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NOTE

JARKESY AND THE FOREIGN CORRUPT PRACTICES ACT: WHEN CIVIL PENALTIES DEMAND A JURY

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1. Introduction

SEC v. Jarkesy[1] constrains non-jury adjudication of legal claims to protect the right of trial by jury, enshrining the jury trial as "a privilege of the highest and most beneficial nature"[2] and "a valuable safeguard to liberty."[3] The United States Congress enacted the Foreign Corrupt Practices Act ("FCPA") to address hundreds of American companies' improper payments to foreign government officials for work.[4] The

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1. SEC v. Jarkesy, 603 U.S. 109, 115 (2024).
2. 3 WILLIAM BLACKSTONE, COMMENTARIES *215.
3. THE FEDERALIST NO. 83 (Alexander Hamilton); *see* Lucia v. SEC, 585 U.S. 237, 255 (2018) (Thomas, J., concurring) ("[A]dministrative. Law judges of the Securities and Exchange Commission easily qualify as [Article I] 'Officers.'").
4. CRIM. DIV. OF THE U.S. DEP'T OF JUST. & THE ENF'T DIV. OF THE U.S. SEC. AND EXCH. COMM'N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 2 (2d ed. 2020) [hereinafter *Resource Guide*], https://www.justice.gov/criminal/criminal-

Department of Justice ("DOJ") shares FCPA enforcement authority with the Securities and Exchange Commission ("SEC") for criminal and civil penalties, respectively.[5] This Note argues that enforcement actions that allege violations of the FCPA's anti-bribery provisions and seek monetary penalties involve private rights, and books and records actions that seek equitable relief involve public rights, meaning administrative law judges ("ALJs") may adjudicate them without a jury. Part II surveys the right to trial by jury at common law. Part III explores controlling precedent for *Jarkesy*. Part IV analyzes *Jarkesy*. Part V discusses *Jarkesy*'s three eluded grounds: the nondelegation doctrine, removability of SEC ALJs, and Article III limits on SEC tribunals.[6] Part VI forecasts how *Jarkesy* affects the SEC and DOJ's enforcement of the FCPA anti-bribery and books and records provisions for the remedies of disgorgement and criminal monetary penalties, respectively.[7]

2. Seventh Amendment History

William Blackstone, an English common law scholar, summarized the history of the trial by jury in common law actions:

> [T]races of juries [appear] in the laws of all those nations which adopted the feudal system . . . who had . . . a tribunal composed of twelve good men . . . . [This] was universally established among all the northern nations, and so interwoven in their very constitution . . . . And it was ever esteemed, in all countries, a privilege of the highest and most beneficial nature.[8]

Prior to the United States of America's independence, Great Britain established juryless vice admiralty courts in the colonies, where British colonial officials were most likely to win.[9] The Declaration of

fraud/file/1292051/dl?inline= [https://perma.cc/4WHK-2QPV].

5. *Id*. at 1.

6. This Note will not discuss Perttu v. Richards, 605 U.S. 460, 468 (2025) ("[P]arties have a right to a jury trial on [Prison Litigation Reform Act] exhaustion when that issue is intertwined with the merits of a claim that falls under the Seventh Amendment.").

7. President Donald J. Trump has suspended FCPA enforcement because the "[FCPA] has been systematically . . . abused in a manner that harms the interests of the United States." Exec. Order No. 14,209, 90 Fed. Reg. 9587 (Feb. 10, 2025).

8. BLACKSTONE, *supra* note 2, at *215.

9. SEC v. Jarkesy, 603 U.S. 109, 147 (2024) (Gorsuch, J., concurring); *see* Parklane

Independence challenged the King of Great Britain "[f]or depriving us in many cases, of the benefits of Trial by Jury."[10] In Federalist No. 83, Alexander Hamilton responded to Anti-Federalist concerns about the Constitution's lack of an express provision enshrining trial by jury in civil cases by suggesting that the Constitution's silence about the privilege does not mean the Constitution forbade it and that Congress could legislate a right to trial by jury.[11] Hamilton clarified, "there are great if not insurmountable difficulties in the way of making any precise and proper provision for it in a Constitution for the United States."[12] The primary challenge was "[t]he great difference between the limits of the jury trial in different States."[13] Hamilton noted the primary argument for trial by jury in all cases was that it was "a valuable safeguard to liberty."[14] But he suggested that litigants' liberty interests in the right to a jury in a criminal proceeding outweighed those in a civil proceeding.[15]

Justice Joseph Story explained, "the convention [was] greatly divided in opinion" on the Seventh Amendment.[16] He also reasoned that the Seventh Amendment's popularity "establish[ed] its importance as a fundamental guarantee of the rights and liberties of the people."[17] Eventually, Congress passed the Seventh Amendment: "In Suits at common law . . . the right of trial by jury shall be preserved . . . ."[18] The Seventh Amendment "secured the right of a trial by jury, in civil cases, in the fullest latitude of the common law," which is an "inestimable privilege."[19] The common law encompasses "suits in which legal rights were to be ascertained and determined."[20]

William Blackstone, Alexander Hamilton, and Justice Joseph Story show the Seventh Amendment's necessity to not only common law jurisprudence, but also to litigants' protections against one another and an overzealous sovereign.

Hosiery Co. v. Shore, 439 U.S. 322, 337-45 (1979) (Rehnquist, J., dissenting).

10. THE DECLARATION OF INDEPENDENCE para. 18 (U.S. 1776).
11. THE FEDERALIST NO. 83 (Alexander Hamilton).
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1757 (Fred B. Rothman & Co. ed., Littleton, Colorado 1991) (1833).
17. Parsons v. Bedford, Breedlove & Robeson, 28 U.S. (3 Pet.) 433, 446 (1830).
18. U.S. CONST. amend. VII.
19. 3 STORY, *supra* note 16, § 1762.
20. *Parsons*, 28 U.S. (3 Pet.) at 447.

3. *Jarkesy* Precedent

The *Jarkesy* Court concluded that "[a] defendant facing a [securities] fraud suit has the right to be tried by a jury of his peers before a neutral adjudicator" by using *Tull v. United States*'s Seventh Amendment test, analogizing *Granfinanciera, S.A. v. Nordberg*'s fraudulent conveyance action, and disclaiming *Atlas Roofing Co. v. Occupational Safety & Health Commission*'s public rights exception.[21] So this Note will survey these three cases and set the scene for *Jarkesy*.

a. *Atlas Roofing*

In *Jarkesy*, "the SEC and the dissent rel[ied on] *Atlas Roofing*."[22] There, the Court expanded the Seventh Amendment's public rights exception and thus upheld Congress's assignment of factfinding and findings of violations of the Occupational Safety and Health Act ("OSHA") to the Occupational Safety and Health Review Commission ("Commission").[23]

Congress passed OSHA to address the drastic national problem of work-related deaths and injuries.[24] OSHA created a statutory duty to avoid maintaining unsafe or unhealthy working conditions and provided two remedies to the federal government proceedings before the Commission: obtaining abatement orders and imposing civil penalties.[25]

OSHA authorizes inspectors, representing the Secretary of Labor ("Secretary"), to issue citations and discretionarily impose fines.[26] If the employer wishes to contest the remedy, it may do so by notifying the Secretary within fifteen days, staying the abatement order.[27] Then, the Commission's ALJ holds an evidentiary hearing.[28] The Secretary has the burden of proof, and the ALJ's decision becomes the Commission's final order unless, within thirty days, a Commissioner directs that it be reviewed by the full Commission.[29] If review is granted, the Commission's subsequent order becomes final unless the employer petitions for judicial

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21. SEC v. Jarkesy, 603 U.S. 109, 140 (2024).
22. *Id.* at 136 (citation omitted); 430 U.S. 442 (1977).
23. *See Atlas Roofing*, 430 U.S. at 455-56, 461.
24. *Id.* at 444-45.
25. *Id.* at 445.
26. *Id.* at 445-46.
27. *Id.* at 446.
28. *Id.*
29. *Id.*

review in the appropriate court of appeals.[30] The reviewing court must accept "the findings of the Commission with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive."[31] "If the employer fails to pay the [fine], the Secretary of Labor may commence a collection action" in an inferior federal court where "neither the fact of the violation nor the propriety of the penalty assessed may be retried."[32] The civil "penalty may be collected without the employer's ever being entitled to a jury determination of the facts constituting the violation."[33]

The Court answered in the affirmative regarding "whether, consistent with the Seventh Amendment, Congress may create a new cause of action in the Government for civil penalties enforceable in an administrative agency where there is no jury trial."[34] Public rights are "cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact."[35] The Court then distinguished public rights from "purely 'private rights,'" noting administrative agencies could serve "only as an adjunct to an Art. III court" in "factfinding" without violating the Seventh Amendment's guarantees.[36] The Court then surveyed public rights caselaw, concluding, "when Congress creates new statutory 'public rights,' it may assign their adjudication to an administrative agency with which a jury trial would be incompatible."[37] The Court emphasized OSHA's right originated in statute rather than common law or the Constitution.[38] Then, the Court rejected the argument that the public rights doctrine caselaw "deal[t] with the exercise of sovereign powers that are inherently in the exclusive domain of the Federal Government and critical to its very existence" because the Court "did not appear to confine its holdings in this manner."[39] The public rights doctrine necessitated the Court's conclusion.[40] But "the Seventh Amendment was never intended to establish the jury as the exclusive

30. *Id.* at 446-47.
31. *Id.* at 447.
32. *Id.*
33. *Id.*
34. *Id.* at 444.
35. *Id.* at 450.
36. *Id.* at 450 n.7.
37. *Id.* at 455.
38. *Id.* at 456-57.
39. *Id.*
40. *Id.* at 457-60.

mechanism for factfinding in civil cases."[41]

b. *Tull*

Tull resolved whether the federal government could impose a fine against a private party without a jury.[42] The Court upheld Congress's assignment of determining the amount of fines to inferior federal court judges under the Clean Water Act ("CWA") but struck down Congress's assignment of the determination of liability to inferior federal court judges.[43] The federal government sued a real estate developer for violations of the CWA and sought injunctive relief and civil penalties.[44] The inferior federal court denied Tull's "timely demand for a trial by jury" and imposed fines and injunctive relief of "restoration of wetlands" and "removal of fillings."[45] The Court applied a two-part balancing test:

> To determine whether a statutory action is more similar to cases that were tried in courts of law than to suits tried in courts of equity or admiralty, the Court must examine both the nature of the action and of the remedy sought. First, we 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. . . . Second, we examine the remedy sought and determine whether it is legal or equitable in nature.[46]

First, "both the public nuisance action and the action in debt are appropriate analogies to the instant statutory action."[47] "Prior to the enactment of the Seventh Amendment, English courts had held that a civil penalty suit was a particular species of an action in debt that was within the jurisdiction of the courts of law."[48] While the Court said that "federal courts have rightly assumed that the Seventh Amendment required a jury trial" in actions in debt, the Court did not suggest whether public nuisance

41. *Id.* at 460.
42. *See* Tull v. United States, 481 U.S. 412, 416-17 (1987).
43. *Id.* at 426-27.
44. *Id.* at 414-15.
45. *Id.* at 415-16.
46. *Id.* at 417-18
47. *Id.* at 420.
48. *Id.* at 418.

actions required a jury trial.[49] The Court emphasized that whether the CWA and an 18th-century public nuisance action "are close equivalents 'is irrelevant for Seventh Amendment purposes,' because 'that Amendment requires trial by jury in actions unheard of at common law.'"[50]

Second, "[a] civil penalty was a type of remedy at common law that could only be enforced in courts of law," especially here, where the legislative history shows the civil penalty's "punitive nature."[51] But "[i]njunctive relief [for enjoining a public nuisance at the Government's request] is traditionally given by equity upon a showing of [peril to health and safety]."[52] The government analogized the remedy of civil penalty to disgorgement, but the Court responded that it was "a poor analogy" because disgorgement "is a remedy only for restitution" and "is limited to 'restoring the status quo and ordering the return of that which rightfully belongs to the purchaser or tenant.'"[53]

Thirdly, the Court concluded that trial judges' determination "of the amount of civil penalties . . . does not infringe on the constitutional right to a jury trial" because "[t]he assessment of a civil penalty is not one of the 'most fundamental elements.'"[54] So Congress could assign the determination of the amount of civil penalties to inferior federal court judges, but not the determination of the liability of civil penalties.

c. *Granfinanciera*

Granfinanciera effectively decided *Jarkesy*, while *Atlas Roofing* focused on novel statutory claims.[55] In *Granfinanciera*, the Court held that a district court's refusal to try a bankruptcy trustee's fraudulent conveyance actions with a jury violated the defendants' Seventh Amendment rights.[56] The debtor filed for Chapter 11 reorganization.[57] The bankruptcy court assigned causes of action for fraudulent conveyances to the trustee.[58] Then, the trustee brought fraudulent conveyance actions, in

49. *Id.* at 420.
50. *Id.* (quoting Pernell v. Southall Realty, 416 U.S. 363, 375 (1974)).
51. *Id.* at 422-23.
52. *Id.* at 423 (alteration in original) (quoting Steelworkers v. United States, 361 U.S. 39, 61 (1959) (Frankfurter, J., concurring)).
53. *Id.* at 424 (quoting Porter v. Warner Holding Co., 328 U.S. 395, 402 (1946)).
54. *Id.* at 426-27 (quoting Galloway v. United States, 319 U.S. 372, 392 (1943)).
55. SEC v. Jarkesy, 603 U.S. 109, 134, 139-40 (2024).
56. Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 36 (1989).
57. *Id.*
58. *Id.*

inferior federal court, against alleged recipients of "$1.7 million from [the debtor's] corporate predecessor within one year of the date the [the debtors] bankruptcy petition was filed, without receiving consideration or reasonably equivalent value in return."[59]

The Court applied *Tull*'s two-part balancing test to the fraudulent conveyance action, noting "[t]he second stage of this analysis is more important than the first."[60] If the two factors suggest the "party is entitled to a jury trial under the Seventh Amendment," the next inquiry is "whether Congress may assign and has assigned resolution of the relevant claim to a non-Article III adjudicative body that does not use a jury as factfinder."[61]

First, the Court analogized the fraudulent conveyance action to the English common-law trover action, which "like all suits at law, were conducted before juries."[62] The trustee, "would have had to bring his action to recover an alleged fraudulent conveyance of a determinate sum of money at law in 18th-century England."[63]

Second, the trustee's "fraudulent conveyance action plainly seeks relief traditionally provided by law courts or on the law side of courts having both legal and equitable dockets" because "suits in equity will not be sustained where a complete remedy exists at law."[64]

Lastly, the Court clarified and distinguished *Atlas Roofing*.[65] The Court emphasized the necessity of the public rights doctrine to *Atlas Roofing*: namely, the federal government suing a company for violations of a statutorily created duty, foreign to common law, rather than a bankruptcy trustee suing a company for fraudulent conveyance, a descendant of a common law trover action.[66] The fraudulent conveyance action was not "so closely integrated into a public regulatory scheme" of the Bankruptcy Code because "Congress simply reclassified a pre-existing, common-law cause of action."[67] *Granfinanciera* clarified *Tull*: "The Seventh Amendment protects a litigant's right to a jury trial only if a cause of action is legal in nature and it involves a matter of 'private right.'"[68]

59. *Id.*
60. *Id.* at 42.
61. *Id.*
62. *Id.* at 43.
63. *Id.* at 46-47.
64. *Id.* at 48-49.
65. *Id.* at 51.
66. *Id.* at 51-55.
67. *Id.* at 54, 60.
68. *Id.* at 42 n.4.

4. *Securities and Exchange Commission v. Jarkesy*

So the SEC's enforcement of securities fraud for civil penalties before an SEC ALJ violated an investment advisor's Seventh Amendment rights.[69] The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act") authorized "the SEC [to] now seek civil penalties in federal court, or impose them through its own in-house proceedings" rather than solely in Article III courts.[70] The SEC's in-house proceedings offered no juries, lower evidentiary standards than the Federal Rules of Evidence, and more discretion to the SEC as to factfinding, adjudicating, and discovery disputes than the SEC would otherwise have in an inferior federal court.[71] The SEC acted as the judge, jury, and executioner in its in-house proceedings.[72] The SEC offered a discretionary appellate process within its own tribunals and "[b]y law, a reviewing court must treat the agency's factual findings as 'conclusive' if sufficiently supported by the record even when they rest on evidence that could not have been admitted in federal court."[73]

The Court applied the *Tull* two-part balancing test.[74] First, the Court determined the civil penalties were punitive and thus were legal remedies, meaning a court of law must hear the claim, analogous to *Tull*.[75] "In this case, the remedy is all but dispositive. . . . While monetary relief can be legal or equitable, money damages are the prototypical common law remedy."[76] The Court then noted that multiple factors for the availability of civil penalties "concern culpability, deterrence, and recidivism," as the factors "tie the availability of civil penalties" to punishment rather than restoration.[77] Additionally, the size of the available remedies is tied to the culpability and deterrence of the alleged violator, and the SEC must not pay the allegedly injured parties.[78]

69. SEC v. Jarkesy, 603 U.S. 109, 118-19 (2024).
70. *Id.* at 118 (citing Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929P(a), 124 Stat. 1376, 1862-62 (2010) (codified at 15 U.S.C. §§ 77h-1(g), 78u-2(a), 80b-3(i)(1)).
71. *Id.* at 117-18.
72. *See id.*
73. *Id.* at 117.
74. *Id.* at 120.
75. *Id.* at 122-24.
76. *Id.* at 123.
77. *Id.* at 123-24.
78. *See id.* at 124.

Second, the Court concluded that "the close relationship between federal securities fraud and common law fraud confirms that this action is 'legal in nature'" by analogizing securities fraud and common law fraud's substantially equivalent elements.[79] Common law fraud and securities fraud address the misrepresentation or concealment of material facts.[80] Additionally, Congress used language similar to common law fraud, mandating the courts' usage of common law fraud caselaw to adjudicate securities fraud disputes.[81]

The Court rejected the SEC's public rights argument because monetary damages for securities fraud are not closely analogous to a federal government's distress warrant to compel a federal customs collector to deliver public funds to the treasury, a monetary penalty on a steamship company for transporting diseased immigrants, or a president's assessment of tariffs.[82]

a. Justices Gorsuch and Thomas's Concurring Opinion

The Seventh Amendment, Article III, and due process "vindicate the Constitution's promise of a 'fair trial in a fair tribunal.'"[83] Justice Gorsuch continued by comparing the unfairness in SEC tribunals to the British government's vice-admiralty tribunals, where British colonial officials "file[d] where they were most likely to win."[84] Justice Gorsuch emphasized the Framers' opposition to the vice-admiralty tribunals via the tribunals' lack of independent judges and tendency to deprive colonists of jury trials.[85] Justice Gorsuch suggested that the development of the Seventh Amendment, Article III, and Fifth Amendment's due process clause secured colonists' rights against an overzealous, intertwined judiciary and executive, like the vice-admiralty tribunals.[86] Justice Gorsuch did not provide clear guidelines for the public rights doctrine, but he explained that beyond public rights "we have no license to deprive the American people of their constitutional right to an independent judge, to a jury of their peers, or to the procedural protections at trial that due process

79. *Id.* at 126 (quoting Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 53 (1989)).
80. *Id.* at 125.
81. *Id.* at 125-26.
82. *Id.* at 127-31.
83. *Id.* at 141 (Gorsuch, J., concurring) (quoting *In re* Murchison, 349 U.S. 133, 136 (1955)).
84. *Id.* at 147.
85. *Id.*
86. *See id.* at 149-51.

normally demands."[87]

b. Justices Sotomayor, Kagan, and Jackson's Dissenting Opinion

Justices Sotomayor, Kagan, and Jackson defended federal agencies' ability to adjudicate public rights through *Atlas Roofing*, contending the majority oversold its separation of powers concerns.[88] The dissent examined the Seventh Amendment's text and concluded that "whether a defendant is entitled to a jury under the Seventh Amendment depends on both the forum and the cause of action."[89]

The dissent applied the public rights doctrine.[90] After recognizing the public rights doctrine occasionally applies to disputes between private parties, the dissent explained Congress can create statutory duties, specify consequences for a breach, and allow federal agencies to "adjudicate" their breaches and consequences.[91] In the earliest public rights precedents, "this Court, without exception, ha[d] sustained the statutory scheme authorizing that enforcement outside of Article III."[92]

Then, the dissent explained that *Atlas Roofing*'s holding[93] should apply here, especially since *Atlas Roofing*'s statutory scheme was "remarkably similar" to "the Securities Act of 1933, the Securities Exchange Act of 1934, and the Investment Advisers Act of 1940."[94] The dissent contended that *Granfinanciera* was inapplicable because the statutory right (fraudulent conveyance) did not belong to the federal government "in its sovereign capacity."[95] The dissent remarked that *Atlas Roofing*'s unsafe-working-condition cause of action lacked "actionable harm to an individual" and did not preclude the Court from concluding that OSHA's unsafe working conditions had a close relationship to "common-law torts of wrongful death and negligence."[96] "The American People should not mistake judicial hubris with the protection of individual

87. *Id.* at 158.
88. *Id.* at 168 (Sotomayor, J., dissenting).
89. *Id.* at 172.
90. *Id.* at 173-82.
91. *Id.* at 174.
92. *Id.* at 178.
93. *Id.* at 189 (quoting Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n, 430 U.S. 442, 460) (1997)); *id.* at 180.
94. *Id.* at 180-81.
95. *Id.* at 192.
96. *Id.* at 196; *id.* at 195-96.

rights."[97]

5. *Jarkesy*'s Three Eluded Grounds

The Fifth Circuit vacated and remanded the SEC ALJ's adjudication of the securities fraud defendants' liability on three grounds: the Seventh Amendment, the nondelegation doctrine, and the removal of officers.[98] The Supreme Court affirmed the Fifth Circuit's Seventh Amendment determination but declined to address the remaining constitutional issues.[99] This Part explores the nondelegation doctrine, removal of officers, and Article III's limits on Article I tribunals.

a. Nondelegation Doctrine

The Fifth Circuit held that Congress's assignment of prosecutorial discretion to the SEC violated the nondelegation doctrine "[b]ecause Congress fail[ed] to provide [the SEC] with an intelligible principle to guide its use of the delegated [legislative] power."[100] It explained that "Congress may grant regulatory power to another entity only if it provides an 'intelligible principle' by which the recipient of the power can exercise it."[101] The Fifth Circuit said the Dodd-Frank Act allowed the SEC to determine "which subjects of its enforcement actions are entitled to Article III proceedings with a jury trial, and which are not"—a delegation of legislative power.[102] So the Dodd-Frank Act allowed the SEC to channel jurisdiction, a legislative function.[103]

But Circuit Judge Davis concluded, "Congress's decision to give prosecutorial authority to the SEC to choose between an Article III court and an administrative proceeding for its enforcement actions does not violate the nondelegation doctrine."[104] He relied on *United States v. Batchelder*, where the Court upheld Congress's assignment of discretion to federal prosecutors and their choice to enforce statutes and penalties for

97. *Id.* at 203.
98. Jarkesy v. SEC, 34 F.4th 446, 449-50 (5th Cir. 2022), *aff'd and remanded*, SEC v. Jarkesy, 603 U.S. 109 (2024), *enforced*, Jarkesy v. SEC, 132 F.4th 745 (5th Cir. 2024).
99. *Jarkesy*, 603 U.S. at 140-41.
100. *Jarkesy*, 34 F.4th at 459.
101. *Id.* at 461 (quoting Mistretta v. United States, 488 U.S. 361, 372 (1989)).
102. *Id.*
103. *Id.* at 462; *see e.g.*, Yakus v. United States, 321 U.S. 414, 467-68 (1944).
104. *Jarkesy*, 34 F.4th at 475 (Davis, J., dissenting).

the same conduct.[105] Circuit Judge Davis suggested the SEC's prosecutorial discretion was not lawmaking.[106]

The Roberts Court recently discussed the nondelegation doctrine in *Gundy v. United States*, where Chief Justice Roberts and Justices Thomas, Alito, and Gorsuch indicated their willingness to apply the nondelegation doctrine, but Justice Kavanaugh did not participate in the case.[107] The Court concluded that the Sex Offender Registration and Notification Act's ("SORNA") provision requiring "the Attorney General [to] apply SORNA's registration requirements as soon as feasible to offenders convicted before the statute's enactment" did not violate the nondelegation doctrine.[108] "[T]he delegation in SORNA easily passes muster (as all eleven circuit courts to have considered the question found)" because SORNA provided sufficiently definite guidance to the Attorney General in applying SORNA's registration requirements as to feasibility.[109] Justice Alito merely concurred because "since 1935, the Court has uniformly rejected nondelegation arguments and has upheld provisions that authorized agencies to adopt important rules pursuant to extraordinarily capacious standards."[110]

The dissent contended SORNA "gave the Attorney General unfettered discretion to decide which requirements to impose on which pre-Act offenders."[111] Additionally, the Attorney General admitted that SORNA's structure "entitle[d] him to make his own policy decisions."[112] The dissent provided three guidelines for the nondelegation doctrine.[113] First, "Congress must set forth standards 'sufficiently definite and precise to enable Congress, the courts, and the public to ascertain' whether Congress's guidance has been followed."[114] Second, Congress can delegate factfinding to the executive.[115] "Third, Congress may assign [some non-legislative powers to] the executive and judicial branches."[116]

Batchelder instructs *Jarkesy* more than *Gundy*. The *Jarkesy* Court

105. *Id.* at 474 (citing United States v. Batchelder, 442 U.S. 114, 126 (1979)).
106. *Id.* at 474.
107. 588 U.S. 128 (2019).
108. *Id.* at 132.
109. *Id.* at 146-47.
110. *Id.* at 148-49 (Alito, J., concurring).
111. *Id.* at 170 (Gorsuch, J., dissenting).
112. *Id.*
113. *Id.* at 158-59.
114. *Id.* at 158 (citing Yakus v. United States, 321 U.S. 414, 426 (1944)).
115. *Id.*
116. *Id.* at 159.

found that "the SEC's choice of forum dictates two aspects of the litigation: [t]he procedural protections enjoyed by the defendant, and the remedies available to the SEC."[117] The *Gundy* Court explained Congress granted temporary authority to the Attorney General to prevent instant registration and impose some delay on pre-SORNA offenders.[118] Conversely, *Batchelder* Court stated: "The provisions at issue plainly demarcate the range of penalties that prosecutors and judges may seek and impose. In light of that specificity, the power that Congress has delegated to those officials is no broader than the authority they routinely exercise in enforcing the criminal laws."[119] Although the SEC is not an Article II agency nor Article III judge and securities fraud is not a criminal law, the SEC is merely choosing between prosecuting the securities fraud action in a SEC tribunal or in an inferior federal court—like the DOJ's prosecutorial discretion in *Batchelder*. Additionally, in *Batchelder*, the legislative delegation of prosecutors choosing statutes and sentences was more definite and specific than the "as soon as feasible" provision in *Gundy*. So the SEC's forum channeling is not lawmaking and does not violate the nondelegation doctrine.

b. Removal of SEC ALJs

SEC ALJs can fact-find and adjudicate discovery disputes, so their dual for-cause removal is consistent with the Constitution's separation-of-powers limitations. "The executive Power shall be vested in a President of the United States of America . . . . [H]e shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States."[120] The Fifth Circuit highlighted that, per *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, dual for-cause removal "deprive[s] the President of the ability to adequately oversee [inferior officers'] actions."[121] The court reiterated that "SEC ALJs are 'inferior officers' under the Appointments Clause because they have substantial authority within SEC enforcement actions."[122] Thus, "if the President wanted an SEC ALJ to be removed, at least two layers of for-cause

117. SEC v. Jarkesy, 603 U.S. 109, 116-17 (2024).
118. United States v. Gundy, 588 U.S. 128, 146-48 (2019).
119. United States v. Batchelder, 442 U.S. 114, 126 (1979).
120. U.S. CONST. art. II, §1; *id.* art. II §3.
121. Jarkesy v. SEC, 34 F.4th 446, 463 (5th Cir. 2022) (citing Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 492, 496 (2010)).
122. *Id.* at 464 (quoting Lucia v. SEC, 585 U.S. 237, 247-49 (2018)).

protection stand in the President's way."[123] The Fifth Circuit concluded that "the removal restrictions are unconstitutional."[124]

Circuit Judge Davis dissented: "*Free Enterprise*, however, 'did not broadly declare all two-level for-cause protections for inferior officers unconstitutional.'"[125] Additionally, *Free Enterprise* did not address ALJs' removability.[126] Circuit Judge Davis distinguished SEC ALJs from the board in *Free Enterprise*: "the performance of 'adjudicative rather than enforcement or policymaking functions' or 'possess[ing] purely recommendatory powers' . . . may justify multiples layers of removal protection for ALJs."[127] Circuit Judge Davis asserted that "the ALJs' role is similar to that of a federal judge."[128] Therefore, "invalidating the 'good cause' removal restrictions enjoyed by SEC ALJs would only 'undermine the ALJs' clear adjudicatory role and their ability to exercise[ ] . . . independent judgment on the evidence before [them], free from pressures by the parties or other officials within the agency.'"[129] "When an SEC ALJ issues a decision in an enforcement proceeding, that decision is essentially a recommendation as the Commission can review it de novo," meaning the SEC ALJ is using its purely recommendatory powers that may justify multiple layers of removal protection.[130]

The Merit Systems Protection Board can only remove an SEC ALJ "for good cause."[131] The President can only remove the Merit Systems Protection Board's members for good cause.[132] Although the Court in *Free Enterprise* found that "the dual for-cause limitations on the removal of [PCAOB] members contravene the Constitution's separation of powers,"[133] it also found that the ALJs still "perform adjudicative rather than enforcement or policymaking functions . . . or possess purely

123. *Id.* at 465.
124. *Id.*
125. *Id.* at 476 (Davis, J., dissenting) (error in original) (quoting Decker Coal Co. v. Pehringer, 8 F.4th 1123, 1132 (9th Cir. 2021)).
126. *Id.*
127. *Id.* at 478 (Davis, J., dissenting) (alteration in original) (quoting Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 507 n.10 (2010)).
128. *Id.* at 477 (Davis, J., dissenting).
129. *Id.* at 478 (Davis, J., dissenting) (alterations in original) (quoting Duka v. SEC, 103 F. Supp. 3d 382, 396 (S.D.N.Y. 2015), *abrogated on other grounds by*, Tilton v. SEC, 824 F.3d 276 (2d Cir. 2016)).
130. *Id.*
131. 5 U.S.C. § 7521(a) (2025).
132. *See* 5 U.S.C. § 1202(d) (2025).
133. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 492 (2010).

recommendatory powers."[134] Previously, the Supreme Court found that "the system of separated powers and checks and balances established in the Constitution was regarded by the Framers as 'a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.'"[135] SEC ALJs preside over factfinding, adjudicating, and discovery in securities fraud actions in SEC tribunals.[136] Congress can assign factfinding to a non-jury.[137] Analogously, inferior federal court judges can assign discovery disputes to U.S. magistrate judges, whose reports and recommendations receive deferential review.[138] But unlike inferior federal court judges and U.S. magistrate judges, the SEC's possession of both ALJs and its Enforcement Division hobbles Article III's visions of judicial independence from coordinate branches and litigants. Additionally, parties must consent to a U.S. magistrate judge presiding over civil matters and misdemeanors, unlike SEC ALJs.[139] An SEC defendant's road to Article III is much tougher through the SEC than through a hypothetical U.S. magistrate judge because the SEC dictates a defendant's amount of appellate review as the adjudicator (and prosecutor). Since securities fraud is a private right and Article III vests all judicial power in its courts, SEC ALJ's adjudication of securities acts' violations may aggrandize Article III's sole, independent judicial power.

So SEC ALJs can preside over factfinding and discovery disputes but not adjudication of private rights. Thus, dual for-cause removal of SEC ALJs presiding over only factfinding and discovery disputes is consistent with the Constitution's separation of powers, but the SEC ALJs' adjudication of private rights is dubious. But SEC tribunals typically serve as the trial court in factfinding, discovery, and adjudication rather than adjuncts to inferior federal courts, so Article III may further limit SEC tribunals.

c. Article III Limits on SEC Tribunals

The *Jarkesy* Court's discussion of the public rights doctrine suggests it adopted *Northern Pipeline Construction Co. v. Marathon Pipe Line*

134. *Id.* at 507 n.10.
135. Morrison v. Olson, 487 U.S. 654, 693 (1988) (quoting Buckley v. Valeo, 424 U.S. 1, 122 (1976)).
136. SEC v. Jarkesy, 603 U.S. 109, 117 (2024).
137. Atlas Roofing Co. v. Occupational Safety & Health Comm'n, 430 U.S. 442, 450 n.7 (1977).
138. 28 U.S.C. § 636 (2025).
139. *Id.*

Co.'s categorical approach to Article III limits on Article I tribunals.[140] The *Northern Pipeline* Court identified three legislative tribunals consistent with Article III: territorial courts, courts-martial, and legislative courts and administrative agencies created by Congress to adjudicate cases involving public rights.[141] The *Jarkesy* Court rejected the SEC's argument that securities fraud for monetary damages was a public right.[142] So SEC tribunals are already on shaky Constitutional grounds, especially considering the similarities between *Northern Pipeline*'s bankruptcy judges and SEC ALJs.

The question is whether Congress has permissibly allowed SEC tribunals to adjudicate the FCPA's bribery and books and records provisions, which turns on defining a public right. The Court has promulgated six factors for determining whether a claim is a public right:[143] (1) "a matter of public rights must at a minimum arise 'between the government and others;'"[144] (2) the claim rests on "legislative or executive determination;"[145] (3) claims in "specialized areas hav[e] particularized needs and warrant[] distinctive treatment;"[146] (4) whether the claim arises out of a statutory or Constitutional right;[147] (5) "a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary; and "[148] (6) the litigants' consent to or waiver of non-Article III tribunals.[149]

Here, the SEC brings civil enforcement actions to enforce FCPA bribery against businesses and their members. An FCPA bribery claim mirrors a common law bribery claim.[150] Although the legislative history shows the United States' growing animosity against bribery of foreign

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140. N. Pipeline Const. Co. v. Marathon Pipe line Co., 458 U.S. 50, 67 (1982) (plurality opinion); SEC v. Jarkesy, 603 U.S. 109, 127-33 (2024).

141. *N. Pipeline Constr. Co.*, 458 U.S. at 70.

142. *Jarkesy*, 603 U.S. at 120-21.

143. See generally JONATHAN R. SIEGEL, FEDERAL COURTS: CASES AND MATERIALS 234-261 (3d ed. 2023) and WILLIAM BAUDE, ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 475-551 (8th ed. 2025), for a list of factors determining whether a claim is a public right.

144. *N. Pipeline*, 458 U.S. at 69 (quoting *Ex parte* Bakelite Corp., 279 U.S. 438, 451 (1929)).

145. *Bakelite*, 279 U.S. at 453.

146. Palmore v. United States, 411 U.S. 389, 408 (1973).

147. See *N. Pipeline*, 458 U.S. at 80-84 (1982).

148. Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 594 (1985).

149. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 851 (1986).

150. See *infra* Part VI.

officials, Article III courts can readily adjudicate FCPA bribery with existing criminal bribery caselaw.

The fifth factor is the least clear. *Granfinanciera*'s bankruptcy trustee's fraudulent conveyance was not closely integrated into Congress's bankruptcy statutory overhaul; *Schor*'s common law counterclaim in the Commodity Futures Trading Commission ("CFTC") was closely integrated into the Commodity Exchange Act ("CEA"), and *Thomas*'s right to use a registrant's product's data was more of a public right closely integrated into the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA").[151] *Schor* is most instructive but distinct because the counterclaimant initially consented to the CFTC's jurisdiction.[152] *Schor* used the balancing approach—rather than the categorical approach—to Article III limits on Article I tribunals, and the CFTC's jurisdiction over the counterclaim would have confounded the reparations procedures' purposes.[153] *Granfinanciera* is also instructive because both fraudulent conveyance and bribery of a judge were actions at common law in eighteenth-century England.[154] Here, the FCPA's prohibition of domestic businesses and their officials bribing foreign officials is not closely integrated into the securities acts.

The bribery claim arises out of federal statute (which may have codified common law) rather than the Constitution.[155] Alleged violators of the FCPA do not have a choice of, or consent to, forum. The FCPA's bribery provision is likely a private claim and right rather than a public right.

The FCPA's books and records provision is likely a public right. The SEC brings civil enforcement actions to enforce it, the claim arises out of statute rather than the Constitution (and the analogous eighteenth-century English claim of forgery is distant), and SEC ALJs would better be able to

151. Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 54-56, (1989); *Schor*, 478 U.S. at 852; *Thomas*, 473 U.S. at 568.
152. *Schor*, 478 U.S. at 838.
153. *Id.* at 856. (The balancing approach balances four factors: "the extent to which the 'essential attributes of judicial power' are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III.").
154. *See Granfinanciera*, 492 U.S. at 42; Tull v. United States, 481 U.S. 412, 417-18 (1987).
155. *But see* Perrin v. United States, 444 U.S. 37, 49 (1979) ("[T]he generic definition of bribery, rather than a narrow common-law definition, was intended by Congress [in the Travel Act].").

adjudicate the claim than inferior federal courts because of their expertise in financial records compliant with the securities acts. Additionally, allowing an SEC ALJ to hear an alleged violation of the books and records provision would not "eviscerate the constitutional guarantee of an independent Judicial Branch of the Federal Government."[156] But an alleged violator would not have the opportunity to consent to or waive the SEC bringing the claim in an SEC tribunal.

6. How Can the DOJ and SEC Enforce the FCPA?

The SEC's Enforcement Division can bring actions against alleged violators of the FCPA before an SEC ALJ.[157] Since 2021, almost all of the SEC's enforcement actions have resulted in an SEC order.[158] The SEC's cease-and-desist order is a resolution to an alleged FCPA violation which allows the SEC, after a notice and opportunity for hearing, to require FCPA violators to cease and desist from violating the FCPA and comply with the FCPA.[159] The DOJ's non-prosecution agreement ("NPA") is a resolution to an alleged FCPA violation which allows the "DOJ [to] maintain[] the right to file charges but refrains from doing so to allow the company to demonstrate its good conduct during the term of the NPA."[160] Typically, the DOJ will enter an NPA and the SEC will enter a cease-and-desist order for a corporation's alleged violations of the FCPA's anti-bribery and books and records provisions for disgorgement and criminal monetary penalties.

a. Bribery

The first inquiry under *Tull* and *Jarkesy* is whether the FCPA's anti-bribery provision would've been tried in a court of law or equity in eighteenth-century England.[161] An inferior federal court would likely

156. N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 74 (1982) (plurality opinion).
157. *Resource Guide*, *supra* note 4, at 77.
158. *SEC Enforcement Actions: FCPA Cases*, U.S. SEC. & EXCH. COMM'N (July 21, 2025), https://www.sec.gov/about/divisions-offices/division-enforcement/enforcement-topics-initiatives/sec-enforcement-actions-fcpa-cases (on file with the Oklahoma City University Law Review).
159. 15 U.S.C. § 78u-3(a) (2025).
160. *Resource Guide*, *supra* note 4, at 76.
161. Tull v. United States, 481 U.S. 412, 417-18 (1987); SEC v. Jarkesy, 603 U.S. 109, 122-25 (2024).

conclude that the eighteenth-century English crime of domestic bribery and the FCPA's bribery provision have sufficiently similar elements so a court of law would hear the FCPA bribery claim. But the SEC would argue that because England allowed foreign bribes in the eighteenth century, the FCPA creates a new statutory cause of action unknown to common law, so the SEC tribunal can hear it.

"[S]ince the 1600s . . . the British East India Company won duty-free treatment for its exports by giving Mogul rulers 'rare treasures,' including paintings, carvings[,] and 'costly objects made of copper, brass and stone.'"[162] Eighteenth-century England and the early U.S. law proscribed bribery of domestic officials. Sirs William Blackstone and Edward Coke noted bribery occurred when judges and similarly situated officials took an undue reward to influence their behavior in office.[163] The Crown punished both the receiver and awarder of a bribe with at least a fine and at most treble the bribe, punishment at the king's will, and dischargement from the king's service.[164] When discussing impeachable offenses of the President, Alexander Hamilton noted impeachment, trial, and conviction of bribery could justify removal of the President.[165] "The writings of a 19th-century scholar inform us that by that time the crime of bribery had been expanded to include the corruption of any public official and the bribery of voters and witnesses as well."[166] In 1973, the Office of the Watergate Special Prosecutor discovered corporations and executives used corporate funds for foreign political contributions, enkindling the passage of the FCPA.[167]

> More than 400 corporations have admitted making questionable or illegal payments. The companies, most of them voluntarily, have reported paying out well in excess

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162. Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 OHIO STATE L.J. 929, 977 (2012) (quoting Milton S. Gwirtzman, *Is Bribery Defensible?*, N.Y. TIMES MAG., Oct. 5, 1975, at 19).

163. 4 BLACKSTONE, *supra* note 2 *78-79.

164. 3 Edward Coke, Institutes of the Lawes of England *145. https://lawlibrary.wm.edu/wythepedia/library/CokeThirdPartOfTheInstitutesOfTheLawsOfEngland1644.pdf.

165. THE FEDERALIST NO. 69 (Alexander Hamilton).

166. Perrin v. United States, 444 U.S. 37, 43 (1979) (citing J. Stephen, Digest of the Criminal Law 85-87 (1877)) (discussing domestic bribery of public employees).

167. Koehler, *supra* note 162, at 932 (quoting U.S. Sec. & Exchange Comm'n, Report of the Securities and Exchange Commission on Questionable and Illegal Corporate Payments and Practices (1976), *reprinted in* Special Supplement, Sec. Reg. & L. Rep. (BNA) No. 353, at 2 (May 19, 1976)).

> of $300 million in corporate funds to foreign government officials, politicians, and political parties. . . . The payment of bribes to influence the[ir] acts or decisions . . . is unethical. It is counter to the moral expectations and values of the American public. . . . [I]t is bad business . . . . It erodes public confidence in the integrity of the free market system. . . . Bribery of foreign officials by some American companies casts a shadow on all U.S. companies.[168]

The FCPA's anti-bribery provision provides that it is unlawful for a publicly registered company or its employees to use interstate commerce to offer a benefit "to a foreign official, directly or indirectly, for the purpose of: "influencing" that person in their "official capacity"; "inducing" that person "to do or omit to do any act in violation of [their legal duty]"; or for "securing any improper advantage . . . in obtaining or retaining business for or with, or directing business to, any person."[169]

Both common law bribery and FCPA bribery require the payment of an official with the intent of changing the official's acts. But common law and the FCPA depart on the means and the specific intent. The common law's specific intent was influencing a judge's behavior in his office; the FCPA's specific intent is obtaining or retaining business. The common law sources express that Great Britain prosecuted the crime of bribery against a domestic official in a court of law and could impose fines and imprisonment. Similarly, the DOJ and the SEC bring civil enforcement actions to enforce the FCPA's bribery provision against businesses and business executives before an SEC tribunal for disgorgement. Although the British East India Company had practiced bribing foreign officials lawfully under the common law, the common law proscribed bribery of domestic officials. Here, the FCPA's legislative purpose retroactively proscribes the British East India Company's practices, showing Congress's shifting attitude against bribery. So the FCPA's anti-bribery provisions merely show Congress's expansion of the common law crime of domestic bribery to include foreign bribery, which both have substantially similar elements.

b. Books and Records

168. H.R. REP. NO. 95-640, at 4-6 (1977).
169. 15 U.S.C. §78dd-1(a) (2025).

The next inquiry under *Tull* and *Jarkesy* was whether the FCPA's books and records ("B&R") provision would've been tried in a court of law or equity in eighteenth-century England.[170] The FCPA's B&R provision required publicly registered companies to "make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer."[171] The B&R provision "was designed to 'impose[] affirmative requirements on issuers to maintain books and records which accurately and fairly reflect the transaction of the corporation.'"[172] The analogous eighteenth-century English crime is forgery, which is "'the fraudulent making or alteration of a writing to the prejudice of another man's right:' for which the offender may suffer fine, imprisonment, and pillory."[173] Forgery proscribed a person from "falsely" forging or consenting to forge "any [o]bligation . . . or discharge of any debt."[174]

B&R provisions and common law forgery encourage written financial record holders to maintain accurate records. But B&R provisions and the crime of forgery depart on many points. B&R provisions attempted to prevent misconduct; forgery sentences punished completed misconduct. Forgery remedies protected debtors and investors; B&R provisions protected investors in publicly registered companies, usually involved in international trade or coupled with bribery within foreign politics. The eighteenth-century English government punished forgery with fines, imprisonment, and capital punishment; the SEC can punish B&R provisions with disgorgement. B&R violations and forgery are distinct, and English prosecutors would have likely tried B&R provisions for an equitable remedy in a court of equity and for a legal remedy (like disgorgement) in a court of law.

c. Disgorgement

The final inquiry under *Tull* is whether the relief sought is legal or

170. Tull v. United States, 481 U.S. 412, 417-18 (1987); SEC v. Jarkesy, 603 U.S. 109, 122-25 (2024).
171. 15 U.S.C. §78m(b)(2)(A) (2025).
172. United States v. Jensen, 532 F. Supp. 2d 1187, 1198 (N.D. Cal. 2008) (alteration in original) (quoting S. Rep. No. 95-114, at 7 (1977)).
173. 4 BLACKSTONE, *supra* note 2, at *143; see also Gilbert v. United States, 370 U.S. 650, 655-58 (1962).
174. 3 EDWARD COKE, *supra* note 163, at *168.

equitable in nature.[175] The SEC typically seeks disgorgement. In *Liu v. SEC*, the Court has answered this inquiry and stated that disgorgement is a penalty for statute of limitations purposes, and disgorgement is equitable relief for the SEC's FCPA claims in inferior federal courts: "[A] disgorgement award that does not exceed a wrongdoer's net profits and *is awarded for victims* is equitable relief permissible under § 78u(d)(5)."[176] The SEC may "seek . . . any equitable relief that may be appropriate or necessary for the benefit of investors" in any alleged security law violation.[177]

"[C]ourts determined that the SEC had authority to obtain what it called 'restitution,' and what in substance amounted to 'profits' that 'merely depriv[e]' a defendant of 'the gains of . . . wrongful conduct.'"[178] "Equity courts have routinely deprived wrongdoers of their net profits from unlawful activity . . . ."[179] Then, the Court amalgamized accounting for profits, restitution, and disgorgement.[180] The *Tull* Court described, "'disgorgement of improper profits' as 'traditionally considered an equitable remedy.'"[181] A disgorgement order directing proceeds to the Treasury must "be for the benefit of investors as required by § 78u(d)(5) and consistent with equitable principles."[182]

The Court relied on the phrase "for the benefit of investors."[183] "[T]he SEC's equitable, profits-based remedy must do more than simply benefit the public at large by virtue of depriving a wrongdoer of ill-gotten gains."[184] The Court did not address whether "the SEC's practice of depositing disgorgement funds with the Treasury may be justified where it is infeasible to distribute the collected funds to investors."[185]

Justice Thomas alone dissented, "Disgorgement is not a form of relief that was available in the English Court of Chancery at the time of the founding."[186] "No published case appears to have used the term

175. Tull v. United States, 481 U.S. 412, 417-18 (1987); SEC v. Jarkesy, 603 U.S. 109, 122-25 (2024).
176. Liu v. SEC, 591 U.S. 71, 75 (2020) (emphasis added).
177. 15 U.S.C. § 78u(d)(5) (2025).
178. *Liu*, 591 U.S. at 75 (alteration in original) (quoting SEC v. Tex. Gulf Sulphur Co., 446 F.2d 1301, 1308 (2d Cir. 1971)).
179. *Id.* at 79.
180. *Id.* at 79-81.
181. *Id.* at 80 (quoting Tull v. United States, 481 U.S. 412, 424 (1987)).
182. *Id.* at 90.
183. 15 U.S.C. § 78u(d)(5) (2025).
184. *Liu*, 591 U.S. at 89.
185. *Id.*
186. *Id.* at 98.

'disgorgement' to refer to equitable relief until the 20th century," and "[d]isgorgement as a remedy in its own right is also absent from legal publications until the 20th century."[187] He also analogized the majority's conception of restitution to accounting for profits but distinguished the latter.[188] "[I]t is against the general principles of Equity to aid in the enforcement of penalties or forfeitures."[189]

"Since *Liu* was issued, Congress has amended the Exchange Act to directly authorize disgorgement as a distinct remedy and does not appear to have included the 'for the benefit of investors' limitation previously imposed by the Supreme Court."[190] The amended act provides, "[i]n any action or proceeding brought by the Commission under any provision of the securities laws, the Commission may seek, and any Federal court may order, disgorgement."[191]

The *Liu* Court categorized disgorgement with restitution and account for profits, concluding disgorgement for the benefit of the investors was equitable relief.[192] But the *Liu* Court noted the relief cannot merely benefit the public.[193] When the alleged corporation implements remedial measures but refuses to repay its profits to the foreign officials, the disgorgement mirrors a fine rather than payment for the benefit of foreign officials.[194] So disgorgement to remedy *bribery of foreign officials* differs from disgorgement to remedy *securities fraud* because the former disgorgement does not return profits to victims like a penalty.

The *Jarkesy* Court noted that "the civil penalties in this case are designed to punish and deter, not to compensate."[195] "A 'penalty' is a 'punishment, whether corporal or pecuniary, imposed and enforced by the State, for a crime or offen[s]e against its laws.'"[196] If Congress intended disgorgement to return ill-gotten gains to wronged foreign nations and

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187. *Id.* at 95, 97.
188. *Id.* at 94-95.
189. 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 1494, p. 819 (6th ed. 1853). https://archive.org/details/in.ernet.dli.2015.501606/page/n997/mode/2up (on file with the Oklahoma City University Law Review).
190. SEC v. Wahi, No. 2:22-cv-01009-TL, 2024 U.S. Dist. LEXIS 36788, at *27-28 (W.D. Wash. Mar. 1, 2024) (concluding that "disgorgement . . . to be paid to the U.S. Treasury[] is an appropriate remedy.").
191. 15 U.S.C. § 78u(d)(7) (2025).
192. *Liu*, 591 U.S. at 75.
193. *Id.* at 89.
194. AAR Corp., Exchange Act Release No. 101987 (Dec. 19, 2024).
195. SEC v. Jarkesy, 603 U.S. 109, 125 (2024).
196. Kokesh v. SEC, 581 U.S. 455, 461 (2017) (alteration in original) (quoting Huntington v. Attrill, 146 U.S. 657, 667 (1892)).

officials, then it is more of a legal remedy. If Congress intended disgorgement to only remove funds from the violator, then it is more of a penalty.[197] Both intents favor a trial by jury on liability.

d. Criminal Monetary Penalty

The DOJ's NPA can impose a criminal monetary penalty and forfeiture, credited by disgorgement.[198] "[M]oney damages are the prototypical common law remedy. . . . [O]nly courts of law issued monetary penalties to 'punish culpable individuals.'"[199] "[A]lthough the recovery of a penalty is a proceeding criminal in its nature, yet in this class of cases it may be enforced in a civil action, and in the same manner that debts are recovered in the ordinary civil courts."[200] "Actions by the Government to recover civil penalties under statutory provisions therefore historically have been viewed as one type of action in debt requiring trial by jury."[201] Typically, an inferior federal court would impose the remedy of a criminal monetary penalty. But here the DOJ does not use an ALJ or similar administrative proceeding for the SEC. The DOJ's NPA's criminal monetary penalty is legal relief, but the DOJ's enforcement procedures may bar an inferior federal court from hearing a Seventh Amendment challenge to it.

7. Conclusion

An alleged violator of the FCPA's anti-bribery and B&R provisions for the imposition of disgorgement and criminal monetary penalties, respectively, would likely have the Seventh Amendment's right to trial by jury because FCPA bribery mirrors common law bribery, and disgorgement and criminal monetary penalties are legal reliefs. Many of the FCPA's remedies will trigger the Seventh Amendment's protection even though the FCPA's causes of action tend to be foreign to the common law and the Constitution. The SEC's forum selection does not violate the nondelegation doctrine nor does the SEC ALJs' removability as to

197. The United States Courts of Appeals have differed as to whether the SEC must show pecuniary harm for disgorgement in security fraud. *See e.g.*, SEC v. Govil, 86 F.4th 89 (2d Cir. 2023); SEC v. Navellier & Assocs, Inc., 108 F.4th 19 (1st Cir. 2024); SEC v. Sripetch, 154 F.4th 980 (9th Cir. 2025).

198. *See Resource Guide*, *supra* note 4, at 76, 78.

199. *Jarkesy*, 603 U.S. at 123 (quoting Tull v. U.S., 481 U. S. 412, 422 (1987)).

200. Lees v. United States, 150 U.S. 476, 479 (1893)

201. *Tull*, 481 U.S. at 418-19.

factfinding and discovery disputes violate the President's "take care" duty. *Jarkesy* frustrates the SEC's enforcement of the FCPA and rescues FCPA defendants' indispensable right to a trial by jury.