



# THE POTENTIAL IMPACT OF SEC V. JARKESY ON IMMIGRATION LAW AND EB-5 LAWYERS

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On November 29, 2023, the Supreme Court heard oral argument in [\*Securities and Exchange Commission v. Jarkesy\*](#), a case that involves several key questions: whether the statutes allowing the Securities and Exchange Commission (SEC) to bring administrative enforcement proceedings that impose civil penalties violate the Seventh Amendment right to a jury trial, whether the statute allowing the SEC to enforce securities laws through agency adjudication rather than in federal court violates the nondelegation doctrine, and whether the Congress' decision to allow Administrative Law Judges (ALJs) to be removed only for "good cause" violates Article II of the Constitution, which commands the President to "take Care that the Laws be faithfully executed." Oral argument [focused](#) primarily on whether the SEC's enforcement system deprives those charged with SEC violations of the right to a jury trial. *Jarkesy* argued that an SEC adjudication triggers a right to a jury trial because it is more akin to a civil fraud lawsuit imposing monetary penalties than a proceeding involving a "public right", where agency adjudication is appropriate.

An ALJ found Jarkesy, an investment advisor, guilty of violating securities law by fraudulently overvaluing the investments he oversaw, and making misrepresentations to investors about the management of the funds. He was fined \$300,000, barred from securities industry activities, and his firm was ordered to repay investors. Jarkesy challenged the SEC's enforcement action at the [5<sup>th</sup> Circuit](#), arguing that he was deprived of his constitutional right to a jury trial, that "Congress unconstitutionally delegated legislative power to the SEC by failing to provide it with an intelligible principle by which to exercise the delegated power", and that restrictions on the removal of ALJs violate Article II.

The Fifth Circuit agreed, holding that the SEC's choice of enforcing securities violation through agency adjudication violates the Seventh Amendment, and that Congress' open-ended grant of authority to the SEC to determine whether to initiate enforcement proceedings for securities fraud is impermissible under the Constitution. Further, the court held that "for-cause" removal protections for ALJs violates the "take care" clause of the Constitution by impermissibly insulating them from removal by the President.

The outcome of *Jarkesy* could have significant impacts on immigration law. The same arguments that could invalidate the authority of ALJs in *Jarkesy* could also be applied to [Immigration Judges](#) (IJs), potentially depriving them of the ability to hear cases. Because IJs are non-ALJ adjudicators, their authority could be even more vulnerable to the challenges issued by *Jarkesy*. Additionally, if the Supreme Court's holding eliminates ALJs at the SEC, lawsuits challenging the authority of ALJs at [other agencies](#) are likely to follow, meaning that the Department of Labor, for example, could be hindered from holding hearings to address an employer's failure to comply with a Labor Condition Application (LCA). During the [oral argument](#), which only focused on the right to a jury trial under the Seventh Amendment, Justices Kagan and Sotomayor expressed concerns that *Jarkesy* could result in radical changes to the immigration court system. If the Supreme Court's holding brings about the evisceration of the immigration courts, Congress could be forced to create an independent immigration court system under [Article I](#) of the Constitution as a replacement. An Article 1 court would [ensure that IJs are independent from political interference](#) as they are currently under the purview of the Attorney General within the Department of Justice.

S. Michael McColloch, counsel for Jarkesy, argued that the court should hold that when the government brings a case with the "same essential function" as a traditional lawsuit for claims such as fraud, it should have to bring the case in federal court, where a jury trial right would apply. However, when pressed further he [emphasized](#) that *Jarkesy* should not apply to adjudicating government benefits and debts and that the authority of IJs should not be impacted by the outcome of the case.

A broad Supreme Court ruling in *Jarkesy* affirming all the three aspects of the Fifth Circuit decision could have disastrous consequences for the immigration court system while also providing immigration lawyers charged with SEC violations with an interesting means of challenging the administrative

proceedings. The SEC often initiates enforcement actions against immigration lawyers arising from their work with the EB-5 program, which affords noncitizen investors a path to lawful permanent residence. The SEC has initiated these actions against immigration lawyers who it claimed, for example, [offered investments](#) without registering as a broker or [received commissions](#) from their clients' investments. As in the enforcement action at issue in *Jarkesy*, the SEC often imposes monetary sanctions on immigration lawyers found to have committed a securities violation. *Jarkesy* could provide immigration lawyers accused of securities fraud with a template for challenging the enforcement proceedings brought against them by the SEC on the grounds that they are entitled to a jury trial or asserting a Constitutional challenge to the authority of ALJs. *Jarkesy* also argued that the statutory provision which allows the SEC to bring agency enforcement actions rather than enforcing securities law in federal court offends the Constitution's nondelegation doctrine. This argument too could be advanced by immigration lawyers facing an SEC administrative proceeding. The SEC does not always initiate agency enforcement proceedings against immigration lawyers for securities violations, however, sometimes suing in federal court instead (see [here](#) and [here](#)). Immigration lawyers facing a jury trial in federal court will find it more difficult to make use of the arguments laid out in *Jarkesy*.

Our blog on *Jarkesy* is part of a series of blogs analyzing forthcoming Supreme Court cases that may [eviscerate Chevron deference](#), curb the power of federal government agencies in [interpreting statutes and regulations](#), and [broaden the statute of limitations](#) to challenge regulations under the Administrative Procedure Act. Although these challenges are being made by plaintiffs before sympathetic conservative justices whose objective it is to dismantle the administrative state, we have tried to also find a silver lining in each of these cases that might benefit immigrants or their attorneys.

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