JURISPRUDENCE

The 5th Circuit's Ambush Against the SEC Is Unprecedented and Shocking

Two conservative judges are threatening to turn the executive branch into an instrument of the president's personal power.

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The headquarters of the Securities and Exchange Commission in Washington. Saul Loeb/Getty Images

On Wednesday, a panel of the 5th U.S. Circuit Court of Appeals issued a shocking opinion in *Jarkesy v. Securities and Exchange Commission*, which held that key powers and structures of the Securities and Exchange Commission are unconstitutional. The 5th Circuit has become something of a think tank in the conservative legal movement's effort to limit the federal government's regulatory power. Wednesday's ruling is no exception. If the Supreme

Court adopted it in full, the decision would significantly decrease Congress' authority to regulate the economy and combat private corruption, magnify the powers of the courts to thwart administrative agencies, and potentially increase political control over agency adjudicators and the civil service.

Jarkesy departs widely from precedent in some key respects. But this is not entirely a case of appellate judges going rogue. With its transformative, loosely reasoned rulings on issues like the constitutionality of the Consumer Financial Protection Bureau and the legality of COVID-19 vaccination and testing requirements, the Roberts court has opened its doors to novel arguments that strike at the heart of federal agencies' operations.

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Accepting this invitation, Judge Jennifer Walker Elrod, joined by Andrew Oldham, held that the Securities and Exchange Commission exercises unconstitutional power in no less than three respects. Each of Elrod's conclusions is problematic, and one is simply outlandish. But before getting into the details, it's worth taking a step back to understand what's at stake.

The SEC is a paradigmatic administrative agency. Created during the New Deal, it has the power to enforce securities laws by issuing regulations, deciding cases, and bringing enforcement actions in federal court. Congress has extended its powers over the years, including in the Dodd-Frank Act of 2010. The act authorized the agency to impose civil penalties through administrative adjudication. In the case at issue, the SEC relied on this power to impose $300,000 in civil penalties against George Jarkesy for securities fraud. The power to impose civil penalties through administrative adjudication is significant, but it's hardly anomalous. Both the Environmental Protection Agency and the Occupational Safety and Health Review Commission, for instance, have the power to impose penalties in this way.

Administrative adjudication is a key aspect of how modern government functions. Congress has required federal agencies to decide large numbers of cases regarding issues such as labor rights, race and sex discrimination, workplace safety, immigration, disability and

veterans' benefits, unfair trade practices, and much more. Generally, people unhappy with how agency adjudications shake out can appeal the decision to a federal court. But the administrative court system resolves many disputes, and the courts have long shown respect for the conclusions these agencies reach. As a practical matter, it would be impossible for the federal court system to process all of these cases on its own without exponentially expanding the federal bench and probably also loosening rules of evidence and procedure in federal court. In addition, the administrative court systems have specialized functions and rules that are geared toward the social problems they are trying to solve.

This is part of why the conservative legal movement's opposition to the welfare and regulatory state has focused on constitutional objections to administrative procedures. These critiques often appeal to a false, fairy-tale version of how government once operated in the first hundred years of the republic, before the Progressive movement came in and ruined it. Conservatives have asserted that Congress cannot delegate policymaking power to administrative bodies, that agencies cannot make decisions that alter people's rights, and that all administrative officials must be subject to the president's political control. Because it is hard to get Congress to get rid of the welfare and regulatory state through the democratic process, conservatives have turned to the courts—and Republican-appointed judges like Elrod and Oldham—to strike down laws as unconstitutional. That's what happened in *Jarkesy*.

There are, to be sure, some real issues with administrative adjudication. Given the huge volume of claims, agencies can adjudicate cases too slowly or make significant errors. And some adjudicators, such as immigration judges, are subject to troubling political interference. *Jarkesy*, however, doesn't make any serious effort to address these problems. If anything, it makes them worse.

Consider first Elrod's holding that the SEC's power to choose between judicial and administrative enforcement violates the "non-delegation doctrine." This judicial doctrine provides that Congress may not give an agency the power to make binding rules unless it provides an "intelligible principle" to guide its discretion. The Supreme Court has only held that a statute violated the nondelegation doctrine three times in history, each of them in the midst of the court's effort to rein in the New Deal. The doctrine has long been considered moribund, and there are serious doubts about whether the Constitution requires a nondelegation rule at all. But the conservative wing of the Supreme Court has shown keen interest in strengthening it, and the 5th Circuit is eager to lend a hand.

What's particularly striking about *Jarkesy* is that the nondelegation rule it lays down is untethered from the relevant precedents and would open up an entirely new front in nondelegation challenges. Previous nondelegation cases didn't involve anything like an agency's choice to proceed through ordinary courts or its own tribunals. Rather, these cases involved broad grants of substantive power, such as to define "unfair methods of competition," without adequate procedural protection. Elrod didn't question the substantive breadth of the SEC's power. Rather, she held that Congress couldn't give SEC discretion to choose one adjudicatory forum or another without an intelligible principle.

That's an unprecedented proposition. Congress has given many agencies power to combine administrative and judicial adjudication or choose among them as they see fit, including the Consumer Financial Protection Bureau, Federal Trade Commission, Environmental Protection Agency, and National Labor Relations Board. The 5th Circuit's novel nondelegation ruling, if adopted by the Supreme Court, would thus place significant government functions in constitutional peril. Many statutes concerning issues ranging from environmental protection to labor rights would be at risk. That's the point of rulings like this. Such bespoke constitutional rules give private parties new tools to resist agencies' efforts to enforce the law. Nebulous and ever-evolving constitutional standards give courts discretionary power to strike down federal statutes they don't like.

Elrod also concluded that the system that protects SEC's adjudicators against political interference was unconstitutional. This position, if adopted by the Supreme Court, would pose a serious risk to the civil service system as a whole. Currently, the executive branch is staffed not only by politically accountable officials at the top of agencies, but also civil servants and adjudicators protected from at-will termination.

But recent Supreme Court opinions have invited Elrod's conclusion that the system of "good cause" protections for administrative law judges at the SEC violates the Constitution. Combine this holding with originalist arguments that would sweep away decades of precedent, and the Supreme Court might preclude Congress from protecting many other civil servants from political interference. The president or their political appointees might be able to fire whomever they want within the executive branch, which would deprive the government of professional talent and impartial decision-makers. Such a move would create a real risk of the very sort of "tyranny" Chief Justice John Roberts and other conservative jurists have long expressed concern about. It would turn the executive branch into an instrument of the president's personal power.

Elrod's third conclusion was that the SEC's power to issue civil penalties in administrative adjudication runs afoul of the constitutional right to a jury trial. While there are legitimate

arguments concerning the scope of agencies' adjudicatory powers, this opinion plays fast and loose with the relevant precedents. The Supreme Court has long held that agencies may decide matters implicating private legal rights and issue penalties for violating the law. If the Supreme Court took up Elrod's approach, it could deprive Congress and the executive branch of potent tools to regulate the economy, prevent abusive practices, and address existential risks such as climate change. It would create another cottage industry of claims to bring against government agencies.

Like many such opinions with weak grounding in precedent, this panel is extravagant in its reliance on democratic constitutional ideals to justify major changes to legal rules. Elrod says that her ruling is necessary to protect "liberty" and "accountability" to the people. She pays no heed to the risk that private economic power poses to liberty, or that judicial invalidation of congressional statutes poses to democratic control.

Progressive judges and jurists have lagged behind in explaining why administrative power is important. It's not just a matter of efficiency or expertise. It's a matter of respecting the choices of the people's elected representatives, who have created the administrative state that conservative jurists are opposed to. And it's a matter of respecting the public's rights to clean air and water, safe and healthful workplaces, collective bargaining, and fair markets. *Jarkesy* is symptomatic of the conservative judiciary's broader disregard for these democratic values.

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