

The Impact of ‘Jarkesy’: Grappling with the Seventh Amendment 250 Years Later

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The U.S. Supreme Court’s Jarkesy decision prohibits the SEC from imposing civil penalties for securities fraud through in-house administrative proceedings, requiring jury trials in federal court instead. While the ruling has reshaped federal securities enforcement, its reach is limited—it may extend to FINRA proceedings if properly preserved, but does not apply to state administrative actions where the Seventh Amendment’s jury trial guarantee has never been incorporated.

OVERVIEW

In June 2024, the U.S. Supreme Court handed down its landmark decision in *SEC v. Jarkesy*, holding that when the Securities and Exchange Commission seeks civil penalties for securities fraud, the Seventh Amendment entitles the defendant to a jury trial in an Article III court. The 6-3 ruling was a blow to the SEC’s post-Dodd-Frank enforcement model, which gave it the power to route civil penalty cases into in-house administrative proceedings before the agency’s own administrative law judges. *Jarkesy*’s immediate practical effect was clear: the SEC could no longer adjudicate fraud-based penalty actions administratively. Less clear was how far its reasoning would travel, and whether the court’s ruling would impact other federal or state agency administrative adjudication.

Two years later, *Jarkesy*’s boundaries are taking shape. Earlier this year, the U.S. Court of Appeals for the Sixth Circuit addressed whether *Jarkesy*’s logic extends to disciplinary proceedings conducted by FINRA and reviewed by the SEC (bottom line: it might). At the state level, the Delaware Supreme Court affirmed a lower court’s decision that rejected the argument that *Jarkesy* requires jury trials in state administrative enforcement actions. Taken together, these cases illustrate both the transformative power of *Jarkesy* and its limitations. This article examines the *Jarkesy* decision and these two subsequent rulings, reflecting on the practical implications for white collar defense practitioners navigating regulatory administrative proceedings.

THE ‘JARKESY’ DECISION

SEC v. Jarkesy arose from an SEC administrative enforcement action charging investment adviser George Jarkesy Jr., and his firm, Patriot28, LLC with violations of the antifraud provisions of the Securities Act, the Securities Exchange Act, and the Investment Advisers Act, seeking civil penalties. The matter was adjudicated by

an in-house administrative law judge, a forum made available to the SEC for civil penalties by the Dodd-Frank Act's 2010 amendments. Jarkesy challenged the constitutionality of that arrangement, and the Fifth Circuit agreed, holding on multiple grounds that the SEC's administrative adjudication was unconstitutional. The Supreme Court granted certiorari and affirmed on Seventh Amendment grounds alone.

U.S. Supreme Court Chief Justice Roberts, writing for a six-justice majority, applied the framework from *Granfinanciera v. Nordberg*, 492 U.S. 33 (1989) and *Tull v. United States*, 481 U.S. 412 (1987) to discern whether civil penalty adjudications fell under the Seventh Amendment's protection. First, the court examined whether the SEC's antifraud claims were analogous to common-law causes of action. It found a close fit: the SEC's antifraud provisions target conduct that "replicates common-law fraud," specifically "misrepresenting or concealing material facts" in connection with securities transactions. Second, the court examined the remedy sought. Based on the language of the statutes themselves, the court noted that the civil penalties imposed are designed to punish and deter, not to restore the status quo or make an injured party whole. Because this kind of remedy is legal in nature, the Seventh Amendment's jury trial guarantee attached.

The majority then turned to the government's primary defense: that SEC fraud enforcement falls within the "public rights" exception, which permits Congress to assign certain matters to non-Article III tribunals without a jury. The court rejected this argument, emphasizing that the public rights doctrine is confined to historically recognized categories such as revenue collection, customs duties, immigration, public lands and government benefits. Securities fraud claims, by contrast, implicate private rights; they "are akin to common law claims." The court stressed that Congress cannot "conjure away the Seventh Amendment by mandating that traditional legal claims be taken to an administrative tribunal."

The practical upshot was immediate: the SEC's practice of adjudicating civil penalty cases in-house was constitutionally infirm. The commission would need to bring fraud-based civil penalty actions in federal district court, where respondents could demand a jury.

'SMITH V. SEC'

In *Smith v. SEC* the Sixth Circuit was presented with a question that seemed a natural extension of *Jarkesy's* logic: if the SEC cannot constitutionally impose civil penalties for securities fraud in its own administrative proceedings, what about penalties imposed by FINRA, a private self-regulatory organization subject to SEC oversight?

Eric Smith, the majority owner of a company that in turn wholly owned a registered FINRA broker-dealer subsidiary, brought this challenge forward after he was sanctioned by FINRA for violations of the Securities Exchange Act. FINRA barred Smith, who had resisted FINRA membership, from associating with any FINRA member and ordered restitution (to be paid either to the victims, or, if they could not be found, to FINRA). The SEC affirmed those sanctions. Smith then petitioned the Sixth Circuit, raising for the first time a Seventh Amendment challenge to the entire administrative adjudication of his case.

The Sixth Circuit panel unanimously agreed that Smith had forfeited his constitutional argument by failing to raise it before the SEC. Despite finding forfeiture, Judge Chad Readler, writing for the majority, devoted significant analysis to the merits of this question, providing a substantive roadmap for future litigants. The opinion concluded that Smith "may well have been entitled to a jury trial in federal court." The reasoning tracked the two-part test

applied in *Jarkesy* closely. First, Readler considered that the restitution order appeared to function as a legal remedy because it imposed monetary penalties on Smith that were not necessarily tied to investors' actual dollars and could be paid to FINRA instead of victims. Readler also opined that the public rights exception likely did not apply. On this last point, the court noted that the historical model of self-regulation in the securities industry rested on voluntary consent; courts allowed organizations like FINRA to self-adjudicate because membership was voluntary. Smith, by contrast, never consented to FINRA's jurisdiction, and in fact, "explicitly attempted to avoid becoming a member of FINRA."

Judge Eric Murphy's concurrence took this argument further. He invoked the unconstitutional conditions doctrine, arguing that Congress effectively forces securities professionals to join FINRA as a condition of entering a lawful occupation. If FINRA membership is compelled rather than voluntary, Murphy reasoned, then the government may be coercing waiver of the constitutional right to a jury trial. This framing transforms the *Jarkesy* question from one solely about the nature of the proceeding into a broader inquiry about structural coercion in the regulatory state.

The practical significance of *Smith* is substantial. The decision signals, in dicta, that *Jarkesy*'s logic may extend to FINRA disciplinary proceedings, at least where the same antifraud provisions and legal remedies are at stake. But it simultaneously reinforces that exhaustion requirements are a formidable procedural barrier. Future respondents in FINRA proceedings must raise Seventh Amendment arguments before the SEC to preserve them for appellate review, or risk the same forfeiture that doomed Smith's claim.

'SWAN ENERGY V. DELAWARE DOJ'

If *Smith* tested *Jarkesy*'s reach within the federal enforcement architecture, *Swan Energy v. Investor Protection Unit of Delaware Department of Justice* tested whether *Jarkesy*'s reasoning crosses the federal-state boundary. The answer from both the Delaware Superior Court and the Delaware Supreme Court was a firm "no."

Swan Energy Inc. was accused of selling unregistered securities and committing securities fraud under the Delaware Securities Act. The Investor Protection Unit of the Delaware Department of Justice initiated an in-house administrative proceeding—the state-level analogue to the SEC enforcement action invalidated in *Jarkesy*. Swan Energy raised jury trial and due process challenges, arguing that *Jarkesy* compelled the same result at the state level.

The Delaware Superior Court's rejection rested on a threshold constitutional point: the Seventh Amendment does not apply to the states. Unlike nearly every other individual right enumerated in the Bill of Rights, the right to a jury trial has never applied to state governments. The court cited to and agreed with a Vermont Supreme Court decision reaching the conclusion that "the Seventh Amendment is not applicable to state courts, and *Jarkesy* is therefore nonbinding."

The court then analyzed whether Swan Energy was entitled to a jury trial under the Delaware Constitution. Critically, the Delaware test focuses on the nature of the cause of action, not the remedy sought. This differs fundamentally from the federal *Granfinanciera/Tull* framework applied in *Jarkesy*, which examines both the nature of the claim *and* the remedy.

Applying its cause-of-action test, the court concluded that government-brought securities fraud enforcement is a "new statutory cause of action" not sufficiently analogous to common-law fraud to trigger the jury trial right. The

court identified several distinguishing features: the government need not prove reliance, an element central to common-law fraud; the government need not prove scienter under certain provisions equivalent to Sections 17(a)(2) and (3) of the Securities Act; and the action serves the public purpose of “protecting citizens” rather than remedying individual private injuries.

The Delaware Supreme Court affirmed in July 2026, expressly addressing *Jarkesy*’s characterization of the “close relationship” between federal securities law and common-law fraud. The high court acknowledged *Jarkesy*’s reasoning but held that “the measure of a jury trial for Delaware is the common law, not the remedy sought” based on the language of the Delaware Constitution and state jurisprudence. Delaware’s cause-of-action-focused test yields a different result because the statutory action differs in structure and purpose from its common-law ancestor.

Swan Energy thus establishes that *Jarkesy* provides no direct relief to defendants facing state administrative securities enforcement. The decision’s reasoning will likely prove persuasive in other states whose constitutions preserve jury trial rights using historical formulations similar to Delaware’s, particularly where courts apply a cause-of-action rather than remedy-focused test.

PRACTICAL IMPLICATIONS FOR WHITE COLLAR PRACTITIONERS

The *Jarkesy-Smith-Swan Energy* trilogy creates a complex procedural landscape that defense practitioners must navigate with precision.

First, at the federal level, exhaustion is paramount. *Smith* demonstrates that even a meritorious Seventh Amendment argument will be forfeited if not raised before the SEC. Practitioners representing respondents in FINRA disciplinary proceedings or SEC administrative actions must assert jury trial rights at the earliest possible stage, ideally in initial responsive pleadings before the adjudicatory body, to preserve them for appellate review.

Second, the *Smith* dicta strongly suggests that FINRA proceedings are vulnerable to *Jarkesy* challenges when properly preserved. The majority’s analysis concluding that Smith “may well have been entitled to a jury trial” provides a detailed roadmap for future litigants. Where FINRA enforces the same antifraud provisions at issue in *Jarkesy* and imposes monetary sanctions that function as legal remedies, a properly preserved Seventh Amendment challenge has significant prospects for success.

Third, at the state level, because the Seventh Amendment does not reach the states, *Jarkesy* may not signify relief—as states test the questions posed in *Swan Energy*, they will determine whether their constitutional provisions and precedent yield similar results. Defense practitioners facing state administrative enforcement must analyze each state’s constitutional jury trial provision independently, paying close attention to whether the state applies a remedy-focused test (more likely to align with *Jarkesy*) or a cause-of-action-focused test (more likely to yield the result in *Swan Energy*). Delaware’s analysis underscores that federal constitutional reasoning, however persuasive as a policy matter, does not automatically translate into state constitutional law.

CONCLUSION

The landscape of securities enforcement has been fundamentally reshaped, but its contours are still being drawn. *Jarkesy* established that the Seventh Amendment prohibits the SEC from adjudicating fraud-based civil penalty

actions in-house—a holding that has immediate and profound practical consequences for federal enforcement. *Smith* signals that this principle extends logically to FINRA proceedings, though exhaustion requirements remain a critical gatekeeper that can extinguish even the strongest constitutional claim. *Swan Energy*, meanwhile, demonstrates that *Jarkesy*’s reach may be stopped at the state line: the Seventh Amendment has never been incorporated against the states, and state constitutional jury trial provisions may apply different analytical frameworks that yield different results.

For white collar defense practitioners, the message is clear: *Jarkesy* is a powerful tool, but it must be wielded with procedural precision and doctrinal awareness. Raising jury trial arguments early and often in federal proceedings is now essential. At the same time, practitioners must recognize that state administrative enforcement actions are insulated from *Jarkesy*’s holding, requiring independent state constitutional analysis. As courts continue to refine the boundaries of the jury trial right in the enforcement context, practitioners who understand these parallel but divergent frameworks will be best positioned to protect their clients’ interests across both federal and state forums.

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