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PRESERVING THE IMPARTIALITY AND CONSTITUTIONALITY OF SEC ALJs: CONGRESSIONAL REFORM OVER ADMINISTRATIVE REMEDIATION

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PRESERVING THE IMPARTIALITY AND CONSTITUTIONALITY OF SEC ALJS: CONGRESSIONAL REFORM OVER ADMINISTRATIVE REMEDIATION

Kaiya Arroyo

ABSTRACT

The Dodd-Frank Wall Street Reform Act has in recent years greatly expanded the jurisdiction and reliance on the SEC's administrative law courts. Despite the SEC Enforcement Division's increased caseload and focus on high-profile, complex securities cases, the SEC's win-rate within the administrative court has been astronomical, particularly when compared against its successes before district courts. This success has resulted in increased criticism by corporations, the defense bar, government actors, and the courts. In response to this criticism, the SEC has recently proposed several amendments to its administrative court's Rules of Practice, which seek to create a more even adversarial field. While commendable, these proposed amendments fail to address the underlying concern with the administrative court: SEC judges appear to be unduly influenced by the Commission and biased against individual defendants. This lack of objectivity, whether real or impartial, is a violation of each defendant's right to due process. Reform is required, but can only be done through significant congressional action that formally divorces administrative law judges from the agencies in which they preside. This Comment examines the real or perceived biases of the SEC's administrative law judges. It examines the principle proposed amendments to the SEC's Rules of Practice to highlight the amendments' failure to alleviate the underlying due process concern in light of this bias before recommending positive congressional reform in the shape of a new Department of Administrative Law Judges.

I. INTRODUCTION

The Dodd-Frank Wall Street Reform Act, legislation designed to increase transparency within the financial community, greatly expanded the authority of the Securities Exchange Commission ("SEC") to enforce violations of securities law. Dodd-Frank allowed the SEC to collect penalties against "any person in an administrative proceeding, including unregistered

entities and individuals.”¹ As a result, the SEC’s Division of Enforcement has recently experienced an increased caseload. In 2015 alone, the SEC had more than 550 pending cases.² The Director of the Enforcement Division, Andrew Ceresney, has made it clear that the Commission’s litigation docket will only continue to expand.³ At the same time, in response to pressure from Congress, the Division has begun implementing an aggressive “broken windows” enforcement approach that seeks to penalize less egregious, previously-ignored securities law violations⁴ by targeting high-profile corporate defendants who have the resources to zealously advocate their positions.⁵

Despite this expanding and highly demanding caseload, the SEC has had an outstanding success rate in its litigated cases. In 2014, for example, the Commission won 100% of its cases before its administrative law court.⁶ Additionally, in a recent speech before the New York City Bar White Collar Institute, Director Ceresney boasted that the Division won twenty-two consecutive trials in both district and administrative courts, with wins in twelve out of fourteen jury trials.⁷ Beyond its team of litigators, the Division credits this unprecedented success to the evidentiary strength of each case after extensive investigation by the Division.⁸

However, critics in both the press and the corporate defense bar increasingly attribute this success to the Commission’s heavy reliance on its own administrative courts.⁹ These critics question the constitutionality of

¹ Andrew Ceresney, Dir., U.S. Sec. & Exch. Comm’n Div. of Enforcement, Keynote Speech at New York City Bar 4th Annual White Collar Institute (May 12, 2015) (transcript available at <https://www.sec.gov/news/speech/ceresney-nyc-bar-4th-white-collar-key-note.html>). See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, § 929P(a), 124 Stat. 1376, 1862-64 (2010).

² Ceresney, *supra* note 1.

³ *Id.*

⁴ Mary Jo White, Chair, U.S. Sec. & Exch. Comm’n, Deploying the Full Enforcement Arsenal, Address at the Council of Institutional Investors Fall Conference (Sept. 26, 2013) (transcript available at <https://www.sec.gov/News/Speech/Detail/Speech/1370539841202>).

⁵ See, e.g., Press Release, U.S. Sec. & Exch. Comm’n, Former Goldman Employee Charged With Insider Trading Before Mergers (Nov. 25, 2015), <http://www.sec.gov/news/pressrelease/2015-267.html>; Press Release, U.S. Sec. & Exch. Comm’n, SEC Charges Bitcoin Mining Companies (Dec. 1, 2015), [http://www.sec.gov/news/press release/2015-271.html](http://www.sec.gov/news/press%20release/2015-271.html). See also Alexander Stevenson and Matthew Goldstein, *On the Defensive: The S.E.C. Quietly Pursues High-Profile Cases*, N.Y. TIMES (Aug. 8, 2015), http://www.nytimes.com/2015/08/10/business/dealbook/on-the-defensive-the-sec-quietly-pursues-high-profile-cases.html?_r=0.

⁶ Ryan Jones, *The Fight Over the Home Court: An Analysis of the SEC’s Increased Use of Administrative Proceedings*, 68 SMU L. REV. 507, 519 (2015).

⁷ See Ceresney, *supra* note 1.

⁸ *Id.*

⁹ See, e.g., Daniel Walfish, *The Real Problem With SEC Administrative Proceedings, and How to Fix It*, FORBES (July 20, 2015), <http://www.forbes.com/sites/danielfisher/2015/07/20/the-real->

these proceedings¹⁰ and claim that the administrative court may violate defendants' rights to due process.¹¹ These allegations have recently attracted significant scrutiny beyond the press and into government. The Chamber of Commerce submitted a white paper to the SEC criticizing the Commission's choice of forum as a way to improperly create regulatory policies,¹² and one of the SEC's own commissioners has respectfully – but pointedly – noted that a perception problem exists.¹³ Most notably, courts have now begun to question the constitutionality of administrative law judge ("ALJ") appointments and the objectivity of the ALJs themselves.¹⁴

In response to increasing backlash from the corporate defense bar, the press, and the courts,¹⁵ in late September 2015, the Commission submitted for comment several proposed amendments to its administrative proceedings' Rules

problem-with-sec-administrative-proceedings-and-how-to-fix-it/ (highlighting the impartiality concerns regarding SEC administrative law judges); *2015 Mid-Year Securities Enforcement Update*, GIBSON, DUNN & CRUTCHER LLP (July 13, 2015), <http://www.gibsondunn.com/publications/documents/2015-Mid-Year-Securities-Enforcement-Update.pdf> (outlining the problematic nature of administrative proceedings evidentiary and timeline concerns).

¹⁰ See *infra* notes 86-100 and accompanying text.

¹¹ *Compare* Order Concerning Additional Submission and Protective Order, Timbervest, LLC, Joel Barth Shapiro, Walter William Anthony Boden, III, Donald David Zell, Jr., and Gordon Jones II, Investment Advisers Act Release No. 4103, Investment Company Act Release No. 31660, 2015 WL 3507107 (June 4, 2015),

<https://www.sec.gov/litigation/opinions/2015/ia-4103.pdf> (inviting SEC ALJ Cameron Elliott to submit an affidavit affirming his belief that he was under no pressure to decide in the Commission's favor) with Jean Eaglesham, *SEC Wins With In-House Judges*, WALL ST. J. (May 6, 2015), <http://www.wsj.com/articles/sec-wins-with-in-house-judges-1430965803> [hereinafter Eaglesham, *In-House Judges*] (listing allegations that former ALJs came "under fire" for ruling against the Commission and were questioned about their loyalty if they did not assume that "the burden was on the [respondents] to show that they didn't do what the agency said they did").

¹² U.S. CHAMBER OF COMMERCE, EXAMINING U.S. SECURITIES AND EXCHANGE COMMISSION ENFORCEMENT: RECOMMENDATIONS ON CURRENT PROCESSES AND PRACTICES 14 (2015), http://www.centerforcapitalmarkets.com/wp-content/uploads/2015/07/021882_SEC_Reform_FIN1.pdf.

¹³ Michael Piwowar, Comm'r, U.S. Sec. & Exch. Comm'n, A Fair, Orderly, and Efficient SEC, Remarks at the "SEC Speaks" Conference 2015 (Feb. 20, 2015) (transcript available at <https://www.sec.gov/news/speech/022015-spchemsp.html>) (advocating for forum choices that do not create the perception of inequitable forum shopping).

¹⁴ See sources cited *supra* note 11.

¹⁵ See, e.g., Hazel Bradford, *SEC on Defensive Following Setback on Use of Hearings*, PENSIONS & INVS. (March 9, 2015), <http://www.pionline.com/article/20150629/PRINT/306299976/sec-on-defensive-following-setback-on-use-of-hearings> (discussing Senator Elizabeth Warren's criticism of the SEC leadership and the injunction in *Hill v. SEC*); Marc J. Fagel, *The State of SEC Enforcement Heading into 2015*, INSIGHTS: THE CORPORATE & SECURITIES LAW ADVISOR, Feb. 2015, at 1 (criticizing the explosion of administrative proceedings in recent years and highlighting impartiality and due process concerns).

of Practice.¹⁶ Many of these amendments respond directly to the almost universally approved recommendations for reform put forth by corporations and the defense bar.¹⁷ Most importantly, these amendments (1) conform certain evidentiary requirements to the Administrative Procedure Act,¹⁸ (2) allow defendants to take limited depositions,¹⁹ (3) double the length of the prehearing (discovery) period during administrative proceedings,²⁰ and (4) provide a timeline for the disposition of cases by the ALJ.²¹

The proposed amendments, while commendable and likely to lessen concerns from both the court and the corporate bar, fall short of providing defendants an equal footing to adequately vindicate their claims.²² It is not enough for the Commission to conform to the standards in the Administrative Procedure Act or to the processes of other, less polemic agencies. Whether an amendment changes an evidentiary standard or modifies the timeline for disposition, that change will still create a standard that will require judicial discretion. However, the underlying frustration with the Commission's administrative courts lies in a perception that administrative judges are, or appear to be, beholden to Commissioners who have publicly claimed that their judges are mere agency employees. In this regard, the proposed amendments do little to overcome the real concern facing the SEC.

In light of this reality, greater reform is required. An objective adjudicator is a necessary aspect of due process,²³ and as long as there is a potential for ALJs to be unduly influenced by the agency in which they serve, defendants in administrative cases will be denied that process. This is true not only in the SEC, but in any administrative forum where there is an opportunity for an ALJ to be influenced by those with power. Such levels of reform are not within the agency's power, despite their well-intentioned efforts.

¹⁶ Amendments to the Commission's Rules of Practice, 80 Fed. Reg. 60,091 (proposed Oct. 5, 2015) (to be codified at 17 C.F.R. pt. 201).

¹⁷ See, e.g., U.S. CHAMBER OF COMMERCE, *supra* note 12, at 3-8.

¹⁸ *Id.* at 18, 53.

¹⁹ *Id.* at 7, 44.

²⁰ *Id.* at 5, 54.

²¹ *Id.* at 24, 60.

²² See COVINGTON & BURLING, THE SEC'S PROPOSED MODERNIZATION OF ITS RULES FOR ADMINISTRATIVE PROCEEDINGS (Sept. 28, 2015), https://www.cov.com/-/media/files/corporate/publications/2015/09/the_secs_proposed_modernization_of_its_rules_for_administrative_proceedings.pdf (noting the time difference in the SEC's ability to prepare in conjunction with respondents); *SEC Moves in the Right Direction with Proposed Amendments to Rules Governing Administrative Proceedings, But the Changes Do Not Go Far Enough*, GIBSON, DUNN & CRUTCHER LLP (Sept. 18, 2015), <http://www.gibsondunn.com/publications/documents/SEC-Proposed-Amendments-to-Rules-Governing-Administrative-Proceedings.pdf> (discussing the continued inability for respondents to fully defend themselves).

²³ *Marshall v. Jerrico*, 446 U.S. 238 (1980).

Instead, Congress must recognize the reality of this country's vast administrative adjudicatory regime. A majority of judicial proceedings occur in non-Article III courts: in 2013, for example, 363,914 civil and criminal cases were filed in federal district courts,²⁴ while the Social Security Administration alone heard over 700,000.²⁵ Each of these 700,000 cases is presided over by an Article I administrative judge, who is assigned to a particular agency and works within the bureaucratic framework of the agency, just as ALJs function within the SEC. This framework creates a system with the potential for constant undue influence.

Congress could remove this specter of impartiality by creating a new administrative agency to appoint, remove, and house its Article I judges. Currently, each team of ALJs are housed in an Office of Administrative Law Judges ("OALJ") within a particular agency, but most administrative matters pertaining to ALJ employment are primarily conducted through the U.S. Office of Personnel Management. By relocating each agency's OALJ into a new "Department of Administrative Law Judges," Congress can remove the stain of partiality and grant defendants their right to due process without greatly increasing government spending. Moreover, in light of recent concerns about the constitutionality of ALJ appointments, a new department would ensure the continued use of these vital government employees while simultaneously avoiding the need to further strip ALJs of their independence.

This Comment discusses why the SEC's proposed amendments to its Rules of Practice cannot assuage the true due process concerns facing its administrative proceedings. Section I provides a foundational overview of the SEC's administrative court process, which highlights the degree of discretion of SEC administrative judges. Section II discusses the perceived bias currently associated with SEC ALJs and how that bias hinders the Commission's Proposal from realizing true fairness in the administrative court. This Section is broken into two parts: (a) a discussion on the perceived and actual biases of the administrative judges, and (b) a dissection of the most pertinent proposed amendments and how they fail to alleviate current procedural concerns in the light of perceived or actual judicial bias. Finally, Section III proposes a solution to this problem through the creation of a new administrative department.

²⁴ *Federal Judicial Caseload Statistics*, U.S. CTS., <http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2013> (last visited May 11, 2016).

²⁵ Information About SSA's Office of Disability Adjudication and Review, U.S. Soc. Security Admin., https://www.ssa.gov/appeals/about_odar.html (last visited May 25, 2016).

II. THE SEC'S ADMINISTRATIVE PROCESS

Every securities investigation begins in the same manner, irrespective of whether the SEC elects to resolve a case in the district courts or its own administrative forum. Interwoven throughout this process are the actions and rulings of the ALJs, whose jurisdiction in recent years has been significantly expanded. For example, the Securities Enforcement Remedies and Penny Stock Reform Act of 1990 expanded the jurisdiction of ALJ proceedings to include registered firms, broker-dealers, and investment advisors.²⁶ Then, Dodd-Frank augmented that power to include all persons within the SEC's jurisdiction, which extends to claims from registered firms to associated, unregistered defendants.²⁷ As a result, nearly any person who has even collateral dealings with securities is under the jurisdiction of the administrative courts and the ALJs, who have the power to issue fines and injunctions, order disgorgements, oversee entire proceedings, rule on constitutional questions, and make final findings of fact.²⁸

This process begins with the Office of Compliance Inspections and Examinations ("OCIE"), which oversees the SEC's National Examination Program ("NEP") and functions as the initial actor in investigations and compliance assurance.²⁹ If in the course of an inspection, an OCIE staff member determines that there is a potential securities violation, the OCIE will refer the matter to the Enforcement Division, which launches an investigation³⁰ that can last for months or years.³¹ At the conclusion of both formal and informal investigations, the Division staff typically provides a "Wells notice" of its preliminary decision to the Commission.³² Within 180 days of this notice, SEC staff must either file an enforcement action memo or notify the Enforcement Division Director of its recommendation not to act.³³

²⁶ Pub. L. No. 101-429, 104 Stat. 931 (1990).

²⁷ Dodd-Frank Wall Street Reform and Consumer Protection Act § 929p.

²⁸ David Zaring, *Enforcement Discretion at the SEC*, 94 TEX. L. REV. (forthcoming 2016) (manuscript at 115-118) (on file with author) (describing judicial powers of administrative law judges).

²⁹ About Office of Compliance Inspections and Examinations, U.S. Sec. & Exchange Commission, <http://www.sec.gov/ocie/Article/about.html> (last visited May 11, 2016).

³⁰ 17 C.F.R. § 202.5(c) (2015). See also D. OCIE Referrals to Enforcement Implications, PORTFOLIO 283: THE SEC, THE DOJ AND INVESTMENT ADVISERS: THE EXAMINATION AND ENFORCEMENT REGIME, available at Bloomberg BNA, Securities Practice Portfolio Series.

³¹ See generally *Federal Court Management Statistics*, USCOURTS.GOV, <http://www.uscourts.gov/statistics-reports/analysis-reports/federal-court-management-statistics> (last visited May 11, 2016).

³² See *Background*, PORTFOLIO 281: THE SEC ENFORCEMENT PROCESS: PRACTICE & PROCEDURE IN HANDLING AN SEC INVESTIGATION, available at Bloomberg BNA, Securities Practice Portfolio Series. It should also be noted that the SEC reserves the right not to provide a Wells notice.

³³ 15 U.S.C. § 78d-5(a) (2012).

The Enforcement Division may only bring civil enforcement against a defendant.³⁴ If the Enforcement Division does elect to seek penalties, it must decide whether to bring action in a federal district court or before one of the Commission's administrative law judges.³⁵ The Division's considerable latitude to choose its own forum is integral to this decision and greatly affects the number of cases that will appear before an ALJ. The Commission has outlined four main criteria³⁶ it uses for forum selection that, while not exhaustive, aid in determining which cases will go before the Commission's ALJs.³⁷ While certain theories or claims are proscribed from being litigated in the administrative forum,³⁸ such as when a statute requires that the case be brought before an Article III tribunal, most criteria favor appearance before an ALJ. For example, if the potential defendant is an entity required to register with the SEC or is a person associated with such an entity, the Commission is more likely to try such cases before an ALJ, who has "developed extensive knowledge and experience" on these issues.³⁹ Of course, this also encompasses an overwhelming majority of enforcement cases.⁴⁰ Additionally, the Commission may consider cost, resources, and time when balancing which forum to use. Because appearances before ALJs are truncated proceedings, this factor almost uniformly favors an administrative proceeding. When weighing these factors together, it is unsurprising that the SEC is increasingly electing to bring cases before its administrative court.

An entire administrative proceeding, which is calculated from the initial notice of proceedings to the publication of an initial decision, may last either 120, 210, or 300 days, or from about three to ten months.⁴¹ These timeframes are notably shorter than district court proceedings, where the

³⁴ *How Investigations Work*, U.S. SEC. & EXCHANGE COMMISSION, <https://www.sec.gov/News/Article/Detail/Article/1356125787012> (last visited May 12, 2016).

³⁵ U.S. SEC. & EXCH. COMM'N, DIVISION OF ENFORCEMENT APPROACH TO FORUM SELECTION IN CONTESTED ACTIONS 1 (2015), <https://www.sec.gov/divisions/enforce/enforcement-approach-forum-selection-contested-actions.pdf>.

³⁶ These criteria are: (1) the availability of the desired claims, legal theories, and forms of relief in each forum; (2) whether any charged party is a registered entity or an individual associated with a registered entity; (3) the cost-, resource-, and time-effectiveness of litigation in each forum; and (4) fair, consistent, and effective resolution of securities law issues and matters. U.S. SEC. & EXCH. COMM'N, *supra* note 35.

³⁷ *Id.* at 1-2.

³⁸ *Id.* at 3-4.

³⁹ *Id.* at 3.

⁴⁰ Press Release, U.S. Sec. & Exch. Comm'n, *supra* note 25 (describing SEC enforcement actions brought in 2015, which show that approximately half of all enforcements include filing delinquencies and penalties against issuers and that the remaining 50% are largely comprised of persons and entities who are connected to or are registered with the Commission).

⁴¹ 17 C.F.R. § 201.360 (2015).

median length of a trial lasts approximately three to seven years.⁴² The specific administrative duration is dependent upon the SEC's enforcement power. Generally, registration violations are 120-day cases, sanctions arising out of injunctions or convictions are 210 days, and violations of securities law are 300 days.⁴³ The duration of each stage of a proceeding – pre-hearing, hearing, and post-hearing⁴⁴ – is delineated in the Commission's Rules of Practice.⁴⁵ Notably, discretion to extend the time period for this process to fairly meet the needs of both parties lies with the administrative judge.

When the Commissioners vote to pursue enforcement through an administrative proceeding, the SEC notifies the defendant by issuing an "order to institute proceedings."⁴⁶ This order gives reasonable notice of the upcoming hearing, the nature of the proceedings, jurisdictional and legal statements of authority, as well as any factual matters to be considered during the hearing⁴⁷ in a similar manner as in the district courts. Through this order, the Commission will also notify the defendant which case schedule the administrative law judge will follow throughout the proceedings.⁴⁸

The pre-hearing period begins upon service of the order to institute proceedings. A defendant has 21 days to file an answer from service of that order,⁴⁹ which is significantly shorter than the 60-day time period for district court.⁵⁰ The administrative law judge then schedules a pre-hearing conference⁵¹ similar to the district court's Rule 16 pre-trial conferences,⁵² and the discovery phase begins. Under the original rules, discovery was incredibly limited.⁵³ Whereas district courts require parties to share with their adversary any relevant, non-privileged evidence that supports their own case,⁵⁴ the SEC had greater leeway to withhold

⁴² This estimate uses an average of the median time of a case from filing to disposition with an emphasis on the United States District Court for the Southern District and Eastern Districts of New York, which are most likely to prosecute securities litigation. U.S. COURTS, U.S. DISTRICT COURTS COMBINED CIVIL AND CRIMINAL FEDERAL COURT MANAGEMENT STATISTICS (2015), <http://www.uscourts.gov/statistics/table/na/federal-court-management-statistics/2015/06/30-3>.

⁴³ 17 C.F.R. § 201.360(a). *See also* Amendments to the Commission's Rules of Practice, 80 Fed. Reg. at 60,091-92.

⁴⁴ 17 C.F.R. § 201.360(a). *See also* Amendments to the Commission's Rules of Practice, 80 Fed. Reg. at 60,092.

⁴⁵ *See* 17 C.F.R. § 201.360(a).

⁴⁶ 17 C.F.R. § 201.200(a)(1).

⁴⁷ 17 C.F.R. § 201.200(b)(3).

⁴⁸ 17 C.F.R. § 201.360(a).

⁴⁹ 17 C.F.R. § 200.360.

⁵⁰ FED.R.CIV.P. 12(a)(ii).

⁵¹ 17 C.F.R. § 201.221.

⁵² FED.R.CIV.P. 16.

⁵³ 17 C.F.R. § 201.360.

⁵⁴ FED.R.CIV.P. 26(a),(b)

privileged materials that will still be used against a party.⁵⁵ Defendants were also limited in other ways – for example, defendants could not take any depositions for the proceeding,⁵⁶ and must instead rely on the subpoena process.⁵⁷ The Commission (which had months to build a case, interview witnesses, conduct searches, and test theories), had greater access to impeachable material.

At the close of the pre-hearing period, the scheduled hearing before the ALJ begins. The hearing functions similarly to a bench trial before a district court judge, with a few key exceptions. A party is entitled to present its case and defenses through oral or documentary evidence and rebuttal evidence.⁵⁸ However, a party may only conduct a cross-examination if, in the ALJ's discretion, it is necessary to obtain a "full and true disclosure of the facts."⁵⁹ Originally, hearsay evidence was allowed if the ALJ determines that it is not "irrelevant, immaterial or unduly repetitious."⁶⁰ Under the new rules, hearsay will only be permissible if it also "bears satisfactory indicia of reliability so that its use is fair,"⁶¹ which is also determined by the ALJ.⁶²

At the end of the hearing, parties are permitted to submit a brief with proposed findings of fact and conclusions of law using specific citations in the record.⁶³ Transcripts of the hearing may be purchased by defendants.⁶⁴ The ALJ determines which party must file first⁶⁵ – the first party to file has 30 days from the conclusion of the hearing, while the opposing side must file within 90 days.⁶⁶ The ALJ has 120, 210, or 300 days from the initial notice to present his or her initial decision, but this deadline can be extended for cause.⁶⁷ Finally, defendants may appeal the decision to the Commission⁶⁸ and then to the district court.⁶⁹

⁵⁵ 17 C.F.R. § 201.230(a)(1), (b).

⁵⁶ 17 C.F.R. § 201.233(b).

⁵⁷ 17 C.F.R. § 201.232.

⁵⁸ 17 C.F.R. § 201.326.

⁵⁹ *Id.* See also Amendments to the Commission's Rules of Practice, 80 Fed. Reg. at 60,104.

⁶⁰ 17 C.F.R. § 201.320. See also Calais Res., Inc., Securities Act Release No. 67312, 104 SEC Docket 12-18 (June 29, 2012) ("Hearsay is admissible in administrative proceedings, and 'we evaluate such evidence based on its probative value, its reliability and the fairness of its use.'") (citing Leslie A. Arouh, Exchange Act Release No. 62898, 99 SEC Docket 32306, 32323 (Sept. 13, 2010)).

⁶¹ Amendments to the Commission's Rules of Practice, 80 Fed. Reg. at 60,104.

⁶² *Id.* at 60, 095.

⁶³ 17 C.F.R. § 201.340(b).

⁶⁴ 17 C.F.R. § 201.302(b) ("Transcripts of public hearings shall be available for purchase at prescribed rates.")

⁶⁵ 17 C.F.R. § 201.340(a), (c).

⁶⁶ 17 C.F.R. § 201.340(c)(1), (2).

⁶⁷ See *supra* note 29 and accompanying text. See also 17 C.F.R. § 201.360(b).

⁶⁸ 17 C.F.R. § 201.411(a).

⁶⁹ *Id.*

SEC prosecutors are incredibly successful under this administrative regime. For the cases that prosecutors do lose, they have historically succeeded in the appeals process. The Commissioners who originally voted to initiate enforcement have authority to review or reverse the ALJ's findings on appeal, and the Commission affirms an ALJ's initial findings 95% of time.⁷⁰ While the SEC argues that such win rates are overblown because prosecutors fail to receive every single aspect of relief sought,⁷¹ this process garners significantly more favorable results than in district court, where Commission prosecutor success rate was 67% in 2012, 75% in 2013, and 61% in 2014.⁷²

Perhaps unsurprisingly, these successes have caused significant criticism about (1) the SEC's motivations when using their administrative proceedings, (2) the impartiality of the presiding administrative law judges, and (3) the questionable procedural rules during the hearing itself. The following Section discusses these concerns, beginning with the perceived and actual bias of SEC administrative judges.

III. CONCERNS OVER PROCESS: IMPARTIALITY AND THE RIGHT TO A DEFENSE

Whether appearing before a district court or an administrative proceeding, a defendant is entitled to two inherent aspects of due process: (1) the right to present a defense,⁷³ and (2) the right to present that defense before an impartial judge.⁷⁴ There is significant concern that these fundamental rights have been abridged by the lopsided nature of the SEC's Rules of Practice,⁷⁵ as well as a perceived or real lack of objectivity by SEC administrative judges.

⁷⁰ Tessa Stillings, Development Articles, *Are the SEC's Administrative Law Courts Constitutional?: Recent Developments in the SEC's Increased Use of Administrative Proceedings*, 35 REV. BANKING & FIN. L. 96, 100 (2015).

⁷¹ Zaring, *supra* note 28, at 137.

⁷² Eaglesham, *In-House Judges*, *supra* note 11.

⁷³ *Washington v. Texas*, 388 U.S. 14, 19 (1967) ("right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's" to determine "where the truth lies...is a fundamental element of due process of law").

⁷⁴ *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 876 (2009) ("It is axiomatic that 'a fair trial in a fair tribunal is a basic requirement of due process.'").

⁷⁵ See *SEC Moves in the Right Direction with Proposed Amendments to Rules Governing Administrative Proceedings, But the Changes Do Not Go Far Enough*, *supra* note 22 (discussing the continued inability for respondents to fully defend themselves); Ed Beeson, *SEC Proposes to 'Modernize' In-House Court*, LAW360 (Sept. 24, 2015), <http://www.law360.com/articles/707076/sec-proposes-to-modernize-in-house-court> (highlighting the major criticisms of the SEC's current rules of practice); Elizabeth P. Gray, *SEC Attempts to Address Due Process Concerns*, LAW360 (Sept. 24, 2015), <http://www.law360.com/art>

As previously discussed, the rules of evidence and procedure typically required in district courts are relaxed in an administrative proceeding,⁷⁶ which makes it easier for prosecutors to admit inculpatory evidence. The procedural timing is also vastly accelerated when compared to the district court,⁷⁷ and leaves defense counsel with weeks or months to defend a charge which the Commission has built for months or years. Finally, and most importantly, the discretion to include or exclude evidence, the discretion to affirm or extend deadlines, and the discretion to ultimately decide the primary contested matters lies with an administrative law judge who may be beholden to the prosecuting agency.⁷⁸

This framework, along with the astronomic success rate for Commission staff, has created an either real or perceived unfairness in cases that come before SEC administrative law judges.⁷⁹ To its credit, the SEC has proposed several amendments that seek to streamline their administrative proceedings and level the playing field for defendants.⁸⁰ However, while these proposed amendments represent necessary progress towards a more even-handed process, the amendments cannot alleviate the second – and distinct – concern of impartiality. Without addressing this second concern, the amendments function as mere bandages to mollify increasingly loud skepticism.

This Section explores the tension between a defendant's truncated ability to present a defense and concerns surrounding bias. It discusses the constitutionally problematic issue of perceived and actual bias of an adjudicator, and outlines a defendant's right to present a defense. This will provide context for the following Section's discussion of how the SEC's proposed amendments aim to lessen concerns associated with the right to present a defense in SEC proceedings, and how the amendments ultimately fail achieve that goal.

icles/707917/sec-attempts-to-address-due-process-concerns (outlining the three primary categories of change incorporated by the SEC's Proposed Amendments).

⁷⁶ See *supra*, notes 40-69 and accompanying text. Compare FED.R.EVID. 801-804 (outlining the disallowance of hearsay and the specific exceptions to the hearsay rule) with 17 C.F.R. § 201.360 (2015) (allowing the general use of hearsay).

⁷⁷ Compare FEDERMAN & SHERWOOD, THE MULTIPLE STAGES OF SECURITIES LITIGATION 2 (May 15, 2013), [http://www.federmanlaw.com/Websites/federmanlaw/images/Securities LitigationProgression.pdf](http://www.federmanlaw.com/Websites/federmanlaw/images/Securities%20LitigationProgression.pdf) (describing the discovery process as taking at least one to two years) with 17 C.F.R. § 201.360 (outlining the timeline in an administrative proceeding before the SEC).

⁷⁸ See Notice of Filing, Timbervest, LLC, Joel Barth Shapiro, Walter William Anthony Boden, III, Donald David Zell, Jr., and Gordon Jones II, Administrative Proceeding File No. 3-15519 (June 4, 2015), <https://www.sec.gov/litigation/apdocuments/3-15519-event-139.pdf> (describing the hiring process for administrative law judges).

⁷⁹ See *infra* footnotes 87-101 and accompanying text.

⁸⁰ Amendments to the Commission's Rules of Practice, 80 Fed. Reg. at 60,091-107.

A. The Impartial Judge

“The Due Process Clauses entitles a person to an impartial and disinterested tribunal in both civil and criminal cases.”⁸¹ An impartial judge is essential both to ensure the appearance of fairness and ensure that cases are not determined by a distorted image of the facts.⁸² Without a dispassionate administrative law judge presiding over the tribunal, or without the appearance of one, the proceeding cannot be considered “fair.”⁸³ Currently, defendants appearing before the SEC’s administrative courts are faced with this perception of unfairness. This is a violation of due process that has not been addressed in the Commission’s proposed amendments, and, as such, cannot truly assuage the procedural concerns associated with the forum.⁸⁴

Like most administrative agencies, the SEC faces constant criticism surrounding the implementation of its administrative courts. However, in mid-2015, tensions with the SEC escalated in the wake of several Wall Street Journal exposés that brought these concerns to the general public.⁸⁵ The articles highlight the different success rates between the initial administrative law court decisions and the district courts (90% vs. 69%) and the different success rates in appeals to the Commission (95%).⁸⁶

In one article, a former SEC judge was quoted saying that the judges were to assume that “the burden was on the people who were accused to show that they didn’t do what the agency said they did,” and judges who deviated from this standard would have their loyalty questioned by the Chief Administrative Law Judge.⁸⁷ This presents a serious violation of the standard of proof – that it is the *Commission* that bears the burden to establish the defendant’s fault, typically by a preponderance of evidence.⁸⁸ Previous

⁸¹ *Marshall v. Jerrico*, 446 U.S. 238 (1980).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ See Barry R. Goldsmith, *SEC Proposed Amendment to Rules for Administrative Proceedings*, HARV. L. F. CORP. GOVERNANCE & FIN. REG. (Oct. 15, 2015), <https://corpgov.law.harvard.edu/2015/10/15/sec-proposes-amendments-to-rules-for-administrative-proceedings/> (highlighting the incremental gains of the proposed amendments compared to the needs of respondents).

⁸⁵ See, e.g., Eaglesham, *In-House Judges*, *supra* note 11. See Jean Eaglesham, “Deflategate” Judge Urges SEC to Investigate In-House Tribunal, WALL ST. J. (Sept. 17, 2015), <http://www.wsj.com/articles/deflategate-judge-urges-sec-to-investigate-in-house-tribunal-1442512351>; Jean Eaglesham, *Judge Adds to Pressure on SEC Over How It Names Its Judges*, WALL ST. J. (Aug. 3, 2015), <http://www.wsj.com/articles/another-court-tells-sec-to-reconsider-how-it-names-its-judges-1438625510>.

⁸⁶ Eaglesham, *In-House Judges*, *supra* note 11.

⁸⁷ *Id.*

⁸⁸ This preponderance standard is typical in administrative proceedings. See *Steadman v. SEC*, 450 U.S. 91, 103-04 (1981) (outlining the allowance of a preponderance standard by

commissioners have also weighed in, saying that “the SEC judges aren’t deliberately biased,” but that “the system itself appears inherently skewed toward the agency,”⁸⁹ and that the increased authority granted by Dodd-Frank represented “a fundamental change” in enforcement.⁹⁰

Criticism of the SEC’s administrative law judges reached its peak in July 2015 with the case *In re Timbervest*.⁹¹ Timbervest LLC, a real estate brokerage firm, and four of its brokers were charged with failing to disclose brokerage fees.⁹² In his initial decision, ALJ Cameron Elliott found that all parties had violated the law and ordered approximately \$1.9 million in disgorgement.⁹³ Timbervest appealed this initial decision to the Commission to challenge, among other things, Judge Elliott’s bias as an administrative law judge.⁹⁴ Citing the Wall Street Journal article *SEC Wins with In-House Judges* (which noted that Judge Elliott had never decided in a defendant’s favor) and several questionable evidentiary and credibility determinations made in the Commission’s favor,⁹⁵ Timbervest argued that the “administrative forum lacks impartiality.”⁹⁶

To combat this argument, the Enforcement Division requested that Judge Elliott submit an affidavit “addressing whether he has had any communications or experienced any pressure similar to that alleged in the [article]” and whether he was aware of any bias.⁹⁷ Judge Elliott promptly declined to submit an affidavit disavowing that such pressures existed.⁹⁸

the Administrative Procedure Act and the SEC’s continued, and acceptable, use of that standard in its administrative proceedings).

⁸⁹ Jean Eaglesham, *Fairness of SEC Judges Is in Spotlight*, WALL ST. J. (Nov. 22, 2015), <http://www.wsj.com/articles/fairness-of-sec-judges-is-in-spotlight-1448236970> [hereinafter Eaglesham, *Fairness*] (discussing former Commissioner Thomas McGonigle’s views on SEC judges).

⁹⁰ Eaglesham, *In-House Judges*, *supra* note 11 (discussing former Commissioner Joseph Grundfest’s views on the current state of the administrative proceedings).

⁹¹ Timbervest, LLC, Joel Barth Shapiro, Walter William Anthony Boden, III, Donald David Zell, Jr., and Gordon Jones II, Initial Decision Release No. 658, 2014 WL 4090371 (ALJ Aug. 20, 2014) (initial decision), <https://www.sec.gov/alj/aljdec/2014/id658ce.pdf>.

⁹² *Id.* at 2. This failure violated Section 206(1) and (2) of the Investment Advisers Act of 1940, and the four individuals were charged with aiding and abetting this violation.

⁹³ *Id.*

⁹⁴ Timbervest, LLC, Joel Barth Shapiro, Walter William Anthony Boden, III, Donald David Zell, Jr., and Gordon Jones II, Initial Decision Release No. 658, 2014 WL 4090371, at 37-38 (ALJ Aug. 20, 2014) (initial decision), <https://www.sec.gov/alj/aljdec/2014/id658ce.pdf>.

⁹⁵ Eaglesham, *In-House Judges*, *supra* note 11.

⁹⁶ Order Concerning Additional Submission and Protective Order, Timbervest, LLC, Joel Barth Shapiro, Walter William Anthony Boden, III, Donald David Zell, Jr., and Gordon Jones II, Investment Advisers Act Release No. 4103, Investment Company Act Release No. 31660, 2015 WL 3507107 (June 4, 2015), <https://www.sec.gov/litigation/opinions/2015/ia-4103.pdf>.

⁹⁷ *Id.* at *2.

⁹⁸ Jean Eaglesham, *SEC Judge Declines to Submit Affidavit of No Bias*, WALL ST. J. (June 11, 2015), <http://blogs.wsj.com/moneybeat/2015/06/11/sec-judge-declines-to-submit>

Some within the SEC explained this refusal as Judge Elliott's desire to avoid a political quagmire, but the judge's denial unleashed a second firestorm of articles from journalists, defense counsel, and bloggers on the problematic nature of biased administrative judges.⁹⁹

These concerns are not meritless. While Supreme Court precedent has cautioned that "most matters relating to judicial disqualification do not rise to a constitutional level,"¹⁰⁰ a judge cannot fairly preside over a trial in which he has "a direct, personal, substantial pecuniary interest."¹⁰¹ Such pecuniary interests are often deemed constitutionally suspect because of the personal nature of the judge's interest, as intimated by the maxim *nemo iudex in sua causa*, or "no man should be judge in his own case."¹⁰² And so, while it is true that evidence showing pressure may have been exerted to induce ALJs rule in certain ways does not equate to a direct *pecuniary* interest, such pressure does represent a clear *proprietary* interest in the actual and reputational standing of an ALJ within the SEC, and should be treated as equally problematic.

Holdings that do not recognize this as a legitimate due process concern remove practical avenues of proving bias in this context. ALJs are presumed to be unbiased (as the Commission stated in upholding Judge Elliott's initial decision in *Timbervest*).¹⁰³ That presumption can only be overcome when there is a clear conflict of interest or other reason for disqualification.¹⁰⁴ Unfortunately, to show this, a defendant would have to

affidavit-of-no-bias/ (describing Judge Elliott's single-sentence email sent to the SEC in response to their request stating "I respectfully decline to submit the affidavit requested").

⁹⁹ See, e.g., Jean Eaglesham, *SEC Judge Declines to Submit Affidavit of No Bias*, WALL ST. J. (June 11, 2015), <http://blogs.wsj.com/moneybeat/2015/06/11/sec-judge-declines-to-submit-affidavit-of-no-bias/> (discussing the mounting pressure of the SEC's use of its administrative law judges and calling Judge Elliott's declination "unprecedented"); Stephanie Russell-Kraft, *SEC Asks SEC Judge If He Is Biased Towards SEC*, LAW360 (June 4, 2015), <http://www.law360.com/articles/664093/sec-asks-sec-judge-if-he-is-biased-towards-sec> (mocking the Commission's request to ask Judge Elliott to state that he is unbiased); *SEC Inspector General Reveals Investigation Into Possible Bias of SEC ALJs*, SECURITIES DIARY (Aug. 10, 2015), <http://securitiesdiary.com/2015/08/10/sec-inspector-general-reveals-investigation-into-possible-bias-of-sec-aljs/> (speculating on the future use of the Commission's administrative courts).

¹⁰⁰ *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 876 (2009) (quoting *FTC v. Cement Institute*, 333 U.S. 683, 702 (1948)).

¹⁰¹ *Tumey v. Ohio*, 273 U.S. 510 (1927).

¹⁰² Zaring, *supra* note 28 at 117.

¹⁰³ *Timbervest, LLC*, Joel Barth Shapiro, Walter William Anthony Boden, III, Donald David Zell, Jr., and Gordon Jones II, Initial Decision Release No. 658, 2014 WL 4090371, at 37 (ALJ Aug. 20, 2014) (initial decision), <https://www.sec.gov/alj/aljdec/2014/id658ce.pdf> (citing *Shweiker v. McClure*, 456 U.S. 188, 195 (1982) and *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

¹⁰⁴ *Shweiker*, 456 U.S. at 195.

prove that “the ALJ’s behavior, in the context of the whole case, was ‘so extreme as to display clear inability to render fair judgment.’”¹⁰⁵

This standard creates an unwinnable scenario for the individual defendant in a particular case because here, impartiality does not just involve one particular administrative law judge in a given case. Rather, as former commissioner Thomas McGonigle mentioned, it is the overall inherently skewed nature of the Commission’s administrative courts.¹⁰⁶ A defendant cannot rely solely on the particular judge’s decision rates¹⁰⁷ or particular evidentiary rulings when the problem lies within a pervasive culture of loyalty to and bias in favor of the Commission. Thus, while the bias is evident in statistics, it will likely evade review and continue throughout the SEC’s proceedings.

This bias, whether perceived or actual, taints the entire administrative process and, as discussed more extensively below, is the reason why the current proposed rules are insufficient to alleviate the concerns currently facing the SEC’s administrative courts. The newly proposed amendments create higher evidentiary standards and increase the ALJs’ discretion to extend deadlines for the purpose of enhancing fairness. However, this goal is only achieved if the presiding judge is objective, and a judge cannot be impartial when he or she is expected to view all cases with a perceived assumption of the defendant’s guilt and preference towards the Commission.

B. The Right to Present a Defense

Turning now to the specific amendment proposals, it is important to reiterate the progressive steps that the SEC’s amendments represent. The proposal is extensive, but many amendments function as support for the efficient application of the primary proposals within the Rule scheme.¹⁰⁸ Generally, these primary amendments seek to (1) conform certain evidentiary requirements to the Administrative Procedure Act,¹⁰⁹ (2) allow defendants to

¹⁰⁵ Rollins v. Massanari, 261 F.3d 853, 858 (9th Cir. 2001) (quoting Liteky v. United States, 510 U.S. 540, 551 (1994)). *Accord* Keith v. Barnhart, 473 F.3d 782, 788 (7th Cir. 2007).

¹⁰⁶ Eaglesham, *Fairness*, *supra* note 89 (quoting former Commissioner Thomas McGonigle).

¹⁰⁷ Moreover, it is “almost never” constitutionally insufficient to rely solely on a judge’s record. Liteky v. United States, 510 U.S. 540, 541 (1994).

¹⁰⁸ For example, proposals 180, 221, 234 all function to support Rule 233’s amendments to allowing depositions. These proposals update administrative requirements and deadlines that would otherwise unduly burdensome in light of the changes. *See* Amendments to the Commission’s Rules of Practice, 80 Fed. Reg. at 60,100, 60,101, and 60,104.

¹⁰⁹ *Id.* at 60,104.

take limited depositions,¹¹⁰ (3) double the length of the prehearing (discovery) period during administrative proceedings,¹¹¹ and (4) provide a timeline for the disposition of cases by the ALJ.¹¹² Underlying each of these changes is a desire to provide defendants greater fact-finding abilities and to alleviate the concerns associated with the abbreviated nature of many aspects of the proceeding by either changing a previous standard or granting an ALJ the discretion to determine the fairest outcome on a case-by-case basis.

The core usefulness of many of these amendments is the increased discretion of the administrative judge to fairly balance the needs of both parties in service to the case. However, when the judges granted that discretion are, or appear to be, working in service of the Commission, increased discretion serves as yet another hurdle for defendants. The SEC has recognized that hardline rules and deadlines fail to encapsulate the complexity of most cases, and without this discretion, the Proposed Rules would not do enough. Ironically, however, the increased discretion proposed in these amendments only augment fairness concerns.

For example, Rule 340 allows the administrative judge to determine which party must first file any post-hearing briefs.¹¹³ There are tactical advantages to filing either first or second, but the party who files second is given 90 days to respond, whereas the first to file has only 30 days.¹¹⁴ This rule allows the judge to determine which side may need more time to respond based on legitimate reasons, but that discretion is tainted by the perceived bias of the judge who may be pressured to choose sides out of loyalty to the Commission.¹¹⁵ The only way to combat this would be to allow the same amount of time for each brief, which does not leave room to consider legitimate needs by each party.

These evidentiary, discovery, and timing concerns can all be categorized as “the right to present a defense.”¹¹⁶ Alone, none of these procedural questions can withstand a constitutional due process challenge.¹¹⁷ However, within each line of precedent, the Court has recognized that there is a point at which each concern becomes constitutionally problematic and together, in combination with ALJ biases, the entire process begins to appear

¹¹⁰ *Id.* at 60,092.

¹¹¹ *Id.* at 60,104.

¹¹² *Id.* at 60,106.

¹¹³ 17 C.F.R. § 201.340(a), (c) (2015).

¹¹⁴ 17 C.F.R. § 201.340(c)(1), (2).

¹¹⁵ Eaglesham, *In-House Judges*, *supra* note 11 (recounting an SEC Chief ALJ questioning another ALJ’s loyalty after certain rulings).

¹¹⁶ MARK MAHONEY, *THE RIGHT TO PRESENT A DEFENSE* 1 (2009).

¹¹⁷ *See* notes 118-150 and accompanying text (highlighting the potential due process concerns associated with the SEC’s original rules for evidentiary standards, depositions, and deadlines).

suspicious. The following Sections will discuss the specific constitutional concerns surrounding the SEC's proposed rules for allowing hearsay, abbreviating discovery, and limiting depositions.

i. Hearsay

The first significant distinction between district court proceedings and SEC administrative proceedings are the rules surrounding hearsay. In federal court, hearsay – an out of court statement used to provide the truth of a particular matter¹¹⁸ – is generally impermissible.¹¹⁹ This is not true in administrative proceedings. The SEC's Rule of Practice 320 states that “the hearing officer may receive relevant evidence and shall exclude all evidence that is irrelevant, immaterial, or unduly repetitious,”¹²⁰ which, like most other administrative proceedings, allows the admission of hearsay evidence.¹²¹

It is well-established that hearsay, on its own, does not create a procedural due process violation. The Commission, the Administrative Procedure Act, and the courts have unanimously accepted hearsay material in these proceedings.¹²² Specifically, in *Richardson v. Perales*, the Supreme Court found that hearsay is “admissible up to the point of relevancy.”¹²³ However, the current SEC Rule 320 raises concerns for two reasons. First, the language provides a much lower admissibility bar than the Administrative Procedure Act, and second, the application of Rule 320 falls short of the fundamental fairness requirements also found in *Richardson*.

The Administrative Procedure Act's guidelines for hearsay admissibility include an additional requirement that all evidence be sufficiently reliable such that its use is fair.¹²⁴ This heightened standard is important, as it can eliminate statements that are hearsay within hearsay,¹²⁵

¹¹⁸ FED.R.EVID. 801(c).

¹¹⁹ FED.R.EVID. 802.

¹²⁰ 17 C.F.R. § 201.320 (2015).

¹²¹ *Richardson v. Perales*, 402 U.S. 389, 410 (1971).

¹²² See Administrative Procedure Act, 5 U.S.C. § 556(d) (2012) (describing the criteria for the admissibility of evidence); *Richardson v. Perales*, 402 U.S. 389, 407-08 (1971) (upholding constitutionality of hearsay evidence); Amendments to the Commission's Rules of Practice, 80 Fed. Reg. at 60,095 n.31 (recognizing the long history of hearsay use in administrative proceedings).

¹²³ 402 U.S. 389, 410 (1971).

¹²⁴ 5 U.S.C. § 556(d)(2) (2012).

¹²⁵ *Anim v. Mukasey*, 535 F.3d 243, 257 (4th Cir. 2008) (finding an official letter that was “comprised entirely of multiple hearsay statements” insufficient indicia of reliability).

letters by unidentified investigators,¹²⁶ and testimony of co-defendants.¹²⁷ Additionally, *Richardson v. Perales* was clear that there are boundaries to “hearsay-when-relevant” usage. *Richardson* explained that “[t]he matter comes down to the question of the procedure’s integrity and fundamental fairness.”¹²⁸ Only a fair procedure “does not fall short of procedural due process,”¹²⁹ and courts of appeals have recognized this key caveat and have crafted holdings to recognize the necessity of fairness and reliability in admitting hearsay.¹³⁰

The original Rule 320, which provides that relevance is the sole determinant in hearsay admissibility, fails to account for the requirements of fairness and reliability, especially in light of other fairness concerns. The amendment to Rule 320 seeks to heighten this standard of mere relevance to also exclude any evidence that does not “bear[] satisfactory indicia of reliability so that its use is fair.”¹³¹ This amendment correlates more closely with the constitutionally appropriate Administrative Procedure Act¹³² and incorporates the notions of fundamental fairness that are required in *Perales*.

However, the second, distinct question of fairness is still present. If the administrative proceeding followed a pattern of objective and dispassionate evidentiary rulings, then perhaps the proposed amendment could alleviate all concern. Unfortunately, the SEC’s administrative proceedings are not so judicious. The Commission, in its role of appellate review, has instructed its administrative law judges to be incredibly liberal when considering admissible evidence. Indeed, in the case *In re Del Mar Financial Services, Inc.*, the Commission clearly stated that “administrative law judges should be inclusive in making evidentiary determinations in its proceedings: ‘if in doubt, let it in.’”¹³³ Essentially, this requires an ALJ to defer to the relevancy determinations of the prosecuting SEC staff member.

¹²⁶ *Banat v. Holder*, 557 F.3d 886, 892–93 (8th Cir. 2009).

¹²⁷ *Lee v. Illinois*, 476 U.S. 530 (1986).

¹²⁸ 402 U.S. at 410.

¹²⁹ *Id.*

¹³⁰ *See, e.g., Echostar Commc’n Corp., v. FCC*, 292 F.3d 749, 753 (D.C. Cir. 2002) (admitting hearsay if there is “substantial evidence” that it is reliable trustworthy); *J.A.M. Builders, Inc. v. Herman*, 233 F.3d 1350, 1354 (11th Cir. 2000) (admitting “reliable and credible” hearsay); *Calhoun v. Bailar*, 626 F.2d 145, 149 (9th Cir. 1980).

¹³¹ Amendments to the Commission’s Rules of Practice, 80 Fed. Reg. at 60,095 n.31.

¹³² *See, e.g., Calhoun*, 626 F.2d at 148 (upholding the admissibility of hearsay evidence if “it bear[s] satisfactory indicia of reliability” and is “probative and its use fundamentally fair”).

¹³³ *Del Mar Fin. Servs., Inc., Kevin C. Dills, Private Brokers Corp., Robert A. Roberts, Matthew A. Jennings, Philip S. Brandon, and Jai Chauduri*, Initial Decision Release No. 188, 75 SEC Docket 1473 (ALJ Aug. 14, 2001) (initial decision) (citing *City of Anaheim, Order Vacating Grant of Motion to Exclude Evidence*, 71 SEC Docket 191, 193-94 (Nov. 16

Richardson is clear that fairness is the key to process. When a defendant faces an administrative judge who appears beholden to the enforcement agency,¹³⁴ the degree of discretion that the judge holds can be daunting. Because the Commission has been clear that its administrative law judges must be deferential to the relevancy determinations of the prosecutor, the fairness of the process is diminished. Thus, although the proposed amendment increases the relevancy standard, it is insufficient to alleviate concerns that a biased judge will admit less probative or reliable evidence.

ii. Depositions

Next, the current Rules of Practice deviate from district court practice in its proscription of depositions. While there is no specific limit to the number of individuals who can be deposed in federal court,¹³⁵ defendants are barred from calling for any depositions for an administrative proceeding. This proscription impinges on a defendant's fundamental right "to present [his] version of the facts."¹³⁶ This right can be broken into the two distinct ideas: the right to challenge evidence, and the right to create an affirmative defense.¹³⁷ The ability to take depositions is an important aspect of both facets of this right. Accordingly, many who represent corporate defendants have balked at the lack of opportunity to craft a narrative wholly separate from that of the prosecution.

Currently, Rule 233 only allows deposition by oral examination if the witness will not be able to testify at the hearing.¹³⁸ This severely limits the ability for parties to develop arguments and defenses and intrudes upon a defendant's ability to create *affirmative* defenses, rather than merely relying on the facts and written testimony presented by the SEC. This rule becomes more problematic in light of the high standards for allowing cross-examination, which hinders a defendant's ability to challenge evidence.¹³⁹ If a defendant has no authority with which to impeach a witness, he cannot show credibility weaknesses in the Commission's case.

1999)), *rev'd on other grounds*, Securities Act Release No. 33-8314, 81 SEC Docket 1195 (Oct. 24, 2003).

¹³⁴ For a deeper discussion of perceived bias with the SEC's administrative law judges, see *supra* notes 63-85 and accompanying text.

¹³⁵ FED.R.CIV.P. 30, 31.

¹³⁶ *Washington v. Texas*, 388 U.S. 14, 19 (1967) (overturning a conviction in which the defendant was barred from presenting his chosen witnesses).

¹³⁷ MAHONEY, *supra* note 116, at 1.

¹³⁸ 17 C.F.R. § 201.233(a)-(b) (2015).

¹³⁹ 17 C.F.R. § 201.326 (allowing cross-examination only if necessary to obtain "a full and true disclosure of the facts").

Proposed Rule 233 greatly expands both parties' ability to do this. Under the proposed amendment, single-party defendants will now have the opportunity to depose three witnesses and multi-party defendants will have the opportunity to depose five.¹⁴⁰ While a step in the right direction, this severe limitation still deprives the defendant the opportunity to prepare her defense. This proposal recognizes that different proceedings may require different degrees of investigation and fact-finding to present an adequate defense. As the Commission has already recognized the need for more depositions in complex cases involving multi-party defendants, it follows that certain complex proceedings may require a greater number of witness depositions.

Accordingly, this proposed amendment fails to adequately consider the scope of certain cases, and could be augmented by granting an impartial ALJ the discretion to determine how many depositions would be appropriate in a given situation. However, as discussed previously, the ability to remedy this shortcoming is beyond the control of the SEC and lies exclusively Congress. To fix this concern, all the SEC can do is grant its administrative judges the discretion to rule on motions for increased depositions. This, in turn would only increase the objectivity concerns.

iii. Discovery and Disposition Time-Frame

A final fundamental factor in the concept of due process is the ability for counsel to have adequate time to prepare a defense.¹⁴¹ The proposed amendment to Rule 360, which governs the timeline for an administrative proceeding, seeks to significantly extend the amount of time for discovery.¹⁴² A defendant would have one to four months to prepare for a sanction arising out of registration violations, two and a half to six months for sanctions arising out of injunctions or convictions, and four to eight months for cases arising out of securities violations.¹⁴³ The proposal also seeks to divorce the deadline for ALJs to submit initial decisions from the pre-hearing period,¹⁴⁴ which could allow more discretion on extensions.

Like hearsay, there is no strict due process violation for failing to provide a specific amount of time to prepare for a case. Thus, while the time

¹⁴⁰ Amendments to the Commission's Rules of Practice, 80 Fed. Reg. at 60,092.

¹⁴¹ *Avery v. Alabama*, 308 U.S. 444, 450-52 (1940) (holding there was no due process violation because counsel had access to all the necessary witnesses and facts within the time-period provided by the court).

¹⁴² Amendments to the Commission's Rules of Practice, 80 Fed. Reg. at 60,093.

¹⁴³ 17 C.F.R §§ 201.221, .360(a) (2015). *See also* Amendments to the Commission's Rules of Practice, 80 Fed. Reg. at 60,104-05.

¹⁴⁴ *See* Amendments to the Commission's Rules of Practice, 80 Fed. Reg. at 60,092.

period for discovery in the district court typically lasts one to two years,¹⁴⁵ there is no per se constitutional problem in truncating the process for administrative proceedings.¹⁴⁶ Rather, like with hearsay, the district courts rely heavily on individual trial judge discretion to determine whether the accused can sufficiently prepare for trial.¹⁴⁷ In these cases, the courts look at the alleged crime and the asserted defenses.¹⁴⁸

While there are not many cases that deal directly with this issue, *United States v. Sahley*,¹⁴⁹ a case from the Fifth Circuit, provides an interesting example of how the abbreviated discovery phase can have problematic constitutional outcomes. In *Sahley*, the defendant was tried for making “a material false financial statement to a federally insured bank” in violation of 18 U.S.C. § 1014.¹⁵⁰ The defendant argued that denying a continuance constituted a denial of his right to adequately prepare for trial.¹⁵¹ The Fifth Circuit ultimately held that the defendant’s rights were not violated, as the judge acted within his discretion to determine the facts were sufficiently straightforward so as not to warrant a continuance.¹⁵² However, the Court also held that while there is no “constitutionally proscribed time period” to prepare, “the answer [to determining how much time is sufficient] must be found in the circumstances present in every case.”¹⁵³

As the Commission has admitted, securities proceedings are vastly more complicated than a simple bad-check case.¹⁵⁴ The issues are complex and parties are increasingly requesting additional time to sort through the mountains of discovery documents disclosed by the Enforcement Division.¹⁵⁵ In a district court proceeding, defense counsel has significantly more time to prepare defenses and

¹⁴⁵ See, e.g., FEDERMAN & SHERWOOD, *supra* note 77.

¹⁴⁶ *United States v. Sahley*, 526 F.2d 913, 918 (5th Cir. 1976) (“[T]here is no constitutionally proscribed time period . . . [or] mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process.”)

¹⁴⁷ See *Eubanks v. United States*, 336 F.2d 269, 270 (9th Cir. 1964) (“The determination as to whether there was time sufficient to permit the accused to prepare his defense is largely a matter of trial court discretion.”); *Baldwin v. United States*, 260 F.2d 117, 118 (4th Cir. 1958) (deferring to the discretion of the district court judge to determine whether the defendant in a bank theft was granted enough time to prepare his defense).

¹⁴⁸ See, e.g., *Eubanks*, 336 F.2d at 270 (“What is a sufficient time in a particular case depends upon the circumstances, including the nature of the charge, the issues presented, counsel’s familiarity with the applicable law and pertinent facts, and the availability of witnesses.”)

¹⁴⁹ 526 F.2d at 917.

¹⁵⁰ *Id.* at 914.

¹⁵¹ *Id.* at 915.

¹⁵² *Id.* at 918.

¹⁵³ *Id.* (citing *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964)).

¹⁵⁴ See Amendments to the Commission’s Rules of Practice, 80 Fed. Reg. at 60,092.

¹⁵⁵ See *id.*

to compile evidence beyond the documents disclosed by the Commission,¹⁵⁶ which is likely a significant factor in the SEC's disproportionate success rate. Proposed Rule 360 helps alleviate this concern by divorcing an ALJ's deadline for releasing an initial decision from other stages of the proceeding, which allows for greater discretion to extend discovery time in complex cases.¹⁵⁷ This helps lessen the incongruities in each side's ability to prepare.

However, the proposal retains the same amount of time to obtain transcripts and submit post-hearing briefs as allowed by the original Rules of Practice.¹⁵⁸ The complexity and length of hearings and the issues presented vary extraordinarily by case and so, while the proposed rule grants the ALJ the discretion to extend the initial decision deadline 30 days,¹⁵⁹ much of that time would likely be used by the ALJ to read over the docket and weigh important evidence rather than allowing parties additional time to gather evidence or present their case. Parties on both sides would benefit by allowing an impartial judge to determine on a case-by-case basis whether the *parties* should be granted the extra time.

These concerns cast an unfortunate shadow over an otherwise well-reasoned and progressive proposal and could be fixed by granting an objective judge greater discretion to allow sufficient process for each case. Because Congress has made a policy choice that adequate representation must be balanced with the public's need for such cases to be quickly resolved¹⁶⁰ and has offered an alternative to Article III jurisdiction for these types of cases, the correct answer cannot lie in removing cases to the district court. Nor is it necessary – not every matter that goes before an ALJ is complex or requires significantly more time for discovery than the rules allow.

However, these decisions require a dispassionate arbiter who can make impartial decisions for each case. Currently, the SEC judges have a real or perceived interest in the disposition of the case. An administrative law judge that is either perceived to be or actually beholden to the Commissioners cannot alleviate the lingering procedural concerns that are still present in the proposed amendments, and the SEC does not have the power to fix this problem. As Congress has made the policy decision to create administrative courts to quickly resolve burdens, it lies with that body to ensure defendants receive adequate due process in that forum. The following Section will discuss how Congress can achieve this goal.

¹⁵⁶ FEDERMAN & SHERWOOD, *supra* note 77. See also COVINGTON & BURLING, *supra* note 22 (noting the time difference in the SEC's ability to prepare in conjunction with respondents).

¹⁵⁷ Amendments to the Commission's Rules of Practice, 80 Fed. Reg. at 60,092.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 60,093.

¹⁶⁰ *Id.* at 60,092.

IV. EVENING THE HOME FIELD ADVANTAGE

The proposed amendments will not be enough to alleviate the procedural concerns currently embedded in the SEC's administrative proceedings. Administrative law judges need more discretion to make case-specific determinations that maximize fairness, but the judges themselves cannot be entrusted to make those determinations when there is a deep-rooted concern that they are not free to make unbiased decisions. To lessen the concern of impartial judges and ensure that each defendant is afforded the process that he or she requires, ALJs should be (1) completely insulated from appointment and removal by their department, and (2) formally removed from the bureaucracy of the agency in which they preside.

Before discussing how Congress and the administrative state can accomplish these goals, it is important to note a constitutional challenge gaining traction with SEC defendants that has received favorable recognition in the district courts and affects the availability of certain remedies to the ALJ objectivity problem. Several defendants have recently attacked the legitimacy of the SEC's administrative law judges, claiming that they are unconstitutionally appointed as inferior officers under Article II.¹⁶¹ In *Hill v. SEC*, a district court judge for the North District of Georgia granted defendants a preliminary injunction to enjoin an administrative proceeding before an SEC administrative judge on the likelihood that this argument would succeed on the merits.¹⁶² While this constitutional problem is likely to be easily remedied through a change in the hiring process, it does have greater implications when seeking to rid the bias from the administrative court.

Article II requires inferior officers to be appointed by the President alone, the Courts of Law, or in the Heads of Departments,¹⁶³ and applies to agency officers whose functions are "predominantly quasi-legislative or quasi-judicial."¹⁶⁴ Furthermore, "any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed" by

¹⁶¹ U.S. CONST. Art. II, § 2, cl. 2. See, e.g., *Tilton v. SEC*, No. 15-CV-2472 RA, 2015 WL 4006165, at *3 (S.D.N.Y. June 30, 2015); Order Granting in Part and Denying in Part Plaintiff Charles L. Hill, Jr.'s Motion for a Temporary Restraining Order, Or in the Alternative, a Preliminary Injunction, *Hill v. SEC*, 114 F. Supp. 3d 1297, 1305 (N.D. Ga. 2015); *Duka v. SEC*, 103 F. Supp. 3d 382, 393 (S.D.N.Y. 2015).

¹⁶² Order Granting in Part and Denying in Part Plaintiff Charles L. Hill, Jr.'s Motion for a Temporary Restraining Order, Or in the Alternative, a Preliminary Injunction, *Hill*, 114 F. Supp. 3d at 1320.

¹⁶³ U.S. CONST. Art. II, § 2, cl. 2.

¹⁶⁴ *Buckley v. Valeo*, 424 U.S. 1, 133 (1976).

Article II.¹⁶⁵ In *Hill*, the district court relied primarily on *Freytag v. Commissioner*, which held that a special trial judge for the tax court was an inferior officer because the role exercised “significant authority,” to determine that SEC ALJ’s were inferior officers.¹⁶⁶ The court also noted that “district-court clerks, thousands of clerks within the Treasury and Interior Departments, an assistant surgeon, a cadet-engineer, election monitors, federal marshals, [and] military judges” were considered inferior officers.¹⁶⁷

While other courts have declined to accept this argument,¹⁶⁸ it does create a wrinkle in certain paths to removing the bias from SEC ALJs. Currently, potential ALJs are screened through the U.S. Office of Personnel Management, which sends a short list of candidates to the Chief Administrative Law Judge.¹⁶⁹ The Chief Judge then selects the top three candidates from that list and, with an interview committee, makes a preliminary selection that is approved by the Commission’s Office of Human Resources.¹⁷⁰ Once hired, ALJs are only removable by the Commission for “good cause,” which is established by an independent federal agency.¹⁷¹

If the courts ultimately rule that the administrative judges are inferior officers, then only the President, the Commission, or a “Court of Law” can appoint them.¹⁷² However, appointment by the Commission, which is the most likely modification and the recommended course of action by the judge in *Hill*,¹⁷³ would simply aggravate the bias of the administrative court. Because the Commissioners can only be removed for cause,¹⁷⁴ the ALJs would lose their current removal protections. Under *Free Enterprise Fund v.*

¹⁶⁵ *Freytag v. Comm’r*, 501 U.S. 868, 881 (1991) (quoting *Buckley*, 424 U.S. at 126).

¹⁶⁶ Order Granting in Part and Denying in Part Plaintiff Charles L. Hill, Jr.’s Motion for a Temporary Restraining Order, Or in the Alternative, a Preliminary Injunction, *Hill*, 114 F. Supp. 3d at 1316-20. *But see* *Landry v. FDIC*, 204 F.3d 1125, 1134 (D.C. Cir. 2000) (holding that FDIC ALJs are not inferior officers because they do not make final decisions).

¹⁶⁷ Order Granting in Part and Denying in Part Plaintiff Charles L. Hill, Jr.’s Motion for a Temporary Restraining Order, Or in the Alternative, a Preliminary Injunction, *Hill*, 114 F. Supp. 3d at 1316.

¹⁶⁸ *See* *Tilton v. SEC*, No. 15-CV-2472 RA, 2015 WL 4006165, at *13 (S.D.N.Y. 2015) (declining to rule on jurisdictional grounds); *Duka v. SEC*, 103 F. Supp. 3d 382, 396 (S.D.N.Y. 2015) (holding that the argument failed on the merits).

¹⁶⁹ 5 U.S.C. §§ 1104, 1302 (2012); 5 C.F.R. § 930.201(d)-(e) (2016).

¹⁷⁰ 5 U.S.C. §§ 3317-18 (2012); 5 C.F.R. §§ 332.402, 332.404, 930.204(a).

¹⁷¹ 5 U.S.C. § 7521 (2012); 5 C.F.R. § 930.211(a).

¹⁷² U.S. CONST. Art. II, § 2, cl. 2.

¹⁷³ Order Granting in Part and Denying in Part Plaintiff Charles L. Hill, Jr.’s Motion for a Temporary Restraining Order, Or in the Alternative, a Preliminary Injunction, *Hill v. SEC*, 114 F. Supp. 3d 1297, 1320 (N.D. Ga. 2015).

¹⁷⁴ *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 487 (2010).

PCAOB, there cannot be a “double-layer” of protection from removal by the President, which means that an entity (like the Commission) with the power to remove an inferior officer who can only be removed for cause (like an ALJ) cannot itself only be removed for cause (as the Commissioners are).¹⁷⁵ To remedy the double-layer protection issue, either the Commissioners or the ALJs would need to be removable without cause, which would augment objectivity concerns by including an actual fear of being fired. It is unlikely that the Commissioners would ever lose their for-cause removal status and so, ironically, adherence to the Constitution would only increase the ALJs’ perceived or real pressures and biases.

And yet something must be done. The Commission’s administrative law courts operate with, at the very least, an image of favoritism towards its own prosecutors,¹⁷⁶ and due process cannot tolerate even the perception of a tribunal with pervasive bias. Our current bureaucratic framework breeds this perception. Whether or not ALJs can be removed without cause, SEC ALJs do not enjoy life tenure, are hired internally by the Chief Administrative Law Judge, and are—to an extent—subject to removal by the same Commissioners who determine which cases should be brought before them.¹⁷⁷

There is a simple solution to alleviating the impartiality concern, but this remedy could not come from within the administrative agency. Rather, Congress must remove the possibility that ALJs are unduly influenced by the Commission or any administrative agency which holds hearings involving a potential assessment of penalties or fines and in which due process must be granted.

To do this, Congress would need to pass legislation to create an entirely distinct Department of Administrative Courts that is responsible for the appointment, removal, and payment of all administrative law judges in Article I tribunals. This Department would be run by a Director whose appointment conforms to the requirements for “Officers of the United States,”¹⁷⁸ and who would be removable at will under Article II. The Office of Personnel Management would retain its primary role of administering qualitative exams,

¹⁷⁵ *Id.* at 514.

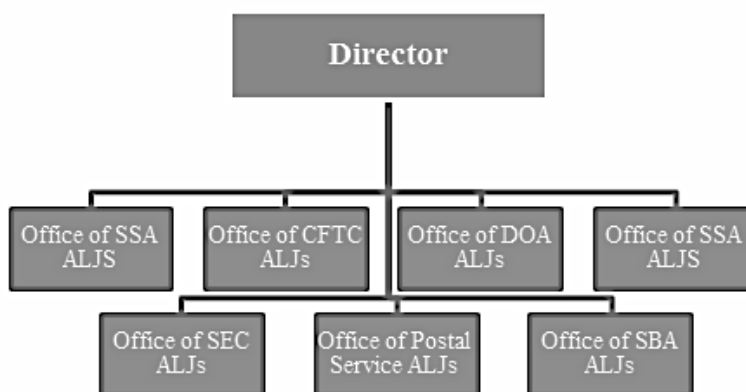
¹⁷⁶ *See supra* notes 84-106 and accompanying text.

¹⁷⁷ Notice of Filing, Timbervest, LLC, Joel Barth Shapiro, Walter William Anthony Boden, III, Donald David Zell, Jr., and Gordon Jones II, Administrative Proceeding File No. 3-15519 (June 4, 2015), <https://www.sec.gov/litigation/apdocuments/3-15519-event-139.pdf>.

¹⁷⁸ U.S. CONST. Art. II, § 2, cl. 2. (“The President...with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States.”).

ranking applicants, and producing a list of finalists for review.¹⁷⁹ This list of finalists would be sent to the Director, who would appoint all administrative law judges presiding over hearings in a particular agency. Each ALJ would continue to be removable only for cause. The changes would, in a simple form, change the location of the SEC's Office of ALJ's as follows:

Department of Administrative Law Judges



Under this framework, Congress could alleviate the concerns of partiality in the administrative process while maintaining fidelity to the constitutional “double-layer” proscription in *PCAOB*. This removal framework would also alleviate concerns that specific ALJs would be terminated as political attitudes shift but ensure that the courts remained balanced as new Presidents appoint Directors with different political leanings. Other than appointment and removal, each ALJ and agency court would function under the same regulations it currently functions.

This transition could be easily achieved without uprooting the framework by which each specific administrative court functions. Currently, there are 34 federal agencies that employ administrative law judges, including the SEC, CTFC, EPA, DEA, the Social Security Administration and the Postal Service.¹⁸⁰ As of 2009, these 34 agencies employed 1,422 administrative law judges.¹⁸¹ Each judge works primarily with the Office of Personnel Management for the initial portion of their hiring process as well

¹⁷⁹ VANESSA K. BURROWS, CONG. RESEARCH SERV., RL34607, ADMINISTRATIVE LAW JUDGES: AN OVERVIEW 2 (2010).

¹⁸⁰ *Agencies Employing Administrative Law Judges*, ASS'N OF ADMIN. L. JUDGES, <https://www.aalj.org/agencies-employing-administrative-law-judges> (last visited May 14, 2016).

¹⁸¹ VANESSA K. BURROWS, CONG. RESEARCH SERV., *supra* note 179, at 2.

as for compensation disbursement for all ALJs, regardless of agency¹⁸² and within their own agency-specific Office of Administrative Law Judges. These offices need only be transplanted from within the specific agency into the new Department of Administrative Law Judges, which would not upend the bureaucracy within the agency systems.

Because the threat to an ALJ's objectivity lie with soft, institutional power and pressure, formal removal from within the agency from which the ALJ's cases originate can remove undue influence from administrative proceedings. SEC Commissioners do not only serve as appellate review for cases. They also function as overseers of the SEC prosecutors and all rulemaking. In this position of legislator, prosecutor, judge, and jury, it is apparent why term-specified administrative judges may feel unduly pressured. As we believe is true of Article III courts, judicial independence from both the legislators and prosecutors is a fundamental aspect of objectivity, and can be easily achieved here.

Adding a Department of Administrative Law Judges would remove the appearance of ALJs who feel beholden to the departments in which they preside, alleviate the double-layer protection concerns described in *Free Enterprise*, and retain they necessary for-cause removal protection that the judges need to impartially decide cases. Once the perception of bias is removed, the SEC's administrative court operates very similarly to other agency's administrative proceedings.¹⁸³ With confidence restored in the judge's ability to decide cases, the proposed amendments do a good deal to even the playing field in the Commission's administrative courts and would only be enhanced by greater judicial discretion.

V. CONCLUSION

With the passage of Dodd-Frank, the caseload for the SEC's Division of Enforcement increased dramatically. This, in turn, resulted in a fundamental shift in the agency's forum choices for bringing cases. For defendants in these cases, this is an unwelcome shift, as Commission prosecutors win in this forum at much higher rates when compared to the district court. In response to increased pressure from the media, Congress, former commissioners, and constitutional attacks in district court, the SEC has offered several important improvements to its administrative proceedings' Rules of Practice.

¹⁸² *Id.* at 2-3.

¹⁸³ *See, e.g.*, FDIC Rules of Practice and Procedure, 12 C.F.R. pt. 308 (2016); Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary of Agriculture Under Various Statutes, 7 C.F.R. §§ 1.130-.151 (2016).

Unfortunately, none of these improvements reach the underlying issue. There is sufficient evidence to cause serious concern that the SEC administrative law judges feel in many ways beholden to the Commission and therefore cannot act as impartial judges before the tribunal. This concern diminishes the value of any proposed amendment. Congress has recognized the policy need for a quick resolution of securities violations, which must be balanced by due process and the ability of respondents to adequately prepare a defense. To expeditiously handle such an immense caseload, ALJs must have the necessary discretion to – within reason – determine the needs of each individual case.

This cannot be done without an impartial administrative judge. So, although the proposals to allow depositions, increase discovery, and heighten evidentiary standards are positive steps and could be augmented by further judicial discretion to make decisions that fit the needs of the party, real reform remains elusive, and the Commission cannot provide a rule change to achieve it. To do so, administrative law judges must be removed from undue influence by the SEC. This requires congressional action, who alone can completely divorce the appointment and removal process from the agencies in which the judges work and remove administrative judges from the undue influences that diminish a defendant's right to due process.