

Right-wing Supreme Court majority on brink of gutting federal regulatory powers

John Burton

3 December 2023

At oral arguments Wednesday morning the right-wing majority of Supreme Court justices sympathized openly with an extremist position advocated by the attorney for a fascistic con artist that threatens longstanding federal powers to regulate the securities markets and other major business activities, including workplace safety, environmental protections and health care.

The decision in the closely watched case could strip about two dozen federal agencies of the authority to hold administrative hearings to assess penalties for regulatory violations. Instead, agency lawyers will be forced to litigate such claims in the already congested federal court system, where alleged violators can invoke the right to a jury trial.

George Jarkesy is a former stockbroker turned right-wing media commentator and conspiracy theorist who established a reputation in certain circles by supporting the Tea Party and attacking then president Barack Obama as a communist surrounded by advisers from the Muslim Brotherhood. In one segment, Jarkesy claimed the Civil War was driven by over-taxation in the North and the need for money from the South.

To cash in on his fascist audience, Jarkesy set up small hedge funds, totaling \$20-30 million, by attracting between 100 and 200 gullible investors.

After the funds predictably collapsed, the US Securities and Exchange Commission (SEC) charged Jarkesy with bilking his investors by lying about the assets held, inflating their values to generate excessive fees, and misrepresenting the identities of auditors and brokers.

Instead of suing in court, the SEC presented its case to an administrative law judge, employed by the Commission itself, who held a 12-day hearing, rejected Jarkesy's testimony as evasive and unreliable, and

sustained the charges. Jarkesy was ordered to stop his fraudulent activities, return almost \$700,000 stolen from investors and pay a \$300,000 penalty.

Such administrative proceedings have become ubiquitous over the last 75 years as the primary mechanism for enforcing federal regulations that provide at least a modicum of protection for the public. Accordingly they have become the target of pro-business and libertarian organizations bent on removing all impediments to generating profits through fraud, exploitation, environmental pollution and outright swindling.

Jarkesy petitioned for review of the SEC penalty in the right-wing dominated Fifth Circuit Court of Appeals, headquartered in New Orleans. Instead of asserting his innocence, he challenged the constitutionality of the SEC's administrative procedures themselves. Shocking many legal observers, two of the three judges, one nominated by George W. Bush and the other by Donald Trump, essentially ruled the entire federal administrative law system that has been in place since 1946 to be unconstitutional. The dissent was by an 87-year-old Reagan-nominated judge.

There are nearly 2,000 administrative law judges compared to less than 900 federal court judges. Forcing all their cases into the federal judiciary for resolution will result in logjams making meaningful enforcement of federal regulations impossible. That is the purpose of the ruling.

The SEC appealed to the Supreme Court, where a conglomeration of pro-business and libertarian organizations, right-wing "think tanks," and billionaires, including Mark Cuban and Elon Musk, have filed friend of the court briefs in support of Jarkesy.

Wednesday's oral arguments focused entirely on the Seventh Amendment of the Bill of Rights that guarantees "the right of trial by jury" for "suits at common law," which would apply were the SEC limited to civil actions in federal courts rather than the more streamlined administrative proceedings to assess fines for regulatory violations.

In a landmark 1977 workplace safety case, *Atlas Roofing Company v. Occupational Safety & Health Commission*, the Supreme Court ruled explicitly that administrative law courts have the power to assess fines based on regulatory violations because such proceedings enforce "public rights" and are not "suits at common law." That precedent would seem to resolve the issue, except that the corrupt right-wing bloc in control of the Supreme Court has no regard for precedents or the rule of *stare decisis* that interfere with its overtly political goals.

For those familiar with the Supreme Court's outrageous expansion of "qualified immunity," a doctrine fabricated by the court that frequently deprives civil-rights plaintiffs of their right to jury trials for police killings and other egregious official misconduct, the sanctimonious defense of the Seventh Amendment for a Wall Street swindler by these justices was truly stomach-churning.

Most outspoken was Associate Justice Neil Gorsuch. After calling "the right to trial by jury" a "very important foundational freedom in American society and a check on all branches of government," he told the SEC's attorney, "the Seventh Amendment would, on your account, dissipate, disappear, whatever verb you want to use."

Some may recall that Gorsuch's first Supreme Court opinion, 2018's *Epic Systems v. Lewis*, upheld the blanket use of compulsory arbitration clauses by businesses to deny their aggrieved employees the Seventh Amendment right to present employment-based cases to a jury.

Associate Justice Elena Kagan spoke most directly for the three moderate justices, and the status quo, telling Jarkesy's lawyer that the use of administrative fines has stood for "50 or 60 years" because "nobody has had the chutzpah, to quote my people, to bring it up since *Atlas Roofing*."

Kagan added, "When you say, well, we should go back to the common law suits that were brought 200

years ago in the courts of Westminster, is Congress' judgment—after the Depression, after the savings and loan crisis, after the Great Recession—is Congress' judgment that more powers were needed within an administrative agency entitled to no respect?"

There are two other challenges to federal regulatory agencies pending in the Supreme Court. The first, which challenged funding for the Consumer Financial Protection Bureau, was argued last month. In January the Supreme Court will hear arguments on the *Chevron* doctrine, which requires that courts defer to an agency's interpretation of a statute.

Many commentators are predicting that by the end of the Supreme Court's current term next June there will be insufficient power remaining for federal agencies to regulate businesses and commerce effectively, turning the clock back to the wide open practices that culminated in the 1929 stock market crash and ensuing Great Depression.



To contact the WSWS and the
Socialist Equality Party visit:

wsws.org/contact