Extending *Jarkesy*: The Constitutionality of the Aviation Administrative Enforcement Process

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ABSTRACT

Last year the Supreme Court decided SEC v. Jarkesy. *Of the three issues presented, the Court ruled on just one of them: whether the Securities and Exchange Commission's (SEC) administrative adjudication of civil penalties without a jury violates the Seventh Amendment. In the decision below, the Fifth Circuit decided two other issues related to the nondelegation doctrine and Article II removal powers. It was not just the Court's avoidance of two major issues that left some commentators wanting more. The Court's focus on SEC enforcement process makes it difficult to determine how* Jarkesy *will be applied in other contexts. This includes: (1) whether a civil penalty remedy alone makes an offense legal in nature; (2) the extent of exceptions for equity and admiralty jurisdictions; (3) whether the public rights exception is limited to only the categories the Court listed; and (4) Atlas Roofing's continued viability.*

This article analyzes the aviation enforcement process under Jarkesy *in an attempt to answer some of these outstanding questions. Through that lens, it becomes clear that* Jarkesy *extended the Seventh Amendment to cover all actions that are not in equity or admiralty. That means civil penalties with a deterrent or punitive motive are legal in nature regardless of the triggering violation's common law pedigree. The six public rights exception categories are not easily expandable and may only be modified if the matter historically could have been determined by the executive or legislative branch. Finally, Atlas Roofing uses an outdated and now abandoned approach to the Seventh Amendment and has been limited to its facts.*

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INTRODUCTION

The Supreme Court's October 2023 term featured three cases with major implications on administrative law.[1] *SEC v. Jarkesy* involved three challenges to the Securities and Exchange Commission's (SEC) administrative enforcement process under the Seventh Amendment, nondelegation doctrine, and Article II of the Constitution.[2] The Court only addressed the Seventh Amendment challenge. This left two major issues undecided: whether allowing SEC the choice to enforce civil penalties via in-house administrative or Article III judicial proceedings violates the nondelegation doctrine and whether dual-layered for-cause removal protections for SEC Administrative Law Judges (ALJs) violates Article II.[3] Moreover, the Court's Seventh Amendment analysis is quite specific to SEC securities fraud enforcement, making it difficult to map *Jarkesy*'s holding onto other administrative enforcement regimes.

To apply *Jarkesy* to other contexts, courts must understand the new scope of the Seventh Amendment. The Supreme Court has now recognized that the Seventh Amendment covers all actions that are legal in nature, which means any action that is not in equity or admiralty.[4] The Seventh Amendment covers all actions legal in nature, including those subject to the public rights exception. It is the public rights exception that then works to remove the jury trial right.[5] To qualify for the public rights exception, the matter must generally fall into one of the six historically recognized categories.[6] Because it is an exception the government has the burden to show the action fits into one of these categories.[7] This list is not subject to expansion unless the matter historically could have been determined exclusively by the executive or legislative branch.[8] *Atlas Roofing* has been considered a public rights case.[9] But careful attention to the Court's reasoning and supporting authorities reveals that the Court decided civil penalties for Occupational Safety and Health standards were outside the Seventh Amendment's scope because they were not suits at common law.[10] That approach does not fit with the Supreme

1. SEC v. Jarkesy, 603 U.S. 109 (2024); Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024); Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 603 U.S. 799 (2024).

2. Petition for Writ of Certiorari at 1, SEC v. Jarkesy, 603 U.S. 109 (No. 22-859), *cert granted*, 143 S. Ct. 2688 (2023) (certiorari granted without limiting questions presented).

3. *Id.*; *see also* Jarkesy v. SEC, 34 F.4th 446, 451 (5th Cir. 2022) (holding that the SEC administrative enforcement process violates the nondelegation doctrine and Article II's removal powers).

4. *Jarkesy*, 603 U.S. at 122 (quoting Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 447 (1830)).

5. *Id.* at 127 ("Although the claims at issue here implicate the Seventh Amendment, the Government and the dissent argue that a jury trial is not required because the "public rights" exception applies.").

6. The list includes revenue collection, immigration and foreign commerce, tariffs, relations with Indian tribes, adjudicating public land grants, and granting public benefits. *Id.* at 128–30.

7. *Id.* at 131 ("The public rights exception is, after all, an *exception*." (emphasis in original)).

8. *Id.* at 127–28.

9. Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n, 430 U.S. 442 (1977); *see Jarkesy*, 603 U.S. at 135–36.

10. *Atlas Roofing*, 430 U.S. at 461.

Court's Seventh Amendment jurisprudence since *Granfinanciera*, and the decision is largely limited to its facts if not overruled *sub silentio*.[11]

In expounding *Jarkesy*'s impact on administrative agencies, lower courts—and perhaps eventually the Supreme Court—will have to grapple with how to apply these principles in challenges brought against individual agencies. In light of this approach, this article uses the aviation administrative enforcement process as an example of *Jarkesy*'s broader impact on administrative enforcement regimes. Aviation enforcement provides a helpful analytical example because it touches on four considerations that are key to expounding *Jarkesy*: (1) whether a civil penalty remedy alone makes an offense legal in nature; (2) the extent of exceptions for equity and admiralty jurisdiction; (3) whether the public rights exception is limited to only the categories the Court listed; and (4) *Atlas Roofing*'s continued viability. In answering these questions in the aviation context, this paper will attempt to derive general principles applicable to other administrative enforcement structures. This includes how to apply the Fifth Circuit's alternate holdings on nondelegation and Article II removal powers.

Part I of this article discusses the Fifth Circuit and Supreme Court's decisions in *Jarkesy*. Part II explains the aviation administrative enforcement process and compares it to SEC's in-house adjudication regime. Part III explains the Seventh Amendment's expanded scope and discusses civil penalties, *Atlas Roofing*, equity and admiralty jurisdiction, and applies all of them to aviation. Part IV discusses what is left of the public rights exception. Part V applies the Fifth Circuit's alternate holdings on the nondelegation doctrine and Article II removal powers, which are still good law in that circuit.

I. SEC ADMINISTRATIVE ENFORCEMENT AND THE CASE AGAINST GEORGE JARKESY

A. Case Background and SEC Administrative Adjudication

SEC v. Jarkesy began when the SEC initiated an enforcement action against George Jarkesy and the fund he managed, Patriot28.[12] From 2007 to 2010, Jarkesy raised $24 million from 120 investors.[13] The SEC alleged Jarkesy defrauded his investors by misrepresenting the fund's investment strategies, auditor, prime broker, and also inflated asset valuations to collect larger fees.[14] SEC began its investigation in 2011.[15] In 2013, the SEC Commissioners approved securities fraud charges under the Securities Act of 1933, the Securities Exchange Act of 1934, and the Investment Advisers Act of 1940.[16] Congress had

11. *See Jarkesy*, 603 U.S. at 138 ("The reasoning of Atlas Roofing cannot support any broader rule."); Granfinanciera v. Nordberg, 492 U.S. 33, 71 n.1 (1989) (White, J., dissenting) ("the Court's opinion can be read as overruling or severely limiting . . . *Atlas Roofing*").

12. *Jarkesy*, 603 U.S. at 118-19.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 115–116.

passed, and the president signed into law, these three Acts to remedy ills stemming from the Wall Street Crash of 1929.[17] The SEC's enforcement process changed little over the next six decades.[18]

For most of the SEC's history, the commission could only seek civil penalties if it filed the case in an Article III federal court.[19] But in 2010, Congress authorized the SEC to adjudicate civil penalties through in-house proceedings.[20] It did so by augmenting the SEC's cease-and-desist authorities—an equitable proceeding—to also authorize the commission to impose civil penalties.[21] The SEC retained the option to seek civil penalties in federal court, and Congress gave the Commission complete discretion in choosing the prosecution's forum.[22] In Mr. Jarkesy's case, the SEC decided to use its new authority to adjudicate the charges in-house.[23]

When the SEC adjudicates securities violations in-house, the Commission presides as a factfinder and makes legal determinations, while the SEC's Division of Enforcement serves as the prosecutor.[24] As it did in Jarkesy's case, the SEC can delegate its presiding role to an agency ALJ.[25] The ALJ has significant power to control the proceedings, which includes ruling on admission of evidence and punishing contemptuous conduct.[26] The ALJ's decision is final unless the Commission reviews the case.[27] Such review is discretionary in the case of civil penalties.[28]

During in-house adjudications, the SEC's Rules of Practice govern rather than the Federal Rules of Civil Procedure and Federal Rules of Evidence.[29] SEC rules

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17. *Id*. at 115.

18. *See* 15 U.S.C. §§ 77h–1 (note), 78u–2 (note), 80a–9 (note) (explaining historical amendments to the three statutes).

19. *Jarkesy*, 603 U.S. at 118 (citing Insider Trading Sanctions Act of 1984, §2, 98 Stat. 1264 and Securities Enforcement Remedies and Penny Stock Reform Act of 1990, §§ 101, 201–202, 104 Stat. 932–933, 935–938). "Article III courts" refers to those courts in which the constitution vests "[t]he judicial Power of the United States" and whose judges have lifetime tenure and salary protections. U.S. Const. art. III, §§ 1–2; *see Jarkesy*, 603 U.S. at 147 (Gorsuch, J., concurring).

20. Dodd-Frank Wall Street Reform and Consumer Protection Act, § 929P(a), 124 Stat. 1376, 1862–64 (2010) (amending section 21B(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78u–2(a), and section 9(d)(1) of the Investment Company Act of 1940, 15 U.S.C. 80a–9(d)(1)).

21. *Id*. § 929P(a)(1), (3). The SEC's cease-and-desist authority allows the Commission to order a person found violating the Securities Act, Securities Exchange Act, or Investment Advisers Act to cease further offending conduct. 15 U.S.C. §§ 77h–1(a), 78u–3(a), 80a–9(f). This finding is made by the Commission alone, after notice and an opportunity for hearing. *Id*. Once this finding is made, the SEC can impose civil penalties at an amount the Commission chooses, subject to statutory maxima based on tiers of conduct. *Id*. §§ 77h–1(g), 78u–2, 80a–9(d). Judicial review is available, but courts will not overturn the SEC's factual findings so long as there is sufficient support in the record. *Id*. §§ 77i(a), 78y (a)(1), 80b-13(a); Richardson v. Perales, 402 U. S. 389, 401 (1971).

22. *Jarkesy*, 603 U.S. at 117.

23. *Id*. at 117–18.

24. *Id*. at 117.

25. *Id*. at 117, 119; 15 U.S.C. § 78d–1.

26. Jarkesy v. SEC, 34 F.4th 446, 464 (5th Cir. 2022).

27. 17 C.F.R. § 201.360(d)(2).

28. *See* 17 C.F.R. § 201.411(b).

29. *Jarkesy*, 603 U.S. at 117; 17 C.F.R. pt. 201, subpart D.

do not provide a general right to discovery beyond "material exculpatory evidence," strictly limit the number of depositions, and require the ALJ to approve subpoenas, which they often narrow or decline to approve.[30] The SEC's evidence rules allow the ALJ to consider some categories of evidence, such as hearsay, that would be inadmissible under the Federal Rules of Evidence.[31] The SEC's rules also set a fast-tracked trial schedule that can leave litigants little time to review the charges and evidence.[32] In Jarkesy's case, the SEC's disclosure contained 700 gigabytes of data, which Justice Gorsuch notes "would take two lawyers or paralegals working twelve-hour days over four decades to review."[33] The ALJ gave Jarkesy 10 months to review this disclosure and prepare for the hearing.[34]

Once the ALJ makes his or her decision, a person may appeal to the full Commission.[35] The Commission may overturn the ALJ's decision in the case of prejudicial error, a factual finding that is "clearly erroneous," an erroneous conclusion of law, or if the ALJ exercised discretion that is "important."[36] Although the ALJ's decision becomes final absent an appeal to the Commission, a person cannot seek judicial review unless he or she appeals to the full Commission.[37] Once the Commission decides the appeal or declines review, a person may seek judicial review in the court of appeals circuit where the person resides or in the U.S. Court of Appeals for the D.C. Circuit.[38]

Jarkesy objected to SEC's in-house adjudication from the beginning. He first attempted to obtain an injunction against the agency proceedings, arguing it violated the Administrative Procedure Act (APA) and his constitutional due process rights.[39] The district court held that the statutory judicial review provisions for SEC actions precluded his collateral attack.[40] Thus Jarkesy had to raise his constitutional challenges through the SEC in-house enforcement process.[41] Unsurprisingly, he was not successful.[42] After the full Commission affirmed the ALJ's decision, Jarkesy sought review in the U.S. Court of Appeals for the Fifth Circuit in 2020.[43]

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30. *Jarkesy*, 603 U.S. at 143 (Gorsuch, J., concurring).

31. *Id.* at 117 (majority opinion); *id.* at 143 (Gorsuch, J., concurring). This inadmissible evidence cannot later be challenged when a party is eventually allowed to seek judicial review in an Article III court. *Id.* at 117 (majority opinion) (citing Richardson v. Perales, 402 U.S. 389, 401 (1971)).

32. *Id.* at 144 (Gorsuch, J., concurring).

33. *Id.* (quoting Compl., Jarkesy v. U.S. SEC, No. 1:14-cv-00114 (D.D.C. Jan. 29, 2014), ECF No. 1, ¶ 49, pp. 12-13 (internal quotations omitted)).

34. *Id.*

35. 17 C.F.R. § 201.411.

36. 17 C.F.R. § 201.411(b)(2)(i)–(ii).

37. 17 C.F.R. § 201.410(e).

38. 15 U.S.C. §§ 77i(a), 78y(a)(1), 80b–13(a).

39. Jarkesy v. U.S. SEC, 48 F. Supp. 3d 32, 35 (D.D.C. 2014), *aff'd*, 803 F.3d 9, 12 (D.C. Cir. 2015).

40. *Jarkesy*, 48 F. Supp. at 40; *but see* Axon Enter. v. FTC, 598 U.S. 175, 195–96 (2023) (holding that collateral constitutional challenges to agency enforcement proceedings may be brought in district court).

41. *See* Jarkesy v. SEC, 34 F.4th 446, 450 (5th Cir. 2022) (listing five arguments the Commission rejected on appeal).

42. *Id.*

43. *Id.*; Petition for Review, Jarkesy v. SEC, No. 20-61007, (5th Cir. Nov. 2, 2020), ECF No. 1.

This was the first time an Article III court heard the merits of his constitutional claim—seven years after SEC announced the charges.

B. The Fifth Circuit's Decision

In the Fifth Circuit Jarkesy raised three main challenges to the SEC's enforcement process: (1) adjudication by an agency ALJ deprived him of the right to a jury trial under the Seventh Amendment; (2) allowing the SEC to choose between in-house adjudication and an Article III court violates the nondelegation doctrine; and (3) removal protections for SEC ALJs violate Article II.[44] The Fifth Circuit agreed with all three challenges and vacated the SEC's decision.[45]

First, the Fifth Circuit held that SEC in-house adjudication violates the Seventh Amendment.[46] Jarkesy argued the Seventh Amendment requires a jury trial for securities fraud cases involving a civil penalty.[47] The SEC countered that prosecutions for securities fraud fall within the Seventh Amendment's public rights exception.[48] To resolve this, the Fifth Circuit traced the origins of the Seventh Amendment jury right, holding that fraud actions are the kinds of cases that would have been brought in common law courts at the founding.[49] Because securities fraud cases "are not new actions unknown to the common law" and "are not uniquely suited for agency adjudication" they do not fall within the public rights exception.[50] In essence, the Fifth Circuit's Seventh Amendment and public rights analysis runs together: if a case involves a traditional common law claim and remedy, Congress cannot assign its adjudication to a juryless tribunal.

Second, the Fifth Circuit held that allowing the SEC to choose between in-house adjudication and an Article III court violates the nondelegation doctrine. Jarkesy argued the SEC's choice between forums conferred legislative power without an intelligible principle.[51] The SEC argued this choice is a form of prosecutorial discretion.[52] The court held that forum choice is an exercise of legislative power because it affects the legal processes the defendant receives.[53] Citing *Crowell v. Benson*, the court said "'the mode of determining' which cases are assigned to administrative tribunals 'is completely within congressional control.'"[54] Then the court noted "[e]ven the SEC agrees that Congress has given it exclusive authority and absolute discretion to decide" the prosecution forum.[55] Because Congress delegated

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44. *Jarkesy*, 34 F.4th at 450.
45. *Id.* at 450, 466.
46. *Id.* at 451.
47. *Id.*
48. *Id.*
49. *Id.* at 451–54.
50. *Id.* at 455.
51. *Id.* at 459.
52. *Id.* at 461–62.
53. *Id.* at 462. *See also* SEC v. Jarkesy, 603 U.S. 109, 143 (Gorsuch, J., concurring); *infra* pp. 8, 12–13 (discussing procedural differences between SEC's in-house adjudication and an Article III court).
54. *Jarkesy*, 34 F.4th at 461 (citing Crowell v. Benson, 285 U.S. 22, 50 (1932)).
55. *Id.* at 462.

away its case assignment control and did not provide any intelligible principle, the SEC's power to choose the forum violates the nondelegation doctrine.[56]

Third, the Fifth Circuit held that dual-layered for-cause removal protections for SEC ALJs violates Article II.[57] The Supreme Court has interpreted the Constitution's Take Care Clause[58] to give the President control over executive officers that perform "sufficiently important executive functions."[59] That control includes both appointment and removal.[60] The Fifth Circuit determined that the SEC ALJ's power to control proceedings, admit evidence, and issue final, binding decisions are important executive functions.[61] True, the Supreme Court has carved out exceptions for principal officers on expert boards and has blessed for-cause removal protection for some inferior officers.[62] But an officer cannot have both layers of for-cause removal protection between the officer and the President.[63] This becomes a problem when all agency ALJs have for-cause removal protection.[64] SEC ALJs are appointed by the SEC, whose Commissioners also have for-cause removal protection,[65] and ALJs can only be removed for cause as determined by the Merit Systems Protection Board (MSPB), whose members also have for-cause removal protection.[66] The Fifth Circuit held that these two layers (minimum) of for-cause removal protection for SEC ALJs violates Article II.[67] But the court reserved its judgment on whether the Article II violation alone warrants vacating a SEC ALJ's decision.[68]

Judge Davis dissented as to the majority's three holdings.[69] Judge Davis would have applied the public rights exception,[70] held that choosing the prosecution's forum is an exercise of prosecutorial discretion,[71] and held that ALJs perform adjudicative and recommending functions that are not important executive functions.[72] For those reasons, he would have denied Jarkesy's petition for review.

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56. *Id*. at 459, 463.
57. *Id*. at 463.
58. U.S. CONST. art. II, § 3 ("[The President] shall take Care that the Laws be faithfully executed").
59. *Jarkesy*, 34 F.4th at 463.
60. *Id*. at 463.
61. *Id*. at 464 (citing Lucia v. SEC, 138 S. Ct. 2044, 2053 (2018)).
62. *See* Humphrey's Executor v. United States, 295 U.S. 602 (1935); Morrison v. Olson, 487 U.S. 654 (1988).
63. *Jarkesy*, 34 F.4th at 464 (citing Free Enter. Fund v. Public Co. Acct. Oversight Bd., 561 U.S. 477, 492, 496 (2010)).
64. 5 U.S.C. § 7521(a).
65. *Jarkesy*, 34 F.4th at 464–65; *see also Free Enter. Fund*, 561 U.S. at 487 (for-cause removal for SEC Commissioners).
66. *Jarkesy*, 34 F.4th at 464–65; *see also* 5 U.S.C. § 1202(d) (for-cause removal for Merit Systems Protection Board members).
67. *Id*. at 465.
68. *Id*. at 465–66.
69. *Id*. at 466 (Davis, J., dissenting).
70. *Id*. at 466–70 (Davis, J., dissenting).
71. *Id*. at 473–75 (Davis, J., dissenting).
72. *Id*. at 475–79 (Davis, J., dissenting).

C. The Supreme Court's Decision

The Supreme Court's grant of certiorari included three questions presented covering each of the Fifth Circuit's major holdings.[73] However, the Supreme Court only decided the Seventh Amendment question and affirmed the Fifth Circuit on that ground alone.[74]

Although the Supreme Court came to the same conclusion on the Seventh Amendment, its approach differs from the Fifth Circuit. The Fifth Circuit used a blended approach, relying on the securities fraud claim's common law roots to determine that the Seventh Amendment jury trial right applied and that securities fraud did not involve a public right.[75] The Supreme Court bifurcated this analysis.[76] First, the Court explained "[t]he Seventh Amendment extends to a particular statutory claim if the claim is 'legal in nature.'"[77] That analysis looks to the cause of action and remedy as a whole, and does not depend on links to an ancestral common law action.[78] Once an action is within the Seventh Amendment's scope, the Court looks to the public rights exception.[79]

The Court began its public rights analysis by noting that a suit "in the nature of an action at common law . . . presumptively concerns private rights, and adjudication by an Article III court is mandatory."[80] It also recognized that "the presumption is in favor of Article III courts" even when public rights are arguably involved.[81] So instead of proving an action is not a public right—as the Fifth Circuit's analysis proceeds[82]—the government must show that the action it seeks to prosecute in-house fits within the exception.[83] The Court then went through historic invocations of the public rights exception: cases involving revenue collection, immigration and foreign commerce, tariffs, relations with Indian tribes, adjudicating public land grants, and granting public benefits.[84] It also looked to a modern invocation of public rights in *Atlas Roofing*.[85] The Court held that securities fraud did not fall within any of the recognized exceptions.[86] With the

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73. Petition for Cert., Writ of Certiorari at I, SEC v. Jarkesy, 603 U.S. 109 (No. 22-859), *cert granted*, 143 S. Ct. 2688 (2023) (certiorari granted without limiting questions presented).

74. *Jarkesy*, 603 U.S. at 139.

75. Jarkesy v. SEC, 34 F.4th 446, 451–55 (5th Cir. 2022).

76. Although the Fifth Circuit explains the Seventh Amendment analysis as a two-step rule, its analysis on the two steps runs together. *Id*. at 453–57.

77. *Jarkesy*, 603 U.S. at 121 (quoting Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 53 (1989)).

78. *Id*. at 123.

79. *See id*. at 127.

80. *Id*. at 128.

81. *Id*. at 132.

82. Jarkesy v. SEC, 34 F.4th 446, 453 (5th Cir. 2022).

83. *Jarkesy*, 603 U.S. at 131 ("The public rights exception is, after all, an *exception*.").

84. *Id*. at 127–29 (citing Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1856); Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320 (1909); Ex parte Bakelite Corp., 279 U.S. 438 (1929); United States v. Jicarilla Apache Nation, 564 U.S. 162 (2011); Crowell v. Benson, 285 U.S. 22 (1932); United States v. Duell, 172 U.S. 576 (1899)).

85. *Id*. at 136–40; Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n, 430 U.S. 442 (1977).

86. *Jarkesy*, 603 U.S. at 135, 139.

common law roots of securities fraud as confirmation, the Court held the public rights exception did not apply.[87] The Seventh Amendment guaranteed Jarkesy a right to a jury trial.

Justice Gorsuch, joined by Justice Thomas, concurred. The concurrence emphasized how the Seventh Amendment, Article III, and the Fifth Amendment's Due Process Clause work together to require a jury trial before an impartial tribunal.[88] It noted that litigants in agency ALJ proceedings have less procedural protections and that the SEC's win rate was much higher in front of its own ALJs than in an Article III court.[89] Justice Gorsuch analogized the SEC's in-house adjudication to the British government's efforts to steer prosecutions in the American Colonies to vice admiralty courts.[90] Vice admiralty courts lacked a jury, had less procedural protections, and its judges served at the pleasure of the royal administration rather than enjoying life tenure.[91] These courts heard the same kinds of cases that in England had to be brought in common law courts with a jury.[92] Although Parliament did not require these cases be brought in vice admiralty courts, like Congress did with the SEC, Parliament gave colonial officials the discretion to proceed in common law or admiralty courts.[93]

The Fifth Amendment's procedural requirements for depriving a person of life, liberty, or property support the Seventh Amendment and Article III's protections.[94] As originally understood, due process requires a person receive "those customary procedures to which freemen were entitled by the old law of England" including an impartial judge and jury, notice of allegations, an opportunity to answer, and "a trial according to some settled course of judicial proceedings."[95]

The concurrence continued its Seventh Amendment, Article III, and Fifth Amendment analysis as it applies to the public rights exception. Quite notably, the concurrence would hold that the existing list of public rights the Court has previously recognized is not subject to expansion.[96] Public rights must have "a serious and unbroken historical pedigree" with a "deeply rooted tradition of nonjudicial adjudication" to overcome the presumption in favor of Article III courts.[97] These limits come not only from the Seventh Amendment, but also Article III

87. *Id*. at 125, 133–34 (analogizing to the statutory fraud claim in Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989)).

88. *Id*. at 141 (Gorsuch, J., concurring).

89. *Id*.

90. *Id*. at 145–46.

91. *Id*.

92. *Id*. at 147.

93. *Id*.

94. *Id*. at 148–52.

95. *Id*. at 150 (quoting Sessions v. Dimaya, 584 U.S. 148, 176 (2018) (Gorsuch, J., concurring in part and concurring in judgment)); Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 280 (1856)).

96. *See id*. at 157 ("[O]utside of those limited areas, 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 normally demands.").

97. *Id*. at 154.

and the Fifth Amendment as well.[98] The concurrence finished by explaining how subsequent decisions in *Granfinanciera* and *Tull* cabined *Atlas Roofing* and criticized the dissent's broad and unqualified conception of the public rights exception.[99]

The dissent takes an inverse approach to the Seventh Amendment. The majority starts its analysis by determining if the claim is legal in nature.[100] If yes, the Seventh Amendment and Article III apply, requiring a jury trial in an Article III court.[101] The dissent instead starts with Article III.[102] It reasons that if it is not mandatory for an action to be heard in an Article III court, then Congress can assign it to a juryless forum without running afoul of the Seventh Amendment.[103] In that way, Congress's assignment to in-house adjudication works to transform an action from a *legal claim* at common law into a mere *adjudication* that is "free from the strictures of the Seventh Amendment."[104]

Although the dissent says its Seventh Amendment analysis "depends on both the forum and the cause of action," the cause of action and remedy play a very small role.[105] A claim's common law origin matters little to the dissent's analysis, since Congress can create statutory causes of action with small enough changes to differentiate them from a common law ancestor.[106] In the case of securities fraud, the dissent notes the Government's ability as a sovereign to recover for fraud was "unknown to the common law."[107] That meant Congress "effectively supplant[ed] a common law cause of action carrying with it a right to a jury trial with a statutory cause of action shorn of a jury trial right."[108] Therefore Congress's forum assignment becomes all but dispositive to the dissent's Seventh Amendment analysis.

The dissent also flips the public rights exception analysis. The majority notes the limits of the public rights exception, reminding us "[t]he public rights exception is, after all, an *exception*."[109] In contrast, the dissent would allow Congress to assign to administrative adjudication any claim that does not neatly fit into the private rights category.[110] As part of this broad concept of public rights, the dissent puts forth the following definition: public rights exist any time "the

98. *Id.* at 159.

99. *Id.* at 157-59, 166 (citing Tull v. United States, 481 U.S. 412 (1987) and Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989)).

100. *Id.* at 121 (majority opinion).

101. *Id.* at 126.

102. *Id.* at 171 (Sotomayor, J., dissenting) ("Although this case involves a Seventh Amendment challenge, the principal question at issue is one rooted in Article III and the separation of powers."); *see also id.* at 173. (Sotomayor, J., dissenting) ("The Article III analysis should be conducted first, on its own.") (quoting Will Baude, *Adjudication Outside Article III*, 133 HARV. L. REV. 1511, 1571 (2020)).

103. *Id.* at 173 ("[I]f non-Article III adjudication is permissible, then the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder . . . ." (cleaned up)).

104. *Id.* at 171, 189–90.

105. *Id.* at 171.

106. *Id.* at 190.

107. *Id.* at 194.

108. *Id.* at 192 (quoting Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 53 (1989)).

109. *Id.* at 131 (majority opinion).

110. *See id.* at 192 (Sotomayor, J., dissenting) (explaining a claim must go to an Article III court only if "a statutory right is not closely intertwined with a federal regulatory program Congress has

Government is involved in its sovereign capacity under an otherwise valid statute."[111] Both the majority and concurrence heavily criticize this formulation, arguing it has no limiting principle to stop Congress from legislating around the Seventh Amendment's jury trial right.[112]

II. AVIATION CIVIL PENALTY ENFORCEMENT PROCESS

A. Administrative Assessment and Adjudication by FAA, DOT, and DHS

Congress has empowered three federal agencies to use administrative adjudication in seeking civil penalties for aviation-related violations: the Department of Transportation (DOT) enforces economic and consumer protection laws;[113] the Federal Aviation Administration (FAA) enforces aviation safety laws;[114] and the Department of Homeland Security (DHS) enforces aviation security laws.[115] Each agency is authorized to employ ALJs to adjudicate civil penalties in-house.[116] However, in the case of civil penalties against a pilot, mechanic, repairman, or flight engineer, an individual may "appeal" a FAA-imposed civil penalty for an initial hearing before a National Transportation Safety Board (NTSB) ALJ.[117] Although FAA has the authority to employ ALJs, its current practice refers civil penalty cases to DOT ALJs, who apply FAA's rules of practice.[118] All four agencies have rules of practice set forth in the Code of Federal Regulations.[119]

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power to enact, *and* if that right neither belongs to nor exists against the Federal Government") (quoting Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 54–55 (1989)).

111. *Id*. at 195 (quoting Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n, 430 U.S. 442, 458 (1977)).

112. *Id*. at 140 (majority opinion); *id*. at 158–60 (Gorsuch, J., concurring).

113. 49 U.S.C. § 46301(c)(1). The list of chapters in subparagraph (A) are all in title 49, subtitle VII, pt. A, subpart ii, which is titled "Economic Regulation."

114. *Id*. §§ 44704(e)(4)–(5), 46301(d)(2). Both Congress and the Secretary of Transportation have empowered the FAA Administrator to carry out the Secretary's functions related to aviation safety. *See id*. § 106(f)(3); 49 C.F.R. § 1.83(a).

115. 49 U.S.C. § 46301(d)(2) ("The Secretary of Homeland Security may impose a civil penalty for a violation of chapter 449"). Chapter 449 is titled "Security." *Id*. subtitle VII, pt. A, subpart iii.

116. *See* 5 U.S.C. § 3105; 49 U.S.C. § 1113(a)(1) (NTSB); 14 C.F.R. § 13.205 (FAA); *id*. § 302.17 (DOT); 49 C.F.R § 1503.607 (DHS).

117. 49 U.S.C. § 46301(d)(5)(B); *id*. § 1133(4).

118. FED. AVIATION ADMIN., FAA ORDER NO. 2150.3C, at 8–24 (Nov. 14, 2022), https://www.faa.gov/documentLibrary/media/Order/FAA_Order_2150.3C_includingCHGS1-10.pdf [https://perma.cc/FBN6-HURP]; *see also Civil Penalty Appeals*, FED. AVIATION ADMIN., https://www.faa.gov/about/office_org/headquarters_offices/agc/practice_areas/adjudication/civil_penalty [https://perma.cc/L2DM-KHGP] ("If the respondent does not accept the proposed penalty, it may request a hearing before an ALJ at the Department of Transportation's Office of Hearings."). According to FAA, its ALJs currently preside over informal hearings, which are outside the scope of civil penalties. *Adjudication*, FED. AVIATION ADMIN., https://www.faa.gov/about/office_org/headquarters_offices/agc/practice_areas/adjudication [https://perma.cc/L6KL-S59D] ("The Office of Adjudication provides administrative judges to hear informal matters governed by subpart D of Part 13"); *see* 14 C.F.R. § 13.37(a) (referring to such employees as "hearing officers").

119. 14 C.F.R. pt. 13, subpart G (FAA); *id*. pt. 302, subpart D (DOT); 49 C.F.R. pt. 821 (NTSB); *id*. pt. 1503, subpart G (DHS).

Aviation civil penalty enforcement actions typically proceed in the following manner. First, the relevant agency gives notice of the violation and proposed civil penalty.[120] If the matter is not settled through informal means or a settlement,[121] the person can request a hearing in front of an ALJ.[122] Then the ALJ renders an initial decision on the record.[123] This decision becomes final unless the agency grants an appeal.[124] The losing side—either the person found in violation or the agency—can appeal to an agency decisionmaker. In the case of FAA, this is the FAA Administrator or his designee.[125] In the case of DOT, this is the Assistant Secretary for Aviation and International Affairs, unless the Secretary or Deputy Secretary of Transportation chooses to directly exercise review power.[126] In the case of DHS, this is the Transportation Security Administration Administrator or his designee.[127] In the case of FAA proceedings adjudicated by NTSB, this is the full five-member NTSB.[128] Appeals of a final agency decision may be filed in the court of appeals for the circuit in which the person resides or the D.C. Circuit.[129] Once the case arrives in an Article III court, the facts are reviewed under the substantial evidence standard, and the agency's decision will be upheld unless it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[130]

B. Similarities Between Aviation and SEC Administrative Adjudication

Although there are some variations amongst FAA, DOT, and DHS, their structure and procedures are quite similar to the SEC's in-house enforcement process.

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120. 49 U.S.C. § 46301(c)(1), (d)(2); 14 C.F.R. §§ 13.16(f), 13.18(d) (FAA); *id.* § 302.406(a)(1) (DOT); 49 C.F.R. § 1503.413 (DHS).

121. 49 U.S.C. § 46301(f) (DOT); 14 C.F.R. §§ 13.16(n), 13.18(i) (FAA); 49 C.F.R. § 1503.425 (DHS).

122. 49 U.S.C. § 46104(e); 14 C.F.R. § 13.16(i) (FAA); *id.* § 302.23 (DOT); 49 C.F.R. pt. 821, subpart F (NTSB); *id.* § 1503.427 (DHS).

123. 49 U.S.C. § 46102(c); 14 C.F.R. § 13.232 (FAA); *id.* § 302.31(a)(1) (DOT); 49 C.F.R. § 821.42 (NTSB); *id.* § 1503.655 (DHS).

124. 14 C.F.R. § 13.232(e) (FAA); *id.* § 302.31(d) (DOT); 49 C.F.R. § 821.43 (NTSB); *id.* § 1503.655(c) (DHS).

125. *Id.* §§ 13.202, 13.233.

126. *Id.* §§ 302.18(a), (c), 302.32.

127. 49 C.F.R. §§ 1503.103, 1503.657.

128. *Id.* § 821.47.

129. 49 U.S.C. § 46110, 46301(g). Although not applicable to civil penalties, it is worth mentioning that the Pilot's Bill of Rights allows an appeal of a certificate action (i.e. suspending or revoking a pilot's certificate) under 49 U.S.C. § 44709 to be filed in a federal district court, and that court must "give full independent review." Pilot's Bill of Rights, Pub. L. No. 112–153, § 2(e)(1), 126 Stat. 1159, 1161 (2012). Few courts have addressed what "full independent review" means, and those that have addressed it have struggled with this novel kind of review. Two courts determined that phrase does not displace the APA's traditional deferential standard of review. Creighton v. DOT, No. 6:13-cv-907-Orl-18TBS, 2014 U.S. Dist. LEXIS 50616, at *7 (M.D. Fla. Feb. 28, 2014); Dustman v. Huerta, No. 13 C 3565, 2013 U.S. Dist. LEXIS 152471, at *17 (N.D. Ill. Oct. 23, 2013). Only one has held "full independent review" means de novo review. Johns v. Whitaker, No. 4:23-cv-00761-MTS, 2024 U.S. Dist. LEXIS 178865, at *6 (E.D. Mo. Sep. 30, 2024).

130. 49 U.S.C. § 46110(c); 5 U.S.C. § 706(2); *see, e.g.*, Palmer v. FAA, 103 F.4th 798, 802 (D.C. Cir. 2024), Zukas v. Hinson, 124 F.3d 1407, 1409 (11th Cir. 1997).

Like the SEC, these agencies employ their own ALJs, who make findings of fact and conclusions of law that are binding on the parties. The ALJ's decisions become final absent an appeal. Their decisions are subject to review by their respective Department's leadership. Each agency wrote for itself rules of practice that apply in place of the Federal Rules of Civil Procedure and Federal Rules of Evidence.[131] The ALJs themselves have significant powers over the proceedings, to include issuing subpoenas, ruling on the admissibility of evidence, deciding dispositive motions, and controlling contemptuous conduct.[132] And of course, none of these agency proceedings have a jury.

Also like the SEC, aviation civil penalties can either be enforced in-house or in federal district court at the agency's discretion. As is the case with SEC, the statute that authorizes administrative adjudication of civil penalties gives the agency *discretion* not an *obligation* to proceed in-house.[133] In the aviation context, that discretion exists when the FAA or DHS seeks a penalty for $100,000 or less if committed by an individual or small business, or $1.2 million or less for all others.[134] Above that amount, the statute gives federal district courts "exclusive jurisdiction" over a civil penalty action.[135] But neither the statute nor regulations require in-house adjudication when the amount is lower than that threshold.[136] DOT is not subject to this threshold, so DOT's administrative adjudication and federal district courts have concurrent jurisdiction over all DOT aviation civil penalties.[137]

Also similar to the SEC, administrative adjudication of aviation civil penalties is relatively new. The federal government has regulated aviation in some form for 99 years—since the Air Commerce Act of 1926 (predating the SEC).[138] But the FAA did not have the permanent power to administratively adjudicate general civil penalties until the FAA Civil Penalty Administrative Assessment Act of 1992.[139] Before FAA had this authority, it had to refer civil penalties to the

131. *See generally* 14 C.F.R. pt. 13, subpart G (FAA); *id.* pt. 302, subpart D (DOT); 49 C.F.R. pt. 1503, subpart G (DHS).

132. *Compare* 17 C.F.R. § 201.111 (powers of SEC hearing officer), *with* 14 C.F.R. § 13.205 (ALJs in FAA civil penalty proceedings), *id.* § 302.17 (DOT ALJs), *and* 49 C.F.R. § 1503.607 (DHS ALJs).

133. *Compare* 15 U.S.C. §§ 77h–1(g), 78u–2, 80a–9(d), *with* 49 U.S.C. § 46301(c)–(d).

134. 49 U.S.C. § 46301(d)(4)(A).

135. *Id.* § 46301(d)(4).

136. *See id.* § 46107(b). 14 C.F.R. §§ 13.15(b)(1) and 49 C.F.R. § 1503.701(b) mirror the statute, except that the amounts have not been increased in line with recent amendments to 49 U.S.C. § 46301(d)(4)(A) made by the FAA Reauthorization Act of 2024, Pub. L. No. 118-63, § 345, 138 Stat. 1025, 1102 (2024). 14 C.F.R. § 13.15(b)(1) and 49 C.F.R. § 1503.701(b) are written in a way that the civil penalty referral process to the Department of Justice only applies when the threshold has been exceeded. But § 46107 permits civil penalty cases to be referred to the Attorney General regardless of the amount, and nothing in the regulatory language prohibits either agency from seeking in district court a civil penalty below the exclusive jurisdiction threshold.

137. 49 U.S.C. § 46301(c).

138. *A Brief History of the FAA*, FED. AVIATION ADMIN., https://www.faa.gov/about/history/brief_history [https://perma.cc/U7GV-A3SW]; Air Commerce Act of 1926, Pub. L. No. 69-254, 44 Stat. 568 (1926).

139. FAA Civil Penalty Administrative Assessment Act of 1992, Pub. L. No. 102-345, § 2, 106 Stat. 923 (1992). Prior to the 1992 Act, Congress ran a pilot program that temporarily allowed the FAA to

United States Attorney's office for prosecution.[140] But apparently DOJ pursued very few civil penalty cases due to competing caseloads.[141] According to FAA, Congress authorized administrative adjudication to "circumvent the complex and lengthy process of referring these civil penalty cases to the United States Attorney," thereby making the process more efficient and increasing deterrence.[142] But even then, a court reviewing the administrative adjudication program noted that some critics lodged complaints over a "systematic procedural bias in favor of the FAA."[143] These reasons are very similar to the reasons Dodd-Frank gave SEC in-house adjudication authority: to "streamline" enforcement and "improve" SEC's ability to prosecute.[144] DHS inherited this administrative adjudication regime when Congress reassigned aviation security from FAA to the Transportation Security Administration.[145]

C. Unique Considerations for NTSB Adjudications

Civil penalty proceedings against pilots, mechanics, and flight engineers are different in that they employ a split enforcement regime.[146] Instead of adjudicating these civil penalties in-house, FAA serves as the prosecutor in front of a NTSB ALJ, and appeals go to the full five-member board.[147] But in practice, this amounts to a distinction without a difference. Although the NTSB is not bound by FAA's findings of fact in its proposed civil penalty, its rules of practice differ from the Federal Rules of Civil Procedure and Federal Rules of Evidence.[148] Congress attempted to fix this by mandating NTSB proceedings "shall be conducted, to the extent practicable, in accordance with the" federal rules.[149] But

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administratively adjudicate civil penalties beginning in 1987. *See* Air Transp. Ass'n v. Dep't of Transp., 900 F.2d 369, 372 (D.C. Cir. 1990) ("Before the 1987 amendments, the FAA could propose a maximum civil penalty of only $1,000 per violation and had no enforcement authority of its own.") (citing Airport and Airway Safety and Capacity Expansion Act of 1987, Pub. L. No. 100-223, § 204(g), 101 Stat. 1486, 1520–21 (1987)). FAA could, however, assess civil penalties for a narrow class of hazardous materials violations under a 1975 Act. *Id.* at 372 n.2; Transportation Safety Act of 1974, Pub. L. No. 93-633, § 110 (a)(1), 88 Stat. 2156, 2160 (1975). Prior to 1975, no law authorized DOT or FAA to administratively assess and adjudicate aviation civil penalties.

140. *Air Transp. Ass'n*, 900 F.2d at 372.

141. *Id.* (citing 133 Cong. Rec. S15,294 (daily ed. Oct. 28, 1987) (statement of Sen. Wilson).

142. Rules of Practice for FAA Civil Penalty Actions, 53 Fed. Reg. 34,646 (Sept. 7, 1988). *But see* SEC v. Jarkesy, 603 U.S. 109, 140 (2024) ("[E]ffects like increasing efficiency and reducing public costs are not enough to trigger the [public rights] exception.").

143. *Air Transp. Ass'n*, 900 F.2d at 373.

144. H.R. REP. NO. 111-687, at 78 (2010); Jarkesy v. SEC, 34 F.4th 446, 469 (5th Cir. 2022) (Davis, J., dissenting).

145. Aviation and Transportation Security Act, Pub. L. No. 107-71, § 140(d)(1)–(4), 115 Stat. 597, 642 (2001). Aviation security functions were initially transferred to an Undersecretary of Transportation for Security until Congress created DHS in 2002. *Id.* § 101(a); Homeland Security Act of 2002, Pub. L. No. 107-296, § 403(2), 116 Stat. 2135, 2178 (2002).

146. *See* Garvey v. Nat'l Transp. Safety Bd., 190 F.3d 571, 573 (D.C. Cir. 1999).

147. *Id.*; 49 U.S.C. § 46301(d)(5).

148. 49 U.S.C. § 46301(d)(5)(C); 49 C.F.R. pt. 821.

149. Pilot's Bill of Rights, Pub. L. No. 112–153, § 2(a), 126 Stat. 1159, 1159 (2012).

NTSB ALJs still treat the rules as "non-binding guidance."[150] As to other similarities, SEC and NTSB ALJs both have broad powers over the proceedings.[151] Each of their initial decisions become binding absent an appeal.[152] On review, Article III courts defer to agency fact finding under the "substantial evidence" standard.[153] Both SEC commissioners and NTSB board members have their own for-cause removal protections.[154]

In some ways, pilots have even less protection before the NTSB. In civil penalty proceedings the NTSB is "bound by all validly adopted interpretations of laws and regulations the Administrator of the Federal Aviation Administration carries out and of written agency policy guidance available to the public related to sanctions."[155] Although this principle is implicit when the ALJ works for the same agency, it is explicit in the NTSB's case and diminishes the independence its ALJs have from FAA. Furthermore, this statutorily mandated, *Chevron*-style deference[156] to agency sanction policy has been interpreted to mean that NTSB cannot reduce FAA's recommended penalty amount, even if it finds mitigating factors.[157] So in some respects, pilots, mechanics, and flight engineers have *fewer* protections under the FAA-NTSB split enforcement regime. NTSB also has the unique power to modify a certificate action (i.e., suspending or revoking a pilot or mechanic's certificate) into a civil penalty.[158] There is no legal standard for determining this modification,[159] and the full NTSB uses the deferential abuse of

150. FAA v. Tushin, NTSB Order No. EA-5902, at 43 (2021), https://www.ntsb.gov/legal/alj/OnODocuments/Aviation/5902.pdf [https://perma.cc/2SW2-EYZS]; FAA v. Norwitch, NTSB Order No. EA-5914, at 12 n.66 (2021), https://www.ntsb.gov/legal/alj/OnODocuments/Aviation/5914.pdf [https://perma.cc/C3AR-9C6E]; *see also* FAA v. Kennedy, NTSB Order No. EA-5928, at 24–25 (2022) https://www.ntsb.gov/legal/alj/OnODocuments/Aviation/5928.pdf [https://perma.cc/QDV8-85VD] (same).

151. *Compare* 17 C.F.R. § 201.111 (powers of SEC hearing officer), *with* 49 C.F.R. § 821.35 (powers of NTSB ALJ).

152. 17 C.F.R. § 201.360(d)(2) (SEC); 49 C.F.R. § 821.42 (NTSB).

153. 15 U.S.C. §§ 77i(a), 78y(a)(4), 80a–42(a); 49 U.S.C. § 46110(c); *see also* SEC v. Jarkesy, 603 U.S. 109, 145 (2024) (Gorsuch, J., concurring) (explaining that the substantial evidence standard is satisfied when there is "more than a mere scintilla of evidence") (internal quotations omitted).

154. Free Enter. Fund v. Public Co. Acct. Oversight Bd., 561 U.S. 477, 487 (2010) (for-cause removal for SEC Commissioners); 49 U.S.C. § 1111(c) (NTSB).

155. 49 U.S.C. § 46301(d)(5)(C).

156. Technically this deference stems from *Martin v. Occupational Safety & Health Review Comm'n* which holds that, in a split enforcement regime, a reviewing agency must defer to the prosecuting agency's interpretation of law. 499 U.S. 144, 153–55 (1991). But *Martin* deference uses the familiar arbitrary and capricious safety valve for agency interpretations that came from *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 844 (1984).

157. *Cf.* Pham v. NTSB, 33 F.4th 576, 583–84 (D.C. Cir. 2022) (interpreting an analogous provision that applies to revoking an airman certificate).

158. 49 U.S.C. § 44709(d)(2).

159. *Id.*; *see* FAA v. Rasmark Jet Charter, Inc., NTSB Order No. EA-4571, at 11 (1997), https://www.ntsb.gov/legal/alj/OnODocuments/Aviation/4571.pdf [https://perma.cc/84NM-Z9V7] (deferring to ALJ's decision to modify based on observations during the hearing); FAA v. Oklahoma Exec. Jet Charter, Inc., NTSB Order No. EA-3928, at 2, 9 (1993), https://www.ntsb.gov/legal/alj/OnODocuments/Aviation/3928.pdf [https://perma.cc/73NZ-GRVH] (same); FAA v. Bednar, NTSB Order No. EA-4316, at 6–7 (1995) https://www.ntsb.gov/legal/alj/OnODocuments/Aviation/4316.pdf [https://perma.cc/UK4Z-QK7N] (NTSB modifying certificate action to civil penalty on appeal).

discretion standard to review an ALJ's decision to modify a certificate action into a civil penalty.[160]

III. NEW SCOPE OF THE SEVENTH AMENDMENT

Jarkesy represents a significant shift in the Supreme Court's Seventh Amendment jurisprudence. This comes from the Court recognizing that the Seventh Amendment covers many more causes of action than previously thought, and that the public rights exception is limited to a narrow class of historically recognized cases. The Court did not set forth an explicit test for its new approach to the Seventh Amendment. I propose this two-step test to determine if a civil case must be tried by a jury in an Article III court: (1) the action is legal in nature, which includes all actions that are not definitively in equity or admiralty; and (2) the action does not involve one of the six historically recognized public rights. Under this formulation, all actions that are legal in nature—including public rights—are subject to the Seventh Amendment's jury trial right. Only if a matter was traditionally considered a public right (typically because it could be resolved by the executive or legislative branch) can it be excluded from the right to a jury trial in an Article III court.

A. Claims that are "Legal in Nature"

To begin, courts will have to determine whether the Seventh Amendment applies to a particular proceeding. Both the Fifth Circuit and Supreme Court spend significant time tracing the common law roots of a securities fraud action.[161] While this may be helpful for *Jarkesy*'s case, it obfuscates how the decision will apply to other statutory schemes. To find the answer, one must zoom out and return to the Seventh Amendment's text:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.[162]

The Seventh Amendment applies to Suits at common law."[163] Courts have long held that a suit at common law is an action that would have been decided in English law courts, as compared to actions brought in the chancery court or admiralty court.[164] In these suits, the jury trial right is "preserved"—not created or

160. FAA v. Grossman, NTSB Order No. EA-4752, at 4 (1999), https://www.ntsb.gov/legal/alj/OnODocuments/Aviation/4752.pdf [https://perma.cc/7MKC-9YR2] ("The law judge did not abuse his discretion when he refused to impose a civil penalty in lieu of a suspension."); *see, e.g.*, Gall v. United States, 552 U.S. 38, 52 (2007) (describing the abuse of discretion standard as "deferential").

161. SEC v. Jarkesy, 603 U.S. 109 124–26 (2024); Jarkesy v. SEC, 34 F.4th 446, 451–55 (5th Cir. 2022).

162. U.S. CONST. amend. VII.

163. *Id.*

164. *Jarkesy*, 603 U.S. at 121.

limited.[165] The right being preserved is, as Blackstone described it, "the most transcendent privilege which any subject can enjoy, or wish for, that he cannot be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbours and equals."[166] Much like the right to self-defense, the jury trial right predates our Constitution, and the Bill of Rights codified it in our new system of government.[167] The Seventh Amendment's authors meant for the right to be read broadly, adaptable to future legal systems.[168]

The Court explained that "Suits at common law" encompasses a broader range of claims that are "legal in nature."[169] This "legal in nature" framing of the Seventh Amendment is admittedly broader than prior Supreme Court decisions that focused on whether the cause of action or remedy was "akin to common law claims" or is "unknown to the common law."[170] (That is the language the Court used when holding that the Seventh Amendment applies to the causes of action in *Tull* and *Granfinanciera*.) While the common law roots of securities fraud may be helpful as an analytical construct, the *Jarkesy* Court said "the close relationship between federal securities fraud and common law fraud *confirms* that this action is 'legal in nature.'"[171] Thus to determine whether the Seventh Amendment applies to an action, one need look no further than the nature of the action and remedy.

In *Jarkesy* the Court moved away from a strict common law historical analog requirement for a claim to be legal in nature.[172] Instead, the inquiry is broader and looks to the distinctions between law, equity, and admiralty. Several founding-era authorities support this conclusion. While the Constitution's meaning does not change unless amended, its principles were designed to "endure for ages to come."[173] This necessarily means applying the Constitution's timeless principles to new legal developments. As applied to the Seventh Amendment, Justice Story explained in *Parsons v. Bedford* that the amendment is not limited to "suits[] which the common law recognized among its old and settled proceedings."[174] Instead, the Seventh Amendment's invocation of "common law" is to be read

165. *Id.*

166. Reid v. Covert, 354 U.S. 1, 10 (1957) (plurality opinion) (quoting 3 BLACKSTONE, COMMENTARIES 379).

167. *Cf.* District of Columbia v. Heller, 554 U.S. 570, 592 (2008) ("[I]t has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right.")).

168. *See Jarkesy*, 603 U.S. at 148 (Gorsuch, J., concurring); Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 447 (1830).

169. *Jarkesy*, 603 U.S. at 122 (quoting Granfinanciera v. Nordberg, 492 U.S. 33, 53 (1989)).

170. Tull v. United States, 481 U.S. 412, 421–23 (1987); Granfinanciera v. Nordberg, 492 U.S. 33, 60 (1989) (citing Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n, 430 U.S. 442, 461 (1977)).

171. *Jarkesy*, 603 U.S. at 126 (emphasis added).

172. *Id.* at 121.

173. *Id.* at 149 (Gorsuch, J., concurring) (quoting McCulloch v. Maryland, 17 U.S. 316 (4 Wheat.) 316, 415 (1819)).

174. 28 U.S. (3 Pet.) 433, 447 (1830).

broadly, "embrac[ing] all suits which are not of equity and admiralty jurisdiction."[175] That means a case is legal in nature if it does not definitively fall within equity or admiralty jurisdiction. This has always included cases brought pursuant to statutory codes passed by a legislature. After all, *Parsons* arose under Louisiana's civil law system.[176] The *Jarkesy* concurrence notes that "[t]he founding generation anticipated the possibility Congress would introduce new causes of action and perhaps new remedies, too."[177] This ensures the Seventh Amendment's purpose—securing the jury trial right "against the passing demands of expediency or convenience"—is fully realized.[178] It protects the Seventh Amendment from a slow death at the hands of an ever-evolving legal system. Specifically, it means there cannot be juryless tribunals in the federal system—be they "vice-admiralty" or "administrative"—adjudicating matters that are legal in nature.[179] As applied to the aviation context, dispensing with the historical analog requirement is helpful since the common law was well-developed by the time the Wright Brothers first took flight in 1903.[180]

B. Civil Penalty Cases are Legal in Nature

Without the need for a specific common law historical analog, one can look more broadly at the cause of action and remedy to determine if they are legal in nature and thus implicate the Seventh Amendment. This becomes useful to deriving general principles when a given industry may be subject to thousands of civil penalty violations.[181] The Court has long held that the type of remedy is the "more important" consideration than the cause of action.[182] In *Jarkesy* the Court held the civil penalty remedy "is all but dispositive."[183] Moving forward, the Court's reasoning shows that a civil penalty remedy *is* dispositive in determining whether a case is legal in nature.

Before beginning this analysis, it is important to define terms. Here, a "civil penalty" refers to a monetary remedy for a statutory violation that the government seeks for a punitive or deterrent purpose.[184] It does not apply to statutes that

175. *Id.*; *see also Jarkesy*, 603 U.S. at 121 (quoting *Parsons*, 28 U.S. (3 Pet.) at 447).

176. *Parsons*, 28 U.S. (3 Pet.) at 444.

177. *Jarkesy*, 603 U.S. at 149 (Gorsuch, J., concurring).

178. Reid v. Covert, 354 U.S. 1, 10 (1957) (plurality opinion).

179. *See Jarkesy*, 603 U.S. at 149 (Gorsuch, J., concurring) ("[T]he Seventh Amendment seeks to ensure there will be no juryless vice-admiralty courts in the United States.").

180. *Wright Brothers National Memorial North Carolina*, NAT'L PARK SERV., https://www.nps.gov/wrbr/index.htm [https://perma.cc/NV4U-CGPE] (last updated Nov. 12, 2024).

181. Civil penalties under 49 U.S.C. § 46301 apply to eleven chapters of title 49, each with several sections that contain regulatory requirements. 49 U.S.C. § 46301(a)(1)(A). That section also authorizes civil penalties for regulatory violations. *Id.* § 46301(a)(1)(B). Regulations the FAA, DOT, and DHS have promulgated under those sections exceed 3,400 pages. *See generally* 14 C.F.R. pts. 1–399 (2024), 49 C.F.R. pts. 1540–1562 (2024) (pagination from https://www.govinfo.gov/app/collection/cfr/).

182. Tull v. United States, 481 U.S. 412, 421 (1987).

183. *Jarkesy*, 603 U.S. at 123.

184. *See id.* (quoting *Tull*, 481 U.S. at 422) ("What determines whether a monetary remedy is legal is if it is designed to punish or deter the wrongdoer, or, on the other hand, solely to 'restore the status

remedy harms to the government itself, such as the False Claims Act.[185] The term "civil penalty" also does not apply to non-monetary orders (regardless of whether it is called an injunction) to do or refrain from certain conduct—even if the purpose of the order is punitive rather than remedial. The legal in nature analysis for orders of the latter type cannot be combined with that same analysis for monetary civil penalties.

Using that framing, it is clear that such civil penalties—no matter their underlying cause of action—are a legal remedy and thus legal in nature. That is because a civil penalty is the kind of remedy that could traditionally be sought only in common law courts, not in courts of equity or admiralty.[186] Common law courts' involvement in civil penalties stretches back to Magna Carta. Magna Carta clause 20 states that the King many not impose an amercement[187] "except by the oath of honest men of the neighbourhood."[188] This clause was meant to eliminate the King's ability to arbitrarily assess penalties, instead entrusting this function to "impartial assessors."[189] It led to a practice where the King's justices provisionally set the penalty amount, and a county court with twelve jurors confirmed or reduced the amount.[190] This then led to the English practice where "[r]emedies intended to punish culpable individuals, as opposed to those intended simply to extract compensation or restore the status quo, were issued by courts of law, not courts of equity."[191] Civil penalties are not avenues to "restore the status quo" or to compensate the victim. They are specifically designed to deter and punish proscribed behavior.[192]

That is not to say that one can ignore the underlying cause of action altogether and declare all monetary extractions to be "legal in nature" civil penalties. Sometimes it will be necessary to reference the triggering violation to determine if the civil penalty serves a punitive or deterrent purpose rather than remedial purpose. But this inquiry can often be satisfied and applied to a broad range of penalties. For example, the Supreme Court examined several factors the SEC considers in setting the civil penalty amount. These factors are quite broad. They

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quo.'"); *see also* Austin v. United States, 509 U.S. 602, 610 (1993) ("[A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment." (internal quotations omitted)).

185. 31 U.S.C. §§ 3729–33. This is not to say that False Claims Act actions are not legal in nature. That subject is beyond the scope of this Article. I merely reference the False Claims Act and statutes like it to exclude them from the definition of "civil penalty."

186. *Tull*, 481 U.S. at 422 ("A civil penalty was a type of remedy at common law that could only be enforced in courts of law.").

187. Amercements were the medieval predecessors of fines. United States v. Bajakajian, 524 U.S. 321, 335 (1998). But amercements were also used in the purely civil context "to sanction those guilty of offenses not criminal but worthy of punishment." Calvin R. Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons from History*, 40 VAND. L. REV. 1233, 1267 (1987).

188. Magna Carta ch. 20, *reprinted in* WILLIAM S. MCKECHNIE, MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 284 (2d ed. 1914).

189. MCKECHNIE, *supra* note 188, at 287.

190. *Id*. at 288.

191. *Tull*, 481 U.S. at 422.

192. *See id*.

include whether the violation involved deceit or manipulation, caused harm to others, led to unjust enrichment or substantial gains, the defendant's prior history, and "the need for deterrence."[193] Accordingly, the test to determine if a civil penalty is punitive or deterrent is not a high bar and does not require an expansive inquiry into the cause of action's elements. Instead, one can answer whether the penalty is punitive or deterrent by looking at the factors the agency uses to determine the civil penalty's severity.

Civil penalties are also a remedy unique to the government as a sovereign.[194] The *Jarkesy* dissent uses the fact that civil penalties are a remedy unique to the sovereign to argue civil penalties are public rights.[195] But it is important to note that the government acting in its sovereign capacity does not change the *legal* nature of the civil penalty remedy. It only affects whether the public rights exception removes civil penalties outside of the Seventh Amendment's scope. Put another way, if there were no public rights exception, a civil penalty remedy would fall squarely within the legal in nature cases that the Seventh Amendment protects.

The majority in *Jarkesy* tries to downplay this sweeping conclusion by saying "[i]n this case, the remedy is all but dispositive."[196] Yet the Court ends that same paragraph by saying "we have recognized that 'civil penalt[ies are] a type of remedy at common law that could only be enforced in courts of law.'"[197] It then analyzes the factors that determine whether civil penalties are available in SEC cases, and the size of those civil penalties.[198] As explained above, this test does not require much more than a slight deterrent or punitive motive for a civil penalty remedy to be a legal remedy. Thus, the conclusion easily drawn is that civil penalties for punitive and deterrent purposes are legal remedies subject to the Seventh Amendment. Because nearly all civil penalties are brought for at least some punitive or deterrent purpose, such civil penalties trigger the Seventh Amendment.

True, there may be some kinds of civil penalties that—in addition to punishing and deterring—can compensate a victim or otherwise remedy the violation that occurred. Those kinds of remedies may blur the line separating legal and equitable remedies. And there are other instances where a monetary remedy is "incidental to or intertwined with injunctive relief."[199] The latter monetary penalties are properly considered equitable remedies when they are subservient to a primary remedy that is equitable, like an injunction. As to the former, when the primary

193. SEC v. Jarkesy, 603 U.S. 109, 123 (2024) (citing 15 U.S.C. §§ 78u–2(c), 80b–3(i)(3)).

194. *See id.* at 162 (Gorsuch, J., concurring) (citing Shinn v. Martinez Ramirez, 596 U.S. 366, 376 (2022)); *id.* at 181–82 (Sotomayor, J., dissenting).

195. *Id.* at 174–75, 178, 181–82 (Sotomayor, J., dissenting).

196. *Id.* at 123 (majority opinion).

197. *Id.* (quoting Tull v. United States, 481 U.S. 412, 422 (1987)).

198. *Id.* at 123–24.

199. Nat'l Presto Indus. v. U.S. Merchs. Fin. Grp., Inc., 121 F.4th 671, 678 (8th Cir. 2024) (quoting Chauffeurs, Teamsters & Helpers, Loc. No. 391 v. Terry, 494 U.S. 558, 570–71 (1990)).

remedy is a legal remedy, an ancillary remedial motivation does not change the legal nature of civil penalties.[200] As long as there is some motivation to punish or deter, the civil penalty at best could be considered a mixed question of law and equity. In such cases, the pendulum swings in favor of the legal remedy and right to a jury trial.[201]

The Fifth Circuit grappled with this very question in the SEC civil penalty context. The SEC's administrative civil penalty authority is located in its power to issue cease-and-desist orders.[202] Despite this blurring of the line between legal and equitable remedies, the Fifth Circuit pointed to three cases affirming the right to a jury trial when SEC seeks both legal and equitable remedies.[203] In *SEC v. Lipson* the agency sought a civil penalty, disgorgement, prejudgment interest, and an injunction.[204] The Seventh Circuit held that "[b]ecause the SEC was seeking both legal and equitable relief . . . [the defendant] was entitled to and received a jury trial."[205] Two district court decisions, one before and one after Dodd-Frank, also held that a jury must determine whether a defendant is liable for a civil penalty.[206]

This principle applies to mixed questions outside the SEC context. The Supreme Court has held that "where both legal and equitable issues are presented in a single case, 'only under the most imperative circumstances . . . can the right to a jury trial of legal issues be lost through prior determination of equitable claims.'"[207] This right is so strong that in mixed cases courts must be careful not to infringe on the jury trial right by treating legal issues as incidental to equitable claims.[208] A punitive or deterrent motive suffices to make a civil penalty claim legal in nature and thus implicate the Seventh Amendment.

That a punitive or deterrent motive makes a claim legal in nature makes even more sense when one considers an analogous context: criminal law. True, the Seventh Amendment does not apply to criminal law. But its scope is determined by "Suits at common law."[209] Prior to the broader "legal in nature" framing,

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200. *See* Feltner v. Columbia Pictures Television, 523 U.S. 340, 352 (1998) ("We have recognized the general rule that monetary relief is legal, and an award of statutory damages may serve purposes traditionally associated with legal relief, such as compensation and punishment." (internal quotations and citations omitted)).

201. Dairy Queen, Inc. v. Wood, 369 U.S. 469, 472–73 (1962); SEC v. Lipson, 278 F.3d 656, 662 (7th Cir. 2002).

202. 15 U.S.C. §§ 77h–1(a), 78u–3(a), 80a–9(f); *see also* Dodd-Frank Wall Street Reform and Consumer Protection Act, *supra* note 21 (explaining SEC's cease-and-desist authority under the Securities Act, Securities Exchange Act, and Investment Advisers Act).

203. Jarkesy v. SEC, 34 F.4th 446, 454 (5th Cir. 2022) (citing SEC v. Lipson, 278 F.3d 656, 662 (7th Cir. 2002); SEC v. Badian, 822 F. Supp. 2d 352, 365 (S.D.N.Y. 2011), and SEC v. Solow, 554 F. Supp. 2d 1356, 1367 (S.D. Fla. 2008)).

204. *Lipson*, 278 F.3d at 662.

205. *Id.*

206. SEC v. Badian, 822 F. Supp. 2d 352, 365 (S.D.N.Y. 2011); SEC v. Solow, 554 F. Supp. 2d 1356, 1367 (S.D. Fla. 2008).

207. Dairy Queen, Inc. v. Wood, 369 U.S. 469, 472–73 (1962) (quoting Bacon Theatres, Inc. v. Westover, 359 U.S. 500, 510–11 (1959)).

208. Ross v. Bernhard, 396 U.S. 531, 538–39 (1970).

209. U.S. CONST. amend. VII.

courts often determined the Seventh Amendment's scope is looking to what actions were tried in the courts of Westminster in 1789.[210] At that time, there were three courts that sat at Westminster Hall: the King's Bench, which heard criminal matters; the Exchequer, which heard monetary disputes including customs and fines owed to the government; and Common Pleas, which heard civil disputes between private parties.[211] Although there was clear separation between civil and criminal courts by 1789, both were courts of law. And before the relatively recent codification of criminal statutes, crimes were also considered part of the common law.[212] Common law courts in 1789 heard both criminal fine and civil actions.

Furthermore, not all monetary penalties collected by the Crown for deterrent or retributive purposes were considered criminal. The King could impose an amercement "to sanction those guilty of offenses not criminal but worthy of punishment."[213] But those subject to amercements had the right to a jury trial beginning with Magna Carta.[214] As the amercement fell out of use, another action—a civil penalty suit as an action in debt—also historically required a jury trial.[215] So even if one were to argue that the action that triggers a civil penalty was not known to the common law or that it could be brought in courts of equity, the remedy—the government seeking a monetary penalty for punitive or deterrent purposes—is known to the common law as an amercement and action in debt that would have been brought in common law courts. Just as securities fraud's common law roots "confirms" the Seventh Amendment applies to civil penalties for securities fraud, the common law roots of amercement confirms all civil penalties sought for punitive and deterrent purposes implicate the Seventh Amendment jury trial right.[216]

C. Atlas Roofing *Primarily Involved the Seventh Amendment Itself, Not Public Rights*

The Supreme Court decided *Atlas Roofing* using the language of the public rights exception. But a closer look at its supporting authorities reveals that the Court determined the matters involved were outside the Seventh Amendment altogether. *Atlas Roofing* involved a Seventh Amendment challenge to the Occupational Safety and Health Administration's (OSHA) in-house adjudication process for civil penalties.[217] A company that was assessed civil penalties challenged OSHA's administrative adjudication process as violating the Seventh

210. SEC v. Jarkesy, 603 U.S. 109, 127–28 (2024).

211. United States v. McCrickard, 957 F. Supp. 1149, 1152 n.7 (E.D. Cal. 1996).

212. *See* 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 2.1, at 103 (2d ed. 2003) ("the substantive criminal law began as common law for the most part, and only later became primarily statutory").

213. Massey, *supra* note 187, at 1267.

214. MCKECHNIE, *supra* note 188, at 287–88.

215. Tull v. United States, 481 U.S. 412, 418 (1987).

216. *See* SEC v. Jarkesy, 603 U.S. 109, 124–26 (2024).

217. Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n, 430 U.S. 442, 446 (1977).

Amendment.[218] In holding that the in-house adjudication did not violate the Seventh Amendment, the Court looked to the Seventh Amendment's scope and public rights exception and determined that OSHA health and safety standards were outside the Seventh Amendment's scope.[219] Although the Court discussed public rights, the authorities it ultimately relied upon were about the scope of the Seventh Amendment itself, not the public right exception's scope.[220] SEC and the *Jarkesy* dissent heavily relied on *Atlas Roofing* to uphold in-house adjudication of securities fraud actions.[221]

The *Jarkesy* majority recognized that *Atlas Roofing* actually concerned the Seventh Amendment's scope and not the public rights exception. The Court explained *Atlas Roofing* relied on cases that "did not extend the public rights exception to traditional legal claims."[222] This point ties into the majority's recognition that the Seventh Amendment is much broader than it has been applied in previous cases. Although the Court has long held that the remedy is the more important consideration, some cases focused primarily on the cause of action's common law pedigree.[223] That too was the error in *Atlas Roofing*, which similarly focused on the cause of action instead of the remedy. Its Seventh Amendment holding was premised on OSHA's complex regulatory requirements being "unknown to the common law" and thus outside the Seventh Amendment's scope in the first instance.[224] That conclusion was bolstered by the fact that OSHA claims from the beginning were decided through agency adjudication.[225] But *Atlas Roofing* never addressed that the civil penalty remedy was well known to the common law. The public rights discussion served as mere confirmation that OSHA civil penalties fell outside the Seventh Amendment's scope, as the Court did not attempt to fit it within a previously recognized public right category.[226]

It is safe to say that *Atlas Roofing* would not be decided the same way today. Under *Jarkesy* the Court would look to both the cause of action and remedy in OSHA violations, with the remedy being the "more important consideration."[227] Using the approach just explained in Part III-B, the Court would very likely conclude that an OSHA civil penalty is a remedy that is legal in nature and thus falls within the scope of the Seventh Amendment. That is because OSHA civil

218. *Id.* at 447–48.

219. *Id.* at 449–55.

220. *Id.* at 453–55 (citing NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) and Block v. Hirsh, 256 U.S. 135 (1921)).

221. *Jarkesy*, 603 U.S. at 136.

222. *Id.* at 137 (internal quotations omitted).

223. Stern v. Marshall, 564 U.S. 462, 484 (2011) (focusing on whether the "suit is made of 'the stuff of the traditional actions at common law'"); Granfinanciera v. Nordberg, 492 U.S. 33, 43–47 (1989) (first focusing on the cause of action); Tull v. United States, 481 U.S. 412, 421 (1987); Curtis v. Loether, 415 U.S. 189, 196 (1974) (focusing on remedy as the more important consideration).

224. *Atlas Roofing*, 430 U.S. at 461.

225. *See Jarkesy*, 603 U.S. at 140 ("The novel claims in *Atlas Roofing* had never been brought in an Article III court.").

226. *Atlas Roofing*, 430 U.S. at 457–58.

227. *Jarkesy*, 603 U.S. at 123 (quoting Tull v. United States, 481 U.S. 412, 421 (1987)).

penalties extract a monetary sum for at least a deterrent purpose.[228] The Court did not do this analysis in *Atlas Roofing* and did not have an opportunity to do so directly in *Jarkesy*. In fact, whether to overturn *Atlas Roofing* was not properly before the Court in *Jarkesy*.[229] It will take additional litigation to determine *Atlas Roofing*'s final fate. For now, *Granfinanciera* and *Jarkesy* have at the very least limited *Atlas Roofing* to its facts.[230]

D. Application to Aviation Civil Penalty Cases

The principle that all civil penalties implicate the Seventh Amendment is fully applicable to aviation civil penalty cases. Again, a civil penalty is a monetary remedy for a statutory violation that the government seeks for a punitive or deterrent purpose. All three aviation agencies impose civil penalties for punitive and deterrent purposes. FAA's sanctions policy directly states that it "imposes . . . civil penalties for punitive and deterrent purposes."[231] DOT's sanctions policy states that "[c]ivil penalties are meant to be sufficiently large to change the violator's behavior . . . . They also should be sufficient to deter the violator and other entities from committing similar violations in the future."[232] DHS's sanctions policy also uses punitive and deterrent factors to calculate the penalty amount.[233] These policies are enough to show aviation civil penalties are legal in nature and thus implicate the Seventh Amendment.

Aviation enforcement cases may seem to be a remote subject, and the highly regulated nature of the industry may lend itself to more efficient enforcement through administrative adjudication. But real rights are at stake on the other side of the case. To exemplify this, consider this analogy: administrative enforcement of traffic violations on federal land. Aviation can be a complex sector. But there is a striking similarity between the rules of the road and the day-to-day rules pilots must follow—i.e. the rules of the sky. For example, the Federal Aviation regulations require occupants wear a seatbelt,[234] use lights after sunset,[235] register

228. OCCUPATIONAL SAFETY & HEALTH ADMIN., FIELD OPERATIONS MANUAL, Directive No. CPL 02-00-164, at ch. 6 (2025), https://www.osha.gov/fom/chapter-6 [https://perma.cc/Y972-WVNK] ("Congress has made clear that penalty amounts should be sufficient to serve as a deterrent to violations.").

229. *See generally* Brief for Respondents, SEC v. Jarkesy, No. 22-859 (U.S. filed Oct. 11, 2023); *but see Jarkesy*, 144 S. Ct. at 2137 ("we need not reach the suggestion made by Jarkesy and Patriot28 that *Tull* and *Granfinanciera* effectively overruled *Atlas Roofing*").

230. *Jarkesy*, 144 S. Ct. at 2138 ("The reasoning of Atlas Roofing cannot support any broader rule."); Granfinanciera v. Nordberg, 492 U.S. 33, 71 n.1 (1989) (White, J., dissenting).

231. FAA ORDER NO. 2150.3C, *supra* note 118, at 9-2.

232. *See* TRANSP. SECURITY ADMIN., ENFORCEMENT SANCTION GUIDANCE 2 (2025) (listing penalty determination factors that take into account deterrence and punishment), https://www.tsa.gov/sites/default/files/enforcement_sanction_guidance_policy.pdf [https://perma.cc/3B27-53GK].

233. DEP'T OF TRANSP., NOTICE REGARDING INVESTIGATORY AND ENFORCEMENT POLICIES AND PROCEDURES 4 (2023), https://www.transportation.gov/sites/dot.gov/files/2023-01/OACP%20Enforcement%20and%20Sanction%20Practices%20Notice%2012%202022.pdf [https://perma.cc/5KCP-FY58].

234. 14 C.F.R. § 91.107.

235. *Id.* § 91.209.

the aircraft,[236] set speed limits,[237] and prohibit impaired operations.[238] To ensure the Seventh Amendment applies to this analogy, let's say a traffic violation occurs in a National Park. To address increasing visitor counts, associated increases in traffic violations, and caseloads in federal district court, Congress authorizes the National Park Service to administratively assess civil penalties for traffic violations, using in-house ALJs. A person is pulled over for drunk driving, violating 36 C.F.R. § 4.23 and underlying state law.[239] Instead of appearing before a federal magistrate judge, the person has a hearing before an agency employee who applies the agency's own rules of practice rather than the Federal Rules of Evidence and Civil Procedure. Even though the underlying state law violation would entitle the person to a jury trial using the state court's rules of evidence, this federal civil penalty for the same conduct is adjudicated in-house without a jury.

Now consider how the same operating-while-impaired violation would be handled in aviation. A FAA inspector approaches a pilot after an hour-long flight. As the pilot takes out his wallet to show identification, a receipt falls out. The receipt shows that he closed his bar tab seven and a half hours before the flight began, indicating the pilot may have violated the FAA's prohibition on consuming alcohol within eight hours of operating an aircraft.[240] The FAA issues a civil penalty.[241] That civil penalty is without a doubt punitive for the pilot's actions and serves as a deterrent for future pilots that may consider violating the regulation. Such an action could be brought in federal district court, but instead the FAA chooses to bring the case before a NTSB ALJ.[242] Although the ALJ comes from a separate agency, the ALJ applies its own rules of practice, and the pilot does not get a jury trial. Although driving impaired is a reprehensible offense, drivers would be concerned if their procedural and jury rights were taken away to make traffic enforcement more efficient. The same concern applies to aviation administrative enforcement.

Notably, the "legal in nature" test only concerns whether the Seventh Amendment applies in the first instance. It does not determine whether the jury trial right and Article III apply full stop. That is resolved based on whether a public right applies and is addressed in Part IV. I merely pause here to note that this analytical approach—first determining whether the Seventh Amendment applies

236. *Id.* § 91.203(a)(2); *see also* 49 U.S.C. § 44101(a) (statute requiring registration).

237. 14 C.F.R. § 91.117 (limiting aircraft below 10,000 feet to 250 knots and limiting aircraft below certain airspace to 200 knots).

238. *Id.* § 91.17.

239. 18 U.S.C. § 13; 36 C.F.R. § 4.2(b).

240. 14 C.F.R. § 91.17(a)(1).

241. FAA's policy is to seek the maximum penalty for a single act of operating while impaired. FAA ORDER NO. 2150.3C, *supra* note 118, at 9-14. The maximum civil penalty for an individual is $1,828. 14 C.F.R. § 13.301(c).

242. 49 U.S.C. §§ 44709(d), 46301(d)(5); *see supra* note 133 (describing how, like the SEC, FAA has the discretion but not an obligation to seek civil penalties in-house).

and recognizing that public rights fall within the Seventh Amendment's scope—is key to understanding the majority's approach to the Seventh Amendment.

E. Admiralty and Equity Exceptions in Aviation Enforcement

Before moving on to the public rights analysis, it is important to discuss other subjects that remain outside the expanded Seventh Amendment's scope: admiralty and equitable actions. Aviation implicates both to some degree, but they only remove from the Seventh Amendment's scope a narrow class of civil penalties that are directly tied to admiralty or equity actions.

1. Admiralty Exception

Aviation inherited much from its ancestral connection to seafaring. Airspeed is measured in nautical miles per hour (knots).[243] The magnetic compass is the primary navigation instrument, in that an aircraft or ship's course is determined by reference to magnetic headings.[244] Weather is a much greater concern for aircraft and ships than it is for landlubbers, and the National Weather Service produces specific marine and aviation forecasts.[245] Airplanes and vessels use the same navigation light arrangement: red on the left (port) side, green on the right (starboard) side, and white on the back (stern) side.[246] Aircraft and vessels must be registered, and that registration serves as its nationality.[247] We even use the same word for the person in charge of the airplane or ship: captain. Seaplanes featured prominently in early aviation—so much so that Pan American Airways retained the title "clipper" for its planes even after they shifted to an all-land fleet.[248]

Despite these similarities, aviation inherited very few aspects of admiralty jurisdiction from its nautical forebearer. Federal courts use a two-part test to determine when an action falls within admiralty jurisdiction: "First, the alleged tort must have occurred on or over 'navigable waters.' Second, the activity giving

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243. Chris Loh & Gaurav Joshi, *Why Do Pilots Measure Airspeed In Knots?*, SIMPLE FLYING (Sept. 9, 2022), https://simpleflying.com/pilot-airspeed-knots/ [https://perma.cc/3DNF-T2ZL].

244. *See Flight Instruments: The Heading Indicator and Magnetic Compass*, LEARN TO FLY BLOG (Nov. 14, 2016), https://learntoflyblog.com/flight-instruments-the-heading-indicator-and-magnetic-compass/ [https://perma.cc/YV4R-E6SK] ("The magnetic compass is the primary indicator of direction in most airplanes."); Philip K. Allan, *A History of the Ship's Compass*, U.S. NAVAL INST. (last updated Dec. 2022), https://www.usni.org/magazines/naval-history-magazine/2022/december/history-ships-compass [https://perma.cc/H9F5-4K68].

245. *See, e.g.*, *NWS Marine Products via the Internet*, NAT'L WEATHER SERVICE, https://www.weather.gov/marine/internet [https://perma.cc/42BL-3D2S] (last visited Jan. 9, 2025); *Aviation Weather Center*, NATIONAL WEATHER SERVICE, https://aviationweather.gov/ [https://perma.cc/EJ2S-R3QW] (last visited Jan. 9, 2025).

246. 14 C.F.R. § 23.2530(c) (2025); *Common Navigation Lights*, BOAT-ED, https://www.boat-ed.com/washington/studyGuide/Common-Navigation-Lights/10105002_50084/ [https://perma.cc/A9G6-CYJ6] (last visited Jan. 9, 2025).

247. *See* Convention on International Civil Aviation art. 17, Dec. 7, 1944, 61 Stat. 1180, 1185, 15 U.N.T.S. 295 (aircraft nationality); 49 U.S.C. § 44102 (aircraft registration); Ganpat v. E. Pac. Shipping PTE, Ltd., 100 F.4th 584, 592 (5th Cir. 2024) (ship registration and nationality).

248. *See* Pranjal Pande, *The Story Behind Pan Am's Clipper Name Changes*, SIMPLE FLYING (Dec. 24, 2020), https://simpleflying.com/pan-am-clipper-name-changes/ [https://perma.cc/X29R-ATHM].

rise to the incident must have had a substantial relationship to traditional maritime activity, such that the incident had a potentially disruptive influence on maritime commerce."[249] But the Supreme Court has substantially limited the test when it comes to aviation. In *Executive Jet Aviation v. City of Cleveland*, the Court held: "in the absence of legislation to the contrary, there is no federal admiralty jurisdiction over aviation tort claims arising from flights by land-based aircraft between points within the continental United States."[250] By extension, that holding excludes from admiralty jurisdiction any civil penalty arising from a flight within the continental United States.

There are three statutes applicable to aviation that are relevant to this rule. One is an exception to *Executive Jet Aviation*'s general rule; the other two concern aircraft flying over the high seas. The first is 49 U.S.C. § 46305, which states an action in rem to collect a civil penalty must "conform as nearly as practicable to a civil action in admiralty."[251] This statute applies within the continental United States and acts as an exception to *Executive Jet Aviation*'s rule. But this same section guarantees a right to a jury trial, using similar language as the Seventh Amendment.[252] Congress thereby prevented any degradation of the jury trial right caused by placing this action in admiralty. By using similar language, we can assume Congress meant for the statutory jury trial right in these actions to be coextensive with the Seventh Amendment's jury trial right.[253]

The other two statutes apply exclusively to flights over the high seas. The second statute is the Death on the High Seas Act (DOHSA).[254] Although aviation is not within its explicit terms, DOHSA has long been interpreted to include aviation accidents on the high seas.[255] Congress amended DOHSA in 2000 to exclude commercial aviation accidents that occur twelve nautical miles or less from

249. Vasquez v. GMD Shipyard Corp., 582 F.3d 293, 298 (2d Cir. 2009) (quoting Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 534 (1995)) (internal citations omitted).

250. 409 U.S. 249, 274 (1972). This holding does not apply to seaplanes, which comprise less than 5% of the U.S. aircraft fleet. Janice Wood, *Report Takes In-depth Look at Seaplane Accidents*, GEN. AVIATION NEWS (May 16, 2023), https://generalaviationnews.com/2023/05/16/report-takes-in-depth-look-at-seaplane-accidents/ [https://perma.cc/5VYZ-TLMK]. Perhaps due to this rareness there is no clear answer as to when seaplanes may implicate admiralty jurisdiction. *But see* Reinhardt v. Newport Flying Serv. Corp., 232 N.Y. 115, 118, 133 N.E. 371, 372 (1921) (Justice Cardozo holding in 1921 that seaplanes are subject to admiralty jurisdiction when they are on navigable waters, but that admiralty does not apply to seaplanes in flight).

251. 49 U.S.C. § 46305.

252. *Id.* ("a party may demand a jury trial of an issue of fact in an action involving a civil penalty . . . if the value of the matter in controversy is more than $20. Issues of fact tried by a jury may be reexamined only under common law rules.").

253. *See, e.g.*, SEC v. Jarkesy, 603 U.S. 109, 125 ("[W]hen Congress transplants a common-law term, the old soil comes with it.").

254. 46 U.S.C. ch. 303.

255. Exec. Jet Aviation v. City of Cleveland, 409 U.S. 249, 262–64 (1972) ("it may be considered as settled today that [DOHSA] gives the federal admiralty courts jurisdiction of [aircraft crashes on the high seas] wrongful-death actions").

shore.[256] This was done to allow families of TWA Flight 800 victims to sue under state law rather than the more restrictive DOHSA cause of action.[257] Following that amendment, admiralty jurisdiction applies to wrongful death claims when an aircraft crashes more than twelve nautical miles offshore and state law applies to crashes within twelve nautical miles of shore.

DOHSA's twelve nautical mile line does not mean admiralty jurisdiction applies to aircraft that fly over the high seas without crashing. That is because DOHSA is limited to a single cause of action: wrongful death.[258] Outside of wrongful death, which was created by statute, federal maritime common law applies.[259] For maritime law to apply, one must be within the admiralty jurisdiction.[260] The second part of the admiralty jurisdiction test requires a nexus to traditional maritime activity.[261] In *Executive Jet Aviation* the Supreme Court said that a tort that merely occurs over water is not in itself enough to trigger admiralty jurisdiction.[262] Furthermore, the statutory basis for DOHSA applying to aviation is the fact that the death occurs "on" the high seas.[263] It says nothing of activities above the high seas that never touch the ocean's surface. So for DOHSA to potentially infer admiralty jurisdiction over an aviation civil penalty, the civil penalty must arise from a death resulting from an aircraft crash on the high seas. A non-death tort that occurs on an aircraft flying over the high seas is not enough for DOHSA to infer admiralty jurisdiction.

A further complicating factor for admiralty jurisdiction under DOHSA is that a jury trial is available when claims in admiralty are joined with claims that have a jury trial right.[264] As discussed *infra*, a jury trial right exists for claims of death or bodily injury on an international flight.[265] That means any loss of a jury trial right due to DOHSA's admiralty jurisdiction does not apply to international flights. It would only apply to a domestic flight that crashes on the high seas and causes a death.[266] Civil penalties could arise from an incident that fits this criterion, such

256. Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Pub. L. No. 106-181, § 404(b), 114 Stat. 61, 131 (2000) (now codified at 46 U.S.C. § 30307).

257. *See* Horsley v. Bell Textron, Inc., Civil Action No. 4:19-cv-00772-O, 2021 U.S. Dist. LEXIS 259715, at *12 (N.D. Tex. July 20, 2021).

258. 46 U.S.C. § 30302.

259. *Horsley*, 2021 U.S. Dist. LEXIS 259715, at *11; *cf*. Offshore Logistics, Inc., v. Tallentire, 477 U.S. 207, 216 (1986) ("Congress has never enacted a comprehensive maritime code").

260. *Exec. Jet Aviation*, 409 U.S. at 253.

261. Vasquez v. GMD Shipyard Corp., 582 F.3d 293, 298 (2d Cir. 2009).

262. *Exec. Jet Aviation*, 409 U.S. at 270–71; *but see Offshore Logistics*, 477 U.S. at 216 (helicopter crash enroute to an offshore oil platform is properly within admiralty jurisdiction, separate from DOHSA, because the flight replaced a traditional maritime transportation method).

263. *Offshore Logistics*, 477 U.S. at 220; *see Exec. Jet Aviation*, 409 U.S. at 263–64.

264. *See* Fitzgerald v. United States Lines Co., 374 U.S. 16, 21 (1963).

265. In re Air Crash Disaster near Honolulu, 783 F. Supp. 1261, 1266 (N.D. Cal. 1992) ("Under the 'saving to suitors' clause [28 U.S.C. § 1333], a plaintiff with claims in both admiralty and law may invoke either jurisdiction. Furthermore, when claims carrying a right to a jury trial are joined with admiralty claims, all claims may be tried to a jury." (citations omitted)).

266. *Offshore Logistics, Inc., v. Tallentire* fits this description: a case involving a domestic flight over the high seas to an offshore oil rig. 477 U.S. 207, 209 (1986).

as a domestic flight over the high seas that crashes as a result of a hazardous material violation or due to an unresolved maintenance issue that rendered the aircraft unairworthy. Admiralty jurisdiction may apply to this narrow class of civil penalty cases and allow them to be adjudicated in-house without a jury. But such cases would undoubtedly be rare.

The third statute is 18 U.S.C. § 7, which defines the "special maritime and territorial jurisdiction of the United States" to include American-owned aircraft flying over the high seas.[267] This statute provides punishment for certain crimes, including murder, assault, kidnapping, and robbery, relying on admiralty jurisdiction and Congress's power to punish offenses on the high seas and on federal land.[268] This may lead to the conclusion that civil offenses committed during flight over the high seas also trigger admiralty jurisdiction. But rather than look to criminal law, a better source is the law that applies to civil offenses, namely torts, when aircraft are flying over the high seas.

The Convention for the Unification of Certain Rules for International Carriage by Air, also called the Montreal Convention, governs passenger claims on international flights.[269] Article 17 makes carriers liable for damages in the case of death or bodily injury sustained on board the aircraft or in the process of embarking or disembarking.[270] Under these broad provisions, the Montreal Convention allows its member states to use domestic law in determining which harms are cognizable and the procedures used to decide cases.[271] The Montreal Convention does not address admiralty jurisdiction or jury trial rights. But several courts have determined that claims under a preceding treaty—the Warsaw Convention—are triable by a jury, even when admiralty jurisdiction is implicated.[272] Both *In re Air Crash Disaster near Honolulu* and *In re Korean Air Lines Disaster* involved crashes into the high seas on international flights. Both courts found that "[c]laims under the Warsaw convention are triable by jury."[273] Although no case has explicitly affirmed the jury trial right under the updated Montreal Convention, courts rely on decisions interpreting the Warsaw Convention as highly persuasive authority in interpreting the Montreal Convention.[274] The likely reason courts have not adopted the jury trial right under the Montreal Convention is that airline crashes into the ocean are exceedingly rare. In fact, no U.S. airline flight has

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267. 18 U.S.C. § 7(5). This jurisdiction is different from the special aircraft jurisdiction of the United States, which applies regardless of whether the aircraft is flying over the high seas. 49 U.S.C. § 46501.

268. U.S. CONST. art I, § 8, cl. 10; *id*. art. IV, § 3, cl. 2; 18 U.S.C. §§ 113, 1111, 1201(a)(2), 2111.

269. Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999, S. Treaty Doc. No. 106-45 (2000), 2242 U.N.T.S. 350 [hereinafter "Montreal Convention"].

270. *Id*. art. 17(1).

271. *Cf*. Zicherman v. Korean Air Lines Co., 516 U.S. 217, 224 (1996). *Zicherman* was decided under the Warsaw Convention, which preceded the Montreal Convention. *Id*. at 219; Montreal Convention, *supra* note 269, Preamble cl. 1.

272. In re Air Crash Disaster near Honolulu, 783 F. Supp. 1261, 1265–66 (N.D. Cal. 1992) (citing In re Korean Air Lines Disaster, 704 F. Supp. 1135, 1153 (D.D.C. 1988)).

273. *Id*. at 1265; In re Korean Air Lines Disaster, 798 F. Supp. 755, 761 (E.D.N.Y. 1992).

274. *See* Cohen v. Am. Airlines, Inc., 13 F.4th 240, 244 (2d Cir. 2021) (collecting cases).

crashed into the ocean on an international flight since the Montreal Convention went into effect in 2003.[275]

Beyond the fortunate lack of high seas crashes since the Montreal Convention went into effect, there is additional reason to believe that the district court decisions in *In re Air Crash Disaster near Honolulu* and *In re Korean Air Lines Disaster* correctly describe jury trial rights for Montreal Convention claims. This is borne out in how federal courts treat non-crash tort cases under the Montreal Convention. Given that most international flights to and from the United States cross the high seas, if the tort's location or the aircraft's route over water were relevant to the court's jurisdiction one would expect courts to inquire whether the injury occurred over the high seas. But courts do not seem interested in this question. Instead, courts routinely use jury trials to determine issues of fact in cases brought under the Montreal Convention.[276] This practice is strong evidence that civil cases involving aircraft in flight over (and not crashing into) the high seas are not within the admiralty jurisdiction.

In sum, these three statutory provisions shift very few aviation activities into admiralty jurisdiction. The text of 49 U.S.C. § 46305 prevents any degradation to the jury trial right. Tort law practice under the Montreal Convention provides strong evidence that the criminal law provisions in 18 U.S.C. § 7 do not shift into admiralty jurisdiction wrongs committed while aircraft fly over the high seas. DOHSA covers deaths due to airplane crashes more than twelve nautical miles from shore, but concurrent claims for international flights under the Montreal Convention limits DOHSA's lack of jury trial to domestic flights only.

Outside of these statutory provisions, admiralty jurisdiction may apply to aviation based on the test articulated in *Grubart*: (1) the incident must occur over navigable waters; and (2) have a substantial relationship to traditional maritime activity such it could disrupt maritime commerce.[277] *Executive Jet Aviation* removed from admiralty jurisdiction flights between points in the continental U.S., absent some strong connection to traditional maritime activity.[278] What's left is flights to and between Hawaii and other U.S. island Territories. DOHSA

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275. CONVENTION FOR THE UNIFICATION OF CERTAIN RULES FOR INTERNATIONAL CARRIAGE BY AIR DONE AT MONTREAL ON 28 MAY 1999, MEMBER STATES 3, https://www.icao.int/secretariat/legal/List%20of%20Parties/Mtl99_EN.pdf [https://perma.cc/WH5Q-5JKU] (last visited Jan. 30, 2025) (Montreal Convention entered into force on November 4, 2003). The most recent ocean crash of a U.S. flight subject to the Warsaw Convention occurred on January 31, 2000. *See* FEDERAL AVIATION ADMINISTRATION, McDonnell Douglas MD-83, Alaska Airlines Flight 261, https://www.faa.gov/lessons_learned/transport_airplane/accidents/N963AS [https://perma.cc/LQP8-94TZ].

276. *See, e.g.*, Irene Zhang v. Air China Ltd., No. 2:21-cv-01840-VAP-JCx, 2023 U.S. Dist. LEXIS 242862, at *14 (C.D. Cal. Apr. 6, 2023); Oshana v. Aer Lingus Ltd., No. 20 C 2041, 2022 U.S. Dist. LEXIS 8176, at *14 (N.D. Ill. Jan. 12, 2022); Hidalgo-Lobato v. Am. Airlines, Inc., No. 2:10-cv-3212 (WHW), 2014 U.S. Dist. LEXIS 75779, at *9–10 (D.N.J. June 4, 2014); Rothschild v. Tower Air, No. 94-2656, 1995 U.S. Dist. LEXIS 2078, at *2 (E.D. Pa. Feb. 22, 1995) (all discussing jury trials that were either scheduled or had already happened). Each of these cases involved international flights over the high seas.

277. Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 534 (1995).

278. Exec. Jet Aviation v. City of Cleveland, 409 U.S. 249, 271, 274 (1972).

establishes that admiralty jurisdiction applies to these flights if they crash on the high seas. Does admiralty jurisdiction apply to a tort committed while in flight and outside the continental U.S.? At least one court has answered no. In *Saegusa-Beecroft v. Hawaiian Airlines, Inc*., the U.S. District Court for the District of Hawaii declined to invoke admiralty jurisdiction for a tort committed on an inter-island flight that did not crash.[279] It held "[m]aritime jurisdiction is generally limited in aviation cases to incidents where the plane crashed into navigable waters."[280] That the flight replaced a boat ride between islands is not enough, even outside the continental U.S., to confer admiralty jurisdiction when the flight does not touch the water.

There remains one final kind of activity that could theoretically overcome *Executive Jet Aviation*'s strong presumption that land-based flights do not implicate admiralty jurisdiction. The second part of the test—a substantial relationship to traditional maritime activity such it could disrupt maritime commerce—could be implicated in the civil penalty context if the violation disrupts maritime commerce. One could imagine that dive bombing a ship or dropping an object from a plane that damages a ship would disrupt maritime commerce. In this instance, a violation of 14 C.F.R. § 91.15 (dropping objects) or § 91.119 (minimum altitudes and distance from vessels) could implicate admiralty jurisdiction due to its disruptive effect on maritime commerce. If found to be properly within the admiralty jurisdiction, civil penalties for these violations might not implicate the Seventh Amendment's jury trial right. Again, this niche kind of case does not apply to broad categories of aviation civil penalties.

For the foregoing reasons, admiralty jurisdiction does not apply to the vast majority of violations for which DOT, FAA, or DHS can bring civil penalties. The narrow, hypothetical situations that may implicate admiralty jurisdiction are (1) a civil penalty violation that arises from a death resulting from a crash on the high seas; and (2) use of an airplane to disrupt maritime commerce on navigable waters. Outside of these specific categories, admiralty jurisdiction does not apply to aviation civil penalties.

2. Equitable Remedies and Certificate Actions

DOT, FAA, and DHS have broad authority to issue orders to enforce their statutory and regulatory authorities.[281] Some of these orders take the form of a temporary restraining order, cease-and-desist order, injunction, or lien.[282] Because these orders fall within equity jurisdiction, they are not subject to the Seventh Amendment's jury trial right. Absent a statutory jury trial right, the only way these cases make it to an Article III court is if there is a mixed question of law

279. Saegusa-Beecroft v. Hawaiian Airlines, Inc., No. 18-00384 HG-KJM, 2019 U.S. Dist. LEXIS 63766, at *13 (D. Haw. Apr. 12, 2019).

280. *Id.*

281. 49 U.S.C. § 46105.

282. *See, e.g.*, *id.* § 46301(d)(4); 14 C.F.R. § 13.20.

and equity that then triggers the Seventh Amendment.[283] Title 49 removes the guess work from mixed questions when it comes to FAA and DHS. Section 46301 gives district courts exclusive jurisdiction any time FAA or DHS brings an action in rem, a lien, or an injunction in connection with a civil penalty.[284] For mixed questions of law and equity brought by DOT, as discussed *supra* Part III-B, the determining factor is whether a monetary remedy is "incidental or intertwined with injunctive relief."[285] In those cases the incidental nature of monetary relief does not transform the equitable nature of the action. But when there is motivation to use something styled as an equitable remedy to punish and deter, the balance tips in favor of the legal remedy and right to a jury trial.[286]

The mixed question analysis applies when an equitable remedy combines with a monetary assessment. This leaves in limbo non-monetary penalties that do not have a historic connection to equitable relief. The most prominent form of this penalty in aviation is a certificate action. In keeping with the divide between economic and safety regulations, DOT issues economic operating certificates and FAA issues safety-related certificates.[287] FAA certificate holders include entities (such as air carriers, manufacturers, and flight schools) and individuals (such as pilots, flight engineers, mechanics, and dispatchers).[288] For clarity, in aviation parlance, pilots hold a certificate (not a license), so certificate actions include suspending or revoking a pilot certificate. DOT and FAA have broad authority to suspend or revoke these certificates in the public interest.[289] Appeals of DOT certificate actions are heard by DOT ALJs.[290] Appeals of FAA certificate actions are heard by NTSB ALJs.[291]

It is unclear whether the Seventh Amendment applies to certificate actions. There are two reasons the Seventh Amendment may not apply. First, certificate actions do not involve a monetary value in controversy exceeding $20.[292] There is scant precedent to determine whether the "value in controversy" must be measured in dollars that a litigant seeks to recover, or if it may be calculated by consequential harms that have a determinable monetary value. While a certificate action does not impose a direct monetary penalty, it may lead to a loss in revenue

283. *See* Ross v. Bernhard, 396 U.S. 531, 538 (1970).
284. 49 U.S.C. § 46301(d)(4)(B)–(D).
285. Nat'l Presto Indus. v. U.S. Merchs. Fin. Grp., Inc., 121 F.4th 671, 678 (8th Cir. 2024).
286. *See* Dairy Queen, Inc. v. Wood, 369 U.S. 469, 472–73 (1962).
287. 49 U.S.C. §§ 41102, 44702(a).
288. *See id.* § 44702(a).
289. 49 U.S.C. § 41110 ("the Secretary may amend, modify, or suspend any part of a certificate if the Secretary finds the public convenience and necessity require amendment, modification, or suspension"); *id.* § 44709 ("The Administrator may issue an order amending, modifying, suspending, or revoking any part of a certificate issued under this chapter if the Administrator decides after conducting a reinspection, reexamination, or other investigation that safety in air commerce or air transportation and the public interest require that action").
290. 14 C.F.R. pt. 302, subpart B.
291. 49 U.S.C. § 44709(d).
292. *See* U.S. CONST. amend. VII.

or wages, or cost money to reinstate the certificate—costs that could easily exceed $20. The common law has long recognized consequential damages as a legal remedy.[293] But governmental immunities and statutory judicial review procedures bar recovery of consequential damages stemming from an improper certificate action.[294]

Second, a certificate action may be considered an equitable action similar to an injunction. This analogy treats the order suspending or revoking a certificate as an injunction against exercising the privileges of the certificate. But FAA's practice does not fit well with this analogy. For one, when FAA suspends or revokes a certificate the person must turn in the physical certificate to FAA.[295] Failure to do so results in daily accruing civil penalties.[296] Such an injunction would not be a mere order requiring a person to refrain from unlawful activity, like a cease-and-desist; it would remove (temporarily or permanently) the privileges associated with a certificate. Furthermore, not all certificate actions meet the traditional purposes of equity jurisdiction. Equity is supposed to remedy injustices, while legal remedies can punish and deter.[297] FAA's stated purpose in seeking fixed-term certificate suspensions (as well as civil penalties) is "for punitive and deterrent purposes."[298] While FAA characterizes its motive for revoking or indefinitely suspending a certificate as remedial, the remedy is for the agency, not any victim of the offending conduct.[299] FAA cannot deny that some certificate revocations also have a punitive and deterrent effect.[300] Consider a few of the violations for which FAA seeks a permanent certificate revocation after one violation: a husband turns off his airplane's transponder in airspace where no transponder is required so his wife cannot track him online; a private pilot refusing a drug or alcohol test demanded without probable cause; a student pilot selling a photo he took while on a solo flight; or unintentionally missing a check box on a FAA medical application.[301] While all of these acts violate the Federal Aviation Regulations, it is hard for a neutral observer to say revoking a pilot certificate for these violations has solely remedial motivations. That view is reinforced by the fact that a person may rely on all of their previously logged flight experience when applying for reissuance of the certificate.[302] Logic would say a certificate action for remedial purposes should require some remedial training, not just a retest.

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293. *See generally* Hadley v. Baxendale, 156 Eng. Rep. 145 (Ex. Ch. 1854).

294. 49 U.S.C. § 46110; *see* Green v. Brantley, 981 F.2d 514, 520 (11th Cir. 1993); Pastrana v. United States, 746 F.2d 1447, 1448 (11th Cir. 1984); Gaunce v. deVincentis, 708 F.2d 1290, 1291 (7th Cir. 1983).

295. *See, e.g.*, 14 C.F.R. § 61.19(f).

296. FAA ORDER NO. 2150.3C, *supra* note 118, at 9-12.

297. *Cf.* SEC v. Jarkesy, 603 U.S. 109, 123 (2024) ("[W]hile courts of equity could order a defendant to return unjustly obtained funds, only courts of law issued monetary penalties to punish culpable individuals." (internal quotations omitted)).

298. FAA ORDER NO. 2150.3C, *supra* note 118, at 9-2.

299. *Id.* at 9-13.

300. *Cf.* Austin v. United States, 509 U.S. 602, 610 (1993) ("It is commonly understood that civil proceedings may advance punitive as well as remedial goals").

301. FAA ORDER NO. 2150.3C, *supra* note 118, at 9-13–14.

302. *Id.* at 7-4.

It is also worth noting that equity is an *exception* to the Seventh Amendment's scope. Justice Story's framing of the Seventh Amendment—which the *Jarkesy* court adopted—"embrace[s] all suits which are not of equity or admiralty jurisdiction, whatever may be the peculiar form which they may assume."[303] If the analogy between certificate actions and equitable remedies breaks down, then *Jarkesy*'s Seventh Amendment test would trigger the right to a jury trial. Courts implementing this new test may require the government to identify a historic equitable remedy before determining a matter via in-house adjudication.

3. Jury Trial Right via the Due Process Clause

Equity and nonmonetary value considerations present difficult questions as to whether the Seventh Amendment applies to certificate actions. Justice Gorsuch's concurrence fortuitously offers another path to requiring a jury trial in an Article III court: the Due Process Clause. The concurrence explains how the Seventh Amendment, Article III, and the Fifth Amendment's Due Process Clause work together to require a jury trial in front of an impartial tribunal.[304] Prior to depriving a person of life, liberty, or property, the Due Process Clause requires a person receive "those customary procedures to which freemen were entitled by the old law of England."[305] This includes an impartial judge and jury, notice of allegations, an opportunity to answer, and "a trial according to some settled course of judicial proceedings."[306] In other words, "due process demands nothing less than 'the process and proceedings of the common law.'"[307] This concept of due process applies if certificate actions implicate property interests.

Several courts have held that FAA certificate holders have a property interest in their certificate. In *Tur v. FAA*, the Ninth Circuit applied the Due Process Clause to a certificate action against a helicopter pilot, holding the pilot "undoubtedly has a protectable property interest in his airman's certificate."[308] The Eleventh Circuit in *Pastrana v. United States* likewise held that an airline pilot's certificate "is a cognizable property interest protectable by the procedural due process requirement of the fifth amendment. Petitioner has a continuing legitimate claim of entitlement to the pilot certificate . . . ."[309] This principle has been applied to other FAA certificates, such as an airline's operating certificate. *In re Horizon Air* held that the certificate is a "significant property interest" and "[t]he mere fact that the certificate is issued and regulated by the FAA does not preclude

303. SEC v. Jarkesy, 603 U.S. 109, 122 (2024) (quoting Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 447 (1830)).

304. *Id.* at 2140, 2144–47 (Gorsuch, J., concurring).

305. *Id.* at 2144–45 (quoting Sessions v. Dimaya, 584 U.S. 148, 176 (2018) (Gorsuch, J., concurring in part and concurring in judgment)).

306. *Id.* at 2145 (quoting Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 280 (1856)).

307. *Id.* (quoting 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1783, p. 661 (1833)).

308. Tur v. FAA, 4 F.3d 766, 769 (9th Cir. 1993).

309. Pastrana v. United States, 746 F.2d 1447, 1450 (11th Cir. 1984).

the certificate from being treated as a property right."[310] It has also been applied to an air traffic controller specialist certificate. *Newton v. Utah Nat'l Guard* cited the three prior cases in holding that the certificate was a protected property interest.[311] This property interest approach aligns with the statutory structure. Unlike some FAA designations that can be rescinded at will,[312] the FAA "shall issue" a certificate to anyone who demonstrates he or she is qualified.[313] In the case of a pilot certificate, a person who demonstrates those qualifications is "entitled" to the certificate, and the certificate is valid "unless it is surrendered, suspended, or revoked."[314] That language supports a cognizable property interest in a certificate. Although the Supreme Court has not addressed property interests in pilot certificates, it has held that state driver's licenses "are not to be taken away without that procedural due process required by the Fourteenth Amendment."[315] It is not difficult to extend this holding to airman certificates.

Although three of these courts declared FAA certificates property under the Due Process Clause, none explained in detail the process that is due. Certainly none of the decisions would require the kind of processes that Justice Gorsuch's concurrence envisions. Assuming FAA certificates are cognizable property interests under this view of the Due Process Clause, the concurrence's conception of due process would require certificate actions to be brought in an Article III court with a jury.[316] This approach would avoid some of the difficult questions of equity and nonmonetary value that come from a jury trial right under the Seventh Amendment, and may prove a viable path for certificate holders to avoid the DOT, FAA, and DHS administrative enforcement processes.

IV. WHAT'S LEFT OF THE PUBLIC RIGHTS EXCEPTION?

Jarkesy recognized that the Seventh Amendment's scope is much broader than previously recognized. Under the Court's framing, public rights fall within the Seventh Amendment's scope, and it is the public rights exception that works to remove the jury trial right.[317] The public rights exception affects both the Seventh Amendment jury trial right and the ability to have a case heard in an Article III

310. In re Horizon Air, 156 B.R. 369, 376 (N.D.N.Y. 1993).

311. Newton v. Utah Nat'l Guard, 688 F. Supp. 2d 1290, 1307 (D. Utah 2010).

312. *See* Bradshaw v. FAA, 8 F.4th 1215, 1221–22 (11th Cir. 2021) (FAA may terminate a Designated Pilot Examiner's authority because 49 U.S.C. § 44702(d)(2) allows FAA to rescind that authority "at any time for any reason").

313. 49 U.S.C. §§ 44703(a), 44704(a)(1), 44705, 44706(a).

314. 14 C.F.R. §§ 61.13(a)(4), 61.19(a)(2).

315. Bell v. Burson, 402 U.S. 535, 539 (1971).

316. SEC v. Jarkesy, 603 U.S. 109, 151 (2024) (Gorsuch, J., concurring) ("due process demands nothing less than the process and proceedings of the common law. That means the regular course of trial proceedings with their usual protections, not the use of ad hoc adjudication procedures before the same agency responsible for prosecuting the law, subject only to hands-off judicial review.") (internal quotations and citations omitted).

317. *Id.* at 127 (majority opinion) ("Although the claims at issue here implicate the Seventh Amendment, the Government and the dissent argue that a jury trial is not required because the 'public rights' exception applies.").

court. Actions of a legal nature presumptively concern private rights, which trigger both the jury trial right and Article III.[318] The Article III analysis goes further, in that there is a presumption in favor of Article III courts even when public rights are arguably involved.[319] So instead of proving that an action is not a public right, the government must show that the action does involve a public right before it seeks to prosecute in-house.[320] "The public rights exception is, after all, an *exception*."[321]

The *Jarkesy* majority's public rights test can best be described as covering matters that "historically could have been determined exclusively by the executive and legislative branches" without the judiciary's involvement.[322] Its analysis focuses on six historically recognized invocations: cases involving revenue collection, immigration and foreign commerce, tariffs, relations with Indian tribes, adjudicating public land grants, and granting public benefits.[323] The Court ultimately held that securities fraud did not fall into any of these historically recognized exceptions and declined to create a new public right for such actions.[324]

Justice Gorsuch's concurrence picks up on this analysis and fashions a public rights exception definition rooted in history: "public rights are a narrow class defined and limited by history."[325] All public rights, the concurrence notes, have "a serious and unbroken historical pedigree" with a "deeply rooted tradition of nonjudicial adjudication."[326] Most notably, the existing public rights the Court has recognized are not subject to expansion: "[O]utside of those limited areas, 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 normally demands."[327] The majority's approach to public rights seems to agree with the concurrence that the existing list of public rights is not subject to expansion—but does not say so explicitly. The Court leaves the door open to recognizing new public rights if historically the matter could have been resolved exclusively by the executive or legislative branch.

A. Public Rights Recognized in Jarkesy

Jarkesy recognized six categories of public rights: revenue collection, immigration and foreign commerce, tariffs, relations with Indian tribes, adjudicating

318. *Id.* at 127–28.
319. *Id.* at 132.
320. *Id.*
321. *Id.* (emphasis in original).
322. *Id.* at 128 (quoting Stern v. Marshall, 564 U.S. 462, 493 (2011)) (cleaned up).
323. *Id.* at 128–29 (citing Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1856); Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320 (1909); Ex parte Bakelite Corp. 279 U.S. 438 (1929); United States v. Jicarilla Apache Nation, 564 U.S. 162 (2011); Crowell v. Benson, 285 U.S. 22 (1932); United States v. Duell, 172 U.S. 576 (1899)).
324. *Id.* at 134, 139.
325. *Id.* at 152 (Gorsuch, J., concurring).
326. *Id.* at 153.
327. *See id.* at 158.

public land grants, and granting public benefits.[328] The first case to recognize public rights, *Murray's Lessee v. Hoboken Land & Improvement Co.*, involved the government collecting undelivered public revenue from a federal customs collector.[329] The Court upheld a sale of property to satisfy the amount owed even though the amount owed was not set by judicial order.[330] The Court reasoned that no judicial involvement was necessary because such collection proceedings had long used nonjudicial summary proceedings to compel payment.[331] Even before *Murray's Lessee* the Court recognized that public benefits—Revolutionary War pensions, as it was in *Hayburn's Case*—could be decided by the executive and legislative branches without judicial involvement.[332] This eventually led to recognizing public benefits in general as public rights.[333] The Court also held Congress's plenary powers over immigration and foreign commerce, combined with the lack of a vested right to import anything into the country, made immigration and customs violations subject to the public rights exception.[334] Another case found this extended to tariffs as well.[335] This plenary authority argument also applies to relations with Indian tribes.[336] Disputes over public land grants were also held to be determinable by the executive branch without judicial involvement.[337]

The Court noted that all of these public rights had a long history of non-judicial adjudication.[338] That history is necessary to overcome the presumption in favor of Article III courts and the attendant right to a jury trial. In place of judicial adjudication, these categories were subjects that could be exclusively resolved by the political branches. Moreover, these cases did not involve vested rights, whether it was due to Congress's plenary authority over a subject or the voluntary extension of benefits for a public purpose that could be repealed at any time. This attention to history contrasts with other justifications for the public rights exception, such as practical considerations, governmental efficiency, or the government being a party to the case. The Court rejected these bases for invoking the public rights

328. *Id.* at 128–29 (majority opinion) (citing Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1856); Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320 (1909); Ex parte Bakelite Corp. 279 U.S. 438 (1929); United States v. Jicarilla Apache Nation, 564 U.S. 162 (2011); Crowell v. Benson, 285 U.S. 22 (1932); United States v. Duell, 172 U.S. 576 (1899)).

329. Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 274–75 (1856).

330. *Id.* at 275, 281.

331. *Id.* at 278.

332. Hayburn's Case, 2 U.S. (2 Dall.) 409, 410 n.2 (1792).

333. *See* Crowell v. Benson, 285 U.S. 22, 51–52 (1932). The *Jarkesy* opinion mentions veteran benefits, pensions, and patents as public benefits subject to the public rights exception.

334. Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 331–35, 339–40 (1909).

335. Ex parte Bakelite Corp., 279 U.S. 438, 458, 460–61 (1929).

336. United States v. Jicarilla Apache Nation, 564 U.S. 162, 174–75 (2011) ("Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government." (quoting Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903))).

337. Smelting Co. v. Kemp, 104 U.S. 636, 640–41 (1881); *see also* Crowell v. Benson, 285 U.S. 22, 59–60 (1932) (explaining disputes over public land disposal).

338. SEC v. Jarkesy, 603 U.S. 109, 131, 134 (2024); *see also id.* at 153–54 (Gorsuch, J., concurring).

exception and noted that without such attention to history "the exception would swallow the rule."[339]

B. Aviation and Public Rights

If the list of public rights is not subject to expansion, as Justice Gorsuch posits, then aviation is not a public right. Aviation is not properly categorized as revenue collection, immigration and foreign commerce, tariffs, relations with Indian tribes, adjudicating public land grants, and granting public benefits. The closest fit one could argue is that aviation is a public benefit. But it would take a substantial expansion of that category for aviation to fit within its scope. To determine whether a matter fits within the public rights exception one must look at both the action and the remedy.[340]

Aviation does not properly fit within the public benefits category in the public rights exception. When discussing public benefits, the Court lists veteran benefits, pensions, and patents.[341] The first two can be classified as welfare-type benefits. Congress passed legislation that created programs to benefit veterans and other pensioners, such as Social Security. The benefits flowing from those programs exist solely by statute. In contrast, Congress chose to enter the preexisting field of aviation and control who may fly an aircraft to promote air safety. Persons would be at liberty to fly aircraft as they please absent this legislation. In other words, Congress did not create the benefit of flight; it exists without Congressional action. If the legislation creating a true public benefit such as food stamps were repealed tomorrow, a recipient today would have no avenue to continue receiving benefits or sue for its reinstatement. Not so with aviation. If Congress repealed title 49 tomorrow, the same people certified to fly today would be at liberty to fly a plane tomorrow. In aviation, repealing the underlying legislation does not destroy the benefit that the person seeks to exercise.

DOT and FAA certificates are also distinguishable from patents. First, nearly all certificates are issued without a specific expiration date.[342] That contrasts with a patent's fixed term of applicability.[343] Second, certificates do not create a public franchise in the way patents do. In holding that patents are public rights, the Court in *Oil States* relied on the fact that patents grant franchise rights that would not exist outside the patent system.[344] Aviation certificates do not grant a franchise. In fact, title 49 explicitly states that an air carrier certificate "does not

339. *Id.* at 131, 134, 139 (majority opinion).

340. *Id.* at 138 ("Where the action involves rights and remedies recognized at common law, it must preserve to parties their right to a jury trial." (quoting Pernell v. Southall Realty, 416 U.S. 363, 383 (1974)) (cleaned up)).

341. *Id.* at 130.

342. *See* 49 U.S.C. § 41110 (DOT certificates); 14 C.F.R. § 61.19(a)(2) (pilot certificates); 14 C.F.R. § 119.61(a) (FAA air carrier certificates).

343. 35 U.S.C. § 154(a)(2). Indeed, the Constitution requires patents to be "for limited Times." U.S. Const. art. I, § 8, cl. 8.

344. Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 584 U.S. 325, 335, 337–38 (2018).

confer a proprietary or exclusive right."[345] *Oil States* also found relevant that the benefit patentees seek was not available at common law; it is a creature of statute.[346] As discussed above, the ability to pilot an aircraft is not a creature of statute, it is only the introduction of a statute that requires certification. Furthermore, *Oil States* explained a patent "takes from the public rights of immense value and bestows them upon the patentee."[347] That does not apply to aviation. Although certificate holders are the only ones authorized to exercise certain privileges, anyone can obtain a certificate provided they meet the qualifications. It does not matter to the *Jarkesy* analysis whether this certificate grants private or commercial privileges, as common carrier privileges do not transform a privilege into a public right.[348] There is no cap on the number of certificates DOT or FAA may grant. Issuing a new certificate does no more to diminish public rights than adding another driver to the roads with each new driver's license. The only special benefit a certificate provides is exemption from some state-level regulation and taxes.[349] But those benefits are part of Congress's measures to regulate the entire field of aviation at the federal level, not to privilege certificate holders at the expense of the general public. Put simply, aviation does not meet any of the factors that cause patents to be considered a public benefit.

Even if the public rights categories can be expanded based on matters that historically could have been determined exclusively by the executive and legislative branches, aviation still does not fit within the public rights exception. The best evidence of this is the district court's exclusive jurisdiction over aviation civil penalties until 1987, and the concurrent (and in some cases exclusive) jurisdiction that exists to this day.[350] To be considered a public right, the matter must have historically "been determined exclusively by the executive and legislative branches."[351] This history does not exist for aviation civil penalties. To the contrary, Congress's first authorization of aviation civil penalties included an express jury trial right, and for most of the time the federal government has regulated aviation civil penalty cases have been brought exclusively in federal district courts.

Congress established civil penalties for aviation violations in 1926.[352] Notably, that penalty provision included a clear jury trial right that mirrors the modern 49 U.S.C. § 46305.[353] Between 1926 and 1975, neither DOT nor FAA had the

345. 49 U.S.C. § 41101(c).

346. *Oil States Energy Servs*., 584 U.S. at 335.

347. *Id*. at 335 (quoting United States v. American Bell Tel. Co., 128 U.S. 315, 370 (1888)).

348. AT&T, Inc. v. FCC, 149 F.4th 491, 500–02 (5th Cir. 2025), *cert. granted*, 2026 WL 73092, ___ S.Ct. ___ (Jan. 9, 2026).

349. *See* 49 U.S.C. §§ 40116 (preempting state taxation), 41713 (preempting state regulation of price, routes, and service). The latter was enacted as part of the Airline Deregulation Act of 1978. Pub. L. 95-504, § 4(a), 92 Stat. 1705, 1708 (1978).

350. Air Transp. Ass'n v. Dep't of Transp., 900 F.2d 369, 372 (D.C. Cir. 1990); 49 U.S.C. § 46107 (b).

351. *See* SEC v. Jarkesy, 603 U.S. 109, 128 (2024) (quoting Stern v. Marshall, 564 U.S. 462, 493 (2011)) (cleaned up).

352. Air Commerce Act of 1926, *supra* note 138, § 11(b).

353. *Compare id*., *with* 49 U.S.C. § 46305.

authority to administratively assess civil penalties for aviation violations.[354] Each civil penalty had to be brought in a district court by the U.S. Attorney.[355] That changed in 1975 when Congress granted DOT and FAA authority to administratively assess and adjudicate civil penalties for aviation-related violations of the Hazardous Materials Transportation Act (HMTA).[356] But outside the HMTA DOT and FAA could not decide aviation civil penalties in-house until Congress authorized in-house adjudications on a trial basis in 1987 and permanently in 1992.[357] That means aviation civil penalties could not be adjudicated in-house at all for the first 49 years the federal government regulated aviation; 61 years for all but hazardous material violations. This shows a strong history of judicial involvement in aviation civil penalties, *not* a history of the executive or legislative branch exclusively deciding these matters. This tradition continues to this day. Aviation civil penalty cases may presently be brought in district court, and the district court's jurisdiction is exclusive above certain statutory monetary thresholds.[358] That practice contrasts with a traditional public right's "deeply rooted tradition of nonjudicial adjudication."[359]

Aviation civil penalties do not fit into any of the six historically recognized public rights. The Supreme Court is not likely to extend the public rights exception to aviation civil penalties because they do not involve a matter that "historically could have been determined exclusively by the executive and legislative branches."[360]

Unlike civil penalties, certificate actions have been adjudicated by the executive branch since 1926. The law that first authorized pilot and air carrier certificates also allowed the executive branch to deny, suspend, or revoke certificates, subject to administrative appeal.[361] That authority was clarified in 1938, giving the power to "amend, modify, suspend, or revoke" a certificate after notice and an administrative hearing and providing judicial review in a federal court of appeals.[362] Although Congress has refined these procedures over the years, the core power to amend or modify certificates granted in 1926 survives to this day.[363] The law has since 1938 explicitly authorized judicial review, but the first step has always been an administrative adjudication.[364]

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354. *See Air Transp. Ass'n*, 900 F.2d at 372.

355. *Id.*

356. Transportation Safety Act of 1974, Pub. L. No. 93-633, § 110(a)(1), 88 Stat. 2156, 2160 (1975). Title I of that Act is cited as the "Hazardous Materials Transportation Act." *Id.* § 101.

357. Airport and Airway Safety and Capacity Expansion Act of 1987, Pub. L. No. 100-223, § 204(g), 101 Stat. 1486, 1520–21 (1987); FAA Civil Penalty Administrative Assessment Act of 1992, Pub. L. No. 102-345, § 2, 106 Stat. 923 (1992); *see Air Transp. Ass'n*, 900 F.2d at 372.

358. 49 U.S.C. §§ 46107(b), 46301(d)(4)(A).

359. SEC v. Jarkesy, 603 U.S. 109, 154 (2024) (Gorsuch, J., concurring).

360. *See id.* at 128 (majority opinion) (quoting Stern v. Marshall, 564 U.S. 462, 493 (2011)) (cleaned up).

361. Air Commerce Act of 1926, *supra* note 138, § 3(f).

362. Civil Aeronautics Act of 1938, Pub. L. No. 75-706, §§ 401(h), 609, 52 Stat. 973, 989, 1011 (1938).

363. *Compare* Air Commerce Act of 1926, *supra* note 138, § 3(f), *and* Civil Aeronautics Act of 1938, *supra* note 362, §§ 401(h), 609, *with* 49 U.S.C. § 44709.

364. Civil Aeronautics Act of 1938, *supra* note 362, §§ 401(h), 609; Federal Aviation Act of 1958, Pub. L. No. 85-726, § 609, 72 Stat. 731, 779 (1958); 49 U.S.C. § 44709.

This practice would likely meet the pure historical test at first blush. But if certificates have a cognizable property interest, the Court's reasoning for other public rights may counsel against applying the public rights exception. For example, the court lists administering public lands as a public right. But not all matters of administration could be decided in-house. The public rights exception covers the initial grant of land, and deciding the claimant's qualifications for the land or settling a dispute among multiple parties who has the superior claim to the land patent.[365] But once the grant had been settled, "the United States had to go to the courts if it wished to revoke a [land] patent."[366] That is because the land became a vested property right of the holder that "could only be divested according to law."[367] If this approach can be grafted onto a potential public right for aviation certificates, this principle means that disputes concerning a certificate's issuance can be decided in-house, while suspensions and revocations must be decided by an Article III court.

Neither aviation civil penalty nor certificate actions fall within any of the six historically recognized public rights. DOT and FAA certificates do not confer a public benefit such that it falls within the public rights exception's public benefit category. Certificate actions may be considered a public right if the Court expands the list of public rights to matters that historically could have been determined exclusively by the executive or legislative branch. But that expansion would be improper if certificate holders have a cognizable property right in an existing certificate. The only appropriate matter that could fit within this historic category is the initial issuance of a certificate because that has been exclusively decided by the executive branch for 99 years and does not implicate a vested right.

V. THE FIFTH CIRCUIT'S ALTERNATE HOLDINGS APPLIED TO AVIATION ENFORCEMENT

Although the Supreme Court did not reach the nondelegation doctrine or Article II removal power challenges, the Fifth Circuit's holdings on these issues remain good law.[368] Their application to the aviation administrative enforcement process does not depend on the Seventh Amendment analysis, and in many ways their application is much more straightforward. The judicial review statute for DOT, FAA, and DHS allows a person to appeal in-house enforcement actions to the circuit court in which the person or business resides.[369] These holdings could

365. SEC v. Jarkesy, 603 U.S. 109, 153 (2024) (Gorsuch, J., concurring) (citing Wellness Int'l Network, Ltd. v. Sharif, 575 U.S. 665, 715 (2015) (Thomas, J., dissenting)).

366. *Wellness Int'l Network*, 575 U.S. at 715 (Thomas, J., dissenting) (citing Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 577–78 (2007)).

367. *Id.* (quoting Johnson v. Towsley, 80 U.S. (13 Wall.) 72, 84–85 (1871)) (internal quotations omitted).

368. Jarkesy v. SEC, 132 F.4th 745, 746 (5th Cir. 2024); *accord* Energy Transfer, LP v. NLRB, 742 F. Supp. 3d 755, 759 (S.D. Tex. 2024).

369. 49 U.S.C. § 46110(a). Notably, American and Southwest Airlines—two of the "Big Four" airlines—are headquartered in the Fifth Circuit. Kaili Killpack, *Just 4 Airlines Control 80% Of The Industry*, Yahoo Finance (Dec. 4, 2024), https://finance.yahoo.com/news/just-4-airlines-control-80-

have a major impact on how DOT, FAA, and DHS approach in-house adjudication moving forward.

A. Nondelegation Doctrine

The Fifth Circuit held that SEC's power to choose between in-house adjudication and an Article III court violates the nondelegation doctrine. Article I of the Constitution begins, "All legislative Powers herein granted shall be vested in a Congress of the United States."[370] The nondelegation doctrine is "rooted in the principle of separation of powers" which "mandate[s] that Congress generally cannot delegate its legislative power to another Branch."[371] Both Montesquieu and John Locke wrote about the need to strictly separate powers among the government and prevent those powers from being delegated away.

Montesquieu's seminal work on separation of powers explains: "When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; . . . ."[372] John Locke explained separation of powers and nondelegation principles by saying that "the legislative can have no power to transfer their authority of making laws and place it in other hands."[373] Locke went on to say, "[The] legislative cannot transfer the power of making laws to any other hands; for it being but a delegated power from the people, they who have it cannot pass it over to others."[374] James Madison understood separation of powers to mean that "*alienating* the powers of the House . . . would be a violation of the Constitution."[375]

Shortly after the founding, Chief Justice Marshall reaffirmed that Congress cannot delegate "powers which are strictly and exclusively legislative."[376] While Marshall did recognize Congress's power to pass general provisions and authorize "those who are to act under such general provisions to fill up the details," Congress must first determine "important subjects, which must be entirely regulated by the legislature itself."[377]

141521012.html [https://perma.cc/Q8D2-8L8R]; Linnea Ahlgren & Jake Hardiman, *Which Airport Does Each Major US Carrier Call Home?*, Simple Flying (Sept. 21, 2022), https://simpleflying.com/major-us-carrier-hubs/ [https://perma.cc/DTP8-GKJG]. The Fifth Circuit is also home to more than 90,000 pilots. FED. AVIATION ADMIN., U.S. CIVIL AIRMEN STATISTICS, TABLE 5 (last updated Jan. 29, 2025), https://www.faa.gov/data_research/aviation_data_statistics/civil_airmen_statistics [https://perma.cc/6486-H5H4].

370. U.S. CONST. art. I, § 1.

371. Mistretta v. United States, 488 U.S. 361, 371–72 (1989).

372. Consumers' Research Cause Based Commerce, Inc. v. FCC, 109 F.4th 743, 786 (5th Cir. 2024) (Elrod, J., concurring) [hereinafter "Consumers' Research"] (quoting BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS, bk. XI, ch. VI (1748)) (quotations omitted).

373. Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 673 (1980) (Rehnquist, J., concurring) (quoting J. LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT, IN THE TRADITION OF FREEDOM, para. 141, at 244 (M. Mayer ed. 1957)).

374. *Id.*

375. Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490, 1520 (2021) (quoting 3 ANNALS OF CONG. 239 (1791) (James Madison)).

376. Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42 (1825).

377. *Id.* at 43.

Marshall did not draw an exact line between permissible "fill[ing] up the details" and impermissible delegations.[378] In modern times the Supreme Court draws this line using the intelligible principle test laid down in *J.W. Hampton, Jr., & Co. v. United States*.[379] The intelligible principle test allows Congress to delegate its power so long as it provides "an intelligible principle to which the person or body authorized to [act] is directed to conform."[380] The Supreme Court further refined this test when in 1935 it struck down two statutes as violating the nondelegation doctrine. In *A.L.A. Schechter Poultry Corp. v. United States*, the Court struck down the National Industrial Recovery Act (NIRA) because it failed to "prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure" and "sets up no standards, aside from the statement of the general aims" to guide executive discretion.[381] In other words, a statute lacks an intelligible principle if it (1) fails to require fact finding or a specific triggering event; and (2) does not provide a standard to guide discretion in executing the law.[382]

In the context of agency adjudication, Congress has sometimes authorized a civil penalty action to be brought in either in-house proceedings or in an Article III court. That is the case for both the SEC and DOT, FAA, and DHS in aviation enforcement proceedings.[383] Jarkesy argued the SEC's choice between forums conferred legislative power without an intelligible principle.[384] The SEC argued that this choice is a form of prosecutorial discretion.[385] The Fifth Circuit held that forum choice is an exercise of legislative power because it affects the legal processes the defendant receives.[386] Those legal processes include applying the agency's own rules of practice rather than Federal Rules of Civil Procedure and Federal Rules of Evidence; the ALJ making findings of fact and conclusions of law that become final absent an appeal; and the ALJ's significant powers over the proceedings, including issuing subpoenas, ruling on the admissibility of evidence, deciding dispositive motions, and controlling contemptuous conduct.[387] And of course, none of these agency proceedings have a jury. Congress supplied "no guidance"—not even an attempted intelligible principle—that the agency must use when deciding the prosecution forum.[388]

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378. *Id.*

379. 276 U.S. 394 (1928).

380. *Id.* at 409.

381. 295 U.S. 495, 541 (1935). The Court set aside another section of the NIRA for similar violations of the nondelegation doctrine. Panama Ref. Co. v. Ryan, 293 U.S. 388, 430 (1935).

382. *A.L.A. Schechter Poultry Corp.*, 295 U.S. at 541; *accord* Gundy v. United States, 588 U.S. 128, 136 (2019) (plurality op.) (courts must "decide whether the law sufficiently guides executive discretion to accord with Article I.").

383. *Compare* 15 U.S.C. §§ 77h–1(g), 78u–2, 80a–9(d), *with* 49 U.S.C. § 46301(c)–(d).

384. *Jarkesy*, 34 F.4th at 459.

385. *Id.* at 461–62.

386. *Id.* at 462.

387. *Id.*; *see also* SEC v. Jarkesy, 603 U.S. 109, 143 (2024) (Gorsuch, J., concurring) (discussing procedural differences between SEC's in-house adjudication and an Article III court).

388. *Jarkesy*, 34 F.4th at 462.

DOT, FAA, and DHS adjudications have these same features. These administrative adjudication processes lack the procedural protection and independence of an Article III court. [389] The statute provides no guidance as to which cases may be adjudicated in-house and which should go to an Article III court.[390] True, the statute requires FAA and DHS civil penalties over a certain amount to go to district court.[391] But under that threshold, FAA and DHS's administrative adjudication and federal district courts have concurrent jurisdiction.[392] Not surprisingly, FAA's enforcement data from 2014–2024 show that when the FAA has the option to adjudicate civil penalties in-house, it chooses in-house adjudication 91% of the time.[393] There is no exclusive jurisdiction threshold for DOT civil penalties, so administrative adjudication and district courts have full concurrent jurisdiction. The statute is silent on which forum to choose where there is concurrent jurisdiction. Therefore, a straightforward application of the Fifth Circuit's holding results in DOT, FAA, and DHS's forum selection power violating the nondelegation doctrine.

B. Article II Removal Powers

The Fifth Circuit also held that SEC ALJs' dual layers of for-cause removal protections violate Article II. The President has the duty to "take Care that the Laws be faithfully executed."[394] The Supreme Court has interpreted this "take care" clause to give the President control over executive branch officials.[395] But it has limited that power to officers that perform "sufficiently important executive functions."[396] That control incudes general policy direction as well as both appointment and removal.[397] It is the President's job to implement legislative enactments and executive policies. The appointment power ostensibly gives him the authority to select persons he thinks are best suited to implement that policy. The removal power is a backstop in case that person uses the President's delegated executive power in an unfavorable manner. The Fifth Circuit determined that SEC ALJs' power to control proceedings, admit evidence, and issue final, binding decisions are important executive functions that trigger the removal power.[398]

The Supreme Court has carved out exceptions to the removal power for principal officers on expert boards and recognized some inferior officers can have for-

389. *See generally* 14 C.F.R. pt. 13, subpart G (FAA); *id.* pt. 302, subpart D (DOT); 49 C.F.R. pt. 1503, subpart G (DHS); *compare* 17 C.F.R. § 201.111 (powers of SEC hearing officer), *with* 14 C.F.R. § 13.205 (ALJs in FAA civil penalty proceedings), *id.* § 302.17 (DOT ALJs), *and* 49 C.F.R. § 1503.607 (DHS ALJs).

390. *See* 49 U.S.C. § 46301(c)–(d).

391. *Id.* § 46301(d)(4)(A).

392. *See* 49 U.S.C. §§ 46107(b), 46301(c)–(d).

393. *See generally* FED. AVIATION ADMIN., ENFORCEMENT REPORTS, https://www.faa.gov/about/office_org/headquarters_offices/agc/practice_areas/enforcement/reports (last visited Apr. 28, 2025).

394. U.S. CONST. art. II, § 3.

395. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 492–93 (2010) (citing Myers v. United States, 272 U.S. 52, 117 (1926)).

396. *Jarkesy*, 34 F.4th at 463.

397. *Id.* at 463.

398. *Id.* 464 (citing Lucia v. SEC, 138 S. Ct. 2044, 2053 (2018)).

cause removal protection.[399] But the Supreme Court has never approved an officer having their own for-cause removal protection when there is an additional layer of officers above him or her (between the officer and the President) that also have for-cause removal protection.[400] This dual-layered for-cause removal protection violates the Take Care Clause.

All agency ALJs have for-cause removal protection.[401] At the SEC, ALJs are appointed by the five-member SEC, whose Commissioners also have for-cause removal protection. SEC ALJs can only be removed for cause as determined by the MSPB, whose members also have for-cause removal protection.[402] Because SEC ALJs exercise sufficiently important executive functions, the Fifth Circuit held that this dual-layered for-cause removal protection violates Article II.[403]

This principle can be most easily applied to NTSB ALJs. NTSB ALJs have similar dual-layered for-cause removal protection as SEC ALJs. To start, all ALJs have for-cause removal protection.[404] NTSB ALJs may only be removed by the five-member NTSB, for causes determined by statute and adjudicated by the MSPB. NTSB and MSPB board members also enjoy for-cause removal protections.[405] NTSB ALJs exercise "sufficiently important executive functions" during administrative adjudications because they have similar powers as SEC ALJs. [406] Thus under Supreme Court and Fifth Circuit precedent NTSB ALJs have impermissible dual for-cause protection. This presents problems for FAA administrative adjudications heard before NTSB ALJs. An appeal to the NTSB is the exclusive method to contest FAA-ordered civil penalties involving pilots, mechanics, and flight engineers as well as all certificate actions.[407] The Fifth Circuit's decision in *Jarkesy* provides a straightforward path to challenge this process.

Another form of dual-layered for-cause removal exists for DOT, FAA, and DHS ALJs. Some scholars have argued that MSPB review grants all ALJs dual-layered (or more) for-cause removal protection.[408] That is because all ALJs enjoy for-cause removal, and the members of the body that adjudicates these for-cause removals—MSPB—themselves have for-cause removal.[409] In other words, it does not matter if the agency head that employs the ALJ is removable without cause. MSPB's review of the for-cause removal grants all ALJs the impermissible

399. *Id*. (citing *Free Enter. Fund*, 561 U.S. at 492, 496).

400. *Free Enter. Fund*, 561 U.S. at 492.

401. 5 U.S.C. § 7521(a).

402. *Jarkesy*, 34 F.4th at 464–65; *see also* 5 U.S.C. § 1202(d) (for-cause removal for MSPB members) and *Free Enter. Fund*, 561 U.S. at 487 (for-cause removal for SEC Commissioners).

403. *Jarkesy*, 34 F.4th at 465.

404. 5 U.S.C. § 7521(a).

405. 5 U.S.C. § 1202(d) (MSPB); 49 U.S.C. § 1111(c) (NTSB).

406. *Jarkesy*, 34 F.4th at 463.

407. 49 U.S.C. § 44709(d)(1) (certificate action appeals), 46301(d)(5)(B) (pilot, mechanic, and flight engineer civil penalty appeals).

408. *See* Spencer Davenport, *Resolving ALJ Removal Protections Problem Following* Lucia, 53 U. MICH. J. L. REFORM 693, 695, 708 (2020).

409. 5 U.S.C. § 1202(d) (for-cause removal for MSPB members); *id*. § 7521(a) (for-cause removal for ALJs).

second layer of for-cause removal protections. The Department of Justice recently adopted this position and announced it will no longer defend multilayer removal protections, including when the MSPB is one of those layers.[410] That means the government will not defend challenges to DOT, FAA, DHS, and NTSB ALJ removal protections.

The one remaining question is remedy. The Fifth Circuit reserved judgment as to whether the Article II violation alone warrants vacating a liability finding.[411] In *Lucia v. SEC*, the Supreme Court determined that an Appointments Clause violation could be remedied by a new hearing before a properly appointed official.[412] In *Lucia*, the dispute centered on who appointed the ALJ. The constitutional problem could be easily remedied by the SEC directly appointing ALJs rather than allowing staff to hire ALJs.[413] Here, the remedy is not so simple. Either NTSB board members or ALJs must lose their for-cause protection, or its ALJs lose all power to hear administrative adjudications. The Court chose the former remedy in *Free Enterprise Fund*.[414] *Free Enterprise Fund* challenged the dual-layers of for-cause removal protection for Public Company Accounting Oversight Board (PCAOB) members.[415] The Court remedied this constitutional violation by severing the for-cause removal protection for the PCAOB board members, making them removable at will.[416] *Selia Law* challenged for-cause removal protections for the single agency head at the Consumer Financial Protection Bureau (CFPB).[417] There the Court also severed the for-cause removal provisions and made the CFPB Director removable at will.[418]

Free Enterprise Fund and *Selia Law* should have made the remedy clear: sever the unconstitutional for-cause removal.[419] But *Collins v. Yellen*—decided one year before the Fifth Circuit's *Jarkesy* decision—muddied the waters. *Collins* challenged for-cause removal restrictions on the Federal Housing Finance Agency Director.[420] The case involved complicated facts: an acting director who was removable at will approved the challenged action, but Senate-confirmed directors who had unconstitutional for-cause removal protections implemented it.[421]

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410. Letter from Sarah M. Harris, Acting U.S. Solicitor General, to Mike Johnson, Speaker of the U.S. House of Representatives (Feb. 20, 2025), https://www.justice.gov/oip/media/1390336/dl?inline [https://perma.cc/LNH6-A96M].

411. *Jarkesy*, 34 F.4th at 465–66.

412. Lucia v. SEC, 585 U.S. 237, 251 (2018).

413. *Id.* at 245.

414. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477 (2010).

415. *Id.* at 508–09.

416. *Id.* at 509.

417. Seila Law LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197, 203 (2020).

418. *Id.* at 509.

419. Admittedly, severability is more difficult here because the for-cause removal protections for ALJs across the government is contained in one statute: 5 U.S.C. § 7521(a). That same statute applies to ALJs who report directly to an agency head who is removable at will, such as DOT ALJs. Instead of targeting § 7521 the court could have made SEC commissioners (and perhaps MSPB board members) removable at will and thus remove the second layer of for-cause removal protection.

420. Collins v. Yellen, 594 U.S. 220, 227 (2021).

421. *Id.* at 257.

Additionally, the challenged action had been superseded during litigation, so the challengers were limited to retrospective relief.[422] To determine that relief, the Supreme Court instructed lower courts on remand to determine the harm that is traceable to the confirmed FHFA Directors' unconstitutional for-cause removal protections.[423]

This precise harm traceability requirement is not likely to apply in other for-cause removal challenges. The only reason it was required in *Collins* was because some actions were lawfully taken by acting directors and some were taken by directors with unconstitutional removal protections.[424] That is not the case for ALJs with dual-layered for-cause removal protection. Take for example SEC and NTSB. Members of both agencies enjoy for-cause removal protections.[425] Unlike FHFA, there are no acting SEC commissioners or acting NTSB board members who are removable at will. That means ALJs in those agencies are protected by unconstitutional removal protections 100% of the time. There is no need to account for when an ALJ has unconstitutional removal protections because all of their actions are taken while they have such unconstitutional protections. That makes the remedy much easier. Under *Free Enterprise Fund* and *Selia Law* the remedy is to sever the second layer of for-cause removal protections. In a challenge brought as part of an enforcement action, that remedy will be similar to *Lucia*'s: a new hearing in front of an ALJ without unconstitutional removal protection. In a pre-enforcement challenge the prospective remedy will be treating NTSB board members as removable at will going forward.

CONCLUSION

Jarkesy's focus on securities fraud makes it difficult to know how the Court will apply its principles in future cases. But it left us a few seeds from which some general principles sprout. The Seventh Amendment covers all actions that are legal in nature. That includes any action that is not definitively an equity or admiralty action. When it comes to remedy, a civil penalty has a sufficient grounding in common law legal actions such that the Seventh Amendment applies to all civil penalties that have a deterrent or punitive motive, regardless of the triggering violation's common law pedigree. The Seventh Amendment analysis starts with this legal in nature inquiry, and that is where *Atlas Roofing* erred. Equity and admiralty still fall outside the Seventh Amendment's scope, but mixed questions of law and equity receive a jury trial.

Applying these principles to aviation provides a case study in how the Court will review other statutory schemes. Aviation civil penalties are legal in nature because they are a monetary remedy brought for a punitive and deterrent purpose.

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422. *Id.*

423. *Id.* at 259–60.

424. *Id.* at 257.

425. Free Enter. Fund v. Public Co. Acct. Oversight Bd., 561 U.S. 477, 487 (2010) (for-cause removal for SEC Commissioners); 49 U.S.C. § 1111(c) (NTSB).

Aviation certificate actions are legal in nature because they are also brought for a punitive and deterrent purpose and implicate a cognizable property right. Equity does not apply because, to the extent certificate actions mirror equitable remedies, certificate actions serve some deterrent or punitive purpose (thus making it a mixed question of law and equity) and certificate holders have a cognizable property interest in their certificate, which triggers due process protections. Admiralty covers very few aviation activities. At most, it removes a jury trial right when a regulatory violation causes a death on the high seas on a domestic flight or when a person uses an aircraft to disrupt maritime commerce. Otherwise, aviation enforcement actions implicate the Seventh Amendment.

Once the Seventh Amendment applies to an action, the Court looks to six categories of historically recognized public rights. Being an exception, the government bears the burden in showing the action fits into one of these categories. This depends on the history of both the action and the remedy. If the action and remedy fall within one of these exceptions, then the matter may be determined by the legislative or executive branch without judicial involvement in the first instance. If the action and remedy do not fall within one of these previously recognized categories, the only way to expand the public rights exception is if the matter was historically determined by the legislative or executive branch and lacks a pattern of judicial involvement at the first stage. It is only these kinds of matters where the Court has left open the door to expanding the public rights exception. Aviation does not fall within the public rights exception's public benefits category. The public rights exception will not be expanded to aviation civil penalties because courts have always had some jurisdiction over aviation civil penalty cases.

These principles can be applied to the Fifth Circuit's other holdings. Aviation civil penalty proceedings violate the nondelegation doctrine because, like SEC, Congress provided DOT, FAA, and DHS no intelligible principle in determining whether to bring a case in-house or in an Article III court. This is a legislative decision because it affects the legal processes the defendant receives. FAA civil penalty actions against pilots, mechanics, and flight engineers and all certificate actions violate Article II's removal powers because those cases are appealed to NTSB, and NTSB ALJs enjoy two levels of for-cause protection. A case brought in the Fifth Circuit—where these holdings are still good law—would find that the FAA's administrative enforcement process is unconstitutional in all three respects.