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Insider Trading: The Problem with the SEC's In-House ALJS

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INSIDER TRADING: THE PROBLEM WITH THE SEC'S IN-HOUSE ALJS

ABSTRACT

Following the publication of an inculpatory Wall Street Journal article, the United States Securities and Exchange Commission (SEC) has been under fire regarding the potential bias of its administrative law judges (ALJs). The success rate of the SEC in its administrative proceedings has raised questions concerning the SEC's increased use of administrative proceedings over the federal court system. Defendants have become frustrated, feeling that the deck is stacked against them and that the ALJs' minds are decided before the administrative proceedings begin. The image of bias has resulted in appeals in administrative proceedings and federal courts as defendants feel that they have been denied fair opportunities to be heard. The very appearance of justice is crucial to the legal system, particularly where the SEC seeks to circumvent federal courts to conserve resources and avoid overloading the federal docket.

This Comment analyzes the various sources of bias in the SEC's ALJs. It then evaluates three mainstream proposals to reduce bias: (1) eliminating administrative proceedings, (2) allowing defendants to select the forum for their cases, and (3) establishing a separate appeals board for defendants and non-parties to raise allegations of ALJ bias. Ultimately, this Comment rejects each of these proposals for failing to reach the root of the bias problem. This Comment concludes that the government should adopt a new solution by restructuring the ALJ system into a neutral pool of ALJs who would be randomly assigned to administrative proceedings at the various federal agencies.

INTRODUCTION	125
I. BACKGROUND OF ALJs AND THE HIRING PROCESS	128
A. <i>Role of ALJs in the Administrative System</i>	128
B. <i>Neutral ALJ Hiring Process Under the OPM</i>	131
C. <i>Former Selective Certification Process</i>	132
II. REASONS FOR ALJ BIAS	134
A. <i>Are the SEC's ALJs More Biased? A Deceptive Assumption</i>	134
B. <i>Recent SEC Enforcement Trends</i>	140
C. <i>Employee-Employer Relationship: The ALJ-SEC Interplay</i>	143
III. SOLUTIONS TO THE APPEARANCE OF ALJ BIAS	146
A. <i>Formerly Proposed Solutions and Their Shortcomings</i>	146
B. <i>An Independent Pool of Neutral ALJs</i>	149
IV. IMPLICATIONS FOR A NEUTRAL POOL OF ALJs	152
A. <i>Implications for the Federal Docket</i>	152
B. <i>Implications for the Administrative Image of Justice</i>	152
CONCLUSION	153
APPENDIX	155

INTRODUCTION

“People generally see what they look for, and hear what they listen for”¹ Or in the case of the United States Securities and Exchange Commission (SEC), its in-house administrative law judges (ALJs) hear what they have been ordered by the agency to hear. The SEC faces constitutional challenges to its administrative proceedings and ALJs from numerous angles.² Its administrative proceeding practices have been the focus of both federal appeals³ and media scrutiny.⁴ Most concerning is the claim that the SEC’s ALJs are biased in favor of the agency.⁵

The appearance of impartiality at the SEC, a financial industry watchdog, is critical.⁶ The SEC is unable to prosecute criminal charges, though it frequently refers criminal violations to the Department of Justice or appropriate state authorities.⁷ The agency is permitted to seek sanctions such as cease-and-desist orders, bars from the securities industry, disgorgement, civil penalties, and suspension or revocation of registered securities or the registration of a broker, dealer, investment company, investment adviser, or financial statistical rating organizations.⁸ The impact of SEC enforcement is therefore immense and felt nationwide.⁹ In the 2016 fiscal year alone, SEC ALJs issued 170 decisions in administrative proceedings, resulting in orders for \$12.4 million in disgorgement and \$14.5 million in civil penalties.¹⁰ From 2013 through 2016, the SEC charged more than 3,300 companies and 2,700 individuals in

¹ HARPER LEE, *TO KILL A MOCKINGBIRD* 174 (Warner Books 1998) (1960).

² See Tyler L. Spunaugle, *The SEC’s Increased Use of Administrative Proceedings: Increased Efficiency or Unconstitutional Expansion of Agency Power?*, 34 *REV. BANKING & FIN. L.* 406 (2015).

³ See, e.g., *Hill v. SEC*, 825 F.3d 1236 (11th Cir. 2016); *Timbervest v. SEC*, No. 1:15-CV-2106-LMM, 2015 U.S. Dist. LEXIS 132082 (N.D. Ga. Aug. 4, 2015).

⁴ Peter J. Henning, *Constitutional Challenges to S.E.C.’s Use of In-House Judges*, *N.Y. TIMES* (Oct. 5, 2015), <https://www.nytimes.com/2015/10/06/business/dealbook/constitutional-challenges-to-secs-use-of-in-house-judges.html>.

⁵ Jean Eaglesham, *SEC Wins with In-House Judges*, *WALL ST. J.* (May 6, 2015, 10:30 PM), <http://www.wsj.com/articles/sec-wins-with-in-house-judges-1430965803>.

⁶ See *Office of Administrative Law Judges*, U.S. SEC. & EXCHANGE COMMISSION, <https://www.sec.gov/alj> (last modified Jan. 26, 2017) (describing the role of ALJs as “independent adjudicators”).

⁷ See Exchange Act of 1934, 15 U.S.C. § 78u(h)(9)(B) (2012); OFFICE OF CHIEF COUNSEL, U.S. SEC. & EXCH. COMM’N, *ENFORCEMENT MANUAL* 84 (2016).

⁸ *Office of Administrative Law Judges*, *supra* note 6.

⁹ *See id.*

¹⁰ *See id.*

administrative and federal court proceedings, and obtained over \$13.4 billion in sanctions.¹¹

The current challenges to the SEC's administrative proceedings include issues with the Appointments Clause,¹² the Seventh Amendment,¹³ Equal Protection,¹⁴ and Procedural Due Process.¹⁵ However, this Comment focuses solely on one challenge: the potential bias of the SEC's in-house ALJs.¹⁶ While the Supreme Court has declined to hear cases challenging the validity of ALJs under the Appointments Clause,¹⁷ the more disturbing claim is the possibility of a biased trier of fact.¹⁸ The SEC has been the center of media attention,¹⁹ but that does not exclude other agencies from scrutiny. While this Comment concentrates on the bias allegations at the SEC, all agencies bringing cases in administrative proceedings in front of in-house ALJs could face a similar problem.

Following the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) in 2010,²⁰ the SEC increased the number of cases it brought in administrative proceedings.²¹ In the 2014 fiscal year, the SEC brought four out of five enforcement actions in administrative

¹¹ Press Release, U.S. Sec. & Exch. Comm'n, SEC Chair Mary Jo White Announces Departure Plans (Nov. 14, 2016), <https://www.sec.gov/news/pressrelease/2016-238.html>.

¹² Alexander I. Platt, *SEC Administrative Proceedings: Backlash and Reform*, 71 *BUS. LAW.* 1, 14 (2015). ALJs are appointed by human resources officials within the SEC—not by the Commission directly—and are not removable by the President, both of which would violate Article II § 2 of the Constitution if ALJs were found to be “inferior officers.” *Id.* at 14–15; U.S. CONST. art. II, § 2, cl. 2 (“[B]ut the 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.”).

¹³ Platt, *supra* note 12, at 17. When a case is heard in an administrative proceeding as opposed to federal court, the defendant loses the opportunity to be heard by a jury, as juries are not used in administrative proceedings. *Id.*; see U.S. CONST. amend. VII (“In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . .”).

¹⁴ David Zaring, *Enforcement Discretion at the SEC*, 94 *TEX. L. REV.* 1155, 1195 (2016) (“[T]hey are arguing that the unfair discrimination lies in the selection of their case for administrative proceedings, while comparable cases go to court.”).

¹⁵ *Id.* at 1197 (challenging forum selection, the jurisdiction of administrative proceedings, and “agency officials act[ing] as judge, jury, and prosecutor”).

¹⁶ See Eaglesham, *supra* note 5.

¹⁷ *Bebo v. SEC*, 799 F.3d 765 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1500 (2016) (discussing removal issue); Brief of Petitioner, *Pierce v. SEC*, 136 S. Ct. 1713 (2016) (No. 15-901) (discussing appointment issue).

¹⁸ See *infra* notes 199–204 and accompanying text (discussing the negative effects of perceived bias).

¹⁹ See discussion *infra* Section II.A.

²⁰ Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. §§ 5301–5641 (2012).

²¹ Spunaugle, *supra* note 2, at 406 (“The SEC has taken advantage of this expanded authority by increasingly preferring to pursue enforcement actions in front of [administrative proceedings] rather than the district courts.”).

proceedings rather than in federal courts.²² Further, the SEC boasted a 90% win rate in administrative proceedings, and only a 69% win rate in federal court, from October 2010 through March 2015.²³ Several commentators have questioned the independence of the SEC's ALJs given the significantly higher success rate in administrative proceedings.²⁴

While other agencies may also have biased ALJs,²⁵ public scrutiny has focused on the SEC.²⁶ All federal agencies use the same ALJ hiring process,²⁷ but only the SEC ALJs receive public scrutiny.²⁸ This Comment argues that SEC ALJs are still biased, despite a neutral hiring process. This Comment further argues that this systemic bias should be removed by restructuring the ALJ program to function as a neutral pool of available ALJs employed by the Office of Personnel Management (OPM) instead of by particular agencies.

Additionally, the agency's leadership remains up in the air.²⁹ Ordinarily, five commissioners, appointed by the President of the United States and confirmed by the Senate, lead the SEC.³⁰ To prevent the appearance of political bias, "no more than three [c]ommissioners may belong to the same political party."³¹ Currently, only three of the five seats are filled, with one commissioner's term having expired in June 2017.³² The last SEC Chair, Mary Jo White, stepped down from her position at the conclusion of President Obama's second term.³³ Thus, the time is now for reform at the SEC.

This Comment proceeds in four parts. Part I explains the role and hiring of ALJs following the passage of the Administrative Procedure Act (APA) to

²² Eaglesham, *supra* note 5.

²³ *Id.*

²⁴ See Platt, *supra* note 12, at 9; Spunaugle, *supra* note 2, at 413; Zaring, *supra* note 14, at 1175.

²⁵ See *infra* Section II.A.

²⁶ See, e.g., Eaglesham, *supra* note 5 (highlighting the SEC's success rate in administrative proceedings); Kimberley A. Strassel, *The SEC Plays Judge and Jury*, WALL ST. J. (Aug. 4, 2016, 7:30 PM), <http://www.wsj.com/articles/the-sec-plays-judge-and-jury-1470353410> (criticizing the SEC's trend towards administrative proceedings).

²⁷ Kent Barnett, *Resolving the ALJ Quandary*, 66 VAND. L. REV. 797, 804–05 (2013).

²⁸ See *supra* note 26 and accompanying text.

²⁹ *Current SEC Commissioners*, U.S. SEC. & EXCHANGE COMMISSION, <https://www.sec.gov/about/commissioner.shtml> (last modified Sept. 17, 2013).

³⁰ *Id.*

³¹ *Id.*

³² *Id.* Because no individual was confirmed when Commissioner Kara Stein's term ended in June 2017, she may continue to serve as a commissioner for up to eighteen months following the expiration of her term.

Id.

³³ Press Release, U.S. Sec. & Exch. Comm'n, *supra* note 11.

demonstrate the facial neutrality of the ALJ infrastructure across agencies. Part II examines the reasons behind the bias allegations at the SEC and evaluates the risk of bias. Part III argues for overhauling the infrastructure of the ALJ program by assessing four solutions. Finally, Part IV describes the implications that the reform would have on future agency adjudications.

I. BACKGROUND OF ALJs AND THE HIRING PROCESS

This Part provides an overview of ALJs. Section A details the role of ALJs in federal agencies. Section B explains the selection process of ALJs as prescribed by the APA and the OPM, which applies to all federal agencies as a means of ensuring impartiality. Finally, section C lays out the selective certification process that was reformed to prevent ALJ biases. Despite the repeal of the selective certification process and maintenance of a neutral hiring process, bias continues to affect the SEC's ALJs.

A. *Role of ALJs in the Administrative System*

The APA formally created the ALJ position in 1946 to “ensure fairness in administrative proceedings before Federal Government agencies.”³⁴ In the APA, Congress carefully described the role of the ALJ to regulate the hiring process and power of the position.³⁵ Previously agencies used their own employees to oversee proceedings, and such proceedings were shrouded in vagueness.³⁶ While there were obvious favoritism issues when ALJs were former employees of an agency, agencies frequently ignored the decisions of ALJs and crafted their own with little or no given rationale.³⁷ The APA intended ALJs to be “impartial triers of fact.”³⁸ “An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review”³⁹

³⁴ *Qualification Standard for Administrative Law Judge Positions*, OFF. OF PERSONNEL MGMT., <https://www.opm.gov/policy-data-oversight/classification-qualifications/general-schedule-qualification-standards/specialty-areas/administrative-law-judge-positions/> (last visited Oct. 1, 2016).

³⁵ Jeffrey S. Lubbers, *Federal Administrative Law Judges: A Focus on Our Invisible Judiciary*, 33 ADMIN. L. REV. 109, 111 (1981).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Qualification Standard for Administrative Law Judge Positions*, *supra* note 34. See Lubbers, *supra* note 35, at 111.

³⁹ Administrative Procedure Act, 5 U.S.C. § 554(d) (2012).

Therefore, to preserve neutrality, the APA intends that ALJs be insulated from agency employees in charge of enforcement actions.⁴⁰

The duties of ALJs include “rul[ing] on preliminary motions, conduct[ing] pre-hearing conferences, issu[ing] subpoenas, conduct[ing] hearings . . . , review[ing] briefs, and prepar[ing] and issu[ing] decisions.”⁴¹ Essentially, ALJs function as the agency counterpart to judges in a courtroom.⁴² While ALJs lack some of the independence and constitutional safeguards of Article III judges, they are still held to the same expectation of justice.⁴³ The SEC describes ALJs as “independent adjudicators,”⁴⁴ though they are not held to the same ethical code as Article III judges.⁴⁵ Article III judges are held to high ethical standards to preserve “the integrity and independence of the judiciary.”⁴⁶ The official commentary of the Code of Conduct further adds, “[V]iolation of this Code diminishes public confidence in the judiciary and injures our system of government under law.”⁴⁷ The mere appearance of prejudice or bias is prohibited in the federal judiciary.⁴⁸ ALJs functionally act as judges in hearing administrative proceedings; thus, they should be held to the same ethical standards prohibiting any bias or partiality.

ALJs can hear a number of cases on issues as varied as the agencies themselves. For example, ALJs hear cases on subject matters ranging from transportation to social security benefits to international trade.⁴⁹ Despite hearing cases on niche areas of law, ALJs are not required to have any

⁴⁰ See Lubbers, *supra* note 35, at 111–12. Whether ALJs are actually insulated from the politics and pressure of their respective agencies is another matter. See *infra* Part II.

⁴¹ *Qualification Standard for Administrative Law Judge Positions*, *supra* note 34.

⁴² Lubbers, *supra* note 35, at 110.

⁴³ Christopher B. McNeil, *Similarities and Differences Between Judges in the Judicial Branch and the Executive Branch: The Further Evolution of Executive Adjudications Under the Administrative Central Panel*, 18 J. NAT'L ASS'N ADMIN. L. JUDGES 1, 6 (1998) (quoting *Barry v. Bowen*, 825 F.2d 1324, 1330 (9th Cir. 1987)) (“[A]dministrative decision makers do not bear all the badges of independence that characterize an Article III judge, but they are held to the same standard of impartial decision making.”).

⁴⁴ *Office of Administrative Law Judges*, *supra* note 6.

⁴⁵ See *Code of Conduct for United States Judges*, U.S. COURTS, <http://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges> (last modified Mar. 20, 2014) (excluding ALJs from the list of judges to whom the code applies).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ See *Republican Party of Minn. v. White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring) (“The citizen’s respect for judgments depends in turn upon the issuing court’s absolute probity.”).

⁴⁹ Lubbers, *supra* note 35, at 110.

specialized knowledge before working for a particular agency.⁵⁰ As of March 2016, 1,792 ALJs serve thirty federal agencies.⁵¹ Given the focus of constitutional backlash on the SEC, one might assume that the SEC has tens or even hundreds of these ALJs serving just its purposes. However, this could not be further from the truth; more than 1,500 ALJs serve the Social Security Administration (SSA), whereas only five serve the SEC.⁵²

Notably, the APA does not require that all agencies bring actions in administrative proceedings.⁵³ For example, the SEC has the option to bring enforcement matters in either administrative proceedings or federal courts.⁵⁴ A guide published by the SEC's Division of Enforcement details the agency's approach to forum selection.⁵⁵ While the agency does not adhere to a strict formula, the Division of Enforcement considers a number of factors when selecting a forum.⁵⁶ These include (1) "[t]he availability of the desired claims, legal theories, and forms of relief in each forum"; (2) "[w]hether any charged party is a registered entity or an individual associated with a registered entity"; (3) "[t]he cost-, resource-, and time-effectiveness of litigation in each forum"; and (4) "[f]air, consistent, and effective resolution of securities law issues and matters."⁵⁷ The SEC notes that one advantage of administrative proceedings is the expertise of the ALJs, who become intimately familiar with the workings of the securities industry and regulations.⁵⁸

⁵⁰ See Barnett, *supra* note 27, at 804 (describing ALJ employment requirements). The selective certification process served to allow agencies to seek out ALJs with specialized knowledge. See *infra* Section I.C.

⁵¹ *ALJs by Agency*, OFF. OF PERSONNEL MGMT., <https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=ALJs-by-Agency> (last visited Oct. 1, 2016).

⁵² *Id.* For a breakdown of ALJs by agency, see the reproduction of the OPM's chart in the Appendix.

⁵³ *Cf.* 5 U.S.C. § 554(a) (2012) (detailing the application of the statute to administrative hearings but leaving open the possibility that a case be brought in court instead).

⁵⁴ U.S. SEC. & EXCH. COMM'N, DIVISION OF ENFORCEMENT APPROACH TO FORUM SELECTION IN CONTESTED ACTIONS 1, <https://www.sec.gov/divisions/enforce/enforcement-approach-forum-selection-contested-actions.pdf> (last visited Oct. 1, 2016) [hereinafter SEC, FORUM SELECTION].

⁵⁵ *Id.*

⁵⁶ *Id.* No one factor is dispositive, but the guide notes, "Not all factors will apply in every case and, in any particular case, some factors may deserve more weight than others, or more weight than they might in another case. Indeed, in some circumstances, a single factor may be sufficiently important to lead to a decision to recommend a particular forum." *Id.* Thus, defendants have no ability to predict in which forum the SEC will pursue a case.

⁵⁷ *Id.*

⁵⁸ *Id.* ("[ALJs] . . . develop extensive knowledge and experience concerning the federal securities laws and complex or technical securities industry practices or products.").

B. *Neutral ALJ Hiring Process Under the OPM*

The APA itself gives little guidance as to the hiring of ALJs.⁵⁹ Section 3105, appropriately titled “Appointment of administrative law judges,” merely states, “Each agency shall appoint as many administrative law judges as are necessary for proceedings required to be conducted in accordance with sections 556 and 557 of this title.”⁶⁰ Therefore the SEC is able to appoint as many or as few ALJs as it would like, dependent on its needs.⁶¹ Further, the statute notes, “Administrative law judges shall be assigned to cases in rotation so far as practicable, and may not perform duties inconsistent with their duties and responsibilities as administrative law judges,”⁶² although this does little to clarify how ALJs are to be appointed.

The APA authorizes the OPM (formerly the U.S. Civil Service Commission)⁶³ to set guidelines and standards for hiring ALJs.⁶⁴ Agencies are restricted to considering a list of candidates ranked by the OPM and the “rule of three.”⁶⁵ The “rule of three” is a statutory requirement that agencies must consider at least three names per vacancy.⁶⁶ Additionally, the agency must select an ALJ from the top three ranked eligible applicants.⁶⁷

Because the APA leaves much to be determined in regard to hiring ALJs, the OPM has the power to craft the relevant hiring standards and procedure.⁶⁸ Qualification, determined entirely by the OPM, consists of three components: licensure, experience, and a written examination.⁶⁹ The first, licensure, is perhaps the easiest standard to pass, as the applicant simply must be licensed to practice law in a state, the District of Columbia, Puerto Rico, or any territorial court under the U.S. Constitution.⁷⁰ Second, to satisfy the experience requirement, “[a]pplicants must have a full seven (7) years of experience as a

⁵⁹ See 5 U.S.C. § 3105 (2012).

⁶⁰ *Id.*

⁶¹ Likewise, ALJs are also subject to agency- or office-wide reductions in force. VANESSA K. BURROWS, CONG. RESEARCH SERV., RL34607, ADMINISTRATIVE LAW JUDGES: AN OVERVIEW 9 (2010).

⁶² 5 U.S.C. § 3105.

⁶³ Lubbers, *supra* note 35, at 112.

⁶⁴ 5 U.S.C. § 3344 (2012).

⁶⁵ Lubbers, *supra* note 35, at 115.

⁶⁶ 5 U.S.C. § 3317(a) (2012); Lubbers, *supra* note 35, at 115.

⁶⁷ 5 U.S.C. § 3318 (2012); Lubbers, *supra* note 35, at 115 (“The agency is then obliged to make its selection from those three who have the highest scores and are actually available for appointment.”).

⁶⁸ Lubbers, *supra* note 35, at 112 (“[OPM] has been exclusively responsible for the initial examination, certification for selection, and compensation of ALJs.”).

⁶⁹ *Qualification Standard for Administrative Law Judge Positions*, *supra* note 34.

⁷⁰ *Id.*

licensed attorney preparing for, participating in, and/or reviewing formal hearings or trials involving litigation and/or administrative law at the Federal, State, or local level.”⁷¹ Third, the OPM administers an examination to judge an applicant’s knowledge, skills, and ability.⁷² Beyond the formal tripartite system, a number of softer factors are also incorporated into the final composite score, which one might normally expect when applying for a job. For example, the candidate must allow the OPM to send “vouchers,” or inquiries, to twenty individuals with “personal knowledge of the applicant’s experience, professional abilities, and qualifications”—the equivalent to a list of references.⁷³

Following the examination, each applicant is given a composite score between zero and 100.⁷⁴ Applicants who score eighty or above are then considered eligible candidates.⁷⁵ The OPM then ranks eligible candidates by score, which is available for review by hiring agencies.⁷⁶ Once the hiring agencies receive the rankings of the ALJ candidate scores, the individual agencies may make appointments from this list subject to the rule of three.⁷⁷ The hiring procedures prescribed by the OPM are objective and calibrated to find the best candidates for ALJ positions.⁷⁸ However, a neutral hiring process is not enough to prevent bias when ALJs are placed at and employed by a specific agency.⁷⁹

C. Former Selective Certification Process

Initially, agencies were permitted to circumvent the rankings set by the OPM and the rule of three by engaging in selective certification.⁸⁰ If an agency gained the OPM’s approval by showing a necessity, the agency could appoint ALJs despite their eligibility ranking.⁸¹ Many agencies would prove necessity

⁷¹ *Id.*

⁷² *Id.*

⁷³ Lubbers, *supra* note 35, at 114.

⁷⁴ *Id.* at 112.

⁷⁵ *Id.*

⁷⁶ *Id.* There are two separate registries, one for GS-16 grade level and one for GS-15 level. *Id.* Most agencies employ GS-16 level ALJs, but four—the SSA; the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF); the Department of Housing and Urban Development; and the U.S. Coast Guard—employ GS-15 level ALJs. *Id.* at 112–13, 113 n. 19.

⁷⁷ *See id.* at 115; 5 U.S.C. § 3317(a) (2012).

⁷⁸ *See Qualification Standard for Administrative Law Judge Positions, supra* note 34.

⁷⁹ *See infra* Part II.

⁸⁰ Barnett, *supra* note 27, at 805.

⁸¹ Lubbers, *supra* note 35, at 117.

by expressing a need for an ALJ who has prior experience or specialized knowledge in the relevant field, such as communications for the Federal Communications Commission.⁸² From the 1960s through the 1980s,⁸³ eleven agencies engaged in selective certification, including the SEC.⁸⁴

However, selective certification was an obvious avenue for agencies to acquire biased ALJs. A 1974 study estimated that 82% of ALJs acquired their jobs using selective certification, rather than the traditional hiring process set and managed by the OPM.⁸⁵ A 1969 study found that fifty-two of sixty-six ALJs hired through selective certification were former employees of the respective agencies, as many agencies found that their own staff attorneys possessed the requisite specialized knowledge.⁸⁶

The OPM ended selective certification in 1984 after criticism that the ALJs hired through selective certification were biased in favor of their agencies.⁸⁷ The OPM's official announcement to end selective certification seemed to leave open a gap: "Where agencies can justify by job analysis that special qualifications enhance performance on the job, agencies may give priority consideration in filling vacant positions to applicants with special qualifications."⁸⁸ Several agencies have appealed to the OPM and Congress under this language for a waiver to return to selective certification.⁸⁹ However, such attempts have been unsuccessful.⁹⁰ Thus far, the OPM has interpreted the language only to mean that when comparing two applicants with equal scores following the ALJ qualification process, an agency may choose the applicant with relevant industry experience.⁹¹ The American Bar Association supported the OPM in denying agency requests to use selective certification.⁹² By closing

⁸² *Id.*

⁸³ Barnett, *supra* note 27, at 805.

⁸⁴ Lubbers, *supra* note 35, at 117–18. Other agencies included the Department of Agriculture, the Civil Aeronautics Board, the Federal Communications Commission, the Federal Energy Regulatory Commission, the Department of Labor, the Interstate Commerce Commission, the National Labor Relations Board, ATF, SSA, and the U.S. Coast Guard. *Id.*

⁸⁵ *Id.* at 118.

⁸⁶ *Id.*

⁸⁷ Barnett, *supra* note 27, at 805.

⁸⁸ BURROWS, *supra* note 61, at 6 (citing OFFICE OF PERSONNEL MGMT., EXAMINATION ANNOUNCEMENT NO. 318 at 8 (1984)).

⁸⁹ Barnett, *supra* note 27, at 805.

⁹⁰ BURROWS, *supra* note 61, at 6.

⁹¹ *Id.*

⁹² *Id.*

the selective certification loophole, the OPM sought to end ALJ bias.⁹³ However, given that claims of biased ALJs continue to crop up,⁹⁴ ending selective certification did not solve the problem.

II. REASONS FOR ALJ BIAS

While the ALJ hiring process is controlled by the OPM and is identical for each agency,⁹⁵ the claims of bias against the SEC's ALJs seem to be front-page news while claims against other agencies take a back seat.⁹⁶ Because all agencies are bound by the same hiring rules, in theory they have equal chances of acquiring biased ALJs. However, the SEC remains in the crosshairs of the *Wall Street Journal*, the *New York Times*, and *Forbes*, while other agencies slip under the radar.⁹⁷ Perhaps other agencies just do not have biased ALJs and this problem is unique to the SEC.

This Part analyzes the reasons for ALJ bias at the SEC. Section A addresses the potentially deceptive assumption that only the SEC faces such allegations, though the media's focus on the SEC demonstrates a lack of public confidence in the agency's impartiality during administrative proceedings. Section B surveys recent trends in SEC enforcement actions indicating a heavy shift toward administrative proceedings where the SEC could receive preferential treatment. Section C analyzes how the employee-employer relationship between the ALJs and the SEC increases the opportunity for bias.

A. *Are the SEC's ALJs More Biased? A Deceptive Assumption*

Due to the high-profile nature of the subject matter and the deep pockets of the parties to SEC administrative proceedings, major news outlets naturally report on the alleged bias of SEC ALJs over those of other agencies, such as

⁹³ See Barnett, *supra* note 27, at 805 (noting that the OPM ended selective certification in response to charges of ALJ bias).

⁹⁴ Eaglesham, *supra* note 5.

⁹⁵ See *supra* Section I.B.

⁹⁶ See, e.g., Eaglesham, *supra* note 5 (suggesting SEC ALJ bias); Henning, *supra* note 4 (describing constitutional challenges to the SEC's ALJ program); Daniel R. Walfish, *The Real Problem with SEC Administrative Proceedings, and How to Fix It*, FORBES (July 20, 2015), <https://www.forbes.com/sites/danielfisher/2015/07/20/the-real-problem-with-sec-administrative-proceedings-and-how-to-fix-it/#5b88c4bf2e01> (concluding that the real problem was with the SEC's appellate process, but still noting the issue of potentially biased ALJs).

⁹⁷ Cf. Eaglesham, *supra* note 5; Henning, *supra* note 4; Walfish, *supra* note 96.

the SSA or the Environmental Protection Agency.⁹⁸ Other agencies' ALJs may face similar bias allegations, yet the media only fixates on such allegations against the SEC, thus making the allegations against other agencies harder to follow.⁹⁹ For example, the SSA was also accused of having biased ALJs in disability hearings, but these allegations were only reported outside of major news outlets.¹⁰⁰ Allegations of bias at the SEC receive attention due to (1) recent cases challenging the SEC, (2) media attention on the SEC, (3) the SEC Office of Inspector General's (OIG) investigation into the agency's ALJs, and (4) other agencies already taking steps to reduce bias in ALJs.

Recent cases have amplified the focus of media attention on the SEC by vocalizing these bias allegations. While many cases have challenged the constitutionality of the SEC's administrative proceedings, the theories of those challenges are varied and diverse.¹⁰¹ Despite the many constitutional challenges to date, no court has heard a due process challenge regarding the impartiality of the SEC's ALJs.¹⁰² However, *Timbervest, LLC v. SEC*¹⁰³ led

⁹⁸ See Eaglesham, *supra* note 5; Strassel, *supra* note 26. Large amounts of money are at stake in SEC enforcement actions. *Office of Administrative Law Judges*, *supra* note 6 ("For fiscal year 2016, [ALJs] . . . ordered approximately \$12.4 million in disgorgement and approximately \$14.5 million in civil penalties."). The actions frequently involve well-known business organizations and individuals. See, e.g., Aruna Viswanatha et al., *Golfer Phil Mickelson Sued, Two Others Charged in Insider-Trading Case*, WALL ST. J. (May 19, 2016, 7:49 PM), <http://www.wsj.com/articles/former-dean-foods-chairman-thomas-davis-charged-with-insider-trading-143663773> (detailing renowned golfer Phil Mickelson's involvement in an insider trading case); Press Release, U.S. Sec. & Exch. Comm'n, Merrill Lynch to Pay \$415 Million for Misusing Customer Cash and Putting Customer Securities at Risk (Jun. 23, 2016), <https://www.sec.gov/news/pressrelease/2016-128.html>; Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Bank of America with Securities Laws Violations in Connection with Regulatory Capital Overstatements (Sept. 29, 2014), <https://www.sec.gov/News/PressRelease/Detail/PressRelease/1370543065> 483.

⁹⁹ See Eaglesham, *supra* note 5; Henning, *supra* note 4; Walfish, *supra* note 96.

¹⁰⁰ See, e.g., Scott Elkind, *The War on So-Called "Outlier" Administrative Law Judges*, AM. ASS'N FOR JUST.: SOC. SECURITY DISABILITY L. NEWSL., <https://www.justice.org/sections/newsletters/articles/war-on-so-called-outlier-administrative-law-judges> (last visited Oct. 29, 2016); Press Release, Gibson Dunn, Historic Class Action Settlement Provides New Hearings and Protections to Thousands of Disabled New Yorkers Wrongly Denied Social Security Benefits (Jan. 14, 2013), <http://www.gibsondunn.com/news/Pages/HistoricClassActionSettlementProvidesNewHearingsandProtections.aspx>; *New SSA Ruling Addresses ALJ Bias*, LAPORTE L. FIRM (Feb. 21, 2013), <http://laportelawfirm.com/2013/02/21/new-ssa-ruling-addresses-alj-bias/>.

¹⁰¹ See *Hill v. SEC*, 825 F.3d 1236, 1237 (11th Cir. 2016); *Tilton v. SEC*, 824 F.3d 276, 278–79 (2d Cir. 2016), *cert. denied*, 137 S. Ct. 2187 (2017); *Bebo v. SEC*, 799 F.3d 765, 767 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1500 (2016).

¹⁰² Cf. *Tumey v. Ohio*, 273 U.S. 510, 535 (1927) (finding a right to an impartial judge).

¹⁰³ No. 1:15-CV-2106-LMM, 2015 U.S. Dist. LEXIS 132082 (N.D. Ga. Aug. 4, 2015) (challenging the constitutionality of the SEC's ALJ appointment procedures).

directly to the publication of the *Wall Street Journal's* article "SEC Wins with In-House Judges," which critiqued the SEC ALJs' ability to be impartial.¹⁰⁴

Among other things, the plaintiffs in *Timbervest* challenged the constitutionality of the SEC's administrative proceedings with regard to the appointment and removal processes for ALJs.¹⁰⁵ While the plaintiffs' argument in federal court focused on the mechanics of hiring and removing ALJs, one of their arguments when appealing to the SEC Commissioners hinged on SEC ALJs being biased in favor of the agency.¹⁰⁶ These bias allegations were reiterated in the district court opinion, stating: "Based on ['SEC Wins with In-House Judges'], Plaintiffs requested that the SEC produce evidence relevant to the former ALJ's allegations because those statements were relevant to Plaintiffs' due process, impartiality claim which was pending before the [SEC]."¹⁰⁷

While the *Timbervest* case added fuel to the fire of allegations of unconstitutionality in administrative proceedings, the *Wall Street Journal* lit the flame.¹⁰⁸ In the "SEC Wins with In-House Judges" article, former SEC ALJ Lillian McEwen stated that she was pressured by Chief Judge Brenda Murray to rule for the SEC more often.¹⁰⁹ McEwen asserted that Murray "questioned [her] loyalty to the SEC" because McEwen often ruled in favor of the defendants.¹¹⁰ Additionally, McEwen explained that SEC ALJs were to view defendants as guilty until proven innocent, contrary to the most basic premise of the American judicial system.¹¹¹

The *Timbervest* case mentioned only one of several accusations of SEC ALJ bias in the media.¹¹² Investor Mark Cuban has criticized the SEC's administrative proceeding process frequently and publicly, as noted in a recent

¹⁰⁴ Eaglesham, *supra* note 5.

¹⁰⁵ *Timbervest*, 2015 U.S. Dist. LEXIS 132082, at *1-2.

¹⁰⁶ See Order Requesting Additional Briefing, Investment Advisers Act Release No. 4166, Investment Company Act Release No. 31749, 2015 SEC LEXIS 3294 (Aug. 11, 2015). Administrative proceedings are directly appealable only to the SEC Commissioners. *Hill*, 825 F.3d at 1238. The SEC's final order may then be appealed to federal district court. *Id.* at 1237.

¹⁰⁷ *Timbervest*, 2015 U.S. Dist. LEXIS 132082, at *12.

¹⁰⁸ See Eaglesham, *supra* note 5.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ See *id.* ("[T]he burden was on the people who were accused to show that they didn't do what the agency said they did.")

¹¹² *Timbervest*, 2015 U.S. Dist. LEXIS 132082, at *12.

interview with the *Washington Post* that highlighted claims of bias.¹¹³ A different article by the *Wall Street Journal* also questioned the impartiality of ALJs, noting, “These judges are hired by the SEC and sit on the [C]ommission’s payroll.”¹¹⁴ The article notes another high-profile case challenging the constitutionality of the SEC’s ALJs, *Tilton v. SEC*.¹¹⁵ In the administrative proceeding prior to *Tilton*, the defendant requested a December trial date upon a dramatic change in counsel in June.¹¹⁶ The ALJ, Carol Foelak, ignored the defendant’s request twice—first scheduling the trial for September, and then moving it to October.¹¹⁷ The ALJ warned “against filing any further ‘frivolous’ motions.”¹¹⁸ The article concluded the “SEC gets to sit as prosecutor, judge and jury—and no surprise that the agency loves this setup.”¹¹⁹

Following the media firestorm resulting from *Timbervest* and the associated *Wall Street Journal* article, the OIG launched an investigation into the bias of ALJs at the SEC.¹²⁰ Then-SEC Chair Mary Jo White requested the investigation, not just into McEwen’s statements, but into bias allegations against all SEC ALJs as a whole.¹²¹ The OIG ultimately concluded that there was no evidence of bias, apart from “systemic factors” such as following SEC precedent and rules of practice.¹²² Despite White’s request, the OIG investigation only focused upon McEwen’s claim that Chief Judge Murray told or in some way pressured ALJs to rule for the SEC.¹²³ However, the OIG merely interviewed the ALJs by asking them if they were ever directly told

¹¹³ Renae Merle, *Cuban on His Crusade Against the SEC—and When He’ll Be Satisfied*, WASH. POST (Mar. 17, 2016), https://www.washingtonpost.com/business/economy/cuban-on-his-crusade-against-the-sec—and-when-hell-be-satisfied/2016/03/17/619d9e9a-ebae-11e5-b0fd-073d5930a7b7_story.html (“Instead of sending the cases to federal court, the SEC puts them before an [ALJ] whom defense attorneys have complained could be biased in favor of the agency.”).

¹¹⁴ Strassel, *supra* note 26.

¹¹⁵ *Tilton v. SEC*, 824 F.3d 276 (2d Cir. 2016), *cert. denied*, 137 S. Ct. 2187 (2017); Strassel, *supra* note 26.

¹¹⁶ Strassel, *supra* note 26.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ OFFICE OF INSPECTOR GEN., U.S. SEC. & EXCH. COMM’N, REPORT OF INVESTIGATION: CASE # 15-ALJ-0482-1 1 (2016), <https://www.sec.gov/oig/reportspubs/Final-Report-of-Investigation.pdf>.

¹²¹ *Id.* at 8.

¹²² *Id.* at 1. See Michael Dvorak, Note, *SEC Administrative Proceedings and Equal Protection “Class of One” Challenges: Evaluating Concerns About SEC Forum Choices*, 2015 COLUM. BUS. L. REV. 1195, 1199 (2015), for a discussion of how the SEC’s rules of practice unduly burden defendants.

¹²³ OFFICE OF INSPECTOR GEN., *supra* note 120, at 1.

how to rule.¹²⁴ This devolved into a game of “he said, she said,” pitting McEwen against the other ALJs.¹²⁵ Unsurprisingly, when asked if they were biased, the other ALJs rejected the allegations.¹²⁶

While the OIG report did not focus on any sources of implicit bias,¹²⁷ the scope of the investigation did include the review of e-mails dated between 2003 and 2015.¹²⁸ One e-mail from Chief Judge Murray in 2014 noted, “[A] securities lawyer said that one of the judge’s [sic] in the office is biased against private companies and he said he would never rule against the government. It was confirmed by another attorney at the reception.”¹²⁹ When Murray confronted the accused ALJ, who goes unnamed in the report, the ALJ denied the allegation.¹³⁰

When the OIG issued its interim report on the matter, the *Timbervest* respondents were so frustrated with the investigation’s lack of progress that they filed a supplemental brief requesting an opportunity to submit additional evidence of bias.¹³¹ Ultimately, their chief criticism of the OIG—that its failure to address the “most significant evidence of bias” rendered the investigation “wholly deficient”—would remain unresolved.¹³² This critical evidence was “the overwhelming success rate of the Division of Enforcement in administrative proceedings and ALJ Elliot’s unbroken record of ruling in favor of the Division.”¹³³ As of the *Timbervest* case, the SEC won in 96% of administrative proceedings compared to 67% of federal court cases.¹³⁴ Further, Judge Elliot ruled in favor of the SEC 100% of the time.¹³⁵ The respondents in *Timbervest* were particularly interested in Judge Elliot, as he made the initial

¹²⁴ See *id.* at 9–14.

¹²⁵ See *id.*

¹²⁶ *Id.* at 10–14.

¹²⁷ *Id.* at 5 n.1 (“[T]he allegations of bias or improper influence investigated were limited to instructions, directives or orders on how to rule on motions, decide questions of facts or law, or make other dispositions of any particular administrative proceeding given by the Chief ALJ to the other ALJs without regard to the evidence or applicable legal authority.”).

¹²⁸ *Id.* at 6–7.

¹²⁹ *Id.* at 15.

¹³⁰ *Id.* at 16.

¹³¹ Respondents’ Supplemental Brief in Further Support of Motion to Allow Submission of Additional Evidence & Leave to Adduce Additional Evidence at 1, *Timbervest, LLC*, Administrative Proceeding File No. 3-15519 (June 4, 2015) [hereinafter Respondents’ Supplemental Brief].

¹³² *Id.* at 4–5.

¹³³ *Id.* at 4.

¹³⁴ *Id.* at 5.

¹³⁵ *Id.*

ruling against the respondents.¹³⁶ When the SEC requested that Judge Elliot submit an affidavit regarding the bias allegations, he declined.¹³⁷ While Judge Elliot claimed he had “multiple reasons why [he] decided not to provide a response” to the affidavit, he did not share any of those reasons with the OIG.¹³⁸ Then-Chair White requested the OIG investigate the bias allegations generally, not just those regarding Judge McEwen.¹³⁹ However, the final OIG report glossed over potential “systemic factors” leading to bias and only focused on the validity of the statements made by Judge McEwen.¹⁴⁰

Although the OIG concluded there was no ALJ bias on behalf of the SEC, the public was not satisfied with the answer. When asked whether he was comforted by the OIG’s findings, Mark Cuban, who won a high-profile case against the SEC in 2013 and has been outspoken with his critiques of the agency, responded simply, “That’s laughable. Why not look to impartial analysis?”¹⁴¹ Likewise, McEwen commented, “[Murray] wins And the SEC will continue to do what it does.”¹⁴²

Further, the focus on the SEC may not be due to something the SEC has done, but instead what it has not done. At least one other agency, the SSA, has already addressed bias concerns. In January 2013, disability claimants and the SSA reached a settlement.¹⁴³ Thousands of claimants sued the SSA on the grounds that five of its ALJs in Queens, New York were biased against the claimants.¹⁴⁴ The five accused ALJs reportedly ignored the law and evidence provided, “bullied” claimants, and disregarded instructions from higher courts, resulting in more than 80% of their cases being reversed on appeal.¹⁴⁵ The settlement agreement provided new hearings for all claimants who had gone

¹³⁶ OFFICE OF INSPECTOR GEN., *supra* note 120, at 7.

¹³⁷ *Id.*

¹³⁸ *Id.* at 11 (alteration in original).

¹³⁹ *Id.* at 8 (“Chair Mary Jo White requested an OIG investigation of the alleged bias issue because the identified concerns could impact all ALJs and the SEC administrative proceedings.”).

¹⁴⁰ *See id.* at 5–7 (“Specifically, the OIG investigated allegations that were attributed to McEwen and included in a May 6, 2015 *WSJ* article”).

¹⁴¹ Merle, *supra* note 113. The journalist who interviewed Cuban also appeared unconvinced. *See id.* (“Instead of sending the cases to federal court, the SEC puts them before an [ALJ] whom defense attorneys have complained could be biased in favor of the agency.”).

¹⁴² Suzanne Barlyn, *Watchdog Clears U.S. SEC’s In-House Judges of Bias Allegations*, REUTERS (Feb. 16, 2016, 4:57 PM), <http://www.reuters.com/article/us-sec-court-bias-idUSKCN0VP2OL>.

¹⁴³ Press Release, Gibson Dunn, *supra* note 100.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

before those ALJs from 2008 forward, “comprehensive retraining” for the five ALJs, and a new monitoring system for SSA claims to prevent future bias.¹⁴⁶

Further, the SSA issued a new rule just after the settlement on January 29, 2013, increasing the review of ALJ decisions to identify and cure bias.¹⁴⁷ The rule creates three different avenues of review or redress.¹⁴⁸ First, the SSA Appeals Council may review any ALJ ruling, either by its own initiative or by complaint of a party.¹⁴⁹ Second, ODAR Division Quality Service investigates allegations of ALJ bias or other misconduct proffered by non-parties, such as witnesses, claimant representatives, and federal courts.¹⁵⁰ Third, a party may file a civil rights complaint if he believes the bias is based upon a protected class.¹⁵¹ Such reforms may not have the same effect on the SEC due to the different natures of the two agencies.¹⁵² However, the SEC lags behind in reforming its administrative proceeding structure despite complaints, while the SSA took swift action to resolve the matter.¹⁵³

B. Recent SEC Enforcement Trends

The SEC’s enforcement trends provide both qualitative and quantitative approaches to examining ALJ bias. At the most basic level, the SEC’s patterns in forum selection may indicate a goal of putting more cases before ALJs in the hopes that those ALJs will view the SEC more favorably than would an Article III judge.¹⁵⁴

The Dodd-Frank Act induced a shift in SEC enforcement actions away from federal court and toward administrative proceedings.¹⁵⁵ The Dodd-Frank

¹⁴⁶ *Id.*

¹⁴⁷ SSR 13-1p, 78 Fed. Reg. 6168 (Jan. 29, 2013).

¹⁴⁸ *Id.* at 6168–69.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 6170; *New SSA Ruling Addresses ALJ Bias*, *supra* note 100.

¹⁵¹ SSR 13-1p, 78 Fed. Reg. 6168, 6169 (Jan. 29, 2013); *New SSA Ruling Addresses ALJ Bias*, *supra* note 100.

¹⁵² *Compare About Us*, SOC. SECURITY ADMIN., <https://www.ssa.gov/agency.html> (“We pay benefits to over 60 million people including retirees, children, widows, and widowers.”), with *What We Do*, U.S. SEC. & EXCHANGE COMMISSION, <https://www.sec.gov/Article/whatwedo.html> (last updated June 10, 2013) (“The SEC oversees the key participants in the securities world, including securities exchanges, securities brokers and dealers, investment advisors, and mutual funds.”).

¹⁵³ *Compare supra* notes 120–142 (describing the SEC’s response to bias allegations), with *supra* notes 143–151 (describing the SSA’s response).

¹⁵⁴ Platt, *supra* note 12, at 9.

¹⁵⁵ See Spunauge, *supra* note 2, at 410 (“The SEC’s use of administrative proceedings has rapidly increased in the years since Dodd-Frank’s passage.”).

Act expanded the scope of the SEC's power and authorized new sanctions in administrative proceedings, such as a bar from the entire securities industry.¹⁵⁶ The act allowed the SEC to sue both registered and unregistered securities entities and individuals in administrative proceedings.¹⁵⁷ Further, the Dodd-Frank Act permitted disgorgement penalties in administrative proceedings, which could amount to millions of dollars, whereas previously fines were limited to much smaller civil penalties.¹⁵⁸ While the SEC had previously reserved administrative proceedings for more basic legal issues, now it files more complex cases at home.¹⁵⁹

Given the procedural and punitive advantages for the agency in administrative proceedings resulting from the Dodd-Frank Act, the SEC has since increased the amount of cases it brings in administrative proceedings as opposed to in federal courts.¹⁶⁰ Prior to the passage of the Dodd-Frank Act in 2010, the SEC brought approximately 60% of its cases in administrative proceedings.¹⁶¹ Since the act, the SEC now brings more than 80% of its cases in administrative proceedings.¹⁶² To keep up with the growing administrative proceeding docket, the SEC hired two additional ALJs in 2014, increasing the total from three to five ALJs.¹⁶³ Kara Brockmeyer, head of the SEC's anti-foreign-corruption enforcement unit, stated that the shift toward administrative proceedings is "the new normal."¹⁶⁴

While the trend toward administrative proceedings itself can only imply that the SEC believes it will be more successful in that forum, the difference in

¹⁵⁶ Platt, *supra* note 12, at 7.

¹⁵⁷ See Giles D. Beal, IV, *Judge, Jury and Executioner: SEC Administrative Law Judges Post-Dodd Frank*, 20 N.C. BANKING INST. 413, 417 (2016) ("Before Dodd-Frank, the SEC could only seek monetary penalties . . . in front of ALJs if the individual or entity was registered with the SEC.").

¹⁵⁸ *Id.* at 424–25. Disgorgement is "the repayment of illegally gained profits (or avoided losses) for distribution to harmed investors whenever feasible." *Id.* at 425.

¹⁵⁹ Jean Eaglesham, *SEC Is Steering More Trials to Judges It Appoints*, WALL ST. J., <http://www.wsj.com/articles/sec-is-steering-more-trials-to-judges-it-appoints-1413849590> (last updated Oct. 21, 2014, 9:40 AM).

¹⁶⁰ Platt, *supra* note 12, at 8.

¹⁶¹ Beal, *supra* note 157, at 417.

¹⁶² *Id.* A broader look at the SEC's forum selection demonstrates that the popularity of administrative proceedings has increased over time in correspondence with similar acts broadening the agency's enforcement powers. Platt, *supra* note 12, at 9–10. From 2010 through 2015, the number of administrative proceedings brought by the SEC increased from roughly 375 to over 500. *Id.* at 10. However, the jump following the Dodd-Frank Act represents the highest proportion of actions going to administrative proceedings to date. See *id.* This jump is likely the largest as the Dodd-Frank Act provided the SEC with two enforcement powers previously unavailable in either forum. See *id.* at 7.

¹⁶³ Spunaugle, *supra* note 2, at 413.

¹⁶⁴ Eaglesham, *supra* note 159.

win percentages between the forums solidifies the implication. In the 2011 fiscal year, the SEC won in 88% of administrative proceedings and only 63% of federal court cases.¹⁶⁵ From September 2011 through September 2012, the SEC won in 100% of administrative proceedings, but only 67% of federal court cases.¹⁶⁶ From September 2012 through September 2013, the SEC won in 90% of administrative proceedings, but only 75% of federal court cases.¹⁶⁷ From September 2013 to September 2014, the SEC won 100% of administrative proceedings, but only 61% of federal court cases.¹⁶⁸ As of 2015, the SEC prevailed in 90% of administrative proceedings, but only 69% of federal district court cases.¹⁶⁹ Several of the SEC's losses in federal court have been high-profile cases, such as the action against Mark Cuban, which could further tempt the agency to shift toward administrative proceedings.¹⁷⁰

Contrary to the OIG's determination that the SEC's ALJs were not biased, the success rates of the SEC before individual ALJs and other evidence suggest that the ALJs are biased. The SEC won 85% of administrative proceedings before Judge Foelak and 87% of administrative proceedings before Chief Judge Murray.¹⁷¹ Judge Elliot ruled for the SEC 100% of the time.¹⁷²

With a recent change in executive administration and the future of the Dodd-Frank Act pending,¹⁷³ it is imperative to note that the issue of bias does not depend upon the Dodd-Frank Act.¹⁷⁴ The SEC has certainly increased the amount of cases it brings in administrative proceedings following the passage

¹⁶⁵ Spunaugle, *supra* note 2, at 412.

¹⁶⁶ Eaglesham, *supra* note 159.

¹⁶⁷ *Id.*

¹⁶⁸ Spunaugle, *supra* note 2, at 412.

¹⁶⁹ Beal, *supra* note 157, at 417–18.

¹⁷⁰ Platt, *supra* note 12, at 9.

¹⁷¹ Eaglesham, *supra* note 5.

¹⁷² *Id.*

¹⁷³ Ryan Tracy, *Donald Trump's Transition Team: We Will "Dismantle" Dodd-Frank*, WALL ST. J., <https://www.wsj.com/articles/donald-trumps-transition-team-we-will-dismantle-dodd-frank-1478800611> (last updated Nov. 10, 2016, 6:29 PM).

¹⁷⁴ See generally Robin J. Artz et al., *Advancing the Judicial Independence and Efficiency of the Administrative Judiciary: A Report to the President-Elect of the United States*, 29 J. NAT'L ASS'N ADMIN. L. JUDICIARY 93 (2009) (providing guidelines for avoiding ALJ bias pre-Dodd Frank Act). Many of the changes promised by President Trump involve loosening current financial regulations and embracing big banks, but the SEC will continue to enforce the remaining financial regulations. Stephen J. Lubben, *Trump's Presidency Raises Questions on the Future of Wall St. Regulation*, N.Y. TIMES (Nov. 14, 2016), https://www.nytimes.com/2016/11/15/business/dealbook/trumps-presidency-raises-questions-on-the-future-of-wall-st-regulation.html?_r=0; Ryan Tracy and Michael C. Bender, *Trump Signs Actions to Begin Scaling Back Dodd-Frank*, WALL ST. J., <https://www.wsj.com/articles/trump-signs-executive-actions-toward-scaling-back-dodd-frank-financial-regulation-1486148274> (last updated Feb. 3, 2017, 2:47 PM).

of the Dodd-Frank Act,¹⁷⁵ but the bias problem was not created by the act, and it will continue to exist even if the act is repealed or dismantled. The APA, not the Dodd-Frank Act, authorized administrative proceedings.¹⁷⁶ The Dodd-Frank Act merely provided the statistics to highlight the extent of the bias problem.¹⁷⁷

C. *Employee-Employer Relationship: The ALJ-SEC Interplay*

Because each ALJ is technically an employee of the agency that he serves, the logistical nature of this setup lends itself to the potential for bias. The areas in question are (1) payroll, (2) office location, and (3) “duty” to please the SEC Commissioners.

First, SEC ALJs are paid from the SEC’s payroll, not from the OPM’s payroll.¹⁷⁸ The OPM oversees the hiring process for ALJs, which may not be delegated to any other agency.¹⁷⁹ Beyond this, the ALJs hired by the SEC are technically employees of the SEC, as they are hired by the agency following the OPM’s guidelines.¹⁸⁰ The OPM sets three levels of ALJ salary and assigns each ALJ to a salary level.¹⁸¹ Given that the SEC itself is not setting the salary, it would appear that ALJs could not be biased for the agency to maintain or increase their salaries. Agencies are not permitted to give awards or performance reviews to ALJs.¹⁸² However, the SEC determines “hours of duty, travel, office space and procedures, and staff assistance.”¹⁸³ While this should be relatively straightforward, one of Judge McEwen’s complaints regarding the pressures on her as an SEC ALJ resulted from the SEC’s refusal to provide an

¹⁷⁵ Platt, *supra* note 12, at 8.

¹⁷⁶ 5 U.S.C. § 554 (2012).

¹⁷⁷ See Eaglesham, *supra* note 159 (noting the SEC’s increasing use of administrative proceedings since the passage of Dodd-Frank).

¹⁷⁸ Eaglesham, *supra* note 5.

¹⁷⁹ *Examining Due Process in Administrative Hearings: Statement Before the Subcomm. on Regulatory Affairs and Fed. Mgmt. of the S. Comm. on Homeland Sec. and Governmental Affairs*, 114th Cong. 2 (2016) (statement of Joseph Kennedy, Associate Director of Human Resources Solutions, U.S. Office of Personnel Management).

¹⁸⁰ *Id.* at 3.

¹⁸¹ *Pay Administration*, OFF. OF PERSONNEL MGMT., <https://www.opm.gov/policy-data-oversight/pay-leave/pay-administration/fact-sheets/administrative-law-judge-pay-system/> (last visited Dec. 26, 2016). Pay may be lowered for “good cause” following a disciplinary proceeding or upon request by an ALJ. BURROWS, *supra* note 61, at 3. While this may seem insidious, the OPM added this option due to frequent ALJ requests for less responsibility. *Id.*

¹⁸² BURROWS, *supra* note 61, at 7.

¹⁸³ U.S. GOV’T ACCOUNTABILITY OFF., GAO/GGD-96-27, *ADMINISTRATIVE LAW JUDGES: COMPARISON OF SEC AND CFTC PROGRAMS* 11 (1995).

assistant and refusal to exceed the per diem rate for reimbursing travel expenditures from one of her hearings in New York City.¹⁸⁴

Second, the SEC oversees the ALJs' office locations.¹⁸⁵ As employees of the agency, naturally the office location would tend to be within the agency's office building. In the case of the SEC, the ALJs' offices are located on the second floor of the SEC headquarters in Washington, D.C.¹⁸⁶ The ALJs' offices are not isolated, but on the same floor as the SEC press office and health club.¹⁸⁷ By the very nature of being located inside the SEC building and sharing a floor with other SEC employees, including a staff gym to which all employees have access, ALJs spend much of their time near other SEC employees. The very proximity of the ALJs' offices to the rest of the SEC allows for ALJs to come into contact with other SEC staff members, including the potential for run-ins with enforcement attorneys or the Commissioners.

Third, due to the structure of the ALJs as an office within the SEC, ALJs have a "duty" to please the Commissioners and other officials at the SEC. The agency has the power to remove or suspend ALJs.¹⁸⁸ Removal is subject to "good cause," though Congress did not define what constitutes "good cause."¹⁸⁹ The Merit Systems Protection Board (MSPB) has the ultimate say over whether a reason for dismissal was "good cause."¹⁹⁰ Given that a third party must review the removal, it is unlikely that the SEC would be able to fire an ALJ simply for refusing to rule for the SEC.¹⁹¹ However, knowledge that the agency ultimately retains the power to remove ALJs certainly puts pressure on the ALJs to satisfy the Commissioners.

The ALJs' decisions are subject to de novo review on appeal by the Commissioners, leading to further pressure to please the heads of the

¹⁸⁴ OFFICE OF THE INSPECTOR GEN., U.S. SEC. & EXCH. COMM'N, *supra* note 120, at 9. Locality adjustments are typically respected by the federal agencies, at least when determining salaries. *Pay Administration*, *supra* note 181.

¹⁸⁵ U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 183, at 11.

¹⁸⁶ Eaglesham, *supra* note 5.

¹⁸⁷ *Id.*

¹⁸⁸ 5 U.S.C. § 7521 (2012); BURROWS, *supra* note 61, at 8.

¹⁸⁹ BURROWS, *supra* note 61, at 8.

¹⁹⁰ *See id.* So far, sexually harassing employees, refusing to travel or to schedule cases requiring travel, refusing to deliver legal documents, disregarding the safety of others, failing to meet financial obligations, misusing office mail supplies, violating agency rules, being unable to work due to disability, refusing to set hearing dates, and "a high rate of significant adjudicatory errors" have been "good cause" rationales. *Id.*

¹⁹¹ *See id.* at 8–9.

agency.¹⁹² The Commissioners may “affirm, reverse, modify, set aside, or remand for further proceedings,” similar to an appellate judge.¹⁹³ Judge Elliot has insisted that there is no pressure from the Commissioners to rule for the SEC, stating, “The SEC can’t fire us, decide our pay or grade our performance. . . . There’s nothing the SEC can do to influence us and they don’t try to.”¹⁹⁴ On the other hand, Chief Judge Murray told a group of defendants that the Commissioners, who must approve actions before they are filed,¹⁹⁵ do not want ALJs “second-guessing them.”¹⁹⁶ In her own words, “So for me to say I am wiping [the charges against you] out, it looks like I am saying to these presidential appointee commissioners, . . . I am reversing you. And they don’t like that.”¹⁹⁷ Therefore, there is some pressure for ALJs to rule for the SEC, which the Commissioners would support. From January 2010 through March 2015, the Commissioners ruled in favor of the SEC on appeal 95% of the time.¹⁹⁸

Even if the logistics of the ALJ and administrative procedure infrastructure at the SEC do not result in bias, the appearance of bias remains an issue. The appearance has come to the point where defendants fear they are unable to get a fair trial at the SEC.¹⁹⁹ Former SEC enforcement chief George Canellos called for the agency to “end the very grave appearance of injustice” at a legal conference in New York.²⁰⁰ Another former SEC enforcement official, Thomas McGonigle, stated that while he didn’t believe the SEC’s ALJs were

¹⁹² *Office of Administrative Law Judges*, *supra* note 6. Under de novo review, the Commissioners are not bound by the findings of the ALJs, which raises a secondary issue regarding what the value of an ALJ is if the Commissioners can later go in and conduct their own decision. Lorenzo, Securities Act Release No. 9762, Exchange Act Release No. 74836 at 17, 2015 WL 1927763 (April 29, 2015) (“Any alleged deficiencies in the [ALJ]’s analysis are of no consequence because our review is de novo; the violations we find and the sanctions we impose are based on our own independent review of the record.”).

¹⁹³ *Office of Administrative Law Judges*, *supra* note 6. Decisions by the Commissioners are further appealable to a U.S. Court of Appeals. *Id.*

¹⁹⁴ Jean Eaglesham, *Fairness of SEC Judges Is in Spotlight*, WALL ST. J. (Nov. 22, 2015, 9:25 PM), <http://www.wsj.com/articles/fairness-of-sec-judges-is-in-spotlight-1448236970>.

¹⁹⁵ Zaring, *supra* note 14, at 1199–1200. Former SEC enforcement chief George Canellos spoke out against the Commissioners playing these two roles, stating, “[T]here is a lot to be desired about the process.” Jean Eaglesham, *SEC Ex-Enforcement Chief Calls for Reforms to In-House Judges*, WALL ST. J. (May 12, 2015, 6:53 PM), <https://www.wsj.com/articles/sec-ex-enforcement-chief-calls-for-reforms-to-in-house-judges-1431471223>.

¹⁹⁶ Eaglesham, *supra* note 194.

¹⁹⁷ *Id.*

¹⁹⁸ Eaglesham, *supra* note 5.

¹⁹⁹ Eaglesham, *supra* note 194.

²⁰⁰ Eaglesham, *supra* note 195.

“deliberately biased,” the appearance of the administrative proceeding seems to favor the agency.²⁰¹

Appearance of impartiality is just as critical to the ALJ system as actual impartiality. The Code of Conduct for United States Judges states that judges must “avoid impropriety and the *appearance of impropriety* in all activities.”²⁰² The Code notes, “Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges.”²⁰³ ALJs are supposed to function as judges; thus it is imperative to hold them to the same standard of impartiality.²⁰⁴ The appearance of ALJ bias has corroded public confidence in administrative proceedings; to prevent the system from falling apart, reform is necessary.

III. SOLUTIONS TO THE APPEARANCE OF ALJ BIAS

A few solutions have been proposed to combat bias, yet the problem remains unresolved. This Part evaluates the different proposed solutions and ultimately rejects each in turn in favor of a new approach. Section A describes three previously proposed solutions and their shortcomings: (1) eliminating administrative proceedings, (2) allowing defendants to select the forum for their cases, and (3) creating a third-party monitoring system of ALJ decisions. Section B analyzes a new potential solution: an independent pool of neutral ALJs to be shared amongst all federal agencies.

A. Formerly Proposed Solutions and Their Shortcomings

Commentators and Congress have offered several solutions to cure the systemic bias of SEC ALJs.²⁰⁵ The first is the most complete fix, but also the most problematic and impractical: to eliminate administrative proceedings and force all cases into federal court.²⁰⁶ This solution is so radical that it has not been seriously proposed due to the number of issues it would create. This

²⁰¹ Eaglesham, *supra* note 194.

²⁰² *Code of Conduct for United States Judges*, *supra* note 45 (emphasis added).

²⁰³ *Id.*

²⁰⁴ See *Qualification Standard for Administrative Law Judge Positions*, *supra* note 34; Republican Party of Minn. v. White, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring) (“Judicial integrity is, in consequence, a state interest of the highest order.”).

²⁰⁵ See, e.g., H.R. REP. NO. 114-697 (2016) (proposing that defendants can opt to litigate in federal court instead of an administrative proceeding); Walfish, *supra* note 96 (suggesting that creating an appeals process that circumvents the Commissioners would allow for more ALJ independence).

²⁰⁶ Joseph A. Grundfest, *Fair or Foul?: SEC Administrative Proceedings and Prospects for Reform Through Removal Legislation*, 85 *FORDHAM L. REV.* 1143, 1153-54 (2016) (stating that removing administrative proceedings entirely would be illogical and undesirable).

solution would undoubtedly eliminate ALJ biases as the cases would be removed from ALJ control.²⁰⁷ However, this would flood the federal docket with agency enforcement actions, further backlogging the courts.²⁰⁸ This solution would effectively move the SEC backward by substantially lengthening the time it would take to reach a decision in each enforcement action.²⁰⁹ Additionally, this would go against congressional direction, as Congress explicitly authorized administrative proceedings to preserve agency resources.²¹⁰

A second proposed solution is a less radical version of the first: allow defendants to select the forum for their cases.²¹¹ Representative Scott Garrett proposed this solution in the Due Process Restoration Act of 2015, otherwise known as H.R. 3798.²¹² H.R. 3798 intended to solve, in part, criticisms “from former SEC judges who felt pressure to rule in favor of the Commission.”²¹³ The bill would allow defendants in administrative proceedings brought by the SEC to terminate the case.²¹⁴ The SEC would then be able to reassert the case in federal district court, effectively removing the case from administrative proceeding to federal court.²¹⁵

However, this plan suffers from a couple of important shortcomings. This proposed solution would be much more costly in the long run.²¹⁶ Part of the appeal of administrative proceedings is the low cost to the parties, most especially to the government.²¹⁷ H.R. 3798 would “decrease revenues by \$553 million over the 2017–2026 period . . . [and] increase discretionary costs for

²⁰⁷ Cf. Platt, *supra* note 12, at 29–30 (noting that the SEC has used administrative proceedings as a means of “unilaterally assert[ing] its interpretation of the laws”). This proposed solution was offered in the context of solving various other challenges to the SEC’s legitimacy, such as the advancement of novel theories in administrative proceedings. *Id.*

²⁰⁸ Grundfest, *supra* note 206, at 1153–54; see Platt, *supra* note 12, at 7 (discussing the advantages of administrative proceedings).

²⁰⁹ Cf. Platt, *supra* note 12, at 6 (noting that administrative proceedings achieve results faster than district court proceedings).

²¹⁰ H.R. REP. NO. 114-697, at 13.

²¹¹ See Jean Eaglesham, *SEC Faces “Crisis of Confidence” Over In-House Court, Ex-Official Says*, WALL ST. J. (Dec. 2, 2015, 3:45 PM), <http://www.wsj.com/articles/sec-faces-crisis-of-confidence-over-in-house-court-ex-official-says-1449089157>.

²¹² Due Process Restoration Act of 2015, H.R. 3798, 114th Cong. (2016).

²¹³ H.R. REP. NO. 114-697, at 3–4.

²¹⁴ *Id.* at 8.

²¹⁵ *Id.*

²¹⁶ See *id.*

²¹⁷ See *id.* at 13.

the SEC by about \$4 million per year over the 2017–2021 period”²¹⁸ The private parties would likely bear the increase in costs.²¹⁹ Therefore, the bill is placing a premium on having a fair trial.

Most importantly, H.R. 3798 does not tackle the main issue: the biases of the ALJs. This bill would simply implement a workaround to administrative proceedings, rather than resolving the problem.²²⁰ Similar to the first proposal of eliminating administrative proceedings, H.R. 3798 would open the floodgates to litigation in federal courts, instead of conserving valuable resources and litigating some of these cases—particularly the cases involving the most straightforward and routine legal issues—in administrative proceedings.²²¹ Tom Quaadman, vice president of the Center for Capital Markets Competitiveness in the Chamber of Commerce, stated that if administrative proceedings were truly fair and adequately protective for defendants, there would be no “stampede to federal courts.”²²² H.R. 3798 can only be successful if implemented in conjunction with other reforms to rid the ALJs of bias for the SEC.²²³

Finally, the SEC could implement the same changes made by the SSA after allegations that its ALJs were biased against claimants.²²⁴ The SSA passed a new rule, SSR 13-1p,²²⁵ which (1) established an Appeals Council to review for “unfairness, prejudice, partiality, or bias” in ALJ decisions, (2) allowed ODAR Division Quality Service to assess complaints regarding ALJ conduct from non-parties present at the hearings, and (3) permitted parties to file discrimination complaints.²²⁶ Given the different natures of the agencies, some of these changes would not be as effective for the SEC. For example, no one alleged that the SEC discriminated against defendants based on a protected class, as had been a problem at the SSA.²²⁷

²¹⁸ *Id.* at 8.

²¹⁹ *See id.* (“If the SEC increases fees to offset the costs of implementing the bill, H.R. 3798 would increase the cost of an existing mandate on private entities required to pay those fees.”).

²²⁰ Eaglesham, *supra* note 211.

²²¹ *Id.*

²²² *Id.* Quaadman pointed out that administrative proceedings further lack the same procedural protections as federal courts, amplifying the rush to file in federal court. *Id.*

²²³ *See id.* (noting that initial reactions to H.R. 3798 have included concerns that the bill does not “go far enough”).

²²⁴ *New SSA Ruling Addresses ALJ Bias*, *supra* note 100.

²²⁵ SSR 13-1p, 78 Fed. Reg. 6168 (Jan. 29, 2013).

²²⁶ *See supra* notes 148–151 and accompanying text.

²²⁷ *Id.*

Still, the ability to appeal a decision to a specified council, not the Commissioners, would be an improvement over the current SEC appellate procedure.²²⁸ This would address the problematic dual nature of the Commissioners, who currently act as both prosecutors and judges.²²⁹ Further, it could place pressure on ALJs to rule fairly so that they will not be reversed on appeal, similar to how there is currently pressure to rule in favor of the agency to avoid being reversed by the Commissioners.²³⁰ However, this proposal still would not get to the root of the problem that SEC ALJs are potentially biased, and instead places the potential for redress in the hands of a hopefully righteous and unbiased appellate group within the SEC.²³¹

B. An Independent Pool of Neutral ALJs

An ideal solution addresses not just the aftermath of biased decisions and redress for those defendants, but rather eradicates systemic bias in the SEC's ALJs. Across all federal agencies, ALJs should be employees of the OPM and should be used for administrative proceedings based on random assignment to cases.²³² All agencies would share ALJs.²³³ Therefore, it is less likely for ALJs to become biased in favor of a particular agency that they worked with because they would be working with a rotating set of agencies.

This system is comparable to the current ALJ Loan Program offered by the OPM.²³⁴ In the ALJ Loan Program, an agency may request the use of an ALJ from another agency if the requesting agency is temporarily understaffed.²³⁵ Alternatively, an agency may offer the services of one of its ALJs if the agency does not have enough work to keep the ALJ busy.²³⁶ In this Comment's proposed solution, ALJs would all be employees of the OPM, and agencies could submit requests for an ALJ to the OPM.

A unified corps of ALJs has been proposed previously, but with hesitation about how such a system would be structured.²³⁷ In 1983, the Judicial

²²⁸ Cf. 78 Fed. Reg. 6168, 6169 (describing the SSA's proposed appeals council).

²²⁹ See Walfish, *supra* note 96.

²³⁰ See Eaglesham, *supra* note 194.

²³¹ Like in-house ALJs, an internal appellate system would be subject to the same potential for bias due to the nature of the employee-employer relationship between the review board and the SEC. *Supra* Section II.A.

²³² Barnett, *supra* note 27, at 828.

²³³ *Id.*

²³⁴ See 5 U.S.C. § 3344 (2012); 5 C.F.R. § 930.208 (2016).

²³⁵ 5 C.F.R. § 930.208.

²³⁶ *Id.*

²³⁷ See Lubbers, *supra* note 35, at 123–24.

Administration Division passed a resolution to support the creation of a neutral pool of ALJs.²³⁸ However, in 1992 the Administrative Conference of the United States opposed the proposition.²³⁹ Nonetheless, numerous scholars supported the proposal, stating that it would uphold “[w]hat is important,” being “that the court/corps not be part of the agency on whose actions it is to sit in judgment.”²⁴⁰

One commentator claimed that despite the appearance of independence by removing ALJs from the direct control of individual agencies, nothing would really change in the outcome of administrative proceedings.²⁴¹ On the contrary, many of the recent pressing critiques of SEC ALJs would be resolved if ALJs were not employees of the SEC. If ALJs were employees of the OPM, rather than individual agencies, they would be on the OPM payroll.²⁴² The ALJs would not depend on the SEC to set their hours, administrative assistance, or travel reimbursements.²⁴³ The ALJs would not have their offices located on the same floor in the same building as other SEC officials.²⁴⁴ There could be no complaints that the head ALJ was directing subordinate ALJs to rule in favor of the agency because there would be no head ALJ directing inferior ALJs.²⁴⁵ The ALJs would still hear cases brought forward by agencies, but it would be hard to fathom an individual so biased that he would rule for the government in all cases, regardless of which agency or cause was at stake.²⁴⁶

This solution makes the ALJs truly impartial arbitrators who are held accountable by the OPM.²⁴⁷ If an ALJ were deemed biased, either in favor of a particular agency or based on a protected class, the OPM would conduct an independent review of the ALJ’s conduct by establishing an appeals board like

²³⁸ James E. Moliterno, *The Administrative Judiciary’s Independence Myth*, 41 WAKE FOREST L. REV. 1191, 1227–28 (2006).

²³⁹ *Id.* at 1228.

²⁴⁰ *Id.* (alteration in original) (citation omitted).

²⁴¹ *Id.* (“Would the increased independence of a central panel ultimately affect the nature of independence enjoyed by administrative judges? Not really.”).

²⁴² See Eaglesham, *supra* note 5 (noting that having ALJs on the SEC’s payroll creates the appearance of bias).

²⁴³ U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 183, at 11.

²⁴⁴ Eaglesham, *supra* note 5.

²⁴⁵ *Id.*

²⁴⁶ *Contra* Moliterno, *supra* note 238, at 1228 (arguing that even neutral panels of ALJs still “act on behalf of those agencies” and “are often expected to help achieve agency objectives”).

²⁴⁷ Lubbers, *supra* note 35, at 124 (arguing that a benefit of a unified corps of ALJs would be the “enhancement of the perception (at least) of judicial independence”).

the one established by the SSA.²⁴⁸ Since the OPM already conducts similar evaluations during the ALJ hiring process, and is therefore qualified to handle complaints of bias or prejudice, it makes more sense for this appeals board to be under the OPM's control rather than under the control of individual agencies.²⁴⁹ Therefore, the agency would be free to focus only on appeals relating to the relevant substantive law.

A neutral pool of ALJs means that ALJs may not be familiar with the intricacies of securities laws when they adjudicate cases for the SEC. However under the existing structure, agencies are only allowed to consider the specialized knowledge of an ALJ under rare circumstances: “[w]here agencies can justify by job analysis that special qualifications enhance performance on the job.”²⁵⁰ In the past, agencies have requested an exception so they could hire ALJs with specialized knowledge, but have been rejected by the OPM.²⁵¹ The OPM likely would only allow an agency to consider specialized knowledge if an agency were deciding between two equally qualified candidates for an ALJ position.²⁵² The OPM has complete control over the ALJ hiring process²⁵³ and has precluded agencies from considering subject-matter expertise in the hiring process.²⁵⁴ This is indicative of the OPM's position that ALJs need not have any prior understanding of the respective area of law to be effective at fairly adjudicating cases.²⁵⁵

Such a process would not be very costly. It would mainly involve the shifting of ALJ costs from individual agencies to the OPM, requiring appropriate adjustments to those agency budgets.²⁵⁶ The additional costs would be the addition of an appeals board to the OPM, such as the one added by the SSA,²⁵⁷ and finding office space for the ALJs outside of the agencies' buildings (which would not be an additional cost if space could be found

²⁴⁸ See *New SSA Ruling Addresses ALJ Bias*, *supra* note 100 (describing a similar review process implemented by the SSA).

²⁴⁹ *Qualification Standard for Administrative Law Judge Positions*, *supra* note 34.

²⁵⁰ BURROWS, *supra* note 61, at 6.

²⁵¹ *Id.*

²⁵² *See id.*

²⁵³ 5 U.S.C. § 3344 (2012).

²⁵⁴ BURROWS, *supra* note 61, at 6.

²⁵⁵ *See id.* (“Agencies were no longer allowed to formally require subject-matter experience.”); *cf. Qualification Standard for Administrative Law Judge Positions*, *supra* note 34 (describing the requisite level of experience for ALJ candidates, but lacking any mention of agency or industry specific experience).

²⁵⁶ This proposed solution would likely be more cost-effective than other solutions that have been proposed. *See* H.R. REP. NO. 114-697, at 8 (2016).

²⁵⁷ *New SSA Ruling Addresses ALJ Bias*, *supra* note 100.

within the OPM's existing building space). This reorganization more efficiently uses resources the government already has, while finally quieting the criticisms of the SEC's ALJs.

IV. IMPLICATIONS FOR A NEUTRAL POOL OF ALJS

Changing the structure of the ALJ program affects not only the SEC but also all federal agencies that use administrative proceedings and the public at large. As previously mentioned, while this Comment focuses only on the SEC as a case study, the entire administrative system could be affected by ALJ biases.²⁵⁸ Section A evaluates the implications for the federal docket. Section B assesses the implications for the image of justice.

A. *Implications for the Federal Docket*

Administrative proceedings were created to balance the federal docket by keeping routine and straightforward legal disputes in-house at the respective agencies.²⁵⁹ Several of the other proposed solutions failed to truly solve the problem because they would have opened the floodgates to federal courts, while leaving the administrative procedure docket barren.²⁶⁰ The proposed solution of a neutral pool of ALJs, however, would not cause a flood to the federal courts. Instead, this solution solves the causes of systemic bias and provides all agencies with neutral ALJs. Consequently, defendants would not be as opposed to adjudication in administrative proceedings.²⁶¹

B. *Implications for the Administrative Image of Justice*

The appearance of justice is nearly as important as actual justice in the courtroom. A defendant who feels that the judge is already against him from the moment he walks in the door will continue to feel that the result is unfair, regardless of how the trial plays out.²⁶² Therefore, as many commentators have stated, the appearance of injustice in the SEC's administrative proceedings is detrimental to the agency's legitimacy and public perception.²⁶³ Improving the

²⁵⁸ See *supra* notes 148–151 and accompanying text (discussing bias at the SSA).

²⁵⁹ See H.R. REP. NO. 114-697, at 13.

²⁶⁰ *Supra* Part III.

²⁶¹ Platt, *supra* note 12, at 46–47 (describing backlash against SEC ALJs).

²⁶² Dvorak, *supra* note 122, at 1220.

²⁶³ Eaglesham, *supra* note 195 (discussing a former SEC director who called for the agency to “end the very grave appearance of injustice”); Eaglesham, *supra* note 211; Eaglesham, *supra* note 5 (“That can create an appearance issue, even if the judges are excellent, as I have every reason to believe they are.”).

appearance of justice would also likely decrease the number of appeals both in federal court and to the Commissioners, as defendants are more likely to feel that they have a fair opportunity to present their case.²⁶⁴

The appearance of justice is crucial to success of the federal judiciary.²⁶⁵ If the SEC brings cases in administrative proceedings that could just as easily go to federal courts,²⁶⁶ why should ALJs be held to a different standard? As Justice Kennedy said, “Judicial integrity is, in consequence, a state interest of the highest order.”²⁶⁷

Having independent ALJs would placate some of the need for forum selection guidelines. If ALJs were fair and unbiased, defendants would be just as willing to have their cases in administrative proceedings as in federal courts.²⁶⁸ However, separate issues regarding the SEC’s rules of practice may still leave defendants in want of forum selection reforms.²⁶⁹ The proposed solution would not change the SEC’s rules of practice; it would only eliminate the ALJs’ bias for the agency. If the SEC’s process is truly unbiased, as directors within the SEC have asserted time and time again,²⁷⁰ the SEC should welcome such a change to the structure of ALJs. This alleviates the criticisms of the agency’s ALJs. Accordingly, if the process has always been unbiased, the SEC’s success rates should not dramatically change.²⁷¹

CONCLUSION

The SEC is at a crossroads. It can continue to defend its administrative proceedings and its ALJs as impartial and just,²⁷² or it can listen to the public criticisms and calls for reform by “end[ing] the very grave appearance of injustice.”²⁷³ Until the SEC adjusts, its Commissioners and the federal courts

²⁶⁴ See Eaglesham, *supra* note 5 (discussing defendants’ concerns about ALJ bias at the SEC).

²⁶⁵ *Code of Conduct for United States Judges*, *supra* note 45.

²⁶⁶ SEC, FORUM SELECTION, *supra* note 54 (“The Commission generally is authorized to bring its enforcement actions in either of two forums—a civil action in federal district court or a Commission administrative proceeding . . . before an Administrative Law Judge.”).

²⁶⁷ *Republican Party of Minn. v. White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring).

²⁶⁸ *Cf.* Walfish, *supra* note 96 (noting that “ALJs strive to be fair to all parties,” but are thwarted by structural issues).

²⁶⁹ *Id.* (criticizing the SEC Commissioners’ dual role as prosecutor and judge).

²⁷⁰ Eaglesham, *supra* note 5.

²⁷¹ See Eaglesham, *supra* note 159 (discussing the SEC’s success rate in administrative proceedings).

²⁷² Eaglesham, *supra* note 5.

²⁷³ Eaglesham, *supra* note 195.

will continue to be flooded with complaints that SEC ALJs are biased.²⁷⁴ Further, given today's era of exposés and informational leaks, Judge McEwen's claim that she was pressured to rule for the SEC is likely not the only claim of that nature in existence.²⁷⁵

This Comment has argued that the SEC must change its current ALJ infrastructure to remove any indicia of bias in its ALJs. While several solutions have been proposed, they all have various shortcomings.²⁷⁶ Some of the solutions provide workarounds for biased ALJs, but none resolve the root of the problem: bias stemming from the ALJs' relationship with the SEC as their employer.²⁷⁷ This Comment concludes that the best option to resolving the ALJs' bias is to restructure the ALJ program across all agencies by having all ALJs employed by the OPM and randomly assigned to an agency for each case. The implications of this solution greatly increase the appearance of justice in administrative proceedings²⁷⁸ while maintaining the balance of cases going to federal courts and administrative proceedings.²⁷⁹ To prevent its ALJs from only hearing what they listen for, the SEC must resolve the bias complaints against its ALJs by ripping out the roots of systemic bias.

LUCILLE GAUTHIER*

²⁷⁴ See, e.g., *Timbervest v. SEC*, No. 1:15-CV-2106-LMM, 2015 U.S. Dist. LEXIS 132082 (N.D. Ga. Aug. 4, 2015); *Eaglesham*, *supra* note 5.

²⁷⁵ OFFICE OF INSPECTOR GEN., *supra* note 120, at 9; *Eaglesham*, *supra* note 5.

²⁷⁶ *Supra* Section III.A.

²⁷⁷ *Id.*

²⁷⁸ *Supra* Section IV.B.

²⁷⁹ *Supra* Section IV.A.

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APPENDIX

Agency	Number of ALJs
Commodity Futures Trading Commission	0
Consumer Financial Protection Bureau	1
Department of Agriculture	2
Department of Education	2
Department of Health and Human Services/Departmental Appeals Board	5
Department of Health and Human Services/Food and Drug Administration	2
Department of Health and Human Services/Office of Medicare Hearings and Appeals	79
Department of Homeland Security/United States Coast Guard	6
Department of Housing and Urban Development	2
Department of the Interior	9
Department of Justice/Drug Enforcement Agency	2
Department of Justice/Executive Office for Immigration Review	2
Department of Labor	40
Department of Transportation/Office of the Secretary	2
Environmental Protection Agency	4
Federal Communications Commission	1
Federal Energy Regulatory Commission	12
Federal Labor Relations Authority	3
Federal Maritime Commission	2
Federal Mine Safety and Health Review Commission	15
Federal Trade Commission	1
International Trade Commission	6
Merit Systems Protection Board	0
National Labor Relations Board	34
National Transportation Safety Board	3
Occupational Safety and Health Review Commission	12
Office of Financial Institution Adjudication	2
Securities and Exchange Commission	5
Small Business Administration	0
Social Security Administration	1,537
United States Postal Service	1
Total	1,792

ALJs by Agency, OFF. OF PERSONNEL MGMT., <https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=ALJs-by-Agency> (last visited Oct. 1, 2016).