflict between *Jarkesy*'s skepticism toward ALJ fairness and how adopting the Fifth Circuit's removal holding will hasten the very fairness concerns the Justices raise. *See infra* notes 189–243 and accompanying text.

[26] *See infra* notes 189–218 and accompanying text.

[27] *See infra* notes 220–243 and accompanying text.

[28] *See* Christopher J. Walker, *What* SEC v. Jarkesy *Means for the Future of Agency Adjudication*, YALE J. ON REGUL. NOTICE & COMMENT (June 27, 2024), https://www.yalejreg.com/nc/what-sec-v-jarkesy-means-for-the-future-of-agency-adjudication [https://perma.cc/5AWR-BLQ9] (predicting that the Supreme Court will soon invalidate the dual-layer removal protections for ALJs); Jellum, *supra*

heighten the very fairness defects in ALJ adjudication that it derides in *Jarkesy*, among other Seventh Amendment decisions.[29]

Part I of this Note explains formal administrative agency adjudication, focusing on the creation of ALJs and their relationship with Article III courts.[30] Next, Part I examines the scholarship surrounding formal administrative adjudication and ALJ independence.[31] It then describes the Court's precedents governing when agency adjudicators can hear cases like federal courts and the Court's expanding view of the President's removal power.[32] Part I concludes by explaining the factual and procedural history of *Jarkesy*.[33] Part II describes *Jarkesy*'s Seventh Amendment and presidential removal holdings by the Supreme Court and Fifth Circuit respectively.[34] It also surveys separate opinions to glean further insight into the Justices' views of ALJ adjudication.[35] Part III argues that the two decisions are contradictory because adopting the Fifth Circuit's removal analysis will heighten the same fairness concerns the Court attributes to ALJ adjudication in its Seventh Amendment cases.[36] Increasing presidential control over ALJs risks subjecting thousands of claimants to politically biased adjudications, ignoring the impartiality Congress sought to enshrine in the APA.[37]

I. Administrative Adjudication, the Public Rights Doctrine, and Presidential Removal Authority

In 2022, in *Jarkesy v. SEC*, a divided panel of the United States Court of Appeals for the Fifth Circuit held that, first, the SEC's internal enforcement of securities fraud penalties violated the Seventh Amendment right to a civil jury trial and, second, that dual for-cause removal protections for SEC ALJs infringed

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note 19, at 707 (writing that "it is only a matter of time before this removal issue reaches the Supreme Court"). In May 2025, the Supreme Court vacated a lower court order enjoining President Trump from firing two members of independent regulatory agencies. Trump v. Wilcox, 145 S. Ct. 1415, 1415 (2025). In doing so, the Court effectively overruled an almost century-old precedent upholding "the power of Congress to create federal agencies headed by commissioners who serve for fixed terms and cannot be fired by the president except for good cause." Michael C. Dorf, *SCOTUS Severely Undercuts* Humphrey's Executor*, Its Own Authority, and Constitutional Democracy*, DORF ON L. (May 26, 2025), https://www.dorfonlaw.org/2025/05/scotus-severely-undercuts-humphreys.html [https://perma.cc/DMN3-3NZX].

[29] *See infra* notes 189–243 and accompanying text.

[30] *See infra* notes 38–57 and accompanying text.

[31] *See infra* notes 58–75 and accompanying text.

[32] *See infra* notes 76–135 and accompanying text.

[33] *See infra* notes 136–152 and accompanying text.

[34] *See infra* notes 153–189 and accompanying text.

[35] *See infra* notes 168–182 and accompanying text.

[36] *See infra* notes 189–235 and accompanying text.

[37] *See infra* notes 220–243 and accompanying text.

upon the President's power of removal under Article II.[38] In 2024, in *SEC v. Jarkesy*, the U.S. Supreme Court affirmed the lower court's Seventh Amendment holding.[39] Section A of this Part explains the foundation of formal agency adjudication proceedings in the APA, as well as similarities between ALJs and Article III judges.[40] Section B then discusses the scholarship and policy considerations surrounding ALJs' ability to hear cases like federal courts, as well as motivations for insulating ALJs from political control.[41] Section C examines the Supreme Court's precedent regarding the pertinent holdings in the *Jarkesy* litigation: the public rights doctrine and presidential control over agency adjudicators.[42] Finally, Section D of this part describes the factual and procedural history of *Jarkesy*.[43]

A. Administrative Law Judges and Article III Courts

Modern administrative law judges are a wholly statutory creation, born out of necessity as the administrative state blossomed.[44] Congress enacted the APA in 1946 with the goal of standardizing the processes by which administrative agencies pass rules and administer internal adjudications.[45] ALJs typically preside over what is often referred to as formal APA adjudication.[46] Formal

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[38] Jarkesy v. SEC, 34 F.4th 446, 451 (5th Cir. 2022), *aff'd*, 603 U.S. 109 (2024).

[39] *See* 603 U.S. 109, 121 (2024) (deciding the case on Seventh Amendment grounds and declining to address the Fifth Circuit's nondelegation or presidential removal holdings).

[40] *See infra* notes 44–57 and accompanying text.

[41] *See infra* notes 58–75 and accompanying text.

[42] *See infra* notes 76–135 and accompanying text.

[43] *See infra* notes 136–152 and accompanying text.

[44] *See generally Administrative Law Judge Basics*, ADMIN. CONF. OF THE U.S., https://www.acus.gov/sites/default/files/documents/35_ALJ%20Basics.pdf [https://perma.cc/PE3X-U7E3] (summarizing the origins of the APA). Administrative adjudication existed long before the APA was passed. *See, e.g.*, Robert L. Glicksman & Richard E. Levy, *The New Separation of Powers Formalism and Administrative Adjudication*, 90 GEO. WASH. L. REV. 1088, 1125–32 (2022) (recounting early historical examples of administrative adjudication). Indeed, there are pre-APA statutory analogues in the Hepburn Act of 1906, which created an expert commission designed to adjudicate questions of fact with limited federal judicial review. Ch. 3591, Sec. 4, 34 Stat. 584, 589 (1906); *see* Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 953, 984 (2011) (exploring the origins of the agency adjudication model at issue in the Court's line of public rights cases).

[45] *See* Kathryn E. Kovacs, *Superstatute Theory and Administrative Common Law*, 90 IND. L. REV. 1207, 1229–30 (2015) (examining the legislative deliberations that led to the passage of the APA). Scholars maintain that the APA fundamentally transformed the contours of the Constitution. *See* Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 422 (1987) (characterizing the New Deal conception of the administrative state as a unique type of "constitutionalism").

[46] BEN HARRINGTON & DANIEL J. SHEFFNER, CONG. RSCH. SERV., R46930, INFORMAL ADMINISTRATIVE ADJUDICATION: AN OVERVIEW 6 (2021); *see also* Kent Barnett, *Against Administrative Judges*, 49 U.C. DAVIS L. REV. 1643, 1646–47 (2016) (distinguishing ALJs from other agency adjudicators on the basis that their hearings implicate formal adjudication under the APA). Interestingly, the

APA adjudication resembles Article III court proceedings, requiring oral arguments, presentation of evidence, rebuttal, cross-examinations, and an impartial adjudicator that issues written decisions.[47] Over 1900 ALJs operate in a myriad of federal agencies, adjudicating Social Security claims, Medicare hearings, energy regulation disputes, and more.[48] ALJs preside over cases concerning important public benefits that millions of Americans rely upon.[49] Agencies often choose to bring claims before ALJs because they have specialized expertise in the agency to which they belong.[50] ALJs are central to administrative agencies' functions; ALJs within the Social Security Administration (SSA), for example, adjudicated nearly half a million hearings and appeals last fiscal year.[51]

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use of administrative law judges is unique to the United States government structure. *See* Jeffrey S. Lubbers, *Administrative Adjudication: The United States Is the Outlier*, *in* THE OXFORD HANDBOOK OF ADMINISTRATIVE JUSTICE 45, 53 (Marc Hertoch, Richard Kirkham, Robert Thomas & Joe Tomlinson, eds., 2021) (comparing the United States' administrative system with the United Kingdom, Australia, and France's systems and finding that the United States system stands out due to its internal administrative adjudication structure).

[47] *See* Lucia v. SEC, 585 U.S. 237, 242 (2018) (writing that SEC ALJs exercise analogous authority to that of an Article III judge). Formal adjudications, unlike their informal counterparts, are subject to the APA's procedural and substantive requirements. *See generally* HARRINGTON & SHEFFNER, *supra* note 46, at 5–8 (outlining the procedures that the APA requires in formal adjudication). For example, in formal adjudication, "[a] party may 'present his case or defense by oral or documentary evidence,' present 'rebuttal evidence,' and 'conduct such cross-examination as may be required for a full and true disclosure of the facts.'" *Id.* at 6 (citing 5 U.S.C. § 556(d)). The provisions triggering formal adjudication are understood to apply only when a statute explicitly states that a hearing is required "on the record." *See, e.g.*, Crestview Parke Care Ctr. v. Thompson, 373 F.3d 743, 748 (6th Cir. 2004) ("Lower courts have explicitly held that a formal adjudication featuring an oral evidentiary hearing is required by the APA only when a statute explicitly calls for a hearing 'on the record.'").

[48] *See United States Office of Personnel Management, Administrative Law Judges*, *ALJs by Agency*, U.S. OFF. OF PERS. MGMT., https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=By-Agency/ [https://perma.cc/WX4C-6MPG] (listing the agencies that utilize ALJs, including but not limited to the SSA, Department of Health and Human Services, National Labor Relations Board, and the Federal Energy Regulatory Commission). ALJs are not a monolith, however, as adjudicators within different agencies handle unrelated responsibilities. *See* Brief for Ass'n of Admin. L. Judges, *supra* note 14, at 2 (noting that ALJs perform "vastly different functions" across various federal agencies).

[49] *See, e.g.*, *Program Provisions and SSA Administrative Data*, SOC. SEC. ADMIN., https://www.ssa.gov/policy/docs/statcomps/supplement/2022/2f8-2f11.html#table2.f8 [https://perma.cc/J2H3-44AS] (offering demographics and statistics surrounding the SSA's workload from the 2019 to 2021 fiscal years).

[50] *See* Brief for Ass'n of Admin. L. Judges, *supra* note 14, at 22 (arguing that ALJs have agency-specific expertise that aids in adjudicating claims). The importance of ALJs within the modern administrative state has motivated one scholar to state that "the linchpin of the US system is the ALJ . . . ." Lubbers, *supra* note 46, at 56.

[51] *See SSA's FY 2024 Agency Financial Report*, SOC. SEC. ADMIN., https://www.ssa.gov/finance/2024/Full%20FY%202024%20AFR.pdf [https://perma.cc/QC24-V8J4] (stating that SSA ALJs completed almost 423,000 hearing requests and reviewed nearly 74,000 appeals in the prior fiscal year); *see also* Jonah B. Gelbach & David Marcus, *Rethinking Judicial Review of High Volume Agency Adjudication*, 96 TEX. L. REV. 1097, 1098 (2018) (referring to the SSA as the nation's most prolific adjudicatory body).

Although ALJs exercise fact-finding duties and issue written determinations, their decisions are not final *per se*.[52] Instead, ALJ decisions are generally subject to appeal and de novo review by the head(s) of their agency.[53] Following an agency head's ruling, a dissatisfied party may appeal to the applicable United States Court of Appeals under a deferential standard of review regarding factual findings.[54] Federal judges, conversely, find their foundation in Article III of the Constitution.[55] Article III judges must be nominated by the President and confirmed by the Senate.[56] Federal courts preside over both criminal and civil cases covering various legal topics, and may review appeals of agency decisions.[57]

B. Scholarship Surrounding ALJ Adjudication

Before delving into policy debates surrounding ALJ adjudication, it is important to briefly distinguish between ALJs and the more common administrative judges.[58] The difference is relatively straightforward: ALJs conduct formal, structured hearings that must comply with the APA's substantive and

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[52] *See, e.g.*, 20 C.F.R. § 683.830 (2020) (providing that decisions rendered by Department of Labor (DOL) ALJs constitute final agency action unless a dissatisfied party has filed a petition for review within 20 days of the decision); 17 C.F.R. § 201.411(b–c) (2004) (stating that an ALJ produces only an initial decision that the Commission may review on appeal or on its own initiative).

[53] *See* Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CALIF. L. REV. 141, 143 (2019) (explaining that under the standard model of ALJ adjudication, "the agency head reviews ALJ decisions de novo and has final decision-making authority"); United States v. Arthrex, Inc., 594 U.S. 1, 25 (2021) (writing that agency head review of an ALJ decision "follow[s] the almost-universal model of adjudication in the Executive Branch").

[54] *See, e.g.*, 15 U.S.C. § 78(y)(a)(1) (explaining that aggrieved parties can appeal final decisions of the Commission to the applicable United States Court of Appeals); SEC v. Jarkesy, 603 U.S. 109, 117 (2024) (citations omitted) ("Judicial review is also available once the proceedings have concluded. But such review is deferential. By law, a reviewing court must treat the agency's factual findings as 'conclusive' if sufficiently supported by the record . . . ."); *see also* Axon Enter., Inc. v. FTC, 598 U.S. 175, 197 (2023) (Thomas, J., concurring) (explaining that federal courts must apply a "highly deferential standard of review" in reviewing ALJs' factual determinations).

[55] *See* U.S. CONST. art. III, § 1 (establishing the federal judiciary); ADMIN. CONF. OF THE U.S., *supra* note 44 (explaining that the APA created ALJs).

[56] *See* U.S. CONST. art. II, § 2 (prescribing that the President shall only nominate federal judges with the advice and consent of the Senate).

[57] *See* 15 U.S.C. § 78(y)(a)(1) (allowing a litigant to appeal a final order by SEC to the applicable federal circuit court); *Types of Cases*, U.S. COURTS, https://www.uscourts.gov/about-federal-courts/types-cases [https://perma.cc/K3HW-L4V9] (noting that the federal courts adjudicate criminal, civil, and bankruptcy suits).

[58] *See* Kent Barnett & Russell Wheeler, *Non-ALJ Adjudicators in Federal Agencies: Status, Selection, Oversight, and Removal*, 53 GA. L. REV. 1, 13 n.57 (2018) (distinguishing between the two kinds of administrative hearing officers and explaining that the confusion between the two terms has stumped even the Supreme Court, which mistakenly wrote that an ALJ presided over an adjudication when, in actuality, an administrative judge had done so); *see also* Perry v. Merit Sys. Prot. Bd., 582 U.S. 420, 427 (2017) (referring incorrectly to an MSPB administrative judge as an ALJ).

procedural requirements.[59] Additionally, ALJs are protected from at-will removal by agency heads.[60] Administrative judges, conversely, preside over informal hearings, have little-to-no job protection, and are functionally subordinate to their agency.[61] As Professor Kent Barnett has observed, these differences result from Congress's aim to insulate ALJs from agency policy-making to achieve litigant-protective adjudication.[62] In line with this commentary, Barnett has argued that complaints about the so-called "hidden judiciary" serving the policy goals of administrative agencies are better aimed at administrative judges than their ALJ counterparts.[63]

Proponents of ALJs take a functionalist approach to administrative adjudication.[64] First, they emphasize that ALJs hold a special role within the APA, referred to by several academics as a "super-statute."[65] These scholars argue

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[59] *See* Christopher J. Walker, *The Lost World of the Administrative Procedure Act: A Literature Review*, 28 GEO. MASON L. REV. 733, 747 (2021) (explaining that informal agency adjudication is a "residual category that encompasses any agency adjudication not subject to" the APA's formal hearing provisions).

[60] *See* 5 U.S.C. § 7521(a) (providing that SEC ALJs may be removed "only for good cause established and determined by the (MSPB)"). Likewise, MSPB members "may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office." *Id.* § 1202(d). The MSPB is an independent executive branch agency that ensures agencies comply with civil service protections in firing employees. *Merit Systems Protection Board*, FED. REG., https://www.federalregister.gov/agencies/merit-systems-protection-board [https://perma.cc/W5EQ-9RBF].

[61] *See* Barnett, *supra* note 46, at 1647 (noting the differences between ALJs and administrative judges). When an SEC ALJ chooses to impose civil fines, the hearing must be "on the record, after notice and opportunity for hearing." 15 U.S.C.§ 77h–1(g)(1).

[62] *See* Barnett, *supra* note 46, at 1648 (explaining that Congress sought to insulate ALJs from agency officials through the use of "hiring, removal, [and] oversight" protections); *see also* Adam B. Cox & Emma Kaufman, *The Adjudicative State*, 132 YALE L.J. 1769, 1785 (2023) (writing that many scholars have observed that the APA "secur[ed] impartiality and fairness in administrative adjudication").

[63] *See generally* Barnett, *supra* note 46, at 1647 (cataloguing features of administrative judges). Informal adjudication makes up the majority of administrative adjudications. *See* Emily S. Bremer, *Reckoning with Adjudication's Exceptionalism Norm*, 69 DUKE L.J. 1749, 1758 (2020) (stating that the majority of agency adjudication is informal). Because informal adjudications are not governed by the APA, there is a broad variety of procedures used in informal hearings. *See* Bijal Shah, *Administrative Subordination*, 91 U. CHI. L. REV. 1603, 1637–38 (2020) (outlining the flexibility agencies have to choose procedures in conducting informal adjudications). Although that is a ripe field for study, this Note focuses on ALJs and formal agency adjudication. *See infra* Part I and accompanying text.

[64] *See* Lucia v. SEC, 585 U.S. 237, 260 (2018) (Breyer, J., concurring in the judgment in part and dissenting in part) (writing that a key tenet of the APA was to achieve impartiality for ALJs in order to ease the disadvantages of pre-APA adjudication); *see also Functionalism*, BLACK'S LAW DICTIONARY (12th ed. 2024) (defining the term as "[a] methodological approach to law focusing on the effects of rules in practice, often as exhibited in judicial decisions, rather than on the precise statements of the rules themselves").

[65] *See* William N. Eskridge, Jr. & John Ferejohn, *The APA as a Super-Statute: Deep Compromise and Judicial Review of Notice-and-Comment Rulemaking*, 98 NOTRE DAME L. REV. 1893, 1894 (2023) (collecting scholarship demonstrating that "[t]here is academic consensus that the Administrative Procedure Act of 1946 (APA) is a *super-statute*"); Bremer, *supra* note 63, at 1750 (referring to

that a central purpose of the APA was to quell concerns about biases and inconsistency in agency adjudication.[66] In turn, to accomplish this aim, Congress wanted ALJs to closely resemble Article III judges.[67] Thus, ALJs enjoy safeguards similar to Article III judges, including protection from reduction of compensation, the inability to have ex parte communications with parties, and freedom from agency retribution.[68] Further, proponents maintain that even in a fact-finding role, ALJs have technical expertise that helps them process fact patterns in administrative cases better than the lay members of a jury.[69]

Despite the APA's intent to achieve impartiality in formal agency adjudications, some question the premise of ALJ neutrality.[70] One primary critique is that agencies are repeat players in front of ALJs; although ALJs independently resolve disputes, they still are technically members of the agency appearing before them.[71] After all, and unlike Article III judges, Congress created ALJs to

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the APA as a super-statute); *see also* Kovacs, *supra* note 45, at 1207 (citing Eskridge & Ferejohn to argue that because the APA is a super-statute, administrative common law that conflicts with the APA should be ignored).

[66] *See* Richard Pierce Jr., *Agency Adjudication: It Is Time to Hit the Reset Button*, 28 GEO. MASON L. REV. 643, 643–44 (2011) (recounting the history and purposes behind the APA). Congress was particularly concerned about the perception that agency adjudicators were biased toward agencies. *See* Richard E. Levy & Robert L. Glicksman, *Restoring ALJ Independence*, 105 MINN. L. REV. 39, 50 (2020) (recognizing that "fairness of agency adjudications was one of the central concerns that fueled the adoption of the APA").

[67] *See* Pierce Jr., *supra* note 66, at 644 (noting the inspiration that Article III civil proceedings provided for Congress in designing formal agency adjudication).

[68] *See* Barnett, *supra* note 8, at 798–99, 819 (comparing and contrasting ALJs and Article III courts). Ex parte communications are "oral or written communication[s] relevant to the merits of an adjudicatory proceeding" where only one party is present. 12 C.F.R. § 263.9 (2025).

[69] *See* Brief for Admin. L. Scholars as Amici Curiae Supporting Petitioners at 30, SEC v. Jarkesy, 603 U.S. 109 (2024) (No. 22-859) (arguing that "[a]gencies frequently have deep knowledge about the underlying context of the regulatory program in which a given adjudicative case arises, including technical issues that are unfamiliar to lay juries"); *see also* Kisor v. Wilkie, 588 U.S. 558, 571 (2019) (Kagan, J., plurality opinion) ("[a]gencies . . . have 'unique expertise,' often of a scientific or technical nature, relevant to applying a regulation 'to complex or changing circumstances'" (citing Martin v. Occupational Safety & Health Rev. Comm'n, 499 U.S. 144, 151 (1991))).

[70] *See* Barnett, *supra* note 46, at 1645–46 (noting the concern about agencies bringing cases before an internal agency adjudicator, which possibly boosts agency success rate). Jed Rakoff, a longtime United States District Court Judge for the Southern District of New York, expressed similar concerns in the SEC context. *See* Jed S. Rakoff, Is the S.E.C. Becoming a Law Unto Itself? PLI Securities Regulation Institute Keynote Address, at 1 (Nov. 5, 2014), https://securitiesdiary.wordpress.com/wp-content/uploads/2014/11/rakoff-pli-speech.pdf [https://perma.cc/ZC7F-VM8F] (cautioning that there are "dangers that seem . . . to lurk in the S.E.C.'s apparent new policy of bringing a greater percentage of its significant enforcement actions as administrative proceedings").

[71] *See, e.g.*, Russell G. Ryan, *The SEC as Prosecutor and Judge*, WALL ST. J. (Aug. 4, 2014), https://www.wsj.com/articles/russell-g-ryan-the-sec-as-prosecutor-and-judge-1407195362 [https://perma.cc/T9XA-KMPG] (referring to SEC ALJs as "executive branch employees").

help agencies effectively carry out their duties.[72] Under the enforcement regime at issue in *Jarkesy*, for example, detractors point to the SEC's higher success rate in administrative tribunals versus federal courts as evidence of pro-agency bias.[73] Critics of ALJs claim these impartiality concerns do not exist in Article III courts, where judges retain constitutional removal and salary protections, thus insulating them from political influence.[74] Accordingly, some scholars and jurists claim that allowing ALJs to adjudicate certain claims is unconstitutional.[75]

C. Supreme Court Precedent Regarding the Public Rights Doctrine and Presidential Removal Authority

To understand *Jarkesy* and its impact on ALJ adjudication, it is critical to grasp landmark Supreme Court decisions regarding agencies' ability to adjudicate cases like federal courts and agency adjudicators' independence from presidential control.[76]

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[72] *See* Barnett, *supra* note 8, at 817–20 (providing an overview of the debate surrounding ALJ impartiality); *see also* SEC v. Jarkesy, 603 U.S. 109, 142–43 (2024) (Gorsuch, J., concurring) (questioning the impartiality of ALJs due to their association with the agency they are employed by).

[73] *See* Ryan Jones, Note, *The Fight Over Home Court: An Analysis of the SEC's Increased Use of Administrative Proceedings*, 68 SMU L. REV. 507, 509–10 (2015) (cataloguing the mounting constitutional challenges against SEC ALJs following the agency's increased use of the administrative proceedings). According to one account, the SEC won over 88% of proceedings brought before SEC ALJs in 2013, compared to 63% in federal district court. *See* Gretchen Morgenson, *At the S.E.C., a Question of Home-Court Edge*, N.Y. TIMES (Oct. 5, 2013), https://www.nytimes.com/2013/10/06/business/at-the-sec-a-question-of-home-court-edge.html [https://perma.cc/UA6C-DSUU] (noting that some legal experts believe the SEC benefits from a "home-court advantage" by bringing claims before SEC ALJs). *But see* Urska Velikonja, *Are the SEC's Administrative Law Judges Biased? An Empirical Investigation*, 92 WASH. L. REV. 315, 315 (2017) (disputing the notion that the SEC enjoys a homecourt advantage in pursuing enforcement actions in agency adjudicatory proceedings versus federal courts).

[74] *See* Barnett, *supra* note 8, at 817 (explaining that critics accuse ALJs of being insufficiently impartial because of their role in performing an agency task); U.S. CONST. art. III, § 1 (providing salary protections for federal judges). Of course, federal judges may be removed only through the Constitution's impeachment process. *See generally* James E. Pfander, *Removing Federal Judges*, 74 U. CHI. L. REV. 1227, 1229 (2007).

[75] *See* Mascott, *supra* note 18, at 45 (writing that the Constitution requires "[c]ases involving . . . deprivations or transfers of life, liberty, or property" to be decided by federal courts, rather than agency adjudicators); *see also* Axon Enter., Inc. v. FTC, 598 U.S. 175, 204 (2023) (Thomas, J., concurring) (maintaining that agency adjudication of "core private rights . . . raise[s] serious constitutional issues").

[76] *See* Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284 (1856) (holding that administrative adjudicators may preside over public rights issues); Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n, 430 U.S. 442, 450 (1977) (same); Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 492 (2010) (holding that dual for-cause removal provisions separating the President and a financial regulatory board violated the separation of powers); Lucia v. SEC, 585 U.S. 237, 251 (2018) (concluding that SEC ALJs are "Officers" within the meaning of the Constitution and thus cannot be appointed by SEC staff).

1. Non-Article III Adjudication Under the Public Rights Doctrine

The Seventh Amendment of the United States Constitution provides:

> 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.[77]

The amendment contains sparse information about what qualifies as "Suits at common law."[78] In interpreting the scope of the Seventh Amendment, the Supreme Court pronounced what has now become known as the public rights doctrine.[79] Public rights, the Court has explained, may be adjudicated by non-Article III adjudicators, such as ALJs.[80] The Supreme Court has admitted, however, that its precedent regarding the public rights doctrine is far from clear.[81] This sub-section attempts to introduce the foundational cases surrounding the Supreme Court's public rights jurisprudence as set forth in *Jarkesy*.[82]

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[77] U.S. CONST. amend. VII.

[78] *See* Darrell A.H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 YALE L.J. 852, 872 (2013) (referring to the protections afforded by the Seventh Amendment as a "riddle"); Ellen E. Sward, *The Seventh Amendment and the Alchemy of Fact and Law*, 33 SETON HALL L. REV. 573, 583 (2003) (writing that the Seventh Amendment's language is "intentionally vague").

[79] *See Atlas Roofing*, 430 U.S. at 450 (explicating the public rights doctrine); *see also* Glicksman & Levy, *supra* note 44, at 1129 (scrutinizing the Court's perplexing distinction between public and private rights in cases like *Murray's Lessee*); *see also* John M. Golden & Thomas H. Lee, *Federalism, Private Rights, and Article III Adjudication*, 108 VA. L. REV. 1547, 1571 (2022) (writing that "[d]elineation of the public rights category has long been more than a little woolly").

[80] *See* James E. Pfander & Andrew G. Borrasso, *Public Rights and Article III: Judicial Oversight of Agency Action*, 82 OHIO ST. L.J. 493, 495–97 (2021) (sketching the public versus private rights distinction); Golden & Lee, *supra* note 79, at 1571–74 (same).

[81] *See* Stern v. Marshall 564 U.S. 462, 488 (2011) (admitting that the Court's precedents regarding the public rights doctrine have "not been entirely consistent"); *see also* Glicksman & Levy, *supra* note 44, at 1125 (referring to the public rights doctrine as "convoluted and obscure . . . [and that] many aspects of this doctrine are poorly explained and make little sense"); 32 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 8126 (4th ed. 2020) ("The constitutional doctrines governing Article III's limitations on non-Article III adjudication are, in many respects, a mess"). This confusion may partially result from the blurred distinction between Article III's requirement that the "judicial power" be exercised by federal courts and the Seventh Amendment's right to a civil jury trial. *See* Note, *Unlinking the Seventh Amendment and Article III*, 138 HARV. L. REV. 588, 588 (2024) (writing that although "the Seventh Amendment, Article III, and the [public rights doctrine] are somehow intertwined, it's unclear precisely how or why"); Richard Lorren Jolly, *The Administrative State's Jury Problem*, 98 WASH. L. REV. 1187, 1191–92 (2023) (arguing that the Court has failed to "fully explore the connection between" the Seventh Amendment and Article III); *see also* William Baude, *Adjudication Outside Article III*, 133 HARV. L. REV. 1511, 1571 (2020) (proposing that "[t]he Article III analysis should be conducted first, on its own. And then . . . if the non-Article III adjudication is permissible, the Seventh Amendment should be ignored"). Additionally, the Court has applied the public versus private rights distinction both in cases brought by the government against private parties and in claims between private parties, perhaps further clouding an

In 1856, in *Murray's Lessee v. Hoboken Land & Improvement Co.*, the Supreme Court first set forth the public rights doctrine, albeit in a decision that has long puzzled scholars.[83] The case involved a federal customs collector who stole upwards of a million dollars in fees from the government.[84] An administrative official auditing the collector's account discovered the theft.[85] Acting pursuant to federal law, the Secretary of the Treasury sanctioned the seizure and sale of the tax collector's property without judicial approval.[86] The collector's creditors sued, arguing that an Article III court was required to adjudicate the legality of the seizure.[87] In rejecting these claims, the Court reasoned that the dispute involved a matter that need not be adjudicated by a federal court.[88] The following language has famously evolved into the public rights doctrine:

> [T]here are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.[89]

already confusing doctrine. *Compare Atlas Roofing*, 430 U.S at 445 (applying the public rights doctrine to a claim brought by the federal government against private parties), *with Stern*, 564 U.S. at 485 (analyzing the public rights doctrine in a bankruptcy dispute between two private parties). *See also* SEC v. Jarkesy, 603 U.S. 109, 173 n.3 (2024) (Sotomayor, J., dissenting) (distinguishing the Court's public rights cases between private parties from those where "the Federal Government is . . . a party in its sovereign capacity").

[82] *See infra* notes 83–107 and accompanying text. This Note does not purport to exhaustively untangle this doctrinal knot. After all, many scholars have sought to do so throughout the years. *See, e.g.*, Gordon G. Young, P*ublic Rights and the Federal Judicial Power: From* Murray's Lessee *Through* Crowell *to* Schor, 35 BUFF. L. REV. 765, 771–72 (1986) (exploring the public versus private rights distinction in non-Article III adjudication); John M. Golden & Thomas H. Lee, *Congressional Power, Public Rights, and Non-Article III Adjudication*, 98 NOTRE DAME L. REV. 1113, 1164 (2022) (investigating the scope of the Court's public rights doctrine).

[83] *See* Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284 (1856) (stating that Congress can assign adjudication of public rights claims to administrative bodies); *see also* Glicksman & Levy, *supra* note 44, at 1129 (referring to *Murray's Lessee* as "a lengthy, confusing, and poorly understood opinion"); Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 IND. L.J. 233, 239 (1990) ("The Supreme Court opinions devoted to the subject of the validity of legislative and administrative tribunals are as troubled, arcane, confused and confusing as could be imagined.").

[84] *See Murray's Lessee*, 59 U.S. (18 How.) at 274–75 (explaining that then-applicable federal law authorized treasury officials to conduct audits of the accounts of customs collectors).

[85] *Id.* at 275.

[86] *Id.*

[87] *Id.* at 275–76. The plaintiff also alleged a due process violation. *Id.* at 275.

[88] *Id.* at 284.

[89] *Id.* This passage has been cited in several of the Supreme Court's subsequent public rights cases. *See* Pfander & Borrasso, *supra* note 80, at 496 (collecting cases quoting the passage); *see also* Crowell v. Benson, 285 U.S. 22, 49 (1932) (citing *Murray's Lessee*, 59 U.S. (18 How.) at 284)); Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n, 430 U.S. 442, 451 (1977) (same); Stern

Simultaneously, the Court cautioned that Congress could not "withdraw from [the federal courts] any matter which, from its nature, is the subject of a suit at the common law."[90] In doing so, the Court indicated that purely private rights must be adjudicated by the federal courts.[91] Still, *Murray's Lessee* left more questions than answers about the contours of the public and private rights distinction.[92] During the growth of the administrative state in the twentieth century, Congress tested the reach of the doctrine, creating new statutory enforcement regimes involving agency adjudicators.[93] Whether or not these novel adjudication schemes concerned public or private rights became a live question for the Supreme Court to consider.[94]

In 1977, in *Atlas Roofing Co. v. Occupational Safety & Health Review Commission*, the Supreme Court unanimously held that Congress could assign fact-finding duties and initial adjudication of a novel cause of action to administrative tribunals.[95] At issue in *Atlas Roofing* was the Occupational Safety and Health Act of 1970 (OSHA), which imposed new workplace safety require-

v. Marshall, 564 U.S. 462, 488–89 (2011) (same); SEC v. Jarkesy, 603 U.S. 109, 175–76 (2024) (Sotomayor, J., dissenting) (same).

[90] *See Murray's Lessee*, 59 U.S. (18 How.) at 284 (identifying the types of suits that must be adjudicated by the federal courts).

[91] *See id.* (listing cases that must be heard by the Article III courts); *Crowell*, 285 U.S. at 50–51 (stating that *Murray's Lessee* barred non-Article III adjudication of disputes involving private rights).

[92] *See* Glicksman & Levy, *supra* note 44, at 1130 (reasoning that "*Murray's Lessee* did not clearly explain the distinction between public and private rights, leading to many different and conflicting perspectives on these concepts"); Golden & Lee, *supra* note 82, at 1141 (stating that "the meaning and modern implications of *Murray's Lessee* remain hotly contested"); Pfander & Borrasso, *supra* note 80, at 495 (writing that although the public rights versus private rights distinction has been "central" to the Court's precedent, the distinction "has not proven self-defining").

[93] *See, e.g.*, Occupational Safety and Health Act of 1970, Pub. L. 91-596, 84 Stat. 1590, 1590–1620 (2018) (codified as amended at 29 U.S.C. §§ 651–675, 677–678) (creating a new regulatory enforcement structure to safeguard employee safety in the workplace); *see also* Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1143 (2014) (noting that "adjudicatory procedures continued to loom large in administrative law in the two decades after passage of the APA").

[94] *See Atlas Roofing*, 430 U.S. at 461 n.16 (stating that whether the Seventh Amendment applies under the circumstances is a question for the Supreme Court to decide); *cf.* Martin H. Redish & Samy Abdelsalam, *The Seventh Amendment Right to Jury Trial in the Administrative State: Recognizing the Dangers of the Constitutional Moment*, 99 NOTRE DAME L. REV. 1743, 1767 (2024) ("It is certainly true that the public rights doctrine finds its origins in Supreme Court decisions handed down prior to President Franklin Roosevelt's New Deal . . . . But it was not until 1977—long after the modern administrative state had taken shape—that the Supreme Court . . . applied that doctrine to constitutionally justify the complete absence of the Seventh Amendment jury trial right in suits which, if heard in Article III courts, would undoubtedly have triggered that right.").

[95] 430 U.S. at 450. The Court defined the Seventh Amendment phrase "Suits at common law" to mean "cases tried prior to the adoption of the Seventh Amendment in courts of law in which jury trial was customary as distinguished from courts of equity or admiralty in which jury trial was not." *Id.* at 449.

ments for employers nationwide.[96] Under the statute, ALJs held evidentiary hearings to determine whether employers breached these requirements, imposing civil penalties on violating parties.[97] The Court rejected the petitioners' claim that the Seventh Amendment entitled them to a jury trial, reasoning that so long as public rights were at issue, Congress could assign adjudicatory responsibilities to an administrative tribunal.[98] The Court distinguished between cases involving private rights and public rights, the latter being where the United States sues to enforce new rights created by Congress.[99] As OSHA established a novel statutory regime accompanied by unique remedies that were non-existent at common law, Congress could vest adjudicatory authority in OSHA tribunals without violating the Seventh Amendment.[100] Notably, the Court emphasized that the public rights doctrine encompassed public benefits such as the award of pensions and payments to veterans.[101]

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[96] 29 U.S.C. §§ 651–678. Congress determined that work-related death and injuries had become a national crisis. *See Atlas Roofing*, 430 U.S. at 444–45 (identifying the human and economic tolls resulting from working conditions in the United States workforce). Further, Congress decided that the then-mainstream common law and state statutory remedies inadequately prevented further workplace injuries to the employee population. *Id.*

[97] *Atlas Roofing*, 430 U.S. at 446. As part of OSHA, inspectors acting on behalf of the Secretary of Labor could order violating employers to fix workplace hazards and suggest civil penalties for any employer who continually violated the statute. *Id.* at 445–46. Petitioners were cited and fined for hazardous working conditions in violation of OSHA. *Id.* at 447. Then, Petitioners appealed the OSHA fines to an ALJ of the Occupational Safety and Health Review Commission, appealed to the full Commission, and finally appealed to the respective federal court of appeals. *Id.* at 447–48.

[98] *Id.* The Court also emphasized that Congress had historically created new statutory requirements and assigned to agencies the task of determining if a violation exists. *See id.* at 450–51 (explaining that the Court has upheld various statutory schemes providing administrative tribunals with the power to adjudicate claims of violations and requiring civil penalties for such infractions).

[99] *Id.* at 450. The Court distinguished the OSHA claim at issue from private rights issues such as "private tort, contract, and property cases, as well as a vast range of other cases, [which] are not at all implicated." *Id.* at 458.

[100] Atlas *Roofing*, 430 U.S. at 461. Regarding cases involving public rights, the Court stated that "Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals." *Id.* at 452 (quoting Crowell v. Benson, 285 U.S. 22, 50 (1932)).

[101] *See id.* at 452 (stating that the category of matters historically recognized as suitable for agency adjudication included "the exercise of the congressional power as to interstate and foreign commerce, taxation, immigration, the public lands, public health, the facilities of the post office, pensions, and payments to veterans" (quoting *Crowell*, 285 U.S. at 51 (1932))). *Crowell* concerned a federal law devising an adjudication scheme for workers' compensation claims. 285 U.S. at 36. To resolve claims, the United States Employees' Compensation Commission served as the fact-finder, with minimal judicial review. *Id.* at 46. In rejecting Petitioners' claim that an Article III court was required, the Court distinguished between "cases of private right and those which arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments." *Id.* at 50.

In 1989, in *Granfinanciera, S.A. v. Nordberg*, the Supreme Court expanded on the contours of the public rights doctrine.[102] The case addressed whether Congress could allow a non-Article III bankruptcy court to adjudicate a fraudulent bankruptcy conveyance among private parties without the right to a jury.[103] *Granfinanciera* held that such a suit was entitled to a jury trial under the Seventh Amendment, reversing the lower courts.[104] First, the Court conducted a preliminary analysis of whether the Seventh Amendment jury trial right was even implicated.[105] Notwithstanding Congress's attempt to assign adjudication to bankruptcy courts, the fraudulent conveyance suit remained, at its core, a common law action closely resembling typical state common law contract claims.[106] Thus, the action implicated a private right, rendering the public rights doctrine inapt.[107]

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[102] *See* 492 U.S. 33, 55 (1989) (assessing whether a bankruptcy trustee's suit to recover a fraudulent conveyance is a public or private right). Of course, there are other decisions addressing the public rights doctrine and permissible administrative adjudication along the path to *Jarkesy*. *See* Glicksman & Levy, *supra* note 44, at 1129–39 (surveying the Court's jurisprudence regarding permissible non-Article III adjudication and the public rights doctrine over time). And the Court has long vacillated between a functionalist and formalist approach to this confusing area of the law. *Compare* Thomas v. Union Carbide Agr. Prods. Co., 473 U.S. 568, 587–89 (1985) (writing that "[t]he enduring lesson of *Crowell* is that practical attention to substance rather than doctrinaire reliance on formal categories" instructs how to apply the public rights doctrine), *and* Commodity Future Trading Comm'n v. Schor, 478 U.S. 833, 851 (1986) (applying a multi-factor balancing test to determine the permissibility of administrative adjudication), *with* Stern v. Marshall, 564 U.S. 462, 493 (2011) (holding that a bankruptcy court cannot adjudicate a common law tort claim because it "does not fall within any of the varied formulations of the public rights exception in this Court's cases"). Given the centrality of *Atlas Roofing* and *Granfinanciera* in *Jarkesy*, this Section focuses on these cases. *See* SEC v. Jarkesy, 603 U.S. 109, 120 (2024) (majority opinion) (explaining that the Court's analysis is governed by *Granfinanciera*).

[103] *See Granfinanciera*, 492 U.S. at 50 (stating that "[t]he sole issue before us is whether the Seventh Amendment confers on petitioners a right to a jury trial in the face of Congress' decision to allow a non-Article III tribunal to adjudicate the claims against them"). In the 1984 amendments to the federal Bankruptcy Code, Congress designated fraudulent conveyance bankruptcy actions as so-called "core proceedings" that could be adjudicated by non-Article III bankruptcy judges. *Id.* at 60.

[104] *See id.* at 56 (holding that a bankruptcy trustee's right to recover a fraudulent conveyance concerned private rights, triggering the Seventh Amendment right to a jury trial).

[105] *Id.* at 42. The Court set forth a two-step analysis for determining whether the Seventh Amendment jury trial right was implicated. *Id.* at 42 (citing Tull v. United States, 481 U.S. 412, 417–421 (1987)). First, the Court must "compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity." *Id.* "Second, [the Court must] examine the remedy sought and determine whether it is legal or equitable in nature . . . ." *Id.* The Court clarified that "[t]he second stage of this analysis is more important than the first." *Id.* Applying this two-step analysis, the Court determined that the fraudulent conveyance was similar to fraudulent conveyances brought at common law, and the remedy for such fraudulent actions was legal in nature; thus, the suit implicated the Seventh Amendment. *Id.* at 43–49.

[106] *See id.* at 60–61 (explaining that Congress could not circumvent the Seventh Amendment jury trial right by relabeling a suit at common law as a new statutory cause of action). In expanding upon what constitutes public rights, the Court seemingly conflated the Seventh Amendment's jury trial right and the constitutional requirement that certain disputes be heard by Article III courts. *See* Glicksman

2. ALJs and the President's Removal Power

There is no explicit presidential removal power enumerated within the Constitution.[108] Instead, the ability to remove executive branch officials has been interpreted as incidental to the President's Article II duty to "take Care that the Laws be faithfully executed."[109] Two modern Supreme Court cases signal a shift in the Court's jurisprudence toward greater presidential control over ALJs.[110]

& Levy, *supra* note 44, at 1135 (stating that "*Granfinanciera* expressly equated the concept of public rights for purposes of Article III and the Seventh Amendment . . . sow[ing] confusion concerning the definition of public rights").

[107] *See id.* at 56 ("There can be little doubt that fraudulent conveyance actions by bankruptcy trustees . . . are quintessentially suits at common law that more nearly resemble state-law contract claims . . . . They therefore appear matters of private rather than public right."). Although the Court declined to apply the public rights doctrine, *Granfinanciera* hinted that the group of public rights Congress could assign to administrative tribunals was broader than even *Atlas Roofing* suggested. *See Granfinanciera*, 492 U.S. at 53 ("Our case law makes plain, however, that the class of 'public rights' whose adjudication Congress may assign to administrative agencies or courts of equity sitting without juries is more expansive than *Atlas Roofing*'s discussion suggests."). Indeed, the Court reasoned that Congress may allow administrative tribunals to adjudicate public rights claims that are "closely analogous" to common law actions. *Id.* at 52. Still, the majority stated that Congress's ability to do so was not limitless. *See id.* (explaining that Congress's power to vest adjudicatory authority outside of the Article III federal courts under the public rights doctrine is constrained). Moreover, the Court affirmed *Atlas Roofing*'s teaching that Congress could "effectively supplant" a common law action accompanied by the right to a jury trial with a new statutory action if the cause of action "inheres in, or lies against, the Federal government in its sovereign capacity." *Id.* at 53. The Court also reiterated that "the Federal Government need not be a party for a case to revolve around 'public rights.'" *Id.* at 54. Justice Antonin Scalia maintained that the presence of the federal government was a requirement for triggering the public rights doctrine. *See id.* at 65 (Scalia, J., concurring in part and concurring in the judgment) (writing that public rights, at the very least, must arise between the federal government and others); *see also Stern*, 564 U.S. at 503 (Scalia, J., concurring) (same).

[108] *Cf.* Aditya Bamzai & Saikrishna B. Prakash, *The Executive Power of Removal*, 136 HARV. L. REV. 1756, 1763, 1789 (2023) (conceding the absence of an explicit, text-based removal clause within the Constitution, leading to a longstanding debate over the extent of the President's implied removal power); Seila L. LLC v. CFPB, 591 U.S. 197, 214 (2020) (writing that "the President's removal power has long been confirmed by history and precedent"). As an originalist matter, scholars have persuasively argued that there was little evidence, if at all, that the President retained a broad ability to remove subordinate executive officers at-will. *See, e.g.*, Edward S. Corwin, *Tenure of Office and the Removal Power Under the Constitution*, 27 COLUM. L. REV. 353, 361–62 (1927) (offering a historical critique of the Court's expansive interpretation of the President's Article II removal power in *Myers v. United States*).

[109] U.S. CONST. art. II, § 3; *see also* Morrison v. Olson, 487 U.S. 654, 688–90 (1988) (recognizing the President's implied removal power under Article II). At issue in the Court's line of removal cases are "for-cause" or "good-cause" removal restrictions, which permit the President to remove an officer only when they are not "competently performing his or her statutory responsibilities in a manner that comports with the provisions of the [a]ct." *Morrison*, 487 U.S. at 692; *see also Good Cause*, BLACK'S LAW DICTIONARY, *supra* note 64 (defining the term as a "legally sufficient reason").

[110] *See* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 484, 492 (2010) (holding that dual for-cause removal protections separating Public Company Accounting Oversight Board (PCAOB) members and the President violated the separation of powers); Lucia v. SEC, 585 U.S. 237,

In 2011, in *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, the Supreme Court held that two levels of for-cause removal protections separating the President and members of a financial regulatory board violated the separation of powers.[111] The Court explained that the President must be able to hold subordinates accountable through removal in order to satisfy the Take Care clause.[112] The Court assumed that under the statute, the President could not remove members of the SEC without satisfying a for-cause standard.[113] SEC Commissioners, too, could not remove a Public Company Accounting Oversight Board (PCAOB) member without satisfying a strict for-cause standard.[114] Therefore, the two-tiered protections from presidential removal meant

251 (2018) (holding that SEC ALJs are inferior officers within the meaning of the Constitution, meaning they must be appointed by the President, a head of department, or a court of law, not by SEC staff). These cases embody the Court's embrace of the unitary executive theory—the idea that Article II vests the President with unfettered control over officials within the Executive Branch. *See, e.g.*, Levy & Glicksman, *supra* note 66, at 77–78 (examining the Court's increasing acceptance of the unitary executive theory).

[111] *Free Enter. Fund*, 561 U.S. at 492. Congress created the PCAOB as part of the Sarbanes-Oxley Act of 2002, intended to overhaul supervision of the national accounting industry. *Id.* at 484. Congress passed the Sarbanes-Oxley Act in response to notable examples of illegal financial activities such as the Enron Scandal. *See* Brandi Anastasiades & William Fritchie, *The Sarbanes-Oxley Act: A Comprehensive Overview*, AUDITBOARD (Aug. 9, 2024), https://auditboard.com/blog/sarbanes-oxley-act [https://perma.cc/D3RQ-LKKM] (noting Congress's desire to bolster financial disclosure requirements for public financial institutions). Although modeled on private industries, the PCAOB has extensive authority to regulate the accounting industry. *Free Enter. Fund*, 561 U.S. at 484–85. Although the Court had previously upheld singular for-cause removal provisions, the two-tiered levels of protection were an issue of first impression. *Id.* at 495.

[112] *Free Enter. Fund*, 561 U.S. at 484. The Take Care clause in Article II requires that the President "take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3.

[113] *See Free Enter. Fund*, 561 U.S. at 487 (presuming that the President could only fire SEC Commissioners for cause based on the parties' stipulation). In dissent, Justice Breyer criticized the majority's assumption as unsound. *See id.* at 546–47 (Breyer, J., dissenting) (writing that by doing so, the majority uncovered "a constitutional defect" in the statute and invoked that flaw to invalidate the statute); *see also* Jellum, *supra* note 19, at 730 (characterizing the Court's assumption that SEC Commissioners were removable only for cause as "a significant concession and likely an inaccurate one").

[114] *Free Enter. Fund*, 561 U.S. at 502–03. Describing the stringent for-cause removal standard for the Commission to remove a board member, the Court wrote: "A Board member cannot be removed except for willful violations of the Act, Board 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." *Id.* at 503. The majority opinion expressed incredulity at the inability of the Commission to fire Board members for violating other laws outside of the Sarbanes-Oxley Act. *See id.* (arguing that the President may lack confidence in a Board member who falsifies his taxes, yet that would not be grounds for removal under the statute). The Court also maintained that multi-tiered removal protections obfuscated political accountability, making it difficult for the public to assign blame for regulatory action. *Id.* at 497–98. While serving on the Court of Appeals for the District of Columbia Circuit, then-Judge Kavanaugh dissented from the lower court's decision upholding the dual for-cause removal protections, emphasizing that the PCAOB structure lacked historical precedent. *Id.* at 505–06 (Kavanaugh, J., dissenting) (quoting Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 537 F.3d 667, 699 (2008), *aff'd in part*, *rev'd in part*, 561 U.S. 477 (2010).

there was functionally no way for the President to exercise control over the PCAOB, flouting the separation of powers.[115] Accordingly, the Court struck down the for-cause removal provision separating the Commission and the PCAOB, thereby permitting the Commission to remove PCAOB members at will and leaving the PCAOB protected from presidential removal by only a single for-cause provision.[116] Finally, the majority noted that it was not addressing the validity of multiple for-cause removal restrictions protecting ALJs.[117]

In 2018, in *Lucia v. SEC*, the United States Supreme Court held that SEC ALJs are inferior officers within the meaning of the Constitution and thus could not be appointed by SEC staff members.[118] As the Court explained, inferior "Officers of the United States" must be appointed by either the President, the Courts of Law, or "the Heads of Departments."[119] Eschewing a precise test for defining an "Officer," the Court reasoned that the SEC ALJs were "near-

[115] *Free Enter. Fund*, 561 U.S. at 498. Notwithstanding the constitutional defects presented by the dual removal protections, the Court held that the violative provision was severable from the rest of the Sarbanes-Oxley Act. *See id.* at 508 (rejecting petitioners' broad request to invalidate the entire PCAOB).

[116] *Id.* at 509. The President's need for control over the PCAOB was especially critical given the Board's expansive powers, requiring every accounting firm to register with the Board, initiating formal investigations and disciplinary hearings, setting ethics rules, and issuing severe sanctions pursuant to federal law. *Id.* at 485. Because the parties stipulated that the PCAOB members were constitutional officers, the Court did not need to address that question. *Id.* at 485–86. Previously, the Court defined a constitutional "Officer of the United States" as one who exercises "significant authority" under federal law. *See* Buckley v. Valeo, 424 U.S. 1, 126 (1976) (per curiam) (holding that a constitutional officer exercises significant authority under the laws of the United States). The exercise of such power separates them from ordinary federal civil servants. *See* Lucia v. SEC, 585 U.S. 237, 245 (2018) (explaining that non-officer employees are part of the "broad swath of 'lesser functionaries' in the Government's workforce" (quoting *Buckley*, U.S. at 126 n.162)).

[117] *See Free Enter. Fund*, 561 U.S. at 507 n.10 (noting that the Court was not addressing whether ALJs could constitutionally be separated by two for-cause removal protections). In dicta, the Court identified characteristics distinguishing ALJs from PCAOB members: "Unlike members of the [PCAOB], many [ALJs] perform adjudicative rather than enforcement or policymaking functions." *Id.* Then-Judge Kavanaugh expressed similar reticence in his dissenting opinion when the Court of Appeals for the District of Columbia Circuit upheld the statute. *See Free Enter. Fund*, 537 F.3d at 699 n.8 (Kavanaugh, J., dissenting) (arguing that "[n]othing in this dissenting opinion is intended to or would affect . . . the status of administrative law judges").

[118] 585 U.S. 237, 241 (2018). At the certiorari stage, the Trump administration asked the Court to determine the constitutionality of dual for-cause removal protections for ALJs. *Id.* at 244 n.1. The Court declined this request, reasoning that it would be inappropriate to do so where no lower court had addressed the issue. *Id.*

[119] U.S. CONST. art. II, § 2. None of the three constitutionally permitted actors appointed the ALJ at issue, requiring the Court to determine whether SEC ALJs qualified as "Officers" of the United States. *See Lucia*, 585 U.S. at 243 (explaining that SEC staff members, rather than Commissioners, appointed the agency's ALJs).

carbon copies" of special trial judges previously held to fit the bill.[120] In 1991, in *Freytag v. Commissioner of Internal Revenue*, the Court found that special trial judges were inferior "Officers" under the Constitution because they exercised significant authority, including the power to preside over adversarial hearings, hear testimony, make evidential determinations, and enforce orders.[121] Similar to the special trial judges in *Freytag*, SEC ALJs obtained career appointments.[122] Likewise, the SEC ALJs held extensive control over critical functions, having plenary authority to preside over adversarial hearings akin to federal district court judges.[123] The Court reasoned that SEC ALJs had even greater authority than the judges in *Freytag* because SEC ALJ decisions could become the final, binding decision of the Commission.[124] To resolve the impermissible appointments of SEC ALJs, the Court concluded that the petitioner should receive a new hearing in front of a properly appointed official.[125]

Although the majority did not invalidate ALJ removal protections, Justice Stephen Breyer wrote separately to explain why the Court should not do so in a

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[120] *See Lucia*, 585 U.S. at 245–46 (declining to apply the test for distinguishing between employees and constitutional officers as set forth in *Buckley*); *see also* Freytag v. Comm'r of Internal Revenue, 501 U.S. 868, 881 (1991) (concluding that special trial judges of the United States Tax Court—called STJs—exercised sufficient authority such that they must be appointed in accordance with the Appointments Clause).

[121] *See Freytag*, 501 U.S. at 881–82 (emphasizing the "significant" responsibilities of the special trial judges that rendered them "Officers of the United States").

[122] *See Lucia*, 585 U.S. at 247–49 (listing similarities between SEC ALJs and the special trial judges of the tax court at issue in *Freytag*).

[123] *See id.* at 248 (observing that SEC ALJs and the special trial judges in *Freytag* shared the power to take testimony, conduct trials, rule on the admissibility of evidence, and enforce compliance with discovery orders). The Court described SEC ALJs as exercising analogous powers to that of a federal trial court judge "conducting a bench trial." *Id.* at 242.

[124] *See id.* at 249 (noting that the SEC can decline to review an ALJ decision, causing the ALJs decision to "become[] final" and be "deemed the action of the Commission").

[125] *See id.* at 251 (holding that the proper remedy for an adjudication suffering from an Appointments Clause infirmity is a "new 'hearing before a properly appointed official'" (quoting Ryder v. United States, 515 U.S. 177, 188 (1995))). Article II also contemplates a distinction among two kinds of "Officers of the United States": inferior officers and principal officers. U.S. CONST. art. II, § 2. Unlike inferior officers, principal officers must be appointed by the President and confirmed with the advice and consent of the Senate. *Id.* The Court has used two methods for classifying an officer as inferior or principal, both relating to the level of independence and authority the officer has. *See* Morrison v. Olson, 487 U.S. 654, 671–72 (1988) (determining that an officer is inferior if removable by a higher executive branch official and has limited duties, jurisdiction, and tenure); *see also* Edmond v. United States, 520 U.S. 651, 663 (1997) (holding that an officer is inferior if they are directed and supervised by a higher-ranking officer). Just last term, the Court applied the *Edmond* formulation to determine whether a group of Department of Health and Human Services officials were inferior or principal officers. *See* Kennedy v. Braidwood Mgmt., Inc., 145 S. Ct. 2427, 2443 (2025) (concluding that U.S. Preventative Services Task Force members are inferior officers who may constitutionally be appointed by the Secretary of Health and Human Services).

future case.[126] In contrast to the majority's formalist approach, Justice Breyer's partial dissent in *Lucia* emphasized the functional role of ALJs within the administrative state.[127] He reasoned that the APA's core purpose was to alter prior administrative adjudication where hearing examiners made decisions that favored their home agencies; consequently, ALJs were insulated as independent decision-makers.[128] By invalidating removal protections that were lawful since the APA's passage in 1946, he argued, ALJs would cease to be neutral decision-makers and, instead, become politically dependent agency personnel.[129] To highlight the ongoing threat to ALJ removal protections, Justice Breyer scrutinized *Free Enterprise Fund*'s dictum that ALJs were unique because they exercised adjudicative functions rather than policymaking or executive powers.[130]

Following *Free Enterprise Fund* and *Lucia*, scholars debated Breyer's very concern—whether the cases required invalidating dual for-cause removal protections enjoyed by ALJs.[131] In one notable law review article, an administrative law scholar answered this question affirmatively.[132] First, the scholar

[126] *See Lucia*, 585 U.S. at 268 (Breyer, J., concurring in the judgment in part and dissenting in part) (warning that expanding *Free Enterprise Fund* by invalidating dual for-cause removal provisions for ALJs would risk "unraveling, step-by-step, the foundations of the Federal Government's administrative adjudication system as it has existed for decades, and perhaps of the merit-based civil-service system in general").

[127] *See id.* at 255 (disagreeing with the majority's decision to rest its analysis on constitutional rather than statutory grounds); *see also* Glicksman & Levy, *supra* note 44, at 1095, 1113 n.112 (referring to the majority opinion in *Lucia* as consistent with the Supreme Court's recent embrace of formalism in its separation of powers jurisprudence).

[128] *See Lucia*, 585 U.S. at 260 (Breyer, J., concurring in the judgment in part and dissenting in part) (characterizing ALJ removal protections as a "central part of the [APA's] overall scheme" in achieving ensuring neutrality and fairness in administrative adjudication).

[129] *See id.* (asserting that extending *Free Enterprise Fund* to invalidate two levels of removal protections for ALJs would contravene the goals of the APA); *see also* Levy & Glicksman, *supra* note 66, at 51–52 (contending that the APA's removal protections "play[s] an essential role in ensuring the independence and impartiality of ALJs").

[130] *See Lucia*, 585 U.S. at 261–63 (Breyer, J., concurring in the judgment in part and dissenting in part) (questioning whether the *Free Enterprise* majority's rationale for nullifying dual for-cause removal provisions for PCAOB members applies equally to ALJs); *see also* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 507 n.10 (2010) (distinguishing, in dicta, dual for-cause removal protections insulating PCAOB members and ALJs from presidential supervision).

[131] *See, e.g.*, Jellum, *supra* note 19, at 708, 741 (reasoning that under the Court's precedents, it is "inevitable" that dual for-cause removal provisions protecting ALJs from removal by the President are unconstitutional); *see also* Aaron L. Nielson, Christopher J. Walker & Melissa F. Wasserman, *Saving Agency Adjudication*, 103 TEX. L. REV. 1013, 1017 n.21 (2025) (collecting scholarship anticipating the Fifth Circuit's presidential removal holding in *Jarkesy*).

[132] *See* Jellum, *supra* note 19, at 741 (concluding that read together, *Lucia* and *Free Enterprise Fund* and mean that dual for-cause removal protections for all ALJs are unconstitutional); Bremer, *supra* note 12, at 1781 (citing Jellum, *supra*, in support of the claim that the majority of jurists and scholars believe dual for-cause removal protections for ALJs are unconstitutional under *Free Enterprise* and *Lucia*).

reasoned that *Lucia* signified that all ALJs were inferior "Officers of the United States," an assumption shared by other academics.[133] Next, the scholar examined *Free Enterprise Fund*, which invalidated dual for-cause removal provisions shielding PCAOB members from presidential oversight, ruling that this structure violated the separation of powers.[134] Vindicating the concerns raised by Justice Breyer's separate opinion in *Lucia*, the scholar concluded that the two cases, read together, meant that dual statutory removal provisions for ALJs are unconstitutional.[135]

D. Factual and Procedural History of SEC v. Jarkesy

George Jarkesy founded two hedge funds and chose co-defendant Patriot28 LLC to serve as the funds' investment adviser.[136] The hedge funds amassed roughly 120 investors and obtained approximately $24 million in assets.[137] In 2013, the SEC brought an enforcement action against Jarkesy and the hedge funds, alleging that they, along with others, committed securities

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[133] *See* Jellum, *supra* note 19, at 734 (writing that *Lucia* determined that ALJs are constitutional officers, rather than ordinary civil service employees); Bremer, *supra* note 12, at 1751 n.8 (assuming that *Lucia*'s holding "likely reaches ALJs employed by other agencies" because of their shared functions); Barnett, *supra* note 25, at 1712 n.97 (writing that although *Lucia* did not determine that all ALJs are inferior officers, its analysis "would appear to apply equally" to SSA ALJs due to their overlapping responsibilities); *see also Lucia*, 585 U.S. at 251 (holding that SEC ALJs are inferior officers under the Constitution, requiring compliance with the Appointments Clause).

[134] *See* Jellum, *supra* note 19, at 730–33 (examining the Court's rationale in *Free Enterprise Fund*); *see also Free Enter. Fund,* 561 U.S. at 484 (holding that dual for-cause removal protections separating PCAOB members and the President unconstitutionally interfered with the President's Article II duties). It is important to briefly address recent cases in which the Court has expanded the President's removal authority, specifically over independent agency heads. *See* Seila L. LLC v. CFPB, 591 U.S. 197, 213 (2020) (invalidating a single for-cause removal provision for the sole head of an independent agency); Collins v. Yellen, 594 U.S. 220, 250 (2021) (same). In *Seila L.*, for example, the Court invoked *Free Enterprise Fund* to hold that constraints on the President's ability to "remove those who assist him in carrying out his duties" are presumptively disfavored. 591 U.S. at 204; *accord Collins*, 594 U.S. at 248. Although both cases expanded *Free Enterprise Fund*, neither directly addressed for-cause removal protections for ALJs. *See Seila L.*, 591 U.S. at 202–38 (expressing no opinion on the validity of for-cause removal protections for ALJs); *Collins*, 594 U.S. 220 at 226–61 (same). For present purposes, then, these cases represent the Court's shift toward an expansive conception of the President's removal power. *See* Bamzai & Prakash, *supra* note 108, at 1758–59 (writing that *Collins*, *Free Enterprise Fund*, and *Seila Law* have broadly interpreted the President's removal authority under Article II).

[135] *See* Jellum, *supra* note 19, at 735, 751 (noting that Justice Breyer's partial dissent in *Lucia* addressed the ongoing constitutionality of multi-level removal provisions for SEC ALJs); *see also* Bremer, *supra* note 12, at 1751 (explaining that the Fifth Circuit relied on *Free Enterprise Fund* and *Lucia* to invalidate two levels of for-cause removal protections for ALJs).

[136] SEC v. Jarkesy, 603 U.S. 109, 118 (2024); Brief for Petitioner at 6, SEC v. Jarkesy, 603 U.S. 109 (No. 22-859) (filed Aug. 28, 2023).

[137] *See* Jarkesy v. SEC, 34 F.4th 446, 450 (5th Cir. 2022) (outlining the conduct that led to Jarkesy being charged by the SEC), *aff'd*, 603 U.S. 109 (2024); Brief for Petitioner, *supra* note 136, at 6 (same).

fraud in violation of the Securities Act, the Securities Exchange Act, and the Investment Advisers Act.[138] At the first stage of the SEC enforcement proceedings, an ALJ held a hearing and determined that Jarkesy committed three securities fraud violations.[139] While Jarkesy's appeal to the full Commission was pending, the Supreme Court held in *Lucia v. SEC* that SEC ALJs were improperly appointed in violation of the Appointments Clause.[140] Accordingly, Jarkesy was entitled to a new hearing in front of properly appointed ALJs; nonetheless, he declined a new hearing and pursued his original appeal to the Commission.[141]

The SEC affirmed the ALJ's decision, finding that Jarkesy committed assorted securities fraud infractions.[142] The Commission issued a cease and desist order, prohibiting him from committing future infractions and requiring payment of a civil fine of $300,000.[143] Further, it ordered Patriot28 to pay back nearly $685,000 in improperly-received earnings.[144] The Commission also prohibited Jarkesy from engaging in numerous securities industry activities.[145] The Commission denied three independent constitutional arguments that Jarkesy raised.[146] Notably, he first claimed that SEC adjudication scheme vio-

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[138] *Jarkesy*, 34 F.4th at 450. Specifically, the SEC alleged that Jarksey: "(1) misrepresented who served as the prime broker and as the auditor; (2) misrepresented the funds' investment parameters and safeguards; and (3) overvalued the funds' assets to increase the fees that they could charge investors." *Id.* For example, Petitioners repeatedly assured investors that a fund would invest fifty percent of its capital in life-insurance policies, investing instead less than twenty percent. Brief for Petitioner, *supra* note 136, at 6–7.

[139] *Jarkesy*, 34 F.4th at 450. Initially, Jarksey sought an injunction in the U.S. District Court for the District of Columbia, claiming that the proceedings violated several constitutional provisions. *Id.* Both the district court and the United States Court of Appeals for the D.C. Circuit declined to issue an injunction, concluding that the district court lacked jurisdiction. *See* Jarkesy v. SEC, 48 F. Supp. 3d 32, 40 (D.D.C. 2014), *aff'd*, 803 F.3d 9,12 (D.C. Cir. 2015) (explaining that Jarksey must continue the SEC adjudication proceedings but could appeal an adverse ruling to the court of appeals).

[140] *See* 585 U.S. 237, 251 (2018) (holding that SEC ALJs are inferior officers within the meaning of the Constitution, requiring that they are appointed by the President, a head of department, or a court of law; thus, they could not be appointed by SEC staff).

[141] Brief for Petitioner, *supra* note 136, at 7; *see also Jarkesy*, 34 F.4th at 450 (explaining how the Supreme Court's decision in *Lucia* affected the proceedings).

[142] *See Jarkesy*, 34 F.4th at 450 (explaining that the full Commission affirmed the ALJ's order that the Respondents violated several securities fraud statutes).

[143] Brief for Petitioner, *supra* note 136, at 7–8.

[144] *See* SEC v. Jarkesy, 603 U.S. 109, 169 (2024) (Sotomayor, J., dissenting) (listing the civil penalties that the full Commission imposed on the Respondents).

[145] *Jarkesy*, 34 F.4th at 450. In particular, Jarkesy was also prohibited from "associating with brokers, dealers, and advisers; offering penny stocks; and serving as an officer or director of an advisory board or as an investment adviser." *Id.*

[146] *Id.* at 450–51 (concluding that the ALJ and Commission erred by not invalidating the SEC proceedings, which "suffered from three independent constitutional defects"). Petitioners (Respondents on appeal to the Supreme Court) also claimed that the ALJ was improperly biased against them and violated their equal protection rights. *Id.* at 450. The ALJ and Commission rejected both claims,

lated his Seventh Amendment right to a civil jury trial.[147] Further, he argued that the dual for-cause removal restrictions shielding SEC ALJs contravened Article II of the Constitution.[148] Under federal law, SEC commissioners could only remove ALJs where an administrative body, called the Merit Systems Protection Board (MSPB), determined there was good cause for doing so.[149] Similarly, the President could only remove SEC commissioners and MSPB members for "good cause."[150] On appeal, the United States Court of Appeals for the Fifth Circuit reversed on the relevant constitutional claims, holding that the SEC proceedings deprived Petitioners of their Seventh Amendment right to a civil jury trial, and that the dual for-cause removal protections for SEC ALJs infringed upon the President's Article II removal authority.[151] The Fifth Circuit declined to rehear the case en banc.[152]

II. LIMITED PUBLIC RIGHTS AND EXPANDED PRESIDENTIAL REMOVAL

A. Jarkesy*'s Curtailing of the Public Rights Doctrine*

In 2024, in *SEC v. Jarkesy*, the United States Supreme Court held that a federal statute allowing SEC ALJs to adjudicate securities fraud penalties violated the Seventh Amendment right to a civil jury trial.[153] Before addressing

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although the Fifth Circuit found it unnecessary to address the issues because it vacated the decision on other grounds. *Id.* at 466 n.21.

[147] *See id.* at 451 (stating that Petitioners challenged the administrative proceedings as incompatible with the Seventh Amendment).

[148] *See generally* Brief for Respondent at 54–55, Jarkesy v. SEC, 34 F.4th 446 (5th Cir. 2022) (No. 20-61007) (filed Mar. 10, 2021) (contending that ALJs who preside over SEC adjudications cannot enjoy multiple layers of for-cause removal protections from presidential oversight).

[149] *See, e.g.*, Lucia v. SEC, 585 U.S. 237, 259 (2018) (Breyer, J., concurring in the judgment in part and dissenting in part) (citing 5 U.S.C. § 7521(a), which provides that SEC ALJs may be removed "only for good cause established and determined by the [(MSPB)]").

[150] *See* Brief for Respondent, *supra* note 148, at 55 n.116 (citing 5 U.S.C. § 1202(d), which states that MSPB members "may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office").

[151] *See Jarkesy*, 34 F.4th at 465 (holding that SEC administrative adjudications violated the Seventh Amendment and that the statutory removal provisions for SEC ALJs improperly infringed on the President's responsibility to ensure faithful enforcement of federal law). Judge Jennifer Walker Elrod, the author of the Fifth Circuit's decision, has publicly staked out her position on the importance of the Seventh Amendment right to a jury trial in civil proceedings. *See* Jennifer Walker Elrod, *W(h)ither the Jury? The Diminishing Role of the Jury Trial in Our Legal System*, 68 WASH. & LEE L. REV. 3, 6 (2011) (emphasizing the historical foundations of the right to a jury trial); Jennifer Walker Elrod, *Is the Jury Still Out?: A Case for the Continued Viability of the American Jury*, 44 TEX. TECH L. REV. 303, 308–09 (2012) (same).

[152] *See* Jarkesy v. SEC, 51 F.4th 644, 644–45 (5th Cir. 2022) (stating that six judges voted in favor of and ten judges voted against rehearing the case en banc).

[153] *See* 603 U.S. 109, 140–41 (2024) (majority opinion) (affirming the Fifth Circuit's holding that a defendant facing securities fraud penalties has a Seventh Amendment right to a civil jury trial).

the applicability of the public rights doctrine, the Court first concluded that the Seventh Amendment right to a trial by jury was implicated.[154] Then, the majority framed the question of whether Congress could nonetheless vest adjudication of securities fraud fines in SEC ALJs under the so-called public rights "exception."[155] The Court concluded that the public rights exception did not apply, reading *Granfinanciera* as controlling the case and rejecting *Atlas Roofing* as inapplicable.[156]

To begin its public rights analysis, the Court cited *Murray's Lessee*, reiterating that claims concerning private rights must be heard by Article III courts.[157] Rights were private, the Court reasoned, if they were "made of 'the stuff of the traditional actions at common law tried by the courts at Westmin-

[154] *See id.* at 120 (stating that "[t]he threshold issue is whether this action implicates the Seventh Amendment"). Next, the Court reasoned that its "analysis of this question follows the approach set forth in *Granfinanciera* and *Tull v. United States*." *Id.* (citation omitted). To conduct that inquiry, the Court considered the cause of action and, more importantly, the nature of the remedy it provides. *Id.* at 122–23. First, the Court reasoned that "the remedy is all but dispositive." *Id.* at 123. Money damages like the SEC civil fines, the Court reasoned, were "the prototypical common law remedy" applied by courts of law. *Id.* Moreover, a remedy was legal "if it is designed to punish or deter the wrongdoer," as compared to an equitable remedy which was aimed at "restor[ing] the status quo." *Id.* Because the availability and size of the remedy meant the securities fraud penalties were designed to be punitive, and none of the recovered fines had to be returned to victims, the Court concluded that Congress improperly permitted SEC ALJs to impose a common law remedy only enforceable by courts of law. *Id.* at 123–24. Turning to the cause of action, the Court reasoned that the SEC's securities fraud penalties were analogous to fraud prosecutions at common law because "both target the same basic conduct: misrepresenting or concealing material facts." *Id.* at 125 (comparing the elements of the relevant SEC statute and common law fraud). Because Congress incorporated elements of common law fraud into the federal securities statutes, the "close relationship" between the two meant that the action was "legal in nature." *Id.* at 126.

[155] *See, e.g.*, *id.* at 128 (considering whether the public rights "exception" applies). Unlike the dissent, the majority opinion only referred to the public rights doctrine with this new terminology. *See id.* at 115–41 (referring only to the public rights "exception"). It appears that Chief Justice Roberts made this switch in *Stern v. Marshall*. *See* 564 U.S. 462, 485 (2011) (framing the Court's precedents as recognizing the public rights "exception" to the Seventh Amendment).

[156] *See Jarkesy*, 603 U.S. at 132 ("This is not the first time we have considered whether the Seventh Amendment guarantees the right to a jury trial 'in the face of Congress' decision to allow a non-Article III tribunal to adjudicate' a statutory 'fraud claim.' We did so in *Granfinanciera,* and the principles identified in that case largely resolve this one." (citing Granfinanciera v. Nordberg, 492 U.S. 33, 37, 50 (1989) (citation omitted))). In doing so, the Court seemed to interpret *Granfinanciera* as significantly narrowing *Atlas Roofing*. *See id.* at 190 n.8 (Sotomayor, J., dissenting) (asserting that the majority opinion "leaves open the possibility that *Granfinanciera* might have overruled *Atlas Roofing*."); *see also* Walker, *supra* note 28 (writing that *Jarkesy* seems to abandon, if not considerably limit, *Atlas Roofing*).

[157] *See Jarkesy*, 603 U.S. at 127 (majority opinion) (citing Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284 (1856)) (writing that "the Constitution prohibits Congress from withdraw[ing] from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law"). The Court grounded this delineation in the separation of powers, reasoning that the "judicial Power of the United States . . . cannot be shared with other branches." *Id.* (quoting *Stern*, 564 U.S. at 483).

ster in 1789.'"[158] Conceding that its public rights cases were unclear, the Court stated that this case was not—*Granfinanciera* declined to apply the public rights exception to a non-Article III tribunal adjudicating a statutory fraud claim.[159] Here too, "the substance of the suit," the securities fraud claim, controlled whether a jury trial was required.[160] Congress could not avoid this conclusion by embedding a common law action in a new statutory scheme; statutory origins made no difference where the suit was common law fraud "in all but name."[161] Because the SEC fines targeted what was quintessentially common law fraud, the suit involved a private right and the defendant had a Seventh Amendment right to a jury trial in federal court.[162]

The Court rejected *Atlas Roofing* as inapplicable because it did not address civil suits for fraud.[163] Importantly, *Atlas Roofing* concerned a purely novel claim with no common law analogues.[164] Conversely, Congress did not create a new cause of action in the SEC fraud statutes, as suits for fraudulent conduct plainly existed at common law.[165] In loosely defining matters falling within the public rights exception, Chief Justice John Roberts included "the granting of public benefits" as the Court previously recognized in *Atlas Roof-*

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[158] *Id.* at 127–28 (quoting *Stern*, 564 U.S. at 484).

[159] *See id.* at 132 (reasoning that the principles set forth in *Granfinanciera* "largely resolve this [case]"). In doing so, the Court seemingly dismissed any expansive reading of *Atlas Roofing* that *Granfinanciera* may have represented. *See id.* at 190 (Sotomayor, J., dissenting) (maintaining that *Granfinanciera* allowed Congress to create new causes of action that closely mirror common law claims and house their resolution in administrative tribunals without violating the Seventh Amendment).

[160] *Id.* at 133 (majority opinion).

[161] *Id.* at 135–36.

[162] *See id.* at 138, 140 (explaining that the fraudulent conduct prosecuted in the case "derive[d] from . . . common law counterparts" and that courts of law have presided over such actions "since before the founding").

[163] *See id.* at 136 (concluding that *Atlas Roofing* does not govern because it did not address "civil penalty suits for fraud"). Although the Court declined to overrule *Atlas Roofing*, the majority chastised the dissent for relying on a case that symbolized "a departure from [the Court's] legal traditions." *See id.* at 138 n.4 (citing scholarship either ignoring or criticizing *Atlas Roofing*'s application of the public rights doctrine).

[164] *See id*. at 136–37 ("Unlike the claims in *Granfinanciera* and this action, the OSH Act did not borrow its cause of action from the common law. . . . In both concept and execution, the Act was self-consciously novel."). The majority also framed the federal government as seeking to invoke the public rights exception by virtue of its presence as a party bringing the suit. *See id.* at 135 ("But we have never held that the 'presence of the United States as a proper party to the proceeding is . . . sufficient' by itself to trigger the [public rights] exception.") (first alteration in the original). Justice Sotomayor accused the majority of constructing a strawman, maintaining that the Solicitor General made no such argument. *See id.* at 193 (Sotomayor, J., dissenting) (writing that "the SEC does not claim that the mere presence of the United States as a proper party necessarily means a public right is at issue").

[165] *See id.* at 135 (majority opinion) (concluding that because the securities fraud claims brought by the SEC were analogous to traditional common law fraud suits, the public rights exception does not apply).

ing.[166] As the case was resolved on Seventh Amendment grounds, the Court declined to address the Fifth Circuit's holding that two levels of statutory removal provisions for SEC ALJs improperly constrained the President's Article II power.[167]

Beyond the Court's doctrinal holding, scholars framed the decision as shifting the concerns underpinning when ALJs can constitutionally adjudicate like federal courts.[168] Professor Leah M. Litman described *Jarkesy*'s apprehensions over agency adjudication as a novel conception of substantive due process—"a hazy sense that liberty is negatively affected by the presence of government, laws, and regulations."[169] These concerns, Professor Litman argued, were exemplified by the *Jarkesy* majority opinion, Justice Neil Gorsuch's concurrence, and the questions asked by the Justices at oral argument.[170] The majority and concurrence voiced particular concerns over Congress vesting both adjudicatory and prosecutorial powers within the SEC.[171] Subjecting a defendant to such an adjudication violated the defendant's right to a neutral adjudicator, separate from the executive branch.[172]

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[166] *Id*. at 130. Such claims, the Court reasoned, were grounded in history and precedent. *Id.* Notable scholars recognize that government privileges fit within the public rights category. *See, e.g.,* Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 574 (2007) (categorizing "privileges" created by the government as public rights suitable for administrative adjudication).

[167] *See id.* at 121 (declining to address the Fifth Circuit's nondelegation and removal holdings because the case was resolved on Seventh Amendment grounds).

[168] *See* Leah M. Litman, *The New Substantive Due Process*, 103 TEX. L. REV. 565, 596 (2025) (writing that the *Jarkesy* majority reoriented its constitutional analysis to focus on how Congress's use of an administrative tribunal encroached upon individual liberties); Blake Emerson, *Vindicating Public Rights*, 26 U. PA. J. CONST. L. 1424, 1427 (2024) (arguing that *Jarkesy* represents a return to the "laissez-faire ideology" of the *Lochner* Era, which emphasized private property rights); *see also* Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2019 SUP. CT. REV. 1, 67 (2020) ("A striking characteristic of many Roberts Court administrative law opinions is their sharp rhetorical attack on the administrative state and bureaucracy.").

[169] Litman, *supra* note 168, at 625. Although this Note recognizes Professor Litman's general characterization of the Court's shift in values, it attempts to make a different argument. Rather than arguing that *Jarkesy* exemplifies the Court's broader embrace of a "new substantive due process," the Note argues that the *Jarkesy* majority is deeply skeptical of ALJ adjudication, sharing Professor Litman's focus on the majority and concurring opinions' language, as well as the Justices' rhetoric at oral argument. *See infra* Part III and accompanying text. Then, it argues that there is a contradiction between the majority's Seventh Amendment rhetoric and the Fifth Circuit's presidential removal holding: any perceived shortcomings regarding the fairness of ALJ adjudication will only be hastened by invalidating ALJ's dual for-cause removal protections. *Id.*

[170] *See* Litman, *supra* note 168, at 596–98 (examining the Justices' disquiet regarding agency infringement of individual liberties, as exemplified by *Jarkesy*).

[171] *See Jarkesy*, 603 U.S. at 140 (writing that "concentrat[ing] the roles of prosecutor, judge, and jury in the hands of the Executive Branch" would violate the separation of powers); *id.* at 142 (Gorsuch, J., concurring) (asserting that SEC ALJs may have "judge" in their title, but in actuality are employees of the agency prosecuting the defendant).

[172] *See id.* at 140 (majority opinion) (stating that the defendant was entitled to a jury trial in front of a "neutral adjudicator"); *id.* at 148 (Gorsuch, J., concurring) (writing that Article III "promised a

Separate writings by members of the *Jarkesy* majority offer additional insight into the Justices' view of agency adjudication.[173] In 2018, in *Oil States Energy Services, LLC v. Greene's Energy Group, LLC*, the Supreme Court held that the U.S. Patent and Trademark Office could make patent determinations without running afoul of Article III or the Seventh Amendment.[174] Joined in dissent by Chief Justice Roberts, Justice Gorsuch protested that the patent matter must be presented in front of a federal judge rather than an agency adjudicator.[175] The inherent risk of capture by bureaucratic agency officials made it critical that an independent federal judge preside over the dispute.[176]

In 2023, in *Axon Enterprise, Inc. v. FTC*, the Supreme Court held that Article III district courts retained jurisdiction to hear claims challenging the constitutionality of administrative agency structures.[177] Justice Clarence Thomas authored a concurring opinion to express his doubts about Congress's ability to vest adjudicative authority over certain rights in administrative agencies.[178]

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defendant an independent judge rather than one dependent on those who hold political power"). Justice Gorsuch has expressed similar skepticism of administrative officials elsewhere. *See, e.g.*, Kisor v. Wilkie, 588 U.S. 558, 617 (2019) (Gorsuch, J. concurring in the judgment) (referring to administrative officials as "self-interested political actor[s]"); *see also* NEIL GORSUCH & JANIE NITZE, OVER RULED: THE HUMAN TOLL OF TOO MUCH LAW 17–23 (2024) (criticizing the modern administrative state as harming ordinary people through excessive lawmaking and regulation).

[173] *See generally* Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 584 U.S. 325, 346 (2018) (Gorsuch, J., dissenting) (characterizing Article III as shielding individual liberties against government overreach); Axon Enter., Inc. v. FTC, 598 U.S. 175, 196 (2023) (Thomas, J., concurring) (questioning Congress's ability to vest adjudicatory responsibilities in ALJs with only deferential federal court review).

[174] *See Oil States*, 584 U.S. at 344–45 (upholding inter partes review by the Patent Trial and Appeal Board, an adjudicatory body housed in the Patent and Trademark Office, as congruent with the Seventh Amendment and Article III). This case concerned administrative patent judges, who are non-ALJ adjudicators. *Id.* at 331. Nonetheless, Justice Gorsuch's dissent exemplifies his critique of agency adjudication more broadly. *See infra* Part III.A and accompanying text.

[175] *See Oil States*, 584 U.S. at 348 (Gorsuch, J. dissenting) (arguing that "[t]he Constitution's original public meaning" determines when a suit must be adjudicated by an Article III court). Justice Gorsuch reasoned that because only courts of law could hear patent challenges at common law in England, the matter had to be adjudicated by the federal courts. *Id.* at 348–49.

[176] *See id.* at 348 ("[W]hen an independent Judiciary gives ground to bureaucrats in the adjudication of cases, the losers will often prove the unpopular and vulnerable[.]"); *see also* Thryv, Inc. v. Click-To-Call Techs., LP, 590 U.S. 45, 62 (2020) (Gorsuch, J., dissenting) (arguing that the Court has erred by delegating the "disposition of private rights and liberties to bureaucratic mercy").

[177] *See Axon*, 584 U.S. at 180 (holding that federal trial courts may adjudicate challenges to the constitutionality of the structure of the SEC and Federal Trade Commission (FTC) before a final ALJ decision); *see also Supreme Court Allows Upfront Challenges to FTC and SEC Proceedings*, DAVIS POLK (Apr. 20, 2023), https://www.davispolk.com/insights/client-update/supreme-court-allows-upfront-constitutional-challenges-ftc-and-sec [https://perma.cc/6AT4-4KU2] (explaining that *Axon* will allow future constitutional challenges to be brought against various agency adjudication schemes).

[178] *See Axon*, 598 U.S. at 196 (Thomas, J., concurring) (expressing "grave doubts" about adjudication of administrative agencies concerning private rights with minimal federal judicial review). Justice Thomas has a long jurisprudential track record articulating this view. *See, e.g.*, Brian Lipshutz, *Justice Thomas and the Originalist Turn in Administrative Law*, 125 YALE L.J. 94, 98–100 (2015)

Unlike how *Atlas Roofing* articulated a broad category of public rights, Justice Thomas took an expansive view of private rights.[179] He contrasted public rights that could be heard by agency ALJs with three unconditional private rights that must be heard in Article III courts: "life, liberty, and property."[180] Critically, Justice Thomas conceived of the private rights category with expansive notions of property rights, including most, if not all, civil penalties or fines.[181] Thus, allowing agency officials masquerading as federal judges to resolve such claims raised severe constitutional concerns.[182]

B. The Fifth Circuit's Presidential Removal Holding

In 2022, in *Jarkesy*, the Fifth Circuit concluded that dual for-cause removal provisions for SEC ALJs violated Article II of the Constitution.[183] The majority combined the rationales from *Free Enterprise Fund* and *Lucia*, employing the analysis posited by some administrative law scholars.[184] First, the Fifth Circuit analogized the dual for-cause removal protections for SEC ALJs to the provisions invalidated in *Free Enterprise Fund*.[185] Then, reasoning that

(writing that Justice Thomas's understanding of the public rights doctrine exemplifies analyzing "original meaning in depth"). *See generally Originalism*, BLACK'S LAW DICTIONARY, *supra* note 64 (defining originalism as "[t]he doctrine that words of a legal instrument are to be given the meanings they had when they were adopted").

[179] *See Axon*, 598 U.S. at 198–99 (Thomas, J., concurring) (describing private rights that must be adjudicated in Article III courts as those grounded in a "Lockean state of nature"); *see also* Emerson, *supra* note 168, at 1436–37 (writing that Justice Thomas's view of private rights prioritizes individual private property rights).

[180] *Axon*, 598 U.S. at 198 (Thomas, J., concurring) (citing Wellness Int'l Network, Ltd. v. Sharif, 575 U.S. 665, 711 (2015) (Thomas, J., dissenting)); *see also* Mascott, *supra* note 18, at 29 (writing that "cases involving . . . deprivations or transfers of life, liberty, or property . . . must be resolved by Article III courts").

[181] *See Axon*, 598 U.S. at 204 (Thomas, J., concurring) (characterizing the imposition of "significant monetary fines" as implicating core private property rights).

[182] *See id.* at 199 (citing Mascott, *supra* note 18, at 45) (expressing when Article III courts, rather than agency adjudicators, must hear claims).

[183] *See* Jarkesy v. SEC, 34 F.4th 446, 465 (5th Cir. 2022) (holding that SEC adjudications violated the Seventh Amendment right to a civil jury trial and that dual for-cause removal provisions for SEC ALJs infringed on the President's constitutional responsibility to "take care that the laws are faithfully executed"), *aff'd*, 603 U.S. 109 (2024)

[184] *See id.* at 463–64 (concluding that the current dual for-cause removal protections for ALJs are unconstitutional under *Free Enterprise Fund* and *Lucia*); Jellum, *supra* note 19, at 709–10, 734 (same); *see also* Fleming v. Dep't of Agric., 987 F.3d 1093, 1115 (D.C. Cir. 2021) (Rao, J., concurring in part and dissenting in part) (arguing that two layers of for-cause removal protections for ALJs violates the separation of powers).

[185] *See Jarkesy*, 34 F.4th at 463–64 (reasoning that *Free Enterprise Fund* called into question two levels of statutory removal protections inhibiting the President's ability to oversee inferior officers' actions); Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 484 (2010) (holding that dual for-cause removal protections separating the President and PCAOB members unconstitutionally interfered with the President's Article II duties).

Lucia held SEC ALJs to be inferior officers under the Appointments Clause, the court determined that the President must retain sufficient control over SEC ALJs in order to satisfy the Article II duty to ensure that federal law is faithfully executed.[186] This was especially critical, the court reasoned, because the President's political accountability to the public requires the President to retain adequate supervision over unelected executive branch officials exercising executive power.[187] Notably, the Fifth Circuit did not limit its analysis to SEC ALJs, suggesting that its reasoning would apply to the nearly two thousand other ALJs conducting formal APA adjudications.[188]

III. ADJUDICATORY ANGST AND THE LOOMING ALJ PARADOX

Although the Supreme Court sidestepped the Fifth Circuit's presidential removal holding in *Jarkesy*, many scholars assume that the Court will inevitably apply the Fifth Circuit's rationale to all ALJs.[189] On one hand, these two

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[186] *See Jarkesy*, 34 F.4th at 464 (concluding that because SEC ALJs are inferior officers for Appointment Clause purposes, "they are sufficiently important to executing the laws that the Constitution requires that the President be able to exercise authority over their functions"); Lucia v. SEC, 585 U.S. 237, 251 (2018) (holding that SEC ALJs are inferior officers within the meaning of the Constitution and thus must be appointed in accordance with the Appointments Clause).

[187] *See Jarkesy*, 34 F.4th at 463 (reasoning that because SEC ALJs are inferior officers under the Constitution, they exercise enough power such that the President must retain the ability to oversee them); *see also* Neomi Rao, *A Modest Proposal: Abolishing Agency Independence in* Free Enterprise Fund v. PCAOB, 79 FORDHAM L. REV. 2541, 2553 (2011) (emphasizing the importance of political accountability through presidential oversight of executive branch officials).

[188] *See Jarkesy*, 34 F.4th at 465 (concluding that "two layers of insulation impedes the President's power to remove ALJs based on their exercise of the discretion granted to them"); Petition for a Writ of Certiorari at I, SEC v. Jarkesy, 603 U.S. 109 (No. 22-859) (asking the Court to determine "[w]hether Congress violated Article II by granting for-cause removal protection to administrative law judges in agencies whose heads enjoy for-cause removal protection"); *see also* John Fry, *Tracking Attacks on the NLRB: Ohio and Michigan Judges Reject Employer's Challenges*, ONLABOR (Sept. 16, 2024), https://onlabor.org/tracking-attacks-on-the-nlrb-ohio-and-michigan-judges-reject-employers-challenges/ [https://perma.cc/9NJX-CK34] (cataloguing the rise in challenges to statutory removal protections for ALJs across various federal agencies following the Fifth Circuit's decision in *Jarkesy*). The Fifth Circuit declined to follow the Ninth Circuit's holding in *Decker Coal Co. v. Pehringer*, which previously upheld two layers of removal protections for DOL ALJs. *See* 8 F.4th 1123, 1130, 1133 (9th Cir. 2021) (upholding statutes permitting the removal of DOL ALJs only for good cause and determined by the MSPB, who likewise were only removable for good cause, as compatible with the separation of powers and Article II).

[189] *See* Bremer, *supra* note 12, at 1752 (stating that "the Supreme Court will have to address the removal question eventually. The APA's day of reckoning has only been delayed"); Walker, *supra* note 28 (anticipating that the Court will soon apply the Fifth Circuit's removal power analysis to all ALJs). Notably, the Supreme Court's emergency docket rulings from May 2025 to September 2025 imply that any limits on the President's power to remove executive branch officers violates Article II. *See* Amy Howe, *Supreme Court Allows Trump to Fire FTC Commissioner*, SCOTUSBLOG (Sep. 22, 2025), https://www.scotusblog.com/2025/09/supreme-court-allows-trump-to-fire-ftc-commissioner/ [https://perma.cc/MSF3-2P7T] (explaining that the Supreme Court stayed district court orders preventing President Trump from firing appointees of the FTC, MSPB, and NLRB). The Court will hear

holdings seem to be cut from the same cloth: an increasingly formalist view of the separation of powers, which in turn inhibits the administrative state.[190] This Note attempts to search further.[191] Beneath the Supreme Court's decision in *Jarkesy* lies a deep mistrust of the impartiality of ALJ adjudication.[192] Taken to its logical conclusion, the Fifth Circuit's holding would invalidate dual for-cause removal protections for ALJs across various administrative agencies.[193] Yet, adopting this holding would subject ALJs to greater partisan influence, intensifying the very fairness defects in ALJ adjudication that the Court decried in *Jarkesy* across thousands of administrative adjudications.[194] This is the Court's impending ALJ paradox.[195]

First, Section A of this Part argues that pervading *Jarkesy* and other recent Seventh Amendment cases is a deep skepticism of the fairness of ALJ adjudication.[196] Next, Section B of this Part asserts that invalidating statutory for-cause removal protections would subject ALJs to greater political influence, which cannot be squared with *Jarkesy*'s cynicism about the fairness of formal agency adjudication.[197] Regardless of whether ALJ proceedings reflect some measure of pro-agency bias, invalidating removal protections designed to mirror Article III courts through insulated, expert-led administrative hearings will

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oral arguments addressing the constitutionality of for-cause removal protections for independent agency heads in December 2025. *Id.* Invalidating protections would effectively eliminate one layer of removal protections for ALJs, leaving only the single layer of for-cause protection between ALJs and agency heads intact. *See generally Free Enter. Fund*, 561 U.S. at 509. Despite Congress's attempts to render ALJs independent, the Court recently emphasized that agency adjudicators are still executive branch employees, suggesting that a decision invalidating for-cause removal protections for independent agency heads could call into question provisions insulating ALJs from agency head removal. *See* United States v. Arthrex, Inc., 594 U.S. 1, 17 (2021) (writing that "under our constitutional structure" administrative agency adjudication is an "exercise[] of . . . the 'executive Power'" (quoting Arlington v. FCC, 569 U.S. 290, 305 n.4 (2013))).

[190] *See* Omarova & Richardson, *supra* note 24, at 493 (referring to *Jarkesy* as part of an "assault on the legitimacy of administrative governance"); Karen M. Tani, *The Supreme Court 2023 Term Foreword: Curation, Narration, Erasure: Power and Possibility at the U.S. Supreme Court*, 130 HARV. L. REV. 1, 43 (2024) (writing that the Court is increasingly applying a "formalistic approach" to constitutional decision-making).

[191] *See infra* notes 200–235 and accompanying text.

[192] *See* Litman, *supra* note 168, at 596–98 (scrutinizing the Justices' concerns that ALJ adjudication harms individual liberties, as seen through the opinions and oral argument in *Jarkesy*).

[193] *See* Barnett, *supra* note 25, at 1712 n.97 (reasoning that *Lucia* likely signals that all ALJs are inferior officers); Bremer, *supra* note 12, at 1779 (writing that "[t]he APA's ALJ structure would not be threatened by *Free Enterprise Fund* if ALJs were employees rather than officers—but the Supreme Court foreclosed this possibility in . . . *Lucia v. SEC*"); Nielson et al., *supra* note 131, at 1041 (predicting that the Supreme Court will soon adopt and apply the Fifth Circuit's holding in *Jarkesy* to invalidate dual statutory removal protections for all ALJs).

[194] *See infra* Part III and accompanying text.

[195] *See infra* Part III and accompanying text.

[196] *See infra* Part III.A and accompanying text.

[197] *See infra* Part III.B and accompanying text.

only worsen the problem.[198] Lastly, Section B of this Part articulates the category of claims that will suffer from increased executive branch control over ALJs—the public benefits claims the Court recognized as plainly falling within the public rights exception.[199]

A. Beyond the Doctrine: Jarkesy*'s Anxiety over ALJ Adjudication*

On one hand, *Jarkesy* embodies the Supreme Court's recent separation of powers jurisprudence; its analysis is highly formalist in nature and restrains administrative agencies' flexibility to address societal problems.[200] But there is something beyond a rigid separation of powers holding: pervading the Supreme Court's doctrinal analysis in *Jarkesy* is a deep doubt of the fairness of ALJ adjudication.[201]

Consider the language used by Chief Justice Roberts in the *Jarkesy* majority opinion.[202] For starters, the Court framed the case as asking whether the Seventh Amendment allowed the SEC to "compel respondents to defend themselves before the agency" against one of the agency's "most potent enforcement tools."[203] The Court underscored that the Commission could delegate adjudication over these civil penalties to SEC ALJs—emphasizing their role as agency employees.[204] Turning to history, the Court highlighted the longstanding importance of the right to a civil jury trial as grounds for its zealous protection.[205] The majority's distrust of ALJs is perhaps best exemplified by its final

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[198] *See infra* Part III and accompanying text.

[199] *See infra* Part III.B and accompanying text.

[200] *See* Omarova & Richardson, *supra* note 24 at 462 (referring to *Jarkesy* as part of an attack on the administrative state); Vladeck, *supra* note 24 (framing the Court's recent administrative law jurisprudence as "hosti[le] to administrative enforcement"); SEC v. Jarkesy, 603 U.S. 109, 201 (2024) (Sotomayor, J., dissenting) ("Litigants seeking further dismantling of the 'administrative state' have reason to rejoice in their win today . . . ."); *see also* Glicksman & Levy, *supra* note 44, at 1090 ("[T]he United States Supreme Court has entered a new era of separation of powers formalism . . . . Prominent decisions invalidating statutory provisions governing appointment and removal of officers of federal administrative agencies reflect a strong formalistic flavor.")

[201] *See infra* Part II and accompanying text.

[202] *See generally Jarkesy*, 603 U.S. at 115–41 (majority opinion) (criticizing the ability of SEC ALJs to impose civil penalties in an enforcement action brought by the SEC).

[203] *Id.* at 115, 118. The Court also noted that the "choice of forum dictate[d]" both the procedural protections afforded to the defendant and the remedies the SEC could seek. *Id.* at 116–17.

[204] *See id.* at 117 ("The Commission may also delegate its role as judge and factfinder to . . . an administrative law judge (ALJ) that it employs."). The Fifth Circuit also questioned the impartiality of SEC ALJs. *See* Jarkesy v. SEC, 34 F.4th 446, 465 n.20 (5th Cir. 2022) ("The SEC's ALJs are not mere neutral arbiters of federal securities law; they are integral pieces within the SEC's powerful enforcement apparatus."), *aff'd*, 603 U.S. 109 (2024).

[205] *See Jarkesy*, 603 U.S. at 121 ("The right to trial by jury is 'of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right' has always been and 'should be scrutinized with the utmost care.'" (quoting Dimick v. Schiedt, 293 U.S. 474, 486 (1936))); *see also* Litman, *supra* note 168, at 596–97 (recounting how the majority invoked early

paragraph, which accused the government of withholding the defendant's right to a neutral adjudicator and allowing Congress "to concentrate the roles of prosecutor, judge, and jury in the hands of the Executive Branch."[206]

Justice Gorsuch's concurrence made concrete what was implicit in the majority opinion: a serious skepticism of ALJ adjudication.[207] Justice Gorsuch characterized the statute as infringing upon the constitutional guarantee of an independent judge to preside over claims where the government deprives an individual of "life, liberty, or property."[208] ALJs, Justice Gorsuch argued, were mere servants of a political body, tasked with adjudicating disputes for their employer.[209] As evidence, Justice Gorsuch pointed to the alleged winning percentage of the SEC in ALJ versus Article III proceedings.[210] Framing the jury right as a response to the injustices that spurred the American Revolution, Justice Gorsuch argued that an independent judge, free from political whims, was constitutionally necessary to protect individual liberty—a requirement he cited

American figures, including Alexander Hamilton, to persuade readers of the importance of the Seventh Amendment jury trial right).

[206] *Jarkesy*, 603 U.S. at 140.

[207] *See id.* at 142 (Gorsuch, J., concurring) (writing that the term "judge" for ALJs is misleading because "they remain servants of the same master—the very agency tasked with prosecuting"); *see also* Tani, *supra* note 190, at 51–52 (writing that Justice Gorsuch's *Jarkesy* concurrence implied "that the in-house administrative law judges . . . were likely to rule in the Agency's favor").

[208] *See Jarkesy*, 603 U.S. at 141 (Gorsuch, J., concurring) (arguing that the Seventh Amendment works in concert with Article III and the Due Process Clause of the Fifth Amendment to realize the Constitution's guarantee of a fair trial in a neutral forum). Justice Gorsuch has emphasized the importance of a neutral, independent judge elsewhere. *See* Kisor v. Wilkie, 588 U.S. 558, 613–31 (2019) (Gorsuch, J. concurring in the judgment) (referring four times to the need for a "neutral" adjudicator to resolve disputes); *see also Confirmation Hearing on the Nomination of Hon. Neil. M. Gorsuch to be an Associate Justice of the Supreme Court of the United States: Hearing Before the Senate Comm. on the Judiciary*, 115 Cong. 72 (2018) (statement of Hon. Neil M. Gorsuch) (expressing the need for a "rigidly neutral, fair, scrupulously fair decisionmaker").

[209] *See Jarkesy*, 603 U.S. at 142 (Gorsuch, J., concurring) (writing that the Dodd Frank Act allowed the SEC to "funnel cases . . . through its own 'adjudicatory' system"). The securities fraud scheme, Justice Gorsuch argued, allowed the SEC to essentially adjudicate disputes that they themselves were prosecuting. *See id.* at 162 ("[W]hy would the government ever go to court if it may more readily secure a win before its own employees?"). Justice Gorsuch also criticized the diminished procedural protections available for litigants in ALJ proceedings. *Id.* at 143–44.

[210] *See id.* at 143 ("[T]he odds were stacked against Mr. Jarkesy. . . . 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."). The actual winning percentage of the Commission in front of SEC ALJs is subject to some disagreement. *Compare* Drew Thornley & Justin Blount, *SEC In-House Tribunals: A Call for Reform*, 62 VILL. L. REV. 261, 286 (2017) (citing a *Wall Street Journal* report asserting a 21% difference in SEC success rate between actions brought in federal court and agency adjudication), *with* Velikonja, *supra* note 73, at 315 (concluding that the *Wall Street Journal*'s data alleging a pro-agency bias by SEC ALJs was unfounded, given that "[f]ederal district court judges ruled for the SEC and against defendants in 88% of cases, whereas ALJs ruled for the SEC in 90% of cases").

eleven times.[211] Moreover, Justices Samuel Alito and Brett Kavanaugh expressed similar concerns at oral argument, peppering the United States Principal Deputy Solicitor General with questions about how SEC ALJs' ability to impose civil penalties for securities fraud threatened individual freedoms.[212]

Recent separate writings outside of *Jarkesy* confirm the trend.[213] Take Justice Gorsuch's *Oil States* dissent.[214] There, Justice Gorsuch argued that even if an agency's patent review process offered procedural efficiency, such an interest did not justify allowing "politically accountable bureaucracies" to adjudicate patent determinations.[215] The procedural guarantees offered by Article III courts, he wrote, were especially important when contrasted with bureaucratic adjudication, where the losers usually are the disadvantaged and defenseless.[216] Likewise in *Axon*, Justice Thomas protested the Federal Trade Commission's (FTC's) success rate in front of agency ALJs versus in federal court.[217] To demonstrate this perceived bias, Justice Thomas analogized the FTC's record in front of agency ALJs to the 1972 undefeated Miami Dolphins.[218] Overall, the majority in *Jarkesy*, the Justices' separate writings, and statements at oral argument reveal a cohesive cynicism toward ALJ adjudication.[219]

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[211] *See Jarkesy*, 603 U.S. at 167 (Gorsuch, J., concurring) (writing that the Seventh Amendment, among other constitutional provisions, was enacted "to ensure a fair trial in a fair forum").

[212] *See* Transcript of Oral Argument at 28, SEC v. Jarkesy, 603 U.S. 109 (No. 22-859) ("[W]hat sense does it make to say the full constitutional protections apply when a private party is suing you, but we're going to discard those core constitutional historic protections when the government comes at you for the same money?") (Kavanaugh, J.); *id.* at 46–47 ("[D]oesn't that seem like a pretty patent evasion of the Seventh Amendment to say this protection which was regarded at the time of the adoption of the Bill of Rights as sufficiently important to merit inclusion in the Constitution can be nullified simply by changing the label that is attached to a tribunal?") (Alito, J.); *see also* Litman, *supra* note 168, at 597–98 (cataloguing individual liberty concerns stressed by Justices at oral argument).

[213] *See* Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 584 U.S. 325, 347–48 (2018) (Gorsuch, J., dissenting) (arguing that patent disputes must be adjudicated by Article III courts); *see also* Axon Enter., Inc. v. FTC, 598 U.S. 175, 198–99 (2023) (Thomas, J., concurring) ("Cases involving . . . deprivations or transfers of life, liberty, or property" must be decided by federal courts, "not executive adjudicators 'dressed up as courts'" (quoting Mascott, *supra* note 18, at 22, 45))).

[214] *See Oil States*, 584 U.S. at 346 (Gorsuch, J., dissenting) (criticizing the use of "a political appointee and his administrative agents" to adjudicate a patent dispute).

[215] *See id.* at 347 (contending that the constitutional requirement of judicial impartiality cannot be cast aside merely in the interest of administrative efficiency).

[216] *See id.* at 348 ("Powerful interests are capable of amassing armies of lobbyists and lawyers to influence (and even capture) politically accountable bureaucracies. But what about everyone else?").

[217] *See* 598 U.S. at 197 n.1 (Thomas, J., concurring) (questioning FTC and SEC ALJ adjudication in light of their "tendency to overwhelmingly agree with their respective agency's decisions"). According to the lower court in *Axon*, the FTC had not lost a case within its adjudication proceedings in over twenty-five years. *Id.*

[218] *See id.* (invoking the lower court's comparison of the FTC's record in agency adjudication proceedings to an undefeated National Football League team).

[219] *See infra* notes 200–218.

B. The Impending ALJ Paradox: Invalidating ALJ Removal Protections Will Heighten Fairness Deficiencies Across Thousands of Agency Proceedings

Although at first glance the Fifth Circuit and Supreme Court's *Jarkesy* decisions seem of a piece, they are contradictory.[220] Section A of this part established that the Justices' recent Seventh Amendment cases are deeply skeptical of the fairness of ALJ adjudication.[221] The Court increasingly perceives ALJs as political agents incapable of unbiased decision-making.[222] But adopting the Fifth Circuit's removal holding will only heighten these fairness concerns.[223] Eliminating dual for-cause removal protections will render ALJs more subject to political control and thus perpetuate the very fairness deficiencies the *Jarkesy* majority abhors.[224]

As Justice Breyer observed, Congress passed the APA with accompanying protections shielding ALJs from presidential removal to quell concerns about biases and inconsistency in agency hearings.[225] Effectively, Congress sought to mirror the impartiality of federal judges.[226] To insulate ALJs from the political process, Congress designed them to only be removable after a thorough investigative process by a neutral merits board.[227] Doing so satisfied the central APA

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[220] *See infra* Part III.B and accompanying text.

[221] *See supra* Part III.A and accompanying text.

[222] *See, e.g.*, SEC v. Jarkesy, 603 U.S. 109, 140 (2024) (majority opinion) (writing that Congress cannot "concentrate the roles of prosecutor, judge, and jury in the hands of the Executive Branch").

[223] *See infra* Part III.B and accompanying text.

[224] *See Jarkesy*, 603 U.S. at 142 (Gorsuch, J., concurring) (writing that the term "judge" for ALJs is misleading because "they remain servants of the same master—the very agency tasked with prosecuting"). In many of the Court's presidential removal decisions, the Court has grounded its holding on the principle of political accountability. *See, e.g.*, Seila L. LLC v. CFPB, 591 U.S. 197, 224 (2020) (reasoning that the need for political accountability justified the President's at-will removal control over the CFPB Director). This Note argues that a paradox arises in the ALJ context, where political accountability would be used to justify expanding the President's removal power over ALJs while the Justices criticize the political dependence of agency adjudicators. *See, e.g.*, *Jarkesy*, 603 U.S. at 148 (Gorsuch, J., concurring) (writing that "Article III . . . promised an independent judge rather than one dependent on those who hold political power").

[225] *See* Lucia v. SEC, 585 U.S. 237, 260 (2018) (Breyer, J., concurring in the judgment in part and dissenting in part) (citing Wong Yang Sung v. McGrath, 339 U.S. 33, 46 (1950) to characterize APA's removal protections as "'safeguards . . . intended to ameliorate' the perceived 'evils'" of unfairness in pre-APA agency hearings).

[226] *See* Pierce, *supra* note 66, at 644 (explaining that Article III civil proceedings partially inspired Congress in designing formal agency adjudication); *see also* Levy & Glicksman, *supra* note 66, at 74 (arguing that invalidating dual good-cause removal protections for ALJs would increase the likelihood that there is political pressure put on ALJs by agency officials, potentially biasing rulings).

[227] *See, e.g.*, 5 U.S.C. § 7521(a) (explaining that agency heads can initiate removal proceedings with the MSPB, which will then determine if there is sufficient cause to remove to remove ALJs); Butz v. Economou, 438 U.S. 478, 513 (1978) (explaining that Congress designed ALJs "to assure that the hearing examiner exercises his independent judgment on the evidence before him, free from pressures by the parties or other officials within the agency").

purpose of neutrality in agency decision-making.[228] Under the Fifth Circuit's Article II holding, however, dual for-cause removal provisions separating agency heads and ALJs are unconstitutional.[229] Thus, the Fifth Circuit's holding would permit the President and their appointed agency heads to exercise considerable control over ALJs, and, in turn, influence thousands of adjudications across the administrative state.[230]

Consider a world where the head of the SSA could threaten ALJs with removal for granting too many disability benefits claims.[231] Although the Due Process Clause sets a minimum level of adjudicatory fairness in agency adjudication, it is unclear how protective the floor is.[232] Regardless, a minimum level of impartiality in adjudication hardly embodies the neutral, scrupulous decisionmaker the Court places on a pedestal in *Jarkesy*, among other deci-

[228] *See* Cox & Kaufman, *supra* note 62, at 1785 (explaining that in expanding administrative proceedings, the APA achieved impartial, unbiased administrative adjudications); Barnett & Wheeler, *supra* note 58, at 15 ("ALJ independence was a purposeful and prominent response to widespread concerns before the APA's enactment over unqualified and biased agency adjudicators."); *see also* *Lucia*, 585 U.S. at 260–61 (Breyer, J., concurring in the judgment in part and dissenting in part) (expressing concerns that the Court's holding in *Free Enterprise Fund*, if applied to ALJs, could threaten the administrative APA's commitment to impartial, expert-led administrative adjudication).

[229] *See* Jarkesy v. SEC, 34 F.4th 446, 463 (5th Cir. 2022) (holding that two levels of statutory removal provisions for SEC ALJs improperly infringed on the President's constitutional responsibility to "take Care that the Laws be faithfully executed"), *aff'd*, 603 U.S. 109 (2024). It is unclear what remedy the Court would apply if it adopted the Fifth Circuit's holding. If the Court applied the remedy from *Free Enterprise Fund*, the Court would invalidate for-cause removal provisions separating agency heads from ALJs, permitting agency heads to remove ALJs at will and leaving ALJs protected from presidential removal by a single for-cause provision. *See* 561 U.S. 477, 509 (2010) (invalidating dual for-cause removal protections separating financial regulatory members from presidential control). Combined with a holding declaring unconstitutional for-cause removal protections for independent agency heads, ALJs would no longer enjoy even a single-layer of for-cause removal protection. *See* Howe, *supra* note 189 (describing the facts and potential legal consequences of the cases).

[230] *See Lucia*, 585 U.S. at 260 (Breyer, J., concurring in the judgment in part and dissenting in part) (claiming that expanding the President's removal authority over ALJs would convert them from neutral adjudicators into agency officials subject to executive branch influence); Nielson et al., *supra* note 131, at 1018–19 (recognizing the threat that politicized agency adjudicators may present to impartiality in agency adjudication, and perhaps even to litigants' due process rights).

[231] *See* Levy & Glicksman, *supra* note 66, at 74 (worrying that invalidating good-cause removal provisions protecting ALJs from agency heads "would seriously compromise the principal of independent and impartial agency adjudication under the APA by exposing ALJs to removal in retaliation for decisions in particular cases that contravene the wishes of their politically appointed superiors"); *Lucia*, 585 U.S. at 260 (Breyer, J., concurring in the judgment in part and dissenting in part) (arguing that eliminating the SEC ALJ removal provisions may subject ALJs to political pressure by executive branch officials).

[232] *See* Levy & Glicksman, *supra* note 66, at 46 n.27 ("[D]ue process demands impartiality on the part of those who function in judicial or quasi-judicial capacities." (quoting Schweiker v. McClure, 456 U.S. 188, 195 (1982))). Like one group of notable scholars, this Note declines "to address the precise constitutional point where political interference in adjudication violates due process." Nielson et al., *supra* note 131 at 1019 n.29.

sions.[233] Scholars dispute the premise of pro-agency bias within ALJ adjudication.[234] Even so, aggrandizing presidential power over ALJs will only hasten such fairness and impartiality issues.[235]

Lastly, *Jarkesy*'s public rights analysis lays out a category of administrative hearings that would be subject to increased executive branch control should the Court agree with the Fifth Circuit.[236] By the Court's own admission, *Jarkesy* did not clarify the fuzzy public versus private rights distinction.[237] Still, in listing matters falling within the public rights exception, Chief Justice Roberts wrote that *Jarkesy*'s holding did not apply to "the granting of public benefits such as payments to veterans, pensions, and patent rights."[238] Similarly, at oral argu-

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[233] *See* SEC v. Jarkesy, 603 U.S. 109, 140 (2024) (majority opinion) (stating that a defendant facing a fraud suit "has the right to be tried by a jury of his peers before a neutral adjudicator"); *id.* at 148 (Gorsuch, J., concurring) (writing that Article III "promised . . . an independent judge rather than one dependent on those who hold political power").

[234] *See* Barnett, *supra* note 46, at 1645–46 (noting that agencies often choose to bring cases within their own internal agency, possibly due to a higher percentage of victories). *Compare* Thornley & Blount, *supra* note 210, at 286 (citing a *Wall Street Journal* article that the SEC won 90% of its suits brought in front of ALJs, compared to 69% of its cases in federal court), *with* Velikonja, *supra* note 73, at 315 (arguing that "[c]ontrary to the claim advanced by the Wall Street Journal and critics of administrative adjudication . . . there is no robust correlation between the selected forum and case outcome").

[235] *See* Levy and Glicksman, *supra* note 66, at 74 (writing that invalidating the APA's independent provisions for ALJs will raise pressure for agency adjudicators to rule in favor of political officials). *Compare Jarkesy*, 603 U.S. at 140 (majority opinion) (stating that a defendant facing a fraud suit "has the right to be tried by a jury of his peers before a neutral adjudicator"), *with Lucia*, 585 U.S. at 260 (Breyer, J., concurring in the judgment in part and dissenting in part) (worrying that expanding the President's removal authority over ALJs "would risk transforming administrative law judges from independent adjudicators into *dependent* decisionmakers, serving at the pleasure of the Commission").

[236] *See infra* Part III.B and accompanying text.

[237] *See Jarkesy*, 603 U.S. at 131 (admitting that the Court has failed to fully explicate the public and private rights distinction). Some scholars argue that *Jarkesy* further blurred the line between its doctrine regarding permissible non-Article III adjudication and the requirements of the Seventh Amendment. *See, e.g.*, Matthew Strada, *The Unfolding Meaning of* Jarkesy, YALE J. ON REGUL. NOTICE & COMMENT (Apr. 27, 2025), https://www.yalejreg.com/nc/the-unfolding-meaning-of-jarkesy-by-matthew-strada/ [https://perma.cc/42KK-NFTD] (arguing that *Jarkesy* conflated the Court's Seventh Amendment and Article III jurisprudence, "not for the first time").

[238] *Jarkesy*, 603 U.S. at 130 (internal citations omitted). This Note does not endorse the Court's broader Seventh Amendment analysis, which will hinder agencies' ability to effectively regulate, and potentially shift thousands of agency adjudications to the already-burdened lower federal courts. *See Jarkesy*, 603 U.S. at 199–200 (Sotomayor, J., dissenting) (listing twenty-four administrative agencies and accompanying remedies that are constitutionally suspect under the majority's analysis); Tierney, *supra* note 24, at 1891 (expressing concerns that "*Jarkesy* will . . . dilute regulatory agencies' power to address violations quickly and efficiently"); Brief for Admin. L. Scholars, *supra* note 69, at 29 (worrying that the Fifth Circuit's Seventh Amendment holding, if adopted, may "enormously expand" the dockets of lower federal district courts). Instead, this Note raises the Court's doctrinal analysis simply to show that there is an articulable group of litigants who will be subject to the so-called "ALJ paradox" if the Court adopts the Fifth Circuit's removal holding. *See infra* Part III.B and accompanying text.

ment, several justices indicated that SSA claims constitute public benefits falling within the public rights exception.[239] ALJs within the SSA alone preside over hundreds of thousands of hearings and appeals per year, the majority of the ALJ corps' docket.[240] So, even if *Jarkesy* foreshadows a shift of administrative claims to the federal courts,[241] ALJs will continue to adjudicate a wide range of public benefits cases like SSA claims.[242] Consequently, litigants advancing these claims will suffer the harms of heightened executive branch control should the ALJ paradox come into fruition.[243]

CONCLUSION

The *Jarkesy* litigation presents a paradox in the Court's approach to ALJ adjudication. On one hand, underlying the Court's Seventh Amendment analysis in *Jarkesy* is a deep skepticism of the fairness of ALJ proceedings. Scholars

[239] *See* Transcript of Oral Argument at 77, SEC v. Jarkesy, 603 U.S. 109 (No. 22-859) (advancing a conception of the public rights exception that encompasses "benefits . . . [including] Social Security and those kinds of agencies") (Kavanaugh, J.); *id.* at 127 (referring to Social Security claims as clear public rights) (Alito, J.); *id.* at 66 (referencing SSA ALJs as adjudicating benefits claims that fall within the public rights exception) (Gorsuch, J.).

[240] *See* SOC. SEC. ADMIN., *supra* note 51 (providing statistics surrounding SSA ALJ proceedings); *see also* U.S. OFF. OF PERS. MGMT., *supra* note 48 (showing that an overwhelming majority of ALJs, 1,655, are housed in the SSA).

[241] *See* Noah Rosenblum, *The Supreme Court Won't Stop Dismantling the Government's Power*, THE ATLANTIC (June 28, 2024), https://www.theatlantic.com/ideas/archive/2024/06/supreme-court-jarkesy-v-sec-loper-bright-chevron-deference/678842/ [https://perma.cc/N74R-P53Q] (arguing that "[m]any agencies pursue enforcement actions that have common-law analogs and have done so for decades. . . ." and "the Supreme Court did not explain the limits or logic of its reasoning. . . ." meaning that "[d]efendants, taking advantage of the Supreme Court's lack of clarity, will raise new challenges to once-typical enforcement proceedings"); Emerson, *supra* note 168, at 1426 (predicting that *Jarkesy* signals that "a wide array of administrative adjudications are at risk: agencies such as the EPA, the Centers for Medicare and Medicaid Services, the Food and Drug Administration, and many others exercise similar powers to those the Court struck down"); *see also* Walker, *supra* note 28 (characterizing *Jarkesy* as "not [a] narrow opinion," with "[n]o [l]imiting [p]rinciple on [the] Seventh Amendment [c]laim"). Indeed, litigants have already invoked *Jarkesy* to challenge agency adjudication schemes at the National Labor Relations Board, for instance. *See* Int'l Union of Operating Eng'rs v. NLRB., 127 F.4th 58, 97 (9th Cir. 2025) (Bumatay, J., dissenting in part) (arguing that under *Jarkesy*, the NLRB could not impose foreseeable damages because it was analogous to a common law remedy that only courts of law could impose).

[242] *See* Richard E. Levy, *Some Thoughts About the Future of Administrative Law*, 34 KAN. J.L. & PUB. POL'Y 165, 186 (2025) (categorizing government benefits, including Social Security, as public rights that ALJs may constitutionally adjudicate after *Jarkesy*); *see also Jarkesy*, 603 U.S. at 130 (majority opinion) (stating that agency adjudicators like ALJs may continue to adjudicate public benefits claims without violating the Seventh Amendment under the public rights exception).

[243] *See* Lucia v. SEC, 585 U.S. 237, 260 (2018) (Breyer, J., concurring in the judgment in part and dissenting in part) (maintaining that eliminating removal protections for ALJs would risk subjecting ALJ hearings to Executive Branch interference); *see also* Arzt et al., *supra* note 9, at 95 (contending that ALJs should retain stringent removal protections as to best administer impartial justice).

dispute whether the Justices' concerns are valid. Regardless, adopting the Fifth Circuit's presidential removal holding will subject ALJs to greater executive branch control. Doing so would amplify the very fairness deficiencies in ALJ adjudication the *Jarkesy* Court denounces, across thousands of hearings. If so, as Justice Breyer cautioned in his *Lucia* partial dissent, the APA's central promise of impartial agency adjudication will evaporate.

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