**Introduction:**

The heart of the American justice system is the right to a jury trial; the right dates back to the ratification of the 7th Amendment in 1791 and has stood ever since. Juries typically consist of 12 members, who have all been selected at random from the population. The system is designed to select people irrespective of economic status, race, gender, and ethnicity. It ensures that the prosecution does not have an unfair advantage and works to ensure that the innocent are protected from unjust charges. The system does not work, however, when the prosecution and the judges are hired by the same entity and both are not removable by any figure accountable to the public.

Within some government agencies, the prosecution only has to present its case to a tribunal of agency employees. The SEC, for example, holds "administrative proceedings" (effectively a form of internal tribunal) to determine guilt and punishment before "administrative law judges" (ALJs). While the SEC can't seek criminal penalties through internal tribunals, they can seek civil penalties including fines. All of the proceedings done through internal tribunals were devoid of the 7th Amendment right to a jury trial, a right that is enshrined for civil and criminal cases alike. The SEC, in its use of internal tribunals violated the 7th amendment and uprooted the nature of the Jury Trial in America, denying defendants a fair trial. At the same time, the use of ALJs partially violates the Appointments Clause of the Constitution and completely disregards the sentiment of the clause. The Supreme Court, in ending the practice of internal tribunals and the use of Administrative Law Judges at the SEC stopped the encroachment of executive branch agencies on the people's right to a fair trial. The Supreme Court was justified in its decision to side with Jarkesy and prohibit this practice.

**Facts of the Case:**

George R. Jarkesy, Jr. was convicted of fraud by an Administrative Law Judge of the SEC for his involvement in overvaluing hedge fund assets following the Great Recession. He was not granted a trial by jury, and all of the proceedings were performed by an officer who was considered an "employee" of the SEC and, as such, was not directly appointed by the department head nor could be fired without cause. Jarkesy appealed to the 5th Circuit Court of Appeals with the hopes of overturning his conviction on the grounds that it violated his 7th Amendment right to a jury trial and the employee status of ALJs violated the Appointments Clause of the Constitution.

The right to a jury trial, according to the text of the Constitution , is indisputable and cannot be overridden with legislation or jurisprudence. Despite the provisions protecting the jury trial, many states mandate a bench trial for certain petty offences. Within the SEC, most cases handled by ALJs would be considered petty insofar as they are civil in nature and, as such, punishments do not include a jail term. Despite the pettiness of the crimes handled by ALJs, any civil action upends a person's life and destroys their chances at future employment. You will hear arguments that it would be unfair to deprive a defendant of the right to a jury trial in all cases due to the severity of a mere civil action. In this respect, SEC v. Jarkesy was correct to extend the right to a jury trial to all civil cases brought forth by the SEC.

Administrative Law Judges have a complicated history init of themselves, whether it be under the SEC, IRS, or another government agency. Through the 1990s and 2000s, plaintiffs were questioning the constitutionality of ALJs (equivalent to Special Tax Judges in IRS cases) with courts holding that they should not be considered simply employees. The debate rested with the question of whether ALJs and alike should be considered employees, "inferior officers," or "principal officers" of the United States. At the same time, the courts refused to issue a concrete definition of "inferior" and "principal" which resulted in a murky and often unsatisfactory understanding of the real difference. You will hear arguments that ALJs should be considered at least "inferior officers" and should be appointed in accordance with the Appointments clause of the constitution. In this respect,

SEC v. Jarkesy was correct in determining that ALJs are not employees of the SEC and as such are bound by all precedent concerning "inferior officers" of the United States, including provisions against dual protection.

**"Inferior" and "Principal" Officers:**

Within the Constitution lies the Appointments Clause, which was written to establish a procedure by which government officials would be selected for duty. At the same time, it outlined two tiers of officers, "inferior" and "principal," both requiring different procedures for selection. The Clause establishes that "Congress may by Law vest the Appointment of … inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments" while "principal" officers must be nominated by the president and then confirmed by the senate.[1] The framers distinguished between the procedures to keep congress from getting bogged down in approving lesser government officials whose duties were not considered essential.

In *Buckley v. Valeo, 424 U.S. 1 (1976)*, the Supreme Court partially clarified the rights of Congress to designate the appointment of "inferior officers" to the president or department heads while confirming that "no class or type of officer is excluded [from the clause] because of its special functions."[2] At the same time, the courts re-enforced the understanding that the term "officers of the United States" "embrace[d] all appointed officials exercising responsibility under the public laws of the Nation."[3] *Buckley*, however, failed to provide a concrete definition of "inferior" and "principal" officers. The supreme court established a clearer definition for "inferior" officers in *Morrison v. Olson, 487 U.S. 654 (1988)* when it ruled that Special Federal Prosecutors are considered "inferior" because of their subordinate position to "principal" officers. The court cited that the Special Prosecutor in question could be removed by, reported to, and was selected by a "principal" officer, and thus was subordinate to said "principal"officer.[4] Justice Scalia dissented in *Morrison* under the belief that the special counsel in question was in fact a "principal" officer. In his dissent, he argued that the court ignored the distinction between the fact that the "appellant is removable only for "good cause" or physical or mental incapacity" and "most (if not all) principal officers in the Executive Branch may be removed by the President at will." Because of that discrepancy, Scalia failed "to see how the fact that appellant is more difficult to remove than most principal officers helps to establish that she is an inferior officer."[5]

The majority opinion in *Morrison* built upon precedent in *United States v. Germaine, 99 U.S. 508 (1878)* which set the bare minimum standard to be considered an "Officer of the United States" of any kind. The title "embraces the ideas of tenure, duration, emolument, and duties" with a requirement that the latter be "continuing and permanent, not occasional or temporary."[6] In *Germaine* specifically, the officer in question "is required to keep no place of business for the public use" and "gives no bond and takes no oath" to the United States and as such cannot be considered an "Officer of the United States."[7] Scalia again dissented against the majority's comparison to *Germaine* in *Olson* because it only distinguished between a mere employee of the federal government and an officer of the federal government. Scalia condemned the court's basis for the "theory of who is an inferior officer" because of its "foundation [in] such an irrelevancy," implying the comparison to *Germaine*[8].

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[1] U.S. Const. art. II, § 2, cl. 2.
[2] Buckley v. Valeo, 424 U.S. 1, 132 (1976)
[3] Id. at 131
[4] Morrison v. Olson, 487 U.S. 671-673 (1988)
[5] Id. at 716
[6] United States v. Germaine, 99 U.S. 511-512 (1878)
[7] Id. at 512
[8] Morrison v. Olson, 487 U.S. 719 (1988)

Finally, within *Morrison*, the court affirmed that "We need not attempt here to decide exactly where the line falls between the two types of officers, because, in our view, appellant clearly falls on the "inferior officer" side of that line."[9] The logic that the court "need not" create a concrete definition for "inferior" and "principal" for the reason that the "appellant clearly falls on" one side of the line is just completely flawed. If the court does not outline a concrete definition for the two different types of officers, and then purports a specific case to be on one side of that divide, then the court effectively sets precedent saying *we know it when we see it*. Without a concrete definition, there cannot ever be a solid understanding of the law and there cannot be a strong argument for either side.

The court further murkied the difference between "inferior" and "principal" officers in *Edmond v. United States, 520 U.S. 651 (1997)* when it based its majority opinion on Scalia's dissent in *Olson* while still permitting the methodology in *Morrison's* majority ruling. The ruling in *Edmond* only served to confuse the process for determining whether a position should be considered "inferior" or "principal" as it directly contradicted, but did not overrule, the majority's methodology in *Olson*[10]. The court, in *Edmond*, ignored two of the main provisions of *Morrison*, that being tenure and jurisdiction[11]. The court justified their actions by affirming that "*Morrison* did not purport to set forth a definitive test for whether an office is "inferior" under the Appointments Clause" and instead was just a loose framework used for solely the context in the case at hand[12]. Part of their decision was based on the precedent in *First Western Govt. Sec. v. Commr. of Internal Revenue, 94 T.C. 549* and *Freytag v. Commissioner, 501 U.S. 868 (1991)* as the court, in both cases, held that Special Tax Judges were neither employees nor principal officers of the United States. *Freytag* confirmed the duties of a STJ were outside the bounds of a simple employee, but yet did not extend to that of a principal officer. *First Western* reached a similar conclusion.

It is inconclusive with the current precedent where the SEC's ALJs fall on the spectrum of principal vs inferior officers, but without a doubt they cannot be considered mere employees as the SEC contends. Their duties extend well beyond that of an executive branch employee and their influence over the interpretation of the law extends their field of influence outside of the executive branch as a whole. When considering the precedent in *Edmond*, *Olson*, *Freytag*, and *First Western*, it is clear that the ALJs fall somewhere between principal and inferior officers, and as such are subject to the appointments clause of the constitution. Their undoubtable standing as an officer of the United States raises additional concerns over the extent of their duties and their isolation from voter accountability in the form of dual protection.

**Constitutionality of Dual Protection:**

Dual-protection is the byproduct of multiple layers of "for cause" restrictions on dismissal for executive branch officers. For example, a department head with a "for cause" restriction cannot be dismissed by the president unless he can prove that the head was incompetent or derelict of duty. If that same department head appoints an "inferior" officer with a "for cause" restriction, the president has no direct or indirect control over said officer. If the president disapproves of the "inferior" officer's actions, he cannot take any action because he cannot dismiss the department head for enacting the "for cause" restrictions and the department head cannot dismiss the officer

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[9] Id. at 671

[10] Seideman, Tina. 2021. "Inferior or Principal? The Current Appointments Clause Jurisprudence Just Isn't Enough." Georgetown.edu. June 10, 2021. https://www.law.georgetown.edu/public-policy-journal/blog/inferior-or-principal-the-current-appointments-clause-jurisprudence-just-isnt-enough/.

[11] Edmond v. United States, 520 U.S. 661 (1997)

[12] Id.

because of the restrictions that he put in place. You will hear arguments as to why these dual protection situations are in clear violation of the constitution.

The label of "inferior officer" does not connote a more difficult hiring process, just that the selection of the officer in question must be performed in accordance with the Appointments Clause and all respective jurisprudence. As with any officer of the executive branch of the United States, an "inferior officer" must be, in some way, accountable to the president. Since *Myers v. United States, 272 U.S. 52 (1926)*, the court has held that the president, "in the absence of any express limitation respecting removals, that, as his selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he cannot continue to be responsible."[13] If the president has no confidence in his subordinates, how is he supposed to perform his duties to the best of his abilities? His enforcement policies would be completely at the whim of his subordinates who he cannot remove unless for reasonable cause--completely hindering his ability to perform his duties as he sees fit. Primarily it is for that reason that the president's power to remove subordinates is considered an important part of the duties as outlined in the constitution. In *Myers*, the court found constitutional support for the presidential power to remove his subordinates because "the natural meaning of the term 'executive power' granted the President … the [right to] appointment and removal of executive subordinates."[14] The Court also found that the constitution held that the "power of removal of executive officers was incident to the power of appointment" and as such could not be revoked[15].

After *Myers*, the court established limitations on the president's power to remove subordinates for political reasons, demanding that they only be dismissed for cause such as malfeasance, neglect of duty, or incapacitation. In *Humphrey's Executor v. United States, 295 U.S. 602 (1935)*, the court held that Humphrey, a FTC commissioner, could not be removed by Roosivelt on a mere political whim. The court argued that, when the officer in question has legislative and judicial powers, the "president has no constitutional power to remove them for reasons other than those so specified" by congress at their appointment[16]. The court justifies their dissent from *Meyers* by pointing to the difference in duties of the officers in question. Since the "Myers case finds support in the theory that such an officer is merely one of the units in the executive department" and it "dealt with the removal of a postmaster, an executive officer restricted to executive functions and charged with no duty at all related to either the legislative or the judicial power," the court argued that it should be disregarded when the office in question has powers exceeding those directly awarded to the executive branch[17]. In the end, the court decided that the protections against dismissal "will depend upon the character of the office" and how its responsibilities fit into the structure of government[18].

The court restricted the allowable cases for "for cause" protections from *Humphrey's Executor* in *Seila Law LLC v. Consumer Financial Protection Bureau, 591 U.S. ___ (2020)* by finding that the president must be able to remove a director of an executive branch department at will. The court based their decision on the fact that "lesser officers must remain accountable to the President, whose authority they wield," essentially finding that the president needs to be able to control his staff[19]. The court upheld Seila Law in *Collins v. Yellen*, which dealt with an identical set of "for cause" restrictions simply placed on another executive branch organization. Since the court upheld the restrictions on "for cause" protections for executive branch entities on more than one occasion, it

[13] Myers v. United States, 272 U.S. 117 (1926)
[14] Id.
[15] Id.
[16] Humphrey's Executor v. United States, 295 U.S. 602 (1935)
[17] Id. at 603
[18] Id. at 604
[19] Seila Law LLC v. Consumer Financial Protection Bureau, 591 U.S. 12 (2020)

would be safe to conclude that the precedent is firm. Department Heads cannot be granted "for cause" provisions.

On top of limiting the "for cause" provisions for principal officers, the court found that two layers of "for cause" protection for inferior officers violated the separation of powers. In *Free Enterprise Fund v. Public Company Accounting Oversight Bd., 561 U.S. 477 (2010)*, the court held "that such multilevel protection from removal is contrary to Article II's vesting of the executive power in the President" because he "cannot "take Care that the Laws be faithfully executed" if he cannot oversee the faithfulness of the officers who execute them."[20] A core part of the court's argument stemmed from the fact that the people do not vote for the officers of the United States, instead they vote for the president and members of congress. If multiple layers of "for cause" removal are enacted, then the public has no direct course if they were displeased with the actions of such an officer. In that case scenario, nobody directly accountable to the public has control over the officer's actions. At the same time, the court was concerned that if "Congress can shelter the bureaucracy behind two layers of good-cause tenure, why not a third?"[21] It could quickly devolve into an unmanageable bureaucracy without any accountability to the president or congress.

In this section, it has been established that "for cause" protections on certain department heads and dual protection of inferior officers are both considered unconstitutional. It is for that reason that the SEC's structure, one where ALJs are considered employees and cannot be fired unless the SEC can prove incompetence, should be considered unconstitutional in accordance with current precedent.

**The Lack of a Jury Trial:**

The SEC, in their administrative proceedings, can issue civil penalties without the approval of a jury. That directly contradicts with the 7th Amendment which clearly states that "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."[22] For reference, $20 at the time of ratification is approximately $660 as of 2025 while the SEC deals with amounts much in excess of $660. So, in the literal sense, the SEC's rejection of the jury trial is unconstitutional. In reality, there are many complexities where the court has upheld restrictions on the jury trial which seemingly violate the constitution. Despite any complexities, the SEC's use of in-house tribunals without a jury is in clear violation of the 7th Amendment.

A strong argument for the use of the jury trial in *all cases* was articulated by George Kaye of the University of Chicago Law Review in his 1959 piece *Petty Offenders Have No Peers!*. In Kaye's work, he criticizes the removal of constitutional protections for petty offenders by examining the language of the federal and state constitutions. In short, he found that the constitutions typically referred to a defendant as a general 'criminal' irregardless of the severity of the crime. The language tracks across all due process provisions. Kaye contends that the detachment of petty offenders from the term 'criminal' for the purposes of using a bench trial opens the door for circumventing other due process protections for petty offenders.[23] Kaye's slippery-slope argument can be augmented with another logical argument against the revocation of due process for petty offenses. The court's current interpretation of the term petty offense would be a maximum of six months imprisonment, which by any account would *not* be insignificant. It is illogical to conclude that any criminal or civil conviction, let alone imprisonment of six months, could be considered petty in any way.

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[20] Free Enterprise Fund v. Public Company Accounting Oversight Bd., 561 U.S. ?? (2010)
[21] Id. at ??
[22] U.S. Const. amend. VI
[23] Kaye, George. "Petty Offenders Have No Peers!" The University of Chicago Law Review 26, no. 2 (1959): 245–77. https://doi.org/10.2307/1598183.

Without a doubt, convicted criminals in America have a difficult time finding employment because of their past convictions. At the same time, civil convictions can cause disqualification for licensed professions in many states[24]. A criminal or civil conviction is devastating, whether or not the defendant is imprisoned for 6 months or fined a couple hundred dollars. As such it is illogical and irresponsible to flaunt due process in the name of expediency when the defendant's livelihood and opportunities are at risk. The court, however, disagrees with the need to protect those charged with so-called petty offenses.

The right to a jury trial in criminal offenses has been questioned when the term of imprisonment was less than 6 months due to its status as a "petty offense." The court, in *Duncan v. Louisiana, 391 U.S. 145 (1968),* held that "a general grant of jury trial for serious offenses is a fundamental right" but is not necessary for "petty offenses."[25] They also "would not assert that any particular trial held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury."[26] For minor cases, the court can overlook the 7th amendment in favor of expediency because it holds that a bench trial is still considered fair. This logic, however, goes against the nature of the constitution as it flaunts the spirit of the amendment. Despite the apparent logical inconsistencies, the court has upheld the president from *Duncan v. Louisiana* on numerous occasions (*Cheff v. Schnackenberg, 384 U. S. 373 (1966); District of Columbia v. Clawans, 300 U. S. 617 (1937); District of Columbia v. Colts, 282 U. S. 63 (1930); Schick v. United States, 195 U. S. 65 (1904); Natal v. Louisiana, 139 U. S. 621 (1891); Callan v. Wilson, 127 U. S. 540 (1888)*)[27].

Apparently, however, the courts find distinction between civil and criminal cases when it comes to the application of the 6th and 7th amendments. For the most part, all civil cases are required to be tried before a jury. For example, in *Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959)*, the court held that, "since the right to jury trial is a constitutional one, [the] discretion [to conduct a bench trial] is very narrowly limited, and must, wherever possible, be exercised to preserve jury trial."[28] The precedent set in *Beacon*, however, was disregarded by lower courts in *Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989)* because the petitioner, in short, was not registered in the United States. The supreme court overturned the lower court's distinction and held that the right to a jury trial is available for all petitioners for which the question was a matter of fact, which was the case in this bankruptcy suit. A question of matter of fact essentially means that the main decision which must be made determines whether the defendant committed an act or directly violated the law. As the court affirms in *Granfinanciera*, the right to a jury trial in civil cases cannot be violated. The court further affirms the right to a jury trial in civil matters in *Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962)*, which cited precedent from *Scott v. Neely, 140 U.S. 106 (1891)* and *Beacon Theatres*, by affirming that in a case with both a question of ethical and fact, the facts must be determined by a jury prior to hearing the case on the ethical matter.

The court, in *Dairy Queen*, upheld the "necessary prerequisite to the right to maintain a suit for an equitable accounting, like all other equitable remedies, is, as we pointed out in Beacon Theatres, the absence of an adequate remedy at law."[29] In upholding the test created in *Beacon Theatres*, the court effectively determined that all matters in relation to the law must be tried by a jury. This precedent should extend to cases brought before the court by an executive branch enforcement agency as the matter in question for such cases would be a matter of fact which will be

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[24] "2007 California Business and Professions Code Chapter 2. :: Denial of Licenses." n.d. Justia Law. Accessed May 5, 2025. https://law.justia.com/codes/california/2007/bpc/480-489.html.
[25] Duncan v. Louisiana, 391 U.S. 157-158 (1968)
[26] Id. at 158
[27] *Baldwin v. New York, 399 U.S. Footnote 5 (1970)*
[28] Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959)
[29] Dairy Queen, Inc. v. Wood, 369 U.S. 478 (1962)

remedied by legal methods. Any case brought by the SEC, for example, would be one based in the legal system and would contain outlined remedies prescribed by the legislature. Cases of this kind cannot be denied a jury trial in accordance with the precedent of the supreme court.

**Application to SEC vs. Jarkesy:**

Nearly every part of the SEC's internal judiciary system should be deemed unconstitutional when considering the precedent of the supreme court. To recap, the SEC's internal tribunals were held before an employee of the SEC, unappointed by the department head and subject to for cause removal protections, without a jury in a matter which could result in remedies including fines as required by statute. The three primary contentions deeming the SEC's procedure unconstitutional is that the ALJs cannot be considered mere employees of the agency and as such must be appointed by the department head, ALJs cannot be subject to for cause removal protections, and a jury trial must be granted for the sanctity of the judicial system.

To start, the court has held that an officer of the United States cannot be considered a mere employee of an executive branch agency if they exert substantial power to enforce or determine the interpretation of laws. In the specific case of the SEC, ALJs were charged with interpreting whether the defendant committed an infraction under their interpretation of the statute. The responsibility held by AJS is just completely inconsistent with the limited responsibilities of unappointed employees of the executive branch. As such, the court should hold that the classification of ALJs as employees of the SEC violates the appointment and separation of powers clauses of the constitution.

Since it has been determined that ALJs are considered officers of the united states, whether principal or inferior is irrelevant to this discussion, their for cause removal protections, when combined with identical protections for the head of the SEC, clearly violates the separation of powers between the executive branch and judicial branch and circumvents accountability to the people. If the president cannot have control over the head of an executive agency, and then the head of the executive agency has no control over its officers, then the president has no ability to exert control over the workings of the state. At the same time, the judicial system has no control over the actions of ALJs either. Since the SEC's tribunals are effectively a judicial function performed by employees of the executive branch, it essentially violates the separation of powers doctrine in two different ways.

Finally, the denial of a jury trial in civil cases brought by the SEC is completely unacceptable and goes against precedent upheld for hundreds of years. The SEC is clearly in violation of the current interpretation of the 6th and 7th amendments. As such, Jarkesy's right to a fair trial was clearly violated. The court correctly held, in a 6-3 split along ideological lines, that the actions of the SEC directly violated current precedent and as such were unconstitutional.

There are some flaws in the argument for Jarkesy in this case, especially since his charges were brought in accordance with the law as created by congress. The SEC was given the powers to use internal tribunals by congress in the legislature passed and signed by the president. Despite the approval of the legislature, the judicial system deemed that the removal of judicial functions from under its purview would be unconstitutional -- especially since those powers were being vested in an employee of an executive branch agency with no accountability to voters.