Help keep Vox free

Financial support from our readers helps keep our unique explanatory journalism free. Make a gift today in support of our work.

Yes, I'll Give

A wild new court decision would blow up much of the government's ability to operate

The US Court of Appeals for the Fifth Circuit's decision in Jarkesy v. SEC would dismantle much of the system the federal government uses to enforce longstanding laws.

By Ian Millhiser | May 19, 2022, 4:10pm EDT

Getty Images

The United States Court of Appeals for the Fifth Circuit issued yet another astonishing decision on Wednesday. ***Jarkesy v. SEC*** seeks to dismantle much of the system the federal government uses to enforce longstanding laws and to determine who is eligible for federal benefits. And it does so in defiance of numerous Supreme Court decisions that should bind lower courts.

The *Jarkesy* decision claims that the system the Securities and Exchange Commission (SEC) uses to enforce federal laws protecting investors from fraud is unconstitutional for at least three different reasons; that it has been unconstitutional for years; and that somehow no one has noticed this fact until two particularly partisan judges, taking liberties with existing law, discovered these defects in the *Jarkesy* case.

The holding of *Jarkesy* is broad. It could destroy the federal government's power to enforce key laws preventing companies from deceiving investors, and it likely goes much further than that. Among other things, the decision could blow up the process that the Social Security Administration uses to determine who is entitled to benefits — although someone would have to file a new lawsuit before that could happen.

The two judges in the majority, Jennifer Walker Elrod and Andy Oldham, are both known for interpreting the law in creative and unexpected ways to achieve results that align with the Republican Party's policy preferences. Elrod is probably best known for her role in a **failed effort to shut down the Affordable Care Act**; Oldham was recently in the news for his vote to strip companies like Twitter and YouTube of their First Amendment rights, and potentially **endanger the entire social media industry in the process**.

Their opinion in *Jarkesy* is primarily an attack on administrative law judges (ALJs). About **30 different federal agencies** employ such officials to resolve disputes ranging from whether an investment fund defrauded its investors to whether an **impoverished American is entitled to federal benefits**.

In total, the federal government **employs nearly 2,000 ALJs**, more than **twice the number of so-called Article III judges** (federal judges who are appointed by the president and who serve for life). If these ALJs are declared unconstitutional — and Elrod's majority opinion in *Jarkesy* suggests that most, if not all, of them should be — the federal government could lose close to two-thirds of its capacity to adjudicate legal disputes,

hobbling enforcement while simultaneously forcing vulnerable Americans to wait years to learn if they will receive Social Security and other benefits.

Elrod launches three attacks on the SEC, none of which are legally sound

The specific dispute in *Jarkesy* involves a hedge fund manager accused of deceiving investors in order to raise about $24 million in assets. According to the government, George Jarkesy and his fund "lied about who audited those funds, who was their prime broker, what the funds were invested in, and how much the funds were worth."

An ALJ who hears enforcement actions brought by the SEC concluded that Jarkesy did, in fact, commit securities fraud. But Jarkesy claims that the SEC could only pursue a case against him in a federal district court, presided over by an Article III judge. In siding with Jarkesy, Elrod's opinion claims that the SEC violated the Constitution in three different ways, all at odds with the Supreme Court's precedents.

First, Elrod claims that securities fraud cases must be heard by district courts because these courts can conduct jury trials, while ALJs cannot.

Although criminal defendants have an **absolute right to a jury trial**, the rules governing civil suits — and SEC enforcement actions are purely civil, not criminal, proceedings — are more complicated. Civil litigants *sometimes* have a right to a jury trial, but they typically don't in cases brought by the federal government to enforce federal statutes. The controlling Supreme Court case is ***Atlas Roofing v. OSHA*** (1979), which held that jury trials are unnecessary in "cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact."

Elrod's decision is at odds with *Atlas Roofing*. As Judge Eugene Davis, a Reagan appointee, explains in his ***Jarkesy* dissent**, federal courts "routinely hold that an enforcement action by the Government for violations of a federal statute or regulation is a 'public right' that Congress may assign to an [ALJ] for adjudication."

Second, Elrod claims that a federal law that effectively permits the SEC to choose whether to bring a particular enforcement action before an ALJ or a district court is unconstitutional. She argues that a federal agency should not be allowed to determine whether a particular enforcement action will be adjudicated using the "legal processes" available in an Article III court, or the somewhat different procedural rules that apply before an ALJ.

This holding is also at odds with existing law. Law enforcement officials routinely make choices that are far more consequential than determining which forum will hear a particular dispute, and the Supreme Court's decisions permit them to do so.

The controlling case here is ***United States v. Batchelder*** (1979). In that case, Justice Thurgood Marshall explained for the Court, Congress enacted two different firearms statutes that each authorized "**different maximum penalties**," and effectively let prosecutors choose which statute to invoke when a criminal defendant's conduct violated both of them. The Court said this was fine, ruling that "the power that Congress has delegated to [federal prosecutors] is no broader than the authority they routinely exercise."

If Elrod is right that Congress cannot allow the SEC to choose whether to bring certain enforcement actions before a district judge or an ALJ, then it is doubtful that the SEC can bring these enforcement actions at all. That is, if it is unconstitutional for Congress to assign this choice to the SEC, then the SEC is not allowed to make either of the choices available to it — it could no more file an enforcement action in an Article III court than in a proceeding before an ALJ.

Third, Elrod claims that ALJs are not allowed to hear SEC enforcement actions because it is too difficult for the president to remove them from office.

There is some irony to this argument because the alternative to conducting SEC proceedings before an ALJ is for the SEC to file a lawsuit in a federal district court. And federal district judges hold lifetime appointments and can *never* be removed by the president.

Nevertheless, Elrod's third attack on the SEC is probably her strongest. There is a body of law establishing that the president must be able to **fire certain federal officials** who are employed by executive branch agencies. Article III judges are employed by the judicial branch, so this body of law does not apply to them.

But the Supreme Court's decision in ***Free Enterprise Fund v. PCAOB*** (2010) suggests that ALJs are not the sort of officials that the president must be able to fire at will, especially if those ALJs only "possess purely recommendatory powers" — that is, if they do not have the power to issue final decisions, and can only recommend a course of action to a higher official.

As Judge Davis explains in his dissent, the SEC's crew of ALJs do, indeed, possess such limited power. "When an SEC ALJ issues a decision in an enforcement proceeding, that decision is essentially a recommendation," Davis writes, because the SEC's commissioners have the power to take over the case and toss out the ALJ's decision entirely. And even when the commissioners decline to do so, "the ALJ's decision is 'deemed the action of the Commission.'" Thus, it is the SEC's commissioners who hold the power to issue final decisions, and not ALJs.

If Elrod's decision stands, it could throw much of the federal government into chaos

At least some of those 30 agencies that use ALJs would lose this adjudicative capacity if Elrod's opinion stands, though Elrod does place one significant limit on her third holding.

ALJs are civil servants, who can **only be fired for limited reasons** by the SEC's commissioners, and only after they've received a hearing from an agency known as the Merit Systems Protection Board. The SEC's commissioners, meanwhile, can only be fired by the president for cause. According to Elrod, the fact that "SEC ALJs are insulated from the President by at least two layers of for-cause protection from removal" renders them unconstitutional.

A similar structure exists in the Social Security Administration, which **employs nearly 1,700 ALJs** to adjudicate disputes over who is entitled to benefits. Like SEC commissioners, the head of the Social Security Administration "may be removed from office only pursuant to a finding by the President of **neglect of duty or malfeasance in office**."

If Elrod's third attack on the SEC is correct, in other words, then it is likely that the Social Security Administration's small army of ALJs also are not allowed to hear benefits disputes because they would also be too hard for the president to fire.

Preventing these ALJs from hearing cases would throw the Social Security Administration into turmoil. It could also completely overwhelm the federal court system, because Article III courts simply do not have the personnel necessary to hear all of the benefits disputes currently handled by ALJs.

Nor is there any politically plausible way to add sufficient seats to the Article III courts to accommodate such a rush of cases. To do so, Congress would have to pass legislation — legislation that could be filibustered in the Senate — to create hundreds of new judgeships.

And then President Joe Biden would need to nominate, and the Senate would need to confirm, a small army of new judges to these seats.

That would effectively dilute the conservative-dominated federal judiciary with a wave of new Biden appointees. The likelihood that Senate Republicans would allow that to happen — even if the White House had the capacity to identify qualified candidates for these new judgeships in a timely manner — is slim to none.

Elrod and Oldham, in other words, have done the judicial equivalent of tossing a Molotov cocktail into the federal government. If federal law permitted such a thing, then maybe their decision would be justifiable. But their decision is not just an invitation to chaos, it is at odds with decades of established law.

Will you support Vox's explanatory journalism?

Millions turn to Vox to understand what's happening in the news. Our mission has never been more vital than it is in this moment: to empower through understanding. Financial contributions from our readers are a critical part of supporting our resource-intensive work and help us keep our journalism free for all. **Please consider making a contribution to Vox today.**