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## Lucia v. SEC: The Debate and Decision Concerning the Constitutionality of SEC Administrative Proceedings

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## Lucia v. SEC: The Debate and Decision Concerning the Constitutionality of SEC Administrative Proceedings

### Cover Page Footnote

J.D. Candidate, May 2018, Loyola Law School, Los Angeles; M.B.A., St. Louis University, Missouri; B.S., Business Administration, Southwest Baptist University, Bolivar, Missouri. I wish to thank Professor Elizabeth Pollman for her encouragement, patience, and dedication in helping me along the way. Her guidance throughout the writing process and unrelenting positivity created a formative learning experience for which I am deeply grateful. I would also like to thank my husband, Jon, my in-laws, David and Darlene, my parents, Lyle and Tina, and my tenacious sister, Sarah, for their love and support because without them law school would have remained a dream.

# **LUCIA V. SEC: THE DEBATE AND DECISION CONCERNING THE CONSTITUTIONALITY OF SEC ADMINISTRATIVE PROCEEDINGS**

*Elizabeth Wang\**

## I. INTRODUCTION

A controversy has been brewing over whether or not the Securities and Exchange Commission's use of administrative law judges is constitutional. The Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), passed on July 21, 2010, expanded the Securities and Exchange Commission's ("SEC" or "Commission") authority and ability to bring administrative proceedings. Since then there have been growing allegations that the use of these administrative tribunals is unconstitutional. In fact, the SEC filed a record number of enforcement actions in the fiscal year of 2016.<sup>1</sup> *Raymond J. Lucia Cos. v. SEC*<sup>2</sup> represents the first federal court ruling on whether administrative law judges ("ALJs") are employees of the SEC or rather inferior officers of the United States, which would subject their appointment to the Appointments Clause of the Constitution.<sup>3</sup>

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1. Press Release, U.S. Sec. & Exch. Comm'n, SEC Announces Enforcement Results for FY 2016 (Oct. 11, 2016), <https://www.sec.gov/news/pressrelease/2016-212.html> (chart showing that in 2016 there were 868 filings versus 807 in 2015, and 755 in 2014).

2. *Raymond J. Lucia Cos. v. SEC*, 832 F.3d 277 (D.C. Cir. 2016).

3. Thomas J. Krysa & Lawrence W. Treece, *A Key Victory For SEC in Battle over Administrative Courts*, LAW 360 (Aug. 15, 2016), <http://www.law360.com/articles/828028/a-key-victory-for-sec-in-battle-over-administrative-courts>.

In *Lucia*, the United States Court of Appeals for the District of Columbia held Article II of the Constitution,<sup>4</sup> which requires judges be appointed by the President and affirmed by the Senate, is not violated by the SEC's use of ALJs, who are not appointed in this manner. This Comment argues, in so holding, the *Lucia* Court reached a decision that was both logical and reasonable.<sup>5</sup> Since *Lucia*, a circuit split has developed<sup>6</sup> which has further highlighted the importance of this issue and the need for the Commission to remain concerned and take action to address the perception of unfairness and lack of transparency, which caused the litigants to challenge the SEC's administrative forum use.

This Comment proceeds as follows: Part II details the background and history of legal issues surrounding the SEC and other administrative bodies' use of ALJs. Part III sets out the facts of *Lucia v. SEC*. After analyzing the history and pertinent reasoning of the court in Parts II and III, Part IV considers the implications of the court's holding in *Lucia*. Lastly, Part V concludes that the court correctly ruled on the merits in the case against *Lucia* because ALJs do not make final decisions or wield significant authority over the SEC. Notwithstanding the merits of the ruling, however, this Comment strongly encourages the SEC to take measures to improve perceived unfairness and lack of transparency. This has become more important in light of the circuit split created by the Tenth Circuit's recent ruling in *Bandimere v. SEC*.

## II. BACKGROUND AND HISTORY OF LEGAL ISSUES

### A. SEC Creation and Authority to Use ALJs

Congress enacted the 1934 Exchange Act, a federal securities law, with the aim of restoring public confidence in corporate securities and the integrity of the stock market after the Wall Street Crash of 1929 preceding the Great Depression.<sup>7</sup> The Exchange Act created the SEC to regulate exchanges, brokers, and over-the-counter

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4. U.S. CONST. art. II, § 2, cl. 2 ("... Congress may by law vest the appointment of such inferior Officers, as they think proper, in the President alone, in the courts of law, or in the Heads of Departments.").

5. See *infra* Part IV.

6. See *Bandimere v. SEC*, 844 F.3d 1168 (10th Cir. 2016).

7. *Securities and Exchange Commission*, HISTORY (2010), <http://www.history.com/topics/securities-and-exchange-commission>.

markets.<sup>8</sup> Congress subsequently expanded the responsibilities of the Commission; by 1960, the SEC administered six statutes including the Investment Advisers Act of 1940, which bars fraudulent and material misstatements of material fact made by investment advisers.<sup>9</sup> Then in 1961, President Kennedy designed a proposal to provide “greater flexibility in the handling of the business before the Commission, permitting its disposition at different levels so as to promote its efficient dispatch.”<sup>10</sup> Congress allowed the Commission to delegate functions including “hearings, determining, ordering, certifying, reporting or otherwise acting as to any work, business, or matter” to an individual Commissioner, an ALJ, or an employee.<sup>11</sup> The delegation, however, did not include the Commission’s rulemaking authority, or right to review or intervene in an action, and it preserved certain instances where the SEC’s review of an ALJ’s decision is mandatory for adversely affected parties.<sup>12</sup>

The statutory scheme and legislative history show that Congress’s goal was to grant the Commission “greater flexibility in the handling of the business before the Commission [. . . and] relieve the Commissioners from the necessity of dealing with many matters of lesser importance and thus conserve their time for the consideration of major matters of policy and planning.”<sup>13</sup> As a result of Congress acceptance of President Kennedy’s proposal, the Commission gave ALJs the “authority to conduct administrative hearings” and make “initial decision[s].”<sup>14</sup> If the action does not trigger a mandatory review, the ALJ prepares an initial decision along with an order and the Commission can then either review the initial decision on its own initiative or upon a petition, or if the Commission subsequently decides not to conduct a review, then an ALJ’s initial decision shall be deemed the action of the Commission, but only after the Commission issues a finality order.<sup>15</sup> No passage of time will transform an initial decision of the ALJ into a final one; even default rulings must be given a finality order by the

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8. *Id.*

9. *Lucia*, 832 F.3d 277, 281, 290 (D.C. Cir. 2016); *see* 15 U.S.C. § 80b-21 (2016).

10. *Id.* at 281 (quoting 1961 U.S.C.C.A.N. 1351, 1351-52).

11. *Id.*

12. *Id.*

13. *Id.* at 287.

14. *Id.* at 282.

15. *Lucia*, 832 F.3d at 282.

Commission.<sup>16</sup> “Thus, the Commission must affirmatively act—by issuing the order—in every case.”<sup>17</sup>

*B. The expansion of the SEC’s power via the Dodd-Frank Act*

The SEC may initiate an enforcement proceeding in two ways: by bringing suit in federal court, or by filing an administrative proceeding.<sup>18</sup> In federal court, defendants have access to a jury trial, independent judges, and deposition “testimony [that] is subjected to the Federal Rules of Evidence.”<sup>19</sup> Alternatively, administrative proceedings are conducted before an ALJ, where there is no jury, discovery is restricted, hearings proceed on a rapid schedule, and the Federal Rules of Evidence do not apply.<sup>20</sup>

The Dodd-Frank Act expanded the SEC’s power in administrative proceedings in two ways.<sup>21</sup> The Act expanded the reach of the SEC as to against whom it can initiate an administrative proceeding, and the Act increased the type and severity of penalties that may be imposed through those proceedings.<sup>22</sup>

Prior to the Dodd-Frank Act, in the context of an administrative proceeding, the SEC could only impose civil monetary penalties, and only against an entity that was registered.<sup>23</sup> These types of proceedings included claims for insider-trading, securities fraud, and unregistered securities.<sup>24</sup>

Dodd-Frank expanded the SEC’s jurisdiction from registered individuals and entities to anyone who may have violated a securities law.<sup>25</sup> Before Dodd-Frank, the Commission had to go to district court to take action against unregistered entities.<sup>26</sup> After Dodd-Frank, the agency’s administrative jurisdiction expanded “to anyone alleged to have violated the securities laws, rather than only those registered with the agency, essentially permitting the agency to pursue any

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16. *Id.* at 286–87.

17. *Id.* at 286.

18. *Id.* at 282.

19. Joseph Grundfest, *Fair or Foul? SEC Administrative Proceedings and Prospects for Reform Through Removal Legislation* 1 (Rock Ctr. for Corp. Governance at Stanford Univ., Working Paper No. 212, 2015), <https://ssrn.com/abstract=2695258>.

20. *Id.* at 3–6.

21. David Zaring, *Enforcement Discretion of the SEC*, 94 TEX. L. REV. 1155, 1164 (2016).

22. *Id.* at 1165, 1172.

23. *Id.* at 1170.

24. *Id.* at 1165.

25. *Id.*

26. Zaring, *supra* note 21, at 1165.

remedy against unregistered defendants that it could pursue against registered defendants.”<sup>27</sup>

While ALJs cannot punish a person by prohibiting him or her from serving as an officer or director of a public company or forfeit incentive or stock based compensations, ALJs can levy serious penalties such as disbarment, which takes away the ability to practice as a broker or accountant and essentially ends an individual’s career.<sup>28</sup> The Act increased the range of penalties the SEC can impose on individuals and business entities that commit serious violations.<sup>29</sup> In addition to the civil penalties, the ALJ can issue an order for disgorgement.<sup>30</sup> Disgorgement refers to “the repayment of illegally gained profits (or avoided losses) for distribution to harmed investors whenever feasible”—“intended to deprive the wrongdoer of ill-gotten gains.”<sup>31</sup>

An even more severe punishment, referred to by some in the industry as the “equivalent of capital punishment,” is the SEC’s new ability to impose “collateral bars,” the same sanction imposed on Lucia,<sup>32</sup> which goes further than disbarment and bans an individual’s association with the entire securities industry.<sup>33</sup> Before the Dodd-Frank Act, the SEC could bar a person from associating with the securities industry sector he had previously associated with that led to the charged misconduct, but not the securities industry in its entirety.<sup>34</sup>

### III. STATEMENT OF THE CASE

#### *A. Facts and Procedural History*

The SEC initiated an administrative enforcement action against Raymond Lucia and the Raymond J. Lucia Companies, Inc., asserting that Lucia’s “Buckets of Money” retirement wealth-

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27. *Id.*

28. *Id.* at 1170.

29. *Id.* at 1170, 1172. Subsequently, the SEC adjusted the penalty to account for inflation in accordance with the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015. *See* Adjustments to Civil Monetary Penalty Amounts, 82 Fed. Reg. 5367 (proposed Jan. 18, 2017) (to be codified at 17 C.F.R. pt. 201).

30. Zaring, *supra* note 23, at 1170–71.

31. *Id.* at 1171.

32. *Lucia*, 832 F.3d 277, 283 (D.C. Cir. 2016).

33. Alexander I. Platt, *SEC Administrative Proceedings: Backlash and Reform*, 71 BUS. LAW. 1, 7 (2016).

34. *Id.*

management presentations violated the “anti-fraud provisions of the Investment Advisers Act.”<sup>35</sup> An ALJ found Lucia liable because he made at least one material misrepresentation, and consequently imposed a “lifetime industry bar” against Lucia.<sup>36</sup> Thereafter, Lucia petitioned the Commission to review the ALJ’s initial decision, and further argued that the presiding ALJ was not appointed in accordance with Article II, Section 2, Clause 2 of the Constitution (Appointments Clause).<sup>37</sup> After an “independent review of the record,” the Commission concluded its ALJs were not covered by the Appointments Clause, and imposed the same sanctions as the ALJ.<sup>38</sup>

Lucia appealed the Commission’s decision and order to the D.C. Circuit, arguing that the ALJ’s decision was invalid because the ALJ was not properly appointed under the Appointments Clause.<sup>39</sup> Thus, the key question on appeal concerned the constitutionality of the proceedings before the ALJ; if the ALJ were deemed an inferior officer, there would be no need to consider Lucia’s challenge to the liability and sanctions ruling.<sup>40</sup>

### *B. Holding and Reasoning*

The Court of Appeals for the D.C. Circuit held that Commission ALJs are not officers within the meaning of the Appointments Clause, and thus, their appointment does not violate the Appointments Clause.<sup>41</sup> As a result, the court did not have to grant the petitioner’s request for review.<sup>42</sup>

Article II of the Constitution requires the President to appoint an inferior officer who is then confirmed by the Senate.<sup>43</sup> The Supreme Court has explained that generally an appointee is an officer, and not an employee who falls beyond the reach of the Appointments Clause, if the appointee exercises “significant authority pursuant to the laws of the United States.”<sup>44</sup>

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35. *Lucia*, 832 F.3d at 282.

36. *Id.* at 282–83.

37. *Id.* at 283.

38. *Id.*

39. *Id.*

40. *Lucia*, 832 F.3d at 283.

41. *Id.* at 289.

42. *Id.* at 296.

43. U.S. CONST. art. II, § 2, cl. 2.

44. *Buckley v. Valeo*, 424 U.S. 1, 126 (1976).



In determining whether an ALJ has “significant authority,” a Court considers three criteria: “(1) the significance of the matters resolved by the official(s), (2) the discretion they exercise in reaching their decisions, and (3) the finality of those decisions.”<sup>45</sup> In *Landry v. FDIC*, the D.C. Circuit ruled that the FDIC’s ALJs were employees rather than inferior officers because, while they did exercise “significant discretion,” they lacked final decision-making authority.<sup>46</sup> The FDIC regulations limited its ALJs to issuing “recommended decisions,” and required the FDIC to consider and decide every case.<sup>47</sup>

By contrast, in *Freytag v. Commissioner*, the Supreme Court determined the special judges of the Tax Court were “inferior officers” because they exercised “significant discretion” in carrying out their duties and functions, so the agency was “required to defer” to the special trial judge’s ruling unless it was clearly erroneous.<sup>48</sup>

In *Lucia*, the primary disagreement revolved around the finality of the decisions issued by the SEC’s ALJs.<sup>49</sup> Lucia agreed that a finality order issued by the SEC could not change an initial order from the judge into a “recommended decision.”<sup>50</sup> But he argued that because the Commission can choose not to order or grant a full review of each case, the initial decision is essentially a final decision.<sup>51</sup>

In siding with the SEC, the three-judge panel of the D.C. Circuit found it critical that under the SEC rules, an ALJ’s initial decision could only become final upon an order of the Commission itself through a “finality order.”<sup>52</sup> The United States Code provides that when the Commission does not review an ALJ’s action, it “shall for all purposes, including appeal or review thereof, be deemed the action of the Commission.”<sup>53</sup> Lucia argued that based on the statute’s wording, the ALJ issues final decisions for all intents and

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45. *Lucia*, 832 F.3d at 284 (quoting *Tucker v. Comm’r*, 676 F.3d 1129, 1133 (D.C. Cir. 2012)).

46. *Landry v. FDIC*, 204 F.3d 1125, 1141 (D.C. Cir. 2000).

47. *Id.* at 1133–34.

48. *Lucia*, 832 F.3d at 288 (discussing *Freytag v. Comm’r*, 501 U.S. 868, 880–82 (1991)).

49. *Id.* at 285.

50. *Lucia*, 832 F.3d at 286.

51. *Id.* at 285.

52. *Id.* at 286.

53. 15 U.S.C. § 78d-1(c) (2012).

purposes.<sup>54</sup> However, Lucia introduced no evidence that the Commission simply “rubber-stamp[s]” the ALJs’ initial decisions.<sup>55</sup>

While the statute may permit this approach, it also authorizes the Commission to establish its own delegation and review scheme.<sup>56</sup> The SEC has the authority to delegate any of its functions—including hearing, determining, or ordering a matter—to an ALJ.<sup>57</sup> The Commission established its process to require action before an initial decision becomes final.<sup>58</sup> In doing so, the Commission retained its discretionary right to review the action of any ALJ, and while it could have chosen to adopt a regulation whereby the ALJ’s initial decision becomes final, it did not.<sup>59</sup>

After an ALJ renders a decision, a petitioner may then seek to appeal the decision by petitioning the Commission to grant review.<sup>60</sup> After a petition is filed, the Commission decides whether or not to review the ALJ’s decision, and take up the petitioner’s petition.<sup>61</sup> If the Commission decides not to take up the petition, the Commission will issue a finality order which sets the date for when sanctions will begin and includes a statement that it is not reviewing the initial decision.<sup>62</sup> “Until the Commission determines whether or not to order review, [ . . . ] there is no final decision that can be deemed the action of the Commission.”<sup>63</sup>

However, the Commission cannot sit on either an appeal or an initial order that is not being appealed and do nothing; it must make an affirmative “final decision” in every case.<sup>64</sup> No passage of time can transform an initial decision into a final one.<sup>65</sup> “The Commission’s final action is either in the form of a new decision after de novo review or, by declining to grant or order review, its embrace of the ALJ’s initial decision as its own.”<sup>66</sup> In any circumstance, the SEC did not delegate any sovereign authority to

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54. *Lucia*, 832 F.3d at 285.

55. *Id.* at 287.

56. *Id.* at 285.

57. 15 U.S.C. § 78d-1(a) (2012).

58. *See Lucia*, 832 F.3d at 286.

59. *Id.*

60. *Id.* at 282.

61. *Id.* at 286.

62. *Id.*

63. *Lucia*, 832 F.3d at 286.

64. *Id.*

65. *Id.*

66. *Id.*

act independently of the Commission to the ALJs, nor has Congress given them any power to act independently.<sup>67</sup>

#### IV. ANALYSIS

Administrative proceedings are far from uncommon amongst regulatory agencies. To deem the SEC's use of ALJs unconstitutional would require the courts to undo years of legislation establishing the creation and workings of the agency.<sup>68</sup>

This Part first addresses and supports the D.C. Circuit Court's ruling on the merits that the SEC's use of ALJs does not violate the Appointments Clause, and second discusses the work ahead for the SEC.

##### *A. The D.C. Circuit Court Ruled Correctly*

The D.C. Circuit Court correctly ruled on the merits that the SEC's administrative proceedings, which are overseen by ALJs, are constitutional. There is nothing in the regulatory history or precedent that indicates the ALJ who presides over an administrative enforcement hearing has been delegated significant authority to make final decisions for the SEC.<sup>69</sup> Further, the court's ruling reflects President Kennedy's proposal that the SEC be "provid[ed] greater flexibility in the handling of the business before the Commission."<sup>70</sup>

In deciding how to best use the flexibility granted by Congress, the SEC chose not to delegate final decision-making authority to ALJs.<sup>71</sup> The SEC is still required to "affirmatively act—by issuing the order—in every case."<sup>72</sup> The SEC intended ALJs to act much like a trial court—a court of first instance.<sup>73</sup> The Commission's retention of final decision-making authority supports an ALJ's ability to perform fair trials and provide uncompromising rulings.

On December 27, 2016, in *Bandimere v. SEC*,<sup>74</sup> the United States Court of Appeals for the Tenth Circuit disagreed with the D.C. Circuit's holding in *Lucia* and found the SEC's use of ALJ's to be

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67. *Id.*

68. *See supra* Part II.

69. *Lucia*, 832 F.3d at 287.

70. *Id.* (quoting 1962 U.S.C.C.A.N. 2150, 2151).

71. *Id.*

72. *Id.*

73. Zaring, *supra* note 23, at 1195.

74. 844 F.3d 1168 (10th Cir. 2016).

unconstitutional.<sup>75</sup> The Tenth Circuit held that SEC ALJs are inferior officers rather than employees because they “exercise significant discretion in performing ‘important functions’ commensurate with the [special trial judges’] functions described in *Freytag*.”<sup>76</sup> The *Bandimere* court reasoned that the Supreme Court “has not equated significant authority with final decision-making power.”<sup>77</sup> Judge Briscoe’s concurrence notes that final decision-making power “might be sufficient to make an employee an Officer, [but] that does not mean such authority is necessary for an employee to be an officer.”<sup>78</sup>

The SEC can petition the Tenth Circuit for a rehearing or a rehearing en banc, or can petition the Supreme Court with a writ of certiorari.<sup>79</sup> A petition for rehearing en banc for *Lucia* is pending before the D.C. Circuit because of the *Bandimere* ruling.<sup>80</sup>

While rehearing en banc and a grant of certiorari are rare, Judge McKay’s dissent expressing concern that the Tenth Circuit’s decision and interpretation of the Supreme Court’s precedent put “all federal ALJs at risk of being declared inferior officers” may draw attention to the circuit split and encourage review.<sup>81</sup> It remains to be seen whether *Bandimere* will discourage the SEC from choosing to pursue enforcement actions in administrative court “at the same rate as in the past several years[,] or whether [the *Bandimere*] decision presages the SEC’s return to federal courts for the majority of its cases.”<sup>82</sup>

### B. *The Work Ahead for the SEC*

In light of the circuit split on the constitutionality of the SEC’s use of ALJs, further court battles may lie ahead. This Comment has argued that the D.C. Circuit correctly ruled on the issue in *Lucia*, and

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75. *Id.*

76. *Id.* at 1179 (citing *Landry v. FDIC*, 204 F.3d 1125, 1134 (D.C. Cir. 2000)).

77. *Id.* at 1184.

78. *Id.* at 1192 (Briscoe, J., concurring).

79. Breon Peace, Darryl Stein, & Lisa Vicens, *Cleary Explores Appeals Court Split Over SEC Administrative Cases*, CLS BLUE SKY Blog (Jan. 11, 2017), <http://clsbluesky.law.columbia.edu/2017/01/11/cleary-delves-into-appeals-court-split-over-sec-administrative-cases>.

80. *Id.*

81. *Bandimere*, 844 F.3d at 1199 (McKay, J., dissenting).

82. Breon Peace, Darryl Stein, & Lisa Vicens, *Cleary Explores Appeals Court Split Over SEC Administrative Cases*, CLS BLUE SKY BLOG (Jan. 11, 2017), <http://clsbluesky.law.columbia.edu/2017/01/11/cleary-delves-into-appeals-court-split-over-sec-administrative-cases>.

this section examines the lingering concerns about the SEC's administrative proceedings and actions the Commission might take to alleviate these concerns. Many scholars and litigants have raised concerns of fairness over SEC enforcement proceedings.<sup>83</sup> Most of the consternation seems to stem from a lack of transparency and perceived unfairness regarding the SEC's forum selection process and the ability to bring unregistered defendants into administrative proceedings.<sup>84</sup> Adjudication through an administrative proceeding raises several problems, including the lack of procedural protections for defendants in such proceedings, the increased penalties that an ALJ may impose, and the prospect that the SEC will deliberately bring an unresolved issue of securities law into administrative court to gain an advantage of legal interpretation when it is at odds with a federal court's interpretation.

As Alexander Platt, an associate at Boies, Schiller, and Flexner LLP, noted:

The problem is not (or not only) that the SEC has been bringing more (and more important) cases in its home forum, that the procedures in that forum are deficient per se, or that the penalties available in that forum are draconian. Rather, the problem it is that, unlike in the past, under the SEC's current enforcement architecture, procedural protections are not commensurate with penalties.<sup>85</sup>

Professor David Zaring explains how these concerns grew after the passage of Dodd-Frank, which "expanded the agency's administrative jurisdiction to anyone alleged to have violated the securities laws, rather than only those registered with the agency, essentially by permitting the agency to pursue any remedy against unregistered defendants that it could pursue against registered defendants."<sup>86</sup> Even the Wall-Street Journal has echoed concerns that the SEC acts as both judge and prosecutor in administrative

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83. See, e.g., *Chau v. SEC*, 72 F. Supp. 3d 417, 425 (S.D.N.Y. 2014), *aff'd*, *Chau v. SEC*, No. 15-461-CV, 2016 WL 7036830 (2d Cir. Dec. 2, 2016); *Gupta v. SEC*, 796 F. Supp. 2d 503, 513–14 (S.D.N.Y. 2011) (Targets of SEC enforcement arguing that the unfair discrimination lies in the selection of their case for administrative proceedings, while comparable cases go to federal court).

84. Platt, *supra* note 33, at 38.

85. *Id.* at 37.

86. Zaring, *supra* note 21, at 1165.

proceedings.<sup>87</sup> These concerns are fueled not just by the Dodd-Frank Act, but also by statements made by SEC Director of Enforcement, Andrew Ceresney.<sup>88</sup> In fact, a “dramatic shift can be seen in enforcement venues for public company defendants.”<sup>89</sup> From 2010 through 2013, the SEC brought more than 65 percent of its enforcement actions against these defendants in civil court, whereas in 2015 the SEC brought 76 percent of enforcement actions in administrative court.<sup>90</sup>

The concern over procedural protections stems from the ALJ serving as both the finder of fact, as opposed to a jury, and the finder of law, as opposed to an independent judge, and also from the fact that the Federal Rules of Civil Procedure and the Federal Rules of Evidence do not apply in administrative proceedings.<sup>91</sup> Instead, the SEC’s own Rules of Procedure govern the courtroom.<sup>92</sup>

The perceived unfairness is compounded by the fact that penalties are no longer commensurate with procedural protections (or a lack thereof) in administrative courts.<sup>93</sup> ALJs can now hand out civil penalties that were previously only available in district court.<sup>94</sup> While an ALJ cannot punish in precisely the same manner as a federal district court judge (such as prohibiting a person from serving as an officer or director of a public company), the Dodd-Frank Act has increased the size and type of civil penalties available in the administrative forum, incentivizing the SEC to bring more enforcement proceedings into this forum.<sup>95</sup> Taken together, the

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87. See Russell G. Ryan, *The SEC as Prosecutor and Judge*, WALL ST. J. (Aug. 4, 2014, 7:36 PM), <http://www.wsj.com/articles/russell-g-ryan-the-sec-as-prosecutor-and-judge-1407195362> (“[A] surge in administrative prosecutions should alarm anyone who values jury trials, due process and the constitutional separation of powers.”); see also Stephen Bainbridge, *Should the SEC Be Prosecutor, Judge, Jury, and Executioner?*, PROFESSORBAINBRIDGE.COM (Oct. 21, 2014, 8:53 AM), <http://www.professorbainbridge.com/professorbainbridgecom/2014/10/should-the-sec-be-prosecutor-judge-jury-and-executioner.html>.

88. Grundfest, *supra* note 17, at 2 n.3 (“In late 2013, SEC Director of Enforcement Andrew Ceresney, stated, ‘[o]ur expectation is that we will be bringing more administrative proceedings given the recent statutory changes [enacted through the Dodd-Frank Act].’”).

89. CORNERSTONE RES. & NYU POLLACK CTR. FOR L. & BUS., SEC ENFORCEMENT ACTIVITY AGAINST PUBLIC COMPANY DEFENDANTS: FISCAL YEARS 2010–2015 (2016), <http://www.cornerstone.com/Publications/Reports/SEC-Enforcement-Activity-Against-Public-Company-Defendants>.

90. *Id.*

91. Zaring, *supra* note 21, at 1166–67.

92. *Id.*

93. Platt, *supra* note 33, at 43.

94. Zaring, *supra* note 21, at 1164, 1170.

95. See *id.* at 1170–72.

problem is that unlike in the past, under the SEC's current enforcement architecture, procedural protections are not equivalent to penalties.<sup>96</sup>

An additional concern stemming from another statement made by Chairman Andrew Ceresney is that the SEC may start using the administrative court to help the Commission substitute its interpretation of federal securities laws for the views expressed by the federal judiciary.<sup>97</sup> Legal scholars are concerned that such use of administrative proceedings will not lead to the same balanced, careful, and impartial interpretations that would result from having those cases brought before a federal district court.<sup>98</sup>

The D.C. Circuit's opinion in *Lucia* only addressed the constitutionality of the SEC's use of ALJs, but it did not resolve lingering concerns over the perceived unfairness and lack of transparency regarding forum selection related to the SEC's enforcement proceedings.<sup>99</sup>

The SEC took certain steps to balance procedural protections against increased remedies. The two changes the SEC announced included doubling the amount of time it allows from filing an action to the conclusion, and increasing allowances for discovery through depositions.<sup>100</sup> The adopted amendments to proscribe how the SEC handles administrative proceedings only recently went into effect in late September 2015.<sup>101</sup> It is too soon to tell how these changes will be received.

Regarding the discovery tools, the SEC expanded the discovery rights for administrative proceedings.<sup>102</sup> Traditionally, parties may take depositions by oral examination only if a witness were unable to attend or testify at a hearing.<sup>103</sup> The recent amendments would allow

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96. Platt, *supra* note 33, at 1.

97. Grundfest, *supra* note 19, at 8 n.21 (“If a contested matter is likely to raise unsettled and complex legal issues under the federal securities laws, or interpretation of the Commission’s rules, it may make sense to file the case as an administrative proceeding so a Commission decision on the issue, subject to appellate review in the federal courts, may facilitate development of the law.”).

98. *Id.* at 8–9 n.21.

99. See generally Raymond J. Lucia Cos. v. SEC, 832 F.3d 277 (D.C. Cir. 2016).

100. Platt, *supra* note 33, at 4.

101. Press Release, U.S. Sec. & Exch. Comm’n, SEC Proposes to Amend Rules Governing Administrative Proceedings (Sept. 24, 2015), <https://www.sec.gov/news/pressrelease/2015-209.html>.

102. Platt, *supra* note 33, at 2.

103. *Id.* at 5.

a maximum of three depositions in cases involving a single defendant and a maximum of five depositions in cases involving multiple defendants.<sup>104</sup> The amendments also adopt a more liberal timeline, allowing for up to eight months (instead of four) for a hearing to begin after the filing of charges for complex cases.<sup>105</sup>

Aside from what the SEC has already done, there are additional actions the SEC needs to take. The SEC needs to provide greater transparency in its data reporting, particularly regarding its exercise of discretion in forum selection.<sup>106</sup> The SEC has declared that there is no “rigid formula,” but rather a “number of factors” it considers for forum selection.<sup>107</sup> This vague approach, coupled with the agency’s proclamation that it will increase the use of administrative proceedings, has raised concerns and continued claims of unfairness.

As Professor Joseph Grundfest argues, the agency could calm concerns about forum selection by providing more detailed and thorough sets of statistics regarding its filing choices and win-loss ratios.<sup>108</sup> There are statistics available regarding the quantity of SEC enforcement filings, but there is not enough detailed information to dissect how many of these filings are substantive versus clerical.<sup>109</sup> This appears to be true for a variety of reasons. First, cases that settle before filing are usually recorded as an administrative proceeding.<sup>110</sup> Also, the agency registers “follow-on” proceedings and minor actions such as delinquent filings as administrative proceedings.<sup>111</sup> More detailed year-over-year reporting distinguishing between matters that “must be brought as administrative proceedings or federal civil actions from matters as to which the agency can exercise discretion over the relevant forum” is needed.<sup>112</sup>

The imagined data would provide insight into currently obscured areas of the Commission’s processes and decision-making.

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104. *Id.* at 40.

105. Grundfest, *supra* note 19, at 15–16.

106. *Id.* at 11–12.

107. Platt, *supra* note 33, at 21.

108. Grundfest, *supra* note 19, at 11 (“Put another way, the Commission has not historically reported its enforcement statistics in a manner that permits the accurate measurement of the extent to which it exercises its discretion in favor of its internal administrative proceedings when making its forum selection decisions. Nor do the agency’s data permit accurate analysis of the factors that influence its forum selection decision.”).

109. *See id.*

110. Platt, *supra* note 33, at 11 n.57.

111. *Id.*

112. Grundfest, *supra* note 19, at 11–12.



First, the data should distinguish among proceedings where the agency exercised its discretion in forum selection, (as compared to instances where a statute or another rigid factor dictates which forum must be used). When the Commission is exercising its discretion in which forum to bring an enforcement action the data should also reveal whether the defendant is registered or unregistered.<sup>113</sup> Additionally, the data should reveal the associated win-loss rates for these adversarial actions, screening for the number and types of cases that are required to proceed in administrative court by default or by statute.<sup>114</sup> Ideally, the data set will prove that as much as possible the Commission is sending non-registered defendants to Article III courts, and will reveal that the Commission is not hampering the development of securities law by using administrative proceedings to gain influence for its interpretation of debated issues.

## V. CONCLUSION

The SEC is facing a crisis of confidence regarding the fairness of its administrative proceedings. The Commission can respond to these concerns by changing its internal policies and providing greater transparency through reporting, which will bolster public confidence that litigation matters are being properly sorted between administrative and judicial forums. While these actions are advisable for the SEC, the cries of concern do not undermine the D.C. Circuit Court's ruling that the Commission's use of ALJs is constitutional. ALJs are not inferior officers wielding significant authority because their initial decisions have no way of becoming final decisions until the SEC chooses to act. Notwithstanding the merits of the ruling, however, and particularly in light of the Tenth Circuit's recent *Bandimere* ruling, it remains advisable for the SEC to take measures to improve perceived unfairness and lack of transparency.

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113. *Id.* at 10–11.

114. *Id.* at 12.

