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ABSTRACT

What empowers the U.S. Securities and Exchange Commission to seek, and federal district courts to order, the disgorgement of ill-gotten gains from securities law violators? The short answer, which stood virtually unchallenged for nearly forty-six years, is that federal courts may award disgorgement, at the request of the SEC, pursuant to the broad equitable powers that Congress conferred in the jurisdictional provisions of the federal securities laws. During the 2017 oral argument in Kokesh v. SEC, *however, five Justices of the U.S. Supreme Court interjected statements expressing varying degrees of skepticism. The tenor of the questions during the* Kokesh *argument, as well as the Court's unanimous decision concerning disgorgement's punitiveness and its opaque footnote disclaiming any view of the judicial power to award the SEC disgorgement, has ignited a firestorm. Pending litigation includes a class action lawsuit seeking to recover a combined total of at least $14.9 billion in disgorgement payments that the SEC is alleged to have improperly collected.*

That a majority of the Supreme Court might be puzzled over the source of authority for court-ordered SEC disgorgement is itself puzzling. Two years prior to Kokesh, *in its exercise of original jurisdiction in* Kansas v. Nebraska, *the Supreme Court drew upon its own equitable powers to order disgorgement, in addition to the payment of compensatory damages, as a remedy for the violation of an interstate water compact that has the status of federal law. Although the Court split 6-3 as to whether such disgorgement was warranted to deter future "misbehavior," the Justices were unanimous in the view that disgorgement was an equitable remedy. The* Kansas *majority also emphasized that a court's equitable powers are particularly broad and flexible when the public interest in the enforcement of a federal law is involved. The five Justices' skepticism during the* Kokesh *argument*

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is likewise puzzling because while the disgorgement remedy in SEC enforcement actions began as interstitial lawmaking pursuant to § 27 of the Securities Exchange Act of 1934's broad jurisdictional provision, Congress has subsequently ratified, and in some instances codified, that disgorgement remedy in six securities statutes enacted between 1984 and 2010.

This essay has two principal goals. One is to elucidate the incontestable statutory authority for court-ordered disgorgement in SEC enforcement actions. Its other goal is to draw on the Kansas *decision to show that such disgorgement is a statutorily authorized equitable remedy, even in instances when it constitutes a penalty under the* Kokesh *criteria.*

TABLE OF CONTENTS

AS the many important contributions to this Symposium reveal, there are a host of reasons to commemorate the fiftieth anniversary of the U.S. Court of Appeals for the Second Circuit's landmark decision in *SEC v. Texas Gulf Sulphur* (*TGS I*).[1] This essay, however, uses this anniversary to spotlight *TGS II*,[2] a related decision issued by a panel of the Second Circuit three years after that circuit's en

1. SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968) (en banc), *cert. denied*, 394 U.S. 976 (1968) [hereinafter *TGS I*].

2. SEC v. Texas Gulf Sulphur Co., 446 F.2d 1301, 1309–10 (2d Cir. 1971) [hereinafter *TGS II*].

banc decision affirming the individual defendants' liability for illegal insider trading. On remand from *TGS I*, the trial court had ordered those defendants to disgorge the ill-gotten gains from their purchases of TGS stock on the basis of material, non-public information.[3] The defendants then appealed the disgorgement orders, claiming that the SEC lacked the statutory authority to seek such relief. The three-judge panel in *TGS II* disagreed and affirmed the trial court's judgment.

TGS II, as a matter of first impression, situated the statutory authority for the disgorgement remedy in the "general equity powers" that Congress conferred upon district courts in the jurisdictional provisions of the federal securities laws,[4] in conjunction with the SEC's enforcement authority to seek injunctions against securities law violators.[5] The panel deemed the disgorgement orders to be an equitable remedy, rather than a "penalty assessment" as the appellants had claimed, because the orders were "ancillary" to the trial court's injunctive power and "merely deprive[d] the appellants of the gains of their wrongful conduct."[6] Utilizing the court's equitable authority to award the SEC disgorgement also "protect[ed] the investing public by providing an effective deterrent to future violations."[7] Importantly, *TGS II* invoked the precedent in *Porter v. Warner Holding Co.*,[8] a decision in which the Supreme Court upheld both "the power of the Government without specific statutory authority" to seek illegal gains attained from federal law violations, as well as the authority of lower courts to award that remedy in the exercise of their "gen-

3. SEC v. Texas Gulf Sulphur Co., 312 F. Supp. 77 (S.D.N.Y. 1970), *aff'd in relevant part*, *TGS II*, 446 F.2d at 1307–08.

4. *See TGS II*, 446 F.2d at 1307 (citing § 27 of the Securities Exchange Act of 1934 (Exchange Act) (codified as amended at 15 U.S.C. § 78aa), which specifies that the "district courts of the United States . . . shall have exclusive jurisdiction of violations of this title or the rules and regulations thereunder, and *of all suits in equity* and actions at law brought to enforce any liability or duty created by this title or the rules and regulations thereunder") (emphasis added). Congress included similar jurisdictional provisions, encompassing "all suits in equity," in the three other principal federal securities acts, namely: the Securities Act of 1933 (the Securities Act) at § 22(a); the Investment Company Act of 1940 (the Investment Company Act) at § 44; and the Investment Advisers Act of 1940 (the Investment Advisers Act) at § 214(a). Section 11 of the Judiciary Act of 1789 likewise gave federal courts jurisdiction over "all suits . . . in equity." 1 Stat. 73, 78 (1789); *see also* U.S. Const. art. III, §§ 1–2 (vesting "judicial power of the United States" in a Supreme Court and "such inferior Courts as the Congress may from time to time ordain," and extending that power to "all Cases, in Law and Equity"). *TGS II*, however, focused entirely on the securities-law jurisdictional provisions. This essay, particularly in view of its space limitations, makes that same choice.

5. *See TGS II*, 446 F.2d at 1307 (citing what is now Exchange Act § 21(d)(1), 15 U.S.C. § 78t(d)(1), which specifies that "[w]henever it shall appear to the Commission that any person is engaged or is about to engage in acts or practices constituting a violation of any provision of this chapter, [or] the rules or regulation thereunder . . . it may in its discretion bring an action in the proper district court of the United States . . . to enjoin such acts or practices"). In connection with violations of provisions in the three other principal securities acts, the SEC may pursue injunctive actions pursuant to Securities Act § 20(b), Investment Company Act § 42(d), and Investment Advisers Act § 209(d).

6. *TGS II*, 446 F.2d at 1307–08.

7. *TGS*, 312 F. Supp. at 92.

8. 328 U.S. 395, 406 (1946).

eral equity powers to afford complete relief."[9] *TGS II*'s holding that federal courts may award disgorgement to the SEC pursuant to the broad equitable powers that Congress conferred in the jurisdictional provisions of the federal securities law was on the mark then and continues to be authoritative today.

In the forty-six years between *TGS II* and the Supreme Court's recent consideration of *Kokesh v. SEC*,[10] this statutory authority for court-ordered disgorgement in SEC enforcement actions stood largely unchallenged.[11] Even the petitioner in *Kokesh* regarded disgorgement as a valid equitable remedy;[12] he was simply challenging the SEC's long-held view that disgorgement relief was not a "penalty" within the meaning of the five-year limitations period applicable to certain enforcement actions initiated by federal agencies.[13] Yet, during the oral argument in *Kokesh*, five Justices interjected statements expressing varying degrees of skepticism about the statutory source for SEC disgorgement: Justice Kennedy questioned whether there is "specific statutory authority that makes it clear that the district court can entertain this remedy";[14] Justice Sotomayor (who subsequently authored the Court's unanimous opinion) inquired about the "source of [district courts'] power;[15] Justice Alito probed into "what this thing is";[16] Chief Justice Roberts observed that Congress "did not specify the remedy";[17] and Justice Gorsuch lamented that "there's no statute governing it . . . [w]e're just making it up."[18]

Less than two months after *Kokesh*'s argument, the Court issued a 9–0 decision that continues to generate intense controversy. The controversy was prompted not so much by the decision itself, but rather by its disclaimer—contained in its third footnote—that it offered "[no] opinion on whether courts possess authority to order disgorgement in SEC enforcement proceedings."[19] In holding that SEC disgorgement constitutes a penalty within the meaning of § 2462's five-year period of limitations, the Court observed that such "disgorgement is imposed by the courts as a

9. *See TGS II*, 446 F.2d at 1307 (citing *Porter*, 328 U.S. at 406).

10. 137 S. Ct. 1635, 1642–45 (2017).

11. *See, e.g.*, SEC v. First City Fin. Corp., 890 F.2d 1215, 1230 (D.C. Cir. 1989) (citing cases and observing that disgorgement "is available simply because the relevant provisions of the [Exchange Act] vest jurisdiction in the federal courts"); SEC v. Commonwealth Chem. Secs., Inc., 574 F.2d 90, 102 (2d Cir. 1978) (emphasizing that when a court orders disgorgement, it "is exercising the chancellor's discretion to prevent unjust enrichment").

12. *See* Transcript of Oral Argument at 8, Kokesh v. SEC, 137 S. Ct. 1636 (2017) (No. 16-529), 2017 WL 1399509, at *8 (petitioner's counsel statement that "we've never challenged the capacity of the district court to seek disgorgement; we've just said that there's a time limitation").

13. *See* 28 U.S.C. § 2462 (specifying that "[e]xcept as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued").

14. Transcript of Oral Argument, *supra* note 12, at 7–8.

15. *Id.* at 9.

16. *Id*. at 13.

17. *Id.* at 33.

18. *Id.* at 52.

19. *Kokesh*, 137 S. Ct. at 1643 n.3.

consequence for violating . . . public laws" and that the disgorgement is intended principally to deter such violations rather than to compensate those harms by misconduct.[20] It further maintained that orders imposed in order to deter infractions "are inherently punitive because 'deterrence is not a legitimate nonpunitive governmental objective.'"[21] Moreover, disgorged funds, at the discretion of district courts, are sometimes distributed as compensation to identifiable victims (as they were in *TGS II*)[22] but at other times are paid to the U.S. Treasury (as they were in *Kokesh*).[23] In the Court's view, such disbursements to the U.S. Treasury held particular significance because "[w]hen an individual is made to pay a noncompensatory sanction to the Government as a consequence of a legal violation, the payment operates as a penalty."[24]

The skepticism conveyed during the *Kokesh* argument, set against the backdrops of the Court's now famous "footnote three" and its declarations concerning disgorgement's punitiveness, has prompted substantial speculation about the remedy's validity. What began as a wave of commentary from securities law practitioners[25] and scholars,[26] was soon followed by (thus far) unsuccessful litigants opposing SEC disgorgement.[27] Other litigants have contended that *Kokesh* calls into question disgorge-

20. *Id.* at 1643.

21. *Id.* (quoting Bell v. Wolfish, 441 U.S. 520, 539 n.20 (1979)).

22. *See* SEC v. Fischbach Corp., 133 F.3d 170, 174–76 (2d Cir. 1997) (observing that it is the SEC's "policy wherever possible . . . to recommend a distribution plan by which a defendant's unlawful gains are paid out to defrauded investors," but recognizing that "[o]nce the profits have been disgorged, it remains within the court's discretion to determine how and to whom the money will be distributed") (citation and internal quotation marks omitted)).

23. *See Kokesh*, 137 S. Ct. at 1644.

24. *Id.*

25. *See, e.g.*, Robert Annello, *Chronicle of Disgorgement's Death Foretold:* Kokesh v. SEC, FORBES (Jul. 11, 2017), https://www.forbes.com/sites/insider/2017/07/11/chronicle-of-disgorgements-death-foretold-kokesh-v-sec/ (describing the *Kokesh* footnote as a "ticking time bomb"); Andrew J. Morris, *"Kokesh v. SEC": Its Wide-Ranging (and Mostly Good) Implications for Disgorgement Actions*, THE WLF LEGAL PULSE (June 14, 2017), https://wlflegalpulse.com/2017/06/14/kokesh-v-sec-its-wide-ranging-and-mostly-good-implications-for-disgorgement-actions/ [https://perma.cc/45SG-BCSY] (predicting "it is very possible the SEC could lose its judge-made ability to seek disgorgement"). In advance of this post-*Kokesh* wave, there were a few ripples raising questions about disgorgement's equitable label. *See infra* notes 144, 148 (citing Russell G. Ryan, *The Equity Façade of SEC Disgorgement*, 4 HARV. BUS. L. REV. ONLINE 1 (November 15, 2013), http://www.hblr.org/2013/11/the-equity-facade-of-sec-disgorgement/ [https://perma.cc/CFW2-AXAA]; Francesco A. DeLuca, *Sheathing Restitution's Dagger under the Securities Acts: Why Federal Courts Are Powerless to Order Disgorgement in SEC Enforcement Proceedings*, 33 REV. BANKING & FIN. L. 899 (2014)).

26. *See, e.g.*, Stephen M. Bainbridge, *Kokesh Footnote 3 Notwithstanding: The Future of the Disgorgement Penalty in SEC Cases*, 56 WASH. U. J. L. & POL'Y 17, 29 (2018) (suggesting that, in light of *Kokesh*, the future of SEC disgorgement "looks bleak"); Samuel Bray, *Equity at the Supreme Court*, WASH. POST: VOLOKH CONSPIRACY (June 10, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/06/10/equity-at-the-supreme-court/ [https://perma.cc/H569-TX3F] ("In *Kokesh*, footnote three is a warning from the Supreme Court about the disgorgement remedy sought by the SEC").

27. *See, e.g.*, SEC v. Jammin Java Corp., No. 15-cv-08921 SVW (MRWx), 2017 WL 4286180, at *3 (C.D. Cal. Sept. 14, 2017) (rejecting defendant's claim that "*Kokesh* should be construed so as to eliminate the disgorgement remedy altogether").

ment sought in enforcement actions initiated by other federal agencies,[28] or that *Kokesh*'s penalty analysis applies to injunctions and other types of remedial relief sought by the SEC.[29] The post-*Kokesh* lawsuits appear to be picking up steam: the SEC was recently named as a defendant in a class action complaint filed by the national law firm that authored the amicus brief submitted by Mark Cuban in the *Kokesh* litigation.[30] The lawsuit seeks to recover at least $14.9 billion in disgorgement payments that the SEC is alleged to have improperly collected.[31]

Whether in the context of commentary or litigation, these recent challenges to the disgorgement remedy proceed along two intersecting tracks. One set of challenges correctly observes that Congress has granted the SEC express legal remedies on multiple occasions since *TGS II*,[32] but then goes on to argue either (1) that these express legal remedies (particularly civil monetary penalties) eliminate the need for the equitable remedy of court-ordered disgorgement,[33] or (2) that the authority to exercise general equitable power pursuant to the jurisdictional provisions in the federal securities laws has since been supplanted by an express and purportedly more restrictive statutory provision in the Exchange Act authorizing "equitable relief . . . for the benefit of investors."[34] The other set of

28. *See, e.g.*, FTC v. Credit Bureau Center, LLC, No. 17 C 194, 2018 WL 482076, at *2 (N.D. Ill. Jan. 14, 2018) (stating that "[t]he Court sees nothing in the 'principles' of *Kokesh*" undermining controlling precedents in the Seventh Circuit, which specifically authorizes disgorgement and restitution in FTC suits (citation omitted)).

29. *See, e.g.*, SEC v. Collyard, 861 F.3d 760, 763–64 (8th Cir. 2017) (stating that an "injunction's 'equitable' label does not exempt it from being a § 2462 'penalty'" but concluding that the district court's injunction did not operate as a penalty in this instance because it was "imposed to protect the public prospectively, not redress public wrong" (citation omitted)); Saad v. SEC, 873 F.3d 297, 304–05 (D.C. Cir. 2017) (Kavanaugh, J., concurring) (joining in remand order so that the SEC can address *Kokesh*'s relevance to permanent bars from the securities industry, and asserting that "[l]ike disgorgement paid to the Government, expulsion or suspension of a securities broker does not provide anything to the victims to make them whole or remedy their losses").

30. *See generally* Class Action Complaint, Jalbert v. SEC, No. 1:17-cv-12103, 2017 WL 4876155 (D. Mass. Oct. 26, 2017) (identifying Brown Rudnick LLP as counsel of record); Brief for Mark Cuban as Amicus Curiae Supporting Petitioner, Kokesh v. SEC, 137 S. Ct. 1635 (2017) (No. 160529), 2017 WL 929704 (filed March 3, 2017) (identifying Brown Rudnick LLP as counsel of record).

31. *See* Class Action Complaint, *supra* note 30, ¶ 1.

32. *See* Part I *infra*.

33. *See* Bainbridge, *supra* note 26, at 26–27 (arguing that civil monetary penalties in SEC enforcement actions "are the functional equivalent of disgorgement" and questioning "whether courts should continue to impose a sanction unauthorized by statute when an equivalent sanction has been so authorized"); Class Action Complaint, *supra* note 30, ¶ 21 (contending that the SEC has continued to argue "for implied remedies, while also using its statutorily authorized enforcement tools" and that "[a]s a result, the SEC sought and obtained double recovery exceeding statutory limits and without statutory authority").

34. *Infra* note 108 (quoting § 21(d)(5) of the Exchange Act). *See* Brief for Mark Cuban as Amicus Curiae Supporting Petitoner, *supra* note 30, at *7 (narrowly construing § 21(d)(5) to contain binding "statutory limitations" that effectively prohibit the SEC from obtaining disgorgement "for the purpose of being paid over to the treasury"); Class Action Complaint at ¶ 23, *supra* note 30 (interpreting § 21(d)(5) to mean that disgorged funds "must be returned to the victim" and may not be disbursed to the U.S. Treasury); *infra* text accompanying note 111 (quoting a statement by Justice Sotomayor during the *Kokesh* ar-

challenges is rooted in the claim that "there are no penalties in equity."[35] That is, these challengers are arguing that disgorgement's post-*Kokesh* status as a "penalty" removes the remedy from the realm of equity, and renders it instead a remedy that can neither be sought by the SEC nor ordered by a district court in the absence of explicit congressional authorization.[36]

This essay has two principal goals. One is to elucidate the incontestable statutory authority for court-ordered disgorgement in SEC enforcement actions. Although the disgorgement remedy in *TGS II* began as interstitial lawmaking pursuant to the jurisdictional provisions in the federal securities laws,[37] Congress ratified, and in some instances codified, that disgorgement remedy in six subsequent federal securities statutes—starting in the 1980s with legislation directed at high profile insider trading scandals and continuing through the congressional response to the 2008 Financial Crisis.[38] Part I examines this legislation and highlights the statutory text that currently references "disgorgement" in judicial actions brought by the SEC. It also examines the Congressional Committee Reports that accompanied the six statutes. Part I's analysis demonstrates that Congress never intended its express grants of authority for civil monetary penalties to supplant a court's general equitable power to order the disgorgement of ill-gotten gains from a securities law violator. In fact, the congressional drafters of the civil penalty provisions specifically contemplated that courts would award such penalties in addition to disgorgement. They also recognized that it was sometimes not feasible for courts to distribute disgorged funds as compensation to victims of wrongful acts. Part I's analysis further shows that, far from seeking to curtail the SEC and federal courts' traditional use of the disgorgement remedy, § 21(d)(5) of the Exchange Act's express authorization for "equitable relief . . . for the benefit of investors" represents a congressional effort, in the wake of the corporate governance and accounting scandals at Enron and WorldCom, to go beyond the disgorgement remedy to reach a broader range of unjust enrichment on the part of corporate executives.[39]

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gument that could be construed to suggest that § 21(d)(5) is the sole basis for SEC disgorgement and that the provision required investor restitution).

35. Bray, *supra* note 26.

36. *See id.* (contending that "[d]isgorgement to the SEC can be a penalty or it can be equitable; the Supreme Court just said it's a penalty; it can't be equitable. And if it's not equitable—jurors, report for duty"); Bainbridge, *supra* note 26, at 30 (citing Bray and contending that "[i]f disgorgement is a penalty, . . . courts lack the power and the SEC lacks the authority" to grant/seek it as a type of equitable relief). *But see* Daniel B. Listwa & Charles Seidell, *Penalties in Equity: Agency Use of Disgorgement After* SEC v. Kokesh, 35 Yale J. on Reg. 667, 671 (2018) (concluding that notwithstanding "its alluring simplicity," the no penalties in equity argument is "unpersuasive").

37. *Cf.* United States v. Little Lake Misere Land Co., 412 U.S. 580, 593 (1973) (observing that "the inevitable incompleteness presented by all legislation means that interstitial federal lawmaking is a basic responsibility of the federal courts").

38. *See* Part I *infra* (discussing federal securities statutes enacted in 1984, 1988, 1990, 1995, 2002, and 2010).

39. *See infra* text accompanying notes 113–117 (examining Exchange Act § 21(d)(5)'s legislative history and observing that the provision was designed to reach benefits attained

Part II turns to this essay's second goal, which is to reconcile the status of disgorgement as a statutorily authorized equitable remedy with *Kokesh*'s holding that disgorgement is punitive, and thus, a penalty for purposes of the five-year limitations period applicable to certain government enforcement actions. Its analysis calls attention to *Kansas v. Nebraska*,[40] a 2015 U.S. Supreme Court decision that has been overlooked in the post-*Kokesh* disgorgement critiques. The *Kansas* decision captures an unprecedented instance in which the Supreme Court itself, in the exercise of its original jurisdiction, awarded disgorgement to remedy the violation of an interstate water compact with the status of federal law.[41] As Justice Kagan and the five other Justices who joined in her opinion saw it, Nebraska's violation of the water compact resulted from its "misbehavior," and therefore the Court could use its broad equitable powers to order Nebraska to disgorge some of its unlawful gains, in addition to Nebraska's payment of compensatory damages for Kansas's loss.[42] Disgorgement, the Court explained, "appropriately reminds Nebraska of its legal obligations, deters future violations, and promotes the Compact's successful administration."[43] Thus, in the very words the *Kokesh* Court articulated two years later, *Kansas*'s disgorgement order "bears all the hallmarks of a penalty: It [was] imposed as a consequence of violating a public law and [was] intended to deter, not to compensate."[44] Notably, the *Kansas* Court rooted its disgorgement decision in the 1946 precedent in *Porter*—the identical precedent that the Second Circuit invoked in *TGS II*—to emphasize that "[w]hen federal law is at issue and 'the public interest is involved,' a federal court's 'equitable powers assume an even broader and more flexible character than when only a private controversy is at stake.'"[45]

Because even the Justices who refused to join in the disgorgement order agreed that it was an equitable remedy,[46] the *Kansas* decision leaves no doubt of the Supreme Court's view that court-ordered disgorgement need not be compensatory and can be both equitable and punitive.

by corporate executives during periods in which their companies had violated federal securities law, notwithstanding that their benefits (whether from salary, bonuses, or their own personal stock transactions) did not directly result from securities law violations they themselves committed).

40. 135 S. Ct. 1042, 1051–64 (2015).

41. *See id.* at 1053 (observing that the interstate compact "counts" as federal law because it received Congress's "blessing").

42. *Kansas*, 135 S. Ct. at 1055–56. Justices Ginsburg, Sotomayor, Breyer, and Kennedy joined fully in Justice Kagan's majority opinion. Chief Justice Roberts joined with the majority in ordering disgorgement pursuant to the Court's "equitable power," but dissented from the part of the opinion that granted reformation of the interstate compact. *See id.* at 1064 (Roberts, C.J., concurring in part and dissenting in part).

43. *Kansas*, 135 S. Ct at 1057.

44. Kokesh v. SEC, 137 S. Ct. 1635, 1644 (2017).

45. *Kansas*, 135 S. Ct at 1053 (quoting *Porter*, 328 U.S. at 398).

46. *See Kansas*, 135 S. Ct. at 1070 (Thomas, J., joined by Scalia, J., and Alito, J., concurring in part and dissenting in part) ("Disgorgement is strong medicine, and as with other forms of equitable power, we should impose it against the States only 'sparingly'") (quoting Missouri v. Jenkins, 515 U.S. 70, 131 (1995)).

Whether equitable authority is conferred on the Supreme Court by Article III of the U.S. Constitution or to federal district courts by Congress in the general jurisdictional provisions of the federal securities laws, the punitiveness of disgorgement does not operate to sever the remedy from its equitable realm.

I. CONGRESS AND THE DISGORGEMENT REMEDY IN SEC ENFORCEMENT ACTIONS

Since the decision in *TGS II*, Congress has enacted six securities statutes encompassing provisions that ratify, and in some instances codify, court-ordered disgorgement as a remedy in SEC enforcement actions. These six statutes include: the Insider Trading Sanctions Act of 1984 (ITSA);[47] the Insider Trading and Securities Fraud Enforcement Act of 1988 (ITSFEA);[48] the Securities Enforcement Remedies and Penny Stock Reform Act of 1990 (Remedies Act);[49] the Private Securities Litigation Reform Act of 1995 (PSLRA);[50] the Sarbanes-Oxley Act of 2002;[51] and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act).[52] As we shall see, in each instance the statutory text as well as its legislative history rest on the congressional understanding that the general jurisdictional provisions of the federal securities laws authorize federal district courts to order disgorgement as a type of equitable relief.

A. The Insider Trading Sanctions Act of 1984

In the early 1980s, Congress sought to intensify the existing criminal and civil sanctions for insider trading and tipping in order to deter violations. It did so in ITSA by raising the maximum criminal fine for Exchange Act violations from $10,000 to $100,000, and by authorizing the SEC to seek court-ordered civil monetary penalties, up to three times the profit made or loss avoided, for defendants found liable for illegal tipping or trading.[53]

Although ITSA did not expressly reference the term "disgorgement," the statutory text did make clear that the new authorization for civil monetary penalties was intended to supplement and enhance the SEC and federal courts' then-existing enforcement authority. Specifically, what was then codified as § 21(d)(2) of the Exchange Act provided that:

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

48. Insider Trading and Securities Fraud Enforcement Act of 1988, Pub. L. No. 100-704, 120 Stat. 4677 (1988).

49. Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Pub. L. No. 101-429, 104 Stat. 931 (1990).

50. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995).

51. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002).

52. Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. 111-203, 124 Stat. 1376 (2010).

53. *See* Insider Trading Sanctions Act of 1984 §§ 3, 5.

> Whenever it shall appear to the Commission that any person has violated any provision [or rule of the Exchange Act] . . . by purchasing or selling a security while in possession of material nonpublic information . . . the Commission may bring an action in a United States district court to seek, and the court shall have jurisdiction to impose, a civil penalty . . . . The amount of such penalty shall be determined by the court in light of the facts and circumstances, but shall not exceed three times the profit gained or losses avoided as a result of the unlawful purchase or sale, and shall be payable to the Treasury of the United States. The actions authorized by this paragraph may be brought *in addition to any other actions that the Commission or the Attorney General are entitled to bring.*[54]

There is no doubt that the above reference to "any other actions . . . that the Commission [is] entitled to bring" encompassed both injunctive relief and court-ordered disgorgement. Indeed, the Report of the House Committee on Energy and Commerce, which is the only written report accompanying ITSA, is replete with references to both remedies.[55] The Report also evidences Congress's view that the statutory source for disgorgement lies in the jurisdictional provisions of the federal securities laws. As the House Report explains,

> Once the equity jurisdiction of a court has been invoked on a showing of a securities violation, the court possesses the necessary power to fashion an appropriate remedy. Thus, *the Commission may request that the court order certain equitable relief, such as the disgorgement (giving up) of illegal profits.*[56]

Although the Committee was clear that equitable relief should continue to be used "aggressively and creatively to meet market abuses," it regarded disgorgement, together with an injunction against future violations, as an "insufficient deterrent."[57] That is, disgorgement and injunctions were viewed as wanting because the "risk of incurring *such penalties* often fails to outweigh the temptation to convert nonpublic information into enormous profits."[58] The civil monetary penalty authorized under ITSA stood as a more powerful deterrent because monetary sanctions did more than "merely restore[ ] a defendant to his original position"—a sanction of up to three times the illicit gain or loss avoided would "extract[ ] a *real penalty* for his illegal behavior."[59]

The House Report is likewise clear that ITSA's provision for civil monetary penalties should not supplant court-ordered disgorgement of an insider trading defendant's illicit profits. The Committee emphasized at the

54. *Id.* § 2(A) (emphasis added).
55. *See, e.g.*, H.R. Rep. No. 98-355, at 7 (1983) ("The principal, and often effectively only, remedy available to the Commission against insider trading is an injunction against further violations of the securities laws and disgorgement of illicit profits."); *infra* text accompanying notes 56–61.
56. H.R. Rep. No. 98-335, at 7 (emphasis added).
57. *Id.*
58. *Id.* at 7–8 (emphasis added).
59. *Id.* at 7 (emphasis added).

outset that the new and existing remedies for insider trading violations were cumulative. It also recognized that, when appropriate, disgorgement may be distributed to the investors who were damaged by the insider trading. But Congress hardly required such distribution:

> The new penalty may be used *in addition to* existing remedies available to the Commission. Thus, in appropriate insider trading cases, the Commission may seek: (1) a court order enjoining the violator from breaking the law again; (2) *disgorgement of ill-gotten gains* which *may, if appropriate*, be paid into an escrow fund so that traders or other private parties damaged by the insider trading can obtain compensation for their losses; and (3) the imposition of the new civil money penalty payable to the U.S. Treasury.[60]

The Report then reiterated the Committee's view that civil monetary penalties could be sought and ordered in addition to disgorgement:

> The Act creates an additional remedy for insider trading in secondary trading markets by providing that whenever it appears that certain transactions were illegal because they were effected by someone in possession of material nonpublic information, the Commission, *in addition to seeking other remedies such as an injunction or disgorgement,* may seek an order in a district court action requiring the violator, or anyone who aided and abetted the violation, to pay as a civil penalty an amount of money up to three times the profit gained or loss avoided as a result of the unlawful transaction.[61]

There is one additional aspect of ITSA that warrants emphasis: the House Report evidences a congressional understanding that equitable remedies, specifically injunctions and disgorgement, constituted punitive sanctions, at least of a sort. As the italicized statements above reveal, the Committee used the term "penalties" to describe injunctions and disgorgement,[62] whereas it used the phrase "real penalty" to describe the three-times-profit sanction.[63] These statements reflect the common sense notion that the term "penalty" lends itself to gradations, from mild to severe. The statements also demonstrate that even in 1983, just over a decade after *TGS II*'s distinction between "remedial" relief and "a penalty assessment," Congress saw no contradiction in categorizing disgorgement as both equitable and punitive.

B. The Insider Trading and Securities Fraud Enforcement Act of 1988

ITSFEA constitutes the second occasion on which Congress ratified court-ordered disgorgement as an available remedy against a securities law violator. But whereas ITSA's text only implicitly recognized the dis-

60. *Id.* at 8 (emphasis added).
61. *Id.* at 20 (emphasis added).
62. *See supra* text accompanying note 58.
63. *See supra* text accompanying note 59.

gorgement remedy, ITSFEA included a provision that explicitly codified court-ordered disgorgement.

ITSFEA sought to further augment the enforcement of the federal securities laws, particularly in the area of insider trading.[64] The legislation amended the Exchange Act in multiple ways, including by: (1) raising the maximum criminal penalties under § 32(a) to a fine of $1 million, ten years in prison, or both;[65] (2) modifying ITSA's penalty provision to clarify liability for "tipping" and to encompass "controlling persons;"[66] and (3) establishing an express private right of action for investors who traded contemporaneously with a person found to have violated an Exchange Act provision or rule by "purchasing or selling any security while in possession of material, non-public information,"[67] or for unlawfully communicating such information to a person who uses it to trade.[68]

Section 20A of the Exchange Act's express right of action for contemporaneous traders is the ITSFEA provision that codifies that federal courts in the exercise of their equitable jurisdiction may order disgorgement in SEC actions seeking injunctive relief. Section 20A(b)(2) provides:

> Offsetting *Disgorgements* Against Liability.—The total amount of damages imposed against any person [found liable for illegal tipping or trading] shall be diminished by the amounts, if any, that such person *may be required to disgorge, pursuant to a court order obtained at the instance of the Commission*, in a proceeding brought [for an injunction] under § 21(d) of [the Securities Exchange Act of 1934] relating to the same transaction or transactions.[69]

The italicized reference to court-ordered disgorgement evidences a Congress completely cognizant and supportive of what had become the SEC's practice of seeking unjust enrichment recovery, as ancillary relief to an injunction, in the lion's share of insider trading actions initiated since *TGS II*. Section 20A(b)(2) further reflects a congressional determination that defendants who were previously ordered by a court to disgorge their gains in an SEC enforcement should not bear additional liability for damages incurred by contemporaneous traders.

ITSFEA also amended ITSA's civil monetary penalty provision by extending it to "controlling persons" who recklessly disregard the likelihood that an employee or agent is engaging in illegal tipping or trading;[70] and by clarifying that tippers may be subject to civil penalties for any tipping activity that involves a violation of the law, irrespective of the tippee's

64. *See* Insider Trading and Securities Fraud Enforcement Act of 1988 § 1.
65. *Id.* § 4. These maximum criminal penalties were again increased in 2002, such that § 32(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78ff(a) (2012), currently provides for fines of not more than $5 million and/or imprisonment of not more than twenty years.
66. Securities Exchange Act § 21A.
67. *Id.* § 20A(a).
68. *Id.* § 20A(c).
69. *Id.* § 20A(b)(2) (emphasis added).
70. *Id.* § 21A(a)(1)(B).

liability.[71] But that civil penalty provision, re-codified as § 21A of the Exchange Act, retained the proviso from four years earlier that its civil monetary penalties were "not exclusive."[72] That is, § 21A(d)(3) expressly provides that actions for a penalty of up to three times the gain made or loss avoided "may be brought *in addition to any other actions* that the Commission or the Attorney General are entitled to bring."[73] The Report from the House Committee on Energy and Commerce once again left no doubt that such civil penalties were intended "*to go beyond disgorgement of illegal profits to add* the imposition of a significant fine as a needed deterrent."[74]

ITSFEA's text, in conjunction with the House Report, also demonstrates that Congress definitely contemplated disgorgement orders that would, in certain circumstances, make non-trading tippers, in Justice Sotomayor's recent words in *Kokesh*, "worse off" by requiring such tippers to disgorge the trading profits gained by persons with whom they had communicated the material, non-public information, even though such tippers never actually received or shared in the profits.[75] After quoting the statutory text that ensures that persons who control tippers would not be liable "for the profits of the possibly endless chain of persons who may trade on the information before it is public,"[76] the House Report observed that the Committee chose not to apply that same limiting language to SEC enforcement actions brought directly against tippers themselves. As the Committee explained, the "public interest nature of Commission actions necessitates that the Commission's ability to obtain the full scope of equitable and other relief available in appropriate cases remain unimpaired."[77] The Committee then provided the following example: "if a tipper's communication resulted in profits to his direct tippee and to remote tippees as well, the Commission *could obtain disgorgement from the tipper of the profits of both the direct and remote tippees, and could seek an ITSA penalty of up to three times that amount.*"[78] Thus, in the Committee's view, the equitable discretion Congress had accorded to district courts supported orders directed at recouping all illicit profits that resulted from a person's unlawful tipping activity, whether or not the initial tipper actually shared in the proceeds derived from the tip and regardless of whether that tipper had been the one to communicate the material nonpublic information to any remote tippees.

71. *Id.* § 21A(a)(1)(A).
72. *Id.* § 21A(d)(3).
73. *Id.* (emphasis added).
74. H.R. Rep. No. 100-910, at 11 (1988) (emphasis added).
75. *See* Kokesh v. SEC, 137 S. Ct. 1635, 1644 (2017) (concluding that SEC disgorgement was punitive, in part because such disgorgement does not always "simply return[ ] the defendant to the place he would have occupied had he not broken the law").
76. H.R. Rep. No. 100-910, at 20 (quoting § 21A(a)(3), which in an SEC enforcement action against the controlling person of a tipper, limits the penalty computation to "the profit gained or loss avoided . . . by the person or persons *to whom the controlled person directed such communication*") (emphasis added).
77. *Id.* at 20 n.16.
78. *Id.* (emphasis added).

C. The Securities Enforcement Remedies and Penny Stock Reform Act of 1990

As the legislation's title suggests, Congress enacted the Remedies Act to provide the SEC with a broader range of enforcement remedies to protect investors and promote the integrity of the national securities markets. The legislation complemented the insider trading penalty scheme in ITSA and ITSFEA by amending the Exchange Act and the three other principal securities acts to authorize the SEC to seek civil monetary penalties in federal district courts for other types of securities law violations.[79] The Remedies Act also broadened considerably the remedies available to the SEC in its own administrative proceedings by authorizing the imposition of "cease-and-desist" orders against securities law violators[80] and by authorizing the entry of orders for "an accounting and disgorgement."[81] The legislation's panoply of other new remedies, while undoubtedly important to the SEC's overall enforcement program, have much less relevance to the focus of this essay.[82]

The Remedies Act has both statutory text and legislative history that confirm Congress's intent to build upon the remedy of court-ordered disgorgement in enforcement actions involving securities law violations other than insider trading. With respect to the statutory text, each of the Act's four civil monetary penalty provisions states that the civil penalty remedy is "not exclusive."[83] Moreover, both the House and Senate Committee Reports accompanying the Remedies Act make numerous direct references to the SEC's new ability to seek civil monetary penalties in addition to disgorgement.[84] For example, at the outset of the House Report, the Committee on Energy and Commerce observed that the Remedies Act authorizes "the federal courts to order the payment of civil money penalties*, in addition to disgorgement*, for a broad range of viola-

79. *See* Securities Exchange Act of 1934 § 21(d)(3), 15 U.S.C. 78u(d)(3) (2012); Securities Act of 1933 § 20(d), 15 U.S.C. 77t(d) (2012); Investment Company Act of 1940 § 42(e), 15 U.S.C. 80a-41(e) (2012); Investment Advisers Act of 1940 § 209(e), 15 U.S.C. 80b-9(e) (2012). Each of these penalty provisions specify a three-tiered structure for virtually any violation of any provision in each act, apart from insider trading offenses, which remain subject to the penalty provisions in ITSA/ITSFEA.

80. Exchange Act § 21C(a); Securities Act § 8A(a); Investment Company Act § 9(f)(1); Investment Advisers Act § 203(k).

81. Exchange Act §§ 21B(e), 21C(e); Securities Act § 8A(e); Investment Company Act §§ 9(e), 9(f)(5); Investment Advisers Act §§ 203(j), 203(k)(5).

82. *See generally* Ralph C. Ferrara et al., *Hardball! The SEC's New Arsenal of Enforcement Weapons*, 47 Bus. Law. 33 (1991) (examining the Remedies Act's grants of authority for court-ordered asset freezes, court-ordered officer and director bars, cease-and-desist orders in administrative proceedings, and civil monetary penalties in certain administrative proceedings brought against securities professionals, including broker-dealers, investment advisers, and their associated personnel).

83. *See* Exchange Act § 21(d)(3)(c)(iii); Securities Act § 20(d)(3)(C); Investment Company Act § 42(e)(3), Investment Advisers Act § 209(e)(3)(C).

84. H.R. Rep. No. 101-616, at 13, 22, 31 (1990); S. Rep. No. 101-337, at 3–4, 8–12, 16 (1990).

tions of the federal securities laws."[85] The Senate Banking Committee's Report was likewise explicit in recognizing that "[c]ourts in civil proceedings currently may order disgorgement under their equitable powers,"[86] and that the new civil monetary "*penalties may be imposed in addition to orders of disgorgement* directing a defendant to return the full amount of profits derived from a violation, and other forms of equitable relief."[87] The Senate Report also recognized that courts may use "their equitable powers to require that law violators 'disgorge' the amounts by which they are unjustly enriched," even in instances when it is the general public, rather than specifically identifiable investors, who were harmed by the violations.[88] Moreover, both Reports deemed it important enough to reiterate the cumulative and flexible nature of the remedies: "[C]ourts will have *the flexibility* to order injunctive or other equitable relief only, injunctive or other equitable relief and a penalty, or a penalty only, *depending upon the facts of a particular case*."[89]

The Remedies Act provisions that empowered the SEC to enter orders requiring "an accounting and disgorgement, including reasonable interest" also authorized the SEC to "adopt rules, regulations, and orders concerning payments to investors, rates of interest, periods of accrual, and such other matters as it deems appropriate to implement [the remedy]."[90] But Congress hardly anticipated that all disgorged funds in administrative proceedings would be distributed to investors. Indeed, the House Report explicitly recognized that "[d]isgorgement is different from restitution or damages in that, whereas the latter are designed to compensate the victims of a violation, disgorgement 'is a method of forcing a defendant to give up the amount by which he was unjustly enriched.'"[91] The House

85. H.R. REP. NO. 101-616, at 13 (emphasis added); *id.* at 17 (stating that while defendants could "reap enormous profits" from securities law violations other than insider trading, such violators were subject only to "an order of disgorgement," which "merely requires the return of wrongfully obtained profits; it does not result in any actual economic penalty or act as a financial disincentive to engaging in securities fraud"). The House Report further observed that its codification of "ancillary relief" in the form of court-ordered officer and director bars should not be read to "restrict the court's inherent equitable authority" and noted that this "could include orders directing disgorgement of unlawful profits." *Id.* at 31.

86. S. REP. NO. 101-337, at 8 n.7.

87. S. REP. NO. 101-337, at 16 (emphasis added). *See id.* at 10 ("[The new] authority to seek or impose substantial money penalties, in addition to the disgorgement of profits, is necessary for the deterrence of securities law violations"); *id.* at 13 (observing that "if a violation involves fraud and resulted in substantial losses to other persons, a court (in addition to ordering disgorgement of profits) may assess a civil penalty equal to a violator's gain, even when that gain exceeds the applicable [monetary] limitation[s]").

88. *Id.* at 9 (observing that the SEC may obtain disgorgement "when there are violations of disclosure and filing requirements under the Federal securities law" and citing SEC v. First City Financial Corp., 890 F. 2d 1215 (D.C. Cir. 1989)).

89. S. REP. NO. 101-337, at 17 (emphasis added); H. REP. NO. 101-616, *supra* note 84, at 22 (emphasis added).

90. Securities Enforcement Remedies and Penny Stock Reform Act of 1990 § 8A(e). *See supra* note 81 (citing "accounting and disgorgement" provisions in the four principal securities acts).

91. H.R. REP. NO. 101-616, at 35 (quoting SEC v. Blavin, 760 F.2d 706, 713 (6th Cir. 1985) (a decision that emphasized that district courts possess "the equitable power to grant

Report also stated that "[t]he Commission, *of course*, will continue to be able to seek disgorgement in its civil injunctive actions."[92] The Senate Report is likewise clear that this new administrative authority to order disgorgement was intended to codify a remedy that was already available to the SEC in federal district court and was often obtained through agreements from respondents "as part of settlement of administrative proceedings."[93]

Digging further into the legislative history of the Remedies Act reveals an important fact that has thus far escaped notice in any of the recent challenges to SEC disgorgement: the Senate Committee had actually contemplated parallel statutory authorizations for court-ordered disgorgement. But the Committee ultimately decided that such explicit authorization was unnecessary, based on the advice of the SEC. That fact can be inferred from a written colloquy between Senate Banking Committee Chairman Donald Riegle and Richard Breeden, who was then the Chairman of the SEC:

> [Question #1] Disgorgement
>
> The penalty provisions of the Securities Law Enforcement Remedies Act are intended to be independent of disgorgement of any profits obtained by the securities law violator as a result of the wrongful conduct. Please suggest clarifying language for S. 647 to ensure that both disgorgement and the penalties provided in the bill can be obtained from securities law violators.[94]

Notwithstanding Senator Riegle's request, the SEC's response did not include such "clarifying language." As Chairman Breeden explained,

> The Commission did not include such language in the legislation as submitted, because it did not believe that the language was necessary. The provision in S. 647 for penalties in civil actions was based upon [the penalty provisions in ITSFEA and ITSA]. Both § 21A and S. 647 provide that the civil penalty actions that they authorize may be brought in addition to any other action that the Commission or the Attorney General is entitled to bring. The legislation that the Commission submitted to Congress on February 9, 1990 contains similar language. This language makes clear that a penalty action is not an exclusive remedy, and that an action for disgorgement also would be available in appropriate cases.[95]

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disgorgement without inquiring whether, or to what extent, identifiable private parties" have been harmed) and SEC v. Commonwealth Chemical Securities, Inc., 574 F.2d 90, 102 (2d Cir. 1978) (a decision which underscored that "the primary purpose of disgorgement is not to compensate investors. . . . [I]t is a method of forcing a defendant to give up the amount by which he was unjustly enriched").

92. H.R. Rep. No. 101-616, at 35 (emphasis added).

93. S. Rep. No. 101-337, at 16.

94. *See Hearings Before the Subcomm. on Sec. of the Comm. on Banking, Hous. and Urban Affairs on S. 647*, 101st Cong. 426 (1990) (written responses of Richard Breedan, Chaiman, SEC).

95. *Id.*

Chairman Breeden's response further assured Congress that while neither ITSFEA nor ITSA's text "expressly referred to disgorgement, the courts have routinely ordered disgorgement and penalties in the same case."[96] That Congress would have so heavily weighted the SEC's input on issues related to the Remedies Act is not at all surprising—the legislation originated from drafts of legislation that were proposed initially and later revised and resubmitted by the SEC.[97]

Had the SEC a crystal ball in 1990 that could have revealed either the questions that would be posed by the five Justices during the *Kokesh* argument[98] or the recent challenges to the SEC disgorgement remedy (including the pending class action seeking recovery of $14.9 billion in previously obtained SEC disgorgement),[99] Chairman Breeden surely would have provided Senator Riegel with statutory text suggestions to authorize explicitly the remedy of court-ordered SEC disgorgement as well as to clarify that courts can order civil monetary penalties in addition to such disgorgement. At the time, however, it was reasonable for the SEC to have assumed that the "remedy not exclusive" text in the legislation—coupled with the expressed intentions of Congress and the nearly two decades of judicial practice since *TGS II*—provided sufficient certainty in each respect. It was also reasonable for Congress to treat as a given that courts would adhere to the repeatedly expressed congressional intentions as well as the firmly ensconced lower court precedents.

D. The Private Securities Litigation Reform Act of 1995

The PSLRA imposes numerous restrictions on securities actions filed by private plaintiffs, who, as Congress saw it, were acting at the direction of securities lawyers all too often seeking simply to reach a quick settlement and collect their attorney fees. Consistent with this supposition, the PSLRA contains a provision thwarting attempts by the securities-plaintiffs' bar to lay claim to portions of disgorged funds that had been awarded to the SEC by federal courts. Specifically, the PSLRA amended both the Securities Act and the Exchange Act to include a provision that specified:

> Prohibition of Attorneys' Fees Paid From *Commission Disgorgement Funds*.— Except as otherwise ordered by the court upon motion by the Commission, or, in the case of an administrative action, as otherwise ordered by the Commission, *funds disgorged as the result of an action brought by the Commission in Federal court*, or as a result of any Commission administrative action, shall not be distributed as payment for attorneys' fees or expenses incurred by private parties

96. *Id.* (citing cases and ITSA House Report).

97. *See* S. Rep. No. 101-337, at 4 (detailing the history of the legislation and observing that S. 647 "originally was submitted to Congress by the SEC on September 28, 1988 and was developed, in part, in response to certain recommendations of the National Commission on Fraudulent Financial Reporting").

98. *See supra* text accompanying notes 14–18.

99. *See supra* text accompanying note 30.

seeking distribution of the disgorged funds.[100]

The text of these provisions not only codify Congress's conviction that court-ordered disgorgement is an appropriate remedy for established violations of the federal securities laws. It also evidences congressional respect for judicial determinations that are grounded in equity. That is, although Congress as a general matter decided that funds disgorged by defendants in SEC enforcement actions should not be used to offset expenses incurred by private parties seeking a share of the proceeds, Congress nonetheless granted federal courts the authority to trump that decision in actions where justice warranted a departure from the default principle.

E. The Sarbanes-Oxley Act of 2002

Enacted in the wake of the corporate governance and accounting scandals at Enron, WorldCom, and numerous other public companies, the Sarbanes-Oxley Act was described at the time as "the most far reaching reforms of American business practices since the time of Franklin Delano Roosevelt."[101] Only two provisions in the Act's eleven titles (running sixty-six pages) directly bear on the remedy of court-ordered SEC disgorgement. One such provision authorizes the SEC to create, for the benefit of injured parties, so-called "fair funds" obtained from disgorgement and civil monetary penalty orders. The other provision authorizes the SEC to seek, and federal courts to grant, "any equitable relief . . . for the benefit of investors."[102]

The text of the Sarbanes-Oxley Act's "Fair Funds" provision reveals yet another instance of court-ordered disgorgement's congressional codification and provides even more evidence that the civil monetary penalty sanction was never intended to supplant a federal district court's general equitable authority to order the disgorgement of ill-gotten gains from a securities law violator. Section 308(a) of the Sarbanes-Oxley Act provided that:

> Civil Penalties Added to *Disgorgement Funds* for the Relief of Victims.—If in any judicial or administrative action brought by the Commission under the securities laws . . . the Commission obtains an order requiring disgorgement against any person for a violation of such laws or the rules or regulations thereunder, or such person agrees in settlement of any such action to such disgorgement, and the

100. Securities Act of 1933 § 20(f); *see also* Securities Exchange Act of 1934 § 21(d)(4) (emphasis added).

101. Elisabeth Bumiller, *Bush Signs Bill Aimed at Fraud in Corporations*, N.Y. Times, July 31, 2002, at A1.

102. Sarbanes-Oxley Act § 304(b)(5) (codified at Securities Exchange Act §21(d)(5)). The Sarbanes-Oxley Act also amended the federal bankruptcy laws to provide that certain debts would be non-dischargeable if they were incurred in violation of the anti-fraud provisions of the federal securities laws. *See id.* at § 803(3)(iii) (codified at 11 U.S.C. § 523(a)(19) and extending to any court or administrative order for any "penalty, citation, restitutionary payment, [or] disgorgement payment").

> Commission also obtains pursuant to such laws a civil penalty against such person, the amount of such civil penalty shall, on the motion or at the direction of the Commission, *be added to and become part of the disgorgement fund* for the benefit of the victims of such violation.[103]

Prior to this "Fair Funds" provision, while monies disgorged by a securities law violator were typically distributed to identifiable injured parties (subject to a court's equitable discretion and the SEC's ability to identify such parties),[104] monies attained through the imposition of civil monetary penalties were required to be dispersed only to the U.S. Treasury.[105] Accordingly, § 308, which was codified at 15 U.S.C. § 7246, substantially increased the amount of funds that could be distributed to the defrauded shareholders of publicly traded companies or other victims of securities-law wrongdoing.[106] However, as the italicized text makes clear, a disgorgement order was an explicit, necessary condition for a civil monetary penalty to be included in any fair fund distribution. Were court-ordered disgorgement anything another other than a congressionally authorized remedy, this fair-funds provision would have been logjammed because, while the SEC at the time had the authority to order disgorgement in its own administrative proceedings, prior to the Dodd-Frank Act of 2010, its authority to order civil monetary penalties in such proceedings extended only to regulated entities and their associated persons.[107]

The Sarbanes-Oxley Act's other SEC disgorgement-related provision is codified at § 21(d)(5) of the Exchange Act, which states in full:

> Equitable Relief.—In any action or proceeding brought or instituted by the Commission under any provision of the securities laws, the Commission may seek, and any Federal court may grant, any equitable relief that may be appropriate or necessary for the benefit of

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103. Sarbanes-Oxley Act § 308(a) (emphasis added) (codified, as amended, 15 U.S.C. § 7246). *See generally* Barbara Black, *Should the SEC Be a Collection Agency for Defrauded Investors?*, 63 Bus. Law. 317 (2008); Verity Winship, *Fair Funds and the SEC's Compensation of Injured Investors*, 60 Fla. L. Rev. 1103 (2008).

104. *See supra* note 22 (quoting SEC v. Fischbach Corp., 133 F.3d 170, 174 (2d Cir. 1997)).

105. *See, e.g.*, Securities Exchange Act § 21A(d)(1) (directing to the U.S. Treasury any civil monetary penalties imposed in insider trading cases); Securities Exchange Act § 21(d)(3)(C)(i) (directing to the U.S. Treasury court-ordered civil monetary penalties for Exchange Act violations other than insider trading).

106. Sarbanes-Oxley Act § 308 further mandated that the SEC study and report on its prior five years of "proceedings to obtain civil penalties or disgorgements to identify areas where such proceedings may be utilized to . . . provide restitution for injured investors . . . and to improve the collection rates for civil penalties and disgorgements." Sarbanes-Oxley Act § 308(a).

107. *See* Urska Velikonja, *Public Compensation for Private Harm: Evidence from the SEC's Fair Fund Distributions*, 67 Stan. L. Rev. 331, 352 (2015) (observing that prior to the Dodd-Frank Act, "the SEC's authority to impose civil fines in an administrative proceeding was limited to actions against broker dealers, investment advisors, and clearing agencies . . . [and to] force other securities violators, in particular issuers and their officers and directors, to pay civil fines, the SEC had to sue in federal court"). *See also infra* text accompanying notes 121–124 (discussing the Dodd-Frank Act's amendment to the "Fair Fund" provision).

investors.[108]

This plain text is frustratingly ambiguous, supporting both narrow and broad constructions.

As the recent challengers to the SEC disgorgement remedy have urged, § 21(d)(5) can be construed in an exceptionally narrow manner to "statutorily displace[ ]" the equitable power that Congress conferred to district courts in the jurisdictional provisions of the federal securities law.[109] The plain text can likewise be read to put an "investor-benefit condition on grants of 'equitable relief.'"[110] In fact, during the *Kokesh* argument, even Justice Sotomayor seemed to suggest that § 21(d)(5) is the sole basis for SEC disgorgement and that the provision requires investor restitution.[111]

But it would be exceedingly odd, to say the least, for a monumental legislative effort directed at preventing future accounting scandals to override *sub silencio* decades of prior practice by eliminating the SEC's ability to recover ill-gotten gains in judicial actions that could compensate victims other than investors (such as securities issuers or market participants) or when ill-gotten gains must be disbursed to the U.S. Treasury because restitution is not possible or feasible. The Sarbanes-Oxley Act's legislative purpose runs diametrically counter to such narrow constructions of § 21(d)(5).

The SEC, not surprisingly, construes § 21(d)(5) more broadly to confirm the agency's authority to seek, and the equitable authority of courts to order pursuant to their jurisdictional provisions, the remedy of disgorgement in its enforcement actions. Some securities law scholars likewise view § 21(d)(5) as an effort by Congress to "remov[e] any lingering doubt about the availability of disgorgement in judicial proceedings."[112] The plain text of § 21(d)(5) also supports these broader readings because any recoupment of a securities law violator's unjust enrichment could be

108. Securities Exchange Act § 21(d)(5) (codified at 15 U.S.C. § 78u(d)(5)). Congress included this "equitable relief" provision in § 305 of the Sarbanes-Oxley Act, which it entitled "Officer and Director Bars and Penalties." Only two subsections follow: an (a) subsection, which amends the Exchange Act and the Securities Act to authorize officer and director bar orders when the SEC can establish "unfitness" as opposed to "substantial unfitness," and the (b) subsection, which authorizes "equitable relief." Congress's depiction of the latter (and perhaps the former) as "penalties" is consistent with the ITSA House Report's observation that injunctions and disgorgement are "penalties," albeit not the "real penalty" of a civil monetary penalty. *See supra* text accompanying notes 59, 63; *infra* text accompanying note 171.

109. Brief for Americans for Forfeiture Reform as Amicus Curiae Supporting Petitioner, Kokesh v. SEC, 137 S. Ct. 1635 (2017) (No. 16-529), 2017 WL 929701, at *13; *see also supra* notes 30–34 (quoting allegations in a class action complaint against the SEC and arguments made by commentators) (citation omitted).

110. *See* Brief for Americans for Forfeiture Reform Supporting Petitioner as Amicus Curiae, *supra* note 109, at *13.

111. *See* Transcript of Oral Argument, *supra* note 12, at 9 (quoting the text of § 21(d)(5), depicting the provision as "the only authority [for disgorgement] that [she] can imagine," and asking rhetorically "if they're not doing restitution, how could that be the basis of disgorgement?").

112. Black, *supra* note 103, at 325–26.

said to ensue to "the benefit of [all] investors," even in instances where restitution to particular investors is impossible or impracticable.

Section 21(d)(5)'s legislative history, although sparse, resolves its textual ambiguity and substantiates its intended breadth. But the provision not only confirms the traditional remedy of court-ordered SEC disgorgement. It also provides entirely new authorization for the SEC and courts to go beyond the traditional disgorgement remedy to reach other instances of unjust enrichment involving the performance-based salary or bonuses, or the personal securities transactions, of corporate executives.

That § 21(d)(5) constitutes a congressional effort to expand the traditional remedy of court-ordered disgorgement is evidenced by the provision's sole reference in the Senate Banking Committee Report:

> The Commission has also suggested that it should be allowed to obtain *additional relief* in enforcement cases. For a securities law violation, currently an individual may be ordered to disgorge funds that he or she received "as a result of the violation." *Rather than limiting disgorgement to these gains*, the bill will permit courts to impose any equitable relief necessary or appropriate to protect, and mitigate harm to, investors.[113]

This paragraph immediately follows the Senate Report's discussion of "a number of changes to improve the responsibility of public companies for their financial disclosures."[114]

The Senate Report's above italicized reference to the SEC's suggestion for "additional relief" almost certainly alluded to corporate-governance proposals made in both chambers of Congress by then-SEC Chairman Harvey Pitt and former SEC Chairman Richard Breeden. As Chairman Pitt explained to the House Financial Services Committee:

> [T]here is a need to make sure that management's incentives align with shareholders' interests. Just last week, we brought a case that is a bit unusual for the Commission in which we have sought to have a former CEO of a public company disgorge his compensation in stock options and bonuses because the appearance of profitability was an illusion. I believe that the Commission has to be much more aggressive in targeting misconduct. And where serious misconduct has occurred, I think one incentive or sanction has to be removing any benefits and making certain that benefits are seen as a long-term proposition and not as a short-term.[115]

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113. S. Rep. No. 107-205, at 27 (2002) (emphasis added).

114. *Id.* at 23.

115. *See H.R. 3763—The Corporate and Auditing Accountability, Responsibility and Transparency Act of 2002: Hearings Before the H. Comm. on Fin. Servs.*, 107th Cong. 77 (2002) [hereinafter Hearings on H.R. 3763] (testimony of SEC Chairman Harvey L. Pitt). The case to which Chairman Pitt was referring was undoubtedly SEC v. John P. Gallo, Exchange Act Release No. 1521, 2002 WL 390033 (Mar. 13, 2002). *See* BNA, *SEC Sues Former IGI President, Seeks Return of Stock Options, Bonuses*, 34 Sec. Reg. & L. Rep. 455 (Mar. 18, 2002) (citing statement from an SEC attorney that "the case stands out because one of the remedies it sought is a return of gains from stock option awards and bonuses based on alleged false financial results").

Former Chairman Breeden likewise championed an expansion of the traditional disgorgement remedy to encompass other types of unjust enrichment by corporate executives whose actions (or inactions) contributed to shareholder losses, notwithstanding that those actions did not constitute federal securities law violations. Responding to a question about whether there should be a "down side" that would require a "CEO [to pay] out of his own pocket," Breeden stated:

> I think your point of there being a down side is important. I think the President's messages have emphasized that. Chairman Pitt's remarks have emphasized that. My own testimony suggests that we do need to do more in the disgorgement area. I am particularly worried about the situation where an executive may be selling, in Gary Winnick's case in Global Crossing, $750 million worth of stock on the eve of bankruptcy and whether or not you should trigger it by a restatement. I think Congress should consider whether stock sales within a certain period of time of the company going into bankruptcy, whether the profits from those sales by senior officers shouldn't be recaptured into the bankruptcy estate.[116]

Chairman Breeden's reference to "the President's messages" was no doubt directed at President George W. Bush's 10 Point-Plan to "improve corporate responsibility and help protect America's shareholders," which included the observation that "CEOs or other officers should not be allowed to profit from erroneous financial statements" as well as a proposal that their "bonuses and other incentive-based forms of compensation would be disgorged in cases of accounting restatements resulting from misconduct."[117]

With respect to such monetary "clawbacks" for CEOs and CFOs specifically, President Bush's plan came to fruition in § 304(a) of the Sarbanes-Oxley Act, which requires CEOs and CFOs to reimburse securities issuers for any bonus or incentive-based or equity-based compensation they received, or for any profits they realized from sales of the issuer's securities, in specified circumstances in which the issuer has had to restate its financial statements.[118] Section 304(a)'s clawback provision, however, does not extend to unjust enrichment by other senior officers, as had been suggested by former Chairman Breeden, nor does it encompass unjust enrichment from other securities-law violations by issuers,

116. Hearings on H.R. 3763, *supra* note 115, at 145 (testimony by former SEC Chairman Richard Breeden). Chairman Breeden may well have had in mind Professor Deborah DeMott's observation that when the beneficiary of a fiduciary relationship "seeks disgorgement of the fiduciary's illicit gains, the absence of but-for causation does not necessarily exonerate the fiduciary." *See* Deborah A. DeMott, *Causation in the Fiduciary Realm*, 91 B.U. L. REV. 851, 852 (2011).

117. *See The President's 10-Point Plan*, WALL ST. J., (Mar. 6, 2002, 10:18 PM), http://www.wsj.com/articles/SB1015460971646141720. *See also* S. REP. NO. 107-205, at 23 (stating that some of the statutory provisions were drawn from "reform proposals by the President on March 7, 2002").

118. Sarbanes-Oxley Act § 304(a) (codified as amended at 15 U.S.C. § 7243).

apart from accounting transgressions, that result in substantial shareholder losses.

Section 21(d)(5)'s grant of judicial authority for "any equitable relief . . . for the benefit of investors" therefore provides a broader and more flexible path toward recovery against a wider range of corporate executives, who may have profited unjustly (assuming the SEC could make that showing) during times when their companies were engaged in securities law violations. But in 2002, unlike today in the wake of *Kokesh*, there was never uncertainty as to whether the SEC could seek, and federal courts could order, the disgorgement of ill-gotten gains that resulted directly from a defendant's own violation of the federal securities laws.

F. The Dodd-Frank Wall Street Reform and Investor Protection Act of 2010

The Dodd-Frank Act is a massive piece of legislation that affects virtually every aspect of the financial industry. It encompasses sixteen titles with multiple subtitles and spans nearly 850 pages.[119] Only two of its provisions relate specifically to SEC disgorgement. The first such provision amended the Exchange Act to require the SEC to pay a qualified whistleblower a bounty award when the SEC has been provided with "original information" about a securities law violation that leads to an enforcement action resulting in "monetary sanctions" of more than $1 million (a figure that includes both civil monetary penalties and "disgorgement . . . ordered to be paid" in any judicial or administrative action).[120] By including in the statute an explicit reference to disgorgement paid in judicial actions, Congress once again codified its decades-old understanding that the SEC may seek and federal courts may order securities law violators to disgorge their ill-gotten gains.

The Dodd-Frank Act's other SEC disgorgement-related provision amended the Sarbanes-Oxley Act's "Fair Funds" provision to eliminate a defendant's disgorgement of ill-gotten gains as an express condition precedent for the creation of a fair fund. As such, 15 U.S.C. § 7246(a) currently provides:

> Civil Penalties to be Used for the Relief of Victims.— If, in *any judicial* or administrative action brought by the Commission under the securities laws, the Commission obtains a civil penalty against any person for a violation of such laws, or such person agrees, in settlement of any such action, to such civil penalty, the amount of such civil penalty shall, on the motion or at the direction of the Commission, *be added to and become part of a disgorgement fund* or other fund established for the benefit of the victims of such violation.[121]

119. Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. 111-203, 124 Stat. 1376 (2010).

120. *Id.* § 922 (codified at Securities Act of 1934 § 21F(a)(4), 15 U.S.C. § 78u-6(a)(4)).

121. *Id.* § 929B (codified at 15 U.S.C. § 7246(a)) (emphasis added).

Congress amended the provision at the behest of SEC officials who, years before, had urged it to rectify what they had categorized as the "technical limitation in the wording" of the Sarbanes-Oxley Act.[122] In instances in which a defendant did not reap any profits from his or her securities law violation, and thus could not be ordered to pay disgorgement, the technicality impeded the creation of any compensatory fund into which the payment of civil monetary penalties could be placed.[123] In the wake of the Financial Crisis of 2008, Congress finally acceded to the SEC's request and altered § 7246(a) to ensure that civil penalties could be directed into a "disgorgement fund" in those instances in which a defendant's ill-gotten gains were recouped and into an "other fund" in instances in which disgorgement was not awarded.[124] The amended provision demonstrates, once again, that Congress was fully cognizant of the distinction between disgorgement of ill-gotten gains and civil monetary penalties, and that Congress sought to ensure that both types of sanctions could be distributed for the benefit of injured investors and other "victims."

The Dodd-Frank Act also contains two provisions that explicitly authorize disgorgement as a type of court-ordered "equitable" remedy that may be sought by two other federal agencies—the Commodity Futures Trading Commission (CFTC)[125] and the Consumer Financial Protection Bureau (CFPB), a new federal agency that was created under the Act.[126] As the text makes clear, these provisions also authorize each agency to seek, and federal courts to award, "restitution." These separate authorizations for disgorgement and restitution mirror the same congressional understandings reflected in the Remedies Act's legislative history – namely, that "[d]isgorgement is different from restitution" and that court-ordered disgorgement need not be compensatory to be categorized as

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122. *See It's Only Fair: Returning Money To Defrauded Investors, Hearing Before the H. Subcomm. on Capital Mkts., Ins., and Gov't Sponsored Enters., Comm. on Fin. Servs.*, 108th Cong. 7 (2003) (testimony by Stephen M. Cutler, Director, SEC Division of Enforcement).

123. *See id.*

124. Notably, prior to § 7246(a)'s amendment, the SEC and courts would on occasion create single-dollar disgorgement funds into which substantial civil monetary penalties could be added. *Cf.* GOV'T ACCOUNTABILITY OFFICE, GAO-05-670, SEC AND CFTC PENALTIES: CONTINUED PROGRESS MADE IN COLLECTION EFFORTS, BUT GREATER SEC MANAGEMENT ATTENTION IS NEEDED 28 (2005) (discussing a court-approved settlement in connection with a $1.1 billion accounting fraud under which the securities issuer agreed to pay $25 million in civil monetary penalties and only $1 in disgorgement).

125. Dodd-Frank Act Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 744, 124 Stat. 1376, 1735 (2010) (amending § 6c(d) of the Commodity Exchange Act, 7 U.S.C. § 13a-1(d), to provide: "(3) Equitable Remedies.—In any action brought under this section, the Commission may seek, and the court may impose, on a proper showing, on any person found in the action to have committed any violation, equitable remedies including—(A) restitution to persons who have sustained losses proximately caused by such violation (in the amount of such losses); and (B) disgorgement of gains received in connection with such violation.").

126. Dodd-Frank Wall Street Reform and Consumer Protection Act § 1055(a) (specifying that in enforcement actions brought by the newly created Federal Consumer Protection Bureau, the federal district court "shall have jurisdiction to grant any appropriate legal or equitable relief with respect to a violation of Federal consumer financial law" including "restitution" and "disgorgement or compensation for unjust enrichment").

equitable.[127]

G. Summary

As the forgoing analysis of the six securities statutes reveals, Justice Gorsuch's lament that "there's no statute governing it . . . [w]e're just making it up," like the other instances of skepticism expressed by the Justices in the *Kokesh* argument,[128] fails to recognize the numerous post-*TGS II* references to court-ordered disgorgement in the statutory text. Specifically, in one section of the Securities Act and three sections of the Exchange Act, as well as in a "Fair Funds" provision of the U.S Code, the statutory text explicitly references disgorgement in judicial actions brought by the SEC. And in contrast to the legislative reenactment doctrine, which merely infers ratification from Congress's failure to disturb well-settled judicial or administrative interpretations of the law,[129] these textual references constitute a codification of the court-ordered disgorgement remedy itself.

The skepticism expressed in the *Kokesh* argument also fails to take account of the illuminating legislative history from the Committee Reports, which as Justices Sotomayor and Breyer have recently emphasized, are a "particularly reliable source to which [the Court] can look to ensure [its] fidelity to Congress' intended meaning."[130] That legislative history reveals three crucial insights: (1) Congress views court-ordered disgorgement as an appropriate use of the equitable powers it conferred to federal district courts in the jurisdictional provisions of the federal securities laws and, more recently, in § 21(d)(5) of the Exchange Act; (2) Congress expects courts to assess the facts and circumstances surrounding securities law violations and to order both disgorgement and civil monetary penalties when the public interest warrants it; and (3) Congress recognizes that courts have discretion over the disbursement of disgorged funds and anticipates that judges will often be unable to identify particular third-party victims to whom such funds can be distributed as compensation.

In short, the statutory text and legislative history lead to an inescapable conclusion: Any judicial action to cast aside the disgorgement remedy would displace decades of congressional lawmaking with a single, and extraordinarily improper, judicial veto.

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127. *See supra* text accompanying note 91 (quoting the Remedies Act House Report).

128. *See supra* text accompanying notes 14–18 (quoting *Kokesh* Oral Argument Transcript).

129. *See, e.g.*, Lindahl v. OPM, 470 U.S. 768, 782 n.15 (1985) (stating that "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change").

130. Digital Realty Trust, Inc. v. Somers, 138 S. Ct. 767, 782 (2018) (Sotomayor, J. and Breyer, J., concurring) (citing Garcia v. United States, 469 U.S. 70, 76 (1984) (Rehnquist, J.) ("In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation" (internal quotes omitted)).

II. THE SUPREME COURT'S VIEW OF EQUITABLE POWERS THAT ARE USED TO FURTHER THE PUBLIC INTEREST IN THE ENFORCEMENT OF FEDERAL LAW

Part II of this essay shifts the focus from Congress to the Supreme Court. But here again we shall see a clear understanding that disgorgement is an equitable remedy even in instances when it operates as a penalty. Moreover, like Congress, the Supreme Court has broadly construed the scope of equitable jurisdiction, particularly in instances when a court's equitable power is invoked to further the public interest in the enforcement of federal law. Section A of Part II examines *Porter v. Warner Holding Co.*,[131] a 1946 decision recognizing that general grants of equitable jurisdiction empower courts in government enforcement actions to order restitution, an equitable remedy with many similarities to disgorgement. It then analyzes *Kansas v. Nebraska*,[132] a 2015 decision in which the Court, in the exercise of its original jurisdiction, invoked *Porter* to justify the use of its own equitable powers to order disgorgement as a remedy for the violation of an interstate water compact with the status of federal law. Section B explains why the disgorgement in *Kansas* operated as a "penalty" under the *Kokesh* criteria. The *Kansas* decision leaves no doubt of the Supreme Court's view that court-ordered disgorgement need not be compensatory and can be both equitable and punitive.

A. Court-Ordered Disgorgement as an Equitable Remedy

The Supreme Court in *Kansas v. Nebraska*, like the Second Circuit in *TGS II*, justified its decision to use its own equitable powers to award disgorgement by invoking the precedent in *Porter v. Warner Holding Co.*[133] The *Porter* case involved an injunctive action brought by the Administrator of the Office of Price Administration against a landlord who had charged excessive rents in violation of the Emergency Price Control

131. 328 U.S. 395 (1946).
132. 135 S. Ct. 1042 (2015).
133. *Porter*, 328 U.S. at 396–403. In addition to *Porter*, *TGS II* invoked two other precedents that relied heavily on *Porter*. *See TGS II*, 446 F.2d 1301, 1307 (2d Cir. 1971) (citing Mitchell v. Robert Demario Jewelry, Inc., 361 U.S. 288, 335 (1960) (upholding the district court's equitable authority to order restitution of lost wages to employees discharged in violation of the Fair Labor Standards Act, in the context of an injunctive action initiated by the Secretary of Labor) and United States v. Moore, 340 U.S. 616 (1960) (upholding the district court's equitable authority to order restitution of "overceiling rentals collected," notwithstanding that a "prohibitory injunction [was] not required because the defense-rental area was decontrolled after the violations" of the Housing and Rent Act of 1947)). To be sure, *TGS II* also used the Supreme Court's implied private right of action cases to bolster its holding. *See* Bainbridge, *supra* note 26, at 27 (observing that *TGS II* relied on "the logic of the early Supreme Court decisions creating implied private rights of action under the securities laws" and contending that these decisions "no longer have the vitality they possessed when [*TGS II*] was decided"). But it was the Court's actual holding in *Porter*, rather than the logic of its implied private action decisions, that supplied the precedent that equitable powers could be utilized flexibly to further the public interest by deterring future violations of a federal law.

Act of 1942. The district court enjoined the landlord from continuing to collect such rents. But it determined, and the Court of Appeals for the Eighth Circuit agreed, that it lacked the statutory authority to order restitution of the illegal rents to the tenants. The Supreme Court concluded otherwise, holding that the absence of a specific statutory authorization did not constrain the broad equitable powers of a district court to "secur[e] complete justice . . . [through] a decree compelling one to disgorge profits . . . acquired in violation" of the statute.[134] As the Court saw it, the restitution of the excessive rent charges would further "the public interest by restoring the status quo" and "would give effect to the policy of Congress."[135] It also emphasized that when a federal law has been violated and "the public interest is involved," a court's "equitable powers assume an even broader and more flexible character than when only a private controversy is at stake."[136] The Court therefore remanded the case so that the district court could properly "exercise the discretion that belongs to it."[137]

Instead of the *Porter* decision, most of the commentators and litigants who reject an equitable label for court-ordered SEC disgorgement look to the Supreme Court's 5–4 decisions in *Great-West Life & Annuity Insurance Co. v. Knudson*[138] and *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*[139] But both of these decisions involved private disputes, not government enforcement proceedings. Thus, even in the absence of the Court's more recent decision in *Kansas*, the precedents in *Great-West Life* and *Grupo Mexicano* are only tangentially relevant to the issue of court-ordered disgorgement in SEC enforcement actions.

The Court in *Great-West Life* narrowly construed the term "equitable relief" in the Employee Retirement Income Security Act (ERISA) to include only those remedies "'that were *typically* available in equity.'"[140] That is, as it had held six years prior in *Grupo Mexicano*, the Court determined that the statutory term "equitable relief" encompassed only those equitable remedies in existence when the Constitution and the Judiciary Act of 1789 adopted what was then "administered by the English Court of Chancery."[141] Because the *Great-West Life* petitioners' claim was not that the plan beneficiary held "particular funds" belonging to them, but rather that they were simply "contractually entitled to *some* funds,"[142] Justice Antonin Scalia and the others in the majority concluded that the

134. *Id.* at 398–99. In so holding, the Court observed that "[r]estitution . . . lies within [its] equitable jurisdiction" and that such restitution "is consistent with and differs greatly from the [statutory] damages and penalties which may be awarded." *Id.* at 402.

135. *Id.* at 400, 403.

136. *Id.* at 398.

137. *Id.* at 403.

138. 534 U.S. 204, 233–34 (2002).

139. 527 U.S. 308, 342 (1999).

140. *Great-West Life*, 534 U.S. at 210 (quoting Mertens v. Hewitt Assocs., 508 U.S. 248, 256 (1993) (emphasis in original)).

141. *Grupo Mexicano*, 527 U.S. at 318.

142. *Great-West Life*, 534 U.S. at 214 (emphasis in original).

relief the petitioners sought constituted a "legal" remedy rather than an "equitable" one.[143]

Most SEC disgorgement detractors construe *Great-West Life* and *Grupo Mexicano* in a manner that either substantially curtails, or eliminates entirely, the power of federal courts to order the disgorgement of ill-gotten gains from securities law violators. Some of those advocating the former argue that "[i]n order to qualify as true equitable relief . . . disgorgement must seek recovery of specifically traced funds of the victim."[144] They also assert that equitable disgorgement is necessarily compensatory and that it cannot encompass a court's order for ill-gotten gains to be disgorged to the U.S. Treasury.[145] And even though the Sarbanes-Oxley Act's legislative history makes no reference to the ruling in *Great-West Life*, and instead evidences a congressional intention for courts to make broader use of their disgorgement powers,[146] some disgorgement detractors nonetheless argue that the opinion "sheds key light on Congress's decision to use the words 'equitable relief' in [§ 21(d)(5) of the Exchange Act] seven months later."[147] Commentators construing *Great-West* and *Grupo Mexicano* to disavow all or almost all instances of court-ordered disgorgement in SEC actions premise their argument on the claim that the disgorgement remedy has no analog in 1789 English High Court of Chancery decisions, and thus conclude that "federal courts may not award the SEC's disgorgement remedy pursuant to their equity jurisdictions."[148] Similarly, in the context of his commentary on the *Kokesh* decision, a notable remedies scholar made the sweeping claim that "[t]here is no equitable remedy of disgorgement."[149]

But in *Kansas v. Nebraska*, when the Supreme Court considered whether its own inherent equitable powers could support a special master's recommendation to order the disgorgement of wrongfully at-

143. *Id.* at 213–15 (emphasizing that equitable relief is available only for the return of "money or property identified as belonging in good conscience to the plaintiff [that] could clearly be traced to particular funds or property in the defendants' possession."). Justice Ginsburg sharply objected to the majority's analysis in both decisions. *See id.* at 224–34 (Ginsburg, J. joined by Stevens, Souter, and Breyer, J.J., dissenting); *Grupo Mexicano*, 527 U.S. at 335–42 (same).

144. *See, e.g.*, Class Action Complaint, *supra* note 30, ¶ 23; Brief for Mark Cuban as Amicus Curiae Supporting Petitioner, *supra* note 30, at 15 ("Once one views the SEC's claim for disgorgement through the analytical prism of *Great-West*, it is clear that the SEC is actually seeking civil penalties under the guise of disgorgement"); Ryan, *supra* note 25, at 20 (maintaining that "disgorgement is often *not* an equitable remedy in SEC enforcement cases but rather a legal remedy akin to a simple money judgment").

145. *See* Class Action Complaint, *supra* note 30, ¶ 2 (alleging that "when the SEC obtained 'disgorgement' and handed the proceeds over to the U.S. Treasury, it did so without proper authority").

146. *See supra* text accompanying notes 113–117.

147. Brief of Amicus Curiae Americans for Forfeiture Reform Supporting Petitioner, *supra* note 109, at 10.

148. DeLuca, *supra* note 25, at 900. *See* Bainbridge, *supra* note 26, at 28–29 (citing DeLuca and casting doubt on the judicial analysis "analogizing disgorgement to remedies that did exist in 1789").

149. Bray, *supra* note 26. *See also id.* (observing that the word disgorgement "does not even appear in Pomeroy's [1941] treatise on equity").

tained profits (in addition to the payment of compensatory damages) to remedy a state's knowing violation of an interstate water compact with the status of federal law, not one of the nine Justices mentioned the "equitable relief" precedents in *Grupo Mexicano* or *Great-West Life*.[150] Nor did any of the Justices inquire as to whether chancery courts typically ordered the disgorgement remedy in 1789—let alone claim that true equitable relief may only seek the return of particularly identified assets to their rightful owners. Instead, the majority quoted *Porter* to emphasize that the Court's equitable powers to enforce the compact are "'broader and more flexible'" than in litigation involving "'only a private controversy.'"[151] The Court also quoted *Porter* to underscore that its equitable powers allow it to "'mould each decree to the necessities of the particular case,' and 'accord full justice' to all parties."[152] None of the three dissenters disputed the majority's categorization of disgorgement as an "equitable remedy."[153] But because they viewed the litigation as "in essence, a contract dispute," they sharply objected to the majority's determination to analogize the compact to "a federal regulatory program."[154]

The Court's decision to order disgorgement in *Kansas v. Nebraska* holds especial significance for the future of court-ordered disgorgement in SEC enforcement actions. To whatever extent *Great-West Life* and *Grupo Mexicano* may have narrowed the scope of equitable relief in other contexts,[155] the Court's more recent view of equitable powers when the enforcement of federal law is at issue undercuts entirely the blanket claim that "[t]here is no equitable remedy of disgorgement."[156]

B. Court-Ordered Disgorgement as a Punitive Remedy

The *Kansas v. Nebraska* decision goes to the heart of the current SEC disgorgement controversy for a second reason: the decision demonstrates that the remedy of disgorgement need not be compensatory and can be both equitable and punitive. In other words, *Kansas* establishes that there can indeed be "penalties in equity."

The facts in *Kansas* involved an interstate water compact setting out Kansas, Nebraska, and Colorado's rights to the waters of the Republican

150. As the Court made clear at the outset of its analysis, proceedings under the Constitution's grant of original jurisdiction to hear suits between the states are "'basically equitable in nature.'" Kansas v. Nebraska, 135 S. Ct. 1042, 1051 (2015) (quoting Ohio v. Kentucky, 410 U.S. 641, 648 (1973)).

151. *Id.* at 1053 (quoting Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946) (citation omitted)).

152. *Id.* (quoting *Porter*, 328 U.S. at 398).

153. *Id.* at 1070 (Thomas, J., joined by Scalia, J., and Alito, J., concurring in part and dissenting in part) (stating that "[d]isgorgement is strong medicine, and as with other forms of equitable power, we should impose it against the States 'only sparingly'") (quoting Missouri v. Jenkins, 515 U.S. 70, 131 (1995)).

154. *Id.* at 1066.

155. *See generally* Samuel L. Bray, *The Supreme Court and the New Equity*, 68 Vand. L. Rev. 997 (2015).

156. *See supra* note 26 (quoting Bray).

River Basin.[157] All nine Justices agreed with the special master's finding that Nebraska had "'knowingly failed' to comply with the compact,"[158] and six Justices agreed with the special master's determination that such knowing overconsumption constituted "misbehavior" that warranted relief beyond Nebraska's payment of the $3.7 million in damages for the water that Kansas lost.[159] The special master had recommended an additional $1.8 million payment, which he described as only "partial disgorgement" because "Nebraska's reward for breaching the Compact was 'much larger than Kansas' loss, likely by more than several multiples.'"[160] The majority accepted this recommendation, stating that it "may order disgorgement of gains, if needed to stabilize a compact and deter future breaches, when a State has demonstrated reckless disregard of another, more vulnerable State's rights under that instrument."[161] In so doing, it emphasized that disgorgement "constitutes a 'fair and equitable' remedy for Nebraska's breach," because it "appropriately reminds Nebraska of its legal obligations, deters future violations, and promotes the Compact's successful administration."[162] It also it quoted *Porter* for the proposition that "'[f]uture compliance may be more definitely assured if one is compelled to restore one's illegal gains.'"[163]

Although Justice Kagan's opinion did not explicitly categorize its disgorgement order as a penalty, under the analysis in *Kokesh v. SEC*, there should be little doubt that the Court's award of equitable relief was in fact "punitive." The *Kokesh* Court grounded its framework in two longstanding principles, both of which are satisfied by the findings in the *Kansas* case. First, according to *Kokesh*, "whether a sanction represents a penalty turns in part on 'whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual.'"[164] The *Kansas* Court, as we have seen, underscored that the compact had the status of federal law, that it was seeking "to give complete effect to public law," and that "'the public interest is involved.'"[165] Second, according to *Kokesh*, pecuniary sanctions may operate as penalties when they are "sought 'for the purpose of punishment, and to deter others from offending in like manner'—as opposed to compensating a victim for his loss."[166] *Kokesh* further observed that "[s]anctions imposed for the purpose of deterring

157. *Kansas*, 135 S. Ct. at 1048–49.
158. *See id.* at 1051 (quoting Report of the Special Master at 112, Kansas v. Nebraska, 135 S. Ct. 1042 (2015) (No. 126)); *id.* at 1064-65 (Thomas, J., concurring in part and dissenting in part).
159. *See Kansas*, 135 S. Ct. at 1055–56.
160. *Id.* at 1049, 1056 (quoting Report of the Special Master at 178). In this regard, the Court observed that "the higher value of water on Nebraska's farmland than on Kansas's means that Nebraska can take water that under the Compact should go to Kansas, pay Kansas actual damages, and still come out ahead." *Id.* at 1057.
161. *Id.* at 1057.
162. *Id.* (citing *Porter*, 328 U.S. at 400).
163. *Id.* (quoting *Porter*, 328 U.S. at 400).
164. 137 S. Ct. at 1642 (quoting Huntington v. Attrill, 146 U.S. 657, 667 (1892)).
165. *See supra* text accompanying note 45 (quoting *Kansas*, 135 S. Ct. at 1053).
166. *Kokesh*, 137 S. Ct. at 1642 (quoting *Huntington*, 146 U.S. at 668).

infractions of public laws are inherently punitive because 'deterrence [is] not [a] legitimate nonpunitive governmental objectiv[e].'"[167] But *Kansas* did not order disgorgement for a compensatory reason—Nebraska had already agreed to pay restitution for the damage it caused Kansas. Instead, in the Court's view, some additional relief in the form of disgorgement was warranted because it "would deter future breaches" and remind Nebraska of its legal obligations.[168] Thus, as *Kokesh* found with respect to SEC disgorgement, the equitable disgorgement that was ordered in *Kansas* "bears all the hallmarks of a penalty: It [was] imposed as a consequence of violating a public law and [was] intended to deter, not to compensate."[169]

One final observation should be made at this juncture. At least at first blush, the categorization of a disgorgement order as both an equitable remedy and a penalty could appear in tension with *United States v. Tull*, a decision in which the Court observed that "a court in equity . . . may not enforce civil penalities."[170] But a closer examination of *Tull* reveals that there is no such tension. While SEC disgorgement and the disgorgement in *Kansas* constitute a "penalty" under *Kokesh*'s analysis, in neither instance can the disgorgement be said to constitute a "real penalty" in the words of the House Report on ITSA,[171] or a "penalty assessment" to quote the Second Circuit in *TGS II*,[172] or a "civil penalty" akin to a "civil fine" as was at issue in *Tull* itself.[173] A district court's equitable powers do not encompass those sanctions because they go beyond "restoring the status quo"[174] or "merely depriv[ing]" those who violate the law "of the gains of their wrongful conduct."[175] Another important distinction between "real" penalties and disgorgement is that civil monetary penalties are in amounts, or up to thresholds, determined by Congress, whereas disgorgement can "be calculated solely on the basis of [the] equitable determinations [of] the profits gained from violations of the statute."[176]

167. *Id.* at 1643 (quoting Bell v. Wolfish, 441 U.S. 520, 539 n.20 (1979)).

168. *See supra* text accompanying notes 161–62 (quoting *Kansas*, 135 S. Ct. at 1057).

169. *Kokesh*, 137 S. Ct. at 1644. The principal difference between the disgorgements in *Kansas* and *Kokesh* is that the funds disgorged in *Kokesh* were paid over to the U.S. Treasury, whereas the funds disgorged in *Kansas* were paid to Kansas. But it was the district court in *Kokesh* that determined how the funds were to be disbursed and, presumably, it had determined that disbursement to the defrauded victims was not feasible. *See supra* note 22.

170. 481 U.S. 412, 424 (1987).

171. *See supra* text accompanying note 59.

172. *See supra* text accompanying note 6.

173. *Tull*, 481 U.S. at 425–27 (holding that the Seventh Amendment guarantees the right to a jury trial to determine liability in an Environmental Protection Agency enforcement action seeking a civil monetary penalty "not to exceed $10,000 per day" during the period of the defendant's violation of the Clean Water Act). Although the *Tull* Court did not explicitly acknowledge that penalties may vary in their level of punitiveness, its use of the term "penalty" when referencing the well-established equitable remedy of restitution is quite telling. *See id.* at 424 (depicting "restitution [as] a more limited form of penalty than a civil fine").

174. *Id.* (quoting *Porter*, 328 U.S. at 402).

175. *See supra* text accompanying note 6 (quoting *TGS II*, 446 F.2d at 1307–08).

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

Thus, while disgorgement may constitute a "penalty" under *Kokesh*'s expansive analysis, the disgorgement ordered in both *Kansas* and *Kokesh* was entirely distinct from the civil monetary penalties that Congress authorizes federal agencies to seek, and district courts to grant, pursuant to express statutory provisions such as those in ITSFEA, the Remedies Act, and the Clean Water Act (the statute at issue in *Tull*). It is that type of monetary sanction, as the *Tull* Court held, that was "traditionally available only in a court of law."[177]

Ultimately, then, the Supreme Court's view of equitable powers that are used to further the public interest in the enforcement of federal law squarely aligns with Congress's view, as reflected in the text and legislative history of the six securities statutes discussed in Part I of this essay. Thus, at least in the context of SEC enforcement actions brought in federal court, the punitive aspects of disgorgement do not operate to sever the remedy from its equitable realm.

III. CONCLUSION

Although *TGS II* is still three years away from its own golden anniversary, the Supreme Court's recent decision in *Kokesh* has rendered *TGS II* as iconic as *TGS I*. *TGS II* articulated what has since become a fundamental precept that has been ratified, and in several instances codified, by Congress in six securities statutes: that federal district courts may use their statutorily authorized equitable powers to award the SEC disgorgement of ill-gotten gains from securities law violators, notwithstanding that the disgorgement may constitute a penalty.

177. *Id. See* Listwa & Seidell, *supra* note 36, at 679 (analyzing *Tull* and concluding that the decision "provides strong reasons to reject not only the conflation of 'penalty' and 'civil penalty,' but also the broader contention that disgorgement is not an equitable remedy").