
HOME COURT ADVANTAGE? THE SEC AND ADMINISTRATIVE FAIRNESS

KENNETH OSHITA *

TABLE OF CONTENTS

INTRODUCTION	880
I. THE SEC ADJUDICATORY SYSTEM	886
A. THE DODD-FRANK ACT OF 2010 AND THE SEC’S GUIDANCE ON FORUM SELECTION.....	886
B. SEC ADMINISTRATIVE PROCEEDINGS AND ALJS.....	889
C. SEC ENFORCEMENT ACTIONS IN ADMINISTRATIVE PROCEEDINGS AND FEDERAL DISTRICT COURT	892
D. PUBLIC AND POLITICAL REACTIONS.....	895
II. CONSTITUTIONAL ARGUMENTS CONSIDERED	897
A. NON-DELEGATION.....	897
B. SEVENTH AMENDMENT.....	899
C. EQUAL PROTECTION	900
D. DUE PROCESS.....	901
1. Separation of Functions	901
2. <i>Eldridge</i> Balancing Test	903
E. APPOINTMENT AND REMOVAL.....	905
III. FAIRNESS.....	906
A. FRAMEWORK.....	906
1. ALJ Bias	907
2. Adjudicatory Procedures	910
B. CONSTITUTIONAL ARGUMENTS REVISITED.....	911

* Managing Editor, *Southern California Law Review*, Volume 90. J.D., University of Southern California Gould School of Law (2017); B.A. Economics, University of Chicago (2012). Many thanks to Professors Sam Erman and Abby Wood for their invaluable inspiration, feedback, and support. I would also like to thank my parents, Susan Kurokawa and Cary Oshita, and my sister, Kelly Oshita, without whom none of this would be possible.

CONCLUSION.....	912
-----------------	-----

INTRODUCTION

Under the Dodd-Frank Act of 2010,¹ the Securities and Exchange Commission (SEC) was given expanded authority to bring enforcement actions against “any person” allegedly in violation of federal Securities and Exchange laws, with unhindered discretion as to whether these actions must be initiated before its own administrative law judges (ALJs) or in federal district courts.² Since then, pursuant to its enhanced prosecutorial power, the SEC has increased its number of administrative proceedings—cases it has brought “in house”—sparking considerable controversy over the SEC’s perceived “home court advantage”³ and stirring up a series of constitutional challenges to its adjudicatory system.⁴ So far, only a few such challenges

1. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

2. See 15 U.S.C. §§ 78u(d), 78u-1(a)(1) (2012). In expanding the SEC’s enforcement powers, Congress intended the SEC’s administrative actions to be “coextensive” with federal civil actions. H.R. REP. NO. 111-687, pt. 1, at 78 (2010) (“This section streamlines the SEC’s existing enforcement authorities by permitting the SEC to seek civil money penalties in cease-and-desist proceedings under Federal securities laws. The section provides appropriate due process protections by making the SEC’s authority in administrative penalty proceedings coextensive with its authority to seek penalties in Federal court. As is the case when a Federal district court imposes a civil penalty in a SEC action, administrative civil money penalties would be subject to review by a Federal appeals court.”).

3. See, e.g., Jean Eaglesham & Timothy W. Martin, *Federal Judge Rules SEC In-House Judges ‘Likely Unconstitutional’*, WALL ST. J. (Aug. 12, 2015), <http://www.wsj.com/articles/federal-judge-rules-sec-in-house-judges-likely-unconstitutional-1439392986>; 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>; Alison Frankel, *Skadden’s New Theory on Why SEC In-House Judges Are Unconstitutional*, REUTERS (Apr. 2, 2015), <http://blogs.reuters.com/alison-frankel/2015/04/02/skaddens-new-theory-on-why-sec-in-house-judges-are-unconstitutional>; Peter J. Henning, *Constitutional Challenges to S.E.C.’s Use of In-House Judges*, N.Y. TIMES (Oct. 5, 2015), <https://nyti.ms/1NgKASV> [hereinafter Henning, *Challenges*]; Peter J. Henning, *New Criticism Over the S.E.C.’s Use of In-House Judges*, N.Y. TIMES (July 20, 2015), <https://nyti.ms/1JsJ8pd> [hereinafter Henning, *Criticism*]; Peter J. Henning, *S.E.C. Finds Itself in a Constitutional Conundrum*, N.Y. TIMES (June 15, 2015), <https://nyti.ms/1MFZEVD> [hereinafter Henning, *Conundrum*]; Peter J. Henning, *S.E.C. Learns the Hard Way How Judges Are Like Umpires*, N.Y. TIMES (June 29, 2015), <https://nyti.ms/1KInvLw> [hereinafter Henning, *Umpires*]; David Zaring, *S.E.C.’s In-House Judges Not Too Tough, a Review Shows*, N.Y. TIMES (Aug. 31, 2015), <https://nyti.ms/1JsttqC>.

4. See, e.g., *Bennett v. SEC*, 151 F. Supp. 3d 632 (D. Md. 2015), *aff’d*, 844 F.3d 174 (4th Cir. 2016); *Ironridge Global IV, Ltd. v. SEC*, 146 F. Supp. 3d 1294 (N.D. Ga. 2015), *appeal dismissed*, (Sept. 27, 2016); *Duka v. SEC*, No. 15 Civ. 357 (RMB) (SN), 2015 U.S. Dist. LEXIS 124444 (S.D.N.Y. Sept. 17, 2015); *Timbervest, LLC v. SEC*, No. 1:15-CV-2106-LMM, 2015 U.S. Dist. LEXIS 132082 (N.D. Ga. Aug. 4, 2015); *Tilton v. SEC*, No. 15-CV-2472 (RA), 2015 U.S. Dist. LEXIS 85015 (S.D.N.Y. June 30, 2015); *Hill v. SEC*, 114 F. Supp. 3d 1297 (N.D. Ga. 2015), *vacated and remanded*, 825 F.3d 1236 (11th Cir. 2016); *Bebo v. SEC*, No. 15-C-3, 2015 U.S. Dist. LEXIS 25660 (E.D. Wis. Mar. 3, 2015), *aff’d*, 799 F.3d 765 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1500 (2016); *Chau v. SEC*, 72 F. Supp. 3d 417 (S.D.N.Y. 2014), *aff’d*, No. 15-461-cv, 2016 U.S. App. LEXIS 21510 (2d Cir. Dec. 2, 2016); *Jarkesy v. SEC*, 48 F. Supp. 3d 32 (D.D.C. 2014), *aff’d*, 803 F.3d 9 (D.C. Cir. 2015); *Gupta v. SEC*, 796 F. Supp.

have garnered any success,⁵ while all others have been dismissed by federal district and appellate courts for lack of jurisdiction.⁶ Despite the attention the SEC has received, the Supreme Court has yet to address the issue,⁷ and Congress similarly has been slow to react. A federal bill addressing the matter, entitled the “Due Process Restoration Act,” has been proposed, but the bill is still in its infancy and has yet to pass the House of Representatives, much less reach the Senate.⁸

This Note argues that the problem here is not the potential unconstitutionality of the SEC’s adjudicatory system, as the controversy so far suggests. Rather, the problem is uniquely sub-constitutional in that it pierces into issues of fairness that constitutional arguments seem able only to approximate. The constitutional claims brought against the SEC’s “home court advantage” cover a diverse and wide array of doctrines: non-delegation,⁹ the Seventh Amendment right to a jury,¹⁰ equal protection,¹¹ substantive and procedural due process,¹² and the appointment and removal of officers.¹³ Each of these arguments attempts to dismantle the SEC’s adjudicatory system by attacking the legitimacy of the SEC’s administration

2d 503 (S.D.N.Y. 2011); *Altman v. SEC*, 768 F. Supp. 2d 554 (S.D.N.Y. 2011), *aff’d*, 687 F.3d 44 (2d Cir. 2012).

5. See, e.g., *Hill*, 114 F. Supp. 3d at 1319–20 (granting plaintiff’s motion for preliminary injunction and therefore halting the SEC’s administrative proceeding against the plaintiff, on the grounds that SEC ALJs are “inferior officers” and that the SEC’s administrative proceedings were thus in violation of the Appointments Clause of the Constitution). See also *Ironridge*, 146 F. Supp. 3d at 1316–18; *Duka*, 2015 U.S. Dist. LEXIS 124444, at *60, *65.

6. See, e.g., *Jarkesy*, 803 F.3d at 30 (“We hold that the securities laws provide an exclusive avenue for judicial review that Jarkesy may not bypass by filing suit in district court. We therefore affirm the judgment of the district court dismissing the case for lack of subject-matter jurisdiction.”); *Bebo*, 799 F.3d at 775 (“The district court’s judgment dismissing the case for lack of subject matter jurisdiction is AFFIRMED.”).

7. See *Bebo*, 136 S. Ct. 1500 (2016) (denying a petition for writ of certiorari).

8. The bill in essence provides an escape route for persons against whom the SEC has initiated administrative enforcement proceedings, such that targeted persons can compel the SEC to instead bring the enforcement action in federal district court. Due Process Restoration Act of 2015, H.R. 3798, 114th Cong. § 40 (2015) (“In the case of any person who is a party to a proceeding brought by the Commission under a securities law, to which section 554 of title 5, United States Code, applies, and against whom an order imposing a cease and desist order and a penalty may be issued at the conclusion of the proceeding, that person may, not later than 20 days after receiving notice of such proceeding, and at that person’s discretion, require the Commission to terminate the proceeding. . . . If a person requires the Commission to terminate a proceeding pursuant to subsection (a), the Commission may bring a civil action against that person for the same remedy that might be imposed.”).

9. See *infra* Part II.A.

10. See *infra* Part II.B.

11. See *infra* Part II.C.

12. See *infra* Part II.D.

13. See *infra* Part II.E.

itself.¹⁴ Though these arguments seem to resonate with the outcries of injustice that have permeated the industry, they do not actually challenge the aspects of the SEC's adjudicatory system that have upset plaintiffs—the perception that SEC ALJs are biased or that the SEC's administrative proceedings are “rigged” and unfair.¹⁵ Instead, the arguments are both diverse and generalized, suggesting that the problem at hand is in some ways inarticulable; plaintiffs, it would seem, are hard-pressed to find a clear and precise constitutional critique. Importantly, upon closer examination, these constitutional challenges are not only inaccurate but also meritless. Thus, despite popular opinion, the supposedly broken SEC system is likely constitutional.¹⁶

The main thrust of this Note, therefore, is to look beyond the constitutionality of the SEC's adjudicatory system and to reframe the discussion by directing our attention toward the real issue: fairness. At the heart of the controversy over the SEC's adjudicatory system is the perception that the agency's ALJs are biased in favor of the SEC and that the administrative process provides fewer procedural safeguards to defendants than federal civil actions. These criticisms assume a preference for federal courts¹⁷ but with limited explanations as to why federal courts (judges and procedures alike) are more fair than administrative ones.¹⁸

14. Procedurally, these constitutional claims have also evoked strong questions about standing and federal jurisdiction, questions which have not only been raised to combat the constitutional challenges but have also been used to successfully delay resolution of the controversy. *See, e.g.,* *Bebo v. SEC*, 799 F.3d 765, 775 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1500 (2016) (“[T]he expense and disruption of defending oneself in an administrative proceeding does not automatically entitle a plaintiff to pursue judicial review in the district courts, even when those costs are ‘substantial.’ . . . If the SEC renders an adverse final decision, judicial review awaits in the court of appeals. The district court’s judgment dismissing the case for lack of subject matter jurisdiction is AFFIRMED.”).

15. *See infra* Part III.

16. *See infra* Part III.

17. The assumption that federal judges are impartial and unbiased, unlike the allegedly biased administrative judges of the SEC, or even that federal district courts afford “better” procedural safeguards to litigants than formal administrative adjudication, is an assumption challenged by this Note, but it is not its focus. Further study into the relative biases and protections exhibited in district court over administrative agencies, while interesting, is a topic for another day.

18. Plaintiffs, for example, highlight what the SEC's administrative system lacks in comparison to Article III courts and equate these differences with deprivations of their rights, as if they are always entitled to only the process provided in federal court. *See, e.g.,* *Bebo v. SEC*, No. 15-C-3, 2015 U.S. Dist. LEXIS 25660, *2 (E.D. Wis. Mar. 3, 2015) (“This arrangement, according to *Bebo*, violates equal protection and due process because it gives the SEC unfettered discretion through its choice of forum to provide (if federal) or withhold (if administrative) a citizen's Seventh Amendment jury trial right for the same conduct and the same remedies. *Bebo* also argues that the SEC's choice of an administrative forum violates her procedural due process rights because certain key witnesses—various members of ALC's Board of Directors—are Canadian citizens beyond the subpoena power of the SEC ALJ.”).

Such criticisms are not new. They echo much of the controversy that has surrounded administrative agencies since their inception.¹⁹ Administrative agencies have historically been seen as dangers to democracy, as being susceptible to tyranny by the majority and arbitrary government because of their mixture of prosecutorial, legislative, and judicial functions.²⁰ Consequently, the administrative state that we know and expect today can be seen as a response to that fear: agencies evolved around the belief that they should abide by the “rule of law” and conform to “social rationality.”²¹ To this end, as manifested in the Administrative Procedure Act of 1940, agencies now have formally separated functions between “prosecutor and judge,”²² they are, importantly, subject to judicial review;²³ and their processes are required to “approximate[] the structure, procedures, and logic of the judiciary.”²⁴ The fairness, thus, that the public demands of the SEC today is an entirely expected and logical reaction when framed against this historical backdrop.²⁵

By contrast, Professor David Zaring, one of the few scholars to have written about the SEC’s constitutional conundrum, sees the current issue as a conflict of perspective, as a clashing of “worldviews” between the adjudicatory justice offered by the SEC’s administrative proceedings and the adjudicatory justice offered by federal district courts.²⁶ In particular, Zaring observes that the controversy is essentially created out of a desire for equity: on the one hand, “routinized and procedurally minded” ALJs that are interested in “bureaucratic regularity” do not and cannot exercise equitable relief for the parties brought before them, while on the other hand, duly confirmed federal district judges are necessarily interested in equity and do just that.²⁷ Though Zaring succinctly highlights the equity-oriented, functional differences between administrative and federal judges in relation

19. See generally DANIEL R. ERNST, *TOCQUEVILLE’S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900–1940* (2014).

20. *Id.* at 2.

21. *Id.* at 2, 138, 142.

22. *Id.* at 105.

23. *Id.* at 105–06 (“[J]udicial review . . . was the best way to prevent administrators from abusing their discretion.”).

24. *Id.* at 5.

25. Such expectations of a legalistic and judicially controlled administration have also been counterbalanced by the recognition that the unique combination of powers held by agencies was “worth braving because courts,” as an alternative to administrative agencies, are “unable to handle certain classes of disputes,” and because there is value in the expertise and efficiency of agencies, as compared to “generalist courts and party-dominated legislatures,” *Id.* at 98, 106. These notions should continue to inform our understanding of the administrative state today, as discussed below.

26. David Zaring, *Enforcement Discretion at the SEC*, 94 TEX. L. REV. 1155, 1217 (2016).

27. *Id.*

to the current controversy, he does not elaborate on the deeper sense of unfairness triggered by these differences, nor does he evaluate how fairness should be approached, considered, and ultimately understood in this context.²⁸ Zaring's insightful but abbreviated analysis reflects a shortcoming in the wider discourse surrounding the SEC controversy: namely, that there has been a clear underdevelopment of the implicated issue of fairness and its measure.²⁹

This Note posits that the fairness issue underlying this dispute, in its simplest form, is rooted in the polarity between an *individual* view of fairness and a *collective* view of fairness—that is, how fairness is viewed by the person targeted by the SEC in an administrative proceeding and how fairness is viewed by Congress and the SEC. The individual disagrees with the government over the “fair” level of adjudicator partiality (whether for an ALJ or federal judge), and the individual disagrees with the government over the “fair” level of procedural safeguards in adjudicatory proceedings (whether in an administrative forum or Article III forum). These disagreements then manifest in constitutional rhetoric, capturing ideas of fairness that roughly translate into a balancing of individual rights and due process with administrative efficiency and consistency. In reality, the conversation quickly turns from an intuitive concern about fairness to an elaborate fight over the legitimacy of the SEC and its statutory mandates.³⁰

28. Zaring quickly dismisses these equity-difference concerns by noting the ability of ALJs to remain impartial and detached from the agency, emphasizing the lack of evidence suggesting that SEC ALJs are “not independent.” *Id.* at 1195. As Zaring describes, “perhaps to indicate his independence, one SEC ALJ has announced that he will apply the *Newman* rule to his insider trading cases—despite the fact that his agency believes *Newman* to have been wrongly decided.” *Id.* at 1217.

29. Responding to Zaring, Professor Gideon Mark criticizes Zaring's analysis for failing to consider the full constitutional arguments against the SEC (specifically that the “SEC's appointment of its ALJs violates the Appointments Clause of Article II of the United States Constitution”) and failing to consider the extent to which the SEC's procedural unfairness can be reduced. Gideon Mark, Response, *SEC Enforcement Discretion*, 94 TEX. L. REV. SEE ALSO 261, 263 (2016). Mark's analysis, however, much like Zaring's, does not break from the general trend of treating the issue with the SEC's adjudicatory system as a byproduct of constitutionalism and does not, therefore, delve into the fairness issues that motivate his constitutional concerns.

30. Interestingly, the constitutional arguments seem less concerned with fairness at the SEC and more concerned with the SEC's legitimacy, at least with regard to the narrow instance of its adjudicatory discretion. The two concepts—fairness and legitimacy—are closely related and touch on a greater theoretical discussion about the authority of the administrative state. Professor Jerry Mashaw describes “three different models of legitimation” of agency discretion, JERRY L. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* 16 (1985), each of which relates to the various critiques directed at the SEC. The first model, which he calls the “transmission belt explanation of administrative legitimacy,” is based on the validity of agencies to act on behalf of legislators, who are themselves acting on behalf of public citizens. *Id.* The non-delegation, appointment, and removal arguments raised against the statutory construction of the Dodd-Frank Act respond to this idea of legitimacy, finding the SEC's adjudicatory design illegitimate at its statutory base. The second model is the “expertise model” and is based on the

This constitutionally oriented and highly legal battle, however, does not address the fairness that is at the issue's core. Even due process arguments are fundamentally misguided. Professor D. J. Galligan observes that "due process, as developed by the Supreme Court, does not mean a general duty to treat [a] person fairly; it means only that decisions about certain, protected interests be in accordance with the law."³¹ Thus, constitutional arguments, like those here, are bound to the law at hand and can therefore only address fairness if fairness is embedded in the law itself. While it is true to some extent that fairness is implicitly considered in constitutional doctrines, it is not generally or practically true in this instance.³² As will be discussed, the constitutional arguments thinly address our fairness concerns, and fairness must now be deliberately considered.

Part I of this Note begins by summarizing the laws that motivate and govern the current SEC controversy. Part I next explains the SEC's adjudicatory and enforcement systems and reviews the various reactions, in the media and otherwise, that have given shape to the public outrage with the SEC. Part II then evaluates the constitutional arguments that have been raised against the SEC and ultimately rejects them, supporting the conclusion that the SEC's adjudicatory system is likely constitutional despite the many allegations that it is unfair. Part III addresses this conundrum—how an otherwise constitutional system can be seen or felt as unfair—providing a framework for understanding fairness in relation to the judicial and

idea that agencies are legitimized by their role as subject-matter experts with the training or experience to make better decisions, such that, more generally, "[a]dministrative governance is . . . an organizational form that recognizes the necessity for combining the locus of decision with appropriate expertise." *Id.* at 18. The due process and Seventh Amendment arguments made attacking the procedures offered by formal adjudication attend to this model by honing in on the possible inability of administrative adjudicators to properly conduct fair trials. Finally, the third model, the "participatory approach," grounds administrative legitimacy in the procedural guarantees embedded in agencies that allow citizens to effectively participate in the formation of administrative policies and decisions. *Id.* at 22–23. The equal protection and due process arguments focusing on the abusive discretion of the SEC incorporate this idea of legitimacy by undermining the sense of individualism and political egalitarianism embedded in this notion of participatory government.

31. D. J. GALLIGAN, *DUE PROCESS AND FAIR PROCEDURES: A STUDY OF ADMINISTRATIVE PROCEDURES* 197 (1996). Galligan further notes that American courts operate by looking at "the interest which triggers due process" as also determining "the process that is due." *Id.* at 198. Accordingly, to determine due process according to notions of fair treatment that "draw on other standards besides accurate application of the law" would be inappropriate in American constitutionalism. *Id.* Thus, under Galligan's view, it would seem absurd for this Note to propose that the constitutional issues surrounding the SEC be considered according to values not fully expressed by the law. However, as this Note suggests, considering such inadequately expressed values is critical; understanding and developing a clear framework for the underlying values at play provides important insight into what should be a stronger constitutional assessment.

32. *See infra* Part II.D.

procedural biases at the heart of this controversy. Finally, the Note concludes with parting thoughts.

I. THE SEC ADJUDICATORY SYSTEM

A. THE DODD-FRANK ACT OF 2010 AND THE SEC'S GUIDANCE ON FORUM SELECTION

In 2010, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act, commonly referred to as the Dodd-Frank Act of 2010.³³ The act allows the SEC to initiate administrative proceedings (seeking monetary penalties) against “any person.”³⁴ Because “any person” can include persons associated with entities unregistered with the SEC, the Act brings into the SEC’s enforcement jurisdiction entities that it formerly could only go after in federal district court.³⁵ Prior to the act, under the Securities Enforcement Remedies and Penny Stock Reform Act of 1990,³⁶ the enforcement actions available to the SEC were limited in that administrative proceedings could only be used against entities directly regulated by the SEC, such as brokers and investment advisers; enforcement actions against non-regulated entities could only be carried out in federal district court.³⁷ Thus, the Dodd-Frank Act expanded the SEC’s enforcement

33. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

34. 15 U.S.C. § 78u(d) (2012). *See* 15 U.S.C. § 78u-2 (“In any proceeding instituted pursuant to sections 78o(b)(4), 78o(b)(6), 78o-6, 78o-4, 78o-5, 78o-7, or 78q-1 of this title against any person, the Commission or the appropriate regulatory agency may impose a civil penalty if it finds, on the record after notice and opportunity for hearing, that such penalty is in the public interest and that such person [violated the Securities and Exchange Laws].”).

35. The statute also allows the SEC to seek cease-and-desist remedies against previously off-limits, unregulated entities. *See* Zaring, *supra* note 26, at 1165 n.43 (“The statute broadened the SEC’s authority to impose industry-wide suspensions, which prohibit securities professionals who are found to have violated any aspect of securities laws from joining any regulated entity, including brokers, dealers, investment advisors, participants in the municipal securities markets, transfer agents, and rating agencies.”).

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

37. *See* Gibson, Dunn & Crutcher LLP, *Client Alert: The Dodd-Frank Act Reinforces and Expands SEC Enforcement Powers*, GIBSON DUNN (July 21, 2010), <http://www.gibsondunn.com/publications/pages/Dodd-FrankActReinforcesAndExpandsSECEnforcementPowers.aspx> (“The SEC first received broad authority to seek or impose civil money penalties in enforcement actions as a part of the Securities Remedies and Penny Stock Reform Act of 1990. Perceiving that such quasi-criminal remedies should not be imposed on persons who did not voluntarily choose to subject themselves to the SEC’s jurisdiction, Congress limited the SEC’s own authority to impose such remedies in administrative actions to persons who were associated with regulated enterprises—brokerage firms, investment advisers, investment companies and other registered entities. For all other persons, the SEC was required to seek an order from a federal district court in a civil action, triable by jury. Dodd-Frank washes away this distinction. Instead, Section 929P of the Act amends Section 8A of the Securities Act, Section 21B(a) of the Securities

powers by providing it with the opportunity to bring more actions “in house,” while also not foreclosing the opportunity to bring the same actions in federal district court instead. The Act, however, failed to indicate when and why one forum should be pursued over the other.

Hence, in choosing between forums in which to bring its enforcement actions—either as administrative proceedings or civil actions—the SEC enjoys considerable discretion, as “[n]othing in Dodd-Frank or the securities laws explicitly constrains the SEC’s discretion in choosing between a court action and an administrative proceeding when both are available.”³⁸ In practice, the SEC uses both forums,³⁹ and the SEC has issued internal guidance on the selection between administrative and civil proceedings.⁴⁰ Its guidance on forum selection was promulgated without Notice and Comment,⁴¹ and it lists non-exhaustive criteria that the agency’s Division of Enforcement may consider, at its discretion, when selecting in-house proceedings over civil ones or vice versa.⁴² In short, the SEC chooses forums with the efficiency and effectiveness of the forum in mind, considering where it can proceed quickly and with least cost, where relevant remedies exist, and where there is the most relevant expertise.⁴³ Intuitively, this seems that it would often result in preferring administrative proceedings to federal civil actions.

As provided in the SEC’s internal guidance, the SEC first considers

Exchange Act, Section 9(d)(1) of the Investment Company Act, and Section 203(i)(1) of the Investment Advisers Act to permit the imposition of civil money penalties in addition to cease and desist orders.”).

38. Jarkesy v. SEC, 803 F.3d 9, 12 (D.C. Cir. 2015).

39. STEPHEN CHOI ET AL., SEC ENFORCEMENT ACTIVITY AGAINST PUBLIC COMPANY DEFENDANTS: FISCAL YEARS 2010–2015, at 6 (2016) (“For fiscal years 2010 through 2013, the SEC brought more than 65 percent of its actions against public company defendants in civil court,” while “[i]n FY 2015, the SEC brought 76 percent of its actions against public company defendants as administrative proceedings.”).

40. See U.S. SEC. & EXCH. COMM’N, DIVISION OF ENFORCEMENT APPROACH TO FORUM SELECTION IN CONTESTED ACTIONS, <https://www.sec.gov/divisions/enforce/enforcement-approach-forum-selection-contested-actions.pdf> [hereinafter “SEC GUIDANCE”].

41. The SEC’s guidance may be attacked under *Appalachian Power Co. v. Environmental Protection Agency* as being an improperly promulgated substantive agency rule requiring Notice and Comment under § 553 of the Administrative Procedures Act. See *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1021, 1024 (D.C. Cir. 2000). Normally, such guidance documents are exempt from rulemaking procedures because they lack “legal effect.” See *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993). But an argument may be made that the guidance here does indeed have legal effect on those affected by the SEC’s decision to pursue actions in administrative proceedings, without all the procedural safeguards of the federal courts. Regardless, the agency’s statutory authority and prosecutorial discretion would provide considerable protection to the agency on this matter, as explored in Part III, but the availability of this argument is worth mentioning.

42. SEC GUIDANCE, *supra* note 40, at 1–4.

43. *Id.*

“[t]he availability of the desired claims, legal theories, and forms of relief in each forum,” as some claims and forms of relief are only available in one forum or the other.⁴⁴ Second, the agency may consider “[w]hether any charged party is a registered entity or an individual associated with a registered entity.”⁴⁵ This is in part because certain remedies are only available against registered entities in the administrative forum,⁴⁶ but it is also because seeking remedies in administrative proceedings is a “more efficient and effective use of limited agency resources.”⁴⁷ Moreover, “Administrative Law Judges and the Commission develop extensive knowledge and experience concerning issues that frequently arise in matters involving registered entities or associated persons,” making the administrative forum more desirable for these kinds of parties.⁴⁸

Third, the SEC considers “[t]he cost-, resource-, and time-effectiveness of litigation in each forum” because, “[i]n general, hearings are held more quickly in contested administrative actions than in contested federal court actions,” which “may allow the Division to use the Commission’s limited resources more effectively.”⁴⁹ Still, recognizing the effectiveness of civil actions, the guidance notes that the “additional time and types of pre-trial discovery available in federal court may entail both costs and benefits, which should be weighed under the facts and circumstances of a case.”⁵⁰

Fourth and finally, the SEC considers the “[f]air, consistent, and effective resolution of securities law issues and matters.”⁵¹ The guidance specifically emphasizes the importance of the expertise of the SEC and its ALJs in regards to “federal securities laws and complex or technical securities industry practices or products.”⁵² Nonetheless, the guidance also notes that, “where application of state law or other specialized areas of

44. *Id.* at 1. The guidance document includes as examples “charges of failure to supervise or causing another person’s violation,” which “can only be pursued in the administrative forum,” and “liability as a controlling person or as a relief defendant,” which “can only be pursued in district court actions.” *Id.*

45. *Id.* at 2.

46. *Id.* The guidance document includes as an example “associational bars and suspensions,” which “can only be imposed in an administrative proceeding.” *Id.*

47. *Id.*

48. *Id.*

49. *Id.* The guidance document specifically identifies that administrative actions allow for “the presentation of testimony from witnesses who have a fresher recollection of relevant events” and “more timely public airing, based on evidence offered by all parties to the proceeding, of the facts and circumstances of the conduct and practices at issue in a matter.” *Id.*

50. *Id.* at 3.

51. *Id.*

52. *Id.*

federal law is integral to the matter, district court may be appropriate.”⁵³

B. SEC ADMINISTRATIVE PROCEEDINGS AND ALJS

Administrative proceedings within the SEC play by their own rules, literally. They follow the SEC’s “Rules of Practice,” which themselves abide by the procedures set forth in the Administrative Procedure Act.⁵⁴ Hence, SEC administrative proceedings (interchangeably referred to as adjudications) differ from federal civil actions because the Federal Rules of Civil Procedure and the Federal Rules of Evidence do not apply.⁵⁵ Hearsay, for example, is admissible in an administrative proceeding; by contrast, it is prohibited in federal civil actions.⁵⁶ Administrative proceedings are also conducted on an expedited timeline: an initial hearing must take place no more than sixty days after notice is issued instituting proceedings, unless respondents consent to an extension.⁵⁷ And a decision must be issued by the ALJ within ten months of the date of the order instituting proceedings, which is considerably faster than most civil litigations in federal court.⁵⁸ Finally, discovery is limited in administrative proceedings, there is no trial by jury, and the burden of proof for the SEC is lower.⁵⁹

53. *Id.* at 4. The guidance document also notes that issues that “may facilitate development of the law” may be appropriate for decision by the Commission. *Id.* at 3.

54. 17 C.F.R. §§ 201.100–201.900 (2016). *See id.* § 201.111 (“No provision of these Rules of Practice shall be construed to limit the powers of the hearing officer provided by the Administrative Procedure Act, 5 U.S.C. 556, 557.”).

55. *See id.* § 201.100(a); Zaring, *supra* note 26, at 1166 (“The ALJ serves as the finder of fact and of law; there is no jury. The Federal Rules of Civil Procedure and the Federal Rules of Evidence do not apply.”).

56. *See* Douglas Davison et al., *Litigating with—and at—the SEC*, 48 REV. SEC. & COMMODITIES REG. 103, 110 (2015) (“Unlike in federal court, hearsay is admissible in SEC administrative proceedings and ‘can provide the basis for findings of violation, regardless of whether the declarants testify.’” (citing Guy P. Riordan, 2009 SEC LEXIS 4166, at *57 (Dec. 11, 2009)). *See also* STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES 515 (7th ed. 2011) (“Under the APA, the Federal Rules of Evidence do not apply in formal adjudications. Rather all relevant, nonduplicative evidence is admissible.” (citing Administrative Procedure Act § 556(d), 5 U.S.C. § 556(d))).

57. 15 U.S.C. § 78u-3(b) (2012).

58. 17 C.F.R. § 201.360 (“In the order instituting proceedings, the Commission will specify a time period in which the hearing officer’s initial decision must be filed with the Secretary. In the Commission’s discretion, after consideration of the nature, complexity, and urgency of the subject matter, and with due regard for the public interest and the protection of investors, this time period will be either 120, 210 or 300 days from the date of service of the order.”); SEC GUIDANCE, *supra* note 40, at 2 (“In general, hearings are held more quickly in contested administrative actions than in contested federal court actions.”).

59. *See* Zaring, *supra* note 26, at 1165–69. Regarding standards of proof, however, at a minimum the Supreme Court has interpreted the APA to require as a default a “preponderance of the evidence.” BREYER ET AL., *supra* note 56, at 516.

In response to the recent firestorm of allegations that the SEC's administrative proceedings lack procedural fairness and fail to sufficiently protect individual parties, the SEC updated its Rules of Practice in 2016.⁶⁰ The amended rules "provide parties with additional opportunities to conduct depositions and add flexibility to the timelines of [the SEC's] administrative proceedings, while continuing to promote the fair and timely resolution of the proceedings."⁶¹ SEC administrative proceedings now offer even more procedural safeguards that align with the procedures used in federal courts, placating some, but not all, of the discontent surrounding the SEC.⁶² The rules governing the power of SEC ALJs, for instance, have remained unchanged.

SEC ALJs make initial decisions on matters presented in administrative proceedings.⁶³ They are employed by the SEC but are independent of the agency in that they are given career appointments without time limits, they are salaried according to statute, and they are removable only for good cause.⁶⁴ SEC ALJs are granted the powers under its Rules of Practice but exercise considerable authority as the overseer of the administrative hearing; they thus enjoy "many of the powers that trial judges have."⁶⁵ Specifically their powers include: administering oaths and affirmations; issuing

60. See Amendments to the Commission's Rules of Practice, 81 Fed. Reg. 50211 (July 29, 2016) ("The [SEC] is adopting amendments to its Rules of Practice. These changes concern, among other things, the timing of hearings in administrative proceedings, depositions, summary disposition, and the contents of an answer.").

61. Press Release, U.S. Sec. & Exch. Comm'n, SEC Adopts Amendments to Rules of Practice for Administrative Proceedings (July 13, 2016), <https://www.sec.gov/news/pressrelease/2016-142.html>.

62. Joan E. McKown et al., *SEC Publishes Final Rules Amending the Rules of Practice for Administrative Proceedings*, JONES DAY (July 19, 2016), <http://www.jonesday.com/sec-publishes-final-rules-amending-the-rules-of-practice-for-administrative-proceedings-07-19-2016> ("The Commission's amended rules of practice for [administrative proceedings] are a step in the right direction, but they do not go nearly far enough to address the concerns underlying the continuing constitutional and legislative challenges to the Commission's administrative process.").

63. 17 C.F.R. § 201.360 ("Unless the Commission directs otherwise, the hearing officer shall prepare an initial decision in any proceeding in which the Commission directs a hearing officer to preside at a hearing, provided, however, that an initial decision may be waived by the parties with the consent of the hearing officer pursuant to § 201.202.").

64. 5 C.F.R. §§ 930.204, 930.211. See also U.S. Sec. & Exch. Comm'n, *Office of Administrative Law Judges*, U.S. SEC. & EXCH. COMM'N (Jan. 26, 2017), <http://www.sec.gov/alj> ("Administrative law judges serve as independent adjudicators. Under the Administrative Procedure Act and the Commission's Rules of Practice, administrative law judges conduct public hearings at locations throughout the United States in a manner similar to non-jury trials in the federal district courts. Among other actions, they issue subpoenas, hold prehearing conferences, and rule on motions and the admissibility of evidence. Following the hearing, the parties may submit briefs, as well as proposed findings of fact and conclusions of law. The administrative law judge prepares an initial decision that includes factual findings, legal conclusions, and, if appropriate, orders relief.").

65. Zaring, *supra* note 26, at 1167.

subpoenas; making rulings on the admissibility of evidence and offers of proof; regulating the conduct of parties and counsel during proceedings; holding prehearing and other conferences; recusing; ordering that the record state each respondent against whom evidence will be offered; considering and ruling on all procedural and other motions; preparing initial decisions; reopening any hearing prior to the filing of an initial decision or prior to the time fixed for the filing of final briefs with the Commission; and informing the parties of alternative means of dispute resolution.⁶⁶ Though they are not allowed to hear counterclaims against the SEC, they are still free to consider other “constitutional and common law issues and defenses.”⁶⁷ They therefore essentially oversee the administrative proceeding as if they were trial judges, subject to the administrative limitations imposed upon them by statute and internal regulations.⁶⁸

After an ALJ decision is reached, it can be appealed to the Commission, who can affirm, deny, or remand the decision for further proceedings.⁶⁹ The decision of the ALJ is reviewed *de novo* by the Commission, and additional evidence may be reviewed at the Commission’s discretion.⁷⁰ After the Commission’s review is completed, the decision of the Commission can be appealed to a federal appeals court.⁷¹ The decision of the SEC is at that point reviewed according to various standards established in administrative law; for example, questions of fact decided by the ALJ, and accepted by the

66. 17 C.F.R. § 201.111.

67. Zaring, *supra* note 26, at 1166 (citing *McKart v. United States*, 395 U.S. 185, 194–95 (1969) (“[N]otions of administrative autonomy require that the agency be given a chance to discover and correct its own errors.”)).

68. *See id.* at 1167.

69. 17 C.F.R. § 201.410 (“In any proceeding in which an initial decision is made by a hearing officer, any party, and any other person who would have been entitled to judicial review of the decision entered therein if the Commission itself had made the decision, may file a petition for review of the decision with the Commission.”).

70. *See id.* § 201.452 (“Upon its own motion or the motion of a party, the Commission may allow the submission of additional evidence. A party may file a motion for leave to adduce additional evidence at any time prior to issuance of a decision by the Commission. Such motion shall show with particularity that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence previously. The Commission may accept or hear additional evidence, may remand the proceeding to a self-regulatory organization, or may remand or refer the proceeding to a hearing officer for the taking of additional evidence, as appropriate.”).

71. 5 U.S.C. § 704 (2012) (“Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.”).

Commission, are reviewed by a federal court of appeals under the “substantial evidence” standard.⁷² Questions of law, by contrast, may be reviewed under the *Chevron* doctrine, requiring the court to treat the agency with considerable deference when the agency reasonably interprets its own organic statute.⁷³

C. SEC ENFORCEMENT ACTIONS IN ADMINISTRATIVE PROCEEDINGS AND FEDERAL DISTRICT COURT

The SEC’s expanded enforcement authority under the Dodd-Frank Act of 2010 led to a percentage increase in the number of administrative actions filed by the SEC, as opposed to the number of civil actions brought by the SEC during the same time period.⁷⁴ A recent study jointly conducted by the NYU Pollack Center for Law & Business and Cornerstone Research, led by Professors Stephen Choi, Sara E. Gilley, and David F. Marcus, showed a disparity in the number of administrative proceedings initiated by the SEC against public company defendants.⁷⁵ The study draws on data gathered in the Securities Enforcement Empirical Database (SEED), which contains all SEC actions filed against public company defendants.⁷⁶ The study concludes that: (1) between the 2010 and 2013 fiscal years, “the SEC brought more than 65 percent of its actions against public company defendants in civil court”⁷⁷; (2) in fiscal years 2014 and 2015, there was a “dramatic shift in the enforcement venue for public company defendants [because] the SEC’s venue of choice became its administrative court”⁷⁸; and (3) in the 2015 fiscal year, “the SEC brought 76 percent of its actions against public company defendants as administrative proceedings.”⁷⁹

72. See *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (“[S]ubstantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.’ Accordingly, it ‘must do more than create a suspicion of the existence of the fact to be established. . . . [I]t must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.’”) (citations omitted).

73. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 844 (1984).

74. CHOI, *supra* note 39, at 1–6 (2016).

75. *Id.*

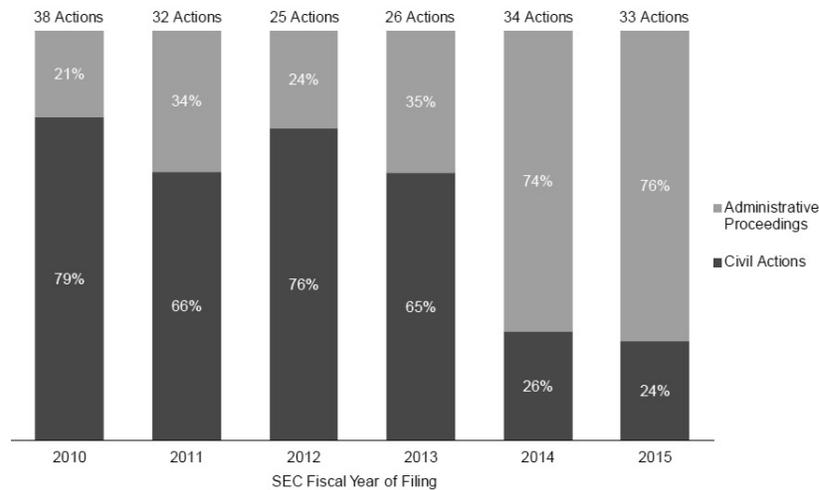
76. *Id.* at 1. Public companies are those traded on the major U.S. exchanges, as captured by the Center for Research in Securities Prices U.S. Stock Database, which includes data from the NYSE, NYSE MKT, NASDAQ, and NYSE Arca stock exchanges. *Id.* at 1 & n.1.

77. *Id.* at 6.

78. *Id.*

79. *Id.*

FIGURE 1. Distribution of Public Company Actions by Enforcement Venue, FY 2010–FY 2015⁸⁰

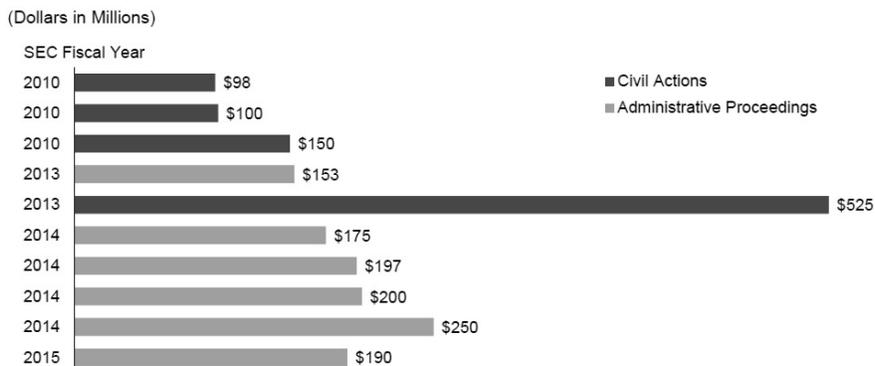


Source: Securities Enforcement Empirical Database (SEED)
 Note: Relief defendants and nonpublic subsidiaries are not considered public company defendants.

The study provides as part of its findings Figure 1, entitled “Distribution of Public Company Actions by Enforcement Venue, FY 2010–FY 2015.” Figure 1 demonstrates the stark change in enforcement behavior by the SEC regarding forum selection, exemplifying a proportional increase in the number of administrative proceedings it has initiated as compared to civil actions, at least since 2014. At the same time, the successes achieved by the SEC in administrative proceedings also increased, as demonstrated in Figure 2, entitled “Distribution of Public Company Actions by Enforcement Venue, FY 2010–FY 2015.”

80. *Id.*, fig. 4.

FIGURE 2. Distribution of Public Company Actions by Enforcement Venue, FY 2010–FY 2015⁸¹

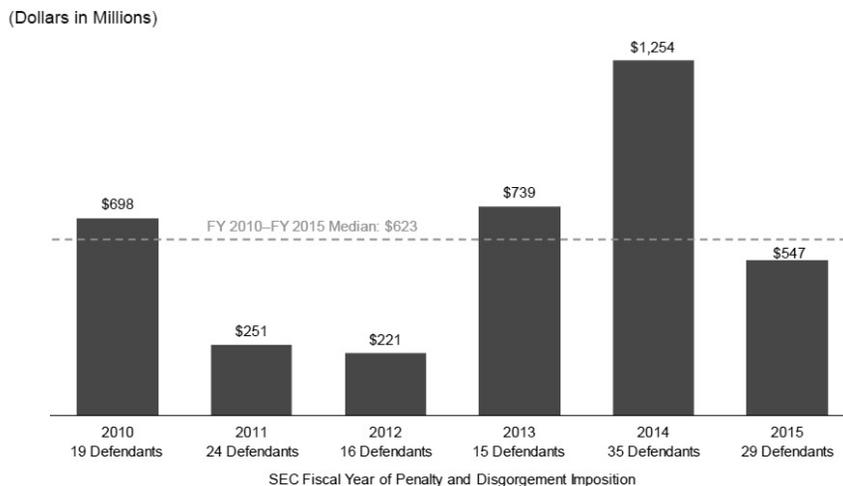


Source: Securities Enforcement Empirical Database (SEED)

Note: Total penalties and disgorgements exclude monetary penalties and disgorgements shared by multiple defendants. Relief defendants and nonpublic subsidiaries are not considered public company defendants.

The monetary success was also captured by the study in Figure 3, entitled “Total Monetary Penalties and Disgorgements Imposed on Public Company Defendants, FY 2010–FY 2015.”

FIGURE 3. Total Monetary Penalties and Disgorgements Imposed on Public Company Defendants, FY 2010–FY 2015⁸²



Source: Securities Enforcement Empirical Database (SEED)

Note: Total monetary penalties and disgorgements exclude monetary penalties and disgorgements shared by multiple defendants. Relief defendants and nonpublic subsidiaries are not considered public company defendants.

81. *Id.* at 10, fig. 8.

82. *Id.* at 9, fig. 7.

The clearly demonstrated shift by the SEC in bringing its enforcement actions in house, rather than to federal courts, and the evident increase in monetary success, was sharply noted and commented on by the public in 2015, as discussed below.

D. PUBLIC AND POLITICAL REACTIONS

Though the first constitutional challenges to the SEC's increased enforcement capacity began in 2011,⁸³ the public frenzy over the SEC's adjudicatory system took off in 2015 with a series of high-profile cases that were publicized in the media as examples of the SEC's unfair "home court advantage."⁸⁴ The articles focused on the purported, and demonstrable, benefit enjoyed by the SEC as it continued to not only bring more cases in house but also achieve more judgments in its favor through its administrative enforcement actions.⁸⁵ Public outrage at such undemocratic unfairness found validation in federal district judges who ruled that aspects of the SEC's adjudicatory system were unconstitutional, fueling even sardonic media commentary about how the SEC was learning "the hard way that having an unfavorable umpire can hurt."⁸⁶

Public sentiment, however, has not fully engaged with the intricacies of the constitutional arguments levied against the SEC, glossing over the differences between the perceived unfairness of the SEC's adjudicatory system and the largely collateral ways that the system was challenged in court. For example, in *Hill v. SEC*, Judge Leigh Martin May of the United States District Court for the Northern District of Georgia is described by the *New York Times* as finding "that the S.E.C.'s method of appointing its administrative judges violated the constitutional requirement that 'officers' are supposed to be appointed by the president of the United States or the head of an agency."⁸⁷ However, the status of official appointment is not the actual

83. See *Gupta v. SEC*, 796 F. Supp. 2d 503 (S.D.N.Y. 2011).

84. See, e.g., *Eaglesham & Martin*, *supra* note 3; *Eaglesham*, *supra* note 3; *Frankel*, *supra* note 3; *Henning, Challenges*, *supra* note 3; *Henning, Criticism*, *supra* note 3; *Henning, Conundrum*, *supra* note 3; *Henning, Umpires*, *supra* note 3; *Zaring*, *supra* note 3.

85. See *Eaglesham*, *supra* note 3 ("[The agency prevails against around 90% of defendants when it sends cases to its administrative law judges.]). See also *CHOI*, *supra* note 39, at 9 ("The large increase in [fiscal year] 2014 monetary penalties and disgorgements imposed against public company defendants was driven by *administrative proceedings* against four defendants, which together accounted for more than 65 percent of the [fiscal year] 2014 total dollar amount.") (emphasis added).

86. *Henning, Umpires*, *supra* note 3.

87. *Id.* The *New York Times* here overstates the holding of *Hill*. Judge May found that because "Plaintiff has proved a substantial likelihood of success on the merits of his claim that the SEC has violated the Appointments Clause as well as the other factors necessary for the grant of a preliminary

concern brought up in news articles discussing *Hill*; the issue is instead focused on the SEC's "home field" advantage and, specifically, SEC "administrative proceedings that provide only limited discovery and no right to a jury for the defendants."⁸⁸

This wave of constitutional litigation and media controversy also coincided with the introduction of a federal Congressional bill, entitled the "Due Process Restoration Act."⁸⁹ Drafted by the House in October 2015, the bill allows persons against whom the SEC has initiated in-house administrative proceedings to compel the SEC to instead bring the enforcement action in federal district court.⁹⁰ A report issued by the House in support of the bill states that the need for legislation arises from the imbalance between procedures used in administrative proceedings and the due process rights of defendants, as defendants are "not afforded the same protections as they would receive under the Federal Rules of Civil Procedure and the Federal Rules of Evidence that apply in federal district court," they "do not have the opportunity to have a jury trial, and any appeals of the administrative proceeding are first heard by the very same SEC Commissioners that authorized the enforcement action."⁹¹

The bill is opposed by those that see the bill as resting on a "false premise."⁹² Under this view, the SEC's use of administrative proceedings is valid because it is expressly authorized by Congress, because the SEC is doing so properly and fairly, because the administrative proceedings themselves abide by due process protections, and particularly because an aggrieved defendant in an administrative proceeding can appeal its adverse decision to the full SEC Commission and then to a federal appellate court.⁹³

Beyond the introduction of the bill and its subsequent House report, the bill has not progressed any further.

injunction . . . a preliminary injunction is appropriate to enjoin the SEC administrative proceeding and to allow the Court sufficient time to consider this matter on the merits." *Hill v. SEC*, 114 F. Supp. 3d 1297, 1320 (N.D. Ga. 2015) (emphasis added), *vacated and remanded*, 825 F.3d 1236 (11th Cir. 2016).

88. *Id.* See also Henning, *Challenges*, *supra* note 3 (framing the issue as generally being about "procedural fairness and regularity" and "liberty" in reference to the actual issues of appointment and procedure raised in recent court cases).

89. Due Process Restoration Act of 2015, H.R. 3798, 114th Cong. (2015), <https://www.congress.gov/bill/114th-congress/house-bill/3798/text>.

90. *Id.* The bill additionally raises the burden of proof to a "clear and convincing" evidentiary standard for cases that remain in administrative proceedings. *Id.*

91. H.R. REP. NO. 114-697, at 2 (2016).

92. *Id.* at 13 ("H.R. 3798 is based on a false premise: that the SEC is unfairly prosecuting Wall Street criminals by using the administrative process, rather than the federal court system.").

93. *Id.*

II. CONSTITUTIONAL ARGUMENTS CONSIDERED

The following discussion reviews and evaluates the various constitutional arguments raised by litigants looking to challenge the SEC's adjudicatory system. The arguments cover many doctrines, but none, individually or collectively, necessarily addresses the underlying fairness concerns that have motivated the dispute over the SEC's administrative scheme—namely that the SEC's ALJs and adjudicatory procedures are uniquely biased against defendants and deprive defendants of a fair opportunity to litigate their issues. The arguments highlight important aspects of the problem at hand, but the demonstrable limitations of the constitutional agenda point us toward the much needed discussion, developed in Part IV, of how fairness should be understood and applied as a rhetorical tool in this context.

A. NON-DELEGATION

The non-delegation argument has been raised in only a few cases and mostly without success.⁹⁴ The non-delegation argument is based on the alleged “unfettered discretion” given to the SEC by Congress to select its enforcement forum, positing that Congress failed to provide the SEC with an adequate “intelligible principle as to when the Commission is to bring an enforcement action against an unregulated individual in an administrative forum.”⁹⁵ The argument thus attacks the seemingly arbitrary ability of the SEC to bring enforcement actions in forums other than federal district courts, thereby addressing the intuitive unfairness embedded in the SEC's perceived advantage in bringing cases in house. The constitutional dimensions of the non-delegation doctrine also base themselves on the idea of separation of powers, such that Congress is not allowed to delegate certain powers given to it by the Constitution without proper guidance.⁹⁶

94. *E.g.*, *Hill v. SEC*, 114 F. Supp. 3d 1297, 1313 (N.D. Ga. 2015), *vacated and remanded*, 825 F.3d 1236 (11th Cir. 2016); *Bebo v. SEC*, No. 15-C-3, 2015 U.S. Dist. LEXIS 25660, at *2, *10 (E.D. Wis. Mar. 3, 2015), *aff'd*, 799 F.3d 765 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1500 (2016); *Jarkesy v. SEC*, 48 F. Supp. 3d 32, 37 (D.D.C. 2014), *aff'd*, 803 F.3d 9 (D.C. Cir. 2015).

95. *Hill*, 114 F. Supp. 3d at 1310.

96. See Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 485 (1989) (“Explicitly condoning the transfer of some lawmaking power meant reconceptualizing not only the nondelegation doctrine itself, but also, and more importantly, the principle of separation of powers that the doctrine was invoked to serve. The ‘intelligible principle’ construct no longer permitted even a fiction that division of power was being preserved. The structural metaphor changed. Rather than discrete compartments of scrupulously segregated powers, the edifice of government now appeared as an ordered collection of weight-bearing and subsidiary components: agency decisions were acknowledged to be ‘indeed binding rules of conduct,’ but were accepted as ‘subordinate rules’ that existed ‘within the framework of the policy which the legislature has sufficiently defined.’ The

However, the argument fails because the kind of discretion under attack here is not the kind of discretion targeted by the non-delegation doctrine. As articulated in *Whitman v. American Trucking Association*, the non-delegation doctrine is based on Article I, section 1, of the Constitution, which vests “[a]ll legislative Powers herein granted . . . in a Congress of the United States.”⁹⁷ “This text,” the *Whitman* Court states, “permits no delegation of those [legislative] powers.”⁹⁸ Thus, the type of power under scrutiny in a non-delegation critique must necessarily be legislative or quasi-legislative in nature, yet the power of the SEC to choose forums is not of such a nature.⁹⁹

The power exhibited by the SEC instead is one of prosecutorial discretion, which has largely been precluded from extensive judicial interference when there is no “law to apply.”¹⁰⁰ Agency decision making that is “committed to agency discretion” is presumptively unreviewable by the courts without sufficient guidance from Congress.¹⁰¹ Thus, in the instant case, in which the SEC was given discretion by Congress to bring enforcement actions in either an administrative or civil forum without specific standards to apply when making that decision, it would seem that the agency’s discretion here is unreviewable (and hence not an issue under non-delegation principles). Likewise, the guidance provided by the SEC on forum selection¹⁰² would likely be upheld and respected under *Chevron*¹⁰³ or *Skidmore*¹⁰⁴ deference.

Thus, while the argument seeks to address the perceived imbalance or malapportionment in powers given to the SEC by Congress, the constitutional doctrine is unsuited to dismantle it, focused more on the

emphasis was shifting from power divided to power kept in check.”).

97. *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 472 (2001).

98. *Id.*

99. *See Hill*, 114 F. Supp. 3d at 1311 (“The SEC argues that its forum selection decision is no different from any other decision made by prosecutors, and courts consistently reject non-delegation challenges to prosecutorial-discretion-related decisions. . . . This Court agrees.”).

100. *See Heckler v. Chaney*, 470 U.S. 821, 834–35 (1985) (“The danger that agencies may not carry out their delegated powers with sufficient vigor does not necessarily lead to the conclusion that courts are the most appropriate body to police this aspect of their performance. That decision is in the first instance for Congress, and we therefore turn to the FDCA to determine whether in this case Congress has provided us with ‘law to apply.’ If it has indicated an intent to circumscribe agency enforcement discretion, and has provided meaningful standards for defining the limits of that discretion, there is ‘law to apply’ under § 701(a)(2), and courts may require that the agency follow that law; if it has not, then an agency refusal to institute proceedings is a decision ‘committed to agency discretion by law’ within the meaning of that section.”).

101. *See id.*

102. SEC GUIDANCE, *supra* note 40.

103. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984).

104. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

legislative nature of non-delegation and the type of power at issue.

B. SEVENTH AMENDMENT

The Seventh Amendment argument has also arisen in only a few cases, and it too has met with no success.¹⁰⁵ The Seventh Amendment guarantees that “[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.”¹⁰⁶ The argument then follows that because SEC administrative proceedings do not provide trial by jury, and the actions initiated by the SEC are essentially analogous to suits at common law, “the SEC’s decision to prosecute the claims against [persons] in the administrative proceeding rather than the district court violates [the] Seventh Amendment right to a jury trial.”¹⁰⁷ Such an argument therefore attends to the deeper procedural unfairness and deficiency observed in the SEC’s formal adjudicatory system because the system as set up by the SEC and the APA does not necessarily provide jury trials to its parties.¹⁰⁸

However, the argument here is unfounded in the doctrine. The Supreme Court has stated that “the Seventh Amendment was never intended to establish the jury as the exclusive mechanism for factfinding in civil cases.”¹⁰⁹ In *Atlas Roofing Co. v. Occupational Safety & Health Review Commission*, the Court noted that “there is little or no basis for concluding that the [Seventh] Amendment should now be interpreted to provide an impenetrable barrier to administrative factfinding under otherwise valid federal regulatory statutes” and that the Seventh Amendment did not render “Congress powerless . . . to create new public rights and remedies by statute and commit their enforcement, if it chose, to a tribunal other than a court of law—such as an administrative agency—in which facts are not found by juries.”¹¹⁰ Thus, where public rights (rights that arise between the government and its citizens “in connection with the performance of the constitutional functions of the executive or legislative departments”¹¹¹) are at issue, as is the case here, Congress has the discretion to decide whether a

105. *E.g.*, *Hill v. SEC*, 114 F. Supp. 3d 1297, 1313–15 (N.D. Ga. 2015), *vacated and remanded*, 825 F.3d 1236 (11th Cir. 2016); *Bebo v. SEC*, No. 15-C-3, 2015 U.S. Dist. LEXIS 25660, at *2 (E.D. Wis. Mar. 3, 2015), *aff’d*, 799 F.3d 765 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1500 (2016); *Jarkesy v. SEC*, 803 F.3d 9, 28 (D.C. Cir. 2015).

106. U.S. CONST. amend. VII.

107. *Hill*, 114 F. Supp. 3d at 1313.

108. *See supra* Part I.B.

109. *Atlas Roofing Co. v. Occupational Safety & Health Review Comm’n*, 430 U.S. 442, 460 (1977).

110. *Id.*

111. *Id.* at 457.

jury trial should be required, and it has not done so here.¹¹²

Thus, while the procedural argument at the heart of the Seventh Amendment was initially appealing as a source of criticism, the constitutional argument falls short. The constitutional doctrine does not cut against the fact-finding power of administrative agencies, as interpreted by the Supreme Court, and, consequently, it is an inadequate doctrine for addressing the procedural concerns that motivated its invocation in the first place. The fairness of the SEC's adjudicatory procedures therefore remains untouched by this argument.

C. EQUAL PROTECTION

The equal protection argument has been raised in considerably more cases, and it fares only slightly better than the arguments described above.¹¹³ The equal protection argument is based on the idea that the SEC, by initiating administrative proceedings against some defendants rather than others, “intentionally, irrationally, and illegally” singles out persons, amounting to “unequal treatment in a bad faith attempt to deprive [such persons] of constitutional and other rights.”¹¹⁴ The argument, as with the non-delegation argument above, isolates the discretionary, arbitrary authority of the SEC as a root of unfairness in the current controversy.

In *Gupta*, the court validated the plaintiff's equal protection argument, while no other case has.¹¹⁵ However, the facts of *Gupta* suggest that such a decision was tethered to the unique circumstances of that particular enforcement proceeding and should not be understood as a reflection of the systematic dimensions of the SEC.¹¹⁶ Accordingly, it is difficult to imagine how the equal protection doctrine can categorically be used to critique the SEC's discretionary use of power, as such attacks should focus more on the statutory construction of the SEC's system rather than any given instance of

112. See *Hill*, 114 F. Supp. 3d at 1315–16. See also *Jarkesy v. SEC*, 803 F.3d 9, 28 (D.C. Cir. 2015).

113. E.g., *Bebo v. SEC*, No. 15-C-3, 2015 U.S. Dist. LEXIS 25660, at *2, *10 (E.D. Wis. Mar. 3, 2015), *aff'd*, 799 F.3d 765 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1500 (2016); *Chau v. SEC*, 72 F. Supp. 3d 417, 430, 434 (S.D.N.Y. 2014), *aff'd*, No. 15-461-cv, 2016 U.S. App. LEXIS 21510 (2d Cir. Dec. 2, 2016); *Jarkesy v. SEC.*, 48 F. Supp. 3d 32, 38 (D.D.C. 2014), *aff'd*, 803 F.3d 9 (D.C. Cir. 2015); *Gupta v. SEC*, 796 F. Supp. 2d 503, 513–14 (S.D.N.Y. 2011).

114. *Gupta*, 796 F. Supp. 2d at 513.

115. *Id.* at 514.

116. See *id.* (“Here, by contrast, we have the unusual case where there is already a well-developed public record of Gupta being treated substantially disparately from 28 essentially identical defendants, with not even a hint from the SEC, even in their instant papers, as to why this should be so. A fear of abuse by litigants in other cases should never deter a federal court from its unflinching duty to provide a forum for vindication of constitutional protections to those who can make a substantial showing that they have indeed been denied their rights.”).

the SEC's actual enforcement proceeding. Thus, as Zaring has noted, "[i]t is very unlikely that other federal judges will follow in [Gupta's] wake."¹¹⁷

D. DUE PROCESS

The due process argument has been raised in few cases, offers the most varied approach, and, as above, has seen little success.¹¹⁸ Due process, both substantive and procedural, encompasses several lines of reasoning that primarily fall into two theories: separation of functions,¹¹⁹ and the *Eldridge* balancing test.¹²⁰

1. Separation of Functions

The separation-of-functions argument posits that the mixing of prosecutorial and adjudicative functions violates our basic notions of due process before the law, as it seems fundamentally unfair for a single entity to serve as prosecutor, judge, and jury all at once.¹²¹ Thus, this argument needles into an idea of fairness that seems violated when an adjudicator is nested within an agency that has the power to arbitrarily initiate cases, have its own adjudicators judge the issue, and itself be entitled to review the decision of that adjudicator. The power granted to the SEC, and many agencies similarly situated, seems astonishingly biased in the agency's favor.¹²² Indeed, this argument more squarely addresses the fairness issues at play under the SEC's current system, as well as all administrative systems that utilize adjudicatory proceedings because the right to a fair and unbiased

117. Zaring, *supra* note 26, at 1197 ("[Such a case] is quite an outlier, and the language in the case would have permitted the court to reverse itself upon fact-finding (it suggested that an equal protection claim might apply in the context of a motion to dismiss, assuming all the facts alleged by the plaintiff were true).").

118. *E.g.*, *Bebo*, 2015 U.S. Dist. LEXIS 25660, at *2, *10; *Chau*, 72 F. Supp. 3d at 430; *Jarkesy*, 48 F. Supp. 3d at 38.

119. *See* *Withrow v. Larkin*, 421 U.S. 35, 51–52 (1975).

120. *See* *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976).

121. *See* Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 504–05 (1986) ("Specifically, we argue that due process is inadequately protected when an individual must depend on an adjudicator who lacks salary and tenure protection (such as most state court judges and all ALJs) to protect an entitlement to a life, liberty, or property interest. Similarly, we challenge the practice of allowing an adjudicator who has been the subject of allegedly contemptuous behavior to serve as prosecutor, judge, and jury . . .").

122. Zaring notes that "[t]his sort of argument about administrative adjudicators has a long pedigree, even if . . . it has never gone very far in the courts." Zaring, *supra* note 26, at 1199–1200. Moreover, Zaring observes that the SEC in particular "has been criticized for this since its inception," citing a scholar from the 1930s who observed that "[t]here is something abhorrent in the idea that any single group may make laws, may act as a public prosecutor in enforcing those laws, and may then determine the guilt or innocence of the person it has accused." *Id.* at 1200 n.231 (quoting Roland L. Redmond, *The Securities Exchange Act of 1934: An Experiment in Administrative Law*, 47 YALE L.J. 622, 636–37 (1938)).

adjudicator seems deeply inherent in the idea of due process, especially as it applies to adjudications.¹²³

However, the constitutional critique here is limited by the Supreme Court's holding in *Withrow v. Larkin*, which established that "the combination of investigative and adjudicative functions does not, without more, constitute a due process violation."¹²⁴ Interestingly, the *Withrow* Court recognized that a biased adjudicator is "constitutionally unacceptable" and that "our system of law has always endeavored to prevent even the probability of unfairness."¹²⁵ Yet, even recognizing the importance of fairness in this constitutional principle, the Court reasoned that the combination of functions within an agency is constitutionally acceptable.¹²⁶ More universally, the basic power of agencies to adjudicate at all has been vindicated by the Court time and time again.¹²⁷

Thus, the due process argument here brings into more precise focus how fairness and constitutionality intersect with respect to agency adjudication. As demonstrated by the separation-of-functions critique, bias is identified as the main antagonistic force cutting against our notion of fairness in adjudicatory proceedings, wherein bias is measured as the mixing of prosecutorial and judicial roles in a single entity. This bias, however, has been deemed constitutionally allowable, suggesting that our intuitive sense of unfairness in such a system must be tempered by the Constitution. In other words, while it is not necessarily incorrect to deem the process unfair, unfairness is not wholly congruent with what we deem unconstitutional. It is possible that the SEC's adjudicatory system can be both biased and unfair—but also constitutional. Though the Court in *Withrow* seems to suggest that an agency's mixed-function proceedings could *not* be both unfair and constitutional,¹²⁸ it leaves open the possibility that if there is a "probability" of unfairness, so long as it is minimal, the proceeding can be constitutionally acceptable.¹²⁹

123. See *Withrow*, 421 U.S. at 46–47 ("Concededly, a 'fair trial in a fair tribunal is a basic requirement of due process.' This applies to administrative agencies which adjudicate as well as to courts. Not only is a biased decisionmaker constitutionally unacceptable but 'our system of law has always endeavored to prevent even the probability of unfairness.'" (citations omitted)).

124. *Id.* at 58.

125. *Id.* at 47 (citing *In re Murchison*, 349 U.S. 133, 136 (1955)).

126. See *id.*

127. See, e.g., *Crowell v. Benson*, 285 U.S. 22, 57–58 (1932).

128. See *Withrow*, 421 U.S. at 47.

129. See *id.*

2. *Eldridge* Balancing Test

Mathews v. Eldridge established the Court's modern approach for determining whether the principles of due process are satisfied in any given government procedure, even though the question considered by the *Eldridge* Court was whether administrative judicial proceedings should be added to an agency's administrative scheme.¹³⁰ The test requires the balancing of three factors: first, "the private interest that will be affected by the official action;" second, "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;" and third, "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."¹³¹ While the test provides a means for determining what process is due in any given situation, the *Eldridge* Court additionally provides that "[t]he essence of due process is the requirement that 'a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it.'"¹³² Moreover, the Court notes that "[i]n assessing what process is due in [a given] case, substantial weight must be given to the good-faith judgments of the individuals charged by Congress with the administration of [its] programs that the procedures they have provided assure fair consideration of the entitlement claims of individuals."¹³³

Applied to the facts presented by the SEC's adjudicatory scheme, the *Eldridge* test suggests that the SEC's administrative process is unfairly imbalanced: its current procedures produce more harm to the private interest at stake, and the inclusion of more or better procedures would be of greater value and interest to all parties involved. The argument therefore taps into the idea that the differences between the private (or individual) and Government (or collective) interests should be equalized. Of all the constitutional doctrines thus far, the *Eldridge* test goes the furthest in

130. *Mathews v. Eldridge*, 424 U.S. 319, 323, 348 (1976) ("The ultimate balance involves a determination as to when, under our constitutional system, judicial-type procedures must be imposed upon administrative action to assure fairness. We reiterate the wise admonishment of Mr. Justice Frankfurter that differences in the origin and function of administrative agencies 'preclude wholesale transplantation of the rules of procedure, trial, and review which have evolved from the history and experience of courts.'") (citing *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 143 (1940)).

131. *Id.* at 334–35.

132. *Id.* at 348 (citing *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 171–72 (1951) (Frankfurter, J., concurring)).

133. *Id.* at 349. The Court, considering the procedural needs of participants in a social welfare program, considered whether an administrative proceeding would be needed, stating that "[t]he judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances." *Id.* at 348.

addressing the actual fairness concerns that underlie the public's dismay with the SEC.

However, upon initial impression, the *Eldridge* argument is difficult to sustain in the context of SEC adjudications because the SEC's adjudicatory system has been described as "virtually identical to U.S. district court bench trials."¹³⁴ The *Eldridge* test also seems factually inapt; *Eldridge* dealt with the implications of a lack of hearings when a person is deprived of social welfare benefits,¹³⁵ in stark contrast to the securities-based, corporate focus of SEC enforcement matters.

Further still, the fundamental difficulty with the *Eldridge* argument as applied here is its ambiguity. The measure of private and governmental interests; the marginal effect of adding new procedural safeguards—these are neither easily calculated values nor easily disentangled from subjective assumptions about the interests at stake. Even if such values were objectively attainable, the doctrine does not provide guidance as to how much weight to give one side over another. Interestingly, the doctrine implies that agencies should be automatically entrusted with making "good-faith" judgments as to the adequacy of their procedures,¹³⁶ tipping the scales in favor of the SEC in this case, regardless of how ambiguously robust this tip may be. Thus, despite the existence of a directly relevant constitutional doctrine, the framework it provides does not allow for a clear analysis of the issues at play. We are left, again, with imprecision.

This illuminates yet another limitation in our constitutional assessment of fairness. Constitutional due process as envisioned in *Eldridge* is seen as a tool for protecting and promoting fairness, which it does by comparing one set of procedures to another and asking about the various public and private values associated with each.¹³⁷ It thus approximates fairness by assuming that fairness is measured by a balancing of interests, but in a way that validates current models and expectations of procedure. The inquiry is therefore bound to precedent—to the palimpsestic presence of previously venerated forms of procedure, such as those in federal courts, and the implicit assumption that federal courts are inherently fairer procedural systems.

134. See Daniel F. Solomon, *Summary of Administrative Law Judge Responsibilities*, 31 J. NAT'L. ASS'N ADMIN. L. JUDICIARY 475, 516 (2011).

135. *Mathews*, 424 U.S. at 323.

136. *Id.* at 349.

137. *Id.* at 334–35.

E. APPOINTMENT AND REMOVAL

The appointment-and-removal argument is the most frequently brought, and with it plaintiffs have seen the most success.¹³⁸ The argument asserts that the SEC's ALJs are "inferior officers," appointed and potentially removable by the President.¹³⁹ Hence, in deciding this argument courts have had to determine whether the ALJs are indeed "inferior officers" or mere employees, which some courts have found to be an adequate basis for allowing these constitutional arguments to move forward.¹⁴⁰ Yet, the argument is an indirect, or at least more removed, method of addressing the unfairness felt in the SEC system; it formalistically but not substantively addresses the separation-of-powers and proper-administration-of-government threads of reasoning previously discussed.

The major limitation of this argument, ironically, is its sense of practicality. Will altering the appointment-or-removal process, such that ALJs would be more directly controlled by the Chief Executive, eliminate the bias and unfairness apparently embedded in the SEC's adjudicatory scheme as it is? No, it will not; instead it seems much more likely that the adjustment sought in this constitutional argument would do more to bring ALJs under greater political pressure to perform according to the executive will. This seems wholly antithetical to the fairness concerns identified in this conversation, specifically that the ALJs promote unfairness by being biased in favor of the agency they work for. The irony here is striking considering that this constitutional argument has gained the most traction. Finding the appointment and removal of SEC ALJs unconstitutional only seems to be an

138. *E.g.*, *Ironridge Global IV, Ltd. v. SEC*, 146 F. Supp. 3d 1294, 1318 (N.D. Ga. 2015), *appeal dismissed*, (Sept. 27, 2016); *Duka v. SEC*, No. 15 Civ. 357 (RMB) (SN), 2015 U.S. Dist. LEXIS 124444, at *65 (S.D.N.Y. Sept. 17, 2015); *Timbervest, LLC v. SEC*, No. 1:15-CV-2106-LMM, 2015 U.S. Dist. LEXIS 132082, at *34 (N.D. Ga. Aug. 4, 2015); *Hill v. SEC*, 114 F. Supp. 3d 1297, 1320 (N.D. Ga. 2015), *vacated and remanded* 825 F.3d 1236 (11th Cir. 2016);

139. *E.g.*, *Hill*, 114 F. Supp. 3d at 1316 ("Plaintiff next brings two claims under Article II of the Constitution: (1) that the ALJ's appointment violates the Appointments Clause of Article II because he was not appointed by the President, a court of law, or a department head, and (2) the ALJ's two-layer tenure protection violates the Constitution's separation of powers, specifically the President's ability to exercise Executive power over his inferior officers. Both of Plaintiff's arguments depend on this Court finding that the ALJ is an inferior officer who would trigger these constitutional protections.").

140. *See id.* at 1319 ("Because SEC ALJs are inferior officers, the Court finds Plaintiff has established a likelihood of success on the merits on his Appointments Clause claim. Inferior officers must be appointed by the President, department heads, or courts of law. Otherwise, their appointment violates the Appointments Clause." (citation omitted)); *Duka*, 2015 U.S. Dist. LEXIS 124444, at *69 ("Therefore, as SEC ALJs are inferior officers, their appointments must be made by the President, courts of law, or department heads. Here, the Court has determined that the ALJs at issue were not appointed by the SEC Commissioners. As they were not appropriately appointed pursuant to Article II, their appointment is likely unconstitutional in violation of the Appointments Clause." (citation omitted)).

effort to disrupt the SEC's enforcement proceedings rather than effectuate an actual solution to the fairness issue.

III. FAIRNESS

The constitutional arguments discussed thus far do not adequately address the fairness concerns underlying the SEC's adjudicatory system, which themselves have motivated the controversy and the constitutional arguments from the beginning. Each argument does its part to approximate and attack various senses of unfairness, but each fails either to address the issue adequately or address the issue at all, despite their seeming appeal. Further still, constitutional arguments seem limited, more generally, to addressing what fairness is or should be in the SEC administrative state, even though the very nature of administrative agencies has developed in accordance with constitutional doctrines of fair governance and administration. Fairness, however, can and should be studied more thoughtfully in this context. The framework developed below can be used to further illuminate the constitutional arguments being made, thereby creating a more exacting rhetoric for litigants as they attack or defend against the legitimacy of the SEC.

A. FRAMEWORK

Fair adjudicatory proceedings and fair adjudicators have roughly been measured against the federal system as an ideal. That is, the SEC and its ALJs have been criticized for their bias, in comparison to that of federal judges, and SEC administrative proceedings have been criticized for their procedural unfairness, in comparison to that of federal civil actions. The discussion, hence, has been couched in terms of a presumptive favoring of the federal system, which is not entirely supported. This section, therefore, orients itself in a way that looks beyond the "standard" set by federal courts and toward a baseline idea of fairness founded on notions independent of what is or has been done.

The framework for understanding fairness begins with a single inquiry: What is our baseline idea of fairness? Intuitively, it would seem that this question can be answered in many ways, from many different perspectives, and that the inquiry would stop with its inherent relativity.¹⁴¹ It is important

141. Fairness is discussed in many schools of thought, including human rights analysis, critical race and gender studies, conservative and liberal pragmatism, and economic theory, to name a few examples. See, e.g., Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1501 (1998) ("Even among the well-mannered, fair-minded agents that populate behavioral economics, self-interest is very much alive and well. For often there will be room for disagreement about what is fair

to recognize, however, that this variability is not an endpoint but a starting point for breaking down the underlying issue of fairness. It is nonsensical to assume that only one perspective of fairness can properly answer this question, and so it is that a thoughtful framework for understanding fairness must acknowledge and address the differences in approach. Thus, this inquiry pulls us into two general approaches—that of the individual’s view to fairness and that of the collective body’s view to fairness; that is, to the two ends of the adversarial dynamic, the plaintiff and the SEC. To determine the baseline of fairness, these two perspectives must be reconciled in some way.

1. ALJ Bias

The bias of adjudicators—ALJs and judges alike—has been extensively studied and is backed by a considerable amount of scholarly literature, much of which looks at various kinds of bias and the ways of addressing it.¹⁴² According to Professors Martin H. Redish and Lawrence C. Marshall, threats to adjudicator independence fall into three categories¹⁴³: direct financial

(or, equivalently, what is the appropriate reference transaction)—and thus there will be the opportunity for manipulation by self-interested parties. These parties may tend to see things in the light most favorable to them; while people care about fairness, their assessments of fairness are distorted by their own self-interest. This is a form of bounded rationality—specifically, a judgment error; people's perceptions are distorted by self-serving bias.”).

142. For example, bias pervades critical race theory and fields such as discrimination law. *See, e.g.*, Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 380 (1987) (“A second difficulty with the cultural meaning test rests in the inevitable cultural biases of judges. Judges are not immune from our culture’s racism, nor can they escape the psychological mechanisms that render us all, to some extent, unaware of our racist beliefs. We must recognize, however, that this difficulty inheres in all judicial interpretation. The advantage of the cultural meaning test is that it makes the issue of culturally induced bias explicit. The judge who is hearing evidence regarding how our history and culture have influenced our racial beliefs is more likely to be made aware of his own heretofore unrecognized biases. Judges continue to come primarily from elite white backgrounds. They undoubtedly share the values and perceptions of that subculture, which may well be insensitive or even antagonistic toward the values, needs, and experiences of blacks and other minorities. The benefit of the cultural meaning test is that it confronts judges with this conflict and forces them to take responsibility for their own biases and preconceptions.” (footnotes omitted)).

143. Redish & Marshall, *supra* note 121, at 492. Note that these categories of judicial bias are provided in terms of their constitutional status as violating due process. That is, the Court has recognized these various aspects of bias as being in discord with our notions of due process under the law—hence their salience as categories worth mentioning. *See id.* at 493.

interests,¹⁴⁴ personal bias,¹⁴⁵ and predispositions to facts or law.¹⁴⁶

Bias in the case of SEC ALJs largely falls into the category of personal bias. From the perspective of an individual being targeted by the SEC for securities law violations, ALJs appear personally biased in that they are part of the same institution that has made allegations against her or him—they carry the same ideologies, they have the same prosecutorial beliefs, and they work in the same office buildings. Contrastingly, from the perspective of the SEC, the ALJs are personally biased as well but only in that they are experts, qualified for their position as an ALJ precisely because their familiarity and experience with the SEC and complex federal securities laws make them befitting of their adjudicatory role. In other words, SEC ALJs are prudently and helpfully biased because they are specialized and their decisions can be sharpened by seasoned knowledge and expertise in an otherwise complicated industry. Bias is therefore observed from either perspective, but in one view bias is seen as unfair and in the other as fair, playing towards different values and affinities. Thus, the bias-fairness issue, seen from varying perspectives, hones in on a fundamental administrative law principle, wherein agency expertise and efficiency are often seen as at odds with individualistic due process concerns. In this sense, the two opposing fairness viewpoints (of the

144. *Id.* at 494–95 (“The decisionmaker who has a direct financial interest in the outcome of a case presents perhaps the clearest instance of partiality. As early as 1610, at the time of *Dr. Bonham’s Case*, the proposition that no man can judge a case in which he has a financial interest was firmly established. Since that time, courts and legislatures, including the United States Supreme Court, have repeatedly held that ‘officers acting in a judicial or quasi-judicial capacity are disqualified by their interest in the controversy to be decided.’ But at the same time that it so held, the Court cautioned that ‘[n]ice questions . . . often arise as to what the degree or nature of the interest must be.’”) (quoting *Tumey v. Ohio*, 273 U.S. 510, 522 (1927)).

145. *Id.* at 500–01 (“In *Tumey* the Supreme Court distinguished financial interests from other types of potential bias. As the Court announced, ‘[a]ll questions of judicial qualification may not involve constitutional validity. Thus, matters of kinship, personal bias, state policy, remoteness of interest, would seem to be matters merely of legislative discretion.’ The Court did not explain why a ‘possibility’ of a judge being swayed by financial self-interest is a constitutional matter, while the fact that a judge harbors either a personal prejudice against or a predisposition toward a litigant is not. Yet this unjustified proposition has to a certain extent survived. The Court has been extremely reluctant to disqualify a judge when no direct financial interest is involved, finding a due process violation only in cases where the judge and one of the litigants or attorneys are embroiled in a heated personal dispute.’”) (quoting *Tumey*, 273 U.S. at 523).

146. *Id.* at 502 (“The Supreme Court has never held that prior exposure to facts or prior adherence to a legal position violates due process. As with the other categories, the rule of necessity has played its part in the creation of doctrine concerning this category of bias. There can certainly be no bias more pervasive than a predisposition to the exact issues—factual or legal—before the court. To the extent that such predisposition arises out of a judge’s general knowledge in the area of law, it is impossible, and certainly undesirable, to eliminate it. But this category also includes predispositions that arise out of a decisionmaker’s prior involvement in a case. In this latter situation, the potential for bias is relatively easy to eliminate, and therefore should not be tolerated.”)

individual versus of the collective body) are not so much reconciled as they are traded off; one is merely sacrificed for the other in various circumstances.

The only path to reconciliation, it therefore seems, is to pick a side—to pick which version of fairness is less dangerous or harmful, or more beneficial and prosperous. Clearly, the choice here subsumes a value system itself, and it is necessary to turn our attention towards this subliminal inquiry. Professor Kathleen M. Sullivan provides useful definitions of fairness in the context of deciding when a rule might be preferred to a standard.¹⁴⁷ She writes:

The argument that rules are fairer than standards is that rules require decisionmakers to act consistently, treating like cases alike. On this view, rules reduce the danger of official arbitrariness or bias by preventing decisionmakers from factoring the parties' particular attractive or unattractive qualities into the decisionmaking calculus. Of course, the counterargument to rules-as-fairness is that bright-line rules are arbitrary at the border. They force the decisionmaker to treat differently cases that are actually substantively alike in terms of the underlying principle or policy, and to treat similarly cases that are different. A decision favoring rules thus reflects the judgment that the danger of unfairness from official arbitrariness or bias is greater than the danger of unfairness from the arbitrariness that flows from the grossness of rules. . . . If fairness consists of treating like cases alike, then there is an argument that standards are fairer than rules. Rule-based decisionmaking suppresses relevant similarities and differences; standards allow decisionmakers to treat like cases that are substantively alike. Standards are thus less arbitrary than rules. They spare individuals from being sacrificed on the altar of rules, notwithstanding the good that rule-boundedness brings to all.¹⁴⁸

The distinctions here are informative. A rule is preferred because it reduces arbitrary and subjective outcomes by requiring consistent, regimented decision-making. Conversely, a standard is preferred because it allows consistency in the treatment of substance rather than form; where rules are unfairly rigid, standards are fair in their flexibility. While these two views regarding the proper decision-making system seem properly opposed to each other, Sullivan's analysis illustrates the common ground between them. Both rules and standards derive their fundamental sense of fairness from the same originating principle: consistency. Rules and standards are fair when they treat like cases alike. Yet at the same time, both rules and standards are subject to their own arbitrariness and bias and, hence, a danger

147. See Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 62, 66 (1992).

148. *Id.* at 62, 66 (footnote omitted).

of unfairness. Hence, choosing one over the other, as Sullivan frames it,¹⁴⁹ is an exercise pitting two views about arbitrariness, bias, and the dangers of unfairness against each other, while also pitting two similar strains of fairness against each other at the same time. While the outward fight appears centered on the mechanics and pitfalls of rules and standards, the gravity of the discussion derives from the underlying conflict about what is or should be fair.

The SEC-ALJ context is similar. The dangers being traded off here are also about arbitrariness and bias, while the fairness in either view is also based on consistency and trust in judicial discretion and the value of an adjudicator. Thus, the question becomes how to determine which danger is greater when both senses of fairness are closely intertwined. Unfortunately, that inquiry seems just as rife with difficulty as asking how to reconcile two visions of fairness. Notably, in either case neither bias nor fairness can be eliminated entirely. While one view of fairness prevails, so too do its troubles.

2. Adjudicatory Procedures

The framework analysis that pairs with adjudicatory procedures proceeds in much the same fashion as the above analysis of adjudicator bias, leading to a refined but nonetheless open question. Adjudicatory procedures, as treated in scholarly literature, trace due process as the high form of fairness, but due process is not, as a doctrine, entirely helpful in piecing together how procedure should be understood in this context.¹⁵⁰ However, the doctrine rightly points our attention towards the balancing of private (or individual) interests with public (or collective) interests.

The notions of expertise and efficiency, which arise throughout administrative law, bear heavily on the discussion of fair procedure. When an individual looks at the SEC's administrative proceedings that individual sees a lack of procedure, or procedures that exist in alternate forms (namely federal court) but are absent when before an ALJ at the SEC. This lack of procedure seems, understandably, unfair. Conversely, when the SEC looks to its administrative proceedings, it sees a great deal of procedure and protection to the individual, yet it also sees the same lack of procedure that the individual sees when comparing administrative proceedings to federal court. Such departures from "full" procedures have been justified as necessary and helpful in the administrative state. They allow for more

149. *Id.*

150. *See supra* Part II.D.

efficient administration of the laws. Thus, efficiency is fair, for procedure comes at a cost.

The two views are reconciled in much the same way that the views on adjudicator bias were reconciled. Here, the fairness seen in procedure is based on the high value placed on the means and ends of process. The dangers being traded off are the costs associated when procedure is added or reduced.

The dangers, however, pierce deeper than this initial picture paints. The danger with procedure, as well as with bias, is the concern with the accuracy of decision making. While it is unclear that federal courts reach more accurate decisions than ALJs or that introducing more procedures would improve ALJ decision making, the suspicion is that the SEC's adjudicatory system may produce more false positives and false negatives than federal courts. The fear with any adjudication is that the innocent may be found guilty (false positive), or that the guilty may be found innocent (false negative). Thus, in this context we see that the idea of fair procedures evokes a subtle shifting between concepts of efficiency and culpability. The tradeoff, then, is one between two views about the fair administration of justice.

B. CONSTITUTIONAL ARGUMENTS REVISITED

Constitutional rhetoric has been ill-equipped to address the deeper concerns about judicial bias and adjudicatory procedures precisely because constitutional arguments approximate, but do not create, our ideals of fairness. Instead, our ideals of fairness exist within and outside the law. This suggests not that the Constitution is irrelevant, but that fairness must be addressed on its own terms. Fairness, understood according to the individual and the SEC, revolves around the proper administration of the law, based largely on common values regarding the role and importance of judges, as well as the role and importance of procedure. "Fair adjudicators" are those that are impartial, on the one hand, and qualified, on the other, while in all ways devoid of arbitrary bias. "Fair procedures" are those that are efficient, accurate, and justifiably costly. Any view towards fairness entails certain pitfalls and tradeoffs, but how such tradeoffs should be resolved remains an open question.

Without recognizing the conflict left after fairness is fully dissected, the constitutional arguments addressing the matter proceed like shots in the dark, ill-aimed at resolving the real dispute. Thus, the appointment-and-removal arguments brought against the SEC clearly make no real difference to the fairness concerns and tradeoffs described. The same can be said of the equal

protection, due process, fair trial, and non-delegation arguments. Essentially, the fairness framework developed here reflects the inadequacy of constitutional doctrine to address the concerns raised. Many brilliant and well-paid lawyers have spent time and energy coming up with these constitutional challenges, yet all seem orthogonal to the underlying problem, further suggesting that we are dealing with a sub-constitutional issue.

Improvement, however, is not impossible. The matter developed here is likely more appropriate for non-litigation-based resolution. Political intervention is likely necessary, unless the specific components of the SEC's systematic design are challenged directly (that is, the statutory grant of power to the SEC to adjudicate with its own ALJs must be attacked, or the statutorily created procedures used by the SEC must be attacked). Only in these regards will the actual aspects of fairness at the heart of this issue see some light and find their way to break through the constitutional arguments that attempt to encapsulate them.

CONCLUSION

The fairness issues underlying the SEC's recent controversies are highly important for understanding not only the dispute at hand but also the constitutional dimensions of the problem. Importantly, this Note demonstrates that the problem is sub-constitutional, finding no solid grounding in principles of constitutional law. This is because the fairness issues that motivate the issue, when fully developed and outlined, do not lend themselves to reconciliation via the constitutional machine. Rather, these issues are properly addressed through democratic means, wherein difficult questions of fairness and its tradeoffs—when such tradeoffs are so closely intertwined with each other—can be decided without judicially imposing one view of fairness over the other.