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Federal Regulatory Enforcement: Alive or Dead?

An FCC Case Study

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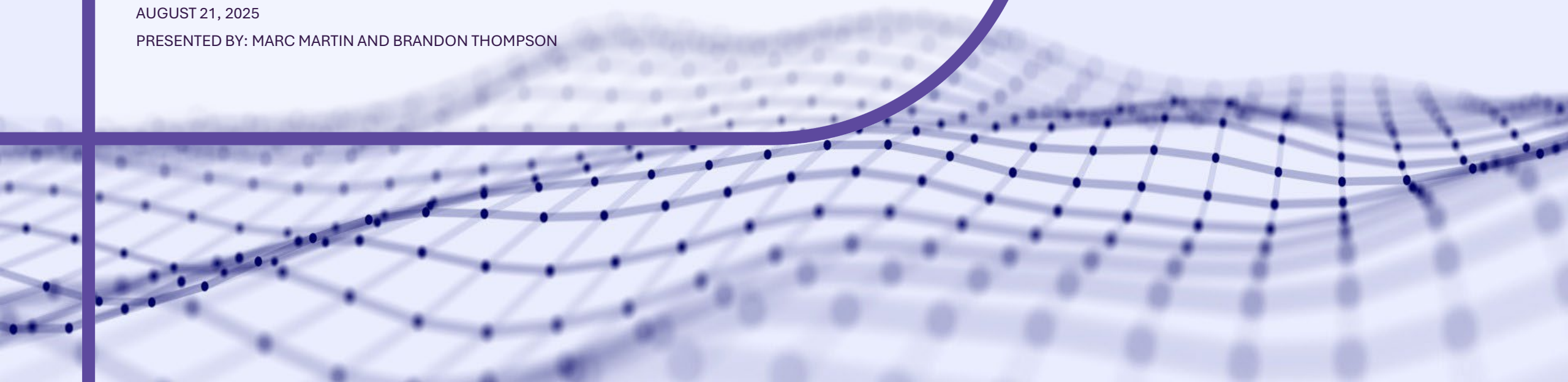

The Compliance Collective

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TL;DR

Over the last year, independent federal agencies have been losing a two-front war. The judicial branch has reclaimed authority to make "best" interpretations of law. The executive branch has asserted greater control over independent agency actions. Where does this leave the FCC's enforcement authority?

- ***Agenda***
  - *SEC v. Jarkesy* and *Loper Bright*
  - Executive Orders Trim Independent Agency Autonomy
  - *AT&T v. FCC*: *Jarkesy,* Applied
  - *Sprint v. FCC*: An Unexpected Twist
  - FCC Changes its Enforcement Strategy

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The Supreme Court's 2024 Term: The Judicial Branch Reclaims Authority from Agencies

The Supreme Court Disrupts Agency In-House Enforcement

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- **SEC v. Jarkesy (2024)**
- **Holding**: The SEC cannot impose civil penalties in an in-house enforcement proceeding about securities fraud because the target was denied its "right to be tried by a jury of his peers before a neutral adjudicator" in an Article III court trial under the 7th Amendment (decided June 27, 2024).
- Claims that are "legal in nature" must go to Article III courts.
- "To determine whether a suit is legal in nature, courts must consider whether the cause of action resembles common law causes of action, and whether the remedy is the sort that was traditionally obtained in a court of law. Of these factors, the remedy is the more important. And in this case, the remedy is all but dispositive. For respondents' alleged fraud, the SEC seeks civil penalties, a form of monetary relief. Such relief is legal in nature when it is designed to punish or deter the wrongdoer rather than solely to 'restore the status quo.'" 603 U.S. 109 , 111.

U.S. Securities and Exchange Commission

Jarkesy: Traditional "Public Rights" Exception Narrowed

- **What is the "public rights" exception?** After *Jarkesy*, a narrow class of matters that have been historically determined exclusively outside the judicial branch, such as the collection of revenue, customs enforcement, and the grant of public benefits.
- ***The exception's limits.*** When the government seeks civil penalties for conduct that is "in the nature of" common law causes of action, then adjudication in an Article III court is *mandatory*.
- *Presumption* in favor of Article III court trial. The public rights exception is narrow and must be justified by clear historical practice rooted in "settled institutional understandings of the branches."
- No deference where Congress delegated an agency power to enforce a matter "where the rights of individuals are at stake." Congress cannot "concentrate the roles of prosecutor, judge and jury in the hands of the executive branch."
- If the civil penalties are "designed to punish and deter, and not compensate" then 7th Amendment right is triggered.

Jarkesy and the FCC

- Justice Sotomayor's dissent in *Jarkesy:* the ruling will dramatically affect agencies "that can impose civil penalties in administrative proceedings," including the "FCC."
- After *Jarkesy*, former Republican FCC Commissioner Nathan Simington voted against every FCC Notice of Apparent Liability (NAL) and Forfeiture Order because he believed the monetary penalties were unconstitutional under *Jarkesy*.
- *Jarkesy* arguably applies to most FCC enforcement actions because they typically:
  - Feature civil penalties;
  - Are punitive in nature; and
  - Possess common law analogues (e.g., negligence, nuisance, and unjust and unreasonable practices)

The Supreme Court Overturns the Chevron Doctrine

- *Loper Bright Enterprises v. Raimondo* (2024)
- **Holding**: the Administrative Procedure Act (APA) requires courts to exercise their independent judgment in deciding whether an agency has acted within its statutory authority, and courts may *not* defer to an agency statutory interpretation simply because the law is ambiguous or the agency has institutional expertise. Deference to merely "reasonable" agency interpretations is prohibited. The courts determine the "best" interpretation of a statute.
- Building on *Loper Bright,* the Supreme Court in *McLaughlin Chiro. Assocs., Inc. v. McKesson Corp.* (2025) determines that federal district courts are no longer required to defer to the FCC's interpretation of statutes in civil enforcement proceedings. Regulated entities can now challenge prior agency interpretations in U.S. district courts.
- The decision further erodes tradition of judicial deference to agencies' statutory interpretations and underscores that the courts, not agencies, will determine the best interpretation of federal statutes.

The Executive Branch Opens Another Front Against Independent Agencies Like the FCC

Executive Orders Curtail Independent Agency Autonomy

Executive Order 13892 – Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication

- Issued Oct. 15, 2019, rescinded by President Biden on January 20, 2021, and *reinstated* by President Trump on January 20, 2025.
- It applies to federal agencies and prohibits (1) regulation by enforcement, (2) regulation by unfair surprise, and (3) lack of transparency in in-house enforcement proceedings.
- "Agencies shall afford regulated parties the safeguards described in this order, above and beyond those that the courts have interpreted the Due Process Clause of the Fifth Amendment to the Constitution to impose."
- "Regulations [must define] the exact contours of [a regulatee's] responsibility." (Citing *Dravo Corp. v. Occupational Safety & Health Rev. Comm'n*, 613 F.2d 1227, 1234 (3d Cir. 1980))

Executive Orders (cont'd)

Executive Order 14215 – Ensuring Accountability for All Agencies

- Issued February 18, 2025.
- "[Independent] regulatory agencies currently exercise substantial executive authority … [and] to be truly accountable … must be supervised and controlled by the people's elected President."
- "All executive departments and agencies, including *so-called* independent agencies, shall submit for review all proposed and final significant regulatory actions to [the White House's Office of Management and Budget] before publication in the Federal Register." (Emphasis added)
- The E.O.'s accompanying fact sheet explained that the President's intent is to ensure so-called independent agencies remain aligned with and accountable to the White House. In other words, not so independent.

Executive Order 14219 – Ensuring Lawful Governance and Implementing the President's "Department of Government Efficiency" Deregulatory Initiative

- Issued February 19, 2025.
- E.O. 14219 requires that all agencies (independent or otherwise) (i) "preserve their limited enforcement resources" by de-prioritizing actions to enforce regulations that are based on anything other than the best *reading of a statute*, and (ii) identify for recession all potentially unconstitutional regulations, regulations that raise constitutional difficulties, and those based on anything other than the *best reading of a statute* (amongst other criteria)." (Emphasis added).
- "Best reading of a statute" is an allusion to *Loper Bright Enterprises*.

Executive Branch Removals of Independent Agency Members Upheld by Supreme Court

- ***Trump v. Wilcox***, (2025)
  - The President removed Gwynne Wilcox and Cathy Harris from the National Labor Relations Board and Merit Systems Protection Board.
  - Supreme Court: President may remove Senate-confirmed members of so-called independent agencies while they challenge their termination in federal courts.
  - The underlying statutes' "for-cause" removal protections are unconstitutional because Art. II, §1, cl. 1 of the Constitution vests executive power in the President, and independent agencies "exercise considerable executive power."
- ***Trump v. Boyle***, (2025)
  - Three members of the Consumer Product Safety Commission were fired by the President. The terminations were overturned by a US District Court.
  - Supreme Court: Consistent with *Wilcox*, the Executive Branch's request for a stay of the US District Court decision to reinstate the three terminated CPSC members is granted.
  - Justice Kagan's dissent: "Once again, this Court uses its emergency docket to destroy the independence of an independent agency, as established by Congress."

Meanwhile, at the FCC…

FCC Proposes Penalty Against Telecom Post-Jarkesy

- On February 4, 2025, FCC proposed a $4.5M fine against Telnyx after a third party made ~300 robocalls to FCC staffers and their family members. FCC argued Telnyx failed to adopt "effective measures" to prevent the rogue third-party caller.
- The NAL never mentions *Jarkesy, Loper Bright* or the Executive Orders targeting independent agencies.
- *Consequences after NAL*: After FCC adopted the NAL, Telnyx was quickly removed from a joint FCC-industry anti-robocall working group on presumption of wrongdoing, but was later reinstated after Telnyx filed its reply to the NAL.
- FCC has not taken further action since Telnyx filed its reply.
- Telnyx's CEO recently said in an interview with Communications Daily that he does not expect a final forfeiture order from the FCC, and the FCC reportedly responded, "no comment."

Industry Reacts to Telnyx NAL and Changed Legal Environment

- On May 1, 2025, four of the largest telecom industry associations (CTIA, NCTA, USTelecom, and WIA) filed a joint petition for rulemaking, requesting that the FCC reform what they described as an *unpredictable, inconsistent, and unaccountable* approach to enforcement.
- The petition argued that the FCC should no longer:
  - issue monetary penalties,
  - engage in regulation by enforcement or regulatory surprise, or
  - draw adverse inferences from NALs in other proceedings (such as transfer of control applications (*i.e.,* M&A transactions)) prior to the adoption of a final order in the enforcement action.
- The FCC has taken no action on the pending petition for rulemaking.

AT&T v. FCC: *Jarkesy* Applied

The 5th Circuit Highlights the FCC's Hobbesian Choice

AT&T v. FCC

- **Option 1**: Pay Full Penalty in Advance to Preserve Right to Appeal in the US Court of Appeals
  - Allows for prompt appellate review without a trial. But the penalty may not be affordable. In addition, appellate review is limited to the facts and legal arguments in the FCC administrative record, where target was not afforded due process rights of a trial court.
- **Option 2**: Do Not Pay (Wait for DOJ Collection Action, and Hope for Eventual *De Novo* Review in US District Court)
  - Target declines to timely pay the FCC's ordered penalty. Order becomes final (effectively conceding "guilt").
  - DOJ may (but rarely does) bring an enforcement action in federal district court to collect penalty (5-year SoL).
  - FCC can take adverse actions based on final order in enforcement action (e.g., license renewal, M&A) and target may suffer reputational damage, customer attrition.
  - The target is entitled to a trial *de novo*. 5th Circuit rule is US district courts are "limited to considering the factual basis for the agency action," not petitioner's "legal arguments."

AT&T (con't)

- **AT&T v. FCC**: The FCC issued a $57M penalty against AT&T for alleged misuse customer proprietary network information (CPNI) data.
- **Held**: A 5th Circuit panel found FCC's in-house adjudication violated AT&T's 7th Amendment right to a trial by jury (April 15, 2025).
  - FCC's statutory scheme was *coercive* and *unconstitutional*, forcing the target to choose between two inadequate remedies: (1) waive the right to a jury trial to appeal the FCC action, or (2) let the FCC order become final and hope for a possible jury trial in the future, but where it cannot address the legal validity of the FCC's action. The court also noted the harms under Option (2) -- reputational harm and the FCC's adverse inferences in future proceedings, even before the jury trial.
  - The FCC's penalty was a punitive, rather than compensatory, and akin to a common law negligence claim, in violation of the 7th Amendment under *Jarkesy*.

FCC Enforcement Actions Post-*AT&T*: *(Similar facts as Telnyx; different treatment)*

- Example of FCC apparently trying to manage around *Jarkesy* and *AT&T*.
- On May 16, 2025, the FCC issued a cease-and-desist letter to BCM One Cloud Communications LLC d/b/a Flowroute.
- As in Telnyx, instead of bringing an enforcement action against the bad actor "spoofing" caller ID info, the letter was directed at the carrier. The letter threatened to remove Flowroute from the Robocall Mitigation Database (RMD), which would permit other carriers to freely block Flowroute's traffic and effectively kill its business.
- The FCC alleged that Flowroute violated the same rule cited in the Telnyx NAL, but this time, the FCC did *not* propose a *monetary penalty*.
- Why? Likely because of the argument Telnyx made— the alleged violation has a common law analogue: *negligence*.
- However, removing a carrier from the RMD can gravely harm the carrier's business and impair its rights – potentially violating *Jarkesy* anyway.

FCC Enforcement Actions Post-*AT&T*

- China Mobile International (USA): Citation & Order (June 16, 2025)
  - China Mobile failed to respond to a letter of inquiry (LOI).
  - FCC warned that it may issue a monetary forfeiture if China Mobile continues to ignore the LOI.
  - No penalty (yet), but FCC framed its threatened penalty as a matter of compliance with FCC procedure, perhaps to distinguish it from a common law claim
  - However, the penalty appears to be punitive, not compensatory (implicating *Jarkesy*)
- Unauthorized Radio Signal Transmissions
  - Numerous NALs and Forfeiture Orders adopting monetary penalties against small entities, post-*Jarkesy* and *AT&T*.
  - As with Telnyx NAL, these NALs and orders make no mention of *Jarkesy, AT&T* or the executive orders.
  - But even the 5th Circuit in *AT&T* noted that certain FCC enforcement orders regarding FCC permits and licenses are examples of excepted "public benefits." *AT&T* at 240 (citing *Scripps-Howard Radio v. FCC*, 316 U.S. 4 (1942)).

CLE Code Word: Enforcement

Sprint v. FCC: A Unexpected Twist Following *Jarkesy* and *AT&T*

The DC Circuit introduces a surprising twist on *Jarkesy*

- **Sprint v. FCC**: The FCC ordered $92 million fine against carriers for alleged misuse of CPNI data. Carriers appealed to US Court of Appeals for the D.C. Circuit, arguing FCC violated the 7th Amendment under *Jarkesy*. Very similar facts to *AT&T* case in 5th Circuit.
- **Holding**: No need to reach 7th Amendment issue because the carriers elected to waive jury trial that was "available" to them (Hobbesian Option 2, above) (decided August 15, 2025).
- "We start with the Carriers' claim that the Commission violated their right to a jury trial under the 7th Amendment. But we need not resolve that claim. That is because the statutory procedure at issue allowed the Carriers to obtain a jury trial before suffering any legal consequences. Thus, regardless of whether it was constitutionally guaranteed, the Carriers had the right to a jury trial. They chose not to wait for such a trial and therefore waived that right."
- Thus, DC Circuit found targets could have the allowed FCC order to become final without appeal or paying penalty, in hope that DOJ would later exercise *rare discretion* by bringing collection action within next 5 years.
- DC Circuit said declining that "Option 2" was a waiver of its right to jury trial.

Questions arising from *Sprint*

- DC Circuit found no harm arising from Option 2's requirement to forgo appeal and let forfeiture order become final before opportunity for discretionary de novo trial.
- The DC Circuit cites statutory language prohibiting the FCC from taking adverse actions based on an *NAL*, but the opportunity for a jury trial only arises after the *final order* becomes effective. The cited statute (47 USC 504(c)) does not prevent adverse actions based on final orders – it prohibits adverse actions based on NALs.
- (Trade association petition cited examples of the FCC taking adverse actions based on NALs)
- Potential Adverse Actions: *Transfers of Control*. FCC's test for approving the transfer of control of spectrum licenses (i.e., telecom M&A) is whether approval of the transfer would serve the public interest. If an enforcement action becomes final without appeal, it could be cause for adverse parties to argue the approval of the transfer would not serve the public interest.
- Other Examples*: License renewals, waiver requests, petitions for declaratory ruling, harm to credibility with FCC staff. The FCC can also apply a penalty "multiplier" in future enforcement actions.*

What's Next, and Takeaways

What's Next?

- The FCC has petitioned the 5th Circuit for rehearing en banc in *AT&T*.
- In Sprint, the parties may petition the DC Circuit for rehearing *en banc* or petition for a writ of certiorari to the Supreme Court—both are discretionary.
- The 2nd Circuit is expected to reach a decision soon in *Verizon v. FCC* which arises from very similar facts as *AT&T* and *Sprint*. The 2nd Circuit may effectively make either the 5th Circuit or the DC Circuit the outlier.
- Normally, circuit splits arise *before* the Supreme Court acts. Here, we may have what is arguably a "split" arising after the Supreme Court ruled.
- But arguably there is no split: the DC Circuit avoided the 7th Amendment issue in *Jarkesy* by how it interpreted the statutory right to a jury trial. That is, *Sprint* is arguably less a split on the merits of *Jarkesy* as it is an instance of varying "best interpretations" of the FCC's organic act by two different circuit courts.

Takeaways

- The FCC has not *rescinded* any NALs or forfeiture orders since *Jarkesy* or *AT&T,* despite Executive Order 14219.
- But it has altered its enforcement strategy, issuing a cease & desist order with no penalty under similar facts to a case where it had issued a penalty.
- It continues to issue fines in selective cases against smaller targets that may arguably meet the "public rights" exception, but there is no discussion of how or why by FCC.
- The FCC has not acted on the trade association petition to reform its enforcement processes.
- There is also no evidence of FCC compliance with Executive Order 14315 to coordinate with White House/OMB prior to initiating enforcement actions to ensure no regulation by enforcement, regulatory surprise or insufficient transparency.
- If the 2nd Circuit (in *Verizon*) aligns with the 5th Circuit (*AT&T*) by finding the FCC's penalty against Verizon unconstitutional, and DC Circuit (*Sprint*) is overturned, the FCC will likely have to rescind all pending NALs, and Congress will need to reform FCC enforcement processes to comply with *Jarkesy*.

Questions?

Citations

- *SEC v. Jarkesy*, 603 U.S. 109 (2024).
- *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024).
- *McLaughlin Chiro. Assocs., Inc. v. McKesson Corp.*, 606 U.S. 146 (2025).
- Exec. Order No. 13892, 84 Fed. Reg. 55239 (Oct. 15, 2019).
- Exec. Order No. 14215, 90 Fed. Reg. 10447 (Feb. 18, 2025).
- Exec. Order No. 14219, 90 Fed. Reg. 10583 (Feb. 19, 2025).
- *Trump v. Wilcox*, 145 S.Ct. 1415 (2025).
- *Trump v. Boyle*, 145 S.Ct. 2653 (2025).
- *In re Telnyx LLC*, Notice of Apparent Liability for Forfeiture, FCC 25-10 (Feb. 4, 2025).
- *In re Ensuring Fair Notice, Consistency, and Government Accountability in FCC Enforcement*, CTIA – The Wireless Assoc. et al., Petition for Rulemaking, RM – (May 1, 2025).
- *AT&T v. FCC*, 135 F.4th 230 (5th Cir. 2025).
- *Sprint v. FCC*, 2025 WL 2371009 (D.C. Cir. 2025).
- *In re China Mobile International (USA) Inc.*, Citation and Order, DA 25-512 (June 16, 2025).
- Letter to BCM One Cloud Communications LLC dba Flowroute, Patrick Webre, Acting Chief, Enforcement Bureau, FCC (May 16, 2025).

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