



Re-establish Justice

CREATING A RIGHT TO REMOVE FOR THE ACCUSED

Keelyn Gallagher and Adi Dynar

Americans accused of breaking the law often do not receive the impartial justice they expect. If they find themselves in the crosshairs of an executive agency, then the law they are accused of breaking has been interpreted, adjudicated, and enforced all by the same government agency. This means the agency decides whether to bring charges, determines guilt, and imposes punishments. This process—which risks dire injustice—is the reality for thousands of Americans each year.

Although some proponents of agency adjudication may acknowledge its constitutional and moral problems, they often maintain that the situation is unavoidable because federal courts would be overwhelmed by the caseload that agencies currently handle.¹ However, the numbers show otherwise. By enacting a mechanism that would allow responding parties in enforcement cases to remove those cases to federal court, Congress could remedy this unconstitutional practice.

Not All Adjudications Are Equal

Agency adjudication is a cornerstone of administrative law, providing a mechanism for resolving

disputes and enforcing compliance. Within the past 50 years, executive agencies have gained the power to enforce regulations, assign penalties, and force the accused into their own courts. This shift leads to concerns about due process for the accused.

Today, about 44 of over 400 federal agencies maintain their own in-house courts.² However, these in-house courts collectively hear hundreds of thousands of cases each year.³ These cases fall into two broad categories: (1) government benefits or assistance programs and (2) enforcement actions.

Benefits and Assistance

A handful of agencies hear the vast majority of all agency adjudications, which relate to government benefits or assistance programs. During such in-house proceedings, an individual usually asks for financial assistance from the government. The agency hearing officer then decides how much money the agency can authorize for disbursement to the individual. Some examples include benefits claims at the Social Security Administration (SSA) or Department of Veterans Affairs. SSA alone conducts about half a million hearings a year.⁴

Enforcement

Enforcement involves an agency accusing someone of breaking the law. In enforcement proceedings, agencies act as investigators, accusers, and adjudicators and wield authority to assess guilt and impose sanctions such as fines (i.e., deprivations of property) or revocations of privileges (i.e., deprivations of liberty). The crux of enforcement is punishment. Agencies that conduct enforcement proceedings include the Securities and Exchange Commission (SEC) and the Environmental Protection Agency.

Enforcement cases warrant special attention due to their unique potential to infringe upon individuals' constitutional rights.

Constitutionality of Enforcement Adjudication

The Constitution separates the powers of government into three branches to protect individual rights. Before any person can be deprived of life, liberty, or property, all three branches must exercise their respective powers. These powers are purposely pitted against each other to ensure fair, just, and objective outcomes. Hence, Congress is tasked with writing the law, the President is tasked with ensuring the faithful execution and enforcement of the law, and the judiciary is tasked with interpreting the law. The executive branch makes sure people do not violate the law by suing alleged wrongdoers and making them answer allegations in open court. In court, a neutral and impartial judge presides over jury trials, and juries exercise a check on both the judge and the prosecutor to ensure justice.

In-house enforcement actions blur the lines separating the legislative, executive, and judicial branches because the same agency does the job of all three branches. The agency does the work of the legislative branch by writing detailed laws. The agency does the work of the executive branch by commencing in-house actions. And the agency does the work of the judicial branch when it conducts the in-house adjudication.

Tasking a single agency with performing the work of three separate branches of government violates the separation of powers by allowing agencies to

create regulations, identify alleged violations of those regulations, and adjudicate those alleged violations.

Individuals pulled into in-house enforcement actions lack the traditional safeguards typically associated with judicial proceedings in Article III courts, such as the right to a jury trial and the right to confront and cross-examine witnesses. Such safeguards are necessary to implement the Fifth Amendment and Seventh Amendment guarantees of the due process of law and the right to a jury trial.

Even though in-house adjudication mimics judicial proceedings, the officials that preside over these trials are not actual judges. They are hearing officers appointed or employed by the agency—an arrangement that guarantees a conflict of interest.

The hearing officer's decision is typically final and unreviewable if the individual aggrieved by that decision does not appeal it first to the hearing officer's bosses inside the agency and eventually to an actual court.⁵ But when the appeal goes to court, the court does not conduct a trial anew, and it frequently puts a thumb on the scales of justice by agreeing with the agency's self-serving interpretation of the law.⁶

Legal scholars have argued that such a system is unconstitutional because it vests the powers of the three branches of government in a single agency, and some litigators are advancing this argument in court cases such as *Leachco, Inc. v. Consumer Product Safety Commission* and *Frank Black and Southeast Investments N.C., Inc. v. FINRA*.⁷ Agency adjudication undermines the Constitution's system of checks and balances and fails to protect individual rights and civil liberties.⁸

George Jarkesy

George Jarkesy is a radio commentator and hedge fund manager. He managed about \$24 million in assets from more than 100 investors.⁹ The SEC initiated an investigation against Jarkesy in 2011 and summoned him to its in-house hearing. The SEC hearing officer who presided over the meeting found Jarkesy to have committed fraud—a likely result, given that the agency wins in about 90% of cases sent to its administrative law judges.¹⁰

Facing a lifetime ban from the investment management industry and nearly \$1 million in monetary penalties,¹¹ Jarkesy appealed his case to the only

people he could: the five commissioners of the SEC.¹² They affirmed the hearing officer’s findings.

Jarkesy continued to fight back and appealed the SEC’s decision to the Fifth Circuit Court of Appeals. It overruled the SEC’s imposition of monetary fines and the lifetime ban.

Having lost after Jarkesy received due process in an Article III court, the SEC appealed the decision to the Supreme Court of the United States. In 2024, the Supreme Court issued its watershed decision confirming that the Seventh Amendment entitles accused individuals to a jury trial when an agency seeks civil penalties.¹³

Congress could reinforce the Supreme Court’s decision by enacting a statute allowing accused individuals to remove their administrative enforcement

cases to federal court. Such a statute would not prevent individuals from keeping their cases in agency tribunals if they so prefer.

Size of the Problem

An examination of executive agencies’ dockets shows how common Jarkesy’s experience is. In 2022, a sample of 15 agencies filed 1,923 enforcement cases, resulting in more than \$10 billion in monetary penalties (see table 1), as well as other administrative sanctions, such as lifetime bans from an industry.

The Seventh Amendment guarantees a jury trial in cases with penalties greater than \$20. The average civil monetary penalty is more than \$5.4 million.

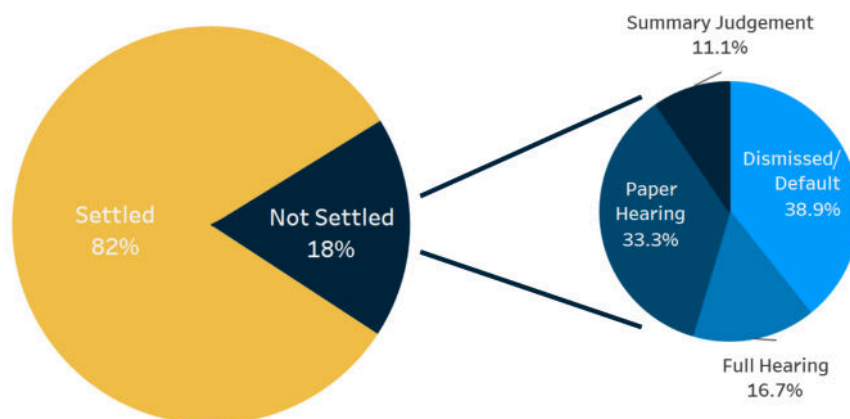
Table 1. Enforcement Actions by Agency

Agency	Enforcement Cases	Total Monetary Penalties Ordered
CFPB	12	\$4,080,665,989
CFTC	43	\$1,939,561,851
EPA	780	\$39,250,031
FCC	19	\$3,687,845
FDIC	69	\$1,612,850
Federal Reserve	34	\$31,450,400
FERC	8	\$15,422,425
FTC	26	\$68,269,109
HHS	173	\$4,533,871
HUD	67	\$22,749,121
Interior Department	5	\$945,440
Labor Department	138	\$11,338,238
OCC	47	\$213,287,456
SEC	467	\$4,020,305,802
USDA	35	\$1,777,952
Total	1,923	\$10,454,858,381

Note: “Total monetary penalties” include restitution, civil monetary penalties, and other monetary exactions. For more information on the method of counting enforcement cases and monetary penalties, see table source.

Source: Will Yeatman and Keelyn Gallagher, “The Rise of Money Sanctions in Federal Agency Adjudication,” *Administrative Law Review* 76.4 (forthcoming), 42–43, <http://dx.doi.org/10.2139/ssrn.4830010>.

Figure 1. Composition of Enforcement Cases in 2022



Source: Yeatman and Gallagher, “The Rise of Money Sanctions.”

More than 80% of these 1,923 enforcement cases were settled, meaning that no formal hearing took place and the parties reached an agreement without going to trial. Seven percent of the total cases were dismissed, which means that only 11% would be potential candidates for removal to an Article III court. In fact, only 53 cases across the 15 agencies required a full hearing during 2022.

An option to change the venue of 53—or even 1,923—enforcement adjudications (keeping in mind that not all of the respondents in agency adjudication will choose to remove their cases to federal court) is unlikely to overwhelm the federal courts. There were 353,170 cases filed in federal district courts in a 12-month period ending March 31, 2023, which is a decrease of 7%, or 27,043 cases, from the previous reporting year.¹⁴

Even if changing venue were to overwhelm the Article III courts, Congress has the power to increase the number of federal judges appointed to district

courts to accommodate the increase in volume.¹⁵ Jeopardy to individuals’ constitutional rights, therefore, cannot be explained by either a lack of capacity or the volume of anticipated removals.

Conclusion

Many legal scholars explain the unconstitutionality of agency adjudication, and the practice necessarily presents a dismantling of the Constitution’s checks and balances.¹⁶ Congress could easily address the ills of agency adjudication without overwhelming federal courts by giving individuals accused of violating the law the option to remove their cases from administrative courts to Article III courts. Doing so would provide due process to those facing unfair proceedings and penalties, and it would be consistent with the Supreme Court’s decision in *Jarkesy*, which affirms individuals’ constitutional rights.

Notes

1. Devon Ombres, "SEC v. Jarkesy: The Threat to Congressional and Agency Authority," Center for American Progress, November 27, 2023, <https://www.americanprogress.org/article/sec-v-jarkesy-the-threat-to-congressional-and-agency-authority/>.
2. "Agencies," Federal Register, accessed June 20, 2024, <https://www.federalregister.gov/agencies>; Stone Washington, *Regulatory Advantages of the Administrative Law Court System* (Washington, DC: George Washington Regulatory Studies Center, April 2024). For a discussion of the controversy on the number of agencies, see Clyde Wayne Crews Jr., "How Many Federal Agencies Exist? We Can't Drain the Swamp Until We Know," *Forbes*, July 5, 2017.
3. Jonah B. Gelbach and David Marcus, "Rethinking Judicial Review of High Volume Agency Adjudication," *Texas Law Review* 96, no. 6 (2018): 1097–1162.
4. Social Security Administration, SSA's Official Hearings and Appeals (website), n.d., <https://www.ssa.gov/appeals>.
5. John Kerkhoff, "Upside-Down Courts: Agency Adjudication and the Rule of Law," *Discourse*, January 12, 2023, <https://www.discoursemagazine.com/p/upside-down-courts-agency-adjudication-and-the-rule-of-law>.
6. Edward Richards, "Agency Interpretation of Law," LSU Medical and Public Health Law Site, last updated April 19, 2009, <https://biotech.law.lsu.edu/map/AgencyInterpretationofLaw.html>.
7. Mark Chenoweth, "Reining in the Administrative State: Agency Adjudication and Other Agency Action," testimony to the Subcommittee on the Administrative State, Regulatory Reform, and Antitrust of the House Committee on the Judiciary, March 20, 2024, 2141 Rayburn House Office Building, <https://www.congress.gov/118/meeting/house/116992/witnesses/HHRG-118-JU05-Wstate-ChenowethM-20240320.pdf>; "Small Family Business Battles Arbitrary Prosecution for Baby Pillow," Pacific Legal Foundation, accessed August 14, 2024, <https://pacificlegal.org/case/cpsc-due-process-leachco/>; "Defending Livelihood and Due Process from Illegitimate In-House Prosecution," Pacific Legal Foundation, accessed August 14, 2024, <https://pacificlegal.org/case/black-finra-alj/>.
8. Kerkhoff, "Upside-Down Courts."
9. "Securities and Exchange Commission v. Jarkesy," Oyez, accessed June 18, 2024, <https://www.oyez.org/cases/2023/22-859>.
10. Jean Eaglesham, "SEC Wins with In-House Judges," *Wall Street Journal*, May 6, 2015.
11. Includes \$300,000 in Civil Monetary Penalties and \$650,000 in disgorgement.
12. Shay Dvoretzky, Parker Rider-Longmaid, and Joseph L. Barloon et al., "Supreme Court Holding That SEC Actions Seeking Civil Penalties Must Be Tried in District Courts," Skadden, July 2024, <https://www.skadden.com/insights/publications/2024/07/supreme-court-holding-that-sec-actions-seeking-civil-penalties>.
13. *Securities and Exchange Commission v. Jarkesy et al.*, 603 U.S. ____, at 2 (2024) (No. 22-859), available at https://www.supremecourt.gov/opinions/23pdf/22-859new_kjfm.pdf.
14. "Federal Judicial Caseload Statistics 2023," Administrative Office of the U.S. Courts, <https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2023>.
15. U.S. Const. art. III, § 1.
16. Richard J. Pierce Jr., "Agency Adjudication: It Is Time to Hit the Reset Button" (GW Law Faculty Publications & Other Works no. 1508, George Washington University Law School, Washington, DC, 2020), https://scholarship.law.gwu.edu/faculty_publications/1508.



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