

REASSESSING THE CONSTITUTIONALITY OF SEC ADMINISTRATIVE PROCEEDINGS IN VIEW OF JAPANESE ADMINISTRATIVE PROCEEDINGS

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I. INTRODUCTION

The U.S. Securities Exchange Commission (“SEC”) exercises a broad investigatory authority and uses powerful enforcement tools, including administrative, civil, and criminal proceedings.¹ In civil proceedings, the SEC files a civil complaint with a federal district court. The SEC may also seek a variety of sanctions through administrative proceedings, which are presided by an administrative law judge (“ALJ”).² Although the SEC is a federal “administrative” agency, the SEC may seek civil “penalties” in either civil proceedings or administrative proceedings.³

Although the SEC claims that whether to use administrative proceedings or civil proceedings “may depend upon various factors [and when necessary the SEC] will bring both proceedings,”⁴ the SEC has apparently used more administrative proceedings recently, in particular, after the enactment of the Dodd-Frank Act.⁵ Civil penalties are generally considered to be more burdensome on actors, compared to other remedies such as disgorgement and injunction,⁶ and, as Justice Gorsuch recognized, the SEC generally has a better chance of winning in

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1. See *How Investigations Work*, U.S. SEC. & EXCH. COMM’N, <https://www.sec.gov/News/Article/Detail/Article/1356125787012> (May 14, 2024).

2. *Id.*

3. *Id.*

4. *Id.*

5. See generally David Zaring, *Enforcement Discretion at the SEC*, 94 TEX. L. REV. 1155 (2016) (providing a detailed analysis on recent development in the SEC’s enforcement—use of more administrative proceedings).

6. See Kenneth B. Winer & Laura S. Kwaterski, *Assessing SEC Power in Administrative Proceedings*, L. 360, Mar. 24, 2011, at 1, 2 (arguing “the imposition of a legal order to comply with the law is not, by itself, onerous” but “an order to pay thousands or millions of dollars can be ruinous.”); see also Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L. J. 1795, 1797-98 (1992) (arguing plaintiffs in civil cases sometimes seek “punitive” civil sanctions, in which the purpose is to punish wrongdoing).

administrative proceedings.⁷ The scholars and practitioners, therefore, have been inspired to write on the topic of constitutionality of administrative proceedings.⁸

The SEC's increasing use of enforcement proceedings before ALJs has also invited many constitutional challenges in federal courts.⁹ Although the SEC's ratification of its prior appointment of all ALJs resolved the "Appointments Clause" issue, a Supreme Court holding in 2023 opened a door for constitutional challenges on other grounds.¹⁰ Finally, the Supreme Court, in June 2024, issued an opinion that could significantly affect how the SEC uses administrative proceedings and potentially put to death not only the SEC's, but all administrative proceedings nationwide.¹¹

In this Article, I first provide an overview of the SEC's administrative proceedings, including their history, comparison with civil proceedings, and increased use by the SEC. I then describe major grounds for constitutional challenges against the SEC's administrative proceedings and present several early cases from 2015 to 2017. I also explain a Supreme Court case in 2023, *Axon Holdings Inc. v. FTC*, and its implication on another Supreme Court case, *SEC v. Jarkesy*, decided in June 2024. Finally, I propose how the SEC could continue using administrative proceedings if they are held unconstitutional by analyzing administrative proceedings used by the SEC's counterpart in Japan, the Securities Exchange Surveillance Commission.

II. SEC'S ADMINISTRATIVE PROCEEDINGS

In this Chapter, I provide an overview of the SEC's administrative proceedings, comparing with civil proceedings and describing how the SEC has increasingly used its "in-house" administrative proceedings.

7. *Axon Enter., Inc. v. FTC*, 598 U.S. 175, 182 (2023).

8. *See, e.g.*, Zaring, *supra* note 5, at 1163; Thomas Glassman, *Ice Skating Up Hill: Constitutional Challenges to SEC Administrative Proceedings*, 16 J. BUS. & SEC. L. 47, 49 (2015); Ethan Y. Kidron, *Systemic Forum Selection Ambiguity in Financial Regulation Enforcement*, 53 AM. CRIM. L. REV. 693, 697 (2016); Alexander I. Platt, *SEC Administrative Proceedings: Backlash and Reform*, 71 BUS. L. 1, 18-20 (2015); Ryan Jones, Comment, *The Fight over Home Court: An Analysis of the SEC's Increased Use of Administrative Proceedings*, 68 SMU L. REV. 507, 510 (2015); Moses M. Tincher, Note, *Timber! The SEC Falls Hard as the Georgia District Court in Timbervest Finds the Appointment of the SEC ALJs "Likely Unconstitutional,"* 67 MERCER L. REV. 459, 461 (2016); Michael Dvorak, Note, *SEC Administrative Proceedings and Equal Protection "Class of One" Challenges: Evaluating Concerns About SEC Forum Choices*, 2015 COLUM. BUS. L. REV. 1195, 1197-98 (2015).

9. *See, e.g.*, *Hill v. SEC*, 825 F.3d 1236, 1237 (11th Cir. 2016) (holding the district court lacked jurisdiction over the challenges and the review scheme created by Congress that required claims be resolved first in the administrative forum, and then, if necessary by an appeal to the federal court); *Bandimere v. SEC*, 844 F.3d 1168, 1188 (10th Cir. 2016) (holding the appointment of the ALJ violated the Appointments Clause); *Raymond J. Lucia Cos. v. SEC*, 832 F.3d 277, 282-84 (D.C. Cir. 2017) (holding the SEC ALJs were not officers, but employees of the SEC, so their appointments were constitutional).

10. *See Axon Enter. Inc.*, 598 U.S. at 195-96.

11. *SEC v. Jarkesy*, 144 S. Ct. 2117 (2024).

A. *Overview of the SEC's Administrative Proceedings*

The SEC can pursue three types of enforcement actions—administrative, civil, and criminal.¹² The SEC may seek a variety of sanctions through the administrative proceedings, which are presided by an ALJ, who is independent of the SEC.¹³ The ALJ conducts a hearing, considers the evidence, and issues an initial decision including recommended sanctions such as cease and desist orders, suspension or revocation of registrations, civil monetary penalties, and disgorgement.¹⁴

The SEC has historically had the authority to revoke or suspend the registration of regulated entities, such as a broker-dealer and investment advisor.¹⁵ The Insider Trading Sanctions Act of 1984,¹⁶ the Insider Trading and Securities Fraud Enforcement Act of 1988,¹⁷ and the Securities Enforcement Remedies and Penny Stock Reform Act of 1990¹⁸ added cease and desist orders, disgorgement, and civil monetary penalties against regulated entities and individuals as remedies, thereby greatly enhancing the SEC's administrative enforcement power.¹⁹ The Sarbanes-Oxley Act of 2002²⁰ further enhanced the remedies available in both civil and administrative proceedings, for example, by allowing the SEC to allocate civil monetary penalties to “fair funds” for the benefit for injured parties.²¹

Even after these amendments, the SEC was not able to impose civil penalties in administrative proceedings on non-regulated entities and general investors. The SEC, therefore, sometimes took parallel actions to seek civil penalties in civil proceedings and other remedies such as an injunction in administrative proceedings.²² In 2010, the Dodd-Frank Act granted the SEC the power to impose civil penalties on *anyone* in administrative proceedings.²³ The SEC's enforcement

12. *How Investigations Work*, *supra* note 1.

13. *Id.* ¶ 6.

14. *Id.* (discussing that monetary penalties obtained through administrative proceedings are called “civil” monetary penalties, and not differentiated from ones obtained through civil proceedings).

15. NICOLE A. BAKER ET AL., *THE SECURITIES ENFORCEMENT MANUAL: TACTICS AND STRATEGIES* 184 (Michael J. Missal & Richard M. Philips eds., 2d ed. 2007) [hereinafter *ENFORCEMENT MANUAL*].

16. Insider Trading Sanctions Act of 1984, Pub. L. No. 98-376, 98 Stat. 1264, 1264.

17. Insider Trading and Securities Fraud Enforcement Act of 1988, Pub. L. No. 100-704, 102 Stat. 4677, 4681.

18. Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Pub. L. No. 101-429, 104 Stat. 931, 933-34, 937.

19. *ENFORCEMENT MANUAL*, *supra* note 15, at 184.

20. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, 783.

21. *ENFORCEMENT MANUAL*, *supra* note 15, at 184.

22. *See The Dodd-Frank Act Reinforces and Expands SEC Enforcement Powers*, GIBSON DUNN (July 21, 2010), <https://www.gibsondunn.com/the-dodd-frank-act-reinforces-and-expands-sec-enforcement-powers/> (“[The SEC] has frequently bifurcated its settled proceedings into two different proceedings—one an administrative action imposing prospective cease and desist orders and ancillary relief; the other a civil, district court action seeking only the imposition of a civil money penalty.”).

23. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929P, 124 Stat. 1376, 1862 (2010).

authority has been greatly enhanced by these amendments because civil penalties are generally considered more burdensome on actors compared to other remedies such as injunctions.²⁴

B. *Comparison with Civil Proceedings*

The Eleventh Circuit enumerated the differences between administrative proceedings and civil proceedings as follows. First, in administrative proceedings, “the Federal Rules of Civil Procedure and Evidence do not apply, and the respondent does not enjoy the right to a jury trial [but] the SEC’s Rules of Practice... govern.”²⁵ Second, “the Rules of Practice provide for more limited discovery [allowing] the taking of depositions at the Commission’s discretion [and not providing] for routine document production, instead requiring parties to request that the ALJ issue subpoenas.”²⁶ Third, “[a]dministrative actions proceed relatively quickly along fixed timelines set by the rules.”²⁷ Fourth, “[e]ither party may appeal the initial decision [of the ALJ] to the Commission [and then t]he aggrieved party may seek review in the United States Court of Appeals.”²⁸

As to the choice between two proceedings, the SEC said “[w]hether the Commission decides to bring a case in federal court or within the SEC before an administrative law judge may depend upon various factors. Often, when the misconduct warrants it, the Commission will bring both proceedings.”²⁹ The SEC has, however, used more administrative proceedings recently as discussed in detail in the next Chapter II.C.³⁰

The SEC has the following benefits of choosing administrative proceedings over civil proceedings.³¹ First, because it does not involve jury trial and is held by the ALJ, an employee of the SEC, decisions tend to be more favorable for the SEC; second, the SEC can settle the case without obtaining approval from the ALJ; third, proceedings would generally be shorter so the SEC can save its monetary and human resources; fourth, respondents would be less prepared because of limited disclosure and motions allowed to them; fifth, the ALJ may allow more evidence into the proceedings; and sixth, the burden of proof in an injunction is lighter.³²

24. *See supra* note 6.

25. *Hill v. SEC*, 825 F.3d 1236, 1238 (11th Cir. 2016).

26. *Id.*

27. *Id.* The Federal Trade Commission also utilizes administrative proceedings. The practice, however, is sometimes criticized on the ground that its administrative proceedings take long. *See, e.g.*, Raymond Z. Ling, Note, *Unscrambling the Organic Eggs: The Growing Divergence Between the DOJ and the FTC in Merger Review After Whole Foods*, 75 BROOK. L. REV. 935, 962 (2010) (“The FTC’s ability to prolong a merger challenge with an administrative trial puts enormous pressure on merging parties to either settle or terminate the transaction, even though the transaction had closed.”).

28. *Hill*, 825 F.3d at 1238.

29. *How Investigations Work*, *supra* note 1.

30. *See generally* Zaring, *supra* note 5 (providing a detailed analysis on another recent development in the SEC’s enforcement—use of more administrative proceedings).

31. *See generally* Luke T. Cadigan, *Practice Tips: Litigating an SEC Administrative Proceeding*, 58 BOS. BAR J. 8 (2014) (comparing administrative proceedings and civil proceedings).

32. *Id.* at 8-11.

In addition, respondents in administrative proceedings must first appeal to the SEC.³³ Though the SEC will review decisions of ALJs *de novo*, the SEC tends to uphold the decisions because the Division of Enforcement, which is closer to the case, has decided there would be sufficient evidence to support a case before commencing administrative proceedings.³⁴ The respondent may further appeal to the District of Columbia Circuit, which will review the case under the standards listed in Section 706 of the Administrative Procedures Act, including whether the decision is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”³⁵ Circuit Courts, however, have deferred to the decision of the SEC in many cases.³⁶

C. Increased Use of ALJs

From January 1, 2013, to March 31, 2014, the SEC brought 185 civil actions and commenced 133 administrative proceedings.³⁷ A ratio of administrative proceedings out of total numbers increased from 25% in the first quarter of 2013 to 38% in the second quarter, 43% in the third quarter, 56% in the fourth quarter, and 58% in the first quarter of 2014.³⁸

From October 2013 to June 2014, the SEC lost three of four important insider trading cases in federal courts.³⁹ First, in October 2013, a jury found Mark Cuban, the billionaire owner of professional basketball’s Dallas Mavericks, did not engage in insider trading in 2004.⁴⁰ Next, in May 2014, a jury found for a fund manager in a claim that he allegedly relied on an illegal merger tip to make \$1.3 million in 2001.⁴¹ Third, in June 2014, a jury found again for the defendant in a claim that STEC Inc.’s former chief executive officer allegedly made \$134 million by selling stock, knowing a substantial loss would be inevitable.⁴²

Though there was no explicit reference to these losses, in June 2014, the Director of the Division of Enforcement expressed, though “[i]t has been pretty rare,” “we will bring insider-trading cases as administrative proceedings in

33. *Hill*, 825 F.3d at 1238.

34. *Cadigan*, *supra* note 31, at 11; *see also* *Zaring*, *supra* note 5, at 1168 (“Appeals from an ALJ’s ‘initial decision’ are made to the SEC itself, which can amend or reverse the decision, although it usually does not.”).

35. 5 U.S.C.A. § 706 (2024).

36. *See Zaring*, *supra* note 5, at 1168 (“[In a Circuit Court, respondents’] claims will be evaluated under the deferential standards of review provided by administrative law.”).

37. MORVILLO ABRAMOWITZ, SEC ENFORCEMENT DATA ANALYSES 5 (vol. 2, issue 1, 2014) (discussing that the scope of the research is limited to “core” cases, which do not include follow-on and delinquent filer cases).

38. *Id.*

39. *See* Edvard Pettersson & Maurice Possley, *SEC Loses Latest Insider-Trading Trial to Former STEC CEO*, BLOOMBERG (June 7, 2014, 12:01 AM), <https://www.bloomberg.com/news/articles/2014-06-06/sec-loses-latest-insider-trading-trial-to-former-stec-ceo> (describing four cases).

40. *Id.*

41. *Id.*

42. *Id.*

appropriate cases.”⁴³ In addition, the SEC publicized it would hire two additional ALJs and three law clerks, thereby almost doubling human resources in the Office of Administrative Law Judges.⁴⁴

As discussed above, prior to the enactment of the Dodd-Frank Act, the SEC had no authority to impose civil penalties against non-regulated persons in administrative proceedings.⁴⁵ The SEC, therefore, had to bring such cases in a federal court, where the accused could invoke multiple rights and protections under the federal rules. The SEC has increased the use of administrative proceedings after the enactment of the Dodd-Frank Act, and the topic of constitutionality of administrative proceedings has inspired many scholars and practitioners.⁴⁶ Many have criticized the increasing use of administrative proceedings by the SEC. For example, even though ALJs are “independent adjudicators,”⁴⁷ the SEC would have a “home court advantage” because the SEC can nominate and employ ALJs.⁴⁸ The SEC’s increasing use of enforcement proceedings before ALJs has also invited many constitutional challenges in federal courts, as we will see in the next Chapter.⁴⁹

III. EARLY CHALLENGES AGAINST ADMINISTRATIVE PROCEEDINGS

Some of the early challenges were not successful. As one scholar observed, “the suits challenging the SEC’s administrative proceedings are without merit; agencies have almost absolute discretion as to whom and how they prosecute, and administrative proceedings, which have a long history, do not threaten the Constitution.”⁵⁰ In 2016, the Tenth Circuit, however, held ALJs were unconstitutionally appointed.⁵¹ In this Chapter, after describing major grounds to challenge

43. Sarah N. Lynch, *US SEC to File Some Insider Trading Cases in Its In-House Court*, REUTERS (June 11, 2014, 4:17 PM), <https://www.reuters.com/article/us-sec-insidertrading-idUSKBN0EM2DI20140611>.

44. *SEC Announces New Hires in the Office of Administrative Law Judges*, U.S. SEC. AND EXCH. COMM’N (July 29, 2014), <https://www.sec.gov/newsroom/press-releases/2014-129>.

45. See Zaring, *supra* note 5, at 1164-65 (providing an overview of the SEC’s enforcement).

46. *Id.*; see *supra* note 8 (providing a list of articles).

47. *Office of Administrative Law Judges*, U.S. SEC. AND EXCH. COMM’N, <https://www.sec.gov/alj> (last visited Aug. 2, 2024).

48. Gretchen Morgenson, *At the S.E.C., a Question of Home-Court Edge*, N.Y. TIMES (Oct. 5, 2013), <https://www.nytimes.com/2013/10/06/business/at-the-sec-a-question-of-home-court-edge.html>; see also Russel G. Ryan, *The SEC as Prosecutor and Judge*, WALL ST. J. (Aug. 4, 2014, 7:36 PM), <https://www.wsj.com/articles/russell-g-ryan-the-sec-as-prosecutor-and-judge-1407195362> (arguing the administrative proceedings violate the Constitution).

49. See *Hill v. SEC*, 825 F.3d 1236, 1237 (11th Cir. 2016) (holding the district court lacked jurisdiction over the challenges and the review scheme created by Congress that required claims be resolved first in the administrative forum, and then, if necessary by an appeal to the federal court); see also *Bandimere v. SEC*, 844 F.3d 1168, 1188 (10th Cir. 2016) (holding the appointment of the ALJ violated the Appointments Clause); see also *Raymond J. Lucia Cos. v. SEC*, 832 F.3d 277, 282-84 (D.C. Cir. 2017) (holding the SEC ALJs were not officers, but employees of the SEC, so their appointments were constitutional).

50. Zaring, *supra* note 5, at 1555.

51. *Bandimere*, 844 F.3d at 1188.

the constitutionality of the administrative proceedings, I present three representative cases from 2015 to 2017.

A. *Major Grounds for Challenges*

1. *Due Process*

This position argues the administrative proceedings violate the Due Process Clause of the Fifth Amendment⁵² because respondents cannot enjoy procedural protections, which are provided in the civil proceedings.⁵³ The due process claims have three aspects: fairness, combination of functions, and consent.⁵⁴ First, it is unfair because, due to the lack of procedural safeguards like those provided in civil proceedings, errors in fact-finding or legal judgement would be more likely.⁵⁵ As noted above, the respondents would usually have only a few months to prepare for the case, discovery is limited, and appeal to the SEC and federal circuit, if not unlikely, would have only a remote chance of success.⁵⁶ Second, the SEC should not act as prosecutor, judge, and enforcer at the same time because the SEC is an administrative agency and not a court established under Article III of the Constitution.⁵⁷ Third, respondents have not given consent to be susceptible to administrative proceedings.⁵⁸

However, Congress seems to have given the SEC the power to adjudicate administrative proceedings “knowing full well that the administrative court process differs from federal court.”⁵⁹ The Supreme Court also found “the combination of investigative and adjudicative functions does not, without more, constitute a due process violation.”⁶⁰

2. *Equal Protection*

Next, this position argues SEC’s practice violates the Equal Protection Clause⁶¹ by discretionarily filing some respondents before ALJs while using civil procedures for similarly situated respondents.⁶² As the Supreme Court found,

52. U.S. CONST. amend. V (“No person shall... be deprived of life, liberty, or property, without due process of law.”).

53. Zaring, *supra* note 5, at 1197.

54. *Id.*

55. See Winer & Kwaterski, *supra* note 6.

56. See Zaring, *supra* note 5, at 1195-97 (comparing administrative proceedings with civil proceedings).

57. Ryan, *supra* note 48.

58. See Zaring, *supra* note 5, at 1201.

59. Stephanie Russell-Kraft, *Why Challenges to SEC Admin Court Will Likely Keep Failing*, L. 360 (Mar. 6, 2015, 8:04 PM), <https://www.law360.com/articles/628601/why-challenges-to-sec-admin-court-will-likely-keep-failing>.

60. *Withrow v. Larkin*, 421 U.S. 35, 58 (1975).

61. U.S. CONST. amend. XIV, § 1 (“No State shall... deny to any person within its jurisdiction the equal protection of the laws.”).

62. See Zaring, *supra* note 5, at 1195.

“[s]uccessful equal protection claims [may be] brought by a ‘class of one,’ where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.”⁶³ A respondent has to prove “intent on the part of the government to prosecute ‘because of’ the defendant’s membership in...a group of whom whose peers received federal court trials.”⁶⁴ The SEC, however, is “generally thought to have unfettered discretion as to *whether* to prosecute, which can reasonably be read to include the discretion over *where* to do so.”⁶⁵

In *SEC v. Gupta*, the respondent in an insider trading case under an administrative proceeding claimed he was treated unfairly because cases against twenty-seven other actors were filed in federal courts, and he filed a Complaint for Declaratory and Injunctive Relief against the SEC.⁶⁶ The court denied the motion to dismiss filed by the SEC, reasoning, among others, that “even if the SEC were acting within its discretion when it imposed disparate treatment on Gupta, that would not necessarily exculpate it from a claim of unequal protection if the unequal treatment was still arbitrary and irrational.”⁶⁷ The choice of administrative proceeding, however, is arguably rational because the SEC’s resources to litigate are limited and it would usually litigate where it is more cost-effective.⁶⁸

3. *Right to a Trial by Jury*

The Seventh Amendment provides, “[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.”⁶⁹ Some argue the administrative proceedings are unconstitutional because there is no jury in administrative proceedings.⁷⁰ The Supreme Court, however, in a case where the constitutionality of a similar administrative scheme was challenged, found “when Congress creates new statutory ‘public rights,’ it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment’s injunction that jury trial is to be ‘preserved’ in ‘suits at common law.’”⁷¹

63. *Willowbrook v. Olech*, 528 U.S. 562, 564 (2000).

64. *Zaring*, *supra* note 5, at 1196.

65. *Id.*

66. *Gupta v. SEC*, 796 F. Supp. 2d 503, 506, 513 (S.D.N.Y. 2011).

67. *Id.* at 513. The SEC later discontinued the administrative proceedings and filed a civil claim in a federal court, where Gupta ultimately was ordered to pay \$13.9 million as a civil penalty. *See SEC Obtains \$13.9 Million Penalty Against Rajat Gupta*, U.S. SEC. AND EXCH. COMM’N, <https://www.sec.gov/newsroom/press-releases/2013-128-sec-obtains-139-million-penalty-against-rajat-gupta> (July 18, 2013).

68. *See Urska Velikonja, Securities Settlements in the Shadows*, 126 YALE L. J. F. 124, 127-28 (2016) (“When the agency can choose the forum, it will usually litigate where it is more cost-effective to do so. The SEC Enforcement Division does not have the resources to litigate all enforcement actions.”).

69. U.S. CONST. amend. VII.

70. *See Zaring*, *supra* note 5, at 1205.

71. *Atlas Roofing Co. v. OSHRC*, 430 U.S. 442, 455 (1977).

4. *The Appointments Clause*

The Appointments Clause states “the President shall nominate [and] appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States...but the Congress may by Law vest the Appointment of such inferior Officers...in the President alone, in the Courts of Law, or in the Heads of Departments.”⁷² Some argue that ALJs are “inferior officers” under the Appointments Clause, but ALJs are unconstitutionally appointed by a division of the SEC, not the President, the courts of law, or the heads of the SEC.⁷³ As described below, this argument became the focal point of the early challenges.

5. *Removal*

The Constitution provides “[t]he executive Power shall be vested in a President of the United States of America.”⁷⁴ The Take Care Clause also provides that the President “shall take Care that the Laws be faithfully executed.”⁷⁵ This means the President is entitled to remove some executive officers to ensure they are responsive to his interests.⁷⁶ This position argues that two layers of for-cause protection of ALJs violates the Take Care Clause: ALJs can be removed from their posts only for cause, and then only if the SEC, whose commissioners can only be removed from their posts for cause, brings a proceeding against ALJs before the Merit Services Protection Board.⁷⁷

B. *Hill v. SEC*

One of the early cases where the constitutionality of the SEC’s administrative proceedings was challenged is *Hill v. SEC* in 2015.⁷⁸ The plaintiff, Hill, is a self-employed real estate developer and allegedly committed insider trading.⁷⁹ The SEC commenced administrative proceedings against Hill, seeking a cease-and-desist order, a civil penalty, and disgorgement.⁸⁰ While Hill’s administrative evidentiary hearing was scheduled, Hill filed a civil lawsuit, arguing the SEC’s administrative proceedings were unconstitutional.⁸¹

The plaintiff argued administrative proceedings violated the following three provisions of the Constitution: (1) Article I and the non-delegation doctrine, (2)

72. U.S. CONST. art. II, § 2, cl. 2.

73. *See Bandimere v. SEC*, 844 F.3d 1168, 1172 (10th Cir. 2016).

74. U.S. CONST. art. II, § 1, cl. 1.

75. *Id.* § 3.

76. *See Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 483 (2010) (“Since 1789, the Constitution has been understood to empower the President to keep these officers accountable - by removing them from office, if necessary.”).

77. *See* 5 U.S.C. § 7521 (2012).

78. *Hill v. SEC*, 114 F. Supp. 3d 1297, 1301 (N.D. Ga. 2015).

79. *Id.*

80. *Id.*

81. *Id.* at 1304-05.

the Seventh Amendment right to a jury trial and (3) the Appointments Clause.⁸² The district court rejected the first two arguments, but held the plaintiff was likely to succeed on the third because ALJs were not appointed by the President or SEC Commissioners but rather hired by the SEC's Office of Administrative Law Judges (though it could be technically cured by having the SEC Commissioners appoint its ALJs directly).⁸³ In 2016, the Eleventh Circuit, however, vacated and remanded, concluding the district court lacked jurisdiction over the challenges and the review scheme created by Congress required claims be resolved first in the administrative forum, and then, if necessary, by an appeal to the federal court.⁸⁴

C. *Bandimere v. SEC*

In *Bandimere v. SEC*, the Tenth Circuit held an ALJ was not constitutionally appointed by the President, a court of law, or the head of a department because the ALJ is an "officer" rather than an employee.⁸⁵ In 2012, the SEC brought an administrative action against a businessman, Bandimere, alleging he violated various securities laws.⁸⁶ An ALJ's initial decision found Bandimere liable, imposing various penalties including civil penalties and disgorgement.⁸⁷ After the SEC reviewed the initial decision and reached a similar result, Bandimere filed a petition for review with the Tenth Circuit.⁸⁸

The Tenth Circuit found ALJs are "officers" who are subject to the Appointments Clause because (1) the ALJ position was established by law, (2) statutes set forth ALJs' duties, salaries, and means of appointment, and (3) ALJs exercise significant discretion in performing "important functions."⁸⁹ As the Tenth Circuit explained in a footnote, the difference between *Hill* and *Bandimere* is whether the SEC respondents have filed a collateral lawsuit.⁹⁰ In *Hill*, the respondent filed a collateral lawsuit while an administrative enforcement action was still ongoing.⁹¹ In *Bandimere*, however, the respondent filed a lawsuit after an administrative enforcement action was concluded.⁹²

D. *Lucia v. SEC*

On the other hand, the D.C. Circuit held the contrary, thereby creating a circuit split. *Lucia*, a respondent to an SEC's administrative proceeding, filed a petition for review with the D.C. Circuit after the SEC concluded the proceeding.⁹³

82. *Id.* at 1320.

83. *Id.*

84. *Hill v. SEC*, 825 F.3d 1236, 1237 (11th Cir. 2016).

85. *Bandimere v. SEC*, 844 F.3d 1168, 1188 (10th Cir. 2016).

86. *Id.* at 1171.

87. *Id.*

88. *Id.*

89. *Id.* at 1179.

90. *See id.* at 1171 n.2.

91. *See id.*

92. *See id.*

93. *Lucia v. SEC*, 832 F.3d 277, 280 (D.C. Cir. 2017).

The D.C. Circuit found an ALJ was an “employee” who was not subject to the Appointments Clause, rather than an “officer,” because the politically accountable Commissioners have authority to determine whether an ALJ’s initial decision is to be the final action of the SEC.⁹⁴

In 2018, the Supreme Court resolved the circuit split.⁹⁵ The Supreme Court reversed the D.C. Circuit’s decision, holding ALJs are “officers” because they received career appointments, the appointments were created by statute, they exercised significant discretion, they issued decisions, and those initial decisions became final if the SEC declined review.⁹⁶ The Supreme Court found the ALJ who decided *Lucia*’s case was unconstitutionally appointed, thus ordering a new hearing by another ALJ who was constitutionally appointed.⁹⁷

E. *The SEC’s Response*

In July 2016, the SEC adopted the following amendments, updating the Rules of Practice governing its administrative proceedings.⁹⁸ First, it extended the potential length of prehearing period from four months to a maximum of ten months; second, it allowed parties the rights to notice three depositions in the cases designated for the longest timelines; third, it clarified the types and procedures of dispositive motions; fourth, it also clarified rules regarding the admissibility of certain types of evidence.⁹⁹ Although the SEC did not explicitly refer to the recent constitutional challenges, Chair Mary Jo White said the amendments “provide parties with additional opportunities to conduct depositions and add flexibility to the timelines of our administrative proceedings, while continuing to promote the fair and timely resolution of the proceedings.”¹⁰⁰

In response to *Bandimere*, where the Tenth Circuit found ALJs were unconstitutionally appointed, the SEC filed a petition for rehearing, but the Tenth Circuit denied the rehearing.¹⁰¹ The SEC, thereafter, decided to stay all administrative proceedings assigned to an ALJ in which a respondent has the option to seek review in the Tenth Circuit.¹⁰² Further, in November 2017, the SEC ratified its prior appointment of all ALJs, thereby resolving any concerns that

94. *Id.* at 286.

95. *See Lucia v. SEC*, 585 U.S. 237 (2018).

96. *Id.* at 237-39.

97. *Id.* at 239.

98. *SEC Adopts Amendments to Rules of Practice for Administrative Proceedings*, U.S. SEC. AND EXCH. COMM’N, <https://www.sec.gov/newsroom/press-releases/2016-142> (Sept. 22, 2023).

99. *Id.*

100. *Id.* Practitioners observed the amendments were “[i]n response to [the] growing criticism.”; *see* Margaret A. Dale & Mark D. Harris, *SEC Adopts Amendments to Rules for Administrative Proceeding*, N.Y. L. J., Aug. 10, 2016, at 1.

101. *Bandimere v. SEC*, 855 F.3d 1128, 1128 (10th Cir. 2017).

102. Order Staying Pending Administrative Proceedings, Securities Act Release No. 10365 et al. (May 22, 2017).

appointment of ALJs by the Office of ALJs, not the SEC, violates the Appointments Clause.¹⁰³

IV. NEW CHALLENGES—*AXON ENTERPRISE* AND *JARKESY*

Although the SEC’s ratification of its prior appointment of all ALJs resolved the “Appointments Clause” issue, other grounds for constitutional challenges remained. In 2023, a Supreme Court case opened a door for constitutional challenges on other grounds.¹⁰⁴

A. *Axon Enterprise Inc. v. FTC*

Michelle Cochran and Axon Enterprise are respondents in separate administrative proceedings initiated by the SEC and the Federal Trade Commission (“FTC”).¹⁰⁵ Each filed suit in federal district court, challenging the constitutionality of administrative proceedings.¹⁰⁶ Both suits were dismissed by the district courts for lack of jurisdiction.¹⁰⁷ On appeal, the Ninth Circuit affirmed the district court’s dismissal of Axon Enterprise’s constitutional challenges against the FTC’s administrative proceedings, but the Fifth Circuit reached the opposite conclusion, reversing the district court’s dismissal of Cochran’s constitutional challenges against the SEC’s administrative proceedings.¹⁰⁸

In its opinion, the Supreme Court considered the *Thunder Basin* factors to determine “whether particular claims [concerning agency action] were ‘of the type Congress intended to be reviewed within this statutory structure.’”¹⁰⁹ Under *Thunder Basin*, a court considers three questions: (1) “could precluding district court jurisdiction ‘foreclose all meaningful judicial review’ of the claim?”; (2) “is the claim ‘wholly collateral’ to [the] statute’s review provisions?”; and (3) “is the claim ‘outside the agency’s expertise?’”¹¹⁰

The Court determined each of the *Thunder Basin* factors favored respondents and remanded the matter for further proceedings.¹¹¹ First, the Court reasoned Cochran and Axon’s injury “is impossible to remedy once the proceeding is over, which is when appellate review kicks in.”¹¹² Second, the Court also found the respondents’ claims collateral to the statutory review scheme because the challenges to the agency’s authority have nothing to do with either the enforcement-related matters or assessment of the charges against respondents.¹¹³

103. *SEC Ratifies Appointment of Administrative Law Judges*, U.S. SEC. AND EXCH. COMM’N (Nov. 30, 2017), <https://www.sec.gov/newsroom/press-releases/2017-215>.

104. *See Axon Enter., Inc. v. FTC*, 598 U.S. 175 (2023).

105. *Id.* at 182-83.

106. *Id.*

107. *Id.* at 184.

108. *Id.* at 184-85.

109. *Id.* at 186 (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 212 (1994)).

110. *Id.* (quoting *Thunder Basin*, 510 U.S. at 212-13).

111. *Id.* at 195-96.

112. *Id.* at 191.

113. *Id.* at 192-93.

Finally, the Court concluded the claims were “not ‘of the type’ the statutory review schemes [at issue] reach.”¹¹⁴

The Court, therefore, decided a party may bring constitutional challenges to the SEC’s administrative proceedings in a federal district court without first litigating to conclude the administrative proceeding.¹¹⁵ Practitioners hypothesize the decision will seriously affect the SEC’s ability to pursue litigated matters in administrative proceedings because “[a]ny respondent to an administrative proceeding will have the ability to effectively stay the proceeding while vindicating his or her constitutional rights in federal court.”¹¹⁶

B. *Concurring Opinion*

The Court in *Axon Enterprise* did not issue any opinion as to the constitutionality of the administrative proceedings, but Justice Clarence Thomas’s concurring opinion provides insight for future cases.¹¹⁷ He first expressed “grave doubts” about the constitutionality of Congress’s “vesting administrative agencies with primary authority to adjudicate core private rights with only deferential judicial review on the back end.”¹¹⁸ He distinguished “core private rights” and “mere public rights and governmental privileges,” where the former can only be adjudicated and divested by Article III courts.¹¹⁹ He further reasoned the rights at issue “appear to be core private rights” because the types of “penalties and orders [sought by the SEC] implicate the core private right to property.”¹²⁰

According to Justice Thomas, administrative proceedings raise four “serious constitutional concerns.”¹²¹ First, they “may violate the separation of powers by placing adjudicatory authority over core private rights—a judicial rather than executive power—within the authority of Article II agencies.”¹²² Second, they “may violate Article III by compelling the Judiciary to defer to administrative agencies regarding matters within the core of the Judicial Vesting Clause.”¹²³ Third, they “may violate due process by empowering entities that are not courts of competent jurisdiction to deprive citizens of core private rights.”¹²⁴ Fourth, they

114. *Id.* at 196 (quoting *Thunder Basin*, 510 U.S. at 212).

115. *Id.* at 180-81.

116. Emily E. Renshaw et al., *US Supreme Court Allows Early Constitutional Challenges to SEC Administrative Proceedings in Federal District Courts*, MORGAN LEWIS (Apr. 18, 2023), <https://www.morganlewis.com/pubs/2023/04/us-supreme-court-allows-early-constitutional-challenges-to-sec-administrative-proceedings-in-federal-district-courts>.

117. Justice Neil Gorsuch also recognized in his concurring opinion in *Axon* that SEC in-house proceedings are “tilted” in the SEC’s favor. *Axon Enter.*, 598 U.S. at 215 (“From 2010 to 2015, the SEC won 90% of its contested in-house proceedings compared to 69% of the cases it brought in federal court.”).

118. *Id.* at 196.

119. *Id.* at 197.

120. *Id.* at 203-04.

121. *Id.* at 202.

122. *Id.*

123. *Id.*

124. *Id.*

“may run afoul of the Seventh Amendment by allowing an administrative agency to adjudicate what may be core private rights without a jury.”¹²⁵

C. *Jarkesy v. SEC*

Meanwhile, in May 2022, the Fifth Circuit held the SEC’s administrative proceedings are unconstitutional.¹²⁶ The Fifth Circuit explained the administrative proceedings violated (1) Seventh Amendment right to a jury trial, (2) Article I’s vesting of “all” legislative power in Congress, and (3) the Take Care Clause of Article II.¹²⁷ In this case, the SEC commenced administrative proceedings against petitioners, alleging securities fraud.¹²⁸ The SEC affirmed the ALJ’s opinion that petitioners committed securities fraud and ordered them to cease and desist from committing further violations, pay civil penalty, and disgorge ill-gotten gains.¹²⁹ Petitioners then filed a petition for review in the Fifth Circuit.¹³⁰

In holding the SEC’s administrative proceedings unconstitutional, first, the Fifth Circuit reasoned the Seventh Amendment guaranteed a jury trial because “the SEC’s enforcement action [to seek civil penalties] is akin to traditional actions at law to which the jury-trial right attaches.”¹³¹ Second, the Fifth Circuit found “Congress unconstitutionally delegated legislative power to the SEC when it gave the SEC the unfettered authority to choose whether to bring enforcement actions in Article III courts or within the agency” because Congress failed to provide the SEC with an “intelligible principle” to use the delegated power.¹³² Third, under the Take Care Clause, the President “must have adequate power over officers’ appointment and removal,” but the Fifth Circuit found “two layers of for-cause protection impede that [power].”¹³³

The SEC filed a petition for writ of certiorari to the Supreme Court, which granted the petition in June 2023.¹³⁴ The Supreme Court in June 2024 held “when the SEC seeks civil penalties... [the] action implicates the Seventh Amendment [because the] SEC’s antifraud provisions replicate common law fraud.”¹³⁵ The decision could significantly affect how the SEC uses administrative proceedings, and potentially put to death not only the SEC’s but also administrative proceedings nationwide.¹³⁶

125. *Id.*

126. *Jarkesy v. SEC*, 34 F.4th 446, 449 (5th Cir. 2022).

127. *Id.*

128. *Id.*

129. *Id.* at 449-50.

130. *Id.* at 450.

131. *Id.* at 451.

132. *Id.* at 459.

133. *Id.* at 463.

134. *SEC v. Jarkesy*, 143 S. Ct. 2688 (2023).

135. *SEC v. Jarkesy*, 144 S. Ct. 2117, 2127 (2024).

136. See Ghillaine Reid et al., *Supreme Court Review May Prove the Death Knell to SEC Administrative Courts*, TROUTMAN PEPPER (July 5, 2023), <https://www.troutman.com/insights/supreme-court-review-may-prove-the-death-knell-to-sec-administrative-courts.html> (“If the Fifth Circuit ruling stands, it could essentially put an end to administrative proceedings nationwide, shocking

V. JAPANESE ADMINISTRATIVE PROCEEDINGS

What could the SEC do if the Supreme Court finds the SEC's administrative proceedings are unconstitutional because the SEC seeks penalties and orders that implicate the "core private right to property"? Administrative proceedings used by the SEC's counterparts in Japan, the Financial Services Agency ("JFSA") and the Securities and Exchange Surveillance Commission ("JSESC"), may provide a useful suggestion.

A. *Securities Enforcement in Japan*

In Japan, the JSESC, an enforcement arm of the JFSA, can conduct administrative investigations to seek an administrative monetary penalty or file a criminal charge with the public prosecutor's office.¹³⁷ In contrast to the SEC, however, the JSESC has no authority to file a civil lawsuit.¹³⁸ The JSESC tends to file criminal charges for "particularly serious and malicious misconduct."¹³⁹

The administrative monetary penalty system for market misconduct was introduced in 2008 as an "administrative measure to impose a financial burden on persons who violate certain provisions of the [Japanese securities regulations]."¹⁴⁰ The measure is intended to achieve an "administrative objective of preventing misconduct and ensuring effectiveness of the regulation."¹⁴¹ If the JSESC finds market misconduct, it may recommend the Prime Minister and the Commissioner of the JFSA issue an order to pay an administrative monetary penalty through administrative proceedings.¹⁴²

The JSESC has used administrative monetary penalties actively to police market misconduct. Between fiscal years 2019 and 2023, the number of recommendations for administrative monetary penalties are fifty-three cases for

administrative agencies and flooding the federal court system with cases once reserved for administrative agencies' in-house review."'). Some, however, suggest that the SEC's administrative proceedings would still work under *Jarkesy*. See Alison Somin, *No, Jarkesy v. SEC Won't End the Administrative State*, THE HILL (July 11, 2022, 7:00 AM), <https://thehill.com/opinion/judiciary/3549629-no-jarkesy-v-sec-wont-end-the-administrative-state/> ("[N]one of the opinion's three core holdings fundamentally threatens the SEC's ability to enforce the securities laws, as long as its process is fair and protects due process as required by our Constitution. The government can, and should, protect investors from fraud and ensure that defendants' constitutional rights are respected. *Jarkesy* shows a path by which the SEC can do both.").

137. See *Securities and Exchange Surveillance Commission*, SEC'S AND EXCH. SURVEILLANCE COMM'N 4 (Feb. 2024), <http://www.fsa.go.jp/sesc/english/aboutsesc/all.pdf>. [hereinafter About SESC]. For a more detailed description of the Japanese administrative proceedings and administrative monetary penalties, see Masamichi Yamamoto, *Reassessing International Cooperation Between Securities Regulators in View of the International Double Jeopardy Principle*, 65 WAYNE L. REV. 325, 342-43 (2020); Masamichi Yamamoto, *Information Exchange Between Securities Regulators in Parallel Proceedings Against Cross-Border Market Misconduct*, 28 MICH. ST. INT'L L. REV. 33, 83-84 (2019).

138. See *supra* Chapter II.B (providing an overview of the civil proceedings).

139. About SESC, *supra* note 137, at 4.

140. *Id.* at 14.

141. *Id.*

142. *Id.*

insider trading and twenty-five cases for market manipulation.¹⁴³ During the same period, the number of criminal charges filed by the JSESC were only fifteen for insider trading and three for market manipulation.¹⁴⁴

The administrative monetary penalties have been used in some of the novel and challenging cases by the JSESC. For example, some of the cases involved market manipulation made by automatic orders placed by algorithmic traders or through orders placed with multiple securities brokers.¹⁴⁵ There was also a case where market manipulation was conducted through transactions on both a major stock exchange and a proprietary trading system (“PTS”), which is a market trading system established and operated by a securities firm.¹⁴⁶ In that case, a trader placed false orders before the opening of the morning session of the stock exchange, thereby boosting quotations, and executed orders on the PTS.¹⁴⁷ The JSESC might not have been able to enforce against these cases if it had relied solely on its criminal investigative authority.

B. Administrative Monetary Penalty

The administrative monetary penalty proceeding under the Financial Instruments and Exchange Act (“FIEA”) was introduced as an administrative action to impose financial obligations on a violator for the purpose of deterring market misconduct.¹⁴⁸ Under the FIEA, the financial obligations are considered equivalent to economic benefits gained by market misconduct.¹⁴⁹ The administrative monetary penalty is an English translation of *Kachōkin* in the original Japanese, which is generally accepted as a correct translation.¹⁵⁰ The term administrative monetary “penalty” might be prone to be construed as quasi-criminal outside of Japan, but *Kachōkin* does not contain any meaning of “penalty,” so the literal translation of *Kachōkin* should have been either “the administrative monetary obligation” or “the administrative monetary imposition.”¹⁵¹

Pursuant to an amendment of the FIEA and relevant regulations in 2014 regarding the amount of administrative penalties, the administrative monetary penalty imposed on investment management business operators engaged in market

143. *Id.* at 27.

144. *Id.*

145. Kenichi Sado, *Annual Report 2015/2016*, SEC. AND EXCH. SURVEILLANCE COMM’N, Dec. 2016, at 120.

146. *Id.* at 122.

147. *Id.*

148. *Memorandum of Financial System Council, Working Group on Insider Trading Regulation*, FIN. SERV. AGENCY (Nov. 7, 2012), https://www.fsa.go.jp/singi/singi_kinyu/insider_h24/gijiroku/20121107.html [hereinafter *Working Group Memo*].

149. *Id.*

150. For example, the Ministry of Justice translated *Kachōkin* as administrative monetary penalty in its “unofficial” English translation of the FIEA. See *Financial Instruments and Exchange Act*, JAPANESE L. TRANSLATION, <https://www.japaneselawtranslation.go.jp/en/laws/view/4633#jech22> (last visited Aug. 2, 2024).

151. “Ka” means imposition, “chō” means collection, and “kin” means money. There are at least two Chinese characters used to express “ka”, and one contains a meaning of “criminal penalty,” but the other does not. The latter Chinese character is intentionally used for *Kachōkin*.

misconduct was increased to three times the amount of the investment management fee that such business operators receive or would have received for the month when the market misconduct occurred.¹⁵² This may also increase the risk that administrative monetary penalties could be considered as “quasi-criminal” or even “punitive.”¹⁵³ The amendments, however, were carefully drafted to reflect an appropriate amount of “disgorgement” because the intent of the revision is not to impose “penalty” on a violator, but to calculate the economic benefits gained by market misconduct more precisely.¹⁵⁴

C. Comparison with the SEC’s Administrative Proceedings

The Japanese Administrative Proceedings are very similar to the U.S. Administrative Proceedings as follows. Both proceedings are presided by an ALJ, who is independent of the securities commission (the SEC or the FSA/JSESC) and do not involve a jury.¹⁵⁵ In both proceedings, as a judge does in civil proceedings, an ALJ conducts a hearing, considers the evidence, and issues an initial decision.¹⁵⁶ Such a decision usually includes payment of a certain amount of money in either civil penalty and/or disgorgement in a case in the United States or administrative monetary penalty in a case in Japan.¹⁵⁷ The initial decision is not final and is appealable to a court.¹⁵⁸

There is, however, a distinct difference. The SEC may seek various types of sanctions, such as cease and desist orders, suspension or revocation of registrations, civil monetary penalties, and disgorgement, but the JSESC may seek only administrative monetary penalty payment orders.¹⁵⁹ As explained above, even though an English translation is administrative monetary “penalty” payment, it is similar to disgorgement, which deprives ill-gotten gains from wrongdoers.¹⁶⁰ The

152. See, e.g., Fin. Instruments and Exch. Act, Art. 175(1)(iii)(a) (Act No. 25/1948) (Japan); Cabinet Off. Ordinance on Admin. Monetary Penalty Provided for in Chapter VI-II of the Fin. Instruments and Exch. Act, Art. 1-21(2) (Japan) (examples of the new provisions added by the Amendments).

153. See Kunihiko Morishita & Koichi Miyamoto, *Amendments to the Regulations on Insider Trading*, ANDERSON MÖRI & TOMOTSUNE (Mar. 2014), https://www.amt-law.com/pdf/bulletins2_pdf/140327.pdf (describing 2014 amendments of the FIEA).

154. The original purposes of the administrative monetary penalty system, such as deterrent effects, disincentives on wrongdoers, and securing the effectiveness of the regulation, were seriously taken into consideration. *Working Group Memo*, *supra* note 148. It was considered that the investment management business operators may be benefited not only through a pro-rated portion of the fees, but also through maintaining or increasing fees in the future by engaging in market misconduct, so the amount of penalty should respond to such benefits. *Id.*

155. See *supra* Chapter II.A; see *supra* Chapter V.A (providing an overview of the SEC’s administrative proceedings and the Japanese administrative proceedings).

156. See *id.*

157. See *id.*

158. See *id.*

159. See *id.*

160. See *supra* notes 148-49 and accompanying text.

SEC also has an option to choose civil proceedings as an enforcement tool, filing a civil complaint in a federal court, but the JSESC does not have such an option.¹⁶¹

D. How Could the SEC's Administrative Proceedings Survive?

As noted above, the Supreme Court's decision in *Jarkesy* essentially put an end to the SEC's current practice of using administrative proceedings to impose civil penalties.¹⁶² The SEC will have to change dramatically how it uses administrative proceedings. The first option is to shift all enforcement cases to civil proceedings, completely stopping the use of administrative proceedings. This option, however, would be unrealistic, given the extraordinary number of the SEC's enforcement cases.¹⁶³

A more realistic approach would be not to seek civil penalties as a remedy in administrative proceedings. It would change the current administrative proceedings to the one like the Japanese administrative proceedings, where civil penalty is not available as a sanction. As described above, the JSESC can seek "administrative monetary penalty" in administrative proceedings, which is considered equivalent to economic benefits gained by market misconduct.¹⁶⁴ If the SEC does not seek civil penalties and tries to order only disgorgement, it would not implicate the constitutional concerns raised by Justice Thomas because the SEC does not need to adjudicate "core private rights."¹⁶⁵

Alternatively, the SEC could seek civil penalties in administrative proceedings against only regulated entities. This means that the SEC goes back to before 2010, when the Dodd-Frank Act granted the SEC the power to impose civil penalties on *anyone* in administrative proceedings.¹⁶⁶ One of the due process grounds for challenging the constitutionality of administrative proceedings was respondents have not given consent to be susceptible to administrative proceedings.¹⁶⁷ By seeking a license to practice before the SEC, "discipline through internal agency procedures might seem like a part of the arrangement."¹⁶⁸

VI. CONCLUSION

In the United States, the growth of the administrative state and a desire to avoid the complication of criminal proceedings have contributed to the increasing use of civil penalties.¹⁶⁹ Civil penalties, however, can be more severely punitive

161. See *supra* Chapters II.A and V.A.

162. See *supra* Chapter IV. C.

163. See ABRAMOWITZ, *supra* note 37, at 5 (analyzing SEC's enforcement case-load).

164. See *supra* Chapter V.B (describing administrative monetary penalties).

165. See *supra* Chapter IV.B (explaining the concurrent opinion).

166. Dodd-Frank Wall Street Reform and Consumer Act, Pub. L. No. 111-203, § 929P, 124 Stat. 1376, 1862 (2010); see also *supra* Chapter II.A (describing how the SEC's enforcement power has been enhanced).

167. See *supra* Chapter III.A.1 (presenting the "due process" argument).

168. Zaring, *supra* note 5, at 1201.

169. Mann, *supra* note 6, at 1844.

than criminal sanctions.¹⁷⁰ Civil penalties are considered to form a “middle ground” or “hybrid” jurisprudence in which the purpose is punishment but the procedure is primarily civil.¹⁷¹

The Dodd-Frank Act granted the SEC the power to impose civil penalties on anyone in its “in-house” administrative proceedings where the SEC can enjoy a “home court advantage.”¹⁷² The increased use of administrative proceedings naturally has invited many criticisms and challenges.¹⁷³ The SEC has used “all the tools in [their] toolkit” to protect investors and enhancing public trust.¹⁷⁴ The SEC’s enforcement authority, however, may have been enhanced too greatly, and the SEC needs to give up one tool—imposition of civil penalties in administrative proceedings.

170. *See id.* at 1797-98 (arguing plaintiffs in civil cases sometimes seek “punitive” civil sanctions, which purpose is to punish wrongdoing).

171. *Id.* at 1799.

172. *See supra* Chapter II.A (providing an overview of the administrative proceedings).

173. *See supra* notes 8-9 (providing relevant articles and cases).

174. *SEC Announces Enforcement Results for Fiscal Year 2023*, U.S. SEC. AND EXCH. COMM’N. (Nov. 14, 2023), <https://www.sec.gov/news/press-release/2023-234>.

